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THE GOVERNMENT OF MODERN STATES

BY

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Revised and Enlarged Edition

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PREFACE TO THE REVISED EDITION

The preparation of this revised edition of a work published some fifteen years ago has been induced by two facts: one, the adoption by a number of the more important countries of Europe of types of government, not only differing radically as regards their structural character and the manner in which political powers are distributed from those in existence at the time this volume was first written, but claiming to rest upon philosophic principles wholly antagonistic to those then generally accepted; and, two, that the author, as the result of the preparation by him of three volumes published by the Brookings Institution—*Principles of Public Administration, Principles of Judicial Administration,* and *Principles of Legislative Organization and Administration*—is now in a position to push his analysis of the problem of government much farther than it was possible for him to do at the time that this work was first written.

As G. D. H. Cole and Margaret Cole have set forth in their acutely interpretative and stimulating recent work, *A Guide to Modern Politics,* the peoples of the nineteenth century and the twentieth century, up to 1917, lived in a world in which the fundamental principles underlying their political organization seemed to be definitely fixed for all time—where such changes as were taking place, or were to be anticipated, appeared to be little more than the "working out and expressing gradually in the structure of their political systems [of] the ideas that had produced the driving force of the great French Revolution." This political world was shattered by the events following the rise to power of the Bolsheviks in Russia. In seeking to put into effect its system of economic organization, not only has that country created a form of government basically different as regards its fundamental principles from those underlying the parliamentary, popular government type that had

been thought to be in process of universal acceptance, but other countries, among which the more important are Italy, Germany, and Turkey, have followed suit in adopting political systems which, while differing widely from that of Russia, are of no less a revolutionary type in that they have departed from the, until then, generally accepted principles of political organization and procedure.

The peoples of other countries, such as the United States, England, and France, though they may remain unshaken in their adherence to liberalism and popular government, cannot ignore these new developments. Though they may, quite properly, be shocked at the means employed in establishing and maintaining them, they find it incumbent upon them to make a searching examination of these systems, as systems, and apart from abuses as may be practised under them, for the purpose of ascertaining the validity of the principles upon which they rest and their ability to meet political problems as they present themselves in both national and international affairs. This they should do if for no other reason than that the rise of these new governmental systems have, as it were, put popular government of the prevailing, parliamentary type upon the defensive. Long prior to the rise of these new systems, dissatisfaction with the practical workings of parliamentary government had become increasingly manifest, and parliamentary government of the accepted type was tending to fall into disfavor. More fundamental still, a feeling was growing that, whatever may have been the advantages of this type of government when the community governed had a comparatively simple economy, there was room for doubt as to its ability satisfactorily to meet the many technical problems of an economy continuously growing more complex and imposing a constantly increasing burden of responsibility upon the governmental machine. Whatever the facts in respect to this question, no more important task is presented to the student of political science than a philosophical examination of the principles underlying the new systems of government in conjunction with a reëxamination of the principles underlying popular government and the forms of government established for putting these

principles into execution. One of the important services which it is hoped that this new edition will render is the laying of a better basis for such an examination.

A second service that it is hoped this new edition will render is that of providing the student with a more intensive and detailed analysis of the problems presented in the organization and operation of the five grand branches into which modern governments of the popular government type, and particularly that of the United States, are divided. In performing this part of his task, the author has drawn heavily upon the three volumes of which mention has been made, written by him while serving as Director of the Institute for Government Research of the Brookings Institution. For freedom to do so, he wishes to express cordial thanks to the officers of that Institution.

W. F. WILLOUGHBY

WASHINGTON, D. C.

PREFACE TO THE FIRST EDITION

The present work seeks to do two things: to set forth the problem of government as a problem; and to show how the leading states of the world have in practice met it. It is easy for students to learn a mass of facts regarding the structural character of different governments. It is exceedingly difficult, however, for them to interpret these facts, to see the fundamental principles lying back of them, and of which they are but the expression; in a word, to grasp the real significance of the differences in governmental organization and procedure and the consequences resulting therefrom. This difficulty arises from, or at least is aggravated by, the fact that government, as generally taught, is so preëminently a matter of description. Students are usually at once introduced to the study of particular governments without first having been given that background of knowledge of fundamental political principles which alone will enable them intelligently to interpret the facts learned.

If one surveys the field of political action, national and international, it is at once apparent that the great issues have been, and are, not over the details of governmental organization and modes of action, but over political principles—whether one type of government or another shall prevail; whether final authority shall be deemed to reside in an autocratic ruler or in the mass of the people; on what basis shall the distribution of political powers take place as between the central, provincial, and local governments, or between the several branches of government, the legislative, the executive and the judicial; what shall be the proper function of the electorate, shall it adhere to the principle of representative government, or shall it seek by various devices itself directly to legislate and determine specific lines of action; what shall be the relations between mother countries and their dependencies; and scores of other questions of like fundamental import. The revolu-

tionists in Russia, China, Turkey, Persia, and elsewhere have not been struggling for a particular form of government, structurally considered, but for one resting upon essentially different principles from the ones under which they were living. The social democratic and liberal parties in Germany and Japan today are demanding, not a mere change in the mechanics of their governments but that the basic principle upon which such governments rest shall be changed, that sovereignty shall be held to reside in the people instead of an autocratic ruler claiming to hold his throne by divine right and to be responsible to God alone for the manner in which he exercises his powers. The present great war, as our President has so ably pointed out, is essentially one for the establishment of basic political principles: that the state exists for the welfare of the individual, not the individual for the state; that the end of all government is the promotion of the welfare of the individual; that in state, as well as individual, action the accepted canons of morality shall prevail; that peoples shall have a controlling voice in respect to the character of government under which they have to live and the policies that shall be pursued by such government.

No amount of study of the mere details of governmental structure and operation will enable students to think intelligently regarding these issues or to pass judgment upon the more or less radical measures of reform that are being proposed in respect to their own as well as foreign governments. If they are to be able to do this they must, in some way, have their attention concentrated on these issues and principles as issues and principles. In existing textbooks on government political principles have not been ignored, but they have not been disentangled from descriptive matter and so presented that their full purport is apparent.

The distinguishing feature of the present work is the attempt to meet this lack. In it, the problem of government is studied as a problem. The great end sought is to get clearly before the student the nature and terms of the problem that is presented to all peoples in seeking to organize themselves as states and devise machineries of government through which they can effectively act as such. The position is taken that not until the terms of a problem are stated

can one intelligently consider the action that has been, or may be, taken in meeting it. With such terms clearly understood, little difficulty ought to be experienced by any student in appreciating the nature of any particular government or the features in respect to which it differs importantly from other governments.

The present work is thus essentially one of analysis. It seeks to resolve the problem of government as it confronts all peoples into its constituent elements; to show the alternative lines of action that are open in each case; and the reasons why one or the other has been chosen by individual States. In doing so, the principle of presentation adopted has been that of proceeding from the general to the particular. The author has sought to put himself in the position of a constituent assembly, or constitutional convention, beginning its work with a clean slate and free to bring into existence that form of government which it believes to be best adapted to the needs of the population on whose behalf it is acting. Such a body has to make its decisions in a certain order. It must determine whether the government to be created shall be one where sovereignty is deemed to reside in an autocratic ruler or in the people; whether the sum total of governmental powers shall be vested in one or a number of governmental organizations; whether there shall be a union or separation of powers; and like questions, before it can proceed to a consideration of the details of governmental organization and procedure. This is the order of treatment followed in the present work. In putting this plan into execution the effort has been made to maintain a due proportion between the importance of the points considered and the space given to them. While the fundamental problems of government are considered at some length, as the inquiry is pushed more and more into details the treatment becomes less exhaustive until, finally, little more than an enumeration of the points that must be considered in framing a system of government is attempted.

W. F. WILLOUGHBY

WASHINGTON, D. C.

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PART I

SOME FUNDAMENTAL CONSIDERATIONS

CHAPTER I

INTRODUCTION

Government and Political Principles.—In entering upon any study, the standpoint from which it is approached is of supreme importance. Examination of the problem of government shows that such study, if properly prosecuted, should do several things: it should make known the character of the institutions made use of by states for the conduct of their affairs, how these institutions have come into existence, the nature and source of their powers and the manner of their operation; and it should reveal and make clear the significance of the fundamental principles lying back of these institutions, the motives that have led to their selection, and the aim it is sought to accomplish through them; in a word, their inner spirit. Thus, to take a single example, it should make known to students, not only that most states, in organizing the legislative branch of their governments, have made provision for two houses, but why they have made this choice, what are the advantages which are supposed to inhere in a bicameral, as opposed to a unicameral, legislature, what are the disadvantages, if any, which such a system presents, whether such a system offers superior advantages under all, or only certain, conditions, and whether the conditions now obtaining are such as to justify the continued use of this system. Government, in a word, should be so studied as to make a constant appeal to the analytical and reasoning powers of the student. No pains should be spared to make known the principles which those responsible for determining the structural character of governments have sought to put into application, the relative merits of these principles, and the success secured as measured by actual results obtained.

Present Contest between Political Principles.—Important at any time, a study of government from this standpoint is espe-

cially desirable at the present moment when the world is confronted with the rise of new forms of government which differ radically from those heretofore existing, not only as regards their structural character, but with respect to the principles upon which they rest. In a most fundamental way, these new types of government challenge the philosophic foundations of all older types of government, including that of the United States. While claiming validity for their own principles, they do violence to many of our most cherished traditions and modes of past political thought. Their rise renders it imperative, not only that their structural character and modes of operation be studied with a view to determining whether they offer features better adapted than our own for meeting modern conditions, but that the principles underlying our form of government should be subjected to a reëxamination if for no other purpose than that of strengthening, in a time of great political and economic ferment, our belief that in them is to be found the only firm foundation for those things which contribute so greatly to our happiness and welfare—individual liberty, justice, and equality before the law.

Distinction between a State and Its Government.—In beginning this study, attention must first be paid to the definitions of the more important terms that will be employed, to the drawing of certain primary distinctions, and to the consideration of certain abstract principles which lie at the very basis of such studies. The task is one which cannot be avoided if clearness of exposition and thinking is to be secured. Political science, in common with other social sciences, has always suffered the grave disadvantage of a loose use of terms and a failure on the part of writers to agree upon the very foundation concepts upon which a study of this science must rest. In this part of our work we will, however, be as brief and summary as due regard to the points that must be made clear will permit.

In the study of political science constant use is made of the terms "people," "nation," "state," and "government." Though these terms are often used interchangeably, they connote quite different conceptions and should be clearly distinguished.

Much the most concise, and at the same time clearest, statement of the distinctions between these several ideas and terms with which the writer is familiar, is that contained in the introductory chapter of the "American Constitutional System," by the writer's brother.[1]

> An aggregate of men living together in a single community and united by mutual interests and relationships we term a Society. When there is created a supreme authority to which all the individuals of this society yield a general obedience, a State is said to exist. The social body becomes, in other words, a Body Politic. The instrumentalities through which this superior authority formulates its will and secures its enforcement is termed a Government; the commands it issues are designated Laws; the persons that administer them, Public Officials, or collectively, a Magistracy; the whole body of individuals, viewed as a political unit, is called a People; and finally the aggregate of rules and maxims, whether written or unwritten, that define the scope and fix the manner of exercise of the powers of the State, is known as the Constitution. The State itself then is neither the People, the Government, the Magistracy, nor the Constitution. Nor is it indeed the territory over which its authority extends. It is the given community of given individuals, viewed in a certain aspect, namely, as a political unity.

Of these distinctions, much the most important is that between the state and government. The state, to use the term employed in political science, is the body politic. The government is merely the aggregate of the instrumentalities employed by such body in performing its functions. To appreciate the significance of this distinction and its bearing upon the problem of government, it is necessary that we should have a clearer idea of precisely the nature of this body to which the term state is given.

[1] W. W. Willoughby: *The American Constitutional System,* American State Series (New York, 1904), pp. 3-4.

CHAPTER II

THE NATURE OF THE STATE

The State as an Abstraction.—A close reading of the definition of a state as given in the preceding chapter will show that the state is almost an abstraction. It is not the territory over which a single political authority holds sway; nor the inhabitants of that territory; nor the collectivity of the instruments through which it manifests itself tangibly. It is, if the expression may be permitted, the thing itself, as distinguished from its parts or outer garments, or, as the author quoted has so aptly put it, "the given community of given individuals viewed in a certain aspect, namely, as a political unity."

Essential Characteristics of the State.—The foregoing definition carries us but a short way towards an understanding of the nature of the state. To secure such an understanding, it is necessary to determine more closely the essential characteristics of this body, which is at once a reality and an abstraction; or, to put it in another way, to determine what features must be present before one is entitled to hold that a given community constitutes a state.

Many attempts have been made by writers on political science to consider this subject. For the most part this consideration is unsatisfactory, due to the fact that they have failed to distinguish with sufficient accuracy between those features which are usually present, such, for example, as that a state is composed of a numerous assemblage of persons, and occupies a determined territory, and those which are essential; that is, that must be present if a state can be said to exist. In the consideration that follows it will be our effort to indicate and discuss only those features which constitute essential characteristics in this sense.[1]

[1] That the possession of a determined territory is not an essential characteristic of a state is evidenced by the recognition on the part of the "Allies" during the World

Desire on the Part of a Community That It Shall Constitute a Body Politic.—The first and prime characteristic of a state is that there shall exist in a community a desire that it shall collectively constitute a body politic. By this is meant that the people composing the community shall appreciate, or acquiesce in, the desirability that there shall exist a central authority which shall exercise powers in respect to, and on behalf of, all the members composing the community. As the author quoted clearly puts it: [2]

> A state owes its existence to the fact that, in the individuals over whom its authority extends, there is a sentiment of unity sufficiently strong to lead them to surrender themselves to the control of a single political power for the sake of realizing the desires to which such a sentiment gives rise. In other words, this subjective condition first comes into being, and when sufficiently powerful, finds objective manifestation in the creation of a political organization.

In most cases a desire or acquiescence of this character has come into existence unconsciously. Only in a few and very exceptional cases has a community, politically unorganized, determined, as a matter of deliberate action, to constitute itself as a body politic. Certainly the most remarkable, if it is not an unique, example of where action of this character has been taken, is that whereby the Pilgrims on the *Mayflower* in 1620 assembled and affixed their names to a solemn covenant by which they bound themselves to constitute themselves a body politic, and to yield obedience to the political authorities that should be selected to exercise the powers of that body. This famous agreement in modern English reads:

> In the name of God, Amen: We whose names are underwritten, the loyal subjects of our dread sovereign, Lord King James, by the Grace of God, of Great Britain and Ireland, King, Defender of the Faith, etc., having undertaken for the glory of God and advancement of the Christian faith and honor of our king and country, a voyage to plant the first colony in the northern part of Virginia, do by these presents solemnly and mutually, in the presence of God and one another, covenant and combine ourselves together into a Civil Body Politic for our better ordering and preservation and furtherance of the ends

War that the Czecho-Slovaks constituted a state though they were not at the time in the possession of a defined territory.

[2] *Op. cit.*, p. 6.

aforesaid; and, by virtue hereof, to enact, constitute and frame such just and equal laws, ordinances, acts, constitutions and offices from time to time as shall be thought most meet and convenient for the general good of the colony unto which we promise all due submission and obedience.

In witness whereof, etc.

The fact that allegiance was pledged to the King of England and no intention was manifested of creating an independent political authority in one sense prevents this act from being an example of the deliberate creation of a state in the fullest acceptation of the term. It does furnish, however, an excellent example of what is meant by the necessity that there shall exist on the part of a community a desire to constitute itself a body politic, in order that a state may come into existence.

Of this act John Quincy Adams said:

> This is perhaps the only instance in human history of that positive, original, social compact which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all the individuals of the community to the association by which they became a nation (i.e., state).[3]

The period immediately preceding the World War furnished a number of striking instances where this initial step towards the creation of a state had been taken. In territories formerly ruled over by Russia and Austria-Hungary, various peoples having a common race origin made known their desire to become independent states.

Necessity That This Desire Shall Find Actual Expression.—Though the desire on the part of a community that it shall constitute a body politic constitutes the fundamental condition that must be present if a state is to come into existence, that desire alone is not sufficient to accomplish this result: it must find expression in positive action.

The taking of such action, and the bringing into existence of the so-called "succession states"—Poland, Czechoslovakia, Hungary, Austria, Jugoslavia, and the Baltic states of Latvia, Estonia, Lithuania, and Finland—constitute one of the important results of

[3] Quoted in Goodwin's "The Pilgrim Republic," Boston, 1888.

The World War. There are at the present time a number of peoples, such as those of India, Puerto Rico, and Korea, who, to a greater or less extent, have a desire to constitute themselves as states. However, not until they have succeeded in effecting an organization for the independent exercise of political authority can they be said to have brought a state into existence.

The State an Entity, Indivisible and Immutable.—A third feature characteristic of the state is that it possesses a unity which is indivisible and immutable. It is like the individuality of a person. It is complete in itself; it cannot be shared with any other body; it is incapable of being either divided or of undergoing change. It is in respect to this characteristic that it is so important to distinguish between state and government. A state can change its government as often as it desires, as an individual changes his clothes, without itself undergoing any change. It can make use of one system of authorities for the administration of its affairs, as is done where the system of government adopted is the type known as unitary, or it can make use of two schemes, as is done where what is known as a multiple or federal form of government is established, without affecting the character of the state.

This point is of special importance since so frequently the mistake is made by writers on political science of designating a state having a unitary government as a Unitary State, and one having a federal government as a Federal State. This is exceedingly unfortunate since it obscures the essential nature of the state and its distinction from government. If we understand the real nature of the state, we must see that the distinction there sought to be made is impossible. The very conception of the state implies unity, indivisibility.

There is thus a state of the United States, notwithstanding its federal form of government, that is as definitely a unit as the state of France, or any other state having a unitary government. The fact that the people of the former have preferred to bring into existence two schemes of government for the conduct of their political affairs, while those of the latter have preferred to make use of but a single system, represents merely a difference of choice

in respect to means to be employed, not different in kind from all other differences in governmental detail, no matter how apparently insignificant.

Force as an Attribute of the State.—Another attribute universally ascribed to the state is that of force or compulsion, or rather the right and the obligation to make use of such force as may be necessary to insure that its will when duly expressed is carried into execution. Manifestly the mere possession of authority would be meaningless without the power to make this authority prevail. This a state can secure only when it has the power and the right to use such power as may be necessary to compel compliance with its mandates. Not only must the state thus possess the right to employ force in order to compel compliance with its orders, but, as the possessor of supreme authority, it alone must determine the form that the compulsion will take and the instrumentalities that will be employed in its exercise. One of the great problems presented to a state in establishing for itself a government is to determine the means that shall be made use of by it for enforcing its will.

Law as an Attribute of the State.—Another feature characteristic of the state is that it not only exercises its authority through the formulation, promulgation, administration and enforcement of general orders which are known as laws, but that, in a strictly juristic sense, it is the sole source of law. As it is expressed by the author's brother in the passages from his book that have been quoted, "The commands that it [the state] issues are designated laws.... In the entire body of laws of a state are summed up the powers of the state as actually exercised."

In respect to this it should be noted that when one speaks of law as an essential characteristic or attribute of the state, one has in mind primarily the modern state as it exists in the West. If we turn to the East, such as it was before it began to westernize its political institutions, we find undoubted states in which law, as that term is properly employed in a juristic sense, plays but a minor or secondary rôle. Here, as will be later pointed out, the state has brought into existence a type of government

known as absolutism. It is the prime characteristic of such states that the organ through which they exercise all their powers, the ruler or sovereign, can and does act in an autocratic manner; that is, he is bound by no law and governs, not through law, but by the exercise of his arbitrary will. There can be no question but that such a community constitutes a state in the fullest acceptation of the word. But it would be hard to say that his commands, when each command may relate to but a single individual or act, and may vary as they relate to different individuals and acts as his arbitrary will dictates, are entitled to be designated laws. Indeed this fact, whether the affairs of state are, or are not, conducted through the issuance and enforcement of laws, constitutes the essential difference between the two great classes of governments into which all governments are primarily divided.

It is thus well to think of law as an attribute of the state in the sense that the state is the true source of all law, but it should at the same time be borne in mind that a state can exist and discharge its function without making any, or only incidental use, of this instrumentality. It is in the adoption of the policy of governing through law that the greatest advance has been made in the evolution of government.

Sovereignty As an Attribute of the State.—Another essential feature of the state is that it possesses an authority which is at once supreme and unlimited or, to use a legal expression, a jurisdiction the scope and extent of which is unlimited. This attribute of supreme and unlimited authority is designated in political science as sovereignty. It constitutes by far the most essential and characteristic feature of the state. As W. W. Willoughby expresses it:[4]

> The one characteristic that is essential to the State, and serves to distinguish it *in toto genere* from all other human associations, is its possession of political sovereignty. By political sovereignty is meant, on the one hand, complete freedom from the legal control of any other power whatsoever, and, on the other hand, absolute and exclusive control over the legal rights and obligations of its citizens individually considered or grouped into larger or smaller associations.

[4] *Op. cit.*, p. 4.

The State is thus supreme, not only as giving the ultimate validity to all laws, but as itself determining the scope of its own legal powers and the manner of their exercise. In every politically organized community that is entitled to be termed a State there must exist thus an authority to which, from the legal standpoint, all interests are potentially subject. In the entire body of laws of a State are summed up the powers of the State as actually exercised.

It is impossible to lay too great stress upon the importance of this attribute of sovereignty of the state. Supreme, final authority must lie somewhere, and, in a politically organized community, it lies in the state. It is in respect to this attribute that we see the essential difference between the state and the government. The authority of the state is unlimited; that of the government only such as the people acting as a body politic, that is as a state, choose to confer upon it. The state is the principal with inherent unlimited powers; the government an agent with only such powers as its principal may choose to confer upon it and those powers moreover it can exercise only in the manner prescribed by the state.

It is in respect to this attribute, and the distinction in respect to its possession between the state and the government, that one must view the whole great question of the enunciation and guarantee of so-called individual rights. There is no such thing as the protection of individual rights or liberties against the state. As Professor Burgess has excellently put it: [5]

The individual is defended in this sphere against the government by the power that makes and maintains and can destroy the government, and by the same power through the government against encroachment from any other quarter. Against that power itself, however, he has no defense.

Significance of the Creation of a State: Surrender of Individual Wills to a Collective Will.—Accustomed as we are to living as members of a state, and having known no other condition, it is difficult for us to realize the profound significance of this act by which a people is converted into a body politic and a state is brought into existence. We have seen that the state is a body having supreme, unlimited powers. The result of this is that it is the

[5] Burgess: "Political Science and Constitutional Law," I, 176, quoted by W. W. Willoughby, *op. cit.*, p. 5.

final authority determining human conduct. There cannot be two supreme wills. The conversion of a people into a state means therefore that by this act the people have surrendered their individual wills as the final arbiter and determiner of conduct in favor of a collective will. Potentially, legally, the state can determine in the minutest detail the conduct and every act of the individuals composing it. The fact that no state in practice attempts to do this in no way alters the fact of the possession by the state of such powers. The fact is, however, that the state goes much further in this direction than is ordinarily appreciated. In the modern state, one lives under an exceedingly elaborate body of laws. Only as one takes deliberate thought, can he appreciate to how large an extent his acts are controlled, not by his individual will, but by the collective will of the state. He may seem to act freely, but he acts within the orbit prescribed by the state and follows rules of conduct laid down by it.

What we now speak of as individual liberties are merely the liberties which the state, as a matter purely of policy or expediency, determines shall be left to individual determination. The power possessed by the individual in respect to these is in the nature of a delegated power. At any moment the state, acting through the machinery it has provided for itself, can enter this field and cancel the powers that it has granted or permitted. This it is constantly doing as emergencies, such as those caused by internal disturbances or foreign war, seem to make such action advisable.

The Paradox of Freedom Through Restraint; of Liberty Through Law.—This phenomenon that the establishment of a state means the absolute negation of individual liberty as an inherent individual possession—that, by the creation of a state, or acquiescence in the existence of a state, the individuals composing it substitute, or permit the substitution of, a collective will for their individual wills—is one which has given rise to a large amount of philosophical inquiry. The questions sought to be answered are: Why is it that individuals as rulers of their own conduct should thus abdicate in favor of an authority in which they as individuals can exercise but an infinitesimal voice? Why are they willing to

exchange a condition of independence for one of subjection? What is the justification, morally, for a collective will to control individual wills in the case of those individuals who generally, or in individual instances, are unwilling to recognize the validity of this collective authority?

It would take us too far afield to attempt to follow out in detail the philosophical speculations to which these questions have given rise. They are mentioned here primarily for the purpose of making known to readers this interesting collateral field of political science. Here we will content ourselves merely with the statement that the solution of the questions propounded is to be found primarily in the paradox that, through the seeming surrender of individual liberty, the actual effective enjoyment of such liberty is increased; that, in a state of society, real freedom is achieved only through restraint; liberty through law. One or two examples will make this clear.

The freedom of an individual to go where he chooses is manifestly a reality only when others stronger than he do not interfere with the enjoyment of this freedom. The freedom of an individual to enjoy the fruits of his own labor is evidently but a theoretical freedom if any one stronger than he can freely take such fruits from him. In a condition of no-state, of no laws, real individual freedom, in the sense of power to do as one chooses, is thus the possession of but the few who are possessed of superior strength. Only by law, by the restraint of these few by the exertion of a collective will, in other words by state action, can individual liberty or freedom be made a general possession. It is the appreciation of this, though such appreciation is more or less unconscious, that has led to the establishment of the state wherever man has emerged from barbarism.[6]

Difficulty at Times to Determine Whether a Given Community Is a State.—No little difficulty arises at times in determining

[6] For a consideration of this question, see A. V. Dicey: "Law and Public Opinion in England in the Nineteenth Century," and W. F. Willoughby, "The Philosophy of Labor Legislation." Presidential Address, American Association for Labor Legislation, *American Labor Legislation Review*, March, 1914.

whether a given community possesses to a sufficient extent the desire to be a body politic, or, possessing the desire, has succeeded in establishing a governmental organization which is of sufficient definiteness and stability, and is acquiesced in by the community as the true organ of the state to a sufficient extent to entitle such community to be designated a state and to receive recognition as such by other states. This question always presents itself when a people, or a part of a people, refuses allegiance to the existing political authorities and seeks to bring into existence another organization for the expression and accomplishment of its political aims. The question is thus presented as to whether the Filipino Republic organized by Aguinaldo which the American forces were compelled to put down before establishing American rule in the Philippines was entitled to be designated a state. When a country is engaged in civil war, does each side constitute a state? Did the Confederate States of America constitute a state?

It is manifestly undesirable that we should interrupt consideration of principles to attempt to discuss in detail each of these special cases. As the decision is one resting upon facts as well as principles, it is moreover doubtful whether a general agreement could be reached in all cases. The author believes, however, that in all cases where the desire to be a body politic is plainly present, and where a bona fide government has actually been organized for the conduct of political affairs, that community, from the standpoint of political science, is entitled to be designated a state, even though it has not succeeded in overcoming opposition from other communities to the maintenance of such a status. To the author, the formal recognition of a state by other states is rather the general recognition of what already exists than in itself constituting an act essential to the coming into existence of a state.

So-Called Non-Sovereign States, Quasi-Sovereign States, States with Impaired Sovereignty, Neutralized States, etc.—One frequently hears the expression "sovereign state" and, in contradistinction to this, of states which are not completely sovereign, which have had their sovereignty impaired, etc. One thus hears the United States, Great Britain, France, and the other great

powers of the world designated as sovereign states, while other political units are referred to as states of impaired sovereignty, and still other nations, the political affairs of which are more or less controlled by some other power, as states which have almost wholly surrendered their sovereignty. In the interest of clear thinking it is important to determine the extent to which any such distinctions are warranted, or the sense in which they should be employed.

We have seen that sovereignty is an essential attribute of the state and that it represents supreme, unlimited, and indivisible authority. This being so, it is evidently impossible to speak of a non-sovereign state, much less of one with impaired sovereignty. It is even tautological to speak of a sovereign state. There can be no doubt about the differences in the conditions under which the powers of the several states which it is sought to distinguish in this way are exercised. Confusion arises in expressing these different conditions, partly through a failure to keep strictly in mind the essential nature of the true political state and of sovereignty as the most essential attribute of such state, partly through the use of the word state to designate given politically organized communities as distinct from the purely political or abstract conception of the state, and partly through the general mistake of describing sovereignty as constituting supreme, unlimited power instead of supreme, unlimited legal authority. Authority and power are two quite different things. A person or body may quite easily possess unquestioned authority but lack the power or the will to use it. This is true of actual states as well as of persons and other bodies.

If we keep these several distinctions clearly in mind, we will, I think, have little difficulty in determining the true political status of those states whose sovereignty is alluded to as impaired or incomplete. Thus, for example, there can be no doubt that China, notwithstanding the fact of the extent to which other governments exercise the power of extraterritoriality within its boundaries, and its freedom of action, even as regards the management of its internal affairs, is restrained by treaty conventions, is a completely sovereign state. In so far as it voluntarily acquiesces in these ar-

rangements it, as a state, exercises its supreme authority to say that the conduct of political affairs shall be had in this way. In so far as it resents such arrangements but feels itself without sufficient power to annul them, the latter represents an impairment of its power but not of its inherent authority.

Sovereignty, as thus expressing the State's supreme will, is necessarily a unity and indivisible. That there cannot be in the same being two wills, each supreme, is obvious. But though the sovereign will of the State may not be divided, it may find expression through several legislative mouth-pieces, and the execution of its commands may be delegated to a variety of governmental organs. Theoretically indeed the State may go to any extent in the delegation of exercise of its powers not only to governmental organs of its own creation, but even to those of other States. Thus a given State may, in fact, retain under its own immediate direction only a most meager complement of activities and yet preserve unimpaired its sovereignty; for in such a case the public bodies or States to which the exercise of the powers has been granted, act as the agents of the State in question, and this State still possesses the legal, if not the actual, powers of again drawing to itself the exercise of the powers it has delegated.

Thus mother-countries may concede to colonies the most complete autonomy of government and reserve to themselves a control of so slight and negative a character as to make its exercise a rare occurrence, yet so long as such control exists the sovereignty of the mother country exists, and such colony is therefore to be considered as possessing no independent political powers. Again as we shall later see, in the so-called Confederate State, the member commonwealths may yield to the central government the exercise of their most important powers and yet retain their sovereignty, and on the other hand, a National Federal State may, without destroying its sovereignty, yield to particular territorial authorities an extent of power sufficient to endow them, apparently, with almost all the characteristics of independent bodies politic.[7]

Distinction between a Federation and a Confederation.— One of the most important points developed by the foregoing consideration of the nature and indivisibility of sovereignty is the distinction between what is known as a Federation or a federal state, though this latter term is, as has been pointed out, an improper one, and a Confederation or, as the Germans express it, the distinction between a *Bundesstaat* and a *Staatenbund*. Both rep-

[7] W. W. Willoughby, *op. cit.*, pp. 5-6.

resent a grouping of large political units. In both, the performance of the functions of the state is entrusted to two sets of governmental machinery, a general or central government which acts for all the units and a special government acting for each of the units independently of the others.

Notwithstanding this similarity, the two are, from the political standpoint, fundamentally different. The former is a single state, the latter is composed of as many separate states as there are units composing the grouping. This difference arises wholly from the differences in respect to the location of sovereignty in the grouping. In the true Federation, or *Bundesstaat,* sovereignty resides in the combined population of all the units. This population has, purely as a matter of practical expediency, decided to make use of two sets of governmental machinery for the performance of its functions: a central government to attend to matters which it is believed concern all, or should receive single generally binding determination; and special governmental agencies for each of the great geographical divisions into which the country, for historical or other reasons, is divided. Each of these governments is but an instrument through which the single state acts.

The Confederation, or *Staatenbund,* on the other hand, is a league of sovereign states. The fact that there is a central government acting for all arises merely from the fact that the several states, though independent sovereignties, have agreed among themselves to make use of a common instrument for the performance of certain of their duties which, as a matter of practical expediency, they believe should receive a common determination. The association is thus a mere league. The tie binding the several units together is in the nature of an agreement which has been entered into, not by the combined population of the several units acting as a body politic, but by the several units acting as independent political units. The distinction between the two, it should be noted, is thus in no way the relative importance of the functions that are exercised by the central government and the governments of the constituent commonwealths. It is solely one of the source of ultimate authority, of the location of sovereignty.

The distinction between a National State with a federal form of government and a Confederacy of sovereign States is not based upon the *quantum* of powers, the exercise of which is vested in the central government; nor primarily whether the commands emanating from the central legislature operate directly upon individuals or upon the individual commonwealths; nor finally upon the difference between a central government with enumerated and one with unenumerated powers. The one absolute and finally determining criterion is: What authority has, in the last instance, the legal power of fixing its own legal competence, and, as a result, that of the others? [8]

The American Civil War a Contest Over the Nature of the State.—It may seem that in this discussion we have wandered far from the practical problems of government and administration. Such a view, however, would be a great mistake. The matter here dealt with has been in the past, and is now, one of supreme practical importance. In a very true sense it may be said to have been the cause of our great civil war, which was fought to decide the true nature of the American state and where the sovereignty of that state rested. Did it reside in the individual commonwealths or in the nation as a whole? Was the Union a single body politic or a mere league of bodies-politic? Was it a single state making use of that form of government known as a Federal Government or a confederation of true sovereign states? This great war involved the question, not of the form of government, but of the nature of the state. On this issue the two sides honestly differed. For years preceding the war, political discussion centered around this question. It constituted the subject matter of the most important speeches of Daniel Webster and his great antagonist, Calhoun. It is almost impossible to say which of the two sides was in the right. What may be said with certainty is that the result of the war decided for all time that the Union was in fact a single state, and not a confederation; that sovereignty resided in the whole body of the people, and that the individual commonwealths were but instruments made use of by the single national state for the exercise of certain of its powers.

The State as the Possessor of Personality.—In the whole domain of political science few questions have received attention

[8] W. W. Willoughby, *op. cit.*, p. 10.

equal to that as to whether there can properly be ascribed to the state the attribute of personality. That the state possesses a legal personality, there can be no doubt. It is a legal person in the same sense that corporations are. It is the possessor of property and enters into contracts in much the same way as any individual or corporation. It has its supreme will with means for formulating, expressing, and enforcing such will. It acts for the most part as a unit and makes use of a great seal to authenticate its more formal acts. Many writers, however, have gone far beyond this. They have maintained that the state not only can thus act as a legal person but that it has a personality as complete as that of a living being, that it is in effect a living organism with a structure, vital organs, and a life history similar in all essential respects to that of man. As the possessor of such a personality, they have held that the state has interests peculiarly its own, and, quite distinct from the interests of the individuals composing it, interests which in fact may be utterly opposed to those of its citizen members. The position held by these writers constitutes what is known as the organic theory of the state. For some time, this theory played a no small part in political thought. It is now held, however, by few political thinkers of first rank in America. The position held at the present time is that, though the nature and activities of the state can at times be made more clear by comparing them with the nature and activities of a living being, it is a mistake to consider the state as an actual living organism.

All States Essentially Identical.—Having completed our attempt to make known the nature of the state and its several attributes, it may be well to recapitulate in one compact statement the points sought to be brought out.

A state is a politically organized community, or to put it in another way, a community viewed as a political entity. It exists in virtue of the desire on the part of such community that it shall collectively constitute a body politic. Such desire means that there shall come into existence an entity known as a state which shall have supreme and unlimited authority over the inhabitants, whether viewed collectively or individually. This entity, the state,

has all the attributes of legal personality. It possesses a supreme will, means for formulating and expressing this will, and full authority to employ all force necessary to compel compliance with its commands. As a legal person, it is a unity which is indivisible and unchangeable. To exercise its powers and to discharge its functions, it brings into existence an organization or a machinery of administration which, viewed as a whole, is termed its government. This government may take an almost limitless variety of forms, but such variety in no way affects or alters the character of the state which itself remains invariable.

Present Importance of the Question of the Nature of the State.—It may have seemed that the foregoing consideration of the nature of the state has only a theoretical interest and could well be left to those who are primarily interested in speculative political philosophy. This, however, is not so. In point of fact the questions involved are of great practical importance. We have already seen that, in a very real sense, the great contest between the North and the South was one over contending theories of the nature of the American State. Had there been no difference of opinion regarding this matter, it is conceivable that that contest might have been avoided. At the present time the questions that have been considered immediately arise wherever a new state is brought into existence or where existing states undergo reorganization. It is impossible, without keeping these considerations in mind, to act intelligently upon such questions as the relations of mother countries to their dominions, colonies, and dependencies; of leagues of nations; and of the relation between states generally.

CHAPTER III

THE MISSION OF THE STATE

Although persons may fairly well agree as to the nature of the state, the widest possible differences can, and do, exist with respect to the part that it is believed the state should play, and particularly with respect to the extent to which the interests of the state, as a state, should take precedence over those of the individuals composing it.

The Anglo-Saxon Conception.—The Englishman's and American's conception of the mission of the state is an exceedingly practical one. They look upon the state as an agency that is brought into existence by a people for the promotion of their own welfare as individuals. The state, in a word, exists for the people, not the people for the state. They conceive of the state as having no interests apart from those of its citizens. The promotion of individual welfare, individual liberty, and individual rights constitutes thus the very foundation for and justification for the state. They hold that, in general, the largest practicable freedom should be left to the individual in determining his affairs. They sanction, however, the intervention of the state wherever the welfare of individuals generally will be thereby promoted. To be justified the necessity for such intervention must, however, be clearly and affirmatively established.

From the moral standpoint, the state is viewed as being without morals; that is, non-moral. Moral responsibility for the acts of the state thus rests upon the persons having in charge the conduct of the state's affairs. No distinction in respect to moral obligations is made between the acts of officers of the state as such officers and as individuals. The same standards of honor, integrity and fair dealing should obtain in respect to acts of the state as in respect to those of individuals. Though moral responsibility attaches to

the individuals acting as officers of the state rather than to the state itself, the highest regard is had for the honor of the state as representing the collectivity of its citizens, their ideals, achievements and reputation for honesty and fair dealing. Regard for the state and pride in its position in the world is thus of the same character as that held by individuals in respect to other bodies, such as the family, the church, the university or other organization of which they are constituent members.

This conception of the state, and of the relations that should exist between it and its citizens, is one which, it is held, should be of general application. It recognizes no distinction between strong and weak states. The same standard of conduct should be maintained towards one as the other. It denies justification for one state to impose its will upon another except in so far as such action is deemed to be necessary to hold such other state to its obligations.

The German Conception.—The conception of the state which has just been described is so matter-of-fact and logical that it is difficult for the Englishman or American to understand any other. Yet, in fact, it is wholly rejected by at least two other peoples, the Germans and Italians. To the Germans, the state is something much more than a mere agent of the people for the protection and promotion of their common or collective interests. It is looked upon as an entity having interests, ambitions and a will of its own quite distinct from those of its citizens collectively considered. These interests moreover, it is held, are superior to those of its citizens. To this entity the citizens are held to owe implicit obedience. Whenever the interests of the state and its citizens come into conflict, those of the latter are to give way. Being superhuman, as it were, it is neither itself bound, nor are those in charge of the conduct of its affairs bound, by the principles of morality governing in the case of human beings. Furthermore, the state is not only justified, but is under the obligation, as it were, to use its utmost powers to advance its particular interests, no matter how much in so doing the interests of other states, and even those of its own citizens, individually viewed, may suffer. In putting forth these

efforts, it knows no law of morality and no restraint but that of expediency.

In juristic philosophy, it has been found convenient in all countries, in order to give formal and logical consistency to their systems of public law, to envisage or picture the State as a political person or corporation possessing and uttering a legally supreme will, and thus in a formal and purely juristic sense, as the ultimate source of all commands that may in technical structure be termed laws. But this conception, which is nothing more than a convenience of thought, and which serves only as a peg upon which to hang other juristic concepts, or as a starting point from which to attempt a logical arrangement of public law principles, is an idea wholly different from the German doctrine which postulates the real, albeit mystical and insubstantial, existence of a State-Being to the commands of which, as a moral proposition, implicit obedience is due, and with ends of its own for the realization of which any and every sacrifice of individual well being might rightfully be required.[1]

This conception of the state is one held not merely by the relatively few ambitious men holding the reins of power in Germany. It permeates all German philosophy. It has been taught in the schools and universities until it has become an essential part of the unconscious political beliefs of the people as a mass. Scores of quotations from German writers might be cited in support of it. Space will, however, permit of but one—that from a work written subsequent to the outbreak of the World War by a professor of history at the University of Berlin. After dwelling upon the essentially different political conceptions of the English and Americans and the Germans, he says: [2]

The State is of much higher importance than any of these individualistic groups, and essentially is of infinite more value than the sum of all the individuals within its jurisdiction. For it has a life apart; its mission is unending, and, in theory at least, unless it is wrecked by a force from without, its existence is endless, encompassing, as it does, all the generations yet to come, and welding them into a great unit—the mighty life of a nation acting its part in the history of the world. This conception of the State which is as

[1] W. W. Willoughby: "The Prussian Theory of the State." *American Journal of International Law*, Vol. XII, No. 2, April, 1918, p. 253.

[2] *England: Its Political Organization and Development and the War Against Germany*, by Eduard Meyer, Ph.D., LL.D., Professor of History at the University of Berlin. Translated by Helene S. White. Ritter & Co., Boston, 1916, pp. 30-31.

much a part of our life as is the blood in our veins, is nowhere to be found in the English constitution, and is quite foreign to English thought and to that of America as well.

It is on the basis of this conception of the state that the Germans, prior to and during the World War, defended their form of government in which supreme authority was deemed to reside in the Emperor rather than in the people, and claimed for it a superiority over the system of popular government possessed by the English and American people. Thus Professor Meyer, in the work already quoted, writes: [3]

To them [the English and Americans] freedom means the right of the majority to have their way, and there is nothing left to those who think otherwise but unqualified submission. Therefore "public opinion" is the highest authority for the Englishman and American, whereas for the German it seems to be almost the reverse, for when an argument is upheld by the statement that it is in accord with "public opinion," or that it is "generally accepted," he is repelled rather than persuaded, by it, and often almost unconsciously ranges himself on the opposing side. . . .

In a strongly monarchical government on the other hand, like that of Prussia or of the German Empire, the final decision in every measure that the State undertakes rests with the sovereign, who therefore assumes full responsibility for it, both in what is done and in what is left undone, and no one can relieve him of it. Although he may be following the advice of his prime minister absolutely, still by giving his consent to a measure, the sovereign makes it his own act, and he therefore must bear the responsibility for its consequences. In this personal element lies the tremendous advantage that a monarchical form of government has over any other, in that it unites in one person the power to act for the State together with the undivided responsibility to conscience for the consequences of the act. Of this highest conception of monarchy and its consequent tremendous moral superiority to any other form of State organization, the English, and the Americans especially, have not the faintest idea; therefore they believe in childish naïveté that they have reason to look down upon our splendidly creative monarchy as upon a less advanced form of government which, in the evolutionary development of State organization, has long since been overtaken and distanced by their own.

Combined with this idea of the state, as a political conception, was the belief generally held by the German people in the superiority of their civilization or *Kultur* over that of other peoples' and in the

[3] Meyer, *op. cit.*, pp. 238-239.

mission of the German state to make this civilization prevail. With such a combination of conceptions, it was inevitable that the policy of the German state should be one of aggression, and that it should lose no opportunity to advance its authority.

The Italian Conception.—The German conception of the state and its mission has been taken over by the new Fascist government of Italy in, if possible, a still more exaggerated form. Alfredo Rocco, Minister of Justice in the Fascist government, in an address which received the hearty endorsement of Mussolini, criticizes the system of popular government possessed by other countries which he characterized as "atomistic" because it exalts the interests of the individuals composing the state over those of the state itself.[4]

As the human species is not the total of the living beings of the world, so the various social groups which compose it are not the sum of the several individuals which at a given moment belong to it, but rather the infinite series of the past, present, and future generations constituting it. And as the ends of the human species are not those of the several individuals living at a certain moment, being occasionally in direct opposition to them, so the ends of the various social groups are not necessarily those of the individuals that belong to the groups but may even possibly be in conflict with such ends as one sees clearly whenever the preservation and the development of the species demand the sacrifice of the individual, to wit, in times of war. Fascism replaces, therefore, the old atomistic and mechanical State theory which was at the basis of the liberal and democratic doctrines with an organic and historic concept. . . . The relations, therefore, between State and citizens are completely reversed by the Fascist doctrine. Instead of the liberal democratic formula "society for the individual" we have "individuals for society" with this difference, however, that while the liberal doctrine eliminates society, Fascism does not submerge the individual in the social group. It subordinates him but does not eliminate him; the individual as a part of his generation ever remaining an element of society however transient and insignificant he may be. . . .

At this juncture the antithesis between the two theories must appear complete and absolute. Liberalism, Democracy and Socialism look upon social groups as aggregates of living individuals; for Fascism they are the recapitulating unity of the indefinite series of generations. For Liberalism, society has

[4] "The Political Doctrine of Fascism." Address delivered at Perugia on August 30, 1925, a translation of which is given in the October, 1926, number of *International Conciliation* published by the Carnegie Endowment for International Peace.

no other purposes other than those of the members living at a given moment. For Fascism, society has historical and immanent ends of preservation, expansion, improvement, quite distinct from those of the individuals which at a given moment compose it; so distinct in fact that they may even be in opposition. Hence the necessity, for which the older doctrines make little allowance, of sacrifice, even up to the total immolation of individuals, in behalf of society; hence the true explanation of war, eternal law of mankind, interpreted by the liberal democratic doctrines as a degenerate absurdity or a maddened monstrosity.

For Liberalism, society has no life distinct from the life of the individuals, or, as the phrase goes: "solviter in singularitates." For Fascism, the life of society overlooks the existence of individuals and projects itself into the succeeding generations through centuries and millennia. Individuals come into being, grow old and die, followed by others unceasingly; social unity remains always identical to itself. For Liberalism, the individual is the end and society the means; nor is it conceivable that the individual, considered in the dignity of an ultimate finality, be lowered to mere instrumentality. For Fascism, society is the end, individuals the means, and its whole life consists in using individuals as instruments for its social ends. The State therefore governs and protects the welfare and development of individuals not for their exclusive interests but because of the unity of the needs of individuals with those of society as a whole. We can thus accept or explain institutions and practices which, like the death penalty, are condemned by Liberalism in the name of the preëminence of individualism.

The fundamental problem of society in the old doctrines is the question of the rights of individuals. It may be the right to freedom, as the Liberals would have it; or the right to the government of the commonwealth, as the Democrats claim it, or the right to economic justice, as the Socialists contend; but in every case it is the right of individuals, or groups of individuals (classes). Fascism, on the other hand, faces squarely the right of the State and the duty of the individuals. Individual rights are only ecognized in so far as they are implied in the rights of the State. In this preëminence of duty we find the highest ethical value of Fascism.

General Comment.—The foregoing may seem to be a rather deep dip into the sea of political theory for the student just entering upon the study of the problem of government. An understanding of these fundamentally different ways in which the mission of the state is viewed by different peoples is, however, imperative if one is properly to comprehend the reasons leading to the establishment of such different forms of government as the world now pos-

sesses. Governments do not work in a vacuum. They are created for the accomplishment of concrete ends; it is only as such ends are clearly appreciated that one can understand why a selection has been made by a people of the particular form of government which it has chosen for itself.

The skilful exposition that has been made by German writers, and particularly by the Italian writer Rocco, of the German and Italian state will probably be unconvincing to Englishmen and Americans as a guide to political action. They should, however, realize that it is one that is not only sincerely held by other peoples, but is, to a certain degree, acted upon by themselves. Placing the great emphasis, as they do, upon the interests of the individual and the protection of his rights as against the possible overriding of them by the government, they nevertheless take cognizance of the interests of the state that are public interests and have regard for the welfare of future generations. This is evidenced by the jealousy with which they guard the prestige of their state against foreign encroachment or insult, resorting if necessary to war in its defense; and by the willingness of the present generation to make sacrifices for the benefit of future generations, when for example, they provide large funds for the prevention of soil erosion, the reforestation of vacant lands and other purposes, the benefits of which will in only slight degree, if at all, accrue to themselves.

CHAPTER IV

THE JURISDICTION OF GOVERNMENT

In our introductory chapter, the necessity of distinguishing between the state and its government was pointed out. In a "totalitarian" government, such as that now possessed by Germany and Italy, where the interests of the state, in contrast with those of the people composing it, are deemed to be supreme, and where, as a consequence, there is no phase of individual activity that is not subject to political control if occasion seems to demand, this distinction is one that may, in practice, have comparatively little significance. It is far otherwise, however, in the case of a "libertarian" government such as our own, where sovereignty is deemed to reside in the body of the people and the government is considered to have only those powers that are expressly granted to it. In such a government, the relationship between the sovereign people and the government is one of principal and agent. As principal, the people have unlimited powers. The government, on the other hand, is but an agency created by the people to act for them. Like all created agencies, it has no inherent powers. It can do only those things which it is specially authorized to do, and these it must do in accordance with the provisions and limitations set forth in its charter or constitution. In such a government, the determination of the scope of the powers of the government and the manner of their exercise is a matter of supreme importance.

People who reject the German and Italian theory of the totalitarian government and who adhere to the opposing principle—that the government finds its moral justification only as an agency for promoting the individual welfare of its citizens—are unwilling to accept the idea that their conduct shall be subject in all respects to a general, collective control. They feel that there are certain matters which each individual should determine for himself. To

hold otherwise, they believe, would mean subjecting themselves to a control as complete as that which has ever existed under the most absolute and despotic of monarchies. This being so, it is evident that every sovereign electorate, in providing for the establishment of a government to act for it in respect to the conduct of political affairs, is called upon to make a momentous decision. Though it cannot divest itself of one atom of its own inherent, unlimited rights, it can decide upon the extent to which it will confer the right to exercise these rights upon its agent, the government. The issue here presented to it is thus, whether it will, or will not, draw a distinction between those acts which shall be subject to governmental regulation and those which shall be left to individual determination; and, if it decides to make the distinction the lines along which it shall be made. To state this in another way, it has to determine the relative jurisdictions of the government and the individual. This issue is often referred to as one between the individual and the state. This is erroneous. No issue can arise between the state and the individual. The state is legally omnipotent. The real issue is one between the government and the individual; and it is the state, acting through its proper organ, that decides this issue.

In seeking thus to delimit the two fields of governmental and individual authority, two methods are open: (1) the powers of government may be enumerated and accurately defined; or (2) a full grant of authority may be given, subject to certain specified limitations. The latter is the method almost universally employed. The attempt, in other words, is made to state the things which shall be deemed matters purely of individual determination. This statement embraces what are popularly known as "individual rights," or "liberties," or "constitutional guarantees."

Three Methods of Providing for the Guarantee of Individual Rights.—Examination of the methods actually adopted by states in providing for the guarantee of individual rights, shows that action may be had in three ways: (1) the framers of the constitution may attempt to state these rights in definite form in the constitution and thus impose strict limitations upon the government in respect

to them; or, (2) they may make a general statement of them in the constitution, but provide that they shall subsequently be more accurately defined, and the conditions under which they shall be valid be more closely determined, by the government itself acting in its law-making capacity; or, (3) they may refrain from all mention of them in the constitution and thus leave the matter wholly one for legislative determination. The three alternatives, it will be observed, are in reality the placing of absolute limitation upon the powers of the government, the placing of no limitation at all, and a compromise between the two.

The Method of the United States.—Each of these three policies has been followed by one or more leading nations of the world. Of nations which have followed the first policy, the leading example is the United States. In the case of this state, the people, in framing both their federal constitution and the constitutions of the several constituent States, have incorporated in those documents definite statements of individual rights in such a form as to remove from the government practically all power to take action representing in any way an infringement of them. Neither the President nor Congress nor the two combined, can perform any act interfering with these rights as so stated. Effective means, moreover, are provided by the creation of an independent judiciary through which the people can protect themselves against any violation should it be attempted.

Were these rights of an absolute character, the policy thus pursued by the United States would undoubtedly represent the one that should be followed by all nations placing a value upon guarantees of individual liberty. This, however, is not the case. There are many cases where the rights ought to be subject to qualifications and limitations if the interests of others and of the general public are not to suffer. This has been abundantly proved by the experience of the United States in attempting to operate under these provisions. It is now the best legal opinion in this country that not only has the statement of these rights in the absolute form in which they appear in the federal and State constitutions led to an enormous amount of litigation, but that the hands of the

government have been seriously tied in its efforts to introduce legal and social reforms urgently demanded by the people themselves. So serious is the situation that it is almost impossible to enact any important social legislation without having its legal validity immediately challenged in the courts. The government and the people thus find themselves in a position where, in seeking to solve their economic and industrial problems, they have to ask themselves not merely what they want to do but what, in view of our constitutional provisions, is it possible for them to do.

The English Method.—Of nations which have gone to the other extreme and imposed no limitations upon the legal powers of the government to take action affecting these rights, the outstanding example is Great Britain. Due partly to the fact that this country has no written constitution but chiefly to the doctrine of the supremacy of Parliament, which constitutes one of the root principles of the British political system, the government is subject to no legal limitations upon its powers in respect to individual rights; nor, for that matter, in regard to any other action. Thus, legally, Great Britain has a government with powers as despotic as those ever possessed by any oriental ruler. There is no act, no matter how arbitrary, discriminatory, or unjust it may be, which the British government cannot legally perform. Legally, therefore, the personal and political rights of the individual in Great Britain are absolutely without formal protection against the government.

Though this is the situation in Great Britain, from the strictly legal standpoint, it is hardly necessary to say that, actually, the rights of the individual are, in that country, as fully respected as in other countries. This results primarily from the fact that for centuries these rights have constituted a fundamental part of the ordinary law of the land, and as such, are protected and enforced by the courts. This alone, however, would not afford an adequate protection. Subject as individual rights are to modification or abolition at any time by act of the government, the real guarantees that they will not be violated rest in the deep-rooted belief of the people that these rights are fundamental, and in the power that the people have to discipline and, if need be, overthrow any administration

interfering with these rights in a way that does not meet with their approval.[1]

Comparison of the Two Methods.—Comparing these two extremes of policy, it will be seen that each has its advantages and disadvantages. On the one hand, the system of the United States affords a positive and tangible guarantee of private rights that is largely lacking in the other system. In securing this advantage, however, it has subjected itself to the disadvantage of unduly tying the hands of the government and of making it difficult, if not impossible, to control abuses arising from an improper use of such rights. The system of non-constitutional guarantees, on the other hand, while avoiding these disadvantages, places these rights on no higher plane than that of other rights, and thus fails to secure that protection of fundamental liberties which common opinion demands shall be specially safeguarded.

The Method of Switzerland and Japan.—These relative advantages and disadvantages have been fully appreciated by those nations which have, in recent years, been confronted with the problem of framing or revising their constitutional systems. They have consequently sought to discover a medium or compromise between the two by which, as far as practicable, the benefits of each will be obtained and the evils be avoided. This they have found in the device of formally drafting and incorporating in their constitutions statements of these rights, but providing that the government shall have the power to take such action as may be necessary to prevent their abuse or to enable the government to carry out proper measures of reform looking to the general welfare of the community. This is the policy that has been adopted by Switzerland and Japan. The constitution of Switzerland provides as follows:

> The free exercise of religious worship is guaranteed within the limits compatible with public order and good morals. . . .

[1] The system of France is in many respects analogous to that of England since, not only do the organic laws forming the constitution of that country make little specific reference to individual rights, but such provisions as do exist are subject to modification by a procedure differing but little from that of ordinary legislation.

The freedom of the press is guaranteed, nevertheless the cantons, by law, may enact measures necessary for the suppression of abuses. Such laws shall be submitted for the approval of the Federal Council. The Confederation may also enact penalties for the suppression of press offenses directed against it or its authorities.

Citizens shall have the right to form associations provided that there be in the purpose of such associations or in the means which they employ, nothing illegal or dangerous to the State. The cantons by law may take measures necessary to prevent the abuse of this right.

The Japanese constitution in like manner carefully provides that all the individual rights set forth are subject to further definition and determination by law. For example, the sections guaranteeing religious toleration and freedom of speech read:

Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Japanese subjects shall, within the limits of the law, enjoy liberty of speech, writing, publication, public meetings and associations.

Qualifications of the same character accompany the enumeration of all the other rights guaranteed by the constitution.

It is a mistaken view to hold that because these rights can be qualified, or their exercise regulated by legislation, no advantage has been gained by their statement in the constitution. In the first place, it is a matter of no little significance that a people should, in this most formal manner, express their belief in the importance of these rights. Such a declaration cannot fail to exercise a profound influence upon the government in legislating regarding them. In the second place, it will be noted that these rights are effective except as they may be qualified by express legislative action. Now the chief end sought by a statement of these rights is to do away with the old régime of arbitrary infringement of them by an absolute monarch or by his officers. The provision that these rights can be curtailed only by legislative action accomplishes this purpose. It should be borne in mind, moreover, that the guarantee of such rights has not the same importance in a state whose government rests upon the principle of popular sovereignty that it has in one whose government rests upon the basis of sovereignty vested in

the hands of an hereditary and irresponsible monarch. The provision, in a state having the constitutional basis, that these rights may be regulated by legislation is thus only providing that the people, acting through their representatives, can take such action in reference to them as they may from time to time deem wise and proper.

The Nature of Individual Rights.—Theoretically, the attempt to divide the whole domain of human activities into two fields, the one embracing acts subject exclusively to individual determination and the other acts which are open to determination by the government, and to prescribe the conditions that must be observed by the latter in exercising the powers that are assigned to it, opens a boundless range of action on the part of different states. Actually, however, modern libertarian states have reached a more or less substantial agreement in respect to the character of the provisions that should be made.

Individual Liberty.—The major restrictions that most libertarian nations now believe should be imposed upon the powers of government are those having for their purpose the guarantee to the individual of the enjoyment of certain fundamental personal liberties free from governmental interference. The more important of these liberties are freedom of religious belief, freedom of thought and its expression in speech, writing, and publication, freedom of movement, and freedom from arbitrary arrest and imprisonment.

The enumeration of these points, in respect to which liberalism holds that individuals should be free from governmental control, shows the enormous change that has taken place within the past few centuries in respect to this question of the relation that should exist between the individual and his government. In former times, no one of these liberties existed. Governments deemed it to be not only within their province, but within their duty, to prescribe the religious beliefs of their citizens, to control, in so far as they could, thought and its expression in any manner, to regulate the movements of individuals and to arrest and imprison them as they deemed such action desirable. The greatest achievement of liberalism in the political field was the abolition of this condition and the

establishment of the principle that there are certain things which should be left as far as possible to individual determination.

Property Rights.—Next to personal liberty man in general prizes the right to own and freely dispose of property. A man's liberty might in practice avail him little if a superior authority could at any time deprive him of the fruits of his labors. In the autocracies of the past, tyranny and abuse of power by the government has been displayed as much in the arbitrary seizure of the property of subjects as in the seizure of their persons. It is not to be wondered at, therefore, that peoples, in the framing of their governmental charters, should seek to incorporate in them provisions aiming to insure that their property rights, as well as their rights to personal freedom, shall be secure against arbitrary infringement by the government. In the federal constitution of the United States, this finds expression in the provisions:

> nor shall (any person) . . . be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. (Fifth Amendment.)

With the general purpose of these provisions to ensure that a man's property shall not be taken away from him except in a legal manner, and after just compensation has been given to him, no one can find fault. In their practical operation, however, they have worked badly in many respects and have resulted in obstructing governmental efforts to effect social reform to an extent not at all contemplated when these amendments were adopted. This unfortunate condition has arisen as the result of the interpretation that the courts have given to the expressions "property" and "due process of law." The former of these terms has been held to include the right of individuals to make contracts. As a consequence of this interpretation, many attempts on the part of both the federal and State governments to improve the conditions of the laboring classes by prohibiting employers from requiring excessive hours of labor, or imposing other conditions believed to be detrimental to the health of employees, have been defeated by the declaration of the courts that the laws imposing these restrictions

were invalid as constituting a violation of the right of individuals freely to contract relative to the conditions under which their labor will be given.

The term "due process of law" has been given both a substantive and a procedural meaning. It has been held by American courts that property is taken without due process of law if either the purpose for which it is taken is held to be an unreasonable one, or not a public one, or if the process of the taking does not satisfy certain established requirements, among which the most important is an opportunity of the owner of the property to have a hearing in a court or judicial tribunal. This interpretation has greatly complicated the problem of regulating the rates and conditions of service of public service corporations such as railroads, telephone, telegraph, and street railway companies, and made extremely difficult the institution of many needed social and economic reforms.

Such a situation would be an impossible one to endure but for the fact that appeal can be made to certain other legal principles of our jurisprudence, the most important of which are those relating to the "general police powers" of the state and to the special status of industries deemed to be "affected with a public interest." By giving a broad interpretation to these principles, the obstacle to social legislation brought about by the construction given to "property" and "due process of law" has been in a measure overcome.

The fact remains, however, that under the American governmental system, almost every important phase of social legislation has to run the gauntlet of the courts, and that it is only by fighting a pitched battle between the constitutional provisions relative to property rights and the general legal principles of police powers of the state and industries affected with a public interest that any progress can be made.

Equality Before the Law.—Next in importance to the enjoyment of personal liberty and the right to own property free from arbitrary governmental interference, must be considered the right of individuals to an equality of treatment before the law. A people

is only partly free if arbitrary discriminations exist between classes in respect to the possession of rights, the extent to which they are called upon to contribute to the support of the government, or their right to appeal to the government for the protection of their rights. In many respects the most important feature of the French Revolution was the sweeping away at one stroke of the great mass of special privileges, restrictions, and monopolies, which had characterized the old régime. Next to the establishment of the principle that a government should be one of law and not of the arbitrary will of a ruler, the most important political gain of all time was the establishment of the principle that equality should exist in respect to the possession by all persons of the enjoyment of rights and the protection of the law.

Political Rights.—Up to the present, we have been considering the question of those rights which, it is held, the individual, as an individual, should have. They represent rights which it is felt should be guaranteed against infringement by the government. There is another class of rights that concern the individual, not in his personal character but as a citizen. They represent his right, not of protection against the government, but affirmatively to take action in reference to the government. They constitute, in a word, what may be called his political rights. Among such rights are the right peaceably to assembly for the discussion of public questions and other matters affecting the common welfare; the right, individually and collectively, to petition the government, that is, to draft and submit petitions or resolutions making known wishes or calling attention to conditions or practices on the part of the government which in the opinion of the petitioners constitute abuses or obstacles in the way of national progress; the right to compete for and hold office, the right to the exercise of the franchise, etc. Fundamentally, these rights have for their purpose the guarantee to the individual of the right to exercise a voice in respect to the manner in which his government is organized and conducted. Of this character are the guarantees contained in the federal constitution of the United States which provide that Congress shall pass no law abridging "the right of

the people peaceably to assemble and to petition the government for a redress of grievances."

As in the case of personal rights, these political rights, though valid as expressions of general principles, are not absolute in the sense that no limitations or restrictions can or should be placed on their exercise. Thus, for example, equality in respect to the enjoyment of the electoral franchise, the right to be elected to office, or to compete for and hold office by appointment, does not, or should not, carry with it the idea that reasonable conditions, such as the possession of a minimum degree of education, or certain technical qualifications, or a material interest in the country, such as is represented by the possession of property, may not be imposed as a condition precedent to the enjoyment of such rights. In like manner, the right to assemble and to petition the government should be subject to reasonable regulations to ensure that it is not so exercised as to result in disorder or improper attempts to intimidate or overawe the government authorities in the proper discharge of their duties.

Procedural Rights.—The foregoing rights constitute what are known as substantive rights. Experience has shown, or has seemed to show, that, if the liberties of the people are to be protected against the government, it is desirable that certain restrictions should be placed upon the manner in which the government may proceed in making use of the powers that are granted to it. With this end in view, many provisions have been inserted in constitutions stipulating that governments shall proceed in a certain way in performing their duties, or placing certain limitations upon the general powers of the government. These provisions have for their purpose the guarantee of what are known as procedural rights. For the most part, they relate to legal procedure. The United States has gone much further in this direction than any other country. Among the constitutional guarantees of this character contained in the federal constitution may be mentioned the following:

nor shall any State deprive any person of life, liberty or property without due process of law. (Amendment Fourteen.)

No bill of attainder or ex post facto law shall be passed. (Art. 1, Sec. 9, paragraph 3.)

No State shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts. (Art. 1, Sec. 10, par. 1.)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Amendment Four.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. . . . (Amendment Five.)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. (Amendment Six.)

In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law. (Amendment Seven.)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Amendment Eight.)

No Rights Absolute.—There is a tendency on the part of many to look upon the rights we have been considering as absolute. This is a mistake. All are subject to the important qualification that they are valid only in so far as they are not exercised in such a manner as to interfere with a like right on the part of other individuals or to constitute a danger to the state. Thus the highest right of all, that to life, is set aside when the government inflicts the penalty of the death sentence for the commission of high crimes, sedition, conspiracy against the state or treason. Personal freedom is abolished when persons are imprisoned as the result

of commission of crimes. Property is taken away in the form of fines or compulsory contributions in the form of taxes for the support of the government; and the right to dispose of property after death is everywhere regulated by law. Indirectly, a government may set a limit to, or interfere with, the accumulation of property through the enactment of progressive inheritance, income, and property taxes. Though freedom of religious belief and of thought generally may not be controlled, its expression may be regulated in many ways.

Individual Rights Versus Social Rights.—This question of individual rights raises an exceedingly important question. This is the extent to which such rights should be permitted when their possession or exercise results in injury to the general welfare. For example, the right of an individual to make such use of his property as long as he does not interfere with a like right on the part of others may be of great value to the individual as an individual; but this right may produce social consequences which are in the highest degree injurious. We see this constantly evidenced in the freedom enjoyed in the United States by individuals to erect such houses as they desire upon lots owned by them in large cities. As a result of this freedom, an individual by erecting a building out of keeping with the character of structures already erected, may seriously damage the general appearance of a quarter or street. Even if the value of adjacent property is not depreciated, the community as a whole has suffered injury through the damage done to the general appearance of the city.

Most existing constitutions in the United States were framed at a time when great importance was attached to the principles of individual liberty. No more fundamental change has taken place in western society during the past century than the increasing importance that is being attached to social welfare as contrasted with individual welfare, social rights and duties as opposed to individual rights and duties. More and more, the feeling is gaining ground that the former should take precedence over the latter. More than this, the state, or rather the government, is more and more being looked to as the agent through which social wel-

fare should be promoted. Now the importance of this, from the present standpoint, is that the attempt to promote social welfare brings the government in many cases into direct conflict with individual rights as guaranteed by the constitution. As has already been noted, it has been found that in the attempt to protect their individual liberties, the people have tied their hands in respect to the promotion of the general welfare. The result of this changed attitude of mind towards rights is to open again the whole question of the extent to which it is desirable to attempt to guarantee specific individual rights by constitutional provisions. The question is being raised whether the attempt should not be abandoned, or express provision made that individual rights shall give way to social rights when the two are in conflict.

So-called Natural Rights.—It is a fact well worth noting that almost from the time when men began to make politics a subject of serious study they have sought to find a justification of the state and of state action by an appeal to some higher law. It was thus by appeal to the principle of the divine right of kings that autocracy was defended. When autocracy was overthrown, this action was justified by an appeal to the doctrine of popular sovereignty as one corresponding to the inherent principles of political justice. In like manner, the attempt has been made to justify the guarantee of specific individual rights by maintaining that these rights correspond to the principles of natural law. There can be little doubt that it was under the influence of this belief that the provisions guaranteeing them were inserted in our federal and early state constitutions. They were constantly described as the inherent, inalienable, natural rights of man, and are so expressly designated in many early documents. The argument that provision for them would advance the welfare and happiness of the people was not deemed sufficient. They had to be supported and justified by the assertion that they were in conformity with natural law.

Though belief in the existence of natural law still constitutes an important influence in Anglo-Saxon jurisprudence, the school of natural law has now largely lost its influence. Study has shown

that there are no immutable principles of human conduct. Certainly it can be shown that none of the rights forming the subjects of constitutional guarantees are of such an absolute character as to entitle them to the designation of natural laws. In point of fact, with the possible exception of freedom of religious belief and of thought, which, whether guaranteed or not, it is impossible for the government really to control, it can be shown that no one of these rights can be accepted in an unqualified manner. Though the inner thoughts of a person may be respected, many cases arise where it is desirable to curb individuals seeking to translate their convictions into actions. Complete freedom of speech, writing, and publication makes possible the evils of slander, libel, and the fostering of sedition; and all modern governments, notwithstanding the fact that freedom of speech is made the subject of a constitutional guarantee, have passed laws limiting this freedom with a view to the prevention of these evils. Freedom to adopt any trade or profession is surrounded by all sorts of limitations or restrictions having for their purpose to ensure that this freedom will not be exercised in such a manner as to work injury to the welfare of others or to the general public. The right to acquire, hold, and transfer property is also made the subject of minute regulation. In like manner, political and procedural rights are now held to be ones which must be justified on the ground of expediency or not at all.

We have devoted some attention to this matter since it is one of great practical importance at the present time. Though the school of natural law is now in decline, the idea of natural rights still has a strong hold upon the imagination of the public, and there is scarcely a political or legal change which its advocates do not seek to advance by a contention that the changes advocated rest upon the principle of natural law. The extent to which this argument was made to do duty in the movement for woman's suffrage is a striking illustration of this. It is of prime importance therefore that students of politics recognize the invalidity of this argument. There may be in a community at any time a prevailing belief with regard to what constitutes justice and what is right,

but it is a mistake to take the position that there are any such things as inherent, natural rights that are absolute under all conditions. Every provision of law should find its justification in its intrinsic merits, and one of the merits may be that it corresponds to the prevailing belief as to what is right and just. To go further than this, and to attempt to apply such provisions to communities where conditions are radically different—as, for example, would be represented by the immediate conferring of all the rights enjoyed by England and America upon a people with a low degree of civilization, simply because they were held to correspond to natural law—would be the height of folly and could not but lead to disaster.

Individual Rights Under Totalitarian Governments.—The foregoing considerations of individual rights and their protection against undue infringement by the government has reference only to those forms of government to which the designation of "libertarian" has been given. For years prior to the outbreak of the World War in 1914, it was the belief of practically all students of public affairs, certainly of a vast majority of those residing in England and the United States, that the principles of liberalism had definitely won their fight and that it was only a question of time until they would be accepted universally by western European nations. No greater reversion of political tendencies has probably ever taken place than that represented by the sudden check to the triumphant march of liberalism brought about by the accession to power of the Bolsheviks, led by Lenin, in Russia, in 1917, of the Fascisti, under Mussolini, in Italy, in 1922, and of the Nazis, under Hitler, in Germany, in 1933. In all three of these cases, the success of the revolutionary parties has been followed by the establishment of forms of government which, among their many other radical departures from theretofore generally accepted political principles, represent a complete denial of the fundamental tenets of liberalism. This has been so not only as regards the methods of the exercise of political authority, but as regards the proper scope of such authority. As has been pointed out, there is in these forms of government a complete denial of

the existence of any individual rights that are not subject to government control when such control is deemed to be in the interests of government as conceived by those holding the reins of power. These same tendencies which have come to full fruition in these countries have likewise been manifested in other countries, with the result that the Western world is confronted at the present time with two completely antagonistic schools of political thought and two types of government corresponding to the antithetical principles held. It is one of the important tasks of the student of government to seek to understand the nature of these differences and the consequences following from the acceptance of, and action upon, one or the other. The most important factor to which consideration must be given is the question—what shall be deemed the proper jurisdiction of government, or, to speak somewhat more concretely, to what extent shall a people in providing themselves with a political authority seek to reserve for themselves certain individual rights and liberties, undue interference with which shall be deemed to be beyond the scope of powers of such an authority.

CHAPTER V

THE FUNCTIONS OF GOVERNMENT

In the preceding chapter we have considered the problem of the scope of government from one point of view—that of the restrictions and limitations that should be imposed upon governments for the purpose of preserving the exercise of certain rights by individuals free from governmental interference. We have, in other words, approached the problem from the standpoint that all things fall within the scope of government except those things expressly prohibited to it.

It is evident, however, that this problem can be approached from the contrary standpoint—that of proceeding from the position that, primarily, all activities are matters concerning the individual and that the government should concern itself with those things only which have been expressly entrusted to it. Approached from this position, the problem of determining the scope of government takes the form of attempting to determine the functions of government, rather than individual rights. Just as adherents of the school of individual rights seek to determine those rights which are believed to be inherent, inalienable, natural rights of the individuals and to guarantee these rights against infringement on the part of governments by inserting in the governmental charters, or constitutions, what are known as declarations or bills of right, so persons, approaching the problem from the contrary position, seek to determine what are the true functions of government and to restrict the operations of governments to these fields.

The Five Schools of Political Thought.—Approaching the problem of the functions of governments from this angle, we may distinguish at least five distinct schools according to the attitude taken towards what constitutes the proper functions of government: (1) the anarchist, (2) the individualist, (3) the collec-

tivist, (4) the socialist, and (5) the communist. The fundamental distinction between these schools is that of the attitude taken by them in respect to the relationship between the individual and the state, the extent to which human conduct should be determined by the individual or the collective will.

The Anarchistic School.—First in order of consideration is the anarchistic school. In the popular mind an anarchist is one who desires to destroy existing government through the use of the bomb and other violent means. It is quite true that many adherents to this school do advocate the use of violence in achieving their ends. It is important to bear in mind, however, that we are here dealing only with means, not the end itself. The really important thing, at least from the standpoint of political science, is the end or the principle which the users of these means seek to make prevail.

The anarchistic school represents the extreme school of individual rights. To its adherents, liberty, individual liberty, is the important thing. All coercion or compulsion such as is implicit in government is inherently and fundamentally wrong and not to be justified. The anarchist appeals from the state law to what he deems to be a higher law, the natural law which gives to each individual the fullest possible freedom to live his life free from restraint on the part of others. There are many persons who belong to this school who do not approve of the use of violence. They constitute what are known as scientific anarchists. Prince Kropotkin is probably the most distinguished representative of this class, and in his writings one can find the best exposition of the philosophy of this school.

It is not feasible for us here to attempt any detailed analysis of this philosophy. We may state, however, that it is the belief of this school, not only that the principles for which they stand are theoretically sound, but that they are susceptible of successful application in practice. It is their belief that common action for the general welfare should rest upon voluntary association rather than state compulsion. They point to the fact that great branches of activities are now conducted in this way. Men form

all sorts of associations for common action in which the principle of compulsion is absent. Especially is the great success achieved in the field of distributive coöperation in England and Europe generally referred to as an example of what can be done through purely voluntary association. In boards of trade, chambers of commerce, trade unions, and like organizations, are found other illustrations.[1]

The Individualistic School.—Next in order is the individualistic school. This school has a philosophy similar to that of the anarchists in that both start from the premise that individual rights and freedom of action is the important thing. The two schools, however, part company in respect to their attitude towards the legitimacy of the state. The anarchist denies that the state has any right to be and that the individual is, therefore, justified in opposing it as an unwarrantable interference with his rights. The individualist holds that this might be true if men were perfect and always acted with justice in their relations with each other. Inasmuch, however, as men are not perfect, they hold that some exterior control is essential. They thus justify government as a necessary evil. In doing so, they logically hold that this evil should be reduced to the lowest possible term. They adhere to the principle that that government is the best that governs the least.

Attempted Distinction Between the Essential and Non-Essential Functions of Government.—In applying this philosophy, individualists have sought to draw a distinction between what they term the essential and the non-essential functions of government. Admitting that some government is necessary, but looking upon that government almost as an evil, they have sought to determine, largely by *a priori* reasoning, those functions which modern conditions render essential that governments should perform. These they term the essential functions of government; all other functions actually performed by government are non-essential, and, in their opinion, should be reduced to the lowest possible term, if not wholly eliminated.

The chief of these so-called essential functions are the enact-

[1] See Kropotkin, *Fields, Factories and Workshops,* and Ely, *French and German Socialism.*

ment and enforcement of law, the administration of justice, the maintenance of order, the protection of life and property, and the safeguarding of the community from foreign aggression. The essential functions of government, in a word, are those of the law-giver, the judge, the policeman, and the soldier. These functions, they hold, all governments should perform. All other functions they hold to be not only non-essential, but ones which the government should not attempt to perform.

Rise of the School of Individualism.—It is difficult for us at the present time to appreciate the strength of the hold that this school long had upon political thinking and action in both England and America. It dominated political thought during the latter part of the eighteenth and the first part of the nineteenth centuries, and exerted a profound influence upon governmental action. It counted Herbert Spencer among its most distinguished adherents. In his "Coming Slavery," "Social Diseases and Worse Remedies," and other writings, Spencer vigorously combated the idea that the government should interfere in any way with the social and economic activities of the people. To him and his followers, all legislative and governmental action having for its purpose the determination of labor conditions in factories and mines, with a view to the prevention of the monstrous abuses that were crushing out the lives of little children and reducing labor in general to the condition of mere brutes were fundamentally wrong in principle. To them these laws represented an unjustifiable interference with individual liberty. The same was true of laws having for their purpose the protection of the public health, and indeed all efforts to improve living conditions through governmental action.

This attitude towards government was but one phase of the general emphasis that was laid at that time upon the idea of natural law, the idea that human conduct was subject to a so-called natural law, and that, as far as possible, human conduct should be left to the uncontrolled working of this law. In the biological field, it found its expression in the principles of evolution—that progress is achieved through the slow workings of natural law of selection, through the life and death struggle of individuals,

the selection of the fit and the elimination of the unfit through this process. In the economic field, it furnished the basis for the great school of *laissez faire,* or the Manchester School as it was known in Great Britain, that held to the opinion that industrial conditions, the ownership of property and economic conditions generally, should be determined by the free play of economic forces; that competition, and the working of the natural law of supply and demand should be the factors regulating economic life; that it was a mistake for the government to interfere in any way with the free working of these natural laws. It was this philosophy that furnished the strongest argument for the establishment of free trade and the removal of restrictions hampering the free development of commerce and industry.

The Collectivistic School.—Sharply opposed to this school of extreme individualists is the school to which, for want of a better name, we have given the designation of collectivistic. This is the school which may be said to be in the ascendancy at the present time. Just at the time when, in the middle of the nineteenth century, the individualists had seemed to have won a victory all along the line, evidence began to accumulate in overwhelming volume that the results following from the attempt to put their principles into practice were far from satisfactory. The placing of reliance upon self-interest as the mainspring of human conduct, the removal of restraints upon industrial activities, and the leaving of economic and social conditions to be determined by the free play of competition, the laws of supply and demand, and other so-called natural economic laws, utterly failed to bring about a condition increasing individual welfare. The strong used their power to advance their own interests and to oppress the weak in a ruthless manner. Wealth and power tended to be concentrated in a few hands and the mass of the people to be reduced to a condition of economic servitude, if not to actual peonage. Furthermore, it became evident that with the increasing concentration of population in large cities, the rise of production upon a large scale, the growing interdependence of industries resulting from the specialization in industry, etc., there were many things which concerned the

people as a whole, which, if they were not done by the people as a whole, would not be done at all or would be done very imperfectly. Regardless of what might be deemed to be wrong in theory, governments found themselves compelled to enter field after field lying wholly outside of the province of the so-called essential functions of government. They had to take steps for the protection of the public health. They had to regulate the supply of such public utilities as water, gas, electric light, and transportation facilities. Public conscience demanded that restrictions be placed upon the right of employers to work women and children in mines and factories.

From an attitude of mind that looked upon government as an evil, public opinion more and more shifted to the position where the government was looked to as an agency having as one of its important functions the use of its powers in an affirmative way for the promotion of human welfare.

Coincident with, and partly as the result of, this change came the almost complete decay of the old school of natural law, and individual rights. Emphasis began to be placed more and more upon social rights and obligations. Government, from being an agent for the protection of individual rights, now began to be looked upon as an organ representing all the people as such and having as its prime function the promotion of the general, as opposed to the individual, interests of the community. It is impossible to exaggerate the importance of the revolution in thought that thus took place in respect to the true functions of government. The old school of natural law, personal rights, and individualism disappeared almost completely, and in its place arose the modern school of collectivism now firmly in its saddle. This school recognizes no *a priori* limitations upon the functions of the government other than possibly the general belief that the government should not intervene until it is clear that individual initiative will not be able to meet the requirements of the situation. It differs radically from the individualistic school in the emphasis that it places upon social obligations, as opposed to individual self-interest, and in the fact that it assigns a positive rôle to government to

promote social welfare instead of the negative rôle of doing only that which it is compelled to do in order that individual initiative may have full play.[2]

The Socialistic School.—We have seen that in the anarchistic school there is a body of opinion that places such emphasis upon the matter of individual liberty and initiative that it denies any right on the part of a community to organize politically for the purpose of imposing its collective will upon the individuals composing it. In like manner there is a large school which places such emphasis upon social obligations and the efficacy of collective action that it believes that the conduct of industrial affairs at least should be almost wholly turned over to the government. In its opinion, the fundamental causes of social evils are to be found in the unrestricted play of individual self-interest, the competition of individual with individual, each seeking his own welfare. Especially does it hold that the institution of private ownership of land and other instruments of production and the use of these instrumentalities by individuals for purposes of personal gain is basically wrong and can only result in an inequitable and socially harmful distribution of wealth and an indefensible inequality in individual incomes. The remedy for this condition of affairs is found in the abolition of the institution of private ownership of the means of production, the elimination of the profit system as the energizing inducement of economic activity, and the substitution in its place of a system under which the ownership of all means of production is vested in the government. In their utilization, the government will be actuated by the motive of social gain, so that the rewards will be distributed in accordance with the principles of distributive justice.

It is not our intention here to enter upon an examination of the principles of socialism from either the theoretical standpoint, the practicality of putting them into execution, or the extent to which, if put into practice, they would bring about the improvement in social welfare that their adherents claim for them. We

[2] For a brilliant survey of this evolution from individualism to collectivism see A. V. Dicey, *Law and Public Opinion in England in the Nineteenth Century.*

are here concerned with this school merely as representing an attitude that can be and is assumed towards the functions of government. This attitude is, it is evident, the opposite of that of the individualistic school.

The Communistic School.—Radical as is the philosophy of the socialistic school, it does not represent the greatest extreme to which the principles of collectivism can be carried. The socialists look upon government as the means through which the industrial activities of the community shall be exercised or controlled. Their interest is centered in the problem of so organizing and conducting the industrial life of the people that greater equality and justice will obtain in the ownership of property and the production and distribution of wealth. In the enjoyment of this property and the wealth intended for consumption, they recognize that individual desires should in large part control. There is another school, however, which denies even this minimum of individual choice. This school, known as the communistic school, holds that it is the function of government, not only to own or control the means by which wealth is produced and distributed, but in large part to direct its subsequent utilization. This school aims to organize society in such a way that all individuals will, as far as possible, lead a common life. It is thus the very reverse of the anarchistic school.

As is generally known, this school regards Karl Marx as the great exponent of its philosophy, the most important of his writings, *Capital,* often being referred to as the bible of communism. Although Marx himself held that the existing system of private capitalism contained within itself the seeds of its own destruction, a characteristic of the modern communist school is the belief that the establishment of the system advocated by it can be brought about only by revolutionary means. In this respect, it differs radically from the socialistic school which, in general, adheres to the belief that it is only a question of time until the mass of the people can be brought to see the superiority of its principles and can be led by a process of evolutionary change accomplished through constitutional, parliamentary procedure, to put them into effect. It is primarily on this ground that, even in libertarian

governments, repressive action against groups seeking to promote the cause of communism is often held to be justifiable. In the past, the existence of this school, while it has at times led to political disturbances, was not a matter to which it was necessary for the student of political science to give great attention. With the acceptance by one of the great nations of the world, Russia, of its principles, and the existence in practically all countries of militant groups advocating their adoption, it becomes one of the tasks of the political student to seek to understand its philosophy and particularly to familiarize himself with the character of the governmental structure with which Russia has provided itself for putting these principles into execution.

General Comment.—The foregoing brief statement of the different schools of political thought as regards governmental functions may not at first sight seem to be needed as a preliminary to the study of the problem of the organization and operation of political machinery. Its necessity must be apparent, however, when due regard is had to the fact that, as has been pointed out in our consideration of the jurisdiction of government, governments are created and maintained for the accomplishment of definite concrete ends. Manifestly, the character of the governmental structure, the manner in which power shall be distributed among its several parts, and the rules that shall govern its action must be such as are adapted to the nature of the work it is called upon to perform. A form of government that might be well suited to meeting conditions when the tasks to be performed by it are relatively few would be quite inadequate when these tasks are, not only greater, but of a quite different character. Particularly is this true when a government undertakes, not only to regulate economic activities of all kinds, but itself to undertake the function of administrating enterprises of an industrial and commercial character. In his study of government, therefore, the student must constantly keep in mind the nature of the tasks that it is the function of government to perform. Only by so doing can he hope to understand why different peoples have adopted governmental systems of so widely divergent types.

PART II

TYPES OF GOVERNMENT

CHAPTER VI

THE THREE TYPES OF GOVERNMENT ACCORDING TO THE LOCATION OF SOVEREIGNTY

In the preceding chapters we have sought to do three things—to distinguish clearly between the state and its government; to make known the nature of the state and the different conceptions that are held regarding its mission; and to set forth the important consequences that may result, and have resulted, from these conceptions. This consideration, which has unavoidably been of a somewhat abstract character, is essential as a starting point, if one, in the study of government, is to gain an insight into fundamental political problems, as well as the more technical questions involved in the organization and operation of the machinery through which a state formulates, expresses, and exercises its will. With this general idea of the nature of the state, we are now in a position to enter upon a consideration of this latter class of questions.

The Location of Sovereignty the Starting Point in Distinguishing Different Types of Government.—Sovereignty, that is, the attribute of supreme, unlimited, indivisible authority, constitutes, as we have seen, the prime or most important characteristic of the state. Its conception is the starting point of political science. The whole complex problem of government and administration, from one point of view, may be resolved into the single problem of determining in whose hands shall be vested the exercise of this authority, to what extent actual use shall be made of it, what shall be the instrumentalities or organs employed in its use, and what rules and procedure shall be followed by such organs in performing their functions.

Of these several questions, the first—in whose hands shall be vested the exercise of this authority—is much the most important,

certainly the one to which an answer must be given before any other step can be taken by a community desiring to organize itself as a body politic and to establish a government through which political authority shall be exercised. No political system can be understood except as its study is approached from this standpoint. Upon the nature of the action had in reference to this point depends the whole character and legal basis of the resulting government, the authority for every governmental act, the manner in which this authority is determined in the first instance, and how it may be subsequently enlarged, curtailed, and controlled.

Three Types of Government According to the Location of Sovereignty.—An examination of the several governments of the world, past and present, shows that they may be made to fall into one or the other of three distinct classes according as one or another of three distinct principles in respect to the location of sovereign authority has been acted upon. These principles are: (1) that the source of all political authority, that is, sovereignty, is to be found in the ruler or head of the state; (2) that it resides in the hands of a special ruling class; and (3) that it is possessed by the general body of citizens. According as one or the other of these three theories or beliefs has been acted upon, there have resulted three distinct types of government to which may be given the designations Autocratic, Oligarchic and Popular.[1]

The Autocratic Type.—The autocratic type of government, as indicated, is that class of governments which rests upon the principle that the source of all political authority is to be found in a supreme ruler. Under this theory, all the organs and officers of government are but the agents of this supreme ruler for the purpose of carrying out his will. All acts of government are his acts and derive their validity from his sanction. All laws are but his commands, though they may have been formulated and promulgated by one of his agents. As the possessor of sovereignty, his authority is supreme, unlimited and self-determined, both as

[1] We have preferred the term *Autocratic* to that more usually employed, *Monarchical*, to designate governments of the first class, since, as will shortly appear, it is quite possible for a Monarchy to belong to the Popular and the Autocratic type.

regards the extent to, and manner in, which it shall in fact be exercised.

This type of government is the one which finds its chief illustration in the absolute empires of the East. In the oriental despotisms of the past, we see this theory not only firmly established but acquiesced in by the people as an immutable political principle. The same is scarcely less true in respect to the kingdoms of Europe as they existed prior to the great revolution in political thought that characterized the seventeenth, eighteenth and nineteenth centuries. It found its expression in the assertion by the Stuart kings of England of their divine right to rule and in the proud boast of Louis Fourteenth of France that "L'état, c'est moi."

Few, if any, more fundamental changes in the history of mankind have occurred than the change of thought which took place in these centuries in respect to this question of the nature and location of sovereignty. Just as our civil war was fought over, or at least intimately involved, contending principles in respect to the location of sovereignty, so the great contests of this period, represented by the establishment of the Cromwellian Commonwealth, the Restoration, the so-called Glorious Revolution of 1688 which brought William of Orange to the English throne, and the French Revolution, represent, in their fundamental aspects, a contest of opposing principles in respect to where the sovereignty of the state should be deemed to reside. No greater mistake could be made than to look upon this question of the location of sovereignty as one of merely theoretical or speculative interest. It furnishes one of the important keys by which historical events are to be interpreted.

More important still is the fact that these contending principles are still playing a vital part in determining the character of present-day governments. The principle of popular sovereignty has by no means won the battle all along the line. In both the East and the West are to be found in the present day states, which are among the most enlightened and progressive in the world, that have governments resting squarely upon this principle. In the East, the leading example of a government of this character is that of

Japan. In the eighties of the last century, Japan decided to abolish her old system of government and to establish in its place one corresponding to modern ideas as represented by existing governments of Europe and America. To this end she made a thorough study of such governments, sending a commission headed by Baron Ito for this purpose to study these governments on the spot. On the basis of this study and the report of this commission she adopted her present constitution. In framing this constitution the first question that she had to answer was in respect to this matter as to where supreme political power or sovereignty should be located. After careful consideration of the contending principles, she made deliberate choice of the autocratic type; and that there might be no question regarding it she recorded her choice in unequivocal terms in her constitution, the preamble of which reads:

> The rights of sovereignty of the State, we (the Emperor) have inherited from our ancestors and we shall bequeath them to our descendants. . . . When in the future it may become necessary to amend any of the provisions of the present constitution, we, or our successors, shall assume the initiative right, and submit a project for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present constitution, and in no otherwise shall our descendants or our subjects be permitted to attempt any alteration thereof.

Article I of the constitution itself reads:

> The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Baron Ito, in his "Commentaries on the Constitution of the Empire of Japan," explains the meaning of this as follows:

> By "reigned over and governed" it is meant that the Emperor on his throne combines in himself the sovereignty of the State and the government of the country and of his subjects.

In the West the two most important examples of governments resting upon the autocratic basis are those of Russia before the Revolution of 1917 and Germany, immediately prior to the adoption of her new form of government brought into existence by her so-called Weimar constitution of 1919.

The "Fundamental Laws of the old Russian Empire," promulgated May 6, 1906, though issued in response to a public demand for a more liberal form of government, were no less emphatic in stating this principle of autocracy than the constitution of Japan. Article IV of that document thus read:

> The Emperor of all the Russias wields the supreme autocratic power. To obey his authority, not only through fear but for the sake of conscience, is ordered by God himself.

This principle was not set forth in the constitution of the first German Reich in the way that it was enunciated in the fundamental laws of old Russia and of Japan at the present time; but that it was the principle upon which rested the constitutional system of Germany immediately prior to the adoption of the Weimar constitution is no less certain. This was due in great part to the circumstances under which Germany obtained that system. Historically, all the powers of the state rested in the hands of the monarch, the king of Prussia and emperor of the German Reich. He as a matter of state policy, had promulgated on his own authority a constitution. It was his act and his act alone. The constitution was "octroyed," not adopted by the people. The monarch, uniting in himself the powers of the king of Prussia and emperor of the German Reich, was thus not only the source of all authority then possessed by the various organs of the state, but was also the possessor of all the powers, i.e., the powers not expressly designated to other authorities.

The Doctrine of the Divine Right of Kings.—If one asks how it was that the ruler not only claimed to be the source of all authority, but that this claim was acquiesced in by the people ruled, the answer must be found in the belief, long unquestioningly held, that the ruler got his authority direct from God, that he was God's vice-regent on earth, that he ruled by divine right. In China we see this belief expressed in all her literature during the thousands of years that she was a monarchy in the constantly reiterated statements that the Emperor was the "Son of Heaven," that he ruled in virtue of the mandate that he

had received from Heaven. The fact that on various occasions a dynasty was forcibly overthrown and its place taken by another did not shake this belief. In all such cases the position taken was that the deposed emperor had forfeited his right to rule by his weakness or misconduct; that Heaven had withdrawn its mandate and had conferred authority to rule upon his successful rival. No further proof of this was required than the fact that this rival had prevailed. That in itself was demonstration that Heaven had transferred its mandate to him. This reasoning is no more sophistical than that underlying the faith in the justice of the ordeal of battle which for centuries after the Norman Conquest prevailed in England. The whole basis for this faith was that God determined the right by permitting him who had the right on his side to prevail.

In scarcely less degree did this belief in the divine right of kings to rule prevail for centuries in Europe and England. It was in matters temporal strictly analogous to the belief in the supreme authority of the Pope as the direct representative of God on earth in respect to matters spiritual. As James Bryce has excellently stated it: [2]

> From the Fifth to the Sixteenth Century whoever asked what was the source of legal sovereignty and what the moral claim of the sovereign to obedience of subjects would have been answered that God had appointed certain powers to govern the world and that it would be a sin to resist his ordinance.
>
> From the Eleventh Century onwards it was admitted in Western Christendom, though less cordially in France, Spain or England than in Italy and Germany, that there were two legal sovereigns and, according to the view more generally held, each was *de jure* absolute, the Pope in spiritual, the Emperor in temporal matters. Both Pope and Emperor were above all positive secular law, but subject to the law of nature and the law of God, these being virtually the same.

That this belief in the divine right to rule was long in dying out can be seen in the constant reference to the Deity made by the former German Emperor in his state papers or public addresses. This frequent invocation of the Deity by him and assertion that he was carrying out the will of God has been a matter difficult for the American public to understand. Its explanation must be found

[2] *Studies in History and Jurisprudence*, p. 529.

in the persistence of the medieval doctrine which we have been considering. It was not so much a manifestation of deep piety as the assertion of a doctrine of political sovereignty.

Two Classes of Autocracies—Absolute and Limited.—In the foregoing we have sought to get clearly before the reader, not only the theory of autocracy, but the extent to which this theory has in fact dominated political thought and action. That this theory continued so long to prevail in the case of many nations was due to the fact that, though all political authority was deemed to flow from the ruler, the belief and practice constantly gained ground that this authority should not be exercised in an arbitrary manner, but in conformity to general provisions of law having for their purpose to insure that due consideration would be had of the rights and interests of the individual citizens. Autocracies, as will hereafter be shown, may thus be divided into two classes according as one or the other of two conceptions obtains in respect to the manner in which the ruler exercises his supreme powers. The first of these is that the ruler is not only the possessor of supreme power, but is free to exercise it in such manner as he may see fit. The second is that, though possessing this authority in no less degree, the ruler should exercise it through regularly constituted organs and in conformity with general provisions of law. The government resulting from action on the first principle is a pure absolutism, a despotism, and its prime characteristic is that the ruler can act arbitrarily. The government resulting from the second is a government of law and may, in its practical operations, be of a scarcely less liberal type and permit of almost as wide a participation on the part of the public as that presented by a government resting upon the doctrine of popular sovereignty.

From the structural standpoint and that of its legal basis, it is immaterial whether this change from an absolutism to the modern type of autocracy comes about by voluntary act of the autocrat or in response to pressure from his subjects which he finds it unwise to resist. Actually, history shows that in most cases the change was forced upon the autocrat either by revolution or threat of revolution. The summoning of the Duma by the Czar of Russia, follow-

ing the war with Japan, is the best modern example of how an autocratic ruler, without losing his legally autocratic powers, was forced by pressure on the part of his subjects to bring into existence an organ through which his power should be exercised to the end that his decisions and acts might be influenced to some degree at least by popular opinion. The summoning of this body in no way affected the location of sovereignty. It merely set up an organ through which sovereign power should be in part exercised.

A study of autocracy, such as that of Japan, thus reveals the fact that these governments are equipped with popular assemblies and other organs, that they are in possession of constitutions, and that their operations are conducted in conformity with law in the same way as governments resting upon the principle of popular sovereignty. This, however, should not blind us to their fundamental difference from the legal standpoint. This distinction, moreover, is not a mere legal technicality having a theoretical value only. It is one of prime practical significance. In an autocracy, the ruler, as has been pointed out, is the source of all political and legal authority. It follows from this that all other organs of government have no inherent powers. They have only such powers as have been expressly granted to them. The scope of their authority is thus strictly limited by the terms of the order by which they have been brought into existence and their powers and functions defined. All such organs and authorities are thus organs of enumerated, delegated and restricted powers. Through their own action they have no power to add to, subtract from, or modify their authority. The ruler, on the other hand, has a legal status exactly the reverse of this. His powers are inherent, unenumerated, and unlimited. To justify any act he does not have to show any grant of authority. From this flows the important consequence that all powers, the exercise of which he has not entrusted to some other organ, remain in his own hands. It is, moreover, a question whether he can finally divest himself of any of his powers as long as this theory of the organization of the state is maintained. In all cases where he has granted a constitution, the matter thus remains an open one whether the continued operation of that constitution does not rest

upon his will alone. What he has granted, he can modify or take away.

This fundamental distinction between the two types of government and the consequences flowing from it has been excellently stated by W. W. Willoughby.[3] Writing under the title of "The Relation of the Individual to the State," and with reference to conditions prevailing before the World War, he says:

As opposed to this fundamental constitutional doctrine (of popular sovereignty) the monarchical (i. e. autocratic) theory of continental Europe is that the right of political rulership comes from above. It inheres in, and is an original right of the monarch, and, as such, in its exercise is ultimately subject only to the will of him who possesses it. It is true that Austria-Hungary, and the German Empire and its individual states, including Prussia, operate under formal written constitutions, but these instruments of government are regarded as themselves the creations of the royal or imperial will. It thus results that, not only may the constitutions be changed by an exercise of the royal or imperial will, but that the sovereign is regarded, not as the exerciser of enumerated delegated powers, but as the possessor of sovereign authority free from legal restraint in all matters in regard to which he has not seen fit to fix self-set limitations. This is the constitutional theory, whatever may have been the popular pressure which, historically speaking, may have led to the promulgation of the written constitutions.

It further follows from this constitutional conception that the part played by the elected representatives of the people in the enactment of laws and in the adoption of public policies is quite different from that which is played in countries where constitutional systems are founded upon a democratic basis. According to the doctrine held by German jurists the people, through their representatives, participate, not in the creation of law, but in the determination of the contents of a proposition which is to be submitted to the sovereign for the exercise of his supreme legislative will. Essentially speaking then, the situation is this: The ruler, as a matter of grace and expediency, is pleased to learn the wishes of his people regarding a proposition of law or the adoption of a public policy, and to obtain such information regarding its wisdom as a representative chamber is able to provide; and these wishes and this information he necessarily takes into consideration in determining the exercise of his own sovereign will. But never does he regard these factors as controlling in any affirmative sense. So long as the constitution which he has promulgated exists, he agrees not to act contrary to its provisions with regard to the mat-

[3] *Problems of Readjustment after the War.* (D. Appleton & Co., New York, 1915), pp. 109-112.

ters which are therein specified. But never for a moment does the German ruler admit himself to be under a legal, or even a moral, or political, obligation to give effect to any expression of the will of the representatives of the people of which he disapproves.

Modern Authoritarian Governments.—The foregoing discussion of autocracies has had reference only to those governments which have as their fundamental juridical base the principle that the exercise of the sovereign power resides in the ruler. Although at the present time the only important state adhering to this doctrine is the Japanese Empire, a consideration of this type of government has been necessary, not only because it reveals the revolutionary changes that have taken place in political thought, but because the present generation has witnessed the rise in a number of the more important countries of Europe and Asia of forms of governments which, while not involving any such doctrine as the divine right of kings for their moral or philosophical justification, nevertheless assert no less emphatically the desirability of governmental action upon the principle that the exercise of the supreme powers of the state shall reside in a single individual. This is the form of government which, in rapid succession, has been established in Italy, Turkey, and Germany, while the principle underlying it finds greater or less expression in the governments of many other countries, such as Jugoslavia and Persia. In at least the three first-named countries, this form of government has been created not merely as a temporary expedient to meet unusual conditions but as representing that form of government deemed best adapted to meeting the permanent political needs of the country. In all of these countries, the principle is firmly held that supreme political power should rest in the hands of a leader—"Der Führer" as he is designated in Germany, or "Il Duce" as he is entitled in Italy; and the government has been so organized as to give full expression to this principle.

This principle, it will be noted, represents but the carrying into full effect, as regards all political authority, that followed in organizing the military and naval force of a nation. Just as, within the scope of his jurisdiction, the authority of the military or naval

commander is supreme, the men under his command having no right to participate in the formulation of policies other than as he is willing to confer such participation upon them, and no duty other than that of implicit obedience to orders, so, in the whole field of political action, the will of the head of the modern authoritarian governments that have been mentioned is deemed to be supreme, all officers of the governments to be his subordinates, and, as such, subject to his orders, and all citizens of the commonwealth to be, in effect, his subjects with no rights other than those he is willing to accord to them and no participation in the formulation and execution of political policies other than he sees fit to confer upon them. The principle upon which this form of government rests is thus the very antithesis of that underlying those governments, to a consideration of which we will shortly turn, where the exercise of the sovereign power is deemed to reside in the people and those discharging the duties of government are regarded as the latter's agents and subject in the last analysis to their orders and control. If an illustration of this plenitude of power of the head of the government in modern autocracies is needed, it is to be found in the ruthless manner in which these heads have suppressed all political opposition, a suppression that has involved the arbitrary arrest, and, at times, the summary execution of persons without even the formality of a trial.

Interested as we are here only in the foundation principles upon which different forms of government rest, any attempt to examine in detail this new form of government would be out of place. Several features characterizing such governments it is however important to notice.

Recognition of Need of Popular Support.—The first of these is that these governments, though wholly denying the principle of popular sovereignty and popular government, nevertheless recognize the practical desirability of securing the fullest possible support of the people for their régime. Though they have not hesitated to use force in suppressing all opposition to their régimes, they have justified this by the exigencies of establishing their new system; and they have had the wisdom to appreciate that, if these sys-

tems are to have permanency and to give satisfactory results in operation, they must be cordially acquiesced in by the mass of the people. To this end, they have sought to indoctrinate the people with a belief in the principles upon which they rest analogous to that held by the populations of countries living under a régime of popular government in the doctrine of popular sovereignty as the only moral justification for the exercise of the sovereign powers of the state. In seeking to do this, they have resorted to the instrument of propaganda on a scale never before attempted.

As was pointed out by the writer quoted, there can be no doubt that these efforts have been strikingly successful. In seeking to understand these governments, it is a mistake to view them as pure despotisms maintained by physical force. In Italy, in Germany, and in Turkey, where this system is in full operation, there can be little question that it meets with the general approval and support of the masses of the people.

The Single Party System.—Another characteristic of this modern type of autocratic government that differentiates it radically, not only from all forms of popular parliamentary government, but from all prior types of autocracies, is its maintenance of the principle that, not only shall there exist at any time but one political party or organization—that composed of supporters of the government—but this organization shall have a character and functions totally dissimilar to political parties as they exist in governments of the popular parliamentary type. In the latter governments, the existence of at least two opposing parties constitutes the very breath of life of the government as a working institution. To the adherents of the modern authoritarian governments such a system, where the people and their representatives in the parliamentary bodies are divided into antagonistic groups, and where one or more of these groups is constantly seeking to check the existing government in its efforts to put its policies into execution, is regarded as inimical to the interests of the state in that it promotes confusion and dissension where unity of purpose and opinion is desirable; by so doing, it gives instability to political policies and weakens the government in the performance by it of its function of promoting

the welfare of the state and its citizens. Acting upon this belief, all modern authoritarian governments have rigidly suppressed all political parties in any way offering opposition. Did they stop here, such action might be deemed to be but a necessary step in fortifying themselves in power. They have, however, supplemented such action by the affirmative step of themselves exerting every effort to build up among the people an organization that will embrace their most loyal and active supporters. In seeking to do this, they have brought into existence an organ of government and a method of exercising political control that constitutes one of the most important features of their political systems.

Although this organization is designated a "party," it has features that differentiate it markedly from political parties as they exist in other governments. In the first place, it is not an open organization with which any citizen may, on his own volition and initiative, affiliate himself. Rather, it partakes of the nature of a select club, admittance to which can be had only upon the approval of those holding control of the administration of its affairs, and expulsion from which requires only the action of such controlling authorities. That this is not merely a theoretical power is evidenced by the "purges," to which parties of this character have been periodically subjected in all countries having these institutions.

A second and still more important feature of this single party system is that, consistent with the principle of leadership, this so-called party is so organized that the supreme power of controlling its action is vested, not in the body of its membership acting through representative agencies, but in the hands of the head of the government. The leader thus combines in himself the two complementary powers of the controlling head of the governmental machine, strictly speaking, and of the single party organization. Finally, and what is of special interest to the student of political science, is the fact that in this organization is vested a large part of the real power of determining political policies, the government proper being assigned merely the executory duty of putting into effect decisions thus reached.

The motives leading to the creation of these two instrumentali-

ties, the governmental machinery proper and the party organization through which the leader exercises his autocratic powers, are multiple. In the first place, it gives to the leader the power to influence and control the political action of the body of people in much the same way as he directs and controls the acts of the government proper. To the leader, the party organization, composed of his most devoted adherents and constantly weeded of the lukewarm members, supplies a body of civil functionaries by which his will may be made to prevail throughout the whole body politic. Secondly, it furnishes an effective means by which the leader may consult with and secure the coöperation of his more important adherents in both the formulation of policies and the putting of them into execution. Finally, it serves the important purpose of broadening the base upon which his power rests, and disguising to a certain extent the fact that the determination of political policies is by a single autocratic will. Under this system, it is in fact possible to set up a form of government in which, theoretically, the exercise of the sovereign power is deemed to rest in the body of the people but which, in fact, may be operated as an autocracy. This is illustrated by the governmental system which Mustafa Kemal has created for the so-called Republic of Turkey. Thus to quote a writer who has described this system as it practically operates: [5]

According to the constitution, all legislative and executive power is vested in a Grand National Assembly chosen by the people. By a majority vote the National Assembly elects one of its members to be President; the Ministers are chosen from the National Assembly and are responsible to it; it decides upon war and peace and upon all treaties with other nations and it can also decree its own dissolution. The President, it is true, has the right to veto any laws passed by the National Assembly, but if a law is then passed a second time his veto is thereby overridden. Thus, according to the letter of the constitution, the representatives of the people are invested with absolute power.

By means of a clever scheme, however, the President while constitutionally without undue influence becomes the real Autocrat. The Chamber is understood to represent, not merely the will of the people, but the completely unified will of the people. All representatives belong to the Republican Peoples Party whose President, according to its statute, is Mustafa Kemal. He also

[5] Hans Kohn, "Ten Years of the Turkish Republic," *Foreign Affairs*, October, 1933.

appoints the Vice-President and the General Secretary of the Party. The three together form the Presidial Council which designates the candidates for the parliamentary elections. The decisions of the Presidial Council are absolutely binding on all the members of the party. It also elects the twelve party inspectors who are responsible for the organization of the party throughout the State. The Republican Peoples Party, and it alone, has its organization in every locality. Thus the Grand National Assembly, ruling the country with absolute power, is the source of all laws and of all actions of the government; the Republican Peoples Party, in its turn, is the absolute ruler of the Grand National Assembly, while Mustafa Kemal is the absolute ruler of the Republican Peoples Party. The entire power of the State is vested in him alone.

In Italy, the single party system which has been built up by Mussolini is substantially similar to that of Turkey just described in so far as its fundamental principle, that of vesting the supreme power over the conduct of the government in the central organ of the party, which in turn is controlled by the leader, is concerned. It differs from that system in the two important respects that there is no pretense of setting up a scheme of government that is republican in form and that express recognition is given by organic act to the existence of the party, to its central governing organ, and to the powers exercised by it. The result of this latter provision is that the governing council of the party, the acts of which are controlled by the leader, constitutes a part of the organic structure of the government, while, in Turkey, it functions outside of the structure of government.

In Italy, this condition was brought about by the passage at the direction of Mussolini of the law of December 9, 1928. Prior to that time, the party had functioned practically as does the Republican Peoples' Party in Turkey. This act provides that the supreme direction of the Fascist Party, as the single party in Italy is known, shall be vested in a Grand Council, the presidency of which shall be vested in the head of the government, and which shall be composed of three classes of members; the quadremviri who participated in the march on Rome which led to the access to power of Mussolini; certain public officials and more important officers of the Fascist Party; and, finally, such other persons as have "deserved well of the nation and the cause of the fascist revolution"

and as the head of the government may nominate for three years' service. Since all of these ex officio members hold their qualifying offices at the will of the head of the government, and the latter can appoint such a number of members of the third category as he sees fit, it is evident that the composition of this council is wholly a matter of determination by the head of the government.

Having so fixed the composition of the Grand Council, the act goes on to declare that this body shall be the central controlling organ of the government and the ultimate source of both executive and legislative power, subject only to the control of the head of the government and responsible to him alone. Thus, to quote from the speech delivered by Mussolini in the Senate, on November 8, 1928, defining the purpose of the proposed act: "The National Fascist Party has in this manner been incorporated in the State and has become one of its fundamental institutions. . . . Thus is completed the evolution by which the National Fascist Party, from a simple private association like the parties of the old régime has been transformed into a great institution of public law, the fundamental instrument of the régime. . . . To say Grand Council of Fascism is equivalent to saying Grand Council of the nation and the State." [6]

The extent of the powers of this body may, in part, be seen from the fact that it is the body that prepares the list of four hundred candidates for the chamber of deputies which must be presented to the voters for acceptance or rejection as a whole; that has charge of the introduction and application of the corporative system; that compiles the list of names to be submitted to the council from which a selection must be made of the head of the government when a vacancy in that office occurs; and that must be consulted on all important questions of constitutional and legislative action. Although the two legislative chambers, the senate and the chamber of deputies, were continued in existence, their functions were restricted in fact to that of acting merely as ratifying bodies with little or no real power to determine legislative or other policies.

Finally, the act is so drafted as to make it clear that this body,

[6] Quoted by Raymond Leslie Buell (ed.), *New Governments in Europe* (1934), p. 70

though nominally the central controlling organ of the government, is itself subject to the control of the head of the government. Controlling as he does its membership, and acting as its President and presiding officer, the council is, in effect, merely the agency through which this officer makes his will effective in determining governmental action.

In Germany, Hitler, following the example of Mussolini and Mustafa Kemal, has taken over in its entirety this single party system of which he, as head of the government, is the directing and controlling head. One of his first steps, after securing power, was the ruthless suppression of all political parties other than his own. This he followed up by dictating the passage by the parliament of the two laws of July 14, 1933, and December 1, 1933, the first of which gave legal sanction to the single party system by declaring the Nazi Party—or, to give to it its official title, "The National Socialist German Workers Party"—to be the only political party in Germany and prohibiting the formation of any other party; and the second of which declared the party to be a "public corporation inseparably connected with the State." The passage of this latter law would appear to indicate an intention of establishing an organic relationship between the governing body of the party and the governmental machinery analogous to that put into effect in Italy.

Other Distinguishing Characteristics.—These modern authoritarian governments present other characteristic features which make their governmental systems radically different from those of popular governments. Among these characteristics is the great centralization of powers in the hands of the central government and the vesting of both the legislative and the executive power in the same hands, a feature which, in effect, abolishes the legislative branch as the seat of legislative authority and relegates it to the rôle of an advisory or ratifying body. These features will be considered when such aspects of the general governmental problem are examined.

The Oligarchic Type.—The second type of government, as determined by the location of sovereignty, is the Oligarchic. This type stands midway between the other two. In it sovereignty is held to

reside neither in the general body of the people nor in a single divinely determined ruler, but in a certain privileged class. Mention is made of this type of government chiefly in order that our classification of governments according to the principle of location of sovereignty may be complete. In the past there have been comparatively few governments of this character, and none of any importance is to be found at the present time. Probably the government of Venice during the period of its existence as an independent power furnishes the leading example of a government of this type. The government of England, after the overthrow of the autocratic principle, which may be said to have been definitely accomplished by the Revolution of 1688, and before the movement in the early part of the nineteenth century for the extension of the franchise to the mass of the people gained headway, approximated this type in practice, if not in theory. In most other cases where this type has existed, the ruling class was closely identified with the priestly class and appeal to divine sanction for its justification was made in much the same way as the doctrine of the divine right of kings was evoked by autocracies.

It is hardly necessary to point out that this form of government should be clearly distinguished from those cases where a small class has, by its superior strength or skill, secured control over the machinery of government. History affords many instances in which this has taken place.

The Popular Type.—The third type of government is the one in which the belief is held that sovereignty should reside neither in a single all-powerful ruler nor in a special ruling class, but in the whole body of the people. It would be difficult to single out a more momentous event in the history of the evolution of governments than the change in both political thought and practice which has resulted from the rise and development of this principle. It constitutes the key to the interpretation of many of the most important events of modern history. It dominates and colors political thought at the present time.

Historical Development of the Doctrine of Popular Sovereignty.—The origin of this doctrine is to be found in the early

Greek and Roman republics. In a very true sense, their governments may be said to have rested on this principle. Even after the establishment of the Empire of Rome, republican forms were long preserved and the fiction was maintained that the Emperors were elected by and represented the people. In time, however, both the form and the fiction disappeared, and the oriental conception of the autocratic monarch ruling by divine right gained dominance. This conception ran parallel with that of the supremacy of the Pope in matters spiritual. The two in close alliance represented the doctrine of authority as opposed to that of reason—that in all matters the seat of authority was to be found in the Divine Being who exercised this authority through his divinely appointed representatives on earth. One cannot understand the history of events in the Middle Ages without having this conception clearly in mind. In the claim of the Popes that in them resided sovereignty in respect to temporal as well as spiritual matters, and in their attempt to make good this claim, is to be found the explanation of the great struggle between church and state which played so important a part during this period, a struggle which has not entirely died out at the present time.

The doctrine of papal supremacy received its great blow in the Protestant Reformation on the Continent and the Puritan movement in England. About the same time, a series of students and writers began to question the doctrine of the divine right of kings. While not directly questioning the right of kings to rule, they sought to find some warrant for the exercise of supreme power other than in divine sanction. This they found in the theory of a supposititious or implied contract between the people and the ruler that the latter should rule over them, or in a hypothetical compact among the people themselves that they should be ruled over in this way.

It is not our intention to enter into any consideration of this very interesting theory. All that it is desired to do is to point out that here is afforded, not only the first serious attack upon the principle of the divine right of kings, but through the elaboration of the social compact or contract theory of government, the germ of the

idea of popular sovereignty which was afterwards to play such an important rôle in historical movements and in the evolution of political thought.

The next great event in the development of this doctrine was the struggle in England between the Puritans and the Stuarts, marked by the establishment of the Cromwellian Commonwealth, the deposition and execution of King Charles I, the Restoration and the Revolution of 1688 which brought William of Orange to the English Throne. The significance of this latter event lay in the fact that for the first time was definitely established the principle, which has ever since been adhered to in England, that the king owes his throne, not to divine or inherent right, but to selection by Parliament which latter body acts in this capacity as the representative of the people. To-day, the English king holds office by virtue of an act of Parliament and it is within the authority and power of that body to make such change in respect to who shall occupy the throne, or indeed as to whether the monarchical form of government shall be maintained or not, as it sees fit. From this event therefore may be dated the definite establishment of the principle of popular sovereignty in England. It is characteristic of the English that action should in general precede theory. Thus, in the present case, it may be said that the actual establishment of the doctrine of popular government as the basic principle of the political system took place before the doctrine itself was consciously or deliberately adopted as a philosophical principle. Even to this day the English are unwilling to change many of the outward forms of administration which are the characteristic features of a purely autocratic type of government.

It remained, however, for the closing years of the eighteenth century to mark the rise to ascendancy of this principle. In bringing about this event, great importance must be attached to the remarkable influence exerted by the preaching and writings of that forerunner of the French Revolution, Jean Jacques Rousseau. In his work, "The Social Contract," the principle of popular, or as it was more generally designated, national sovereignty, was definitely announced and asserted. The French people, long restive under

the abuses and oppressions of the old régime, nevertheless were held to allegiance to their king by the centuries-old belief in the divine right of their king to rule. Rousseau's influence shook this belief. His doctrine of national sovereignty furnished the philosophical basis for, and justification of, the Revolution. What might have been merely an effort to depose a ruler and select another who would give greater regard to the welfare of the people became a struggle for the establishment of individual liberties and the right of the people to rule.

This doctrine of popular sovereignty and individual rights found a fertile soil in the New World and was used by the American colonies in asserting their right to throw off allegiance to the British government. It is a matter of no little interest from this standpoint that the colonists, in taking this step, deemed it necessary to justify their action to the public and the world in their Declaration of Independence. There they asserted that they were but exercising a right which was inherently theirs. Just as the adherents to the principles of autocracy evoked the doctrine of the divine right of kings as a justification for that form of government, so the adherents to the principle of popular government felt the need for evoking some extraneous sanction. This they found in the doctrine of natural law. It was their contention that the right of the people to rule derives its moral sanction from the fact that it constitutes one of the inherent, inalienable, natural rights of the people. As has been pointed out in our consideration of the jurisdiction of government, there are now few students of jurisprudence and politics who adhere to this doctrine. It is none the less desirable to appreciate the great part that it played in the evolution of our system of government and the whole body of our public law, and the influence that it still exerts in the minds of the masses of the people.

Popular Government a Question of Fact.—In most popular governments operating under a written constitution, the doctrine that all political powers are derived from the people is expressly set forth. Thus, the Belgian constitution of 1831 declares that "all powers emanate from the people" and the constitution of the United States opens with the words: "We, the people of the United

States, . . . do ordain and establish this constitution. . . ." Such a formal enunciation of the doctrine is not necessary however in order that a popular government may in fact exist. In England, no such provision is possible since that country is without a formulated constitution; in France also, no direct declaration of popular sovereignty is to be found in the present fundamental laws. That both of these countries have a popular government of a pure type is, however, certain. Furthermore, it is not even necessary that a government should be a Republic in the sense that its chief executive is selected directly, or indirectly, by the people. In point of fact, not a few of the popular governments now in existence are monarchical in form. Examples of this are the governments of England, Belgium, Holland, Norway, and Sweden. In these, the people have chosen to create a form of government in which the chief magistrate bears a monarchical title, is selected in much the same manner as, and has a tenure of office analogous to, monarchs at the head of governments resting upon the principle of autocracy. It is evident that, in such cases, the monarch has no inherent authority. He has only such as has been granted to him by the sovereign people. He is but one of the agents through which the latter have elected to exercise their powers.

Movement Towards and Reaction from Popular Government.—In considering this type of government, the fact of outstanding importance to the student of political science is that a movement covering a period of a hundred and fifty years following the American and French Revolutions of 1776 and 1789, which had every appearance of leading to the general adoption by all western nations of this form of government, should have suddenly come to an end and a counter movement in favor of the autocratic principle arisen. As the Coles in their penetrating survey of present political conditions have written: [7]

> Most people, at any rate in Western Europe, were living in a world that seemed in its essential qualities of political and economic organization settled and sure of itself. Politics touched and seemed likely to touch only a tiny

[7] G. D. H. Cole and Margaret Cole, *A Guide to Modern Politics* (New York, 1934), p. 10.

fraction of most men's lives. Most people lived in a social environment which they accepted almost without question as likely to last their lifetime, subject to only gradual and secondary changes that were in no wise likely to disturb the even tenor of their existence. The general character of political institutions seemed to have been settled; and it seemed to remain only to complete by slow stages the progressive evolution towards a thoroughly "democratic" parliamentary system. There were some who wanted to advance fast, and others who wanted to go slow along this road, and there were of course still many people who did not want to advance along it at all; but even the opponents of parliamentary democracy for the most part regarded its continued progress as inevitable, and confined their efforts to an attempt to slow down the pace of change. There was hardly any argument about the fundamentals of political structure, only about secondary questions of piecemeal reform.

The World War itself was denominated by the Allies a war "to make the world safe for democracy"; and one of its most important political consequences was the destruction of one of the outstanding autocracies of Europe, the German Empire, and the rise in its place of the second Reich with a constitution, as adopted at Weimar in 1919, which declared in its first article that "The German Reich is a Republic. The political powers emanates from the people." Furthermore, all, or practically all, of the succession states created upon the ruins of the old German and Austrian Empires, endowed themselves with political systems resting squarely upon the principle of popular sovereignty with a popular, parliamentary system modeled for the most part upon that of France. The fact that the World War had as one of its most important immediate political consequences, the speeding up of the movement towards the general adoption of popular government by the countries of Europe makes the sudden check upon this movement all the more striking. The initial step in this check was brought about by the rise to power under Mussolini of the Fascist Party in Italy in 1922. This, in itself, would not have been significant but for the facts: that this party stood for a form of government which, as has been pointed out, repudiated, *in toto,* the principle of popular government and asserted the contrary principle of autocracy; that it succeeded in winning the support of the mass of the Italian people; and that that belief in it as the proper principle upon which gov-

ernments should be organized rapidly spread to other countries and, in a number, of which Germany is the most important, led to the overthrow of existing popular governments and the creation in their place of governments of an autocratic character. Even in countries such as the United States, England, and France, where the institution of popular government has been longest, and apparently most firmly, established, the reverberation of this revolutionary change in political thought has not been without its effect. It is a matter of no little significance that so competent a student of modern political conditions as Raymond Leslie Buell, President of the Foreign Policy Association, should in the preface to a book edited by him and published in 1934 write: [8]

> Among the Great Powers the three remaining exponents of democracy are France, England, and the United States. While these countries have experienced democratic rule during a much longer period than Germany, it is by no means certain that they will not adopt some form of dictatorship. In all three countries growing discontent has been expressed with the pettiness of parliaments, the irresoluteness of administrations fearful of overthrow at the next election, and the dominance of local and group interests at the expense of the general good. If Democracy cannot develop a type of leader and political organization which will consider the interests of the forgotten man, if democracy cannot cope with the problems created by the defects of capitalism, then people in despair will turn to more authoritarian rule.

Government of Russia.—As a general rule, little or no trouble is encountered in determining to which of the three categories, into which all governments have been classified according to the location of the exercise of sovereignty, modern governments should be assigned. In the case of the government of Russia, however, the making of this assignment presents difficulties. These arise from the fact that this system, at least as it exists at the present time, presents features furnishing some justification for its assignment to each one of the three classes. Standing as it does for the principle of "Dictatorship of the Proletariat," it might be deemed an oligarchy, though one resting upon a rather broad base. In its practical operation, it has much in common with the autocracies of Italy and Germany, Lenin formerly, and Stalin at the present time,

[8] *New Governments in Europe: The Trend Toward Dictatorship* (1934), Ch. V.

playing much the same rôle as do Mussolini in Italy and Hitler in Germany. Especially is its system similar to those of these two countries in the adoption of the system of a single political party to the central organ of which is entrusted the controlling voice in determining political policies and to a considerable extent governmental action. If consideration, however, is given to the scheme of government as set forth in the constitution of the Soviet Republic and the manner in which it contemplates that it will operate when the transitional period of its establishment is passed, valid grounds exist for assigning it to the popular government class. Not only does this system rest upon the principle that all citizens of the Republic shall be workers, and thus members of the "Proletariat," but it provides for the participation of all members of the proletariat in the selection of the hierarchy of soviets, or representative bodies, constituting the governing bodies of the Republic. It may be true that, in its final form, the controlling voice in determining governmental politics may, as at present, be vested in a relatively small group of men constituting the central organ of the Bolshevist Party, which, in turn, will be dominated by a single individual. But this is little more than exists in England where political power is exercised by the cabinet, which in turn is dominated by the prime minister. In both cases the principle held is that the authority of this group is derived from the people. In this respect the system differs fundamentally from that of Italy and Germany where the governing principle is that of leadership; and authority flows from the top down, instead of from the bottom up.

In point of fact, it is the claim of the Bolshevists that the system of government that they are seeking to perfect is of a far more democratic or popular character than those of England, France, the United States, and other countries professing to be popular governments of the purest type. It is their contention that these latter governments are popular only in a restricted sense, since they rest upon an economic system which, in providing for the private ownership of capital, or the physical instruments of production, mean, in practice, the existence of an economic aristocracy; and that, as a result of this, real power in respect to the control of

human affairs resides in a class instead of in the whole body of the people. True democracy, they maintain, can exist only under a régime of industrial democracy as well as one of political democracy as that term is employed in political science. This claim of the Bolshevists is stated with exceptional clarity by Sydney Hooke, Professor of Philosophy at New York University, in a recent address given before the Institute of Public Affairs at the University of Virginia, July 4, 1934. In the course of this interesting address he says: [9]

> Since in a capitalist society, only a small minority holds ownership, and the actual reins of control, over the means of production, what we really have under the guise of formal democracy is the dictatorship of a minority owning class. . . . Against the dictatorship of the bourgeoisie, Marxists have always opposed the ideal of worker's or proletarian democracy. When they have spoken against formal democracy, it is not because they are opposed to democracy, but to sham democracy. And a sham democracy for workers is one in which, no matter what their paper privileges, they cannot control the social conditions of life. Without social democracy, there can be no real democracy for the working class. . . . It should be clear, then, that Marxists are not opposed to democracy. But they hold that a true democracy is possible only in a socialist society where, in virtue of a common administration of the means of production, an objective social morality harmonizes the interests of men and establishes the goal of social activity. This can only be achieved, or approached as an ideal, by overthrowing the dictatorship of the bourgeoisie which declares itself to be the enduring expression of democracy, and by establishing a workers' democracy, a dictatorship over the bourgeoisie, as a new transitional State from which repressive functions finally disappear in the completely socialist society.

In thus stating, with evident approval, the claim of the Bolshevists that their political system rests upon a basis of democracy such as is found to a like extent nowhere else, Professor Hooke went on to point out that whatever this system may be in theory, in practice it is grossly violated by the system of government now actually existing in Russia. He said:

[9] "The Democratic and Dictatorial Aspects of Communism," Dec. 1934, No. 305. In respect to this address it should be stated that the author, while indicating his opposition to many of the policies of the Bolshevists, writes as one who accepts the ideals of a classless society.

I wish to maintain that there are certain "horrendous excrescences" which interfere with the functioning of workers' democracy within the Soviets. These can be directly traced to the undemocratic domination of the Communist Party, over the entire fabric of social life. The Communist Party, in accordance with its own theory, constitutes only a small minority of the working class. Its leadership is supposed to be won by the voluntary acceptance of its program by the working masses and not by the forceful imposition of its rule. In any conflict between the Soviet and Communist Party, after the discussion is over, it is the collective decision of the Soviets, among whom the Communists are a minority, which would prevail and not the line worked out by the party leadership. Orthodox Communist Party members refuse to recognize it to be even conceivable that their policy should ever be disapproved by a majority in the elective bodies of the working class. This is an unconscious testimony on their part of the boss control they have established over the Soviets and their expectation of enjoying it in perpetuity. When they are forced to admit the possibility of an issue between themselves and the Soviet majority, they defend the imposition of their policy on the ground that, as the enlightened vanguard of the proletariat, they are in a better position to determine what the objective interests of the working masses are than the masses themselves. This old argument for benevolent despotism is contrary to the spirit of Marxism and socialism.

It is this difference between principle and practice that makes it so difficult to say definitely whether the Russian Government is to be deemed an autocratic or popular one. Undoubtedly, it operates at the present time largely as an autocracy. It may well be, however, that this is only a transitional stage and that in time its operation will more nearly conform to the principles of popular government as set forth in its constitution.

CHAPTER VII

THE TWO TYPES OF GOVERNMENT ACCORDING TO THE MANNER OF EXERCISE OF SOVEREIGNTY

In the preceding chapter we have seen that all governments may be primarily divided into three classes according to where the supreme authority, or sovereignty, is deemed to reside. Of these three classes, only two, autocracies and popular governments, are, at the present time, of practical importance. We are now to see that each of these two may be further subdivided into two classes according to the principle adopted in providing for the exercise of this sovereign authority.

Distinction between Governments of Authority and Governments of Law.—If we analyze the problem that is presented to a people after it has decided upon the location of sovereignty, it will be found that the possessor of sovereignty has presented to it two alternative methods of action. It can exercise the supreme power vested in it arbitrarily; that is, without deeming itself to be bound by any general rules of conduct, or subject to any obligation to make its action uniform or consistent, action in each case being determined by its will at the time, or the seeming exigency of that particular case. Or, it can frame general rules by which it undertakes to be guided, these rules having for their purpose to ensure that the power will be exercised in a uniform and consistent manner and with such limitations in respect to procedure as will result in a just and equal treatment of all citizens in their relations to each other and to the government. According as one or the other of these two methods of exercising sovereignty is employed, distinct types of governments are established. The distinction is that between a Government of Authority and a Government of Law. Under the first, the only sanction required for a governmental act is the will of the ruler. Under the second, every act must have the sanction of some

law. This means that in the case of the second there must exist a great body of public law prescribing the form of governmental machinery, the jurisdiction and powers of its several organs and the methods of procedure to be employed by them.

Absolute and Limited Autocracies.—It needs but the statement of this distinction to make known that we have here to deal with a factor that has played an all-important part in the very progress of civilization itself, and that in it we have a prime characteristic differentiating the civilizations and political systems of the East from those of the West. Generally speaking, it may be said that, until the last half of the nineteenth century, the governments of the East were governments of the first class—governments of authority. Sovereignty not only resided in the hands of a supreme ruler, but was exercised by him in a purely personal, arbitrary manner. The resulting governments were pure despotisms. Whether they were or were not benevolent despotisms depended upon the accidental circumstance of whether the ruler for the time being exercised his sovereign power for the purpose of promoting the welfare of his subjects or with a view solely to the gratification of his own caprices and ambitions. China, prior to the revolution of 1911 establishing the present republic, represented probably the best illustration of a government of this arbitrary type. One should read such books as Bland and Backhouse's *Annals and Memoirs of the Court of Peking,* and *China Under the Empress Dowager,* to see what a government of this kind was like. The monarch issued orders, termed mandates, prescribing governmental organization and procedure. These, however, were not laws in any proper jurisprudential sense. They were habitually disregarded; they lacked any adequate penalty or sanction; they did not bind the sovereign himself and were changed or departed from by him at his will. In substance and in form, they were for the most part mere exhortations such as a father might give to his child. China in fact may be deemed to have been at that time a country without a body of public law, and with few definitely formulated private laws. Officers and magistrates, in discharging their duties and in rendering decisions for the settlement of private disputes, were guided primarily

by what they thought the particular circumstances of each case demanded, rather than the enforcement of any general rules of conduct. The very conception of positive law was absent. Authority was enforced and justice administered precisely in the manner that the head of a family regulates and controls the conduct of his children. The people were exhorted to practice virtue and to refrain from evil. Rewards were promised for good conduct and punishment threatened for misconduct, but only in the most loose and uncertain way were general rules with clearly prescribed sanctions laid down, or, if laid down, enforced with any uniformity or certainty.

We have described conditions in China prior to the revolution of 1911 with some degree of particularity, since doing so not only serves to make known in a concrete way the essential character of a government of authority, but lays the basis for a correct understanding of the real significance of a movement such as the Chinese revolution of 1911. To the world at large and, indeed, to no small extent, to the Chinese themselves, the significance of this revolution lay in the substitution of a republican for a monarchical form of government. This, however, represents a misconception of the significance of that event. The really fundamental change there sought to be effected was that of the substitution of a government of law for one of authority. That the government of law then established was to be of a republican rather than a monarchical form was, relatively speaking, a matter of secondary importance. What is true of China's revolution of 1911 is equally true of the revolution which gave to Japan her present form of government. The change that took place in the government of Japan was no less momentous because she retained not only the monarchical but the autocratic form of government. The really important feature of that change was that she passed from a government of authority to one definitely of law. In doing so, she inaugurated a movement which bids fair in time to bring the governments of the East into the same class in this respect as the governments of the West.[1]

[1] The foregoing serves also to bring out the essential difference between revolutions having for their purpose the overthrow of authorities in the control of a

Absolute and Limited Popular Governments.—Thus far we have considered this vital distinction between a government of authority and one of law as applied to the autocratic type of government. The same distinction finds application in the popular type. Popular government, if it is to prove workable at all, means in the last analysis government by a majority. This means that a majority of the citizen electorate, no less than an individual autocrat, may, if it so minded, use its sovereign powers in a capricious, inconsistent and arbitrary manner; and, in doing so, have regard solely to its own wishes and interests, and be guilty of grave acts of oppression and injustice towards the minority. It, like the individual autocrat, has the choice of deciding whether it will regulate its acts according to its wishes for the moment and the conditions surrounding each act to be performed or will lay down general rules by which its action will be controlled and by which due safeguards will be set up for the protection and promotion of the interests of all citizens, rather than those of the majority who happen to be in authority. Nor is the danger slight that the former of these two methods will be employed. It has often been pointed out that no tyranny exceeds that of a majority. In the case of a majority, there is present an apparent justification for its acts that does not exist in the case of an autocrat who represents the extreme case of a minority. When one considers the extent to which the populations of modern states are not homogeneous in respect to race or religion, have distinct or even opposing interests, such as exist in the agricultural as opposed to the industrial class, or the employing and the employee class, or occupying different sections of territory with their particular and special interests, we can appreciate how serious is the question here presented.

It is not our intention at this place to consider the general problem of popular government. It is only desired to point out that a popular government, no less than an autocracy, must make provision for the conduct of all governmental operations strictly in accordance with law, if it is not to present all the evils of tyranny

government, and those having for their purpose the overthrow of the government itself, and the substitution in its place of a government of a different character.

that have marked the absolute autocracies or despotisms of the past.

Constitutional Government.—We have indicated that the distinction between a government of authority and one of law constitutes one of the fundamental distinctions in political science. It is now our purpose to show that in this distinction we have the only really valid basis for distinguishing between what is popularly known as constitutional government and one to which this adjective cannot be applied.

The question as to what constitutes constitutional government has been a favorite one with writers on politics and jurisprudence. Notwithstanding the attention that has been given to the subject, not only is there no general agreement regarding it, but the ideas of individual writers are, upon close examination, found to be exceedingly vague. In so far as any definite test at all as to what constitutes constitutional government has been attempted to be set up, it has centered around the question of the guarantee of individual rights and liberties.

Probably the ablest spokesman of this school was President Wilson. In his book *Constitutional Government in the United States,* he attempted to handle this specific question. In his introductory chapter entitled "What Is Constitutional Government?", he says:

> A constitutional government is one whose powers have been adapted to the interests of the people and to the maintenance of individual liberty.... Roughly speaking constitutional government may be said to have had its rise at Runnymede when the barons of England exacted the Magna Charta of John.

Though devoting a chapter to the subject, this was the nearest that he got to stating what, in his opinion, was the real test of constitutional government. His reference to individual liberty, to the charter of rights exacted of King John, and his general consideration of the subject throughout the volume show clearly, however, that with him the protection of individual liberty was the determining factor.

This attempt to make the guarantee of individual rights a test of

constitutional government is a futile one. For example, it would be absurd to hold that England does not have a constitutional government. Yet that nation happens to be one in which there is not a vestige of a constitutional guarantee of individual liberties and rights. The prime characteristic of the English government is the supremacy of parliament. There is no act which this body cannot legally authorize. It can, by a simple legislative act, order the property of A to be taken from him and given to B, divorce the wife of A and order that she shall be deemed to be the wife of B, order the arrest of A and his execution without trial for an act which at the time it was committed was not only legal but praiseworthy. As its power has been wittily expressed, it can do anything but make a man a woman or a woman a man. It is true that there are certain charters and acts, such as the Magna Charta, Petition of Rights and Bill of Rights, in which the rights of individuals are deemed to be set forth with peculiar solemnity. Legally, however, these documents have no greater force than that of the most petty statute. Whether they are observed or not by the government is purely a matter of expediency. The attempt to make the guarantee of individual rights a test of constitutional government thus leads either to the conclusion that all governments, except absolutisms, are constitutional governments, or that the only government that is constitutional is one like that of the United States, where the field of individual liberties into which the government cannot enter is clearly defined, and means exist for insuring that these limitations upon the power of government will in fact be observed.

In point of fact, the important distinction which lies back of all this discussion as to what constitutes constitutional government is the one which we have been considering, that, namely, between a government of authority and one of law. Here is a distinction which is not only of the most vital importance, but one which can be clearly drawn, and which, when applied, serves to mark off governments of the world into two classes which are organically and fundamentally different from each other. Under this distinction, the governments of the United States, England, France, and the

countries of Europe generally, properly fall into one class, while those of oriental despotisms fall into another.

To this latter class many would probably also assign the modern authoritarian governments, such as those of Italy, Germany, and Turkey. Such an assignment would, however, be incorrect. It is true that these governments do not hesitate ruthlessly to suppress opposition by resorting to the arbitrary arrest and execution of opponents, and, in general, the oppression of minorities. These acts are defended, however, not as representing the proper manner in which the powers of the state should be exercised but as exceptional steps which the exigencies of establishing a new form of government through a revolutionary process render necessary. In all cases it is the aim of the governments to bring into existence, as rapidly as circumstances will permit, a body of organic and statutory law that will define the powers of government and the manner in which such powers will be exercised. Viewed from this standpoint, these governments, while fundamentally of an autocratic character, must nevertheless be deemed to fall within the class of constitutional governments.

CHAPTER VIII

THE TWO TYPES OF POPULAR GOVERNMENT: DEMOCRACY AND REPRESENTATIVE GOVERNMENT

Sovereignty, we have seen, constitutes not only the prime characteristic of the state, but the factor in accordance with whose location and manner of exercise all governments can best be classified. Continuing to use this factor as the basis, or principle, of classification, it will be found that popular governments can be further classified in two distinct types according to the decision reached in respect to the body or organ to which will be entrusted the actual exercise of the sovereign powers which reside in the people.

Having decided to create a government of a popular type, a people has presented to it the alternative of either itself exercising its sovereign powers, or entrusting their exercise to an agent or agents to be selected, instructed, and controlled by it. According as it adopts one or the other of these policies, it brings into existence distinct types of popular government to which have been given the names of Democracy and Representative Government.

Democracy Defined.—The word democracy is unfortunately used in popular discussion, and indeed in much political literature, in two quite different senses: as designating a society or community in which class distinctions are absent or relatively unimportant, and as designating a distinct form of government. It is in the latter, or technical, sense that the term is here employed. A democracy, to repeat more fully what has already been said, is that form of popular government which results where the voters of a state, acting collectively as an electorate, themselves directly administer the affairs of government. By this is not meant that they perform the physical work of building and repairing roads, operating schools, administering justice in the courts, etc., but that they, as

an electorate, attempt directly to determine all matters of policy, reach all important decisions, and select, direct, and supervise the officers under whose immediate direction the actual work of government is performed; that they, in a word, directly assume the functions of a legislature and a board of directors in respect to the conduct of governmental affairs. Under this form of government the electorate occupies, in a popular government, precisely the position of the monarch in an absolutism. It is at once the custodian of legal sovereignty and the directing head for its actual exercise.

Inherent Limitations of Democracies.—It is hardly necessary to point out that a democracy may be said to correspond to the highest ideal of popular government. It represents a form of government in which sovereignty not only resides in the people, but is actually exercised by them. Notwithstanding this theoretical superiority, democracy as a form of government presents certain practical limitations that make it difficult of application except under unusual and specially favorable conditions. These limitations consist in the difficulty in securing prompt and decisive action on the part of a numerous body; in the delay and trouble involved in getting this body together; in the impossibility of this body meeting the demands upon it where the amount of work to be done is at all large; and in the fact that such a body neither has the knowledge nor the training fitting it to handle matters of a special or technical character, and is necessarily so constituted that it can devote but a part of its energies to the work to be done.

These disadvantages are technical and apparent. There is, however, another which, though more subtle, is none the less important. This is the fact that, in a democracy, the actual conduct of governmental affairs is in the hands of those possessed of absolutely unlimited powers. All the dangers which we have described as inhering in popular government, arising from the fact that that form of government means government by a majority, are thus present in an acute form in a democracy. At its best, a democracy may represent the ideal form of government. At its worst, it may be little better than mob rule.

Due to these limitations and dangers, democracy, as a form of government, has played but little part in the history of government. The only instances where it has achieved a fair degree of success are those furnished by certain of the states in ancient Greece, by the smaller forest cantons of Switzerland, and by the towns of New England in our own country. In respect to all of these, it will be noted that not only were all of the special conditions which we have mentioned as being necessary for the successful operation of a democracy present, but that, if we except the Grecian democracies, which were little more than city states, the attempt was not made to apply this type to the entire government of a state but only to certain of its minor subdivisions. Furthermore it is to be noted that, even in these cases, the experiment has been abandoned or is in process of abandonment. The Greek democracies are no more, and the history of the Swiss cantons and the New England towns during recent years shows that they are steadily abandoning their democratic principles and passing to the representative or mixed democratic-representative type of government. For this change, the great increase in the demands made upon the government of all communities, which has been a characteristic feature of modern political life, is chiefly responsible.

If we attempt now to sum up the result of our critical consideration of democracy as a form of government, we may say that notwithstanding the attractiveness of the idea underlying it, it is a form of government which, due to inherent limitations, can be applied with success only under certain special conditions. Whenever the territory is large, the population numerous, the interests varied, the functions of government complicated, or the people not of a high degree of intelligence and exceptional political capacity, a pure democracy may be deemed to be unworkable. Under modern conditions at least, democracy will be found to be a form of government that will find a place only for the administration of the purely local affairs of specially favored communities. Even here it is doubtful whether the results secured will be superior to those that could be obtained where use is made of the representative form of government.

Representative Government.—The foregoing rather lengthy consideration of the limitations of democracy has been essential in order that we may see clearly the reasons why, as a matter of fact, it has given way to the alternative form of popular government, known as representative government.

A representative government, we have seen, is that form of government which results where a legally sovereign electorate, instead of itself attempting to act as the directing head of the machinery of government, brings into existence an organ or organs to represent and act for it in this capacity. The discovery, or rather the application, of this principle of representation to the management of the affairs of the state is rightly deemed to mark one of the greatest advances that has been made in all time in the art of government. Without it, as will shortly appear, the present great extension of popular government would have been impossible, and the doctrine of popular sovereignty would probably have remained but the dream of philosophers, incapable of realization in practice. It was in the perfection of the means through which this principle could be practically applied, as much as in her insistence upon the recognition of individual liberties, and the provision of effective means for their protection, that England made her great contribution to the principles and art of government.

In studying this form of government, it is well to consider it from two points of view: as a device by which the principles of popular government can be applied to large populations and extensive territories; and as involving a principle of government essentially different from that underlying democracy.

As a device, it is evident that it meets most, if not all, of the technical limitations which we have seen prevent the successful operation of a democracy, except in the case of small communities with relatively simple governmental problems to be met. Once adopt the principle of a small number of officials being selected by a large body to act for it, and all barriers which size of country or amount of population had seemed to oppose to the spread of popular government disappear.

Representative government, however, differs from a democracy

in a far more important respect than is exhibited by this mechanical feature. Fundamentally it is based on the principle that, though sovereign authority resides in the people, the latter are incompetent to exercise it, except in the most general way. The philosophy of representative government draws a clear distinction between the possession of sovereignty and its exercise. Sovereignty, as in democracy, resides in the people; its exercise should reside in officers specially selected on account of their qualifications for that work. Essentially, the advocates of representative government take the position that the conduct of the affairs of government require a high degree of education, special knowledge and skill, and that consequently it should be undertaken by officers specially selected for that work.

It is impossible to lay too great stress upon these two fundamentally different points of view. Advocates of democracy say that the people not only are competent, but can be trusted to exercise a wise and just discretion in making political determinations. Advocates of representative government deny this. They maintain that, under modern conditions at least, decisions in respect to matters of legislation and administration, if they are to be wise, must rest upon a special study of conditions that is possible only by a relatively small body of officers specializing in this work. Their position, in a word, is that the conduct of governmental affairs is a special work requiring special abilities, training, and knowledge, and therefore one to be performed by a special body having these special qualifications.

This, however, is not their whole case. They lay great stress upon the danger, which we have seen inheres more markedly in a democracy than in other forms of popular government, that a dominant majority will use its power in an arbitrary, tyrannical, capricious, and oppressive manner. A democracy acts with full powers; there is no check upon its action; there is no authority to which it is responsible or by which it can be held to account. Political authorities in a representative government have the scope of their functions and powers defined and the manner of their exercise determined. They work under a sense of responsibility and ac-

countability. Occupying, as they do, a special position, they can view the problems presented and the results likely to flow from particular lines of action in a more detached manner.

The writer knows of no place where this danger that a majority may use its powers in an arbitrary and tyrannical manner to oppress a minority—a danger that is inherent in a democracy and is guarded against in a representative government—has been set forth more forcibly than in the special message to Congress of April 15, 1911, through which President Taft vetoed the joint resolution providing for the admission of the territories of New Mexico and Arizona as states of the union. The ground for this veto was the objection that President Taft held against the provisions of the proposed constitution of Arizona which permitted the recall of judges by a popular vote. Voicing his objection, President Taft said:

> A government is for the benefit of all the people . . . now, as the government is for all the people and is not solely for the majority of them, the majority in exercising control either directly or through its agents is bound to exercise the power for the benefit of the minority as well as the majority. But all have recognized that the majority of a people unrestrained by law, and without the sobering effect of deliberation and discussion, may do injustice to the minority or to the individual where the selfish interest of the majority prompts. Hence arises the necessity for a constitution by which the will of a majority shall be permitted to guide the course of the government only under controlling checks that experience has shown to be necessary to secure for the minority its share of the benefit to the whole people that a popular government is established to bestow. Constitutions are checks upon hasty action of the majority. They are self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority and of the individual in his relation to other individuals and in his relation to the whole people in their character as a State or government.

Mixed or Democratic-Representative Government.—We have defined and described what may be termed a pure democracy and a pure representative government. In practice, a people may adopt a system of government lying midway between these two systems. It may decide to vest the exercise of certain of its powers in representative organs and retain the exercise of the remainder in its own hands. When it decides to do this, it brings into existence a

government of a mixed type to which we may give the designation democratic-representative.

The Government of England—a Representative Government.—The Government of England represents the purest type of representative government that has ever been established. The people of England have vested the entire exercise of their sovereign powers in a single agency, Parliament. That agency represents them in every capacity. The people themselves perform no political act but that of selecting the members of this body. They do not even attempt, through their political parties, or otherwise, formally to instruct their agent as to what policies it shall adopt or what measures it shall undertake. Nor have they retained in their hands the constituent, that is, the constitution-determining power as distinguished from the legislative power. The grant of authority to Parliament is, in a word, plenary. The government resulting may thus be said to be as pure a type of representative government as it is possible to conceive.

The Government of the United States a Representative Government in Principle.—The distinction between a democracy and a representative government was clearly understood by the framers of our constitution. Due to their appreciation of the dangers which they believed to be inherent in the former type rather than to the technical difficulties in the way of making that type work successfully, they took every possible precaution to insure that the government they were creating should be a representative government and not a democracy. They were as anxious to avoid the dangers of a democracy as they were those of an autocracy. To them democracy meant mob rule and was so denominated in their political discussions. That this is so is clearly shown from the care taken by Madison to point out in the *Federalist Papers* the distinction between the two types of government, and the consequences to be expected in the practical working of the two types. He said:

> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischief of a faction (party strife). A common passion or interest will in

almost every case, be felt by a majority of the whole; and communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths.

Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions and their positions. A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. . . .

The two great points of difference between a democracy and a republic are: first, the delegation of the government in the latter to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may extend.[1]

Not only did the framers of our constitution desire to ensure that the national government they were bringing into existence should be of this character, but they intended that the governments of the individual States should be the same. It is for this reason that, notwithstanding the strong feeling that the power of the central government should be restricted within the narrowest limits compatible with the formation of a strong and permanent union and that, as far as possible, each State should be left the maximum of freedom in the management of its own political affairs, they placed in the federal constitution the provision that "the United States shall guarantee to every state in this Union a republican form of government."[2]

The Contest between the Principles of Democracy and Representative Government in the United States.—Though no one

[1] *The Federalist*, No. 10.

[2] Art. IV., Sec. 4. The expression "republican form of government" is here used to indicate that type of representative government where the chief magistrate is elected by the people. The provision thus equally precludes the establishment by a state of either a monarchy or a democracy. This provision not only imposed upon the states the obligation to adopt this form of government, but likewise placed the obligation upon the national government to see that this was done. On one notable occasion, that of Dorr's Rebellion in Rhode Island, the national government was forced to intervene to enforce this provision.

can question that the government of the United States is properly to be designated a representative government, it is important to note that neither in its legal constitution, nor in its practical operation is it so pure a type as that of England. In the first place, the people, acting directly or through their elected representatives, have retained to themselves the final decision in respect to the making of changes in the government set up by them. Secondly, they have built up a system of party organizations through which they seek by means of the adoption of programs to make known their wishes in respect to the policies that shall be adopted and put into effect by their representatives. Finally, there has been incorporated in the political systems of a number of our western States political devices known as the Initiative, Referendum, and Recall, through which the people may themselves directly make political determinations.

If one surveys the history of politics in the United States since the adoption of the constitution, it will, in fact, be found that one of its most fundamental features has been the persistent contest between the democratic and representative principles of government. The political revolt which led to the election of Jackson as President in 1824 was essentially one having for its purpose the strengthening of the direct influence of the people on the conduct of government. The accomplishment of this end they saw in the requirement that all administrative officers of any importance should hold office as the result of direct election by the people. In practice, this system utterly failed to accomplish its purpose. The people found it an impossible task to select competent officials for a large number of different positions, many of them of a purely technical character. Control, instead of being strengthened, was weakened. As a result, there has been in recent years a strong reaction against the system. This has found expression in the demand for the adoption of what is known as the Short Ballot, that is, the adoption of the principle that only the relatively few officials having distinctly political, i.e., policy-determining, functions, as distinguished from purely ministerial, or administrative, duties, shall be elected by the people, and that all other administrative officials

shall be appointed by them. This movement has the support of almost all students of politics and is slowly advancing.

The latest phase of the contest between the principles of democracy and representative government is the movement already mentioned for the introduction into our political system of the devices known as the initiative, referendum and recall. Manifestly it would be out of place to attempt here to consider the merits and demerits of these proposals. They have been mentioned, however, as illustrating excellently how impossible it is to judge political proposals unless one has a clear conception of the fundamental principles involved.

CHAPTER IX

AUTOCRACY AND POPULAR GOVERNMENT COMPARED

Although, as has been pointed out in the chapters immediately preceding, various types of government may be distinguished according to whether they are governments of authority or of law and according to the location and manner of exercise of the sovereign power, a survey of modern governments, as they exist at the present time in the western world, shows that they all, in point of fact, fall within the two classes of government—autocracy and popular government. This fact—that two opposing doctrines underlie and represent the basic principle upon which all modern governments rest and that the adoption of one or the other of these doctrines determines in the most fundamental way the essential character of the government resulting—renders it desirable that the attempt should be made to state and evaluate their relative merits. To an American or Englishman who, from his earliest youth, has been trained to look upon popular government as inherently the best government and the only system possible of philosophical justification, this is not an easy task. The mere statement of the practical advantages inhering in an autocratic government carries with it the suggestion of disloyalty to the principles upon which our own government is founded, and operated. Notwithstanding this difficulty and disadvantage, a work such as the present one would be seriously defective were the attempt not made.

The best method of approach in considering this question is that of stating the advantages which experience would seem to indicate that an autocracy possesses from the purely governmental standpoint, over its competitor type, popular government; and, in doing so, attempt to determine the extent to which these advantages are inherent in that type, and their absence in popular government is

due to like inherent limitations, or merely to the failure to make the technical provisions necessary in order that they may find expression.

Technical Merits of Autocracy.—Approaching the question from this standpoint, it must be recognized that an autocracy has certain merits of great importance. These are its unity of will, its simplicity of structure, its definiteness as regards the location and exercise of authority, and its consequent strength and effectiveness in operation. A government can no more function without arriving at definite decisions than can an individual. These decisions can represent opportunist determinations in respect to particular matters as they arise or successive steps in the carrying out of a carefully planned, consistent policy. The first great problem in the organization of any government is the provision of means through which this general will of the state may be formulated and expressed. In an autocracy, the organ through which this is done is the autocrat himself—one that possesses in the highest degree the qualities of unity and continuity. It may be that provision is made for a so-called legislative council or assembly, but such a body, in its practical workings, has merely advisory or consultative powers. The final determination of action to be taken, whether of a legislative or an administrative character, rests with the autocrat. Furthermore, as a study of the modern authoritarian governments reveals, the determination of the persons who shall compose such an assembly, the matters that shall be brought before it for consideration, when it shall commence and when terminate its existence, rest largely, if not wholly, in the hands of the autocrat. Such an assembly is thus merely an agency of the autocrat and is subject to his direction and control.

In a popular government of the prevailing parliamentary type, the popular assembly, the parliament or legislature, is the principal, and the chief executive is the agent. It is the popular assembly which formulates and expresses the will of the state. In a government of this type, the will-formulating and expressing organ is thus one possessing neither unity nor continuity. It is composed of a large number of individuals, and its composition undergoes

constant change. Thus the exceedingly difficult problem is presented of evolving a collective will from a number of individual wills which represent many conflicting interests and aspirations and which rarely, if ever, are in complete accord. Even when such a collective will is finally evolved, no certainty exists that it will persist for any length of time. Furthermore, there is no assurance that decisions thus reached will be in the interest of the general welfare, correspond to the real wishes of the people, or even represent the majority will of the chambers making them if such will could be honestly expressed uninfluenced by party and other special pressures brought upon the members to determine their action. This weakness of popular government, in so far as the reaching of fundamental decisions in respect to public policies is concerned, is set forth in an exceptionally forceful way by Sir Arthur Salter, a man who has had exceptional opportunity to familiarize himself with the practical workings of governments. In a recent contribution to *Foreign Affairs*, he says:

In a large proportion of countries at the present day, the fundamental evil, deeper and more enduring than the economic depression itself, is political impotence, the inability of governments to govern. There are other causes of this impotence, but one of the strongest and most widespread is the corrupting influence of a policy of changing tariffs. In the nature of things this must be so. Whatever the loss involved to the community as a whole by a new tariff, it is the corrupting influence of a policy of changing tariff. It usually carries a substantial advantage for the particular industry protected. The industry organizes pressure because it finds that pays. Collectively, members of a representation usually are judges; individually, they become advocates. Log-rolling is the consequence, and the national tariff that emerges is not an expression of national policy, wise or foolish, but the sum of competitive or corruptly concerted pressures. The whole machine of government has its attention diverted from its proper tasks and is made unfit for them. At the best the available resources of intelligence and honesty, in even the most fortunate of countries, are barely sufficient to enable it to deal with its essential problems on the basis of a representative system. With the added duty of forming discretionary and variable tariffs, the task of making representative government compatible with honesty and efficiency becomes impossible. After many years of international negotiations on commercial policies, I came to the deliberate conclusion that the greatest and most fundamental difficulty was not an international one at all; it was the impotence of national governments. Just so far as one could

penetrate the real minds and thoughts of the delegates, one saw that what was determining their attitude was not a conception of national policy, but a calculation of political pressures. If the national representatives had been masters in their own house, a settlement might have been possible, but on the prevailing basis nothing could be done.[1]

Numerous other illustrations could be given to show that the action of the policy determining body, the legislature, represents yielding to what are merely party considerations or the pressure of self-seeking special interests rather than an honest desire to do the thing that is to the best interest of the community as a whole. In our own country, a striking example of this is furnished by the indefensible voting of huge sums to participants in the late war who have suffered no incapacity, physical or otherwise, as the result of such participation.

A second analogous, technical advantage of the autocratic type of government is the similar concentration of executive and administrative authority, not only in the hands of a single organ, but in that organ which is at once the one having legal responsibility for the formulation of policies and a continuous and independent tenure of office. The ruler of an autocracy is unequivocably the head of the administration. All administrative authority is vested in his hands. All officers of government, civil and military, are his agents. It results from this that administrative responsibility is definitely located and the line of authority is always clear. The administrative services are thus but parts of one highly integrated and correlated piece of administrative mechanism, and dangers of duplication or overlapping of organization or activities are reduced to a minimum. Such conflicts between services as do arise are easily adjusted by the superior organ of administration of which they are parts.

In a popular government of the prevailing type, the source of administrative authority is the popular assembly. It is the body which determines not only administrative policies, but the organs and procedure that shall be employed in their execution. Administrative officers are agents of the popular assembly, not of the chief

[1] "The Future of Economic Nationalism," October, 1932.

executive. It thus results that the same disadvantages that a government of this type is under in respect to the determination of policies is found in the field of administration. The consequences resulting from these two systems of locating administrative authority can best be shown by comparing administrative conditions as they existed in autocratic Germany prior to the war and in the United States.

For years, prior to the war, the German government was held up as the leading example of governmental efficiency. This efficiency was very generally ascribed to the special capacity of the German people for organization and the conduct of administrative affairs. This was a mistake. There is no evidence that the German people, as individuals, possess any such capacity superior to that of the American people. The real secret of the undoubted superior administrative efficiency of the old German government over that of the United States lay in its autocratic character. If one seek for the fundamental explanation of why, in the United States, there are found such evils as the pork barrel, log-rolling, special legislation, the spoils system, and a failure to develop a permanent, trained, technical personnel of administration while, in Germany, these evils either did not exist at all, or were on a much smaller scale, the answer must be found in the fundamental difference between the governments of the two countries in respect to the location of administrative authority.

In the autocratic government of Germany, administrative authority was located in an organ which was wholly outside of the field of influence of party politics and largely outside of the field of popular control. Every administrative officer from the monarch himself to the lowest petty clerk occupied this independent position. They were officers of the state rather than servants of the people. As such, their interest was in the state, rather than in that of any particular locality or class. Under such circumstances it was natural that there should be developed a permanent trained bureaucracy for the conduct of affairs, that a consistent work program should be adopted, and that proper means for financing such work should be employed. All this was due to the fact that matters

of administration were in the hands of agents who stood outside the field of party politics and popular pressure. It has been the good fortune of the author to have himself had a practical experience in the conduct of public affairs under a system of government such as this. For a matter of eight years he was one of the six heads of administrative departments of the government of Puerto Rico. In this government all administrative powers were vested in a governor and these six heads of departments, all of whom were appointed by the President of the United States. It resulted from this that Puerto Rico had, from the administrative standpoint, an autocratic government. All administrative authority was vested in officers who were wholly outside the field of party politics in the Island. They did not owe their office to any political party and were under no obligation to any section or class of the community. Consequently, Puerto Rico had an administration of its governmental affairs that was similar in all essential respects to that of old Germany. It is the belief of the author that, in point of efficiency, the Island had an administration of affairs equal, if not superior, to that possessed by any State of the Union. This was not due to any special competence or highmindedness of its officials but to the conditions under which they had to perform their work. In Puerto Rico, as in Germany, the secret of administrative efficiency was in the independence of the administrative personnel rather than in the personal qualities or attainments of the individuals constituting this personnel.

Although the old government of Germany has been selected as an illustration of the advantages offered by an autocracy in the field of administration, it is evident that the new autocracy of Germany has within itself the capacity to realize them to a like degree, and that the same is true of the autocratic governments of Italy and other modern authoritarian states.

Moral Merits of Popular Government.—In the foregoing we have sought to set forth what are believed to be certain incontestable advantages of the autocratic type of government. There is, however, another side to the story. A government is not a mere piece of inanimate administrative machinery. It is an organization

that must be operated by human beings, and in the interests of human beings, who themselves take an active part in its operation. Good government means something more than good administration. It means a government that in its practical operations has regard for the aspirations and welfare of the people subject to it, rather than the ambitions and interests of those in charge of the governmental machinery. A government thus has its moral as well as its material aspects.

In pointing out the merits of the autocratic type, it will be noted that we have at all times been careful to qualify these merits as technical ones. We are now going to see that if such a government be considered from other than its purely technical aspect, that if it be looked at from its human or moral side, it presents elements of danger if not positive defects.

In our consideration of the nature of the state, it has been pointed out that the state may be deemed to have, from certain standpoints, a personality. As the possessor of personality, it may thus have interests distinct from, if not indeed antagonistic to, the interests of the individuals composing it. To cite but one common illustration: generally speaking, it is to the interests of the state to raise the largest sum possible by way of taxation or otherwise, while it is often to the interest of the individual to keep his tax burdens at the lowest feasible sum. It is precisely in this lack of correspondence, if not positive antagonism, between the interests of the state and of the individual that lie the dangers inherent in the autocratic type of government. The danger is that the autocrat, holding his office as he does by no election by the people and legally not subject to their control, will look upon the interest of the state as his primary concern. He represents, indeed personifies, the state. If he exercise his powers to their full legal extent, he is, as Louis XIV expressed it, the state. In many cases the people themselves are looked upon by him almost as enemies of the state, or at least that portion which opposes his wishes is so regarded. The people are subjects not citizens.

This combination of the ruler representing the state *quâ* state, and possessing legally unlimited powers is what gives to the auto-

cratic government its special character. In practice, it profoundly affects the manner in which the affairs of government are actually conducted, both in time of war and of peace. It means that in peace the management of the affairs of government will be in the hands of a bureaucracy. The term Bureaucracy is here used in a restricted or special sense. All governments have to make use of a systematically organized personnel for its administration. Such a personnel in a popular government, is, however, quite a different thing from the bureaucracy of an autocratic government. The officials of the latter are, it is true, necessarily recruited from among the people. Once recruited, however, they constitute an officialdom with a tenure of office dependent upon the will of the ruler and largely independent even of that control which comes from the working of popular opinion. This profoundly affects their whole attitude towards the people in respect to the performance of their duties. It is this attitude which has given to the term bureaucracy its special significance as representing a narrow, self-sufficient, and arbitrary, if not actually oppressive, administration of affairs. This contrast between the two systems of administration has been effectively brought out in the excellent study of European police systems made by Raymond B. Fosdick. In his introductory chapter dealing with "The Purpose and Function of the Police," he says: [2]

To this divergence of problems (economic conditions, etc.) as well as to the distinct historic evolution through which each of the European nations has come, we must look for an explanation of the differences in power and authority conferred upon the police. In no two countries is the conception of the police in its relation to the public exactly the same. In Great Britain the police are the servants of the community. Their official existence would be impossible if their acts persistently ran counter to the expressed wishes of the people. They depend for their effectiveness upon public sanction. They are civil employees whose primary duty is the preservation of public security. . . . In sharp contrast is the continental theory, which, evolved from the necessities of autocratic government, makes of the police force the strong arm of the ruling classes. The continental policeman is the servant of the crown or the higher authorities; the people have no share in his duties, nor indeed, any connection with them.

[2] *European Police Systems* (The Century Co., New York, 1916).

This same difference in respect to the status of officials and their attitude towards their duties and the public runs through all branches of civil administration in the two types of government. Apart from the fact that in an autocracy a bureaucracy of this character may act with an arrogance and disregard of the wishes, or even rights, of the public is the further fact that, in it, the ruler has at his disposal a machine that he can use with tremendous force to mold public opinion to his way of thinking, or to coerce the people in the election of such representatives as the political system of the autocracy may make provision for. That the power so possessed by the autocrat is so used no one familiar with political conditions in Germany and Italy will for a moment deny. Indeed, its use in this way is not only acknowledged but justified as perfectly legitimate in order to advance the welfare of the state as the autocrat sees it.

It is, however, when we turn from a consideration of the influence of an autocracy upon the conduct of governmental affairs in times of peace, to its influence upon the question of the state being plunged into war, and the conditions under which war shall be prosecuted and finally brought to a termination, that we have to do with the most serious danger that is inherent in an autocracy. Militarism is the twin brother to bureaucracy. Or, to change the metaphor, bureaucracy and militarism constitute the two arms of the autocrat through which he is enabled to maintain himself and make his will prevail. There has been much confusion in the United States in respect to precisely what is meant when the term militarism is employed as a term of opprobrium. Militarism as so used is not synonymous with the maintenance of a large military establishment. The distinction between the two is precisely that which we have sought to draw between a bureaucracy in an autocracy and an administrative personnel in a popular government. A military system in an autocracy means the existence of a force of soldiers who are agents of the state, rather than guardians of the public. They constitute a military class accountable to no one but the autocratic ruler. The fact that the soldiers are drawn from the people, or that the system rests upon the principle of universal,

compulsory military service, in no way lessens their character. The distinction between them and the army of a popular government is essentially one of kind, not of size or degree.

If now the attempt is made to draw together these various lines that we have been considering, it will be seen how inevitably they all tend to make of an autocracy a restless and aggressive state, one which is a constant menace to its neighbors and to the peace of the world. In an autocracy, the state is not looked upon purely as a means brought into existence, or maintained, by the people composing it for the promotion and protection of their individual interests as is the case in a popular government. It is deemed to have a life, interests, and ambitions quite distinct from those of its constituent citizen members. This emphasized personality finds concrete expression in the person of an autocrat who believes that he has his authority by something analogous to inherent right, and that he represents the state, rather than the people composing the state. It is inevitable that, under these circumstances, such an autocrat will deem it his primary obligation to seek to advance the interests and ambitions of the state as a state. Now the interests and ambitions of a state as a state are largely of a political and territorial character. They represent the desire to possess or control the largest possible portion of the territory of the globe and to exercise the largest possible influence in the determination of the destinies of its population. These ambitions can thus be fully realized more or less only at the expense, absolutely or relatively, of other states. If to this situation is joined the fact that the individual, having from the very nature of his status and tenure of office this ambition, also has supreme control over all the powers of the state, as represented by its civil and military forces, appreciation can be had of the almost inevitability that an autocratic government will be one seeking constantly to extend its influence and power in the world, and, as such, one constituting a permanent menace to the peace of the world. This, in fact, has been the actual experience in respect to autocracies throughout history.

If now we attempt to sum up the long comparison we have made of these two types of government, it will be found that application

of the autocratic principle means a government of the people by a bureaucracy, civil and military, deriving its powers not from the people or accountable to them, but from a ruler who determines his own powers; a government in which the primary concern of the government is the promotion of the interests and ambitions of the state *quâ* state; one in which consequently the interests and freedom of the individual must give way to the interests of the state whenever the two are believed to be in conflict; one where this power of the government over individual conduct will extend to all fields, religion, education, politics, expression of opinion through speech or the press, organization of associations of all kinds, etc.; in a word, one of directed and regulated conduct in the internal field and aggressive action in the field of foreign politics.

The application of the principle of popular government, on the other hand, means a government of the people by a governing personnel deriving its powers from the people, and subject in the last analysis to their control; one in which the primary interest of the government is the promotion of the interests of the individual *quâ* individual; where the government is looked upon merely as an agent of the people for promoting and protecting their interests and rights; where every emphasis is placed upon individual liberties and rights; where the government engages in activities and enforces rules governing individual conduct only where such action can be clearly demonstrated to be in the interests of the individual; one where it is of the essence of the system that the individual shall have all possible freedom of religion, thought, opinion, and right to express such opinion and, especially freedom to organize and take such action as is necessary to make known his opinions and wishes in the field of politics.

Possible Incorporation in Popular Government of the Advantages of Autocracy.—Were we to stop our comparison of the two types of government at this point, it might appear that the people of the world are confronted with the necessity of making a choice between two desirable ends without the possibility of obtaining both. If the thing most desired be a strong government, one that can act resolutely and consistently in promoting and ag-

grandizing the position of the state in the community of nations and in securing a maximum of efficiency, economy, and dispatch in the conduct of internal affairs, the choice will apparently have to fall on the autocratic form of government. If, on the other hand, the thing most desired be possession of the maximum of individual liberty and freedom from coercion and control, the choice will have to fall upon the popular form of government. This, however, is not so. No such inescapable alternative exists. While it is true that most popular governments now in existence do possess the defects that have been set forth, these defects are not inherent in the system. Efficient administration is not impossible in a popular government; it is merely more difficult to attain. We have taken pains to point out the merits inherent in an autocracy and the corresponding disadvantages under which popular government labors, as it is now for the most part organized. It is only in this way that the student can appreciate why the former should so rapidly have gained the adherence of some of the most intelligent people of the globe, and, at the same time, come to a full appreciation of the fact that, if popular government is to be preserved in other countries, it is important that the people of such countries shall realize the defects that characterize that form of government now in existence and resolutely apply themselves to their correction. The direction that such action should take will be pointed out in the pages that follow when that type of government is taken up for intensive examination. Here, however, it may be said that the more fundamental steps to be taken are the reallocation of powers, or, to speak more correctly, of the relative spheres of influence of the legislative and executive branches; the correction of the excessive distribution of governmental powers among a multiplicity of political agencies to be brought about by a simplification of the governmental structure; provision for an administrative personnel having a permanency of tenure, selected and promoted strictly in accordance with merit and thus removed from sectional and party interests; and the establishment of a scientific system for the determination of and provision for the financial needs of the government.

There can be little question that the rise of autocracy is to be ascribed in no small degree to the widespread dissatisfaction with parliamentary institutions as they have existed and operated in many of the countries of Europe—a dissatisfaction that exists to a greater or less extent in our own country, as is evidenced by the disrepute into which our legislative bodies have tended to fall. Everywhere these bodies have shown their incapacity as organs for the formulation of logical, consistent programs of political action having regard solely to the general welfare and as agencies for regulating the details of administrative action. The correction of this condition of affairs is to be found only in transferring these responsibilities in large part to the executive; that is, the establishment of a system under which the legislature, while not surrendering its function as the controlling organ, will look to the executive, acting as head of the administrative for the formulation of the government's annual financial and work program; and which will vest in him far larger powers than he previously had in respect to the determination of the agencies to be employed in putting legislative determinations into execution. The need for action in this way has arisen in large part from the revolutionary change in the problem of government that has taken place as a result of the increasing magnitude and complexity of the tasks that governments are called upon to perform. A system that works satisfactorily when conditions are comparatively simple and governmental tasks are relatively few must be replaced by one better adapted to the changed conditions.

It is a matter of no little significance that this need for the augmentation of the relative powers of the executive has been fully recognized and acted upon by one of the leading popular governments, that of England, and is receiving increasing recognition in our own country. In England, responsibility for the formulation of public policies and of the legislation required for putting them into execution has passed from the parliament to the executive; and in this country, the tendency to look to the chief executive, the President and the governors of the states, for leadership in the policy determining and legislative field is con-

stantly becoming more pronounced. No further evidence of this is needed than the ready acceptance by the American people of the dominant rôle now [1935] played by the President in influencing legislative action by Congress and in the vastly increased administrative powers that have been conferred by the latter body upon him. This tendency is one wholly to be welcomed. If it be accompanied by the other action that has been mentioned—namely, the simplification of the structure of government, the larger concentration of political authority in substitution for the present widely diffused political powers, the creation of an administrative personnel resting squarely upon a merit basis and offering a permanent career to the members, and the general adoption of an efficient system for the handling of the financial affairs of the government—there is no reason why popular government may not provide a system for managing the political affairs of a nation comparable in efficiency to that of an autocracy, and still not sacrifice in any important respect the individual liberties so greatly cherished by the American people.

PART III

THE ESTABLISHMENT OF GOVERNMENTS

CHAPTER X

THE FORMULATION OF CONSTITUTIONS

In the preceding pages we have seen that a people desiring to constitute itself a state has to make certain fundamental decisions before it can proceed to the work of creating a government through which its powers as a state shall be exercised, and that, according as one or another decision is reached, a distinct type of government results. With these questions answered, there is then presented the problem of making provision for the actual conduct of the affairs of the state; in other words, the establishment of a government.

Governments Established through the Formation of Constitutions.—The primary means employed by a community which has decided to make itself a state in organizing a government for the conduct of its political affairs consists in the formulation of a definite set of principles or provisions embodying, or setting forth, the fundamental features of the government to be created. These principles or provisions, as thus formulated, are collectively known as the constitution of the state. In describing this act by which a form of government is determined, use has been made of the term formulation instead of adoption, since one of the most important features of any political system consists in the fact that it is undergoing constant change. This change, as we shall shortly see, takes place in a number of ways. It is sufficient here, however, to point out that the problem of the formulation of a constitution has two distinct phases; that of the adoption of a constitution, in the first place, and its subsequent modification, as changes in political ideas or conditions take place. Each of these phases has its own particular problems which will have to be separately considered.

Written and Unwritten Constitutions.—In all cases, except that of England, these fundamental provisions of the governmental

system are set forth in a formal document or documents which, as a document, is styled the constitution. For reasons which will appear hereafter, England has never reduced her basic political provisions to written form. These principles, however, are none the less definitely determined, and England, for this reason, is said to have an unwritten, as opposed to a written, constitution. In the past, great stress was laid upon this difference in practice of England and other countries. That important consequences flow from it cannot be doubted. It is now recognized, however, that, in the case of all countries, there are many fundamental political provisions which are not set forth in their formal constitutions but which none the less must be deemed to be of a constitutional character. Of no country is this more true than of the United States, which, of all countries, is supposed to have a peculiarly inflexible constitution. Thus, to illustrate, our constitution makes no reference to such important political institutions as the president's cabinet, the congressional caucus, or political parties. No one can question, however, that these institutions constitute as integral parts of our political machinery as do almost any of those formally provided for in the written constitution. The difference between written and unwritten constitutions is thus one of degree as well as kind. The most important fact, from the standpoint of the study of government, resulting from this is that only a very imperfect idea can be obtained of the governmental system of a country as it actually exists and functions by a mere study of its written constitution. The constitution considered alone is a dead, inert thing. It is this that makes the study of government, seemingly an easy task, in fact one of great difficulty, requiring in high degree the exercise of the inquisitive and analytical faculties.

Methods of Establishing Constitutions.—We have pointed out that the task of formulating a constitution has two distinct phases; that of its adoption in the first instance and that of its subsequent modification, and that each of these phases presents special questions or problems requiring separate consideration.

If we analyze the problem of the adoption of a constitution in the light of history it will be found that modern states have ac-

quired their constitutions in four different ways: (1) by grant, (2) by deliberate creation, (3) by a process of gradual evolution, and (4) by revolution.

Establishment of Constitutions by Grant.—Historically, most modern states began their careers as, or speedily became, in effect, autocracies. The adoption of systems under which the governmental organization and the exercise of governmental powers are carefully described and defined in written constitutions is a distinctly modern phenomenon. It dates only from the end of the eighteenth and the beginning of the nineteenth centuries. In the development of their constitutional systems, most existing states have therefore had to start from the point where all governmental authority was vested in the hands of their rulers and was defined only in a most general way. Under these conditions, the first and simplest method by which a state may become endowed with a constitution is that whereby the ruler decides that the interests of the state and of its citizens require that the organization and powers of the government and its several agencies shall be carefully set forth in a formal document. This has meant that the ruler has consented, usually as the results of pressure which he did not find it possible to resist, to surrender his position as an autocrat, and has undertaken to exercise his powers in accordance with certain principles and through certain agencies and procedure. This decision he has put into execution through the promulgation of a document or constitution embodying these principles and provisions by which he undertakes to be bound in the future exercise of his political powers. A constitution so established is said to be one by grant, or to be *octroyed*.

It is immaterial, from the standpoint of political science, whether the ruler's motive in doing this is a belief that the powers of government and the manner of their exercise should be defined in a document of a formal, legal character, or is due to a desire to avoid consequences that might follow should he refuse to do so. The important thing is that this act is his act. When a government is established in this way, the sovereign ruler acts as does a constitutional convention. He frames the constitution that is to provide for

the new form of government, adopts it, and promulgates it. The actual drafting of the constitution may be performed by some other body, but such other body acts merely as his agent and the work must be adopted by him as his own. Legally, the act is his and his alone, and it is his approval that gives it validity.

Important consequences flow from this. Of these the most important is that the ruler, in promulgating the constitution, does not thereby divest himself of his sovereign power. Sovereignty continues to reside in him. He merely undertakes to exercise this power in the manner set forth in the constitution as promulgated by him. Legally, he can, at any time, modify, suspend or wholly abolish it. Actually, however, the attempt to do so may provoke such discontent on the part of his subjects that he will only make the attempt under most unusual circumstances.

In point of fact, most constitutions owing their origin to this method of establishment have been granted by rulers as the consequence of demands on the part of their subjects which they have found it impossible, or impracticable, to resist. They have been forced from rulers by threatened revolutions.

Establishment of Constitutions by Deliberate Creation.—A second method by which a constitution may be established is its formulation and adoption by a people at the time that they constitute themselves a state. A constitution so adopted may be said to be adopted by deliberate creation. It is hardly necessary to point out that opportunities for the establishment of states and the adoption of a constitution in this way were in the past comparatively rare. It could only occur where a community, the members of which had already had a political experience, emigrated to a territory the inhabitants of which, if any, had no political organization, whose authority the emigrants were willing to accept. It is indeed doubtful whether any instance of the creation of a sovereign state in this way can be cited, though a close approach to it has been made in the organization of governments by the colonists who have gone out from England for the purpose of establishing settlements beyond the seas. In all, or practically all, of these cases, the persons participating in the enterprise have, however, continued to

recognize the political authority of the mother country. Though their action was analogous to that of the creation by deliberate act of a constitution for an independent state, the act itself had to do only with the establishment of a government for the conduct of local affairs.

Establishment of Constitutions by a Process of Gradual Evolution.—A third method by which a constitution may come into existence is to be observed when a state secures its form of government as the result of slowly working evolutionary changes. This takes place when a state starts with an autocratic government and gradually secures a government in which political authority is deemed to reside in the hands of the people. This transfer of the seat of sovereignty usually takes place in the following way. Originally both the possession and the exercise of sovereignty rest in the hands of the ruler. Gradually, as a matter of fact, though not of law, the power of determining how this sovereign power shall be exercised passes from the hands of the ruler to persons selected in some way by, or at least claiming to represent, the people. In time, what was at first merely a *de facto* power comes to be looked upon as a *de jure* power. Long acquiescence in the determinations of these representatives has deprived the ruler of any real power to act counter to them and he in turn accepts the new principle of sovereignty as the *de jure* as well as the *de facto* condition of affairs.

The leading, if not the only, example of a representative government coming into existence through this method is furnished by Great Britain. Certain acts, such as the election of William of Orange as king by the Parliament in 1688, may constitute decisive steps in this evolution; but the process itself has been one of gradual change in the attitude of the people towards their government and of acquiescence and action on the part of their rulers in this change. In the case of Great Britain, this change was not only a gradual one, but an almost unconscious one. So much so was this the case that the change was primarily in the spirit of political practice rather than in the form of action. The result is a political system in which the government, as a matter of form

and mode of procedure, is still of an autocratic character, while as a matter of fact the government in its practical workings is as thoroughly a representative government as any existing in the world. It is due to this fact that it is so difficult for the foreigner, and indeed for the Englishman himself, to describe or understand the English system of government. Only as one ignores the form and attends to the actual workings of this government can its essential character be determined. It is for this reason also that we are confronted with the unique phenomenon of a state having a definite form of representative government without possessing any written or formulated body of supreme law corresponding to the constitutional documents of other countries.

It should be noted also that a representative government may come into existence as the result of an evolution from a democracy. This occurs when the people of a democracy find that it is impracticable for them to manage their political affairs directly, and decide that it is preferable to entrust such management to agents selected by them to represent them in this capacity. This is what has taken place in recent years in those territorial subdivisions of the Swiss Republic and the United States (the forest cantons of the former and the towns of New England of the latter), which attempted at the start to have their political authority exercised directly by their electorates. Steadily this democratic practice has been departed from, and the governments of these communities have assumed more and more a representative character. In like manner, as we have pointed out in the case of our own government, a form of government originally intended to be of a purely representative character may, by the adoption of such devices as the initiative, referendum and recall come to partake of the nature of a mixed democratic-representative form of government.

Establishment of Constitutions by Revolution.—A final, and much more usual, method by which a constitutional system is established is revolution. This occurs when people living under an autocracy becomes dissatisfied with that form of government and decides, notwithstanding the opposition of its ruler, to estab-

lish in its place a government resting upon the principles of popular sovereignty and representative government, or, vice versa, a people living under a representative form of government overthrows that form and establishes one resting upon the principle of autocracy. This is the method through which were established the representative governments of France, our own Republic, and most of the succession states that have come into existence as the result of the break up of the old German and Austro-Hungarian Empires.

Dual Character of Revolutions.—In studying these movements whereby a change in the form of government is forcibly brought about, it is of interest to note that revolutions present two distinct phases or aspects. They are an armed protest against existing misgovernment or oppression by the governing authorities and they are an assertion that the government, purely as a matter of political theory, should rest upon another principle. Neither one of these motives alone seems to be sufficiently powerful to bring about a successful revolt. History furnishes few if any instances of where a people, having little to complain of in the way of misgovernment or oppression by their political authorities, have overthrown such government simply because they had become persuaded that their government, as a matter of political theory, should rest upon a different principle as regards the location of sovereignty. On the other hand, it is equally noteworthy that it is exceedingly difficult to rouse a people to revolt against an existing government, once firmly established, no matter what the degree of misgovernment and oppression to which they may be subjected, until they have been persuaded that some great principle is at stake. The need in other words seems to exist that a revolutionary movement should be justified in theory as well as in fact. It has always been difficult on the part of many to understand the significance that historians have attached to the preachings of Voltaire, Rousseau and other writers of the eighteenth century in bringing about the French Revolution. The explanation of this is found in this characteristic of the people which we are considering. These writers furnished the philosophical basis for the revolu-

tion. Not until a justification for their action, as a matter of theory or principle, was established, could the people be brought to the point of the united action required for success.

In the case of the establishment of our own government, we have evidence of this need for a philosophical justification of the act of revolt. This justification was formally expressed in our Declaration of Independence. Whatever may have been the conditions causing the people to take action, the rebellion itself was made to establish certain fundamental principles in which the people at that time firmly believed.

Difficulties in Establishing a Government by Revolution.—Of all methods of establishing a constitution, revolution is much the most difficult, and resort to it is justified only when all other means have failed. Rarely is success achieved except after years of turmoil and bloodshed. The French Revolution led to years of fighting before stable political conditions were finally achieved. In one sense it might almost be said that the final end sought was not attained until the establishment of the present form of government in 1871. In the case of our own revolution, we had to go through the so-called critical period of thirteen years from 1776 to 1789 before a definitive constitution was adopted. The revolution of 1911, in China, by which the old Manchu Dynasty was overthrown, has as yet failed to give to that country a permanent constitution. The revolutions in Turkey and Persia some years ago proved to be abortive and the existing form of government that those countries now have was secured only after a period of strife and uncertainty.

The situation confronting a population which has succeeded in overthrowing the established government is as follows: It finds itself in the first place owing allegiance to a government which can hardly be other than a temporary makeshift, one hastily organized for the purpose of conducting a revolutionary movement rather than for providing a permanent constitutional system. In the second place this government is, strictly speaking, an illegal one, or at least one which was illegal in its inception and, even after all resistance against it has ceased, probably still lacks that

affirmative action on the part of the people that will give it full legality in accordance with the doctrine of popular sovereignty. The government in existence is essentially one known as a provisional government, a *de facto* but hardly as yet a *de jure* government. The problem is to convert this provisional, imperfect, *de facto* government into a permanent, carefully elaborated, *de jure* government, or rather to supplant it by one having these characteristics.

In solving this problem the provisional government has several lines of conduct open to it. It can, in the first place, assume that it has full power to act as the representative of the people in respect to the work of both drafting and adopting a permanent constitution and, if the people acquiesce in this assumption, it must be presumed that they in effect have the necessary public sanction for the exercise of this power. This is the position that was taken by the Constituent Assembly which was brought into existence by France to pass upon the question of continuing the War of 1870-1871 with Prussia or making peace. This assembly, though elected only for the purpose mentioned found itself, on the conclusion of the treaty, the only general political authority of the land. It was quite proper for it therefore to undertake the work of a provisional government. It, however, went much further than this. In addition to acting as a *de facto* or provisional government, the assembly took to itself the function of a constituent assembly or constitutional convention and proceeded, after an interval of several years, to formulate and enact a series of fundamental laws, which, with certain amendments, form the existing constitution of the present French Republic. It is a matter of no little interest to note, therefore, that, though France is now undoubtedly in possession of a full representative government, the constitution providing for this government was neither drafted nor adopted by a body directly authorized by the people to undertake this work, nor was it ever referred to the people or approved by them in any way other than by tacit acquiescence in an accomplished fact. It should be noted, however, that the body performing this work was not a self-constituted body but was com-

posed of members duly elected by the people, though not elected for the express purpose of performing this work.

This method by which the revolutionary government, or the one which has secured *de facto* control of the political machinery, itself devises the new form of government and puts it into effect is, it need hardly be said, the one that has been followed in establishing the existing governmental systems of Italy, Germany, Turkey, and Russia, though, to a certain extent, the formality of having these systems ratified by the previously existing parliamentary body has been observed.

A second line of procedure is for the provisional government frankly to recognize both its provisional character and the limited scope of its authority and, proceeding on this basis, to take the necessary steps by which a permanent government may be established by deliberate affirmative act of the people. If it adopts this policy, it can do one of three things: (1) it can itself draft a constitution and submit it to the people for adoption; or (2) it can provide for the assembling of a special body the members of which are selected by the people in some way for the drafting and adoption of a constitution; or (3) it can provide for a body of this character having the function simply of drafting a constitution which shall be submitted to the people for approval. It need hardly be pointed out that the latter method constitutes the one most nearly conforming to the principle of popular sovereignty. It is therefore the one that should be adopted unless the existence of bitter divisions among the people regarding the character of government to be established are such as to render it likely that a resort to this method would invite further dissensions and possible disaster to the whole undertaking.

In the case of our own federal constitution, provision was made for the assembling of a special convention for the framing or drafting of a constitution, and that convention, after completing its draft, provided that it should go into effect as soon as it had been ratified, that is, adopted, by nine States acting through State conventions assembled for that purpose. A nice question is presented as to whether the convention was not a revolutionary body

since no provision was made for any such agency by the existing constitution, the Articles of Confederation, that document making no provision by which constitutional changes might be affected.

In the foregoing, we may seem to have gone out of our way in discussing the character of political revolutions. We have felt justified in doing so both on account of the inherent importance of the subject and the extreme difficulty that exists in making students appreciate the importance that matters of pure political theory play in determining the course of historical events and the character of governments enjoyed by states. Next to the World War itself, the greatest political movement of modern times has been the widespread revolts in various quarters of the globe, in Russia, China, Turkey, Persia, and elsewhere, for the establishment of new forms of government. If we are to understand this movement, we must see clearly that these revolutions essentially have as their issues great political principles rather than a mere protest against governmental conditions and practices.

CHAPTER XI

THE MODIFICATION OF CONSTITUTIONS

Turning from the manner in which constitutions are adopted to the manner in which they are, or may be, modified, we have to deal with an entirely new set of problems. Though supreme importance attaches to the act of adopting a constitution in the first instance, and the problem is one which has yet to be met by many politically backward peoples, it is not one of practical importance to most nations.

Most western nations have firmly established constitutional systems. The problem of constitutional development is thus that of the modification of these systems rather than that of creating new constitutions out of hand.

This problem, moreover, is one which is always with us. Particularly is this true of the United States at the present time. After years of unquestioned adherence to certain fundamental principles lying at the basis of both our federal and our State constitutions, public opinion has begun to question whether they have the virtue or validity which has been so universally attributed to them in the past. There is scarcely a State among our forty-eight commonwealths in which important constitutional changes are not now being seriously urged. The problem of the modification of constitutions is thus a very live one.

Policy in Respect to Ease of Modification of Constitutions.—If an analysis of this problem of constitutional reconstruction be made, it will be found that it involves two sets of considerations: (1) the policy that should be adopted in respect to the facilitation or the restriction of the effecting of modifications in a constitution once adopted; and (2) the procedure that should be provided by which this policy is to be carried into effect. The first is one of principle; the latter one of means. Manifestly, no intelligent action

can be taken in reference to the second until a decision has been reached regarding the first. Before taking up the various means by which constitutional changes may be effected, as illustrated in the political system of our own and foreign countries, we shall therefore seek to point out the considerations that have to be borne in mind in formulating a policy regarding the amendability at all of constitutions.

Stability a Prime Requisite of a Constitutional System.—One of the first requisites of any constitutional system is that it shall have a high degree of stability.

It is universally recognized that neither political nor social progress can be achieved when the fundamental law of a land is undergoing constant modification. Not only do frequent changes in the constitutional system of a country necessarily introduce disturbing elements into the life of a people, but the mere fact that such changes are possible, and likely to occur, tends to keep the people stirred up; and the uncertainties regarding the future thereby endangered act as a powerful deterrent upon undertakings of all kinds. More important still, the making of frequent changes tends to weaken that allegiance to, and respect for, the government that is such an important factor in securing an orderly conduct of political affairs.

Flexibility a Requisite.—The high desirability of giving stability to a constitutional system is questioned by no one. There is, however, another consideration directly opposed to it that is no less important. Were conditions to be met by a government unchangeable, were the political ideas and aspirations of a people always the same, and were the framers of constitutions all-skilful in framing a constitution to meet these conditions and aspirations, it would be possible to frame a constitution of such a character that no need for its subsequent modification would afterwards arise. It need hardly be said that no one of these three conditions actually obtains. Conditions of life are constantly changing. The rise of the factory system, the conversion of most western countries from almost exclusively agricultural communities to ones in which industry, as distinguished from agriculture, is highly

developed, the aggregation of people in industrial centers and large cities, the development of means of communication, and the enormously greater complexity of modern life, as compared with that of former times—to mention but a few of the changes which have taken place in recent years and are still at work—have altered fundamentally the problems that a government has to meet.

No less fundamental are the changes that have taken, and are taking, place in respect to the attitude of the individual towards the state and the government through which the latter acts. From an organ having but a few essential functions, such as the conduct of foreign relations, the maintenance of order and the protection of life and property, the government is now looked upon as an instrument through which all matters affecting the general welfare may be handled. To the great importance attached to the obligations of the government in respect to the protection of the liberties of individuals, as individuals, has succeeded an attitude of mind where the emphasis is rather laid upon the obligation of the government to promote social welfare, to take the steps necessary to bring about a greater equality of opportunities and a more equitable distribution of wealth, income and means of enjoyment. It is not too much to say that the change that has thus taken place in respect to the attitude of mind towards the functions of government during the past few generations is little short of revolutionary.

Finally, it is hardly necessary to state that the framers of constitutions are not infallible; and it is certain that actual experience under a system will reveal features in which improvements can be made. Especially is this true when the system framed represents one with which the people concerned have never had any practical experience. The attempt made in the latter part of the eighteenth and in the nineteenth centuries to create governments based on the representative principle constituted a great experiment in government. Though the principle that it was sought to establish was clear enough, there was almost nothing to guide constitution framers as to the proper means to be employed in putting this

principle into operation. It would have been a miracle had they made no errors.

It follows inexorably from this that the constitution of a modern state should be susceptible of progressive change or growth as errors of judgment in its framing are revealed by experience, as conditions change, and as the political aspirations and beliefs of the people undergo alteration. We have, then, two directly opposing considerations which have to be met—the need for stability and the equal need for flexibility. The problem is to adopt a policy and procedure in respect to the amendability of constitutions that will represent a compromise between or a harmonizing of the two —a scheme which, while permitting changes to be made, will yet insure that they will not be effected until it is certain that they represent real improvements, and correspond to a real, and not a merely temporary, change in the political desires of the people.

Two Methods of Securing Both Stability and Flexibility.—A study of the problem of harmonizing these two apparently conflicting and opposing principles of stability and flexibility shows that two means may be employed for this purpose: (1) the drafting of the provisions of the constitution in such a way that great freedom of action is possible under them; and (2) the provision of means through which the constitution as first drafted may be formally amended.

Of these two methods the first, if not the most important, is the one upon which reliance should primarily be placed. Provision of means by which a difficulty may be avoided is always preferable to provision of means by which a difficulty after it has arisen may be met. Flexibility is not synonymous with susceptibility to change. Indeed, it is almost the opposite. A flexible object is one which can be bent without breaking, one that can be adjusted to new conditions without undergoing any structural change. In this sense, stability and flexibility are not incompatible qualities. The presence of the latter attribute may add strength to the former. The really stable constitution is, in fact, the flexible constitution, the one which is of such a character that it can adjust itself to new condi-

tions and to new demands without itself undergoing structural change.

We have here to do with what is probably the most important consideration involved in the whole problem of constitution drafting. It is one that should never be out of the minds of those having responsibility for this work. The extent to which it is met determines in no small degree the excellence of work performed.

Turning now to the means that may be employed in meeting this consideration it will be found that but one method is possible —that of confining the provisions of the constitution as far as possible to absolutely essential features and leaving all less essential matters to the determination of the government which is to be established by the constitution. To the extent to which this principle is violated there is created a constitutional system which is rigid but not necessarily stable, since to that extent the probability of necessity for change in the constitution itself is correspondingly increased. To illustrate, a constitution may provide, as does our federal constitution, in effect, though not in so many words, that the conduct of the administrative affairs of the government shall be entrusted to such administrative departments as may be created by the government from time to time for that purpose; or, it may provide, as do the constitutions of a number of states, that these affairs shall be entrusted to certain enumerated departments. In both of these cases, the same fundamental provision is made. In the former, however, the whole matter of determining the number, designation, and jurisdiction of these departments is left to the decision of the government established by the constitution. The hands of the latter are left free to take such action as conditions at any time warrant. The constitution in this respect thus has a high degree of both flexibility and stability—flexibility, since provision once made can readily be changed as new conditions, demands or opinions arise; stability, since the likelihood of any change in the constitution itself being necessary is rendered correspondingly remote. In the latter case we have, instead of flexibility, rigidity; instead of stability, instability. For with a definite determination of the number and

character of the administrative departments that shall be employed, all opportunity is destroyed for readjusting the administrative organization to meet new conditions, needs or desires, and a direct incentive for the effecting of changes in the constitution is created, since, by that means alone, can needed changes in this respect be made.

The foregoing but illustrates a choice that must be made in respect to almost every feature of a constitution. That document may thus content itself with providing that justice or law shall be administered through a system of courts organized on a certain basis, or it may seek to set forth in detail the scheme of judicial tribunals to be established, the manner of selecting the judicial officers to man them, the procedure to be followed, etc. It may content itself with providing for a legislature of a certain character, or may seek to determine precisely not only how that body shall be constituted, but the manner in which it shall exercise its powers. It may give a broad grant of powers to the government to be established, or it may restrict these powers by all sorts of limitations and restrictions.

A primary principle of constitution drafting should, therefore, be that of giving to the constitution the widest possible flexibility compatible with definitely determining the general character, organization, jurisdiction and modes of procedure of the government to be established by it. No detail should be inserted unless this detail is essential in order that the general scheme of government and its powers may be made clear.

The Constitution of the United States a Model of Proper Drafting.—In no respect has our federal constitution received greater praise, or merited it, than on this point. It stands today a model of self-restraint—confining its provisions to those features which were deemed to be absolutely essential. That exceptions occur is due not to any lack of appreciation of the importance of the principle, or desire to follow it, but to the fact that no judgment can be infallible. To this, primarily, is due the fact that the United States, notwithstanding the tremendous changes which have taken place in conditions, problems of govern-

ment, and political thought, has had a progressive development of its political life and institutions with but few fundamental changes in its constitution as first drafted.

The Constitutions of Many of the States of the United States Examples of Poor Drafting.—If we turn from our federal to our State constitutions, we find quite a different condition of affairs. The earlier constitutions were marked by an adherence to this principle of dealing with essentials and of expressing provisions in general terms to an extent almost as marked as in the case of the federal constitution. Later constitutions have departed widely from this principle. Many of the more recent constitutions represent the attempt to regulate in the greatest practicable detail the manner in which the government shall be organized, the jurisdiction or power of each organ and the precise manner in which these powers shall be exercised. The reason for this change in policy, which is one that cannot but be regretted, is not difficult to find. It consists in the fact that the electorate has not been satisfied with the manner in which its agent, the government, has discharged the duties entrusted to it. Particularly has it been dissatisfied with the working of that part of the government to which it entrusted the exercise of legislative powers. That the electorate was justified in being dissatisfied with the manner in which its representatives performed their duties is unquestionable. It is when we turn to the means taken by the electorate to remedy this condition of affairs that one may well doubt whether the proper line of action was taken. The question of the reform of our State governments is too large a one to be discussed here. It is pertinent, however, to point out that the electorates of our States, having discovered that the governments they had established did not work satisfactorily, had two alternatives open to them. They could either have sought to discover and correct the defects in the system of government established by them; or have sought to control the abuse of power, or failure to exercise power properly, by themselves prescribing in greater detail how the power granted should be exercised. For the most part, they have chosen the latter alternative. In doing so, a great mistake has been

made. The failure of State governments has been due, not to the fact that too broad powers have been granted to them, but to the fact that the problem of distributing these powers among the several organs of government was not properly worked out, and to the further fact that adequate provision was not made by which the electorate might exercise its second great function, that of holding its agent to a strict accountability for the manner in which it discharged the duties placed upon it. The fault, in other words, was that of the electorate which first failed to work out properly the problem of government, and then failed to discharge properly its duties as a principal, or rather failed to provide itself with the means for discharging these duties properly. A due appreciation of this fact would have led it, not to lessen the power of government, to tie its hands, as it were, and thus render it if anything more ineffective, but to correct the defects in respect to the location of powers within the government.

Excessive Rigidity of Early Constitutions.—There can be little doubt that almost all the earlier constitutions, that is, those which were adopted in the latter part of the eighteenth or first half of the nineteenth centuries were characterized by an excessive rigidity. Certain of them were in terms declared to be unchangeable. Others imposed such conditions for the effecting of a change as to make them in practice almost immutable. This was due to various causes. In the first place, political thought was largely dominated by the idea of natural law. The belief was widely held that there were certain rights, and certain political principles, which owed their validity to natural law, and were consequently true for all time and under all conditions. Believing in this, it was the desire of constitution framers, not only to incorporate these rights and principles in the constitutions they were framing, but to incorporate them in such a way that they could not be departed from, or only departed from with extreme difficulty.

In the second place, the world had not yet come under the influence of the evolutionary point of view. It was not until the middle of the nineteenth century that Darwin and Wallace made their epoch-making contribution to natural science that existing

forms of life have attained their present character as the result of long evolutionary processes and attempted to formulate the laws governing this change. This contribution revolutionized, not only the study of natural science, but that of practically all thought. In all fields, whether of morals, political institutions or social conventions, it became apparent that the same principle could be applied in interpreting present conditions. The idea that existing conditions were permanent was destroyed. Thought was turned from the attempt to discover eternal verities to that of the discovery of laws of growth, development, and adaptation.

In no field was this changed attitude of mind more radical, or productive of more important results, than in that of politics. The problem of politics, from being one to determine and establish a system corresponding to natural law, became one to determine and establish a system which, while conforming to existing conditions, should be susceptible of progressive change as the conditions to be met changed.

A third reason for the placing of great difficulties in the way of change in constitutional provisions arose from the fact that these early constitutions represented the establishment of popular government as opposed to autocracy. The feeling was strong that though the former had won a victory over the latter, all danger of a restoration of absolutism was by no means over. Coupled with this was an equal fear that the people might go to the other excess and establish a political democracy which, in the eyes of the framers of the constitution, meant little less than giving the country over to the dangers of mob rule. There was nothing like the belief or trust in democracy that prevails at the present time. It was for these reasons, and to avoid these dangers, that extreme precautions were taken to make constitutions difficult of amendment.

Present Tendency towards More Flexible Constitutions.— It is hardly necessary to state that present conditions are quite different from what they were at the time these early constitutions were adopted. Political thought is no longer dominated by the belief in natural law. The effort is no longer made to devise

political institutions that are of universal applicability. The view is now held that the excellence of a political system is determined by the extent to which it conforms to actual conditions, and consequently that such systems should change as conditions change. It follows inevitably from this that political thought now holds that it was a great mistake to attempt to establish a constitutional system that was unchangeable, or one that could be changed only with extreme difficulty; and that all constitutions should contain provisions making it possible for their provisions to be changed when it is clearly evident that change is needed.

In the case of the constitution of the United States, the feeling is now strong that the provisions contained in it setting forth the manner in which it may be amended are much too restrictive. What these provisions are will receive attention in another place.

Two Methods of Modifying Constitutions.—With this knowledge of the general considerations involved in making provision of means by which constitutions may be modified, we now turn to an examination of the several methods of procedure by which such change may be effected. Consideration shows that established constitutions undergo changes in two distinct ways: (1) through the formal alteration of the provisions of the constitution as expressed in writing; and (2) through the informal process of changing the manner in which these provisions work by placing upon them a changed construction or by developing political institutions and practices which profoundly modify the way in which they operate in actual practice. Each of these methods requires separate consideration.

Modification by Formal Act.—In practically all cases, states, in adopting constitutions, have recognized that, as the result of either changing ideas or altered conditions, alterations would have to be made in their provisions from time to time. With one or two exceptions, therefore, they have inserted in their constitutions provisions setting forth the manner in which such changes may be effected. These provisions are among the most important of any contained in the constitution. In practice, they vary widely in different governments. It is, therefore, of extreme importance

that the considerations that underlie these variations should be clearly understood.

Distinction between Constituent and Legislative Powers.—In considering this problem of the formal modification of constitutions, no progress can be made until a clear grasp is had of the fundamental distinction between what are known as constituent and legislative powers, since the whole question of the methods that shall be employed in effecting constitutional changes centers in the extent to which this distinction is recognized and separate provisions for their exercise is made.

Constituent powers are the powers of the legal sovereign to determine the character, organization, jurisdiction, and mode of procedure of the government which shall act for it in the actual conduct of state affairs. They are the powers exercised by a principal in creating and fixing the powers and conduct of an agent. They represent thus the direct exercise of sovereign powers in their most important manifestation. From their very nature, they are original, inherent, and unlimited.

Legislative powers are the powers possessed by the particular organ, or organs, of the government to which the legal sovereign has entrusted the authority of enacting subordinate legal regulations required for carrying out its functions. They are the powers to frame rules of conduct possessed by an agent. In contradistinction to constituent powers, they are derived, not original; delegated, or specified, not inherent; limited, not unlimited. They extend no further than the grant authorizing their exercise, and must be exercised in strict compliance with the manner laid down in such grant.

It is hardly necessary to point out the importance of this distinction. It lies at the basis of the whole question of legality of acts of the government. It means not only that every act of ordinary administration must rest upon a legal warrant in order to be valid, but that every act of legislation itself shall have a like warrant. When the Supreme Court of the United States is called upon to decide the validity of an act of Congress, it is doing nothing more than passing upon this point, viz., whether Congress has

or has not acted within the scope of its delegated authority and in conformity with the procedure laid down for it by the sovereign authority in creating and determining its powers. This matter of the distinction between constituent and legislative powers is one which runs through the whole conduct of government affairs. Here, however, we are interested in it only as it affects the problem of constitutional revision and amendment.

Importance in Practice of Distinction between Constituent and Legislative Powers.—It would seem that with a distinction so clear and important as that between the rule-making powers of the legal sovereign and the agency government, separate provision would be made for the exercise of the two. The situation is one which would seem to call for means by which the sovereign electorate might, independently of its agent, from time to time determinc for itself what changes, if any, it desired to make in respect to the character, powers, or procedure of such agent. Actually, however, this is by no means always, nor even usually, the case. A study of the provisions of existing constitutions regulating the matter of constitutional change shows that to a very large extent the sovereign electorate, instead of retaining in its own hands the exercise of this most essential power, has, in fact, surrendered it into the hands of its agent, the government. The extent to which it has done so and the conditions that it has imposed upon its exercise determine the whole character of the system that it has established for the revision and amendment of constitutions.

Complete Surrender to the Government by the Electorate of the Exercise of Constituent Powers.—With this as a principle of classification of methods of constitutional revision and amendment, we have first to consider the case where the electorate surrenders, or acquiesces in, the complete surrender of the exercise of constituent powers into the hands of the government. This takes place where no provision is made in the constitution for the electorate, acting on its own initiative, to propose amendments to, or a revision of, the constitution, or to ratify or reject proposals that may emanate from the government. Where this system is adopted, we have the anomalous situation that the government,

though theoretically but an agent, and morally responsible to its principal, the electorate, is, in fact, independent of the latter. It determines for itself its own character, organization, powers, and procedure. The government in fact becomes the legal sovereign, and only political sovereignty remains with the electorate.

This system of constitutional determination may or may not involve an abolition, from the legal point of view, of the distinction between constituent and legislative powers. The electorate, in surrendering the exercise of constituent power into the hands of the government, may provide that the latter shall exercise it through the same organs and with precisely the same procedure that is employed in exercising its legislative powers; or, it may provide that the two powers shall be exercised through separate organs, or, if the same organs are employed, that use shall be made of a different procedure. If the former of these two methods is employed, the legal distinction between the two powers is totally destroyed. It becomes impossible to distinguish between a constitutional enactment and an ordinary statute, and the courts in fact make no attempt to do so. The result is that one is justified in saying that a state with this system has no legal, though it may have a political, constitution.

If the second policy is pursued, the distinction between the two powers is maintained intact. Manifestly the object sought in maintaining this distinction is to secure, if possible, a situation where what may be called the fundamental political law of the land, that is, the law determining the character, powers, and general conduct of the government, shall not be subject to change with the same ease as laws of a less important or basic character. Some of the more important devices employed in securing this end are: that a revision or amendment of the constitution can be effected only by the legislative chambers, specially organizing themselves as a constitutional convention for that purpose; that action will require the affirmative vote of an absolute majority of the entire assembly instead of a majority of a quorum, as in the case of ordinary legislation, or a vote greater than an absolute majority, such as a two-thirds or three-fourths vote; that affirmative action

will have to be taken by two successive legislatures, etc. This latter method is important since it provides for a means by which the electorate may indirectly at least participate in the work.

The English System.—The English political system furnishes a perfect example of this principle. The electorate has not only wholly surrendered to the government the exercise of constituent powers, or, to speak more correctly, has not only acquiesced in the complete exercise by that body of constituent powers, but has imposed upon that body no obligation to exercise these powers in any manner different from that followed in the enactment of ordinary law. The result is that, in England, to-day, not only does the exercise of complete sovereignty reside in the government itself, but no legal distinction exists between constituent and legislative powers. This is the secret of the sovereignty of Parliament, so justly deemed a distinctive feature of the English political system and the justification of the statement often made that England has no constitution.

It is hardly conceivable that a people desiring to organize a political system resting upon the principle of popular sovereignty should by deliberate act create a government of this character. The explanation of its existence in the case of England, and the fact that it there gives satisfactory results in practice, are found in three facts: (1) the historical conditions under which it has come into existence by a process of gradual evolution from an autocracy; (2) the development of certain canons of political practice, known as conventions of the constitution, which, while having no legal force, are yet held to be almost as binding as though possessing that attribute; and (3) the development, outside of the government, of a body of law, known as the common law, an essential feature of which is the protection of personal rights.

Among these canons of political conduct, or constitutional conventions, to use the term more usually employed, the most important from the standpoint of constitutional modification, is that Parliament, notwithstanding its legal power so to do, should pass no act having for its purpose a material change in the political

system of the country until an approval of such change has been given by the politically sovereign electorate. This approval is given by the latter through a general election placing in power the party pledged to put into effect the change proposed. This convention, though not a legal obligation, is none the less effective, since a disregard of it in any vital respect would in all likelihood lead to an opposition that would drive the offending Parliament from power.

Though this system has given very satisfactory results, we should not, however, blind our eyes to the fact that it is one which can be expected to work satisfactorily only under the special conditions which have made it workable in Great Britain and that even there it by no means always works smoothly. Whatever may be the fact in the case of Great Britain, it is certainly true that as a general proposition a failure to make a distinction of such importance as that between the exercise of constituent and legislative powers throws open the door to abuse of power in communities that have not had the political development of that country and are not possessed of that inherited and ingrained attitude of mind towards the functions of the government, and the manner of their exercise, and of political obligations in general, which is so characteristic an attribute of the English people.

In the second place, it will be noted that, under the English system, not only has the electorate absolutely no legal means by which it may initiate and have considered proposals for constitutional changes, but it has no means by which it may directly express its opinions regarding proposals of this character originating with its representative, Parliament. The only way in which it can approve or disapprove of a proposed change is by supporting or defeating the party pledged to put into effect such change. It may well happen that an electorate may desire that a certain party shall have charge of the government while it is opposed to that particular feature of this party's program represented by the proposed change. It is then placed in the difficult position where it has either to endorse a proposal with which it is not in accord or to defeat the party with whose general policy it is in agreement

and by which it wishes to be represented in Parliament. This situation was very much in evidence during the critical period of 1909-1914 when the momentous issues were up for decision regarding the political status of Ireland, the power of the House of Commons in respect to matters of finance, and the position and power of the House of Lords in the political system, matters going to the very foundation of the political system of the country. In no one of these cases did the electorate have the opportunity of expressing its opinion squarely upon the single issue involved.

The French System.—The political system of France furnishes an excellent example of an electorate that has pursued the second policy of surrendering full constituent powers to the government. We have seen that the present constitution of France was not only adopted by a body which was not expressly elected by the people as a constituent assembly, but that, after it was framed, it was not even referred to the people for ratification. This constitution, which consists of three so-called constitutional laws enacted February 24, February 25, and July 16, 1875, in like manner accords to the people no participation in the effecting of constitutional changes, either in the way of initiating proposals for change, or in the ratification of changes proposed by the government. It does, however, provide that a special procedure shall be employed by the legislature in carrying out constitutional revisions and, by so doing, maintains the distinction between constitutional laws and ordinary statutes. The provisions of the constitution governing this matter are as follows: [1]

> The chambers shall have the right by separate resolution, taken in each by an absolute majority of votes, either upon their own initiation, or upon the request of the President of the Republic, to declare a revision of the constitutional laws necessary.
>
> After each of the two chambers shall have come to this decision, they shall meet together in National Assembly to proceed with the revision.
>
> The acts effecting revision of the constitutional laws, in whole or in part, shall be passed by an absolute majority of the members composing the National Assembly.

[1] Constitutional laws on the Organization of the Public Powers, Feb. 25, 1875, Art. 8.

It will be seen from the foregoing that, though provision is made for the exercise of constituent powers in a manner different from that employed in the exercise of legislative powers, the two powers are not only wholly vested in the government as in the English system, but are exercised by what is in effect the same organ of government. Furthermore, it is of importance to note that the special safeguards which are purported to be thrown around the effecting of constitutional changes are, from the legal standpoint, more or less illusory. This arises from the fact that in France no court is deemed to have the power to declare invalid a law duly enacted by the National Assembly. The latter body thus has the power to ignore the requirements of the constitution regarding the employment of a special procedure making constitutional changes. It can pass acts, which will be enforced, which are not in conformity with the constitution and which in effect constitute modifications of that document.

In this connection, another fact of importance should be noted. In France, notwithstanding the requirement of a special procedure in making constitutional changes—a requirement that does not exist in England—neither the same effective safeguard against constitutional change exists as in the latter, nor is the electorate in practice given the same opportunity to express its will regarding proposed constitutional modifications. This arises from the fact that France has not as yet developed as a binding obligation the convention that no constitutional change of importance shall be effected until a general election has intervened between the proposal and its final consummation. We have here an interesting illustration of the importance of judging political systems by the manner in which they operate as well as their purely legal provisions.

System of Retention by the People of Participation in the Exercise of Constituent Powers.—In marked contrast with the system whereby the exercise of constituent powers is wholly surrendered to the government is the system under which the electorate retains in its own hands a participation, and usually a controlling voice, in the exercise of this power. In order to under-

stand the various ways in which this participation can take place, certain important distinctions must be made.

Distinction between the Revision and the Amendment of Constitutions.—The first of these is the distinction that should be made between the revision of constitutions and their amendment. By revision is meant the operation of reconsidering and reframing the constitution as a whole. By amendment is meant the operation of effecting a change only in some one or more specific features of a constitution. This distinction is not one merely of relative importance of the two operations. The two present quite different considerations in respect to the policy that should be pursued in permitting them. It is one thing to provide means by which a constitution may be changed in some one or more particular features and quite another to provide that the whole question of the character of the constitutional system that a country shall have shall be thrown open to examination and redetermination. It is not to be wondered at, therefore, that states have pursued different policies in respect to the two; that many, while permitting proposals for specific changes to be brought forward and adopted, provide no means whereby an entire revision of their constitution may be effected.

Of equal importance is the fact that radically different methods of procedure are required in carrying through the two operations. In amending a constitution, no special organ is required for the consideration, formulation, and adoption of a proposal. It is otherwise, however, in the case of a revision. Here, not only must every single feature of the existing constitution be subjected to careful examination, a study be made of the manner in which each has worked in practice, and every alternative provision be considered, but the fundamental character of the constitution as a whole must be inquired into. Such a work can be performed properly only by an organ specially organized for the purpose. The operation of revising a constitution is in fact strictly analogous to that of formulating and adopting a constitution in the first instance. The only important difference between the two operations is that in the latter case, the work must be done by a body which determines for

itself its procedure, while, in the former, the body must proceed strictly in accordance with the rules laid down for it in the constitution to be revised.

The Revision of Constitutions.—Where provision is made in a constitution that it may be subjected to wholesale revision, two points have to be provided for: (1) the fixing of the means through which a decision shall be arrived at that a revision shall take place; and (2) the providing of the procedure that shall be employed in effecting the revision.

The matter of deciding whether a revision of the constitution shall be entered upon may be determined in a number of ways. The more important methods that have been provided in modern constitutions are the following:

The most effective of all methods is that where the constitution makes it mandatory that the work of revision shall be entered upon once in so often. This is accomplished by inserting in the constitution a provision that at certain intervals constitutional conventions shall be convened for this purpose.

A second method, somewhat analogous to this, but not so stringent, is that where, instead of making the convening of a constitutional convention mandatory at certain intervals of time, the constitution simply provides that once in so often the question shall be submitted to the electorate as to whether it is its desire that such a convention shall be held. This is the provision in a number of the constitutions of the States of the United States.[2] If this method of determination is adopted, differences may exist in respect to the character of the vote that will be required in order to authorize the assembling of a convention. A bare majority of the votes cast may suffice, or there may be required an affirmative vote greater than this. If it is desired to make the requirement very rigid, the requirement may be that a certain proportion of the total number of registered voters shall vote for the revision. A point of no little importance is whether this vote shall be had in connection with the regular election of officers of the

[2] For example, Maryland, Maine, Minnesota, Wisconsin, Virginia, New Hampshire, and New York.

government or at a special election. If the former plan is adopted, there is danger that the question of revision of the constitution will be deemed to be a party issue and will not be considered to a sufficient extent on its intrinsic merit. If the latter is adopted, it is difficult to get a general participation on the part of voters in the election.

Another method of providing for a constitutional revision is that where provision is made by the constitution that the question of convening a constitutional convention shall be submitted to the people whenever a certain number of qualified voters petition that this be done. This method is known as "the initiative" and is analogous to the initiative permitted in certain governments in respect to purely legislative matters.

Finally, there is the method whereby the determination as to whether the revision of the constitution shall be entered upon is left to the government itself. When this is done, the provision may be that the government shall determine when the question of revising the constitution shall be submitted to the people; or that the government, without getting any such expression of opinion from the people, shall itself be the authority to determine when the work of revision shall be entered upon.

In respect to the character or composition of the body that shall perform the work of revision, the weight of opinion and experience is in favor of having this body composed of persons specially selected for this purpose. The objections to having the work of revision performed by the legislature, either sitting as such, or reconstituted as a constitutional convention, are two. In the first place, the members of that body have not been selected by the electorate on account of their special qualifications for this work. They have been chosen, rather, as representing particular party divisions or because of their adherence to particular political policies. In all modern communities having a representative government, there are always men of high legal and other attainments who are not actively engaged in politics and who thus are not members of the legislature, but whose coöperation in the work of determining the political system of the country is very desirable. In the

second place, it is in the highest degree desirable that, as far as possible, purely party considerations shall be eliminated from the work of revising political systems. The ideal method is that of getting together a body of the most competent men who, in a purely non-partisan manner, will seek to determine the character of constitution best adapted to the general needs of the community. This cannot possibly be secured where the work of revising the constitution is entrusted to the legislature, either sitting as such, or reconstituted as a constitutional convention.

There remains the final point of the manner in which the work of the constitutional convention shall be ratified. Here two questions of great importance are presented. The first is whether the constitution as revised shall or shall not be submitted to the electorate for ratification. The second is whether, if the constitution is submitted to the electorate, the latter shall be given an opportunity to pass upon the changes effected in detail, approving some and rejecting others, or whether it must accept or reject the revision as a whole.

The first of these questions we have already considered to a certain extent in our discussion of the problem of the original adoption of a constitution. There is much to be said in favor of each of the two alternatives. The devising of a constitutional system is a work requiring the highest order of abilities. The results reached must rest upon considerations that it is difficult adequately to get before a large electorate. There is good ground for the position that the opinion of a carefully selected body of highly qualified representatives is of greater value than that of a general electorate. There is, moreover, no departure from the principle of representative government when the electorate gives to a body not constituting a part of the government the power to act for it in respect to determination of the character of government that shall be provided. On the other hand, there is always the danger that the work of the convention, no matter what its intrinsic excellence, may not represent the real wishes of the electorate; and a system that does not do so violates the essential principle of popular government.

In deciding this question as to whether a revision of a constitu-

tion should be referred to the people for ratification, much will depend upon the particular conditions of each case and especially the character of the electorate. It may thus well be that while ratification by the electorate is desirable in a country such as the United States, it would be undesirable in a less politically developed country such as China. In the United States, practice has varied widely, not only among the several States, but at different periods of our history.

In regard to the second question, also, arguments can be urged in favor of each policy. A political system should possess unity. Its several parts should all correspond to certain fundamental principles in respect to the possession, location, and exercise of political powers. There is thus a danger that if the electorate is permitted to accept some changes and reject others, the outcome will be a system lacking consistency and unity. On the other hand, it is a rather hard alternative to place before an electorate that it must accept changes with which it is not in accord in order to secure other changes that it does desire. In actual practice, however, the choice is not so difficult as would here appear. Most revisions maintain intact the essential principles of the existing constitution. The work of revision thus, for the most part, represents little more than a series of distinct amendments. When this is the case, it would seem preferable that the electorate should be given an opportunity of passing upon each separate amendment proposed. Where, however, the revision provides for a form of government radically different from the one in existence, it is preferable that the electorate should be called upon to pass upon but the single question of the adoption or rejection of the revision as a whole.

The Amendment of Constitutions.—In the foregoing we have considered the problem of effecting an entire revision of a constitution. It remains for us to examine the procedure that may be employed in subjecting a constitution to partial changes, leaving the document as a whole intact. Modification of a constitution in this way is known as its amendment.

Distinction between the Initiation, the Adoption, and Ratification of Amendments.—In entering upon this matter, the first

point to be noted is that the act of amending a constitution involves three distinct operations: (1) the initiating or bringing forward of proposals for amendments; (2) the consideration, formulation, if need be, and adoption or rejection of these proposals; and (3) the ratification of such action. This threefold distinction is of importance since not only must each point be specially covered in providing means for effecting amendments to constitutions, but the electorate may participate in quite a different way in respect to each.

The Initiation of Amendments.—In respect to the first operation, three lines of action are open: (1) that of leaving the initiating of proposals for constitutional amendments to the government; (2) that of entrusting this duty to the electorate; and (3) that of permitting amendments to originate in either of these methods. When the first procedure is adopted, the legislature is usually, if not invariably, designated as the organ to take action. When the second method is adopted, the electorate retains to itself the power to initiate and compel consideration of any proposal for a constitutional change that it may desire to bring forward. It exercises this power through the filing with the government of a petition bearing the signature of a certain number, or proportion, of the registered voters. Under the third system, as has been stated, amendments may be originated in either manner.

The first of these methods is the one which, until very recent years, was invariably adopted by the States of the United States. Within the past few years, however, a certain number of States have adopted the third. The second and third methods are the ones which have been generally adopted in Switzerland.

The Adoption of Amendments.—The second step in amending a constitution is that of considering, formulating, if need be, and adopting or rejecting the proposals for changes brought forward. When the first method of originating amendment proposals is employed, the requirement usually exists that the legislature, in acting upon amendment proposals, shall act under a procedure and rules different from those followed when it is considering ordinary legislative proposals. A usual requirement is a vote greater than a

majority, usually two thirds of the votes cast, or an affirmative vote of two thirds of the total membership of each house. Rarely is the approval of the governor in American States required as in the case of acts of legislation.

When the second method of initiating proposals is employed, the legislature has no function but that of formulating the proposal, if it is not already definitely formulated, and submitting it to the electorate for final action.

The Ratification of Amendments.—The ratification of an amendment is the act by which an amendment which has been adopted by a legislature is finally approved by the authority exercising legal sovereignty. In some cases, no distinction is made between the acts of adoption and ratification. This obtains when final power is vested in the legislature of a representative government to effect amendments. A usual rule in a representative government is, however, that an amendment, after adoption by the legislature, shall be ratified by the electorate before becoming effective. Various provisions exist regarding the character of the vote that is required to ratify an amendment. In some cases a majority of the votes cast suffices. In others, a vote greater than a majority is required, or the majority must also represent a certain proportion of the total number of registered voters. Under such a provision, an amendment may be defeated even though it receives a large majority of all the votes cast. The object of this provision is to ensure that no constitutional change will be made which does not correspond to a public demand sufficiently strong to ensure that the required number of voters will take the trouble required to endorse it. Another method of ratification is that of requiring the action of the legislature adopting the amendment to be ratified by the next succeeding legislature. This is the Delaware system. Here it will be noted that the electorate, though not voting directly upon the question, has the opportunity of expressing its will indirectly, through the opportunity that is given to it of electing members of the second legislature who favor or approve the ratification of the amendment adopted by the preceding legislature.

When the method of originating amendments through petition

by electors is employed, provision is always made for submitting the question of the final ratification of the proposed change to the electorate. Here, as in the case of amendments adopted by a legislature, various requirements may exist regarding the vote required for ratification.

Special Problems Involved in the Revision and Amendment of Constitutions of Federal Governments.—In a multiple or federal government, the problem of constitutional revision or amendment presents certain considerations which are not present in the case of a unitary government. Here the important question is presented as to whether the modification of the federal constitution shall be deemed to be one which concerns only the federal government and the electorate of the country as a whole or whether action shall be had by, or through, the governments of the constituent states and their electorates individually considered.

This question has been answered in almost diametrically opposite ways by the two leading states having a federal government resting upon the principle of representative government. In Switzerland, the individual cantons, as such, play no part in effecting a revision or amendment to the federal constitution, with the single exception that ratification of a revision or amendment requires the vote of not only a majority of all the electors voting, but a majority of the voters voting in a majority of the cantons. In the United States action must be had both through and by the governments and electorates of the constituent States acting individually. The interest attaching to the government of our own country warrants our considering the system here prevailing with special detail.

The Revision and Amendment of the Federal Constitution of the United States.—The manner in which our federal constitution may be revised or amended is set forth in Article V of the constitution, which reads as follows:

> The Congress, whenever two-thirds of both Houses shall deem it necessary, shall prepare amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for preparing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-

fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

The first point to be noted in respect to this system of constitutional revision and amendment is that, from the strictly legal point of view, it places the United States in the class of government in which the entire power to effect constitutional changes is vested in the government, but with a clear distinction made between the exercise of constituent and legislative powers. The electorate has no means of originating proposals for constitutional change; nor are changes brought forward and adopted by the government submitted directly to it for ratification.

A second point of importance is that, though the term amendment is the only one used, a clear distinction is in effect made between the two operations of amending and revising the constitution. Amendments are proposed by Congress. It lies with the state governments, however, to take the initiative in convening conventions through which all features of the constitution may be passed in review for the purpose of determining what revision of the constitution as a whole may be desirable.

It is not our purpose in this place to consider the wisdom displayed by our constitutional fathers in meeting the question of the difficulties that should be placed in the way of effecting constitutional changes. It should be noted, however, that the system adopted is one which makes the effecting of such changes exceedingly difficult. This is not due wholly to the stringency of the requirements for the adoption and ratification of proposals when these provisions were adopted. At that time there were but thirteen constituent States and the membership of the two houses of Congress was very much smaller, and it was far less difficult to get the required action than at the present time when there are forty-eight States and the two houses of Congress have a membership of 96 and 435 in the Senate and House of Representatives respectively.

In no small part, the great difficulty that now lies in the way of amending the federal constitution has been due to the growth of the country. The question is thus a fair one whether, in view of these changed conditions, a change should not be made in respect to the provisions regulating this matter of constitutional change. Certainly the difficulty encountered in effecting amendment postpones the making of changes long after they are urgently needed and are desired by the great bulk of the people. This is especially true in respect to certain technical features of the constitution which it is very important to have changed in the interest of efficient government, but which cannot get the support required since they do not involve any great political principle appealing to the imagination of voters.

Before leaving this subject it is of interest to call attention to the peculiar way in which the requirement of ratification of amendment proposals by State legislatures has worked in practice. As no time limit is fixed within which ratification by State legislatures of amendments adopted by Congress must be secured, such amendment proposals are deemed to be pending until they are finally ratified. A curious distinction also is made between the conclusiveness of State action when the action is affirmative and when it is negative. If a State legislature votes to ratify an amendment, such action is irrevocable: neither it nor a subsequent legislature can rescind the vote then given. Should the vote, however, be against ratification, there is nothing to prevent the same or any subsequent legislature from reconsidering the matter and voting for ratification. It results from this that an amendment adopted by Congress may remain pending before the State legislatures for an indefinite length of time, and may finally be ratified years after action was taken by Congress, and after the country as a whole may have changed its mind regarding the advisability of making the change. It is unnecessary to say that an arrangement such as this is hardly a satisfactory one. This has been recognized by Congress, in proposing recent amendments to the constitution, by sometimes providing in the resolution for such amendments that ratification by the States, to become effective, must be taken within a certain

period of time. The Eighteenth Amendment providing for the prohibition of the manufacture, sale, or transportation of intoxicating liquors, adopted in 1919, thus contained a clause that "This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several States as provided in the constitution, within seven years from the date of the submission hereof to the States by the Congress."

The Revision and Amendment of Constitutions of Autocracies.—In governments of an autocratic type, the problem of constitutional change is also a special one. Since, in such governments, the source of all authority is the ruler, and any constitution is, legally, but a document issued by him declaring that he will exercise his powers in the manner therein sent forth, it follows that no change in this document can be made except with his approval. In an autocracy, therefore, the ruler is the ratifying authority. In respect to the matter of initiating and formulating amendments, however, the ruler can, if he sees fit, provide that such proposals for changes may originate with some other authority than himself, or he may retain to himself the whole power of even suggesting changes.

The two leading autocracies of the old type, Japan in the East and the old German Empire in the West, have pursued different policies in this respect. The former has adhered rigidly to the principle that the whole constitution-determining power resides in the ruler, though a certain coöperation in the work, where the ruler believes a change is desirable, is given to the legislative branch of the government. Its constitution thus provides that all proposals for amendment of the constitution must originate with the ruler. It reads (Art. LXXIII):

> When it may become necessary in future to amend the provisions of the present constitution a project to that effect shall be submitted to the Imperial Diet by imperial order.

In the old German Empire, on the other hand, provision was made for the origination, consideration, formulation and adoption of constitutional amendments by precisely the same procedure as

ordinary legislative proposals. The constitution thus provided (Art. 78):

> Amendments of the constitution shall be made by legislative enactment. They shall be considered as rejected when 14 votes are cast against them in the Bundesrat.
>
> The provisions of the constitution of the Empire by which certain rights are secured to particular states of the Union in relation to the whole may be amended only with the consent of the states affected.

Under the constitutional system of Germany, as it then existed, the Emperor, as King of Prussia, controlled absolutely the fourteen votes of Prussia in the Bundesrat. The effect of the foregoing provision, therefore, was that, though proposals for the amendment of the constitution might originate and receive consideration in the same manner as any matters of legislation, no change could be made except as it received the approval of the Emperor. He thus had an absolute veto upon all constitutional changes.

Futility of the Attempt to Declare Certain Provisions of a Constitution Unamendable.—Before leaving this subject, it is of interest to note that in a few cases constitution framers, while providing a method whereby the constitution framed by them might be amended, have sought to except certain features of the constitution from the operation of these provisions and to declare them unamendable. Thus Article V of our federal constitution, which determines the manner in which its provisions may be amended, contains the following proviso:

> Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article [those relative to the slave trade and capitation taxes] and that no State without its consent shall be deprived of its equal suffrage in the Senate.

The first of these provisions as is seen was declared to be but temporary. The latter, however, represents an effort to make practically unamendable one of the most vital features of our whole constitutional system, that which gives to each State no matter what its size and population equal representation in the Senate.

A like attempt was made to make certain provisions of the

French constitution unamendable by an amendment to the constitutional laws adopted August 14, 1884. This was done by adding to Section 8 of the Constitutional Law on the Organization of the Public Powers of February 25, 1875, the following:

> The republican form of government shall not be made the subject of a proposed revision. Members of families that have reigned in France are ineligible to the presidency of the Republic.

Another example of an attempt to make certain features of a constitution unamendable is furnished by the Provisional Constitution of China promulgated on May 1, 1914. That document declared that stipulations that had been promulgated determining the treatment of the late Emperor, the Imperial Clan, and the Manchus, Mongols, Mohammedans and Thibetans "shall never be modified."

It must be evident that, though provisions of this character may tend to prevent the changes prohibited, they by no means guarantee that they will not be made and by a strictly legal method of procedure. Should the time ever arrive, for example, when the people of the United States are convinced that the present system of equal representation of the States in the Senate is inequitable, not consonant with the existing ideas of nationality, or otherwise unsatisfactory, all that would be required would be the repeal of this provision prohibiting the change by the ordinary method of amending the constitution. This amendment having been made, a further amendment could then be adopted modifying the provisions of the constitution dealing with the composition and manner of election of the members of the Senate.

The Informal Modification of Constitutions.—In the foregoing we have considered the manner in which governmental systems undergo modification as the result of formal changes deliberately made in their constitutional documents. We are now to consider how equally far-reaching changes may be effected in such systems by a purely informal and, as it were, unconscious change made in the manner in which these systems are made to work in practice. The method here to be considered is essentially the one by which England has evolved her constitutional system.

For many years it was believed that England, with her unwritten constitution, had a great advantage over other states, with their written constitutions, in the fact that her system was susceptible to constant evolutionary changes, as new conditions and ideas developed, while those of other states were not. Closer study, however, has revealed the fact that all constitutional systems, whether possessing written constitutions or not, are, if viewed in their practical operation, undergoing changes in this way. Of no country is this more true than of the United States, which, among all countries, is supposed to have the most rigid of constitutions. This is illustrated, not only in the constantly changing construction placed upon the powers of government through decisions of our courts, but in the development of political institutions and practices which profoundly modify our system of government in its actual operation. These institutions and practices are usually designated as extra-constitutional or extra-legal since they find no recognition in the constitution and only to a slight degree in formally enacted laws.

Probably the most striking example of such a change is presented in the manner in which the machinery provided by the constitution for the election of the President and Vice-President has been made to work in practice. The system for the election of these officers, as provided for by the constitution, is that the States shall select, in such manner as they see fit, electors equal in number to the number of Senators and Representatives to which they are entitled in Congress and that these electors should assemble in their respective States and make known their choice for a President and Vice-President. If no person receives a majority of the votes cast, a selection is then to be made by the House of Representatives from among a certain number of candidates having received the highest number of votes. If was the clear intent of the framers of the Constitution that the duty of making a choice of these officers should rest with these bodies, and that, in doing so, they should use their own best judgment as to who was most worthy. In providing this method it was deliberately intended to avoid the system of electing a President and Vice-President by popular vote. As is well known,

this intent has been wholly defeated. By developing a system under which electors pledged to vote for a designated candidate are selected by popular vote, the President and Vice-President are now in fact elected by what amounts to a popular vote.

Another example of the informal, or extra-constitutional, development of political institutions is found in the President's cabinet as now constituted. No such body is provided for by either the constitution or any law. It has developed solely as the result of the action of successive Presidents who have felt the need of securing in this way the collective advice of the chief administrative officers of the government. Legally, the President is under no obligation to make use of any such body and, if he does, is free to determine whom he shall make members of it. Actually, however, practice in respect to the composition and functions of this body has so hardened as now to have almost the same force as though the character and duties of this body were determined by express provisions of the constitution.

Most important of all political institutions thus informally brought into existence is, however, that of political parties. From beginning to end, the constitution makes no reference to any such bodies. There was in fact no idea on the part of the framers of the constitution that such bodies would play any important part in our political life. In so far as thought was given to the subject at all, parties were looked upon as factions dangerous to the welfare of the Republic. It is hardly necessary for us to point out how vital a part these bodies now play, not only in the political life of the nation, but in the actual conduct of governmental affairs. Not the first beginning could be made towards comprehending our real governmental system except as we understand the principles underlying the organization and operation of these bodies. They constitute as essential parts of such system as if they were expressly provided for in the constitution. We shall consequently have to devote a considerable amount of attention to them in a later chapter.

PART IV

THE STRUCTURE OF GOVERNMENT

CHAPTER XII

THE DISTRIBUTION OF GOVERNMENTAL POWERS TERRITORIALLY

In the preceding pages, an account has been given of the several types of governments among which a people desiring to constitute themselves as a state must make a choice; some of the considerations that should govern them in making this choice; and the procedure that may be followed in actually bringing into existence, and subsequently modifying, the form of government selected. From this exposition of the political problem as it presents itself to a people in its broadest and most fundamental aspect, we now come to a consideration of the more special or technical aspects of the problems involved in giving form to the type of government decided upon. As the interest of the American student lies principally in the problems involved in organizing a government of the popular government type, our attention from now on will be directed primarily to a consideration of those problems as they present themselves in the case of a government of that type. At the same time, however, collateral consideration will be given to the manner in which the problems are, or may be, handled in a government of an autocratic type, to the end that a still clearer appreciation may be had of the differences that exist between these two systems and the consequences flowing therefrom.

The Unity of Government.—In our consideration of the nature of the state, we have shown how unity constitutes one of its most essential attributes. It is of the utmost importance that we should appreciate that a like quality attaches to its government. It is unfortunate that the term "government" is employed to designate the several subdivisions of the machinery made use of by a state for the conduct of its affairs; as, for instance, the government of a province, the government of a city, etc., as if there could exist

within a state a number of distinct governments at the same time. In a very real sense, a state can have but one government. What seem to be separate governments for the administration of public affairs for the country as a whole and such subdivisions as constituent states, provinces, cities and the like are, in reality, but parts of one governmental system. They all constitute but parts of one integrated scheme of governmental organization.

Not until we grasp this point can the first advance be made in studying the governmental system of any country. In all cases we must start from the position that a single governmental system is to be brought into existence. The problem is that of the distribution of governmental powers among parts of this system in such a way that together they will constitute one harmonious scheme for the administration of public affairs. How this problem is met determines in a vital aspect the character of the resulting governmental system.

We have taken pains to emphasize this point since we, in the United States, are apt to think that the essential point of difference between our government and that of countries having what is termed a centralized government is that, in the latter, the conduct of public affairs is entrusted to a single government, while, with us, use is made of a number of governments. This is so only in a very special sense. As we shall see, states having so-called centralized governments have political subdivisions corresponding to our States and these divisions have their special governing authorities. The real distinction is not between having one government or a number, but in respect to the principles in accordance with which a distribution of the totality of governmental powers is made between governmental organs. The United States no less than any other state has a single government.

The Necessity for the Distribution of Governmental Powers.—Though a state can have but one government, it is imperative that the sum total of its powers shall be distributed in some way among distinct organs if they are to be exercised effectively. Such is the extent of the territory of modern states, and such are the amount and variety of work to be done, that it is impossible for

any single authority directly to undertake the performance of all the duties that, under any system, fall within the province of the government. In all governmental systems we find a multiplicity of organs and authorities, each with its more or less distinct field of activities and duties, but each maintaining important relations with the other organs and authorities. Together, they constitute the government of the state on behalf of which this authority is exercised.

Twofold Method of Distributing Governmental Powers—Territorial and Functional.—Two methods of distributing governmental powers may be employed—the territorial and the functional. The territorial method is found where the territory of the state is divided into a number of distinct districts each of which is charged with the performance of certain governmental duties within its boundaries, and each of which is provided with a governmental organization through which such performance may be had. The functional method is that where the distribution to particular organs or authorities is made in accordance with the character of the authority to be exercised.

These two are not alternative methods. Both are employed in the organization of all modern governments. In their employment a wide divergence of policy is, however, possible. Whether the distribution is made in accordance with one policy or another goes far towards determining the fundamental character of the resulting governmental system. According as one principle or another is followed in distributing powers territorially there is brought into existence a type of government known as a Unitary Government or one to which the designation of Multiple Government may be given, though the term more usually employed is that of Federal Government. And, according as one or another principle is adopted in respect to the distribution of powers functionally, types of governments are created known as Governments of a Union of Powers and Governments of a Separation of Powers. The importance of these two questions is therefore such that we are warranted in examining them with exceptional care.

Distinction between Administrative Districts and Political

Subdivisions.—The necessity for the division of the territory of a state into governmental areas arises from two facts: (1) the great extent of territory over which most modern states exercise jurisdiction; and (2) the fact that many functions of government have to do with operations affecting the interests of particular localities rather than those of the country as a whole.

Subdivisions for the first reason are made purely for the purpose of facilitating the administration of public affairs. Of this character are the areas into which countries are divided for the conduct of military affairs, the collection of revenue, the operation of a national postal system, or the performance of any work constituting one of the functions of the general or central government of the state. In all these cases, the powers exercised are powers of the central government. The officers exercising authority in the districts are officers not of the district, but of the central government. The districts themselves have no governmental organization, no governmental powers, no political autonomy. Districts of this character thus are not, properly speaking, political subdivisions; and, in them, we have no territorial distribution of governmental powers in the sense in which we are now employing that term. They are, as stated, merely administrative areas.

If we turn to subdivisions of a country that are made in order to take account of the fact that certain functions of government affect the interests of localities rather than those of the country as a whole, we have to do with quite a different condition of affairs, and one that raises questions exceedingly difficult of satisfactory solution. The problem here is one of splitting up the sum total of governmental powers and distributing them among a number of distinct governmental organizations, each exercising an authority within a fixed territory and in respect to certain determined matters.

The reason for such a splitting up and distribution of governmental powers has already been indicated. It lies in the fact that many functions which it is desirable to assign to government affect exclusively, or primarily, particular communities rather than the country as a whole. It would of course be possible to ignore this

distinction and entrust the performance of all these functions to a single central authority. Two powerful reasons exist, however, why this should not be done. The first is that it would be extremely difficult, if not impossible, to secure an efficient administration of governmental affairs in this way. The burden of work and responsibility that would thus be thrown upon the central organization would be greater than it could effectively bear. The attempt on the part of a central government to determine such conditions and needs and to take the action required in each case would result in intolerable expense and delay.

The second reason is, if possible, of still greater importance. It consists in the fact that, as far as possible, each community should have the management of those governmental affairs which concern itself alone or do not affect the interests of other communities in such a way as to warrant their intervention. This is so for two reasons: first, because it must be deemed just that each community should manage its own affairs; and, second, because the presumption is that affairs will be better administered by the community directly interested in the results obtained than by one having no such interest.

It is for these reasons that, as we have stated, all states of any size have divided their territories into political subdivisions, provided each with a governmental organization, and have made a distribution of governmental functions among them and the central government.

System of Political Divisions of Modern Governments.— Not only have all modern states of any size adopted the policy of dividing their territories into political subdivisions for governmental purposes, but, in doing so, they have brought into existence systems of divisions which, from the territorial standpoint, are substantially similar. First in order we have the entire country treated as one political area. The organization managing its political affairs is known as the Central or National government. Next we find this area subdivided into a relatively small number of grand divisions variously designated as Kingdoms, Constituent States, Provinces, Departments, etc., each with its special government. Each of these

grand divisions is, in turn, further subdivided into smaller areas known as Districts, Counties, Townships, Communes, etc., each also having its political organization. Theoretically, this process of successive subdivision of the territory of a state for governmental purposes could be carried out indefinitely. Actually, it rarely proceeds beyond this point. If there are any other subdivisions, they are usually of a purely administrative character, and as such must, as already pointed out, be carefully distinguished from the political subdivisions of a country which we are now considering.

All countries, moreover, recognize that the problems of government of urban and rural areas are different. All consequently provide for the segregation of distinctly urban areas, and grant to them special political organizations for the performance of the governmental duties specially affecting them. All of these areas may not be treated alike. Each may be given its special political organization and powers; or the several areas may be divided into classes according to the size of their respective populations or some other criterion. A usual distinction is that between the more populous areas which are designated Cities and the smaller or less densely populated centers which are known as Villages. It is, however, by no means unusual for areas of the first class to be further divided according to their size into cities of the first class, cities of the second class, and so on.

Finally, we have the division of the entire area of the state, or the segregation of special areas, for the performance of certain special functions. Of this character are the areas which are set up for the administration of such matters as education, the construction and maintenance of roads, the care of the public health, the relief of the poor, etc. In the United States this policy of dividing the country into special areas for the performance of particular functions of government has been carried to a very great extent. We thus have irrigation districts, levee and drainage districts, flood and river control districts, bulkhead and seawall districts, sanitary and storm sewer districts, school districts, road districts, horticultural and quarantine districts, tuberculosis districts, fire and water districts, lighting districts, bridge districts, stone and gravel dis-

tricts, electrical districts, land improvement districts, and many others too numerous to mention.

It will be seen from the foregoing that we may distinguish five distinct categories of political divisions: (1) the entire area over which the state exercises jurisdiction, (2) major divisions, (3) minor divisions, (4) municipalities, and (5) special activities divisions.

Though five separate kinds of political divisions may thus be recognized, it is desirable for many purposes to consider the last three as constituting a single class. Though distinct in character, these three have two things in common: They are established almost invariably solely for the purpose of providing an organization through which matters of purely local concern may be administered; and only in exceptional cases are any general powers of government conferred upon them. Treating these three for present purposes as one class, we therefore have three main classes of political divisions, the governments of which are usually designated as Central Government, Provincial or State Governments, and Local Governments.

Analysis of the Problem.—The government of a state, we have pointed out, consists of the totality of the organs or authorities made use of by the state for the exercise of those powers which it has decided shall fall within the province or jurisdiction of government. In practice, all states of any size have, as we have seen, made provision for three classes of organizations each exercising authority over a particular area. Concretely, therefore, the problem of the distribution of governmental powers territorially is that of determining the manner in which the sum total of governmental powers shall be distributed among these three classes of political organizations.

If we analyze this problem, it will be found that in it are involved four distinct questions: (1) the determination of the authority by which the distribution shall be made, (2) the division of the country geographically into political divisions, (3) the determination of the powers of government that shall be conferred upon each class of divisions, and (4) the determination of the character of

governmental organization that shall be provided for each class for the exercise of these powers. Of these four questions, the first, the determination of the authority by which the distribution shall be made is, from the standpoint of political science, much the most important. Decision in respect to it determines the whole character of the resulting governmental system. To it we shall, therefore, devote our chief attention.

Determination of the Authority by Which the Territorial Distribution of Powers Shall Be Made.—Throughout our consideration of the organization of a state and its government, we have sought to make clear that the controlling factor determining the type or character of government resulting is in all cases the location of authority. In no case do we find this more true than in respect to the question now under consideration. Upon the possessor of legal sovereignty falls the responsibility for determining the character of government that shall be established for the exercise of the powers which it has decided shall fall within the province of government. This responsibility it can meet in two ways: (1) by itself taking action; or (2) by delegating to its agent, the government, power to act for it. If it acts in the first way, we have an example of the exercise of constituent powers, the decision reached thus being made an integral part of the constitution by which a government is established and its character and powers defined. If action is had in the second way, we have an example of the exercise of legislative powers, the decision being embodied in a document known as a statute or act.

This is the issue which squarely confronts a state in determining the character of the government that shall be established by it. Shall it seek to determine by constitutional enactment how the territory of the state shall be divided into political divisions and the manner in which governmental powers shall be distributed among these divisions; or shall it content itself with creating a single organization in which shall be vested all governmental powers, leaving to that organization the responsibility for determining subsequently the manner in which the powers conferred upon it shall be distributed territorially?

Distinction between a Unitary and a Multiple Government.—This is a momentous question. Next to the question as to whether sovereignty shall be deemed to reside in the ruler or in the people, its answer more than anything else determines the whole character of the governmental system resulting. According as one principle or the other is adopted, there is brought into existence a form of government known as a Federal Government, but which can be more expressively designated as a Multiple Government, or one which in political science is known as a Unitary Government.[1]

All modern governments fall within one or the other of these two categories. To the first belong the governments of the United States and Switzerland; to the second those of Great Britain, France, Germany,[2] Italy, Belgium, Japan and indeed almost all other countries. We have here a classification of governments that is thus of the utmost significance. Manifestly, therefore, it is of prime importance that we should seek to determine the motives which have led to the adoption of one or the other type, the relative advantages of the two types and the character of the results that each type has given in practice. To us in the United States it raises the great question as to whether the multiple system adopted by us is the one best suited to our needs. The statement that this is the only form of government under which a union of the original thir-

[1] The term multiple government, though not generally recognized in political terminology, is here employed in preference to that of federal government which is neither sufficiently comprehensive nor does it bring out clearly the essential distinction between the two types of government. The term federal government, properly employed, covers only the case where a dual division of governmental authority has been made between a central government and that of constituent states. It is quite possible for governmental authority to be distributed among three or more separate political bodies. In fact, the demand often made that the status and powers of municipalities be determined by constitutional provisions definitely raises the question of making such a triple division. There is indeed no logical reason why this demand should stop here and not be extended to the determination of the spheres and activities of other political subdivisions by constitutional provision.

[2] As is subsequently pointed out, the government of Germany, as it existed prior to its reconstitution as a *de facto* autocracy, fell in the first class of multiple governments. Its conversion into a unitary government represents one of the most fundamental changes effected in the governmental system of that country following the rise to power of the Nazi Party led by Hitler.

teen States could be effected undoubtedly describes an historical fact. From this standpoint, the action taken was an act of wisdom and was fully justifiable. This, however, does not absolve us from the obligation of seeking to determine by careful study the intrinsic merits and demerits of the two systems. Action that was the most feasible under the circumstances may not be the best that could have been taken had complete freedom of choice existed. Nor does it necessarily follow that the decision thus made is one which equally well meets conditions as they exist at the present day. Principle and expediency are two quite different things.

From what has been said, it is evident that the distinction between a unitary and multiple government does not lie in the division or non-division of the territory of a state into distinct political areas, since such a division is found in all states of any size; nor even in the nature of the powers or form of government of such subdivisions, but wholly in the difference as regards the authority by which such areas are established and their powers and governmental organization determined.

In a multiple government this distribution of powers territorially is made by the body exercising legal sovereignty as an essential part of the task of framing a constitution by which the powers of government and the manner of their exercise are determined. In a unitary government, no such attempt is made. All the powers of government are conferred in the first instance upon a single central government and that government is left complete freedom to effect such a distribution of these powers territorially as in its opinion is wise. A unitary government thus represents the decision on the part of the legal sovereign to make use of a single integrated system of organization for the exercise of all the powers which it has decided shall fall within the province of government; a multiple government, the decision to make use of two or more distinct organizations for this purpose.

Theoretically, in the latter case, a people could, in framing a constitution, determine the manner in which the country shall be divided into both major and minor subdivisions and the powers and form of government of each. Actually, however, most, if not all,

states which have adopted the multiple form of government have not gone this far. They have contented themselves, in framing their constitutions, with a division of the field of government between a central government and those of major divisions, leaving to the latter the responsibility for making such further subdivisions as may be found necessary. They have thus adopted the multiple principle, in so far as the central government and that of the major divisions are concerned, and the unitary principle, in respect to the relations between the latter and minor divisions. It is of interest, however, to note that at the present time there is a strong movement to extend the multiple principle into the field of state government. The demand that exists for the constitutional guarantee of what is known as home rule for cities is nothing more than the demand that the legal sovereign, in the exercise of its constitution-framing powers, shall provide for the organization of municipal governments and determine, in part at least, what shall be their powers and form of organization.

It is evident that this difference in respect to the authority by which a territorial distribution of governmental powers is effected profoundly affects the status of political subdivisions. In a multiple government the two or more governing bodies are coördinate. In each case, the line of authority runs direct to the legal sovereign. In a unitary government, the political subdivisions are integral parts of the single central government. They are created, their powers defined, and their form of organization determined, by that government.

Comparison of the Relative Merits of Unitary and Multiple Governments.—Having stated the essential differences between a unitary and a multiple government, it remains for us to attempt a comparison of the two forms, with a view to determining their relative merits and demerits. In doing so, we shall put aside, for the present at least, all considerations arising out of the circumstances under which existing governments have been established, or the particular motives, historical or otherwise, which have led nations to adopt one type or the other. We shall seek to make the comparison one solely of intrinsic merits and demerits.

Viewed from this standpoint, it is well to state at the very outset that there can be hardly any question that the unitary type represents by far the most effective form of governmental organization. It is indeed difficult to indicate a single administrative feature in respect to which it is not superior to the multiple type. In the first place, the whole problem of the organization of a government is enormously simplified when the decision is made to establish a unitary government. The constitution-framing body has but the single task of determining the form of government that shall be established for the general government of the country. It does not have to concern itself with the manner in which the territory shall be divided into political divisions nor the manner in which governmental powers shall be distributed among such divisions in order that they may be most efficiently performed. The whole question of distributing power territorially is treated as a matter of internal organization to be decided by the government itself. When a multiple government is established, on the other hand, the constitution-framing body is forced to assume the burden, not merely of providing for two or more governments, but of determining the manner in which the total of governmental powers shall be distributed among them. This is a task of such difficulty that a satisfactory performance of it at one time is almost impossible. We in the United States are only too familiar with the troubles to which the attempt that was made to mark off definite fields of activities for the national and the State governments has given rise. Our whole political history has been marked by bitter contests regarding the jurisdiction of the two governments. Even now, a century and a quarter after the constitution was adopted, the issues growing out of this attempt have by no means all been solved.

A second great advantage of the unitary over the multiple government lies in the greater flexibility that it possesses. In a multiple government, the jurisdictions of the central government and the constituent states have been rigidly fixed by constitutional provisions. The only way by which a change can be effected is therefore that of securing an amendment to the constitution. Were social conditions static and political problems always the same, this

might not be an important consideration. It is hardly necessary, however, to say that this is not the case. Certainly it is not true of the period covering the last hundred or hundred and fifty years, during which the governmental systems of most modern states have come into existence. Nor is there any indication that it will be any more true in the immediate future.

Now the most significant feature of the changes that have taken place during this period, and are still in progress, in so far as they affect the problem of government, is that they bear specially on this question of the territorial distribution of powers. If we go back to the middle of the eighteenth century, we find a situation of affairs where the several parts of a country were in great part self-contained communities. Each produced the great bulk of the commodities consumed by it. From the economic standpoint, they were almost non-competing areas. Under these conditions, it was quite feasible that each should manage its own public affairs independently of the others. The development of improved means of communication and of production upon a large scale, to mention but two of the more important changes that have taken place since that date, have changed all this. The entire area of states, instead of being composed of districts more or less independent industrially, have become single competing districts. What were formerly matters of local concern are now of general interest, and as such ones to be regulated or determined by a general authority. It is indeed not too much to say that the transformation that has taken place in the industrial and social life of nations during the past century or century and a half have profoundly changed the whole problem of government.

As bearing on the question now under consideration, the important point to be noted is that these changes have not taken place all at once. Only step by step have local interests been transformed into general interests. The situation therefore cannot be met by effecting a change in the distribution of powers at infrequent intervals. One of the essential features of a good governmental system should be its ability promptly to modify its organization, and the manner in which its powers are exercised, as new needs and

conditions render such change desirable. This feature a unitary government possesses and a multiple government lacks. Possessed of full powers, a unitary government can at all times modify its scheme of internal organization and distribution of powers as need arises. This a multiple government cannot do except by way of securing an amendment to the constitution under which it is working. This, in a state where sovereignty is deemed to reside in the people, is an operation which, under the most favorable circumstances, involves a great deal of trouble and delay. Experience, moreover, has shown that success in such an appeal can rarely be obtained until conditions have become almost intolerable.

It is not necessary, however, to rest the case for the superiority of the unitary system as regards the element of flexibility upon these general statements. One has only to examine the history of governmental conditions in the United States to find a striking illustration of the disadvantages under which this country has labored, and still is laboring, in this respect growing out of its adoption of the multiple type of government. It was the misfortune of the United States to have adopted its constitution just on the eve of the great changes which, as we have pointed out, have so profoundly altered the practical problem of government. At that time conditions were not such as to demand that many affairs should be administered by a national authority. One can very well believe that the distribution of governmental powers that was then made between the central government and those of the constituent States fairly corresponded to conditions then existing, though opinion even at that time was by no means unanimous on that point. No one, however, can question that conditions since then have radically changed. Notwithstanding this, it has been impossible to secure any important modifications in the distribution of powers then made. The result is that we are now seeking to secure an administration of public affairs under a system of distribution of powers that fails in many important respects to correspond to the needs of the situation. We need only mention by way of illustration the matter of the regulation of railway transportation, the business of insurance, the elaboration of a proper code for the regulation of

the conditions of labor, and the securing of social reforms of various kinds. Only by the subjection of the provisions of the constitution to the most strained construction, and by the adoption of such slow and cumbersome indirect methods as that of seeking to secure uniform action by the several states, is the system made to give even tolerable results. The changing of the provisions prescribing the procedure for amending the constitution so as to make such amendment easier would, of course, improve conditions. Such action, however, could never give to a multiple government the same flexibility that is enjoyed by a unitary government.

The two foregoing advantages of unitary governments have to do with the greater ease and promptness with which such a form of government can be established and subsequently modified in order to meet changing conditions. If now we consider the relative merits of the two systems from the standpoint of their practical operation, we will find the advantage to lie no less with the unitary system. The outstanding feature of the unitary system of government is, as the name implies, unity. All the powers of government are concentrated in the hands of a single set of authorities. All the organs of government constitute integral parts of one piece of administrative mechanism. All the force of government can thus be brought to bear directly upon the problems of administration to be solved. There can be no conflict of authority, no conflict or confusion regarding responsibility for work to be performed, no overlapping of jurisdictions, no duplication of work, plant, or organization which cannot be immediately adjusted.

In a multiple government, the reverse of this is largely true. The powers of government are divided among as many sets of officials as there are major political divisions plus, of course, the central government. The organs of government, instead of being parts of one highly integrated piece of administrative machinery, are parts of as many different administrative systems. Being coordinate as regards their status, there is no way by which their energies can be directed to a common end except by way of securing a voluntary agreement on the part of the several systems to coöperate. This is something which it is often difficult if not im-

possible to secure. The particular interests of the several divisions are not always identical, and, when this is the case, each is apt to prefer what seems to be its own interests over those of the state as a whole. More serious still, this difference of interests may bring the several divisions into sharp conflict with each other or collectively into conflict with the central government.

When the fields of activities are not sharply defined there are certain to be conflicts of jurisdiction, overlapping of authorities, and a greater or less duplication of work, plant, and organization. This condition of affairs is revealed at scores of points in the federal system of the United States. We need only cite the cases of conflict that result in the attempt to regulate the rates and conditions of service of railways, telegraphs, long distance telephones, pipe lines and other means of transportation, to control the organization and operation of industrial corporations, to work out proper systems of taxation, and to develop the material resources of the country where authority is divided among as many bodies as there are major divisions.

Even when there is no conflict of interests, great loss often results when a given work is not under a single direction. Had the United States a unitary government, all of the topographic, geological, and other survey services of the several States, all of their forestry, fishery, and analogous services, would be coördinated into single united systems for the promotion of the several ends for which they have been created instead of constituting independent services often working at cross purposes. Under the latter system, a large duplication of plant and work is inevitable. Each must have its own facilities in the way of laboratories, shops, etc., though in many cases a single or a few central plants would suffice to meet the needs of all.

Many of these disadvantages are not absolutely inherent features of the multiple system, since it is possible to avoid them under it. The point that it is here desired to make is that the difficulty in doing so is far greater under this system than it is under the unitary system. Indeed, under the latter system they are in great part hardly present.

The Problem of Local Self-Government under a Unitary and a Multiple Government.—The chief, if not the only, advantage claimed for the multiple type of government is that, under this system, it is possible to secure that decentralization in the administration of governmental affairs, local autonomy, local self-government, or power on the part of each community to determine for itself how its own particular affairs shall be administered, which is generally agreed to be desirable. In no small degree, the preference that is shown by communities living under this form of government is due to this feeling. In the minds of the general public, and, indeed, in those of many students of political science, this is the essential difference between the two systems. Deep-rooted as this belief is, it is erroneous. There is nothing in the unitary form of government which does not permit of as great a decentralization in the actual exercise of governmental powers, or the conferring of as great autonomy or powers of self-government upon political subdivisions as can be secured in a multiple government. Thus, for example, it is apparent that if the framers of our constitution had conferred all governmental powers upon our central government, that government could have proceeded at once, by legislative act, to divide the country into major divisions corresponding to the existing States and have conferred upon them precisely the same powers and form of government that they now enjoy; or, if it were deemed wiser policy, have granted to the electorates of these divisions the right to frame their own constitutions. This is precisely what the States do in providing for the division of their territories into counties, townships, municipal districts, etc. That, under a unitary government, large autonomy and powers of self-government can be given to major political divisions needs no better demonstration than the manner in which provision has been made by the United States for the government of its territories and dependencies. It would be difficult to frame a system under which an administration of the local affairs was more completely vested in the local government than is the case, for example, in Puerto Rico to-day.

The confusion of thought that exists in respect to this matter

arises from a failure to distinguish between a centralization of authority and a centralization of the use of this authority. A really centralized government is one in which the central government, instead of making use of agencies to which large powers of discretion are granted, attempts itself directly to administer local affairs. It is in this sense that France, in comparison with other countries, has a highly centralized government, and not because it has adopted the unitary form of government.

The Establishment of Multiple Governments Due Almost Wholly to Historical Reasons.—It may be asked why it has come about that, notwithstanding the easily demonstrable superiority of the unitary over the multiple form of government, the latter form has been adopted by so many of the more important and politically enlightened nations. The answer to this is that the decision has been dictated, not by a calm weighing of the relative merits of the two systems, but by historical conditions which have made this the only choice possible. Few states which have once enjoyed independence are willing to exchange their independence for the status of mere departments or provinces in a larger state. Only stern necessity will induce them to make that partial surrender which is involved in becoming a member of a confederation or a federation. Examination of the circumstances under which the great states possessing a federal government, the United States, Switzerland, and Germany prior to the Hitler régime adopted that form of government shows that in each of these cases the state itself was established by the union of what had formerly been independent states. In each case also, the establishment of a single state with multiple government was preceded by an effort on the part of the constituent states to effect a union in which their separate sovereignties would be preserved by leaguing themselves into a confederacy. It was only after a loose union of this character had wholly failed to meet the necessities of the situation that they were willing to take the next step, that of forming a federation which should constitute a single state but in which each of the formerly independent states should still retain that larger measure of autonomy or independence of the common government

which is the distinguishing characteristic of the multiple type of government. It was only with the greatest difficulty that the several constituent states could be induced to take this step. The establishment at that time of a unitary government was an historical impossibility.

The Multiple Governments of Central and South America.—The only instances where a multiple government has been established, except as the means through which a number of previously independent states were induced to constitute themselves into a single state, are furnished by certain of the Central and South American states, notably, Mexico, Brazil, and Argentina. Here the motive was the desire to follow the example of the United States. The success of the latter in establishing a government that at once rested upon the principles of popular sovereignty and gave large power of self-government to the several divisions of the country, was believed to be due in large part if not entirely to the adoption by it of the multiple form of government. In this it is evident that they were laboring under a misapprehension. In view of our present knowledge of the essential differences between the two systems and their relative merits, this decision cannot be deemed to have been other than a political blunder. Apart from other disadvantages that have resulted, the difficulties that these states have had in maintaining a stable government must in part at least be attributed to their failure to concentrate all governmental powers in a single strong central government.

Adoption of the Unitary Type of Government by South Africa and China.—It is a matter of no little significance that the two communities which have most recently been called upon to make a decision regarding the character of government that they should have, South Africa, and China, have decided in favor of the establishment of a unitary government. This decision is all the more remarkable since, in each case, the conditions were not dissimilar from those which had led to the establishment of federal governments by other countries in the past. The Union of South Africa was established by bringing under one government political divisions which previously had not only had no political connec-

tion with one another, except in so far as they owed a common allegiance to Great Britain, but had but recently emerged from a war in which they had taken different sides. In the case of China, the problem was that of establishing a general government for provinces and districts which, it is true, had recognized a common allegiance to the Chinese Emperor, but which nevertheless had long enjoyed such autonomous powers as to give them the status of almost independent commonwealths. They had their own armies and, even when their country was attacked by a foreign power, took only such part in the contest as their individual interests dictated.

Notwithstanding these facts, the decision was made in each case, when the Union of South Africa was created in 1900 and the Chinese Republic established in 1911, to adopt a unitary government; that is, one in which all governmental powers rest in the first instance in a single central government and the major political divisions have the status of provinces instead of that of constituent states. What makes this decision of special interest is that in each case it was made only after the relative merits of a unitary and a multiple government had been carefully canvassed; and, furthermore, that the difficulties encountered by the United States in operating the multiple system were in large part responsible for the choice. The decision indeed may be taken as an illustration of principles of political science overcoming historical conditions.

Conversion of the Government of Germany from the Multiple to the Unitary Form.—Far the most significant event of recent years indicating the recognition of the superior advantages of the unitary over the multiple form of government is, however, the transformation of the government of Germany from the multiple to the unitary type. This was accomplished by a series of four laws or edicts, promulgated at the dictation of Hitler, which followed each other in rapid succession during 1933 and 1934, and which had as their purpose and effect to deprive the several states of the Reich of every vestige of their independent political status and powers and to convert them into nothing more than mere administrative subdivisions of the central government. Features of

this action were the abolition of the legislatures of these several states; the provision that thereafter the chief executive and other administrative officers should hold office by appointment or at the will of the central government; abolition of the Bundesrat, the upper house of the Reich's legislature, through which the states had had special representation in the central government; and provision generally that the conduct of public affairs within their boundaries should thereafter be wholly subject to the direction and control of the central government. At a stroke, such great states as Prussia, Bavaria, Saxony, and other constituent states of the Reich with their long historical traditions, ceased to exist as political units. More than this, it is the avowed intention of the Hitler government to re-subdivide the territory of the Reich into a system of administrative areas which will ignore existing boundaries and be based upon geographic, demographic, administrative, and individual needs, rather than historical traditions. Whatever may be the loss from the sentimental standpoint, there can be no question that this revolutionary action by the Nazis will have the result of enormously strengthening the power of the government, of greatly simplifying the governmental structure and of bringing about a corresponding increase in the efficiency and economy with which public affairs can be conducted.

Universal Tendency in Multiple Governments to Increase the Powers of the Central Government.—The action of South Africa, China, and Germany in adopting a unitary type of government is but one illustration of the fact that the superior advantages of that type of government are being more and more recognized. Of still greater significance is the fact that in all those states which have made a practical trial of multiple government, there has been a steady movement to counteract the disadvantages resulting from a constitutional distribution of governmental powers territorially by progressively increasing the powers of the central government. There is no example of the contrary action being taken.

In the United States the same result has been accomplished, in part by constitutional amendment, but, chiefly, by giving to the clauses of the constitution defining the powers of the central gov-

ernment a broadness of interpretation that certainly was not in the contemplation of the framers of the constitution. In addition, by means of constitutional amendment and interpretation, the control by the national government over the exercise of the powers still retained by the States has been increased. Finally the United States has witnessed a remarkable use by the central government of the powers which were granted to it. It has entered many fields which were originally deemed to be the particular domain of the several States. We need only cite the fields of education, public works, and internal development generally. How great has been the change may be seen from the fact that when the proposal was made in 1849 to create the present Department of the Interior as one of the executive departments of the federal government, it was violently opposed upon the ground that the federal government had nothing to do with the internal affairs of the country. Such an attitude would be almost incomprehensible to the present generation.

The greatest evidence of the transformation of opinion that has taken place in the minds of the people regarding their government is, however, found in the contrast between their attitude towards the central government and the governments of their States in former times and at the present day. It is well known that in the years immediately following the adoption of the constitution, political honors in the service of the States were preferred to those of the central government. It was only a few years, however, before the contrary became true. The steady growth of nationality, of the feeling on the part of the citizen that his primary interest and allegiance was in and to the nation as a whole rather than his particular State is one of the most conspicuous facts of our political history. In connection with this is not only the constantly increasing tendency to look to the central government for action in meeting public problems as they arise but the growing conviction that only by such action can many of our most pressing problems be satisfactorily solved. The old school of States Rights is steadily losing its hold upon the people, and in its place is arising the tendency to look to the central government for the solution of the more important political problems.

Interpretation of these Historical Facts.—If now an attempt is made to interpret these historical facts, there would seem to be no escape from the important conclusion that the adoption of a multiple form of government represents but an intermediary stage in the political development of the modern state. The problem presented is that of creating a strong single state out of a number of previously independent states. The effecting of such an operation can only be had step by step. The desire for union finds expression first in the formation of a loose union, or league, known as a Confederation. From this the next advance is to the formation of a real union known as a Federation in which a single state is created, but a large concession is made to the old feeling of separateness of interests by the adoption of the multiple type of government under which only certain powers of government are conferred upon the central authority. This step taken, there immediately develops a steady growth of the spirit of nationalism and, in response to needs actually felt, a progressive development, both absolutely and relatively, of the powers of the central government as opposed to those of the states. So marked is this that it may almost be said that from the moment the system of multiple government is adopted, the tendency is for efforts to be made to get away from the consequences of the decision that has been made. This attempt, however, is in large part an unconscious one. The result is that the movement towards a unitary form of government takes the several forms of action which we have described rather than steps looking to the deliberate change in the form of government. Only after this movement has progressed a long way, and a people have come to a full realization of the essential differences between the two systems and their relative advantages, can the final step be taken.

This superiority of the unitary type of government over the multiple and its tendency to prevail is excellently stated by Frank J. Goodnow in his work entitled *Social Reform and the Constitution.*[3] After considering briefly the extent to which the more recent federations—Australia, Canada and pre-Hitler Germany—had

[3] Pp. 13-14.

given greater powers to the central government than in the case of the United States, he concludes:

> It may therefore be said that the experience of the civilized world since our constitution was adopted is opposed to a system of federal government which fixes inalterably and in accordance with some political theory of universal application the jurisdiction of the national and state governments. Furthermore the recently established systems of federal government accord greater power to the national government than is ordinarily believed to be accorded by our constitution to the national government of the United States. We are justified therefore in assuming that if the American people were called upon at the present time to frame a scheme of federal government they would adopt one which departed in a number of respects from the one under which we now live, and which would resemble that of Germany or Canada in that it would make provision for greater ease of constitutional amendment and for securing to the national government greater powers than are believed by many to be accorded to the government of the United States under the present constitution.
>
> But we are led to such a conclusion, not alone by the experience of the countries in question but as well by the difficulties we encounter in our own country in our attempts to solve the problems which press upon us with the greatest insistence.

In thus pronouncing as we have in favor of the intrinsic merits of the unitary type of government, we should not, however, close our eyes to the immense service which the development of the idea of multiple government has rendered in the past and may still render in knitting together under a common government peoples whose political interests are largely identical but which for sentimental reasons are unwilling wholly to surrender their political autonomy.

Determination of the Powers of the Central Government and Those of the Constituent States in a Multiple Government. —Having reached a decision, whether as the result of historical accident or of deliberate choice, regarding the manner in which the territory of a state shall be divided for governmental purposes, there is next presented the problem of determining the specific duties and powers that shall be assigned to the several political divisions.

Examination of this problem shows that this distribution of powers can be made in three ways: (1) by enumerating in detail

the powers which are granted to the central and the state governments, respectively; (2) by specifying the powers granted to the central government and declaring that all the remaining powers of government shall belong to the state governments; or (3) by specifying the powers granted to the state governments and declaring that all the remaining powers of government shall belong to the central government.

For reasons which are easily apparent, the first of these methods is rarely employed. Its adoption would require a complete enumeration of the powers of government, something which as yet has never been satisfactorily accomplished, if indeed, owing to constantly changing conditions and political ideas, it is possible of accomplishment in any way that would be permanently satisfactory. The attempt to follow this method would not only give rise to the grave danger that omissions may be made, with the result that neither the central nor the state government would have powers which one or the other should have, but may lead to confusion due to the practical impossibility of so specifying the powers that they would be mutually exclusive.[4] It is evident, therefore, that no matter what the distribution of powers desired, it can be better obtained by employing one or the other of the last two methods. In practice, therefore, the real choice of methods may be said to lie between these two.

The decision in regard to this question—whether the central government shall be one of enumerated and the state governments one of residuary powers, or vice versa—is a matter of the utmost importance. The importance of this choice consists in the fact that the field of government is constantly widening. Steadily increasing demands are being made upon governments to assume duties which in earlier times were believed to be beyond their province. From entrance into these unoccupied fields the government of enumer-

[4] Canada furnishes the leading example where the attempt has been made to follow this method. The enumeration of the powers of the Dominion, and those of the Provinces, or constituent States, is, however, in each case followed by a clause giving, in the first case, a general grant of powers in respect to matters of national import, and, in the second case, a general grant of powers in respect to matters "of a merely local or private nature."

ated powers is largely barred. It has within itself but limited powers of growth and development. Before a government of enumerated powers can assume a new duty, it must be in a position to show affirmatively that such duty falls within the grant of powers that has been made to it. The government of unenumerated or residuary powers is subject to no such limitation. It can enter any field from which it has not been expressly debarred by positive constitutional provisions. Subject to this limitation, it has to show no authority for its action.

An examination of systems of multiple government now in existence shows that all federal governments representing sovereign states with the exception of Canada, have adopted the policy of making their central governments ones of enumerated powers, and their state governments ones of residuary powers. This is the system of the United States and Switzerland. For the United States, this point is covered by the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people." The reasons for the adoption of this policy are largely historical. The federal union was in each case formed by the union of previously independent sovereign states. At the time of the union, the latter desired to retain to themselves all governmental powers except such as it was plainly necessary to confer upon the central government in order that an effective union might be established.

A consideration of the relative advantages of these two methods shows that the preference should unhesitatingly be given to the system of enumerated powers of the state government and residual powers of the central government. The prime reason for doing so lies in the fact that a leading feature of the evolution that is now taking place in social conditions is the breaking down of local barriers and the conversion of matters which were formerly of purely local interest into ones of general concern. This tendency is seen in almost every field. However much one may for sentimental reasons regret it, the fact nevertheless remains that more and more the problems of society are becoming such that they can

be met only by an authority representing the general interest. It is desirable, therefore, that the central government shall have as free a hand as possible to meet these new conditions as they arise. The obstacles that the adoption of the contrary system has thrown in the way of the United States in meeting the problems of government with which it has been, and is now being, confronted are only too evident.[5]

Relations Between the Central Government and the Constituent States in a Multiple Government.—The great advantages of a unitary government over a multiple government are, as we have seen, its strength, simplicity, and flexibility in operation. It is strong, since all authority is concentrated in a single organization and can be fully brought to bear at any time. It is simple, since the problem is not presented of rigidly defining the respective jurisdiction, of the central government and its political subdivisions. It is flexible in operation, since the distribution of powers and duties that is made between the central government and its political subdivisions can at any time be altered by mere legislative act.

In contrast with this, a multiple government is relatively weaker, since authority is divided. It is more rigid in operation, since changes in the distribution of governmental powers can be made only through the process of formal constitutional amendment. It is more complex, since, with a number of distinct organizations, the problem is presented of defining not only the respective jurisdictions of these bodies, but their relations to each other. This last problem is one of such importance, and is of such direct concern to us, since we are living under a multiple government, that it is desirable to give it special attention.

The starting point for a consideration of this question is recognition of the fact that, in principle, a multiple government stands for a governmental system in which each government is as nearly

[5] For an admirable discussion of the superior advantages of the Canadian over the American system, see the paper of Professor Stephen Leacock in the *Proceedings of the American Political Science Association,* Vol. V, 1908, on "The Limitations of Federal Government."

as possible a self-contained organism, and in which the only organic relation between the several governments is their common subordination to the same sovereign authority. Under this system, each government has its own field of activities and its own set of organs and offices through which to act. Each is independent of the other government. Each revolves in its own orbit, and joint action can be had only through the voluntary agreement on the part of two or more governments to coöperate for a common or mutual end.

In practice, the principle of multiple government has never been pushed to this extreme, though, as will be seen, the United States has gone a long way in this direction. As the matter of the interrelations of governments within a multiple government is one of departure from, rather than the following of, a principle, it can be best considered by examining the character of the relations which have actually been provided for in the leading multiple governments now in operation. This can be most advantageously done by describing the constitutional system of the United States, as regards this point, and pointing out the features in respect to which the governments of the other two leading examples of multiple governments vary from the provisions thus made.

Intergovernmental Relations in the United States.—An analysis of the question of intergovernmental relations in a multiple government shows that in it are involved two distinct questions: (1) the relations between the central government and the constituent states and (2) the relations between the several constituent states. We will consider each of these in turn.

Relations between the Central and the State Governments.—In studying any governmental system, the point to which attention should first be directed is the manner in which its constitution is adopted, revised, and amended. Complete independence of the central and state governments would require that each should maintain relations with its electorate without any intervention or participation on the part of any other government. In the American constitutional system, such independence is enjoyed by the governments of the several States, but not by the central govern-

ment. Each State determines for itself the manner in which its constitution shall be adopted and subsequently modified.

Action in respect to the adoption, revision, and amendment of the federal constitution, however, is had only through the States. The final adoption of the constitution was had through ratification by the States, not by the general electorate. In respect to the matter of its subsequent revision or amendment, the constitution makes possible a participation by the States in both the proposal and ratification of changes. As regards the proposal of amendments, it thus provides that, in addition to the right which is conferred upon Congress to propose amendments, the States, if two thirds of their number concur, can demand the calling of a convention for the proposal of amendments. As regards ratification, action must in all cases be taken by the States, either through their legislatures or through conventions specially constituted for the purpose, according as one or the other method is prescribed by Congress. Ratification in either case is thus performed by the States, even though the latter, in reaching a decision, may be required specially to consult their electorates through the assembling of conventions to consider the question of ratification. That it is the States rather than the national electorate which exercise the power of ratification is evidenced by the fact that the vote of each State has the same weight as that of any other State regardless of area, population, or size of its electorate. As a result of this system, it is quite possible, not only for a small minority of the national electorate to prevent the adoption of an amendment, but for a minority actually to secure a change against the will of a majority.

In this vital respect, therefore, we see that the central government, instead of being independent of, is directly dependent upon, the governments of the several States. The existence of these provisions, in the opinion of the author, goes a long way towards supporting the contention generally held by the southern States before the civil war, that the central government was one established by the States rather than by the people of the United States. Fortunately, however, that war once for all established the contrary contention that the central government represented the people di-

rectly even though use was made of the States in determining the will of the people.

The next point of importance in considering the relations of a central and state government is the question as to which shall prevail when their action conflicts. Here the position is taken that the central government shall be deemed to be the superior authority. This is clearly set forth in the clause of the constitution which provides that:

> This constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. (Art. VI, p. 2.)

It is unnecessary for us to dwell upon the importance of this provision. It means, not only that the central government shall be deemed to be the superior political authority; that its laws, if within the powers granted to it, shall prevail; but that the decision of all disputes regarding the respective jurisdiction and powers of the two governments shall rest with it, this decision being made by its judiciary.

Another feature in respect to which one government may be dependent upon another appears where provision is made that action by one government can be taken in respect to certain matters only after the approval of the other government has been obtained. This feature exists only to a very limited extent in the governmental system of the United States. The only cases in which it exists are those covered by the following provisions of the federal constitution:

> No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. (Art. I, Sec. 10, p. 2.)

> No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless

actually invaded or in such imminent danger as will not admit of delay. (Art. I, Sec. 10, p. 3.)

These two paragraphs were inserted in the constitution as a part of the provisions having for their purpose the specification of the jurisdiction of the State governments. In practice, they have acted almost as prohibitions, since little or no attempt has ever been made by the States to secure the approval of the central government and the taking of the action covered by them, except in respect to compacts between two or more States. As far as practical results are concerned, they might almost as well have been made absolute prohibitions. No case exists where action by the central government is dependent upon securing the approval of the State governments, except in respect to the matters of constitutional amendments as above described.

Still another way in which a central and state government may maintain relations with each other is through the right which one government may have to call upon, or receive, the assistance of the other government. The only provision for action of this kind contained in the federal constitution is that found in the section which provides that:

The United States shall guarantee to every State in this union a republican form of government and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence. (Art. IV, Sec. 4.)

This means that upon the central government falls the ultimate responsibility for maintaining intact the general governmental system created by the adoption of the constitution of the United States.

Turning now to the field of administration, we find two directly opposite systems open for adoption by multiple governments. In one, as far as circumstances will permit, duplication of officers is avoided by the central government making use of the officers of the constituent states or vice versa. In the other, each government is provided with its own independent set of officials. The first of these two systems was adopted by Germany upon the creation of the first German Reich; the second, by the United States.

In imperial Germany, though the central government had its own distinct sphere of activities, use was made as far as possible, of officials of the constituent states for the actual conduct of its affairs. Thus, though the central government established a system of customs dues which was uniform for the whole Empire and the income from which was covered into the central treasury, the actual collection of these dues was made by officials of the states. The only purely central officials were those which were required to supervise and control the administration of this system. The same was true of almost all other branches of the government service, not even excepting the military establishments. Each state maintained its own army. These were united in a force available for a common use in a war of offense or defense only through stringent provisions regarding the obligation of each state to maintain its army at a certain standard of strength through the authoritative powers by the central government to prescribe the scheme of organization, equipment, etc., and through the possession by the central government of general powers of direction and command in the case of war.

The only notable exception to this policy of making use of state officials for federal purposes existed in the case of the navy. The navy, unlike the army, was a purely federal service. Its officers and men from the lowest seamen to the officers highest in command were purely federal officers.

The same policy was pursued in the organization of the judicial system. Instead of two independent judicial establishments, Germany had but one set of courts in which were tried all cases whether arising under laws of the Empire or of the several states. All of these courts were, with the exception of the superior provincial courts and the supreme court, state tribunals. Under the German system, therefore, the administrative mechanism of the central government and the states were as far as possible integrated into a single system.

In the United States, no such effort has been made to have a single set of officials serve as agents for carrying into effect the wishes of the two governments. The central government and the

State governments maintain almost completely independent services for practically all purposes. This means a complete duplication of authorities for the performance of all of the general functions of government and a corresponding duplication in respect to the performance of those special functions which are performed by both. The central government and each of the governments of the States maintain their own services for the collection of their revenues and their disbursement. Where operations are carried on in the same field, as, for example, in the promotion of education, the regulation of means of communication, the development of the natural resources of the country, each acts independently of the other and through its own officers.

The most striking example of this duplication of organization is furnished by the system of courts. There is no reason why the adjudication of all laws, federal and State, should not be entrusted to a single system of courts. This system might be entirely a federal one or one partly federal and partly State, as was the case in Germany. Under the latter plan, all inferior courts, or those whose territorial jurisdiction did not extend beyond the boundaries of a single state, were state courts and all superior courts, or those whose territorial jurisdiction extended over the territory of more than one state, were federal courts. Instead of any such arrangement, the two governments in the United States maintain independent judicial establishments, each with its own judges, marshals or sheriffs, clerks, deputies, etc.

It is hardly necessary to point out that this policy of maintaining completely independent services for all purposes leads to a great duplication of plant and organization. Two offices are maintained at many points where one would suffice. That it is quite feasible for the same officer to serve in more than one capacity is amply demonstrated by the fact that it is a common practice for the States to make large use of local officials in the collection of their revenues and in the performance of other duties.

Were the fields of activities of the central government and the States distinct, this duplication of organization would not be such an important matter. Such, however, is not the case. We need only

cite such matters as the regulation of rates and conditions of service of railway and other transportation corporations; the enforcement of pure food and genuine label laws; the promotion of education; the investigation of the natural resources of the country through geological and other surveys; the fostering of agriculture through research and experiment stations; the regulation of banking, insurance, etc., to show to how large an extent the two governments are working in the same fields.

What makes the matter all the more serious is the fact that no effective means exist through which like services of the two governments may be brought to work in coöperation or even harmony with each other. The best that can be done is for officials working in the same field to form purely voluntary associations in which their common problems will be discussed and as far as possible agreement reached to adopt the same lines of action or methods of procedure. Of this character are the national associations of railway commissioners, banking and insurance commissioners, factory and mine inspectors, chiefs of bureaus of labor statistics and the like. In a few cases, important work has been accomplished by these organizations, but as a whole the results are relatively unimportant. Much, for a time, was hoped of the annual conferences of governors of the States. The results of these meetings, however, have been exceedingly meager.

In large degree, the duplication of organization, plans, and work is, as we have previously pointed out, a consequence of the adoption of the federal type of government. There is, however, no necessity that it should be carried to the extreme extent that it has been in the governmental system of the United States.

Relations of the States Among Themselves.—The government of each State, while acting within its constitutional competence, is thus almost completely independent not only of the central government but of that of any of its sister States. No provision is made for their acting jointly in respect to matters of common interest. On the contrary, they are expressly prohibited from entering into any formal agreement with each other except with the approval of Congress (Art. 1, Sec. 10, p. 3). Provision is made,

however, that the States shall act in harmony in respect to the recognition of the acts of other States, in the surrender of criminals fleeing from other States, etc. The provisions of the constitution governing these matters are as follows:

Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of any other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof.

The citizens of each State shall be entitled to the privileges and immunities of citizens in the several States.

A person charged in any state with treason, felony, or other crimes who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime. (Art. IV, Sec. 1, 2 and 3.)

The Division of the Territory of a State into Major Political Divisions.—Another problem that is presented in making a territorial distribution of the powers of government consists in the determination of the number and boundaries of the major political subdivisions for which provision will be made. The disadvantages inherent in a multiple government would be greatly minimized if this determination were had strictly in accordance with governmental needs. Unfortunately, this consideration is rarely made the determining factor. Only in exceptional cases is the primary division of a country into grand political divisions a matter of deliberate action. In almost all cases, as has been earlier pointed out, this division has been the result of historical accident. In many cases these subdivisions were originally independent kingdoms or commonwealths. This was true of the constituent states of the old German Empire, the provinces of Spain, the original thirteen States of the American Republic, the four grand divisions of Great Britain—England, Wales, Scotland and Ireland—and indeed of many of their subdivisions now known as counties, and most if not all of the cantons of Switzerland. France is almost the only state of first rank where the attempt has been made to effect the primary subdivision of the territory by deliberate act, though this of course is the means through which all but the original States of

the American union have been brought into existence. This fact is one of great importance and profoundly affects the problems of dividing the territory of modern states for governmental purposes. It means that this division has not been made, nor is it likely in the immediate future to be made, in response to the real political needs of the country. The controlling factor has been and, for a long time, will undoubtedly continue to be, sentiment and regard for historical traditions, rather than actual expediency.

Division of the United States into States.—It might seem that the United States, with its relatively short national existence, composed as it is of commonwealths for the most part having few or no historical traditions as independent states, would be comparatively free from the influence of historical sentiment. Such, however, is not the case. Where such sentiment has been absent, it has been deliberately created. It is thus as true of the United States as of any other country in the world that the division of the country into major political divisions has not been made in accordance with the real governmental needs of the country.

This cannot but be counted as a defect in our political system. Hopeless as may be the chances of correcting this defect at an early date, it is none the less remarkable that it has not received more attention. It must be apparent that the division of the country into States is a purely arbitrary one. What is the difference, for example, in the interests of North and South Carolina, of North and South Dakota, or for that matter between many other adjacent States, that calls for their separation and the consequent existence of two completely separate organizations for the management of their governmental affairs? The further fact that the constituent States vary so greatly in their areas and population has made the federal system more difficult of operation, and has been productive of no compensating advantages.

It is of interest to consider the manner in which we should proceed to effect the primary political subdivision of our country and the character of the system that would result were we to proceed upon the basis of devising a system that would correspond to our governmental needs. Our method of procedure would evidently

be that of determining, by a study of conditions, the extent to, and manner in, which the country is actually divided into areas having a special character and consequently special governmental interests. Should we do this, we would find that the United States embraces no more than ten or fifteen areas having character and interests sufficiently diverse to warrant their being created into political divisions having the status of our constituent States. There would of course be room for considerable differences of opinion regarding the precise number and boundaries of these areas. In general, however, they would correspond to the divisions of the country into sections that have been made by the Federal Census Bureau in order that an effective presentation might be made of its statistics of population, agriculture, manufactures, etc. But a slight familiarity with conditions in the United States is required to show how closely this division corresponds to actual conditions and needs. A properly devised system of primary political divisions should, as far as possible, meet two requirements. The districts provided for should be sufficiently unlike as regards the character of their conditions and problems to warrant their creation into areas having independent political authority and organization, and individually should be sufficiently homogeneous to make reasonably certain that the predominant interests of their inhabitants will be the same. The division of the territory of the United States made by the Census Bureau meets both of these requirements. In the New England division, we have a section of the country that is densely populated, includes a large number of cities of the first and second rank, most of which are important seaports, and is largely given over to manufacturing, commercial, and transportation operations. Its governmental problems are those attaching to a thickly settled, predominantly urban and intensely manufacturing and commercial community, and are manifestly largely identical for all of the States included within it. In the South Eastern and South Central divisions we have sections which are, comparatively speaking, thinly populated, are not only largely given over to agriculture but to agriculture of a quite special character. In these divisions, moreover, are included the great bulk

of the Negro population of the country. To a very considerable extent, therefore, these divisions not only have interests dissimilar from those of other sections, but ones which are fairly uniform throughout these respective areas. In the Central divisions, embracing the great Mississippi Basin, we have regions of a mixed agricultural and manufacturing character, but with the former predominating. In the Mountain districts, the predominant interests are those of mining and cattle-raising. All the States included are relatively thinly populated and have few cities of first rank. They are alike also in having an inadequate rainfall, with the result that recourse has to be had to irrigation if sufficient water is to be secured for the prosecution of agriculture. The region's governmental problems have to do largely with the regulation of mining, and taking up and settlement of land, and the promotion and control of irrigation projects. The Pacific district is one corresponding in general to the North Eastern districts, but has its special problems arising from its geographic situation, the inclusion within its population of large numbers of the yellow races, and the newness of its development.

It cannot but be apparent that, judged solely from the standpoint of governmental needs, a division of the country into a few grand divisions such as these would furnish a scheme of primary political divisions far superior to the one we now have. In each such grand division we would have a single strong organization instead of six, eight, or ten separate governmental organizations attempting independently to solve problems in respect to which the interest of all are largely identical. In place of six, eight, or ten, railway commissions, banking commissions, insurance commissions, etc., we would have a single railway, banking, or insurance commission. Not only would the cost of maintaining these services be greatly diminished, but the industries regulated would be relieved from the great burdens to which they are now subjected by having to meet the requirement of a number of independent authorities.

CHAPTER XIII

THE DISTRIBUTION OF GOVERNMENTAL POWERS TERRITORIALLY (*Continued*)

In the chapter immediately preceding we have considered the problem of the distribution of governmental powers territorially from the standpoint of the manner in which these powers may be distributed as between the central government and the major territorial districts into which all countries of any considerable size are divided for governmental purposes. The important points brought out in that consideration were: (1) that two distinct types of government, the multiple, or federal, and the unitary result, according as this distribution is made by the constituent authority itself and embodied in the constitution, or by the central government upon which all governmental powers were in the first instance conferred by the constituent authority; (2) that the unitary form of government has certain technical advantages; and (3) that the multiple or federal government of the United States presents serious obstacles to an efficient and economical administration of public affairs due not merely to the inherent disadvantages of that type of government but to the failure of the United States to give due consideration to geographic, demographic, and economic factors in determining the number and boundaries of the constituent States.

It is evident that a similar problem exists in respect to the extent to which the governmental powers conferred upon these major territorial areas, in the case of the United States the constituent States, shall be directly exercised by the central governments of such areas or be distributed in part among subordinate political bodies set up for the conduct of political affairs within still smaller territorial areas; and that much the same considerations are present in determining the number and boundaries of these areas, the

powers that shall be conferred upon them, and the character of the governmental systems that shall be provided for their exercise. The questions involved in the examination of these several questions constitutes what is known as the problem of local government.

It is manifestly impracticable to attempt here anything in the nature of a detailed consideration of this problem in all of its ramifications. All that can be done is to make known the broad lines of policy that may be distinguished in handling it, and the consequences resulting as one line of policy or another is followed; to set forth the system that has actually been adopted by the States of the American union, and the extent to which this system meets, or fails to meet, the requirements of an efficient and economical administration of public affairs.

State Governments Within Their Jurisdiction Predominantly Unitary Governments.—As in the case of the problem of the distribution of governmental powers as between the central government and the governments of the major territorial areas, much the most important question to which an answer must be given is that of the authority that shall make this distribution of powers as between the central government of these major territorial areas and the smaller territorial areas into which they are divided for governmental purposes. The choice lies between (1) having this territorial distribution of powers made by the constituent authority, and being thus embodied in the constitution itself, with the result that the major territorial areas are given governments of the multiple type; and (2) the vesting of all the powers conferred upon such major territorial areas in the central governments and leaving it to such governments to make such distribution of these powers as between itself and subordinate governing bodies as it may see fit to create for the handling of political affairs within particular defined territorial areas, in which case, the government of the major territorial area, acting within the scope of its jurisdiction, has the character of a unitary government.

If one accepts the statement that has been given in the preceding chapter of the inherent advantages of a unitary over a multiple

government, no other conclusion can be reached than that it is highly desirable that the latter choice should be made. Fortunately, this is the choice that has, for the most part, been made by the constituent States of the American union. Only to a relatively slight extent do their constitutions seek to fix in detail the territorial subdivisions of the State for governmental purposes, the character of the governments that shall be set up for the administration of public affairs within such areas, or the manner in which political power shall be distributed between such governments and the central government of the State. The result is that in the several States the legislatures have it largely within their ordinary power to make such provision as they see fit for the handling of the problems of the distribution of their governmental powers territorially. Where this principle has been departed from, the results have been almost uniformly bad, and the States have been seriously handicapped in their efforts to improve their local governmental systems.

Multiplicity of Political Subdivisions in the United States.—Although, as has been pointed out, our State governments are, generally speaking, favorably situated for the performance of the important task of determining the manner in which the areas over which they exercise jurisdiction shall be subdivided into smaller areas and the manner in which the sum total of the powers possessed by them shall be allotted for performance as between themselves and their subordinate political subdivisions, it by no means follows that this power of determination has in all cases, or even generally, been wisely exercised. In point of fact, it has not been so exercised with the result that the States now possess, without exception, a system of territorial distribution of powers that is defective in the extreme. The major defect of this system is the excessive multiplicity of political subdivisions for which provision has been made and the delegation to such subdivisions of powers and duties which preferably should be retained by the central governmental organs of the State.

In the first place, the States have divided their respective territories either into areas known as counties or into corresponding

subdivisions known as towns or townships, to each of which has been delegated the exercise of important governmental functions. These, in turn, have, in many cases, been subdivided into smaller areas for the performance of particular functions, the most important of which are the school districts. Furthermore, there have been superimposed upon, or carved out of, this basic division of the State's territory, thousands of other political areas where a relative density of population exists, to each of which has been given a special government, known as a municipal corporation, and varying in importance from the small village or town with a few hundred people to the large cities with their hundreds of thousands or millions of inhabitants. Finally, out of this same area has been carved a vast number of separate areas—drainage and conservancy districts, irrigation districts, sewer, water supply, park, and police districts and the like—to each of which a delegation of governmental powers has been made. It is, of course, necessary that a large area shall be subdivided into smaller areas for purposes of administration as, for example, the federal government divides the United States into districts for the collection of its customs and internal revenue taxes. The previously described division made by the States is, however, of quite a different character. Here, not only have territorial subdivisions been set up, but these subdivisions have had conferred upon them definite political powers (important among which is the right to raise and expend revenues), and they have been endowed with systems of government for the exercise of these powers. They thus represent the splitting up of the governmental powers of the several States and their distribution territorially.

It is by no means contended that this territorial distribution of the states' governmental powers is wholly bad. It is the general opinion of students of American government, however, that it has been pushed to an extreme. According to a recent study,[1] the number of local governments now existing in the United States is in excess of 175,000. The significance of this multiplicity of political

[1] William Anderson, *The Units of Government in the United States*, Publications Public Administration Series, No. 42, 1934.

units can be better seen if conditions in a single State are considered. According to Anderson who made the enumeration for the whole United States,[2] the single State of Minnesota contains no less than 10,545 distinct territorial, political units: one State, 87 counties, 94 cities, 634 villages, 1,970 towns and 7,759 school districts, all together calling for the popular election of approximately 56,393 officials. This enumeration, moreover, does not take account of the numerous other political bodies which have been set up for the discharge of a particular governmental function such as care of the poor, conservancy, water supply, and the like, which, as a rule, do not have separate taxing powers.

To take another State: Ohio, according to the Ohio Institute, maintains 4,703 territorial units, composed of the State itself, 88 counties, 1,387 townships, 83 cities, 732 villages, and approximately 2,400 school districts. The only important difference between this State and Minnesota consists in the possession by the latter of 7,759 school districts as opposed to 2,400 found in the former.

A still more vivid picture of this excessive parceling out of governmental powers among territorial units is furnished by a statement of conditions in a single county or metropolitan area. The Detroit Bureau of Governmental Research reports that Wayne County, in which the city of Detroit is located, is, for the purposes of local government, divided into the following 145 separate units with 944 elected officials: one county with 36 elected officials, seven cities with 151 elected officials, 19 villages with 153 elected officials, 100 school districts with 372 elected officials, and 18 townships with 232 elected officials. A commission appointed to consider local taxation and expenditures in New Jersey reported that it found 140 municipalities in the five counties of Hudson, Bergen, and Passaic, constituting the New York metropolitan region. "This," to quote the report,[3] "means 140 governing bodies levying

[2] William Anderson, *Minnesota Municipalities*, March, 1931.

[3] New Jersey Commission to Investigate County and Municipal Taxation and Expenditure: Report I., *The Organization, Functions, and Expenditures of Local Government in New Jersey* (1931), p. 47.

taxes and trying to supply governmental services; 140 sets of overhead organizations; 140 separate police departments; 140 fire departments; 140 agencies struggling with sewage disposal, streets and roads, health, sanitation and recreation. It means 140 different agencies that are issuing bonds; 140 separate town or city halls and other public buildings large and small; 186 school districts. Over all are five county governments. This amazing amount of governmental organization is crowded into an area which is roughly twenty miles in width and thirty-five miles in length."

The bearing of this multiplicity of territorial political units upon the problem of efficient government can be seen in part if considered in the connection with the performance of a single governmental task. On this, the *Preliminary Report of the Governor's Special Health Commission of the State of New York, 1931,* is especially illuminating. In its introductory consideration of the problem of health administration in the State, it says:

There are now in the State 1,099 local health jurisdictions consisting of 4 county, 59 city, 293 village, 597 town and 146 consolidated (village and town) boards or departments of health. Excluding counties and city health units, there is a total of 1,036 local health units with a population ranging from a few hundred to a few thousand persons. In towns, the town boards and in villages, the trustees, constitute the board of health. These boards appoint a physician as local health officer at an annual salary of not less than fifteen cents per capita amounting usually to from $150 to $200 per year.

Designed to meet conditions of 1850, the present system of town, village and small city boards of health fails utterly to meet needs of 1931 because these units of population are too small to provide the services which modern public health demands. Public health as a science had its origin, and has had its remarkable development since these local boards of health were established. Advances which have been made in laboratories and for the prevention of disease necessitates the employment for this purpose of trained personnel who will devote their entire time to promoting community health. In the modern health program qualified health officers, nurses, engineers, laboratory directors, and other professional personnel are essential if satisfactory services are to be expected. Moreover, other methods of communication by reason of the telephone, improved highways and the automobile, make it easier to serve the larger territory or a county than it was to serve a single town a half century ago.

The present system of town and village board of health upon which are

usually superimposed a number of county services for public health, results in a confusion of responsibility, lack of coördination and waste and excessive costs for the services rendered.

Evils of the Existing System.—It would be possible to extend almost indefinitely this exposition of the extreme length to which our State governments have gone in delegating the exercise of their powers to subordinate territorial subdivisions. Statements similar to those that have been reproduced could be quoted from almost any of the numerous surveys of local governments or the handling of particular problems of government that have been made in recent years under both public and private auspices. It is sufficient to say, however, that, with scarcely an exception, they all find in this detailed distribution of State governmental powers among the territorial units, a serious, if not the major, defect of our State government.

To this complexity of the State's governmental structure the President's Conference on Home Building and Home Ownership attributed chief responsibility for the excessive burden of taxation under which the American people now rest. In its report on "Home Finance and Taxation," issued in 1932, after discussing the defects of municipal government, it said (pp. 142, 144-145):

> The same diffusion and dispersion of functions which has been pointed out as existing between city departments exists also among overlapping units of government. States, counties, special districts cities, towns, and villages maintain police forces, build highways, supervise building construction, administer safety codes in industrial fields, maintain charitable and penal institutions, and perform a wide range of other duties. Among these several related departments of the overlapping units, as well as among those of adjoining units of the same class, there is the same duplication of effort, the same conflict, and the same lack of unified plans which have already been pointed out as existing among departments in loosely organized cities. That these conditions are responsible for waste in the costs of operation and maintenance, and even greater wastes in the design and construction of improvements, hardly needs argument.... In many parts of the country, three layers of local government below the county have become commonplaces; five and six layers with the characteristics of permanence are not unknown; indefinite numbers of more temporary layers exist. Furthermore, added layers have also been interposed in some areas between the county and the state. When one considers that these layers have

taxing and bonding powers within the same areas, that they are in most instances quite uncoördinated with one another, and that there is not always a clear-cut line between their functions, it is not surprising that aggregate local tax burdens within the areas of overlap should be out of proportion to the value of the services rendered.

The use of these thousands of separate units means, not only an unnecessary multiplicity of officials, a duplication of plant and equipment, and a corresponding increase in the cost of government, but, more important still, a great dissipation of political authority, with a corresponding weakening of the power of the State either to meet emergencies as they arise or, in more normal times, broadly to plan and put into execution comprehensive programs for promoting the public welfare.

After all, however, the most serious evil resulting from this diffusion of political authority and overlapping units is the complexity that it introduces into the structure of government. As has been pointed out, the task of operating a popular government of the representative type is, at best, a difficult one. Unless the system is one of comparative simplicity with responsibilities definitely located and with relatively few demands upon the electorate in the way of selecting and controlling officers, the situation becomes one beyond the capacity of the people to handle properly.

Methods of Reform.—The statement of these evils indicates the direction effort should take to remove them. Fundamentally, it lies in the complete reversal of the principle that has dominated political policy in the past in respect to the exercise of political powers. At the time when our political system was assuming form and political beliefs were taking root, social and economic conditions were of a comparatively simple character. Agriculture was the dominant industry, the population was largely rural, means of communication were poorly developed, and the tasks confronting governments were relatively few. It was but natural that, under these conditions, the American people should set up a form of government which, from the structural standpoint, called for the widest possible diffusion of political authority, to the end that each separate locality might have the determination of the character of

political action that should be taken and the selection and control of the officers charged with its performance. Since then, the whole economic and social organization of the United States has undergone a transformation that it is not an exaggeration to describe as revolutionary. Interests that were formerly of purely local concern have become ones affecting large territorial areas and such, therefore, that they can be efficiently and economically handled only by authorities exercising a correspondingly wide territorial jurisdiction. It results from this that the structure of government with which the American people first endowed themselves, while thoroughly satisfactory as regards needs as they then existed, have become totally unadapted to meet the conditions now obtaining. No matter in the field of politics is of greater importance than a recognition by the American people of this fundamental change and a willingness to take the action called for by it.

This action can take a number of forms: the abolition of many smaller territorial units, such as school districts; the lessening of the number of layers of government affecting a given area, for example, where municipal districts are completely segregated from the counties in which they are situated; and the transfer to the State governments of entire responsibility for the performance of functions which are now performed partly by that government and partly by the subordinate political subdivisions.

Fortunately, evidence is accumulating that the need for such action is being recognized, and recent years have witnessed important steps in this direction. Thus, we find educators such as Charles H. Judd, Dean of the School of Education of the University of Chicago, and an outstanding leader in his profession, urging strongly the abolition of the whole system of separate school districts with their special school boards, and the transfer of most school administrations to the general governments exercising jurisdiction within such areas.[4] We find proposals being made in almost every State for the reduction of the number of counties and other political subdivisions and the consolidation of county and city governments. The most significant advance in the way of the simpli-

[4] "Abolish the School Boards," editorial in *Public Management*, November, 1933

fication of the structure of State government has, however, taken the form of the assumption by State governments of full responsibility for the performance of important governmental functions which had previously been delegated in part to its political subdivisions. In this direction, North Carolina has led the way. As a result of detailed investigations of the subject made a few years ago, laws have been passed providing for the taking over by the State of entire responsibility for the construction and maintenance of all roads of the State and also the maintenance and operation of the school system. Its example has been followed by other States and a distinct movement is now under way for similar action in other fields of governmental activity.

Inherent Weakness of Local Self-Government.—In giving approval to and advocating action in this way, it must be recognized that such action represents an attack upon one of the most cherished political traditions of the American people, i.e., their attachment to, and belief in, the doctrine known as local home rule or self-government. There are probably many who are prepared to accept the validity of the arguments that have been given in favor of the assumption by the State government of duties now entrusted to the political subdivisions solely on grounds of efficiency and economy, but who hold that this increased efficiency and economy will be secured at too great a price; that self-government, even though entailing a greater cost and a certain lessening of efficiency, is preferable to an administration of affairs by officers representing, and responsible to, an agency relatively far removed from the immediate direction and control of the people concerned. This opposition can be overridden only by bringing home to the people: first, a realization of the fact that any really worthwhile lessening of the cost of government and consequent relief to the taxpayer can be secured only by reducing the number of political agencies now made use of and putting responsibilities and work in fewer strong and competent units; and, secondly, the fact that the benefits supposed to inhere in self-government are, in reality, to a considerable extent illusory.

Much has been written about the advantages of local self-

government, but too little attention has been given to its disadvantages. It is a noteworthy fact that it is in its local government that the American political system has shown its chief failure. There can be little question but that, speaking generally, our local affairs, as administered by our local authorities, are conducted with a greater amount of waste, extravagance, inefficiency, and corruption than characterizes the administration of affairs by our governments exercising jurisdiction over larger areas. The extent to which this is true, and the long time that it has persisted, would seem to argue that there must be some weakness inherent in the system itself. The explanation generally given is that local affairs, relatively speaking, are of so petty a character that the voters are unwilling to devote to them the attention that is necessary if proper persons are to be put in charge of the administration and if these officers, in fact, are to properly perform their duties. This, however, is at best but a partial explanation. In the opinion of the writer, the real explanation is the following:

All recognize that a prime essential of the proper administration of justice is the existence of a judiciary composed of magistrates who are so selected and who perform their duties under such conditions that they shall be removed as far as possible from all influence and pressure tending, in any way, to make their action conform to other than the requirements of the law and the merits of the cases coming before them for decision. It is not equally recognized that this essential is present to a scarcely less degree in the field of the conduct of administrative affairs. Differences, political and otherwise, have a legitimate place in the formulation of policies and the enactment of laws and ordinances for putting such policies into effect. It is not so, however, in respect to administration, that is, in the performance of the duties and acts necessary in order to give effect to such determinations. It is the essence of good government that all administrative officers shall perform their duties with sole reference to the public good; that they shall not make use of their powers for the purpose of favoring friends or injuring enemies; that they shall not permit their action to be governed by partizan, religious, personal, or other considerations to the detri-

ment of the general welfare: in a word, that they shall seek to do the same justice between parties affected by their action as is demanded of judges on the bench.

The bearing of these considerations upon the problem of local government is this: Local government concerns the conduct of governmental affairs by a magistracy locally selected and locally directed and controlled. They perform their duties in a community made up largely of personal acquaintances to whom they are sure to have obligations, or at least associations, political, social, financial, or otherwise. With human nature as it is, it is difficult, if not impossible, for them not to be subject to the influences growing out of such associations and obligations. Reciprocally, it is impossible for the voters not to permit such relations to influence them in selecting the persons for the administration of their governmental affairs. It is a commonplace to hear voters declare that they have supported such or such a person for office because he is a good fellow, because he is a friend, or because he has a family dependent upon him and needs the money represented by the salary or emoluments attaching to the office.

It is evident that we have here an inherent weakness of local government which is not present in a government that is further removed from the persons affected, or at least not present to the same extent. State officials are in a position where they may exercise their powers with an independence and a freedom from pressure and influence that does not exist in the case of the locally selected, directed, and controlled official. It is not contended that this consideration alone should lead the American people to surrender their system of local self-government. It is contended, however, that this consideration goes a long way towards rebutting the presumption which so generally exists in favor of such government, and that, taken in connection with the other advantages of State administration which have been mentioned, should lead the people to accept the change.

Finally, it should be recognized that the abolition of local political subdivisions and the transfer of their functions to the State government does not necessarily mean a complete surrender by the

people of direct participation in the conduct of their local affairs. A State government, in performing its duties, must perforce divide the State into administrative areas which may conform to the existing territorial, but, preferably, will better conform to physical conditions such as density of population, means of communication, etc. There is nothing to prevent, and indeed it is highly desirable that provision shall be made for, the creation in each such district of a local government advisory council, to which shall be given the responsibility and duty of keeping itself advised of the manner in which the local officers of the State in their districts are performing their duties; of bringing to the attention of their superior officers all failures on the officials' part properly to perform their duties; of making suggestions to such authorities of action which they deem advisable; of filing protests against the action of the State where they believe their districts are not receiving equitable treatment, as in the allotment of funds for road construction and maintenance, the provision of schools, the location of hospitals and dispensaries, and the like. There is every reason to believe that no great difficulty would be encountered in securing the consent of the best citizens of the district to serve on such bodies. Many of the most prominent and capable citizens, who are now unwilling to take on the duties of public office when this involves the assumption of administrative responsibilities and a large draft upon their time, would welcome an opportunity to serve in this capacity. It is quite within the realm of probabilities that the general citizen body, through these councils, might exercise a more effective voice in the conduct of their governmental affairs than they do at the present time.

Restoration of the States to Their Proper Position in the American Political System.—There remains for consideration one other aspect of this proposal for the liquidation of the county and other political subdivisions. It is not so long ago that the feeling was strong that the State was steadily losing ground as an element in our political system—that it was, in a way, being crushed, or its relative importance at least was being greatly diminished, as the result of the rapid increase in the scope of activities of the national

government, on the one hand, and the delegation of many of its functions to its political subdivisions, on the other. This tendency was viewed with not a little concern and not a few looked back with regret to the time when service to the State was as highly, if not more highly, esteemed than service to the national government itself. Anything like a general adoption of the action here advocated would work what would be little short of a revolution in this respect. The State would resume its old importance as a political division. It would be the body to which the citizen would look for the maintenance of law and order, for his protection not only in times of emergency, but at all times, for the enforcement of his civil rights, for the protection of his health, for the education of his children, for the construction and maintenance of his highways, for his care in case he becomes for any reason dependent upon outside aid. With its increased and unified powers, the State would be in a position to formulate and execute general programs for the public welfare such as is not now possible with powers distributed among a multiplicity of agencies acting under no general direction, supervision, or control. Not merely would the State government, under these conditions, be a matter of vital concern to the people, but it would be a government whose organization could be easily understood, and in respect to which responsibility could be clearly located. It would not seem to be too optimistic to expect that, under these conditions, the interest of the voter in State government would greatly increase; that he would make greater efforts to secure a competent magistracy to have charge of the conduct of State government affairs; and that State officials, working under an increased sense of the importance of their responsibilities, would display a faithfulness in the discharge of their duties that is too often lacking under the existing system.

It may seem that this feature of the American political system has been handled at undue length. Our excuse for doing so is our belief in its overwhelming importance. Challenged and repudiated as it has been by some of the most powerful and progressive nations of the world, popular government may now be said again to be placed on trial. If it is to survive, it must demonstrate that it is

capable of so organizing itself that it can, at least measurably, meet the constantly increasing demands put upon it. This it cannot do so long as it retains its present extremely complicated structure with its consequent dissipation and diffusion of powers among a multiplicity of petty political units.

CHAPTER XIV

THE DISTRIBUTION OF GOVERNMENTAL POWERS FUNCTIONALLY

The splitting up of the territory of a state into political divisions and the distribution of governmental powers among such divisions constitutes but one method by which provision may be made for the effective exercise of these powers. The work that has to be done by a government is so complex that it is imperative that special organs shall be established for the performance of the several kinds of work to be done. This is necessary, not only that the benefits of specialization may be secured, but that responsibility may be more definitely located. It follows, therefore, that all governments must seek to determine the classes into which governmental powers fall, viewed from the standpoint of their character, and the provision that shall be made for the exercise of each.

Analysis of the Problem.—An analysis of this problem shows that, like the distribution of governmental powers territorially, it involves a number of distinct factors. The more important of these are: (1) the manner in which governmental powers shall be classified for purposes of distribution; (2) the extent to which each class of work or function so distinguished shall be assigned to a separate organ or branch; (3) the relations that shall be established among these several branches; and (4) the authority by which this classification and distribution of governmental functions shall be effected.

The Classification of Governmental Powers.—In seeking to classify any body of data, the first essential is the adoption of the principle or basis upon which such classification shall be made. In making a selection of a principle, it is furthermore desirable that the choice should fall upon some characteristic which is at once fundamental rather than incidental, and will serve to bring out

distinctions which will best serve the objects in view. In the present case, no doubt exists regarding the principle that should be employed. A distinguishing feature of the modern government in its practical operations is that it is one of law. Every feature of its organization is a matter of legal determination, and every one of its acts, in order to possess validity, must rest upon a legal sanction. The practical problem of organizing and conducting a government is thus one of legal action. It resolves itself into the problem of determining how the law of the land, and particularly that part having to do with the operations of government, shall be declared, how differences of opinion regarding its meaning or applicability to particular cases shall be decided, and how the law as thus declared and interpreted shall be put into effect. The principle upon which governmental powers should be classified functionally is thus universally recognized as that of the nature of the power exercised as determined by its relation to law.

The Traditional Threefold Classification of Governmental Powers.—Based upon this principle of classification, all the powers of government have long been conceived as falling within one or the other of three great classes, according as they have to do with (1) the determination or enactment of law, (2) the interpretation of this law, and (3) its enforcement. To these three classes have been given the names, Legislative, Judicial, and Executive. Structurally considered, government has thus been deemed to be made up of three great branches having for their functions the enactment, the adjudication, and the enforcement of law.

A Fivefold Classification More Satisfactory.—Notwithstanding the fact that this threefold division of governmental powers has received such general recognition as to give it the designation of the classical division of governmental powers, examination will show that it cannot stand the test of scientific analysis, and, furthermore, that attempts to act upon it lead not only to confusion of thought but to serious difficulties in working out the practical problems of the distribution of governmental powers functionally. The defect in this system of classification lies in the fact that it fails to distinguish and make separate provision for the functions of the Elec-

torate and the Administration. In the pages that follow it will be seen how distinct these functions are from the other functions comprehended within the threefold classification and how important it is that their distinct character should be recognized in the practial work of organizing and operating a government.

The Electorate as a Distinct Branch of Government.—At the time that the threefold classification of governmental powers into legislative, judicial and executive established itself, the leading nations of the world were monarchies. Electorates, in the modern sense, were either nonexistent, or played such a minor rôle in the determination of how the actual affairs of government should be conducted, that students of politics were justified in ignoring them. With the rise of popular government, the whole problem of government has undergone a radical transformation. The source of authority has been transferred from the ruler to the people. The latter have been compelled to organize themselves for the exercise of this authority. They have done so by making a selection of those of its members who shall act for them. These members constitute what is known as the Electorate, that is, the body of citizens exercising voting or electoral powers.

This body, it need hardly be pointed out, not only constitutes a distinct branch of the political system of a country but has clearly distinguishable and definite functions to perform. Its existence gives rise to many distinct problems: how it shall be constituted, what shall be its powers and duties, what its methods of procedure, what its relations to the other branches of government, etc. The issue between democracy and representative government is distinctly a problem of this kind. It follows, therefore, that the existence of the electorate as a distinct branch of government should be recognized and the problems connected with it be given independent consideration.

In doing this, two positions may be taken. The electorate may be looked upon as an integral part of the machinery of government or as standing outside of the government, strictly speaking. In a government of a purely representative character, there is some advantage in taking the latter position. When, however, the elec-

torate, as in the United States, seeks to take to itself the performance of certain purely governmental functions, such as the formulation of governmental policies and programs and participation in the actual work of legislation through the devices of the initiative and the referendum, it is probably better to consider it as a branch of the government proper. In practice, the choice between these two positions is of relatively little importance. The important thing is to recognize that, in the electorate, we have to deal with a distinct branch of the political systems of modern states, and one which gives rise to problems as difficult of solution as those presented by any other branch.

Administration as a Distinct Branch of Government.—In the threefold classification of governmental powers, no recognition is given to administration as a separate function or branch of government. In so far as any account at all is taken of this function in that classification, it is confused with, and treated as a part of, the executive function. To so great an extent is this true that the two terms executive and administrative are used almost interchangeably. This is exceedingly unfortunate since, as we shall see, the two terms should be employed as connoting operations which are distinct in character.

To understand the difference between the two, when properly employed, it is necessary to distinguish between two things. The first of these is the difference between the function of seeing that laws are enforced and that of actually doing the things which the laws call for. This distinction is specially apparent where the actual exercise of authority is distributed among a number of organs or parts. Where this is the case it is evident that there must be some authority whose special function it is to see that the laws governing this distribution, determining the special duties of the several parts, and regulating the relations of the latter with each other are in fact complied with. Without some such authority, the several parts cannot be correlated into a single harmonious system and made to work in proper coöperation with each other for the attainment of a common end.

The second distinction is that between the act of an organization

as a whole, and the act of one of its parts. There are many cases where governmental action should represent the action of the government as a unit. This applies especially to the whole field of international relations in which is involved the intercourse of sovereign states with each other. This makes it imperative that there shall be some organ or authority whose special function it is to represent the government in this capacity.

With these distinctions and requirements in mind, the essential difference that exists between the executive and the administrative function, using these terms in their proper technical sense, can be seen. The executive function is the function of representing the government as a whole, and of seeing that all of its laws are complied with by its several parts. The administrative function is the function of actually administering the law as declared by the legislative and interpreted by the judicial branches of the government. This distinction is usually made by declaring the executive function to be essentially political in character; that is, one having to do with the determination of general policies, and involving the exercise of judgment in its use; and the administrative function to be one concerned with the putting into effect of policies as determined by other organs. Thus Aucoc, the eminent French authority on public law, differentiates the two as follows: [1]

> When we distinguish government (i. e., executive direction) from administration, we mean to put in a specal category the direction of all affairs which are regarded as political; that is to say, the relation of the chief executive authority with the great powers of government, the summoning of electors for the election of senators and representatives, the closing of the session, the convening of the chamber of deputies and of the senate, the closing of the senate, the dissolution of the chamber of deputies, and carrying on of diplomatic relations with foreign powers, the disposition of the military forces, the exercise of the right of pardon, the granting of the titles of nobility.

This distinction between the executive and administrative powers is, in fact, clearly made in our federal constitution itself, and for that reason, if for no other, the recognition of the administrative

[1] "Conferences sur L'administration," etc. Quoted by F. J. Goodnow, *Principles of Administrative Law of the United States*, p. 67.

branch as a distinct branch of the government should be made. In the office of the President and in the administrative services we thus have two distinct branches of the government, and the same is true in the States where the executive power is vested in a governor and the administrative power in a collection of operating units which function more or less independently of the executive power and beyond its direction and control. The significance of this distinction will appear more fully in the discussion that follows.

The Question of the Union or Separation of Powers.—Too great importance cannot be attached to the foregoing analysis of the powers of government. The fact that all the work involved in the conduct of a government falls into these five clearly distinguishable categories determines the whole nature of the problem of devising an organization through which they may be exercised. From the structural side the work of organizing a government resolves itself into that of determining the provision that shall be made for the exercise of each of these powers.

In our examination of the problem of the territorial distribution of powers we have seen how the constituent authority is called upon to make the vital decision as to whether it will confer all the powers of government upon a single government, leaving to that government the duty of distributing the actual exercise of these powers between itself and subordinate political divisions; or will itself make such a distribution; and that according as it decides one way or the other, it brings into existence a unitary or a multiple government. Precisely an analogous decision has to be made by it regarding the question of the provision that shall be made for the exercise of the five great classes of governmental powers. It must decide whether it will vest full authority in respect to the exercise of all of the powers that are conferred upon the government proper in a single organ, leaving to that organ the duty of making such a distribution of these powers to special organs to be created by it as it deems proper, or whether it will itself make this distribution. If it decides to do the first, it brings into existence a government known as a Government of Union of Powers; of the second, a Government of Separation of Powers.

To distinguish between these two types of government, it is important to note that, as in the case of the distribution of powers territorially, the issue is not as to whether special organs shall be provided for the exercise of the several powers of government, for such organs are found in all modern governments, but as to the authority by which such organs shall be established, their powers defined, and their relations to each other determined. In a government of union of powers the authority doing this is the organ of government to which all the powers of government have in the first instance been given by the constitutional authority. In a government of separation of powers, this is the constituent authority itself. From the structural side there may be little or no difference since, in both governments, separate organs have been provided for the exercise of the several powers. The fundamental differences between them is in respect to the constitutional or legal status of these organs. In a government of union of powers, one organ is supreme and all other organs are but its agents, the means through which it exercises those of its powers that it does not itself desire directly to exercise. In a government of separation of powers, the several organs or branches of government, in so far as they have been established and their powers defined by the constituent authority, are coördinate in rank; the line of authority in each case runs directly to a common authority, the constituent authority.

Governments of Union of Powers: Autocracies.—It is evident that autocracies are, from their very nature, governments of union of powers, since, in such governments, all political authority is deemed to reside, in the final analysis, in the hands of the head of the government. While the head of the government is thus the custodian of both the legislative and the executive power, he has open to him a choice with regard to the manner in which he will exercise this power. He can either abolish, or fail to create, any body partaking of the nature of a legislative assembly and make himself the legislative organ, in which case all laws will have the character of executive decrees; or, he can continue in existence, or create, bodies having the general character of deliberative assemblies, to which the function of formulating or passing upon

legislative proposals is, in whole or in part, entrusted, but final action in respect to which is directed by him or subject to his control. If the first action is taken, the resulting government is one having no legislative branch properly speaking; if the second, there will be, at least in appearance, a legislative branch, though the powers and part played by that branch in the determination of political policies and the conduct of governmental affairs generally will be quite different from those of the legislative branch in a popular government.

As the governmental structures of modern autocracies are still in a transitional stage, the final character of the machinery and the procedure that the autocrat will provide for the exercise of his dual executive and legislative powers is as yet uncertain. Actually these autocracies have been established where existing and functioning legislative bodies constituted part of the governmental machinery of the old régime. While the upper houses of these legislatures have in general been abolished as incidental steps in converting the government from a federal to a unitary type, or in effecting a greater centralization in the exercise of political powers, the lower houses have, for the time being at least, been continued in existence. However, the character and powers of these bodies have been radically transformed. From bodies independently constituted and possessing inherent legislative powers, they have been transformed into ones whose membership is subject to the control of the head of the state, and whose powers are restricted to those of a consultative character, or of merely giving formal ratification to the legislative determinations of the head of the government. In all cases, moreover, a great extension has been given to the power of the head of the government himself, directly, and without the intervention of such body, to promulgate decrees having all the force of law.

Governments of Union or Separation of Powers: Popular Governments.—As has been pointed out, the question as to whether the government of an autocracy shall be one of union or separation of powers cannot arise; it can only be one of union of powers. In a popular government, however, this choice is not only open, but constitutes one of the most important decisions that must

be made in determining the character of the governmental system that will be set up. If the decision is made to create a government of union of powers, there results a form of government known as Parliamentary or Responsible; if to create a government of separation of powers, a form of government known as Presidential. A study of existing popular governments shows that, practically without exception, all the countries of Europe, in creating governments of this type, have given their choice to the union of powers, or parliamentary, type; while in the Western Hemisphere, the choice has fallen upon the separation of powers, or presidential, type. This has been due to the fact that the European nations have been impressed with the successful working of the governmental system of England, the first among the nations of the world to bring into existence and successfully to operate, a government of the union of powers of the parliamentary type, while the nations of the new world have been correspondingly impressed by the success achieved by the United States in creating and operating a government of the separation of powers or presidential type.

Presidential Government.—It has been pointed out that when the decision is made to set up a representative government of the separation of powers type, there results a government known as presidential. This designation is not a very satisfactory one, since not all governments with a president as their chief executive are necessarily of this type. In point of fact, most of the parliamentary governments of Europe have a president as their chief executive. The adoption of this term is due to the fact that the chief example of this type of government is that of the United States, whose chief executive has the title of president. The prime characteristics of this type of government are, as indicated, that the executive power, both as a matter of law and in fact, is vested in the same individual; that such power is the result of a direct grant from the constituent authority effected through express provision of the constitution; that, as a result, the chief executive has a status independent of, and coördinate with, the legislative branch, and is not subject to the direction or control of the latter either for his continuance in office or in respect to the manner in which he exercises

his powers; that, as an essential feature of his executive powers, he has the selection of the chief officers, and especially those heading the great administrative departments; that the chief administrative officers are not members of the legislative branch; and that, in principle at least, the duties of the chief executive and these administrative officers lie wholly in the executive and administrative field and that they have no responsibility in respect to the discharge of the legislative functions except as it may be their duty to make known to the legislative branch the need for legislation in order that their executive and administrative tasks may be more effectively performed. The system thus assumes that a clear distinction can be made between the legislative, the executive, the administrative, and the judicial functions, and that it is desirable that the discharge of each shall be entrusted to distinct organs of government manned by distinct sets of officials.

The foregoing represents what may be termed the fundamental principles underlying these types of government. In point of fact, as will shortly be made evident, these principles are by no means rigidly adhered to in practice, either in the leading example of this type of government, the United States, or in other governments that have been modeled upon that government. And, furthermore, these deviations from the theory of this type of government are not solely the result of the manner in which this system is operated but are to a considerable extent embodied in the respective constitutions themselves.

Parliamentary or Responsible Government.—The term parliamentary, or responsible, as applied to representative governments of the union of powers type indicates their prime characteristic; namely, that the ultimate seat of governmental power is in the legislature or parliament, and that the executive, instead of having power coördinate with that of the legislative branch, has a status subordinate to the latter and is at all times responsible to it, both for his existence and the manner in which he discharges his functions. This system, it will be noted, is in direct opposition to the one obtaining in an autocracy. Both are governments of union of powers; in an autocracy, however, there is a union of powers

in the hands of the executive branch, while, in a parliamentary or responsible government, there is a union of powers in the legislative branch.

Desirable, if not essential, conditions to the operation of a government of this type would seem to be: (1) the vesting of the executive power, legally speaking, in the hands of a titular chief executive while its actual exercise is in the hands of another body known as a ministry or cabinet; and (2) the provision that the members constituting this ministry or cabinet shall consist predominantly, if not exclusively, of the heads of the more important administrative departments, who shall, at the same time, be members of one or the other of the two houses of the legislature. The first of these provisions has the great advantage that it obviates the necessity of redetermining who shall be the titular head of the state each time that it is deemed necessary to effect a change in the organ actually exercising the executive and administrative powers, an operation which, in times of stress, may seriously endanger the stability of the government as a whole. At the same time, it provides an organ that can take the necessary steps for the selection of a new ministry to supersede the one that no longer has the support of the legislature. The second provision ensures the union of legislative, executive, and administrative powers in the same hands, and thus, in principle at least, that these important branches of the government will work in coöperation with each other. It is thus common to speak of the ministry in power as the Government.

This government, as has been stated, can remain in power only so long as it has the support of the popular branch of the legislature; that is, all of its measures of importance must, upon a test vote, receive a majority of the votes cast. Defeat on any such vote is deemed to be a vote of lack of confidence, and the ministry thereupon must place its resignation in the hands of the titular or legal chief executive. It then becomes the duty of that officer to select some other person who will undertake to form a new ministry that will receive the support of the popular chamber. In making this selection of a Premier, the titular chief executive may,

or may not, according to circumstances, have some discretion in respect to whom he shall choose. If what is known as the Two Party System obtains, his choice is practically limited to the leader of the opposition party in the legislature. When the Multi-Party System obtains, and when consequently a majority may be secured through various combinations of parties, no one of which has a majority, the titular chief executive may have some considerable degree of discretion in making his selection. Under these conditions, it often happens that several men in turn are entrusted with the task of forming a ministry before success is achieved in finding one who can form a ministry that will receive the support of the Parliament.

Two Types of Responsible Government.—Since all popular governments of the representative type fall within one or the other of these two classes, parliamentary and presidential, a comparison of the relative merits of the two systems, and a determination of the conditions under which each may hope to give satisfactory results in operation constitutes one of the most important subjects of enquiry in the whole field of political science. Before entering upon such an enquiry, it is necessary, however, to point out that, though all parliamentary governments rest upon the same fundamental principle of a union of powers, two quite different systems of government have come into existence for putting this principle into operation, with the result that the manner in which this form of government operates in practice is quite different according as one or the other of these systems has been adopted. These two systems are here designated as that of England and that of Continental Europe, since England, on the one hand, has evolved one system, while the countries of Europe, led by France, on the other hand, has evolved the other. It is important to recognize and understand these two systems, since it may well happen that one possesses points of excellence and defects in comparison with our presidential type of government that are not present in the other.

Responsible Government: England.—The system of Responsible Government, as it first developed in England, corresponded

wholly to the principles underlying that type of government as set forth above. The long contest between Parliament and the Crown resulted in the complete triumph of the former, a triumph which found its most emphatic expression in the Revolution of 1688 which brought William of Orange to the throne. The significance of this revolution, from the standpoint of political science, lay in the successful assertion by the Parliament of its right to determine the succession to the throne and, in so doing, to subordinate the executive to the legislative branch. The most important subsequent developments were: the transfer of the exercise of the executive power from the Crown to the body of chief administrative officers known as the Cabinet or Ministry the members of which were selected from among the members of Parliament and who held office at the pleasure of that body, or, to speak more correctly, at the pleasure of the more popular and representative chamber, the House of Commons; the abolition in fact of the right of the Crown to withhold its assent to the legislative acts of the parliament; the broadening of the electorate through the electoral reform acts of 1832, 1867, and 1885; and the subordination of the powers of the upper branch of the legislature, the House of Lords, to that of the lower branch, the House of Commons, accomplished by the Parliament Act of 1911. These developments represented the steps by which the exercise of supreme authority in respect to all governmental action was placed in the hands of the legislative body which, in turn, derived its mandate to act from the popular electorate by which its members were selected. These acts gave reality to the principle of popular government, that sovereignty resided in the people, and, at the same time, to the principle that the actual exercise of such sovereign powers should be united in a single organ, the popular chamber of the legislative branch.

Curiously enough, however, no sooner had this system been definitely established, than a tendency set in to modify it as regards the manner of its actual operation. This consisted in the progressive transfer of the real power to determine governmental action from the legislative chamber itself to its creature, the cabinet. This was brought about by so framing the rules of procedure of the lower

chamber as to vest practically complete control over its proceedings in the hands of the cabinet, and the development of certain political conventions which had, as their effect, the strengthening of the position of the cabinet as the controlling agent within the government and the custodian of leadership of the party in the electorate. Among the more important of these conventions, which long observance has made integral parts of the English political system, are: that the electorate, in selecting its representatives in the House of Commons, in effect denies to them the right to use their individual judgments in passing upon matters coming before them for consideration in the chamber and places them under what amounts to an imperative mandate to support the position taken by the party leaders, which, in the case of the dominant party, means the cabinet; that it is the duty of the cabinet to formulate the legislative program to come before the chamber for action; that the responsibility of the cabinet for all action taken by it shall be collective; and, finally, and in some respects most important of all, that the cabinet, upon being defeated in the House, need not necessarily resign but may, if it believes that the adverse vote does not correctly interpret the will of the electors, appeal to the latter. This is done by recommending to the Crown that it dissolve the House and order the election of a new one. This recommendation, under the English political system, is one that the Crown cannot refuse to comply with.

The result of these several provisions is completely to reverse the position occupied by the House of Commons and the cabinet towards each other. From a position of subordination, the cabinet has risen to one where it is the order-giving and controlling body. Instead of the House determining the continued existence of the cabinet, it is now the cabinet that determines whether the House shall continue to function or be superseded by a newly elected body. Instead of the House determining for itself political policies and the character of legislation that shall be enacted, these matters are now determined for it by the cabinet and its rôle is restricted to that of throwing the light of discussion upon such measures, but with no power to reject, or even to modify, them except as such

modifications may be acceptable to the cabinet. Instead of the House determining the annual work program of the government, and the means by which such program shall be financed, this is done wholly by the cabinet. Thus, a rule of the House expressly deprives the House of the power to consider any bills for the raising or expenditure of revenue except such as are brought before it by the cabinet, while, as has been stated, its power to reject or modify such proposals is practically nil.

Responsible Government: France and the Continent of Europe.—The success achieved by England in transforming her government from an autocracy to a popular government naturally influenced the other nations of Europe, when they were seeking to effect a similar transformation. Upon the establishment of its republic, in 1871, France, accordingly, sought to create a form of government corresponding, in nearly every fundamental respect to that of England as it was then understood; and the other countries of Europe, in embracing the principle of popular government with scarcely an exception, followed the action of France. All provided for a union of powers in the hands of the legislative branch; for the vesting of the exercise of the executive power in a cabinet chosen from among the members of the legislature and responsible at all times to the lower chamber of the legislature for the manner in which it performed its duties; and for the grant to the titular head of the state, the king, or president, of little more than nominal power in so far as the vital determination of important governmental policies is concerned.

We have seen that the English system, subsequent to its establishment, underwent a profound modification, the most important feature of which was the transfer of the center of real power from the legislative to the executive branch. No similar transformation has taken place in the government of France, nor in those of the other countries whose governments are modeled upon that of France. In these countries, the legislative branch remains the seat of real power; and the executive branch, the cabinet, constitutes but its agency, responsible at all times to it for the manner in which it performs its duties. The reasons why political evolution

did not take the same direction in these countries that it did in England are not easy to give. One reason undoubtedly was that the abuses of autocracy were more recent on the continent, and the people had a deeper distrust of the possible dangers of vesting large powers in the hands of the executive branch. Another reason probably was that the people of the continent had not had time to develop those political traditions which have played such an important rôle in determining the actual workings of the English political system. Certain it is that in practically no country of Europe has there been a tendency on the part of the voters to group themselves around two standards, nor anything approaching the convention that members elected to the chamber are under an imperative mandate to make their actions conform at all times to the will of their party leaders. The result of these conditions is that the lower chambers in these governments are, with rare exceptions, made up of a multiplicity of political parties no one of which is sufficiently strong to constitute a majority of the chamber. Under these conditions, cabinets or governments can be formed only by effecting a coalition between a number of parties. Having no pledged majority of votes at their backs, in contrast to the English House of Commons, such ministries are necessarily dependent for their life upon the varying whims of the members, with the result that ministries are constantly changing as new coalitions between party groups are effected. The theory that the existence of the ministry shall be at all times dependent upon the will of the legislative thus finds its complete expression in these governments.

It is evident that a ministry so constituted cannot have the power and influence over the conduct of affairs, whether legislative or executive, which the British ministry has. Its weakness *vis à vis* the chamber is moreover emphasized by certain other features of the French and continental systems. We have seen that the power the English cabinet has to compel a dissolution of the House of Commons gives it the whip hand over that body, for the members are naturally loath to jeopardize their political positions and, at best, to be put to the trouble and expense of a new electoral campaign. The knowledge that a defeat of the ministry by them would

subject them to this penalty thus exerts upon them a strong incentive to make their actions conform to the will of the ministry. No such provision exists in the case of France, nor in an equally unqualified way, in any of the other responsible governments of Europe. According to the French Constitution, the lower house, the Chamber of Deputies, can be dissolved only upon the consent of the upper house, the Senate—a requirement which in operation has practically prohibited an appeal being made to the electorate by the ministry. Finally, the rules of procedure of the chambers in these governments have not been so framed as to vest control of their proceedings and actions in the hands of the ministry as is the case in England.

Comparison of the Two Systems.—A reading of the foregoing analysis of the two systems of responsible government as they exist in England and on the continent of Europe must make clear that while the two present a superficial similarity of structure, they actually constitute two quite different forms of government in the manner of their actual operation. Both are governments of union of powers, but, in the one, the union of powers is in the hands of the executive branch, and, in the other, in the hands of the legislative branch. In England, it is the ministry which not only exercises the executive power but determines the legislation that shall be enacted. Moreover, whatever may be the theory, the responsibility of the ministry for the manner in which it performs its duties is, in fact, to the electorate rather than to the legislature. In France, and in the other countries of the continent that have modeled their governmental systems upon that of France, it is the legislature which, in the last analysis, determines legislative action and controls the exercise of the executive function by the ministry, since the responsibility of the latter to the legislature is a real and not a nominal one. To express it in the briefest manner possible: England is governed by the ministry, while France and the other countries mentioned are governed by their popular chambers.

If the attempt is made to pass judgment upon the relative merits of these two systems, there can be little question regarding the

position that should be taken, if the criterion employed be the manner in which the two systems have worked in practice. Responsible government, as it has operated in England, has given excellent results; as operated on the continent of Europe, it has produced results that are far from satisfactory. The reason why this is so undoubtedly lies in the fundamental differences between the two systems that have been mentioned. Attractive as the system may seem to be from the standpoint of theory, the fact is that a large body composed of heterogeneous elements, and divided into antagonistic groups, is utterly unfitted to perform the exceedingly difficult task of leadership in respect to the conduct of governmental affairs. As John Stuart Mill over seventy years ago pointed out in his remarkable chapter entitled "Of the Proper Function of Representative Bodies": [2]

> Instead of the function of governing which it is radically unfit for, the proper office of a representative assembly is to watch and control the governments; to throw the light of publicity on their acts; to compel a full explanation and justification of all of them which any one considers questionable; to censure them, if found condemnable, and, if the men who compose the Government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office, and either expressly or virtually appoint their successors.... This is surely ample power and security enough for the liberty of a nation.... Nothing but the restriction of the function of representative bodies within their rational limits will enable the benefits of popular control to be enjoyed in conjunction with the no less important requisites (growing ever more important as human affairs increase in scope and complexity) of skilled legislation and administration.

This statement of the disqualifications of the legislative branch itself directly to undertake the work of governing has been abundantly demonstrated by the manner in which responsible government has operated in France and the other countries of Europe. In no one of these countries has the system given thoroughly satisfactory results, while, in most countries, it has operated in such a way as thoroughly to discredit the whole system of responsible government. There can be no question but that the intense and widespread dissatisfaction with the manner in which it has oper-

[2] *Essay on Representative Government* (1861).

ated is, in no small degree, responsible for the readiness with which the people of such enlightened states as Italy and Germany have acquiesced in the destruction of "parliamentarism" and the substitution in its place of the modern autocracy. In some countries, the attempt has been made to make the system more workable by greatly strengthening the executive. This was the prime end sought by Pilsudski in Poland and is the reform urgently demanded in France at the present time. If further example be sought of the growing appreciation of the need of a strong executive with the responsibilities of leadership in the legislative as well as the executive field, it is to be found in the steady trend in the United States to look to the executive as the branch having primary responsibility for the determination of governmental action.

This tendency to magnify the rôle of the executive in the conduct of governmental affairs represents the most promising movement of recent years to bring the structure and processes of government into adjustment to modern conditions. The technical advantages of autocracy from the standpoint of unity of purpose and strength of action have been pointed out. The movement towards a strong executive represents the attempt to realize many of these advantages without surrendering the fundamental principle of popular government and due protection of individual liberty. Apprehension is sometimes expressed that every step towards strengthening the position of the executive is a movement towards the establishment of a dictatorship. Such apprehension, however, lacks foundation. Certainly the transfer of the seat of power in England from the House of Commons to the ministry has in no way jeopardized the liberties of the English people, nor undermined their system of representative government. The ministry, in that country, holds office as the result of a mandate given by the people at least once in every five years. Moreover, while in power, it can act in the legislative, or financial, field only by laying its proposals before the representative assembly, and that body, while nominally under the compulsion of ratifying the ministerial proposals, can, in case of any serious abuse of power or exercise of judgment, reassert its power to control action. There is nothing of autocracy in such a system.

In like manner, the enlargement of the responsibilities of the President and of the governors of the States in the United States leaves intact all fundamental safeguards against autocracy that it is one of the purposes of our constitutional documents to provide.

CHAPTER XV

PERSONAL AND ORGANIC UNION OR SEPARATION OF POWERS: THE GOVERNMENTS OF ENGLAND AND THE UNITED STATES COMPARED

As has been pointed out in the preceding chapter, all the nations of Europe which have gone over to popular government have created that form of this type of government calling for a union of powers. In doing so, England and her self-governing Dominions, although in theory following the principle of vesting all governmental powers in the legislative branch, have, in fact, evolved a system under which governmental powers are primarily united in the hands of the executive branch, while the popular governments of Europe, led by that of France, have adhered to the principle of a union of powers in the legislative branch. In marked contrast with both of these choices, the United States, and the nations of the New World which have modeled their political systems upon that of the United States, have given their choice to that type of popular government calling for a separation of powers.

Due to this basic difference between the systems of popular government as it exists in the Old and New Worlds, it is but natural that this question of the union or separation of powers should have received a great deal of attention at the hands of students of government, with the special objective of seeking to determine the relative advantages of the two. There are indeed few topics in political science about which more has been written by American students. Notwithstanding this, there are few subjects regarding which greater misconception now exists. The reason for this is that there is a general failure to distinguish between certain important questions that are involved in it. The fact of the matter is that the subject is an exceedingly difficult one and only by the most painstaking study can one hope to understand it in all of its phases.

Such a study can best be made by subjecting to further analysis the principles underlying, and the results actually obtained under, the two systems employed by their leading exponents. For this purpose a selection is made of the governmental systems of England and the United States. This is for obvious reasons. At no time has there been a belief in the United States that the parliamentary system of France and other European countries offered any features of importance superior to those of the American governmental system. There has, however, existed a certain body of opinion which, if it has not held that the English political system was generally superior to our own, at least has seen in that system many features that might with profit be incorporated in our own. Under these conditions, it is manifestly desirable to know more in detail the differences characterizing the systems of these two countries and the extent to which the differences are responsible for the different manner in which they work.

Distinction Between a Personal and an Organic Union or Separation of Powers.—In entering upon a comparative study of this character, attention should first be given to a distinction which, though it goes to the very heart of the whole question, is yet one which has received little or no attention. The failure to make this distinction, and to appreciate the consequences flowing from it, is responsible, more than anything else, for the vast amount of misconception that exists in respect to the relative merits and consequences of the two systems.

This distinction is that between the separation of powers which is secured when the exercise of the several powers is vested in distinct organs, each of which is manned by a distinct set of officials, and that resulting where use is made of separate organs, but with these organs, in part at least, in charge of the same persons. This distinction, it is evident, is the same which exists between the two cases where two industrial undertakings are carried on by separate corporations, no officer of which is an officer of both corporations, and where use is made of two distinct corporations, the officers of which consist in whole or in part of the same persons. In both cases the separation is organic. Only in the first case, however,

is it a personal one. We can distinguish between the two, therefore, by designating the first as a personal and the second as an organic separation of powers.

The English Government One of Separation of Powers Organically and Union of Powers Personally.—The importance of this distinction can be seen when we attempt to compare the governments of Great Britain and the United States from this standpoint. The former government is usually regarded as the most striking example of a government of united powers, the latter as an equally prominent example of one with a separation of powers. The undoubtedly greater smoothness with which the former government works, in comparison with the latter, is believed to find its chief explanation in this fact that, in the former, there is a union, and in the latter, a separation of powers.

With the belief that the government of Great Britain does work in a smoother and more efficient manner than that of the United States, and that the reason for this is in great part found in the difference between the two governments as regards this feature of the union or separation of powers, the author is in entire accord. The explanation of the superior results given by the former, is, however, in the opinion of the author, precisely the opposite of that which is usually given. The excellence of the British government, and the relative inferiority of the American government does not lie in the fact that, in the former, there is a union and, in the latter, a separation of powers, but in the precise reverse of this; namely, in the extent to which that principle of vesting the exercise of each power in a distinct organ is adhered to in the former, and disregarded in the latter.

A close study of the English government in its practical workings shows that, organically, the principle of the separation of powers has been carried out with a rigidity that is found in few or no other governments. After a long struggle between the Parliament and the Crown, the latter was shorn of all of its legislative powers and the exercise of this power was vested wholly in the former. On the other hand, Parliament, though victorious in the contest with the Crown, has never attempted to deprive the latter

of any of its executive powers, nor itself to participate in any way in the exercise of that power. More remarkable still, Parliament has never taken to itself the function of administration. This is strikingly illustrated in its attitude towards the budget, that is, towards the determination of the manner in which the revenues of the country shall be raised and expended. The formulation of the annual budget of receipts and expenditures is recognized as essentially an act of administration. By a self-denying ordinance, or rule, it has provided that no measure looking to the raising of revenue or the expenditure of funds shall even be considered by it, except such as are brought before it and recommended by the ministers of the day, which, in their capacity as heads of the administrative departments, constitute the administrative branch of the government. More than this, it denies to itself the right to modify the proposals so brought before them in any respect, except as such modification may meet with the approval of the latter. In point of fact, the budget which constitutes the whole financial program of the government for the year is determined absolutely by the administrative branch of the government. The only real participation in this act by Parliament arises from the right which it has that the budget, as framed, shall be laid before it for its information, and that it shall have an opportunity to express its opinion regarding it. There is here no division of power or responsibility. Power in respect to, and full responsibility for, the budget rests with the administration.[1]

We have mentioned especially this matter of the enactment of the budget not only because it constitutes the most important and vital of all administrative acts, but because the attitude that Parliament takes towards it is typical of its attitude towards all matters of administration. No effort is made by it to substitute its judgment for that of the officials engaged in the actual administration of affairs. In not a single case does it, for example, require that the appointment of officials, high or low, shall come before it

[1] For a full consideration of this feature of the English government, see: "The System of Financial Administration of Great Britain," by W. F. Willoughby, W. W. Willoughby and S. M. Lindsay, (D. Appleton & Co., 1917).

for approval or disapproval. Any such provision would be deemed a grave trespass by the legislative branch upon the field of administration.

In like manner, the judiciary has been established as a distinct and independent branch of the government. This has been accomplished by the enactment of laws requiring that all appointments to high judicial office shall be for good behavior, that the salaries of judges shall constitute a permanent charge upon the Consolidated Fund, and thus be independent of annual budgetary provision, and that the judges themselves shall be removed only upon an address on the part of both houses of Parliament requesting that this be done.

If we turn from a consideration of the union or separation of powers organically to that of their union or separation personally, we find quite a different condition of affairs. Though distinct organs are provided for the exercise of each of the great powers of government, these organs are, as regards their superior officers at least, under the direction of the same persons. We have in effect the same situation as that which exists when the same persons are officers of distinct corporations, each with its distinct field of activities, but all having for their object the attainment of a common end.

This situation of affairs can be understood only by appreciating that the ministry, or the cabinet, though possessed of unity as far as its personnel is concerned, acts as three distinct organs. In their capacity as members of Parliament, the members of the ministry act as a committee on rules and program of that body. As heads of administrative departments, they act as a central administrative board. As the actual custodians of the powers of the Crown, they act as the chief executive of the nation.

This distinction between the three capacities in which the ministry acts is not a mere theoretical one for the purpose of making clear the functions of this body. It is one which is observed strictly in practice. In the ministry we have three distinct organs. When acting as an executive organ, it acts independently of Parliament and as the direct representative of the Crown, of whose original

power it is now the custodian. When acting as a legislative organ, it keeps strictly within the legislative field and does not seek to take to itself either executive or administrative functions. When acting as an administrative board, it does not seek to exercise either executive or legislative powers except when legislative powers are expressly granted to it by the legislative branch, but confines itself strictly to the problem of administration.

To sum up then, the prime characteristics of the British governmental system, from the standpoint of the union or separation of powers, lie in the definite separation of powers organically, and their close union, personally. Each organ confines itself to the work which belongs to itself. At the same time, there is full recognition of the fact that the several branches of government are but parts of one piece of mechanism, and that, as such, their operations should be conducted in accordance with general policies and directed to a common end. This is secured by placing the same persons in charge of these several organs.

It is in this harmonizing of these two apparently conflicting considerations, the distinct separation of powers organically and their union personally, that the great merit of the British governmental system lies. The bald statement that the excellence of this system lies in the union of powers is thus not only misleading, but wholly erroneous, since it implies that this union is not merely a personal but an organic one, an implication which, as we have seen, is directly contrary to the fact. The real explanation of the excellence of the system lies, as much, if not more, in the separation of powers organically as it does in their union personally.

The United States Government One Largely of Union of Powers Organically and Separation of Powers Personally.— If the government of Great Britain is viewed as the most prominent example of one with a union of powers, that of the United States is regarded as a no less striking illustration of the contrary principle. No idea is more firmly held by the mass of the American people than that the most fundamental principle upon which their government is based is that of a separation of powers. It is in this separation of powers which they believe to exist that they find the

greatest guarantee of their political liberties and safeguard against a despotic use of power by public officials. To this characteristic, on the other hand, is attributed many, if not most, of the evils which our system of government presents in actual operation; and in doing away with this separation of powers is believed to lie the only effective remedy against such evils.

Deep-rooted as are these opinions regarding our government, examination will show that they are almost wholly unfounded. The government of the United States, instead of being one of separated powers, is one in which there exists a union of powers, both organically and personally, to an extent that is found in few, if any, other governments of the first rank; and the troubles which are experienced in operating this system, instead of being the consequence of a separation of powers, are due to the precisely opposite reason, namely, a vesting in many cases of the exercise of the same powers in two or more authorities or organs.

The fact of the matter is that our government represents one in which neither the theory of the union of powers nor that of a separation of powers has been consistently carried out. In framing our constitution, its authors proceeded upon the theory that all of the powers of government were divisible into the three great branches of legislative, judicial, and executive, and that separate provision should be made for each. They failed utterly to recognize, or to make any direct provision for, the exercise of administrative powers. In consequence of this failure, our entire constitutional history has been marked by a struggle between the legislative and the executive branches as to the relative parts that they should play in the exercise of this power. This is a matter to which we will give special attention in another place.

Disregarding this point for the present, we find that the framers of the constitution, in acting upon this theory that the powers of government fall into the three classes of legislative, judicial, and executive, proceeded to provide for three organs, a Congress, a Judiciary, and a President, which should constitute the three branches, or departments, of government corresponding to these three powers. Having made provision for these separate organs,

they, however, refused to vest in them the exclusive exercise of the powers to which they correspond. On the contrary, they so defined the powers of each and so distributed the exercise of the three powers among them that no one can act independently in its own field. In almost all vital matters, the concurrence of one or more of the other two organs is required. A rapid survey of some of the more important provisions of our constitution bearing upon the exercise of the three powers will show to how great an extent this is true.

Though the first section of the constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives," active participation in the exercise of this power is in fact conferred upon the executive branch by the requirement that no bill shall become a law until it is referred to the President for his approval and by the power that is granted to the latter to veto such bills as do not meet with his approval. It is true that such veto may be overridden if a two-thirds majority vote for such action can be secured in both houses. This, however, does not negate the fact that the executive is given an active participation in the exercise of the legislative power and that this participation, in the great majority of cases, determines whether a given measure shall, or shall not, become a law. In this connection it is important to note that this veto power of the President, though negative in form, can be and is used to influence legislation in a positive way. This is done by the President letting it be known that if certain provisions are omitted from, or allowed to continue in, a measure it will receive his veto. In considering measures, Congress has constantly to bear in mind this contingency of a presidential veto. Through the possession of this power, the President thus exercises a very positive influence in determining the character of the laws that are drafted by Congress and sent to him for his approval.

This power to veto bills represents, moreover, but one of the ways in which the President participates actively in the exercise of the legislative power. The provision of the constitution that the President "shall from time to time give to the Congress informa-

tion of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient" has been interpreted as conferring upon the President, not only the authority, but the obligation, to propose legislation. In the early days of the Republic, it was believed that the President had exhausted his authority under this grant when he had brought to the attention of Congress action which in his opinion should be taken: responsibility for taking action upon these recommendations was deemed to rest wholly with Congress. Within recent years, however, a radical change of attitude towards this function has taken place. The people now look to the President, not only to formulate a definite legislative program, but to exert all his influence and power to secure favorable action upon it. A few years ago, Congress would have resented as an infringement of its function any attempt on the part of a President to embody his proposals in the form of definite drafts of bills. Now the President boldly puts his proposals in this form, declares them to be administration measures, and takes the position that support of them is a test of party fealty.

The President, moreover, does not stop with this formulation of a legislative program. He thereafter exerts himself to the utmost to secure favorable action upon his proposals. He is in constant consultation with the leaders of his party in Congress. By personal interviews and other means, he seeks to overcome the opposition of members not favorably disposed. If need be, he uses the great powers which he possesses to bring pressure to bear upon individual members to support his measures. Patronage can be liberally bestowed or wholly withdrawn, special action desired by members can be supported or opposed. In extreme cases, the fight can be carried into a member's district and his renomination or reëlection to office can be supported or antagonized according to the position taken by him in relation to administration measures. The extent to which such a use of power by a President to coerce a member of Congress in the exercise of his function as a legislator is legitimate raises an important question which will be considered elsewhere. Here it is desired only to bring out the extent to which the President both has and uses the power to influence legislation

and thus to make of himself one of the distinct organs through which the legislative function is performed. There can be little doubt that this increased participation on the part of the President in the field of legislation meets with popular approval.

The same demand that the chief executive shall formulate and seek to secure action upon a legislative program is equally evident in the administration of the affairs of the individual States. The assumption of this important function in relation to legislation by the chief executive, both of the federal government and of the constituent states, thus bids fair to harden into one of the firmly established conventions of our constitutional system. In virtue of this convention and the existence of the veto power by the President, it is thus not going too far to say that the President now constitutes an organ of legislation scarcely second in power and importance to Congress itself.[2]

The chief executive is not the only organ, however, with which Congress has to share the legislative function. It has now become firmly established that upon the courts falls the function of determining whether the several branches of government in the exercise of their powers have kept within the limitations imposed upon them by the constitution through which they were established and their powers defined. Attention has already been called to the fact

[2] It is important to note that the position now held by the President as one of the distinct organs through which legislation is had is primarily the result of the growth of a convention. The framers of the Constitution had no idea that the President would play any such part in legislative matters. It is well recognized that the veto power was conferred upon him not with a view that through it the President might influence legislation generally. It was granted to him primarily as a weapon through which he might protect himself against an encroachment upon his powers by Congress. This moreover was the manner in which the veto power was interpreted, and, with rare exceptions, acted upon, by Presidents down until the last quarter of the nineteenth century. The idea that it was proper for a President to set up his individual judgment against the collective judgment of Congress was not entertained. Now it is accepted as quite the normal thing that he should do so. In like manner there was no conception on the part of the framers of the constitution that use would be made by the President of his power to recommend action to Congress to formulate and put through if possible a general legislative program. Though the foregoing is a matter of historical interest the fact nevertheless remains that in our constitutional system as actually worked there is this large participation by the President in the exercise of the legislative power.

that one of the serious consequences of the attempt to define by constitutional enactment the extent of governmental powers and the manner in which these powers shall be distributed territorially and functionally is the establishment of a system under which many questions are bound to arise regarding the exact meaning and intent of these provisions and their application to particular concrete cases. This renders it imperative that authority shall be vested in some organ to pass upon these questions. In the United States, this power has been assumed by the courts as a part of their general duty to interpret the law of the land. The result is that all laws must finally pass the test of judicial approval if any question regarding their constitutionality is raised.

It might seem that this power possessed by the courts to construe laws is distinctly a judicial power and in no way partakes of the nature of the exercise of legislative power. Strictly speaking, this is so. Two facts, however, have made the exercise of this power by the courts one profoundly affecting the exercise of the legislative power. The first is the fact that, in practice, the provisions of the federal and State constitutions determining the powers of government and the manner of their exercise have proved of such a character that it is almost impossible for Congress or a State legislature to depart in any way from the beaten path without giving rise to the question of the legality of their action. The result is that almost every attempt made by them to break new ground for the purpose of solving social problems has been questioned in the courts, and the latter have therefore had the final say as to whether they should prevail. The second is that, in passing upon these questions, the courts have taken the position that it is a part of their function to determine the facts to which the laws are intended to apply as well as to interpret the language of the laws themselves. For example, the legislature, when it passes a law fixing the maximum number of hours of labor in a given industry, does so in the belief that the conditions are such as to bring such action within the police power of the State and thus to meet any objection that may be raised that it represents an improper infringement of the constitutional provision that no person shall be deprived of life, liberty, or

property without due process of law. The courts, in passing upon laws of this character, have, however, assumed the power of questioning the soundness of this belief. If, in their opinion, such laws are not required for the proper protection of the individuals that may be affected by them, or the general public, they have not hesitated to declare such laws null and void, as not representing a proper exercise of the police powers and consequently as being instruments violating the constitutional provision just cited. The issue between the legislature and the courts is here one purely of fact and expediency. The propriety of the courts taking this position regarding their power is seriously questioned. This, however, is a matter into which we cannot here enter. We are concerned now merely with the fact that in our governmental system, as it actually works at the present time, the courts play a very large rôle in determining the character of legislation that the country shall have.

To sum up, it will thus be seen that our governmental system, instead of being one of the definite separation and segregation of powers, is, as far as the exercise of the legislative power is concerned, so decidedly the reverse that all three departments of government, the legislative, the executive and the judicial, participate in the exercise of this power. Authority and responsibility, instead of being concentrated in a single organ, are distributed among a number.

If we turn from the legislative to the executive power, we find here too a failure to vest the exercise of this power wholly in one organ. It is true that the constitution provides that "the executive power shall be vested in a President of the United States." Subsequent provisions, however, provide for the participation by Congress in the exercise of this power. The more important of these provisions are those which provide that the President shall have power to make treaties with foreign powers only by and with the advice and consent of the Senate and upon the concurrence of two thirds of the Senators present, that Senatorial approval shall be had of the appointment of important officers, and that Congress and not the President shall be the authority to declare war and to provide for the calling forth of the militia.

Notwithstanding these provisions the principle of vesting the executive power in the hands of a single organ prevails to a far greater extent than it does in the case of the legislative power. The President, moreover, has been able effectively to protect himself from encroachment upon the exercise of his executive powers. The only possible exception exists in respect to the exercise of the treaty-making power. Here it is believed by many that the Senate has pushed its power to greater lengths than was originally contemplated. In this the author does not concur. It is significant that the provision granting the power to the Senate does not provide simply that treaties before becoming effective shall be approved by the Senate, but stipulates that they shall be made by and with the advice and consent of the Senate. Clearly this anticipated that the Senate should be consulted throughout the work of negotiating treaties. If anything, the practice on the part of Presidents of negotiating treaties without seeking the advice of the Senate and only bringing the treaties as negotiated before that body for approval or rejection represents an encroachment on the authority of the Senate as defined by the constitution.

Of the several powers, the judicial power is the one which has been most definitely concentrated in a single organ. The exercise of this power is vested solely in the judiciary. Neither the legislative nor the executive can be said to exercise this power in any way unless, possibly, the impeachment power of Congress be deemed to be judicial in character. Notwithstanding the dependence of the judiciary upon Congress and the President as regards the determination of its organization, procedure, and personnel, the judicial power itself is not distributed among two or more organs as is the case in respect to the executive, legislative, and administrative power, but is vested exclusively in one organ, the judiciary. In exercising its functions, the latter, moreover, enjoys a practical immunity from pressure of every sort from the other departments of government. This is due partly to the provision of the constitution that the judges shall hold office during good behavior and their compensation shall not be reduced during their terms of office, but chiefly to the tradition now firmly

established that judges should exercise their judgment in an entirely independent manner. This tradition prevents the other departments from attempting to influence the judges and causes the judges to repel any such attempt should it be made. That in practice the United States has had a remarkably independent judiciary is beyond question.

It is when we turn to the provision, or rather lack of provision, that has been made for the exercise of administrative power that we find the greatest failure definitely to locate authority and responsibility in a single organ. The framers of our constitution performed their work at a time when all the powers of government were believed to fall within the three branches of legislative, judicial, and executive. They had no conception of the function of administration as one of the distinct powers of government. No specific reference to this power is thus made in the constitution. More remarkable still, only an indirect reference is made to the matter of organization for the administration of governmental affairs. This is found in the provision that the President "may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices," [3] and that the appointment of inferior officers may be vested by Congress "in the President alone, in the courts of law or in the heads of departments." [4]

Owing to the fact that the President at the present time in fact exercises large administrative powers and is in appearance the head of the administrative departments, the popular opinion prevails that the framers of the constitution employed the term executive as including what are now known as administrative powers and that it was their intention that the President should be the head of the administration. This is a mistake. There can be no question but that they used the term executive in its technical sense as covering only the political duties of the titular head of the nation.

It was undoubtedly intended that the President should be little more than a political chief; that is to say, one whose function should in the main con-

[3] Art. 2, Sec. 2, Pars. 1 and 2.
[4] Art. 2, Sec. 2, Pars. 1 and 2.

sist in the performance of those political duties which are not subject to judicial control. It is quite clear that it was intended that he should not, except as to these political matters, be the administrative head of the government with general powers of directing and controlling the acts of subordinate federal administrative agents.[5]

That this is the interpretation that Congress has placed upon its powers, and that it intended to act upon this interpretation is evident from the character of the provision that it has made for the organization and operation of the administrative departments. It is true that in creating a department of foreign affairs (the present State Department) and a Department of War, it vested in the President large powers to direct and control the operations of these departments. It did so, however, since these departments have to do almost wholly with matters affecting the exercise by the President of his executive powers. To have failed to do so would have deprived the President of the means of effectively exercising the executive powers vested in him by the constitution. When Congress came to establish the Treasury Department, however, it made this department a direct agency of Congress. It made its head, the Secretary, directly accountable to it and not to the President. Both the language of the act and the debates in Congress show that it was the intention that the Secretary should receive his orders from Congress. This is clearly shown in the provision that the Secretary should make his annual reports to it instead of to the President. The same is true in respect to the Post Office Department. There is no indication that these officers should be deemed to be subordinates of the President and as such subject to his superior direction. Legally, therefore, the heads of departments, and in fact all officers of the government, are not subject to the direction of the President except in so far as Congress has expressly granted to the President this power of direction and control.

Congress, and not the President, is thus, in the intent of the constitution, the primary source of administrative power, and such it is in fact at the present day. It is the authority which determines

[5] W W. Willoughby, *The Constitutional Law of the United States*, 2nd ed., p. 1479.

how the government shall be organized for the performance of its administrative duties, what offices shall be provided, what compensation shall be paid, what shall be their specific duties, and, subject to a limitation which will be shortly mentioned, how the incumbents of these offices shall be appointed. Congress is thus the ultimate directing, supervising, and controlling authority in respect to matters administrative. In a very true sense, all the administrative officers of the government, including the President himself, when the performance of administrative duties has been entrusted to him, are but agents of Congress and subject to its orders and control.

This interpretation of the powers of Congress in respect to matters of administration has been fully endorsed by the Supreme Court. The leading case on this question is that of United States v. Kendall (5 Cranch 163, 272) in which was raised the question of the power of Congress and the President over the acts of the Postmaster General. In the course of its decision, the Court said:

> The legislature may prescribe the duties of the office at the time of its creation, or from time to time as circumstances may require. If those duties are absolute and specific and not by law made subject to the control or discretion of any superior officer, they must be performed, whether forbidden or not by any other officer. If there be no other officer who is by law specially authorized to direct how the duties are to be performed the officer whose duties are thus prescribed by law is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other person. . . .
>
> As the head of an executive department he (the Postmaster General) is bound, when required by the President, to give his opinion in writing upon any subject relating to the duties of his office. The President in the execution of his duty to see that the laws be faithfully executed is bound to see that the Postmaster General discharges faithfully the duties assigned to him by law; but this does not authorize him to direct how he shall discharge them.

The Supreme Court, on the case being appealed to it, endorsed this opinion, and in the course of its own opinion said: [6]

> It by no means follows that every officer in every branch of that (the executive) department is under the exclusive direction of the President. . . . It would

[6] Kendall v. U. S., 12 Peters 524, 610.

be an alarming doctrine that Congress cannot impose upon any executive officer any duty they may think proper which is not repugnant to any rights secured and protected by the constitution, and in such cases the duty and responsibility grow out of and are subject to the control of the law and not to the direction of the President.

Though Congress has thus been made, and is in fact the primary source of administrative authority, the entire administrative power is not vested in its hands. In two important respects participation in the exercise of the administrative power has been vested in the Executive. Reference is here to the provisions of the constitution which stipulate that the President shall "take care that the laws be faithfully executed" and that "he shall nominate and by and with the advice and consent of the Senate appoint ambassadors, other public ministers and consuls, judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law or in the heads of departments."

The first of these provisions, it should be noted, confers no powers upon the President additional to those elsewhere specifically granted to him. It does, however, impose upon him the obligation of making use of these powers in such a way as to see that the laws are duly executed. Responsibility in respect to matters of administration is thus very definitely imposed upon him. Apart from any specific duty that may be imposed upon him by Congress, the President is thus made by the constitution one of the authorities through which a proper exercise of the administrative power is to be had.

It is in the second provision, however, that the President is granted the most direct participation in the exercise of the administrative power. The power of nominating and appointing the chief officers by whom the affairs of the government shall be carried on necessarily carries with it both a great responsibility and a great power to control the manner in which affairs shall actually be administered. This is especially so when it is held that the power

of appointment carries with it the power of dismissal. Though the constitution failed to cover this point specifically, Congress has repeatedly sanctioned the view that the power constitutionally resides in the President to dismiss all officers which are appointed by him alone or by and with the advice and consent of the Senate. The acquiescence of the latter body is not necessary even in those cases where its approval is required for appointment. More than this, in a recent case which attracted the wide attention of students of American government,[7] the Supreme Court of the United States held that an attempt on the part of Congress to restrict the removal powers of the President by providing that removal could be effected by the President only upon the approval of the Senate being had, was unconstitutional. Much the most important feature of this decision, from the present standpoint, is that this denial to Congress of the right to restrict the President's removal power is based primarily upon the position that such power is inherently an executive one and that its untrammeled possession by the President is essential if he is properly to discharge the constitutional duty imposed upon him of "seeing that the laws be faithfully executed."

The question as to what officers are covered by the expression "all other officers of the United States whose appointments are not herein otherwise provided for" as distinguished from "inferior officers" the appointment of which may be vested by Congress in the President alone, in the courts, or in the heads of departments has never been judicially determined. In practice, however, the heads of departments and their major subdivisions, the bureaus, members of commissions and boards, and even the more important field officers, such as collectors of customs, collectors of internal revenue, and the postmasters of large cities have been treated as officers who can be appointed only with the concurrence of the Senate. The great majority of all other administrative officers are treated as inferior officers, and their appointment is vested by law in the President alone or in the heads of the departments.

In this connection it may be noted that this provision of the constitution regarding the appointment of officers, both superior and

[7] Myers v. U. S., 272, U. S. 52.

inferior, has been construed by the courts as denying to Congress itself all powers of appointment. This follows from the fact that specific provision is made as to how superior officers shall be appointed and that Congress is not included in the enumeration of authorities in whom the appointment of inferior officers may be vested. Congress can create and abolish offices, but it cannot designate the persons to fill these offices.[8]

We have entered thus fully into the question of the power to appoint and dismiss administrative officers since it must be evident that the officer possessing this power not only shares in the responsibility for the proper conduct of the administration of affairs but is in a position where he can direct and control the manner in which the administrative power shall be exercised. Not only can he, in choosing persons for appointment, make a selection of those who have opinions conforming to his own, but he can thereafter control their action by removing from office those who refuse to carry out his will. Whatever may be his lack of legal authority, actual power is thus possessed by him to direct how affairs shall be conducted. This is a power which the President has not hesitated to exercise. The most notable illustration is the removal by President Jackson of successive Secretaries of the Treasury who refused to follow his orders regarding the removal of government deposits from the first Bank of the United States. This led to a direct issue between the President and Congress and caused the latter to pass a vote of censure upon the President for his action. The President, however, carried his point. At the present time, it is rarely necessary for the President to push his action this far. The knowledge that he has full power of removal is sufficient.

Much the most significant feature of this whole question of the direction and control of administrative officers by the President lies, however, in the fact that at the present time the exercise by the President of such power is now looked upon by the country

[8] It is of interest to note that the individual States have not in all cases followed the practice of the United States in respect to the appointment and dismissal of administrative officers. In many cases an officer appointed by the governor upon the approval of the legislature or one of its houses, can only be dismissed by the governor upon the concurrence of the latter body being had.

as thoroughly legitimate and is acquiesced in by both Congress and the heads of departments. It may now be said that the convention is fairly established that the wishes of the President, in so far as they are not in conflict with provisions of law, should control administrative officers in the performance of their duties.

Though the present administrative powers of the President are in large part the outgrowth of this power of removal, other causes have contributed not a little to the same end. With the growing complexity of governmental interests, Congress has found it impossible to provide in advance by means of legislation the precise means that should be employed and the steps that should be taken in carrying through many important classes of governmental undertakings. More and more, therefore, it has pursued the policy of delegating to the President large discretionary powers in respect to the carrying out of its policies; and no small part of the present powers of the President in respect to administrative matters rests upon specific statutory enactments. Notable instances where this policy has been pursued by Congress are furnished by the acts providing for the construction of the Panama Canal, the first government of the Philippines, and the creation of agencies for the meeting of the many problems arising out of the World War, and the combating of the unexampled industrial depression beginning in 1929 and continuing down to the present time. In all these cases the President was given practically *carte blanche* to take such action as he saw fit. In scores of minor matters, a similar authority has been conferred upon the President.

Finally, mention should be made of the fact that the courts, in interpreting the constitutional provisions bearing upon the powers of the President, have been exceedingly sympathetic to this development of his administrative powers. A broad construction has been given to the provision that it is the duty of the President to see that the laws are properly enforced. Wherever possible, the authority of the President over administrative officers has been supported as necessary in order that the former may effectively discharge this duty.

Viewing conditions as they actually are, it will thus be seen that, in the United States, the exercise of the administrative power is fairly evenly distributed between the legislative and executive branches of the government. The former possesses the entire authority to determine what work shall be undertaken, the plant and organization and personnel that shall be made use of, and the procedure that shall be employed. The latter, subject to the necessity for securing the concurrence of the Senate in respect to important offices, has the determination of the persons who shall constitute this personnel, and, in consequence of this power and the other facts which we have mentioned, has a large power of direction and control over the manner in which they carry out the orders given by Congress. Both authority and responsibility for the actual conduct of governmental operations are thus divided between the two branches of government. This is strikingly evidenced in respect to that most important of all acts of administration, the preparation and enactment of the budget by which the annual revenue and expenditure needs of the government are determined. We have seen that in Great Britain the preparation and enactment of the budget rest wholly in the hands of the administrative branch of the government, that Parliament participates in this work only through the requirement that the budget as formulated shall be laid before it and that it shall have an opportunity to criticize its provisions. In the United States the budget is a matter requiring the joint action of the legislative and administrative branches.

If now we seek to sum up and characterize in general terms the system of government of the United States from the standpoint of the manner in which this problem of distribution of powers functionally has been met, it will be seen that the system established, instead of being one of separation of powers, as is popularly supposed, is one which, while not embracing the principle of union of powers, in fact provides for a joint exercise of powers from both the organic and personal standpoints. It is true that special organs have been created for the exercise of legislative, executive, and judicial powers, and that general provisions have been incorporated in the constitution that the legislative, the executive, and the

judicial powers respectively shall be vested in these organs. Actually, however, as we have seen, no one of these organs is independent and supreme within its own field. Especially is this true in respect to the two branches which are most directly concerned with the actual conduct of the internal affairs of government—the legislative and the executive.

This system under which each branch in its operations is more or less subject to the control of one or both of the other two branches is one which has aptly been designated as a system of checks and balances. The explanation of the adoption of a system of this character lies in the apprehension that existed at the time of the adoption of the constitution of the danger which was believed was inherent in any governmental system of the abuse of power by those in authority. One has but to read the discussions of the period to see how the framers of our constitution were dominated by the fear that either the popular branch of the government, the legislative, or the executive would so exercise its powers as to establish in effect a popular or autocratic tyranny. All governments, they believed, had to steer a difficult course between the Scylla of executive tyranny on the one hand and the Charybdis of democracy, or mob rule, as it was designated, on the other. Safety, they believed, could only be secured by making it possible for one branch of the government to check the other at all vital points. Due to this belief, the framers of our constitution were more interested in the negative than in the positive aspects of government, or at least gave undue prominence to the former. They were more concerned about preventing abuses and forestalling possible dangers than about establishing an efficient governmental organization.

Comparison of the Systems of a Union and a Separation of Powers.—Having analyzed the problem of the functional distribution of governmental powers and described the manner in which this problem has actually been met by the two great nations, the governments of which best illustrate the different systems that may be established, it now remains to compare these two systems for the purpose of determining their relative advantages. In mak-

ing this comparison it is necessary to bear in mind the distinctions which we have drawn between first, the union or separation of powers from the constitutional standpoint, that is, from the standpoint of the constituent authority vesting all powers in the first instance in a single, or in a number of coördinate organs; and second, between the actual union or separation of powers organically and personally. Thus we have seen that the government of Great Britain is one of a complete union of powers from the constitutional standpoint, one of a complete separation of powers from the standpoint of the actual exercise of the several powers by distinct organs, and one of a union of powers from the standpoint of the individuals having the direction of these organs; while that of the United States is one of a separation of powers from the constitutional standpoint, and one of a union of powers, both organically and personally, from the standpoint of the actual exercise of these powers.

Confining our attention, first to the two opposing systems of a constitutional union or separation of powers, we find that the system of a union of powers has all those advantages which we have seen attach to a unitary as opposed to a multiple government. In the first, responsibility for the conduct of all the affairs of government is definitely located in a single organ. The government resulting has thus the unity of responsibility, direction, and power that constitutes the chief merit of an autocratic government when in the hands of a benevolent ruler.

Under the English system, it is impossible for several branches of the government to be in disaccord. With us it is almost a matter of chance if the executive and the legislative are of the same political complexion; and instances are constantly arising where a President or governor is not even in accord with the members of his own political party in Congress or the State legislature. The result is that neither the executive nor the legislative is able to carry out its policies unless the latter should be so united that it can master the two-thirds vote necessary to override an executive veto.

Another advantage claimed for the English government is that such government at all times corresponds to the desires of the

electorate as expressed directly or through its representatives in the legislature; since at any moment the ministry may be defeated and one conforming more to popular desires be substituted in its place. This is an advantage, however, which is more theoretical than actual. In England, as we have seen, a ministry is now almost never overturned except as the result of an election. The length of Parliament's term is now fixed at five years; until 1911, it was seven years. A ministry having a substantial majority upon assuming office as the result of a general election thus has an almost assured life of a period greater than that enjoyed by the President and much greater than that enjoyed by the popular chamber of our legislature.

Joined with the foregoing advantages is that of flexibility, the power to change internal organization at will and thus to make it conform to new conditions and desires as they arise. Just as a unitary government has it always in its power to make such a distribution of the exercise of governmental powers territorially as conditions, in its opinion, demand, so the government of a constitutional union of powers can make such a distribution of its powers functionally as in its opinion will permit of the most effective exercise of such powers. Another important feature of this system is the extent to which it avoids the difficulties of conflicts of authority and jurisdiction, and the ease with which such conflicts as do arise can be adjusted. Finally, with authority thus concentrated, the full power of the government can be promptly brought to bear upon any great emergency.

None of these advantages is present in a government of a constitutional separation of powers. Responsibility and authority are here divided among a number of organs. Each is jealous of its own power. Effective coöperation between the several organs is at all times difficult to secure. Instead of being flexible, the system is characterized by rigidity. No change in the distribution of authority can be made except by appeal to the constituent authority by which the distribution was originally made. In its practical operation, disputes regarding the powers of the several organs are bound to arise, and these disputes cannot be settled on their merits by an act of

legislation but must be decided by the courts which, in reaching their decisions, are bound by the wording of the constitution. The result is that not only is the decision made by the branch of government which is not concerned with matters of policy and expediency, but the decision itself is often one which fails to conform to the needs of the case and is contrary to the wishes of the government and of the people as a whole. In all such cases, the only remedy is by way of the difficult process of securing an amendment to the constitution. Finally, the government finds itself unable promptly to bring to bear all of its powers for the meeting of grave crises. If unity of action can be secured at all, it is secured with difficulty and with unavoidable delay. In the case of the United States, only by giving to the so-called war powers of the President the broadest sort of construction has it been possible for the government to meet even in a measurable degree the exigencies of a great war. The government of a constitutional union of powers, in a word, can meet emergencies as they arise with its hands free; the government of a constitutional separation of powers must meet them with its hands more or less shackled.

With the intrinsic advantages so completely in favor of the constitutional union of powers, one must, as in the case of the adoption of the multiple form of government, seek for an explanation of the fact that so many states have adopted the less advantageous system. In the case of the adoption of the multiple form of government, the explanation we have found to lie in the historical circumstances under which these governments came into existence. In the present case, the explanation lies in the prevalence of the belief that a constitutional separation of powers is necessary in order to maintain the political liberties of the people. This belief, in turn, rests upon the belief that any authority possessing political power will seek to increase its power and that, unless it is subject to control by other authorities, there is the grave danger that it will sooner or later exercise these powers in such a way as to destroy political liberty and put in jeopardy, if not absolutely to annul, the most cherished of individual rights.

For the acceptance of this theory, the great French writer, Mon-

tesquieu, is chiefly responsible. In his notable work, *The Spirit of the Laws,* published in 1748, Montesquieu sought among other things to discover the secret of the enjoyment by the people of England of political liberty while those of most European countries were practically without political rights. Mistakenly interpreting the British constitutional system, he thought that the answer to this problem was to be found in the fact that in that country the powers of government, instead of resting wholly in the hands of a single organ, were distributed among the three great branches of government. In point of fact, the real explanation of the individual and political rights enjoyed by the inhabitants of Great Britain was to be found in the development of that great body of legal rules known as the common law, a body of laws which Englishmen rightly looked upon as their most cherished possession and which they were prepared to defend to the utmost. The fundamental principles at the basis of this jurisprudence, as it affected the question of government, were that all government should be one of law and that this law should have as its prime purpose the protection and promotion of the rights of the people. The only real protection that the people of England have had against tyranny, or indeed have at the present time, is their determination that these principles shall prevail.

This theory of Montesquieu met with almost unanimous acceptance in America. It was due to a belief in its validity, and to a failure of Montesquieu to understand the real nature of the political system of Great Britain, that the principle of the separation of powers was made one of the fundamental features of our governmental system.

It may well be that at the time our constitution was framed the danger of an illegitimate use of power and the possible establishment of a tyranny was sufficiently real to warrant the taking of unusual precautions to meet it. Granting this, the question nevertheless remains whether any such need now exists; whether, in view of the manifestly greater technical advantages of the system of a union of powers, steady progress towards that system should not be attempted. In two respects, conditions are now radically

different from what they were when our government was first established. Public opinion is now of so great power, and possessed of such effective means for its expression, that it is almost inconceivable that any government authority could seize power that was not its for the purpose of transforming the government in any way not acceptable to the people. The danger of the establishment of a tyranny so much feared by our forefathers is almost non-existent. In the second place, demands upon the government for positive action are enormously greater than they were, and are growing all the time. Restraints upon the action of government which were felt to a relatively slight degree are now becoming intolerable. It is of first importance, therefore, that we should at least realize to what features of our constitutional systems these restraints are due.

If we turn now from a comparison of the relative advantages of a union or separation of powers, constitutionally speaking, to that of their union or separation as regards their actual exercise we will find all the advantages the other way. The system under which the whole responsibility for exercise of each power is vested in a separate organ possesses great advantages over that whereby co-operation on the part of two or more branches of the government is required before action can be had. It is desirable that the whole legislative power shall be vested in the legislative branch of the government, the executive in the executive, the administrative in the administrative, and the judicial in the judicial. It is possible that an exception to this may be desirable in the case of the treaty-making power and possibly one or two other matters. The principle of the definite location of the exercise of each power in a distinct organ is, however, the correct one. The reasons for this are obvious and have been set forth fully in our consideration of the systems of government of Great Britain and the United States. The evils resulting from the Congress intervening in executive and administrative matters are constantly in evidence. The manner in which public funds are voted for local improvements which correspond to no national need, the insistence upon the building of post-offices and other public buildings, the maintenance of navy

yards, army posts, and local offices which are not necessary, and in many cases positive drags upon the services to which they relate, are the most striking illustrations of the bad consequences of this system. The damage done by the attempt of Congress to control matters of administration affects, however, almost every branch and phase of administration.

Tendency of the English and American Systems to Approach Each Other in Their Practical Operation.—It would be misleading to leave our comparison of the governmental systems of England and the United States at this point without calling attention to a phenomenon of great significance. This is that the two systems, while starting poles apart as regards the principles supposed to govern in respect to the distribution of governmental powers functionally, and still having this difference from the technical standpoint of constitutional law, have tended constantly to approach each other in respect to the manner in which they actually operate.

The most striking illustration of the English approach to the American system has to do with the manner of selection, terms of office, and independence of power of the executive. A prime feature of the American system is that the chief executive, to the end that he may have independence of the legislative branch in respect to the exercise of his powers, shall hold office for a fixed term of years and shall be selected by the electorate rather than by the legislature. This, as has been seen, is substantially the system now obtaining in England. There, a general election must be held at least once every five years. At this election the English electorate determines, in the same way as is done in the quadrennial presidential elections in the United States, by which party it desires to have its governmental affairs administered, and, usually, the particular person whom it desires shall hold the executive office of premier. In both cases, the chief executive officer thus gets his real mandate to act from the electorate, and in both cases can exercise his powers largely in independence of legislative direction and control; the American President because of constitutional provisions to that effect; the English premier because the same election

that brings him to power brings into existence a House of Commons a majority of the members of which are pledged, much as are the electors in the presidential electoral college, to cast their votes in a certain way—that is, in a way that will support the ministry in putting into execution its proposals.

While the English system has tended to approach the American system in respect to the real status and independence of powers of the chief executive, the American system, in a no less striking way, has tended to approach the English system in respect to the relationship that the executive bears toward the legislative branch. As will be more fully shown when we come to a consideration of the problems of party government and political leadership, the formulation of a work program to guide the legislature in the performance of its duties is a prime requisite of an effective political system. This requisite is fully met in the English system. From the first development of cabinet government in England, it has been deemed to be one of its prime functions of the cabinet not only to determine the work that the legislative branch shall undertake, but so to direct and control the latter that assurance will be had that it will, in fact, devote itself to such work, and take the action called for by such program.

No such automatic provision for leadership and program-making exists in the government of personal separation of powers of the United States, and that lack has been one of the serious drawbacks to the effective working of the American system of government in the past. This defect, however, is one which would appear to be now in process of correction through the steadily growing movement for the American people to look to their chief executives, the President and governors of the States, to play much the same rôle as the English premier in the way of formulating programs for legislative action and using the powers of his office to have such programs adopted. It is hardly necessary to say that this development represents one of the most profound changes that have ever taken place in the practical workings of our political system. If the American President has not the success of the English premier, this is due primarily to the fact that the party system in the United

States has not as yet developed the principle of collective responsibility that characterizes the English party system.

If these two tendencies, the one for the English to approach the American system, and the other for the American to approach the English system, are taken together in their relations to each other, it will be seen how closely the two systems, though starting from such opposing principles, have, in their practical operation, sought, and in large degree arrived at, the same solution of one of the most vital of all political problems. As a result of long experience and much experimenting, the English-speaking peoples have become convinced of the necessity of a strong executive—one to which the people can look for the formulation of political policies and which can give leadership to the legislative branch in the consideration of its proposals. It is in respect to this feature, more than any other, that the English and American governments are fundamentally different from the parliamentary governments of Europe. There the attempt has been made to make the legislative branch the center of political authority. This attempt is undoubtedly primarily responsible for the discredit into which this type of government has fallen in Europe. That England and the United States have been influenced to a relatively slight extent by the movement towards autocracy must be attributed to the fact that both have succeeded in establishing a form of government in which the existence of a strong executive has been harmonized with the effective working of parliamentary institutions.

PART V

THE SEVERAL BRANCHES OF GOVERNMENT

CHAPTER XVI

THE ELECTORAL BRANCH: COMPOSITION AND FUNCTIONS

In the preceding chapters we have sought to raise and discuss in their logical order those fundamental questions which have to be met by all peoples in organizing themselves as states and framing schemes of government through which the latter may act. All of these questions are of what may be termed a constitutional character, since definite answers to them must be given at the time that systems of government are brought into existence. It is these questions, or rather the answers that are given to them, which determine the type of government resulting and thus serve to make known the really fundamental differences between the governments of modern states. Until they are settled, it is impossible for a people even to consider, much less to answer, the many secondary, or more subordinate, questions that are involved in the organization of a government and the determination of its methods of procedure.

Having cleared the way by an examination of these basic matters, we now pass to a consideration of questions of quite a different class. They are designated different since, for the most part, they are not constitutional in the sense that answers to them must be given in framing a formal constitution, and because they deal with specific parts, or branches, of government rather than the government as a whole.

In considering these questions, it will not be practicable for us to give them the same detailed examination that we have given the first or constitutional class of questions. This arises from the fact that, in proportion as we push our inquiry from general to less general questions, the field for variations in practice widens. Anything like a detailed examination of every question arising in the work of actually framing the details of governmental organization

and procedure would consequently require a work many times longer than the one here undertaken. All that can be attempted, therefore, is an analysis of the several problems that are presented in providing for the organization of the five branches into which, as we have seen, the governmental structure may be divided; an indication of the more important considerations that must be taken into account in deciding between alternative lines of action that are open; and a summary statement of how these several problems have in fact been met by our own and other governments.

In entering upon a consideration of these separate branches of government, an exceedingly important distinction must be made: that between the electoral, legislative, judicial, executive, and administrative functions of government as functions and the organs and branches of government bearing these designations. This is necessary since, as we have pointed out in our consideration of the union or separation of powers, we find the branches of government bearing these designations in fact performing, or participating in the performance of, the functions pertaining primarily to other branches. This is especially so in the case of our own government.

Another point of equal importance is that, though we may study the several branches of government separately, sight must never be lost of the fact that these several branches are but parts of one machine and must always be studied from this viewpoint. In no small degree, the most difficult questions presented in the whole field of government and administration are those having to do with the distribution of powers between these branches and the adjustment of their relations with each other to the end that all may work harmoniously as one piece of integrated machinery.

The Electorate the Foundation of Popular Government.—In a popular government of the representative type, the electoral branch may be viewed as the foundation upon which the whole structure of government is erected. It is thus logical that a consideration of the several branches of government should begin with it.

A political community is composed of separate individuals each with his individual will, and, in the case of almost all modern

states, of a great many individuals with correspondingly large numbers of separate wills. It is thus necessary to provide some means by which these several wills may be expressed and common decisions arrived at. There is but one method by which this can be done in a populous community—namely, through the device known as voting. In political science a person viewed as a voter in respect to matters political is termed an elector and the entire body of citizen voters an electorate. Concretely, therefore, the primary problem presented to a community desiring to establish a popular government is to organize itself as an electorate, or to make a selection of those of its members whom it desires to act in this capacity.

Determination of the Composition of the Electorate.—Were a political community composed wholly of individuals equally capable of expressing an intelligent opinion regarding matters of general interest, the problem of providing a voting system through which a general will might be evolved from a collection of individual wills would be comparatively simple. In all communities, however, a very considerable proportion of the people are of a character manifestly disqualifying them for the exercise of political authority. Reference is here made to persons of immature age, to those of unsound mind, and, in certain cases, to members of uncivilized or but partly civilized tribes who are included in political groupings of people possessing a higher degree of intellectual development.

In addition to this class, regarding whose non-participation in the exercise of political powers there can be no question, there are, however, many other classes regarding the propriety or advisability of whose active participation in the exercise of political authority grave differences of opinion may exist, and in fact always have existed, even in those communities which have most unreservedly accepted the doctrine of popular sovereignty. Thus, after more than a century of the application of this principle, opinion in the United States, Great Britain, France, and Switzerland, no less than in countries which have not adopted this principle of popular sovereignty, is still widely divided regarding the criteria that should be

applied in determining those members of the community who should actually exercise the sovereign political power. The more important factors around which this difference of opinion has centered, and still in large degree centers, are: race or color, sex, age, ownership or occupancy of land, the possession of other property, education, payment of taxes, political and occupational status, citizenship, conviction of serious crime, bankruptcy, etc.

It needs but an enumeration of these several points to show how serious and difficult is this primary question of determining in whose hands shall rest the actual exercise of sovereignty. In no small part, the internal political history of states resting upon the doctrine of popular sovereignty has been dominated by struggles having to do with this issue. In England, the great questions of internal politics in the nineteenth century were those relative to the broadening of the electoral franchise and improving the machinery through which it was to be exercised. The great reform act of 1832 and the franchise acts of 1867 and 1884, concerned themselves solely with this fundamental question of the constitution of an electorate and a determination of how it should discharge its duties.

In the United States, in early days, acute discussion arose over the question of property and educational qualifications for the franchise. The question of color or race as a determining factor in respect to the possession of the franchise was one of the great issues arising out of the existence of Negro slavery in the United States—an issue which it was sought to settle by the adoption of the Fifteenth Amendment to the federal constitution declaring that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude." That this action did not settle this issue is, however, evidenced by the efforts on the part of many of the Southern States to prevent any actual exercise of the franchise by their Negro citizens, first by illegal means, and, in more recent times, by such nominally legal devices as the so-called "Grandfather" clauses in their franchise laws. Not until the adoption of the Nineteenth Amendment to the constitution

were the women of the United States placed upon an equality with the men in respect to the electoral franchise.

In organizing governments for our insular dependencies, the Philippines and Puerto Rico, the determination of the franchise has been one of the most difficult matters that the American authorities have had to meet.

Determination of the Electorate a Matter of Expediency.—It is manifestly impracticable for us here to enter upon any detailed consideration of the arguments for and against the giving of weight to any particular factor in determining the composition of the electorate. We shall therefore have to confine ourselves to one or two observations of a general nature which are deemed to be of importance, in order that the true nature of the problem may be made clear.

The first of these is that this whole problem of the determination of the composition of the electorate should be viewed strictly as a question of practical expediency. This is of importance since, whenever the demand is made for the extension of the franchise to a new class, the claim is made that such extension represents but the recognition of a natural right. Certainly this claim was constantly put forward by those who advocated the cause of women's suffrage in the United States. We have already stated that in our opinion there is no such thing as natural law, and consequently no such thing as natural rights. Apart from this, it must be apparent that the determination of the composition of the electorate is a matter to be adjusted in accordance with the particular conditions of each case. Thus it is evident that, whether or not the suffrage should be conferred upon women should be influenced largely by the attitude taken by the women themselves; the legal and social status of the women in the community concerned; and the extent and character of their education and general training. It may well be that in one case the grant would be desirable and in another represent a real danger to the proper working of the political system of the country. In like manner the extension of the franchise, which might be both feasible and desirable in a settled community long accustomed to the exercise of powers of self-government, might be

fraught with grave dangers in the case of a more unsettled community or one which had not been accustomed to governing itself or acquiescing in legal determinations.

The Electorate in a Popular Government the Actual Possessor of Legal Sovereignty.—When a community, having adopted the principle of popular sovereignty, makes provision for an electorate, it not only takes the first step towards the establishment of a government, but effects a profound change in respect to the location of the real powers of sovereignty. Though as a matter of theory, sovereign authority may be deemed to reside in the entire body of the people, the actual power to make use of this authority is exclusively vested in the hands of that select portion of the community that has been erected into an electorate. This fact, which is one of great significance, can best be brought out by making a distinction between what may be called political sovereignty and legal sovereignty. With an electorate established, while political sovereignty continues to reside in the whole body of the people, legal sovereignty, that is, the power to make an actual legal use of this authority, passes to the electorate. It might seem that, under these circumstances, no object is gained in continuing to hold that the whole people is the ultimate source of political authority. This, however, is not so. We have here to do with a doctrine or political belief. It is of the utmost importance to preserve in this manner the political principle that the government represents, and should act for, the entire community and not in the interests of any particular class; that, from this point of view, the electorate, though the possessor of absolute political authority, is in the position of a trustee and is under the obligation to exercise its authority in such a way as to promote the general interests of the public as opposed to its particular interest. In no other way can this political principle or ideal be equally well preserved than by keeping constantly in mind this fact that no matter where legal sovereignty may reside, final political sovereignty should be deemed to rest in the whole body of the people.

The Right of Revolution.—Nor is this matter one purely of academic or theoretical interest. In it is involved a question which

at times becomes a matter of overwhelming importance—that, namely, of the right of a people to revolt against their political authorities. We have seen that, with the constitution of an electorate, the actual exercise of sovereign powers passes to that body, the mass of the people back of the electorate possessing merely what has been designated as political sovereignty. After this step has been taken, no change in the form or character of the government can be made except by or through this body. It is as though the people had granted a full, perpetual, and irrevocable power to the electorate to exercise for it all of its sovereign powers.

The question is thus presented, and in fact has repeatedly arisen, as to what action the people are justified in taking in cases where the electorate persists in exercising its sovereign powers in a way doing violence to the wishes of the people. From the strictly legal point of view, the latter are powerless. They can, of course, urge in the strongest way possible upon the electorate the taking of the action desired. If the latter is obdurate, the people must either acquiesce or take the law into their own hands; that is, revolt. This situation has usually arisen where an electorate, established upon a comparatively narrow basis, persists in using its powers in its own interests rather than those of the general public, permits grave evils or inequalities to remain uncorrected, or refuses to comply with the demand on the part of the people that they be given a larger representation in the electorate.

The English Reform Act of 1832 Forced by Threat of Revolution.—These were the conditions that existed in England during the first third of the nineteenth century. Electoral conditions were almost inconceivably bad. The electorate at that time was composed of a comparatively few persons who were freeholders, that is, owners of land according to a particular kind of title in the counties or rural districts, and a few persons, usually the members of the self-perpetuating municipal corporations, in boroughs or cities. There was no approach to equity in the districting of the country for electoral purposes. Some districts included less than a dozen electors, who were wholly under the control of a single large landowner or member of the nobility. There were boroughs so

completely controlled by single individuals, or a small group of individuals, that their representation was treated as property and was openly offered for sale and bought in the open market. Against all efforts to improve this condition of affairs the existing electorate opposed a steady resistance. Despairing of effecting a change through legal means, that is, through the action of Parliament, which alone had legal authority to act, the people began to resort to violent demonstrations. Only after it became evident that these demonstrations would be pushed to actual revolution did Parliament give way and place upon the statute books the great reform act of 1832, the first of a long series of acts by which the electorate has been steadily broadened and its machinery of operation so improved that at the present time the actual exercise of political power has been placed as completely in the hands of the people as in almost any other country in the world. In the forcing of the passage of the Reform Act of 1832, we have therefore an example of the possessors of political sovereignty, dissatisfied with the action of their representatives, the possessors of legal sovereignty, resorting to the only means remaining to it to make its will prevail, that of revolution.

In this connection it is of interest to note that the militant woman suffragists in England, in effect, appealed to this same right of revolution to enforce their demands upon a recalcitrant electorate, and Parliament.

The Right of Revolution as Illustrated in Dorr's Rebellion in Rhode Island in 1841.—Much the best illustration of the right of the possessor of political sovereignty to rise in revolt against the possessor of legal sovereignity is, however, furnished by an event which occured in our own country. Though, from the time of the Declaration of Independence, the people of the United States had been firm adherents of the doctrine of popular government, they were, during the early years of our history as a nation, by no means persuaded that the electorate for the exercise of the power of sovereignty should have the broad basis that it now has. A study of the history of the manner in which the people of the United States have solved this problem of the constitution of an

electorate shows that most of the States started with an electorate resting upon a comparatively narrow basis, one in which the right to vote was hedged in by a large number of requirements, such as the ownership of property, ability to read and write, and, in some cases, even a profession of faith, or membership in a religious congregation, and have progressively broadened the franchise in response to public opinion until the present condition of manhood and womanhood suffrage for the most part prevails.

In almost all cases, the existing electorate has bowed to the demand for a broadening of the franchise when it became clearly apparent that such demands represented the genuine will of the people. A notable exception to this, however, occurred in Rhode Island in 1841. Under the provisions of its early constitution, adopted at a time when it was believed that the suffrage should be rigidly restricted, the power of voting was vested in the hands of a comparatively small number of persons. These persons thus constituted, in effect, a political oligarchy. With the rise of democratic ideas, demands for the broadening of the franchise were put forth with ever-increasing strength. These demands the existing electorate persisted in ignoring. Either because they sincerely believed that an extension of the franchise was unwise, or because they were unwilling to give up the monopoly of political power that they possessed, they steadily refused to acquiesce in the changes demanded. As the possessor of legal sovereignty, their position was legally unassailable.

To meet this situation, the people in 1841 met in mass meetings, effected an organization and took the necessary steps for the assembling of a convention, the members of which should be elected by manhood suffrage, for the framing of a new constitution. This election was duly held; the persons elected came together, organized as a constitutional convention, framed a constitution and ordered it submitted to the people for approval at a special election to be held for that purpose. This election was in turn held, and the constitution so framed was adopted by a clear majority. The members of the constitutional convention thereupon reassembled, and adopted a resolution which declared that

Whereas, by return of the votes upon the constitution, it satisfactorily appears that the citizens of this state, in their original sovereign capacity have ratified and adopted said constitution by a large majority; and the will of the people thus decisively known ought to be implicitly obeyed and faithfully executed; we do therefore resolve and declare that said constitution rightfully ought to be, and is, paramount law and constitution of the State of Rhode Island and Providence Plantations; and we further resolve and declare for ourselves and in behalf of the people whom we represent that we will establish said constitution and sustain and defend the same by all necessary means.'

Under this constitution, an election was held at which a man by the name of Dorr was elected governor and other offices were filled.

In the meantime, the existing government, resting upon the old constitution and the narrow electorate, remained in existence and continued to discharge the functions of government. The result was that there were in existence in Rhode Island at the same time two governments each claiming to be the legal government of the State.

Efforts were then made by the new government to assume control of the government departments and the conduct of governmental affairs. The old government appealed to the President of the United States to assist it in resisting this effort, basing its appeal upon the provision of the federal constitution[1] that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature or of the executive (where the legislature cannot be convened) against domestic violence." The President acceded to this request and took steps to give the aid requested. Thereupon, the new government collapsed. Efforts were subsequently made through an appeal to the Supreme Court of the United States to have this action reversed, and the new government declared the legal government of the State. This the Supreme Court refused to do in a decision handed down in 1845.[2] In this decision the Supreme Court refused to decide directly which of the two governments was entitled to be deemed the legal govern-

[1] Art. IV, Sec. 4.

[2] Luther v. Borden, 7 How. 1.

ment. It dismissed the action upon the ground that the enforcement of the clause of the federal constitution guaranteeing a republican form of government to each of the States was a political matter resting with the President, and that it was improper for the courts to intervene in respect to the exercise of his discretion in relation thereto. The electorate constituting the source of legal authority of the existing government had, however, learned its lesson. It accordingly yielded in large part to the demands of the people which had been so energetically pressed, and the incident was closed.

We have given in some detail the incidents connected with this remarkable occurrence, which is known in history as Dorr's Rebellion, since it illustrates in a remarkably concrete way the relation that exists between the politically sovereign people and the legally sovereign electorate, and the trouble that may arise where the two are not in accord. It is of interest to note that the convention which adopted the new constitution, in declaring that document to be the fundamental political law of the land, based its declaration upon the statement that this document represented the act of the citizens of the State, acting in their original sovereign capacity. Daniel Webster, who represented the old government in the case carried to the Supreme Court, argued that American law knew no such thing as mass action, that no act was legal that was not performed in compliance with the existing law of the land, and that, therefore, the constitution framed in total disregard of such law, was a nullity.

In this particular case, the issue was not carried to the extent of armed revolution. The occurrence nevertheless furnishes a perfect illustration of the fact that cases may easily arise where a sovereign people may be morally, if not legally, justified in resorting to revolutionary means as the only means in their power of overthrowing a tyranny, and in making their sovereign will prevail. It need hardly be said, however, that resort to revolution is justified only when the grievance is one of real and great importance, and when all means of proceeding in a strictly legal manner have been exhausted.

Function of the Electorate.—As has been pointed out in our consideration of popular government, two distinct types of government, democracy and representative government, may result depending upon whether the electorate takes to itself the function of itself assuming direct responsibility for the determination of public policies and the control of their execution, or limits its functions to the selection of the persons to represent them in the discharge of this function. As has been shown, while both England and the United States have governments which properly may be termed representative, the two countries, in practice, have tended to drift apart in respect to the rigidity of adherence to this representative principle. England, with great consistency, has adhered to the practice of assigning to its electorate little or no other function than that of periodically selecting the persons to represent it in the legislative branch and, in so doing, in many cases, who, in fact, shall, as Premier, exercise the executive function. The United States, on the other hand, starting with this system, found the urge towards democracy too strong to be resisted, with the result that the electorate has had conferred upon it, or has assumed, functions representing a direct participation by it in the work of government. To the extent to which it has done so, it has endowed itself with a form of government that may be termed mixed democratic-representative.

Under these conditions, it is evidently necessary, in the case of the United States at least, to consider the electorate as an integral part of the governmental structure, rather than as an element standing outside of it, and, as such, to determine, in a manner that would not be necessary in the case of a government of the pure representative type, the specific ways in which it plays a part in determining and controlling governmental action, and, as a concomitant of this, the relations existing, or that should exist, between it and the other parts of the machinery of the governmental structure.

The Electorate and the Legislature: Initiative and Referendum.—When one thinks of the electorate as an organ proper of the government, he has chiefly in mind its participation in the exer-

cise of the legislative function. This participation can take place in two ways: as the result of a direct grant of power so to act; and through the growth of practices which, in their results, enable the electorate to influence, if not directly control, the action of the legislature proper.

Direct participation by the electorate in the exercise of the legislative functions takes place when the electorate has, by constitutional provision or statutory enactment, had conferred upon it what are known as the rights of initiative and referendum; that is, the right, through some process, itself to initiate legislative proposals or to revise, or determine the final validity of, proposals enacted into law by the legislative branch. The leading example of where this system has been put into practice is probably the government of Switzerland. The practice is one, however, which has had a considerable development in certain of the States of the American Union. Manifestly there is here presented an issue that gives rise to many practical problems of great importance which we cannot consider in detail. Certain general observations regarding the policy itself and the conditions governing its application will, however, be in order.

The first and most important of these is that the grant to the electorate of the right to originate legislative measures and, at times, to negative legislative proposals passed by the legislative branch, represents a belief on the part of the people that the legislature will, on occasions at least, fail correctly to interpret the popular voice, or, interpreting it, will, for reasons of its own, refuse to take action that will give expression to it; or, more seriously still, will take action contrary to such will. The demand for the initiative and referendum in the United States and other countries is thus one manifestation of the growing disrepute into which modern legislatures have tended to fall, a tendency to which allusion has more than once been made.

Secondly, it should be noted that the practicability of these legislative devices is in inverse proportion to the size of the political unit seeking to employ them. It is thus a matter of comparative ease to secure an expression of the will of the people in a small

unit, such as a county or municipality; greater difficulty is encountered in securing such expression from the electorate of a State, and still greater in the case of the central government. Furthermore, an expression of the popular will obtained in this way is of greater significance in the case of a small unit than in that of a larger one, since the electorate of the small unit is usually more homogeneous and in a position more effectively to pass upon the merits of the issues at stake. The system is thus one that may give satisfactory results when applied in a small governmental unit and very indifferent, if not undesirable, results when the attempt is made to apply it to larger and more important units.

Finally, a distinction may be made between those subjects of legislation to which these devices may, or may not, be applicable. It would thus appear to be only logical, and in fact probably desirable, that the electorate should have the right, on its own initiative, to raise the question of the modification of the constitution and to have the final say in respect to whether a proposed constitutional amendment shall become effective. There is, moreover, much to be said in favor of the provision, existing very generally in the United States, that acts authorizing the incurring of bonded indebtedness by the States or their political subdivisions shall not become effective until ratified by a popular vote of the electorate involved. It is possible, also, that advantageous use of the device of the referendum may be made in order to break deadlocks or resolve fundamental differences between the legislative and executive branches of the government. A number of the constitutions adopted by the European nations following the conclusion of the World War contained provisions to this effect. Generally speaking, it would thus seem to be desirable that, at the outset at least, the grant to the electorate of the right of initiative and referendum should not be of a general character, but should be carefully restricted to those questions in respect to which there is special need for a direct expression of opinion by the electorate, or where the issue is a comparatively simple one requiring but little more than a yea or nay vote.

Extra-Legal Participation of the Electorate in the Legislative Process.—In the foregoing, consideration has been given to the matter of the grant to the electorate, by express constitutional or statutory provision, of direct participation in the legislative process. Were we to stop at this point, but an incomplete picture would be given of the extent to which, or manner in which, the electorate may, and, in the United States at least, does intervene to make its will known and controlling in respect to the reaching of legislative determinations. In all countries living under a régime of law, and in none more so than in the United States, there has developed, wholly outside of legal enactments, a variety of means by which the electorate formulates and gives expression to its will regarding the character of the legislation that it desires to have enacted by its representatives in the legislative chambers. Among such means there will immediately come to mind such institutions as the press, the radio, forums or special gatherings for the consideration of political, economic, and social problems, and the like.

Group Representation Before Congress.—These means, while of great importance, have, however, the serious limitation that they are influential in the formulation of public opinion rather than in its authoritative expression; and, even in this restricted field, have to do, for the most part, with general policies rather than with specific action. However, alongside of them, there have developed other institutions which, not merely aid in the formulation of public opinion, but have the function of expressing in an authoritative, though non-legal, way the wishes of important elements of the electorate in respect to the character of legislation affecting their interests that they desire to have enacted. Reference is here made to the national organizations created for the representation of particular interests which, while concerning themselves with the internal or technological problems of their several groups, have as one of their prime functions the formulation and expression of the opinion of their memberships regarding legislation affecting their special interests, and the putting forth of efforts to have such opinion translated into action. To this end, they have

established at Washington, and to a less extent at State capitals, permanent headquarters or agencies, through which this function is performed. So important is the existence of these institutions as a part of the legislative machinery of the country, and as giving to the country what amounts, in effect to a system of vocational representation, which is none the less real though lacking a legal basis, that the writer feels justified in quoting at some length from a preface which he wrote to a volume dealing in an exceptionally effective way with this feature of our public life.[3] After calling attention to the fact that popular government rests upon the fundamental premise that the popular will should control political action, and that that condition can only be realized by the provision of means through which this will may be determined and expressed, he continued:

Political scientists have long concerned themselves with the question as to how this end may be best achieved. In considering this question it is of value to distinguish between what may be termed the general will and the will of that part of the public that is directly and immediately concerned with, or affected by, proposed political action. One of the most important principles of public law is that, as far as is practicable, no action affecting private rights and interests should be taken until full opportunity has been afforded to those to be affected by such action to be heard. In the field of judicial administration this is known as giving to all interested parties their day in court and constitutes the essence of the doctrine of due process. Observance of this principle is desirable both as a matter of abstract justice, and as a means of securing the information needed for intelligent action.

In a general way, it may be said that American legislatures, as now constituted, are reasonably well devised to express the general will. They do not, however, in themselves, possess the means through which the particular will of special interests may be authoritatively determined. To meet this situation, the proposal has, at times, been made that the basis for determining the composition of at least one of the chambers of our bicameral legislative bodies should be vocational rather than territorial. Such a change, even if, on examination, it be deemed desirable from a theoretical standpoint, represents such a radical departure from existing practice and presents so many difficulties of practical application that its adoption is extremely unlikely. In view of this fact, it is a matter of great interest that substantially the ends sought by this

[3] E. Pendleton Herring, *Group Representation Before Congress* (Brookings Institution, 1929).

proposal are in process of being achieved through a development resting upon purely voluntary, private efforts and involving no organic change in our political systems. This development consists in the creation by the more important professional and economic interests of the country, of permanent, central organizations having as one of their primary functions the representation of such interests before legislative bodies. In the case of the national government this movement has gone so far that there is scarcely an interest of substantial importance that is not now so represented at Washington.

Viewed in the large, the existence and work of these organizations constitute an important element in the national legislative process. The extent to which this is so is illustrated by the circumstances attending the putting upon the federal statute books of one of the most important pieces of social legislation of recent years. In the years immediately following the late war, Congress had presented to it the problem of redetermining the fundamental policy of the government in respect to the control of railroad transportation. Here was an issue which, while of concern to the entire public, was one directly affecting in an important way certain definite classes; the railroad executives; that is, those having in charge the operation of the existing railroad systems, the owners of railroad securities, the railroad laborers or employees, and the shippers, or those making use of the railroads in the conduct of their business. The interests of these several classes were, not only not always in accord, but in many respects directly opposed. Both as a matter of securing information upon which to base intelligent action, and of seeking to harmonize conflicting interests, it was highly desirable that an opportunity should be afforded to each of these interests to make known its position and opinion in respect to the determinations to be reached. That this might be done effectively it was imperative that each interest should be represented by some agency or organization authorized to speak for it. Each in fact already had, or created, an organization to act in this capacity, and such organization through its officers, appeared before the committees of Congress having the bill in charge and presented its observations. It is difficult to see how Congress could have secured the information essential to reaching a reasoned conclusion without the aid thus given to it. The proceeding at least meant that each interest had its day in court and, from the standpoint of popular government, an opportunity to make its will known.

The System of Public Hearings by Legislative Committees.—This method of popular participation in the legislative process would not be so effective but for the existence of another institution or practice that has had a development far beyond that to be found in any other country. This is the general practice on the part of American legislative bodies, and particularly the national

Congress, of having their committees to which legislative proposals are referred for consideration and report, hold what are known as public hearings upon all bills of general interest—hearings which all persons and organizations having any real interest or possessing any other valid qualifications entitling them to be heard, may attend and at which they may present their observations and arguments either in favor of or against the approval of such measures or their modification. In the case of the national government, these hearings are, with rare exceptions, reported stenographically and printed. The results of these hearings are thus available, not only to the members of the committees themselves, but to the entire membership of the legislative bodies, to administrative officers, to the press, and to the public.

It is difficult to exaggerate the importance of this practice as a factor in the legislative process, and, more broadly still, as an element in the whole problem of popular government. It constitutes one of the most characteristic features of the American political system, since, as has been indicated, no other country, so far as the writer is aware, has anything comparable with it. Taken in conjunction with the fact that any individual or organization can, if he or it sees fit, draft in complete detail any bill and, with little difficulty, have it introduced by some member of the legislature, whereupon it will automatically be referred to the appropriate committee for consideration, it means that an unequaled opportunity is afforded for a popular participation in both the initiation and the whipping into shape of legislative proposals.

Model Acts.—An important phase of this extra-legal participation by the general electorate in the initiation and framing of legislative proposals is the widespread practice on the part of social reform and technical organizations in the United States of preparing model acts having for their purpose to put into concrete form the legislative action that they believe it desirable to have taken; and, in many cases, the further practice of taking active steps for the introduction and passage of such measures. These bills, emanating as they do from organizations having special competence in respect to the matters to which they relate, and being

prepared after a thorough study of the problems involved, are often of a character far superior, from the standpoint both of their substantive provisions and technical draftsmanship, to measures originating in the legislative assemblies themselves.

This practice, furthermore, has the great merit that, through it, advance is made in securing uniformity in respect to many matters of legislation regarding which it is desirable to have uniformity as between the several States.

Petitions and Letters and Telegrams to Members of the Legislature.—It would be improper to leave this question of the means by which the electorate participates in the legislative process without calling attention to yet another way in which the electorate makes known its will in respect to desired legislative action. The first amendment to the federal constitution provides, among other things, that "Congress shall make no law . . . abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances"; and the State constitutions very generally contain analogous provisions in respect to their State legislatures. This right is very freely exercised. Hundreds, if not thousands, of petitions and memorials, emanating for the most part from organizations of individuals or political bodies pour into Congress during each legislative session. Their receipt is noted in the *Congressional Record* and, at times, they are reproduced *in extenso* in that journal, and are referred to appropriate committees for consideration. It is impossible to say how influential these petitions are in determining Congressional action. That they do serve a useful purpose in letting Congress know of public opinion regarding the matters to which they relate can, however, scarcely be questioned.[4]

[4] The exercise of this right on the part of members of the electorate peaceably to assemble for the purpose of framing and presenting petitions for the redress of grievances thought to exist has given rise to no little trouble within recent years. On more than one occasion discontented elements of the population have organized so-called marches on Washington with a view to influencing, if not actually intimidating, Congress. The famous Coxey's Army of some years ago and the more recent Bonus Expeditionary Force representing the demands by veterans of the late war for a further grant of funds from the public treasury for their benefit are the most striking

Another method employed by the electorate to influence legislative action analogous to that of petition is the dispatch by individuals and organizations of letters and telegrams addressed to individual members of the legislature urging some specified action. This method is usually resorted to where action upon particular measures is imminent; and such communications are addressed chiefly to the members of the committees having the responsibility of recommending the action to be taken. Procedure of this sort is more effective when these communications represent the spontaneous action of their senders. In many cases, however, they are sent in at the instance of organizations having for their purpose to secure certain action, and the form and contents of the letters and telegrams to be sent are dictated by such organizations. When this is the case (and usually the members of the legislature have little difficulty in determining when this is so), their force is greatly discounted, and, in not a few cases, their effect is merely to irritate their recipients and thus to prevent rather than promote the action that it is desired to have taken.

Political Parties.—Finally the electorate, through the organization of itself into political parties, has developed a means, not only of formulating its opinions regarding public policies that should be adopted, but of powerfully influencing the conduct of governmental affairs generally. This method of electoral action constitutes such an important feature of the political system of all modern popular governments and is so pervasive in its influence that it is desirable to give it separate consideration. This will be done in concluding chapters of the present work.

The Electorate and the Executive and Administrative Branches.—In the foregoing we have seen that in the United

examples of such action. Such "marches" give rise to serious problems from the standpoint of the maintenance of public order and the care of the persons participating in them. This results from the fact that radical elements, at times, seek to make use of these manifestations for the deliberate purpose of stirring up social and political discontent rather than for the purpose of promoting the specific action purporting to motivate the assembly. It is not easy for those responsible for the maintenance of public order to handle these situations without giving rise to the accusation that the constitutional right of assembly and petition is being violated.

States (and, with the exception of England, the same is true of most other countries having a representative form of government) the electorate is not content with the discharge of the simple duty of selecting the persons to represent it in the policy-determining and law-enacting branch of the government, but has taken to itself direct participation in the performance of these functions. There would seem to be no occasion for the electorate to seek to play any corresponding rôle in respect to the operation of the other branches of government. Unfortunately, however, in the United States at least, the electorate has extended its activities to these branches as well. As regards the executive and administrative branches, action of the electorate in this way has taken the form of vastly extending its function of determining who shall hold office in these two branches. It may be in harmony with the doctrine of the separation of powers that the chief executive—the President in the case of the national government, and the governors in the case of the States—should be selected by popular vote. There is, however, almost no reason why this method of selection should be employed in filling purely administrative positions. On the contrary, there are many reasons why it should not.

The first of these reasons is that popular selection imposes upon the electorate a task that it is inherently unfitted to perform in a satisfactory manner. Whatever may have been true in the past, the conduct of the administrative affairs of a modern government is a task of great magnitude and complexity and one requiring a high order of specialized abilities. It is impossible for a large body like the electorate, even if it acts with the best possible intentions, accurately to inform itself regarding, and fully to appreciate the importance of, these technical requirements or to select the men best qualified to meet them. In point of fact, the electorate usually gives but partial or secondary weight to these requirements and qualifications; for the most part, it is dominated by purely personal and partizan motives.

The second objection is that popular selection makes it more difficult, if not impossible, for the chief executive properly to perform what is probably his primary duty of seeing that the laws are

faithfully executed. The problem of the organization and operation of the administrative branch of a government are not unlike those of the ordinary business enterprises where operations are varied and on a considerable scale. No such enterprise can be run efficiently and economically unless the several operating units are knit together into one highly integrated scheme of organization in which the lines of authority are clear and finally terminate in the hands of an officer having the duties of a general manager. It must be evident that if this officer is properly to meet his responsibilities he must have large powers in respect to the selection of at least his chief lieutenants. In a government, the only officer qualified to discharge these duties of general manager is the chief executive. Where the chief administrative officers, and often even petty officials, hold office as the result of action by the electorate, and where they may not even be of his political affiliation or sympathetic to his policies, it is manifest that the chief executive lacks the essential elements permitting him effectively to discharge the duties of his office. The result is that a government making choice of this method of selection of its administrative officers is more or less in the position of an enterprise seeking to operate without any general manager, or, at least any general manager with adequate powers.

In view of the foregoing, it cannot but be deemed a serious defect of the American governmental system that, in so far as the constituent States of the Union and their political subdivisions are concerned, the electorate has generally taken to itself the function of selecting many of the chief, and not a few of the subordinate, administrative officers of government. The adoption of this practice was one of the phases of the movement towards democracy that characterized the advent to the presidency of Andrew Jackson in 1824. Fortunately, the evils of this system are now very generally recognized by American students of politics and a strong effort known as the "short ballot movement" is being carried on for its elimination. It is to be noted that this system has never prevailed in the national government, nor has it obtained in the government of England.

The Electorate and the Judiciary.—All of the arguments that have been, or may be, brought against the electorate seeking to determine the set-up, or the conduct of, the administrative branch apply with equal, or even greater, force to the judicial branch. As will be pointed out in our subsequent consideration of the problems presented in organizing and operating this branch of the government, it is of the utmost importance that the judiciary shall be so constituted that it can perform its functions with complete independence of all pressure tending in any way improperly to influence its judgment in handling matters of fact and law coming before it for adjudication. As is there shown, this independence can best be secured by providing for the appointment of judges by the executive for long terms or, preferably, during good behavior; by providing that they cannot be removed from office except through a procedure such as impeachment; and by guaranteeing that their compensation shall not be increased or diminished during their terms of office. Notwithstanding this, many, if not the majority, of the States of the American union now provide for the selection of their judiciaries by the electorate for limited terms of office. It is inevitable that under such a system of selection, the judges will be under a constant pressure to make their action conform to the wishes of the people who have put them into office. Furthermore, it is practically impossible for an electorate to make a selection of persons best qualified to fill these important positions. If one has any doubt about this, he has only to compare the judicial system of the States having an elective judiciary with that of the national government where the electorate plays no part in selecting the judiciary.

One danger, however, the United States has avoided. Some twenty-five years ago, at the time that the movement for the initiative, the referendum, and the recall was much in evidence, there was a strong demand in a number of the States for the adoption of the recall of judges and for the so-called recall of decisions, that is the right of the electorate, by popular vote to bring about the removal of judges from office, or the setting aside of decisions made by them. Fortunately, this movement, which

at one time seemed to have gained considerable headway, has died out. Had it prevailed, it would have still further strengthened the undesirable intervention of the electorate in the conduct of the judicial branch.

Vocational Representation: the Corporative State.—At the time that representative government established itself, economic conditions were comparatively simple, with the result that there was no great divergence of interests between groups of voters constituting the electorate. Under such conditions, it was natural that the electorate should be organized as a single body of voters, all participating in an identical manner in the exercise of the suffrage. Since then, conditions have changed radically. At the present time, the populations of most countries have a widely diverse character, with conflicting interests between economic and social groups, and, in some countries, between groups of different nationalities, races, or religious affiliations. In view of this, there are those who maintain that the organization of the electorate, as it now exists in most countries having representative governments, is defective in that it fails to give due recognition to the existence of these varied interests; and that a more representative system would be one that enabled each of the economic interests of a community to have its proportionate representation in the body that exercises the policy-determining and law-enacting powers.

Although, as has been stated, the desirability of organizing the electorate in such a way as to give a measure of vocational representation has for years been a matter of academic discussion, and here and there some efforts have been made to put such a system into effect, it was not until Italy adopted her present system, as set forth below, that this demand found full expression in the constitutional system of an important state. Almost from the moment of his gaining power, Mussolini announced his intention of converting Italy into what he termed a "Corporative State." By this he meant the substitution for the system under which the citizens were organized in a general electorate for the purpose of participating in the determination of public policies, of a system under which, for purposes of such participation, they were to be grouped

in a number of trade associations, or "corporations," which should represent all persons, employers and employees alike, participating in the lines of work to which the associations related. After a number of preliminary steps, this system was put into effect by a law or decree promulgated November 10, 1934, which provided for the organization of the industry of the country in twenty-two great corporations, the creation of a Governing Council for each such corporation, and the provision that the members or representatives of such councils should constitute a grand National Council of Corporations which it was contemplated would take over the functions of the existing Chamber of Deputies, thereupon to be dissolved.

Although we have discussed this conversion of Italy into a so-called corporative state from the standpoint of the organization of the electorate upon a vocational basis, it would be a mistake to think that this action was taken solely in the belief that representation by vocations was preferable to representation by territorial areas. Primarily, the system was established as furnishing what was believed to be the most effective means through which the government might give expression to its attitude towards the conduct of the economic activities of the country. A prime feature of the Fascist philosophy is that, while it aims to preserve the capitalist system, it at the same time holds that it is the function and the duty of the government to control its operation in the interest of the general welfare; and, to this end, that the government shall be the authority to determine in the last resort such matters as the relations to exist between management and employees, prices, wages, and the like. The organization of industry into corporations, the prohibition of the creation by employers or employees of other organizations to represent their separate interests or resort to such means of warfare as strikes and lockouts thus represent the setting up of a system under which trade matters will, as far as possible, be adjusted by the several corporations acting as political agencies of the state, and where they are unable to do so, or where their proposed action seems to run counter to more general interests, a superior authority will in-

tervene and give the final decision. As Dr. Alberto Pennachio has set forth in his study "The Corporate State": [5]

> Fascism, therefore, upholds the conception of a single syndicate that will protect the professional interests of the members of each category, who, whether or not they are enrolled, and even if they adhere to other syndicate associations, must be represented by it alone. The full right of a juridically recognized syndicate to represent the entire profession is confirmed on the other hand, by the fact that it assumes, through recognition, characteristics of an organ of public law, endowed by the State with special rights and duties.

The only other country that has accepted the principle of the corporative state is Austria, though the system there established has a somewhat different character from that which it has in Italy. In neither of the countries has the system been in effect long enough to determine the results to be expected under it.

It is of course possible for a country, without reorganizing itself as a corporative state, to give representation to diverse vocational interests. It could, for example, do so by permitting the national trade, professional, and other organizations to nominate members for one or the other of the legislative chambers. In considering whether such action is desirable, it should be pointed out that the representation of interests, reasonable as it may appear from some standpoints, presents certain elements of danger. It is a misfortune that a country should have within it groups with conflicting interests. The recognition of those groups for representation purposes cannot but tend to accentuate, rather than to harmonize, this conflict of interests and to make more difficult the task that confronts the legislative bodies. As will be pointed out when we come to consider the legislative branch, one of the most serious evils characterizing modern legislatures is the development in them of what are known as "blocs," that is, groups of members representing special interests who are willing to prefer such special interests to that of the community as a whole. The constitution of a legislative assembly in a non-corporative state upon the basis of giving even partial representation to special vocational interests

[5] *Italian Historical Publications*, Vol. IV, 1927, p. 41.

would considerably accentuate this evil. The existing system of the organization of the electorate has the great advantage that it represents the general, as opposed to special, interests, and thus affords probably the best means available for harmonizing these interests in accordance with the general welfare.

CHAPTER XVII

THE ELECTORAL BRANCH: ORGANIZATION AND PROCEDURE

Basis of Representation—Political Subdivisions or Population.—In all modern states of any size, the political system embraces at least three orders of governmental structures: a central government exercising powers over the entire territory included within the jurisdiction of the state; governments for the conduct of the affairs of the primary divisions into which the country is laid out for governmental purposes, variously designated as states, departments, or otherwise; and governments for the conduct of the purely local affairs of subdivisions of such primary divisions. The existence of such a governmental structure composed of layers of governments raises the question as to whether, in setting up bodies for the exercise of the legislative power in the first two of these areas, the basis of representation should be the political subdivisions embraced within them or should rest solely upon the factor of population.

In the United States, both of these principles are employed. In the upper house of the national Congress, the basis of representation is the constituent States, the Senate being composed of two representatives from each of the States composing the Union regardless of the wide differences existing among them in respect to size and population. Originally, these representatives were selected directly by the State governments acting through their legislative branches. Although, in pursuance of the Seventeenth Amendment to the constitution, adopted in 1913, these representatives are now elected by popular vote, the basis of representation is still the State, the entire electorate participating in the election of both senators. In the lower house, however, the basis of representation is population, each State being given a

number of representatives proportionate to the relation that its population bears to the total population of the country.

In the States, a wide diversity of practice exists in respect to this matter. In colonial days, comparatively little attention was given to the factor of population in determining the composition of the lower, popularly elected chamber, the prevailing principle being that of giving representation to the political subdivisions into which the colony was divided—the towns in the case of the New England colonies, and the counties in that of the Middle Atlantic and Southern colonies. Although upon achievement of independence the tendency was to give greater weight to the factor of population, this principle of making the political subdivision the basis of representation has been largely adhered to. Especially is this true in respect to the upper chamber. In not a few cases, moreover, it is the one followed in determining the composition of the lower chamber, though in doing so the basis of population is not wholly ignored. The state of New Hampshire probably represents the extreme case in which this principle is followed at the present time. The constitution of that commonwealth, as revised in 1877, provides not only that "every town or place entitled to town privileges and wards of cities" having a population of 600 shall be entitled to send a representative to the lower house of the legislature and shall have an additional representative for each additional 1,200 inhabitants over and above 600, but that when any such town, place, or city ward has a population less than 600, it shall have the right to elect a representative for "such proportionate part of the time as the number of its inhabitants shall bear to six hundred." These provisions have a number of interesting consequences. The first is that it gives to the State a lower house exceeding in size that of any other State. The lower house of the legislature which sat in 1933 had a total membership of 416, a number that will be augmented as the population of the State increases. A second consequence is the rather extraordinary condition that certain of the smaller subdivisions, instead of having continuous representation, are represented in only every other, or every third, legislature. In seventeen other

States, the constitutional provision exists that each county, regardless of its population, shall have at least one representative in the lower house. And, generally speaking, while population may determine to a great extent the size of representation, the political subdivision for the most part constitutes the basis of representation.

The Problem of Apportionment.—Where the basis of representation is the political subdivision, the problem is presented of apportioning the total representation in each of the two houses among these political subdivisions. Strict conformity to the principle of popular government would seem to call for the apportionment of the total representation among the political subdivisions in conformity with the relative size of their populations. Doing so, however, would have the result of bringing about a condition where the power to control the conduct of public affairs would be vested more or less permanently in one portion of the territory in respect to which the government has jurisdiction, a condition that is held to be undesirable. Thus, in the case of the national government, a strict adherence to the principle of apportioning representation according to population would mean that political power would rest with that part of the country embracing the States east of the Mississippi, and to a considerable extent, with the still more restricted areas comprehended by the New England and North Atlantic States. In the case of the States, adherence to this principle would mean that, where there is a city or metropolitan area containing a majority, or at all events a considerable proportion, of the State's population, such city or area would be able to dictate the public policies and legislative action of the entire State—a situation that is objectionable since the interests of such urban areas are by no means always identical with, and often are in direct opposition to, those of the rural and less populous districts.

Due to these considerations, both the national government and to a certain extent the States have departed in part from the principle of apportioning representation according to population. This finds expression chiefly in the provision that is made for

the apportionment of representation in the upper chambers of the legislatures, though, as will shortly be pointed out, it is also in evidence in apportioning representation in the lower houses of the State legislatures. Thus, in the case of the national Senate, the population factor has been wholly ignored, two senators being allotted to each State regardless of its size and population. In the case of the States, a diversity of practice in this respect is found. In some, the federal system of assigning representation on an arbitrary or fixed basis, so as to assure an equality of representation to the political subdivisions irrespective of their populations, is followed. In others, the apportionment is made on a strictly population basis. Furthermore, not a few instances exist where the States, in their desire to minimize the influence of a populous city in their midst, have departed in part from the population basis in apportioning representation in their lower houses. From an exposition of conditions as they exist in the States in reference to this feature of the governmental systems of the States, made for the Massachusetts Constitutional Convention of 1917, the following may be quoted: [1]

> In states in which there is a single large city containing a large part of the total population of the state, there is no disposition to allow such a city to elect a proportionate part of the members of the Legislature. New York City contains 52.2 per cent of the total population of the state but it elects only 63 out of the 150 members of the House of Representatives. Providence contains 41.3 per cent of the population of Rhode Island, but it is allowed only 25 out of 100 members of the House. The city of Baltimore must be content with 24 members out of a total of 102 although it possesses 43.1 per cent of the population of Maryland. Chicago contains 38.7 per cent of the population of Illinois but it elects only 42 out of 153 members of the House of Representatives.

Although it must be admitted that there is a seemingly inequitable discrimination against cities of this character in refusing to give to them the representation indicated by their populations, there can hardly be any question that, viewed as a condition

[1] *Constitutional Convention, 1917,* Bulletin No. 29, "The Basis of the Apportionment of Representatives in the Several States."

rather than from the standpoint of principle, action in this way is justified if it is not carried to an extreme.

Electoral Districts: General Ticket and Individual District Plans.—As it affects the composition of the membership, the most important decision that has to be made in organizing an electoral system for the selection of members of a legislative body is as to whether the principle of representation shall be that of the State as a whole or of subdivisions of the State known as electoral districts. Under the first system, known as the "general ticket" plan, all of the voters vote for all of the legislative representatives. Under the second system, the State is divided into as many districts as there are representatives to be elected and the voters participate only in the election of the single representative for the district in which they live. This system is known as the "individual district" plan.

The advantages claimed for the district plan are that it establishes a more intimate relationship between representatives and their constituencies and ensures that all parts of the State will be represented. Those claimed for the general ticket plan are that it ensures that the majority party will prevail; that the greater freedom allowed in selecting candidates permits of the election of superior men; and that, inasmuch as the members elected represent the whole State, instead of single districts, they will make their action conform to the welfare of the State as a whole, rather than to interests of particular districts. By many, the district plan in vogue in the United States is held to be largely responsible for what is known as the "pork parrel" evil, i.e., the practice of each member seeking to secure the expenditure of as large an amount as possible of public money in his district, regardless of whether there is more urgent need for such expenditure elsewhere.

The really important factor determining the choice between these two systems is, however, the bearing that they respectively have on the operation of the party system which now constitutes such an important feature of the political systems of most modern governments. Under the general ticket plan, a party casting a

majority of the votes can elect all the representatives, with the result that minority parties, even though they constitute a very considerable part of the electorate, may be wholly without representation. Under the district plan, these minority parties, unless they are in a minority in all of the districts taken independently, will secure a measure of representation. It should be noted, however, that, under the district plan, it is quite possible for a party that is in a minority in the State as a whole to secure a majority of the representatives. This results where the bulk of the voting strength of the majority party is concentrated in a few districts while that of the minority party is more widely distributed.

The relative merits of the two systems have been much discussed and practice varies widely in different countries. In England, the system of individual districts exists, but members may be, and are, elected regardless of their residence. In France repeated trial has been made of both systems, which are there known as the systems of *scrutin de liste* and *scrutin d'arrondissement.*

As regards the national government of the United States, the district plan is followed up to a certain point, since the constitution provides that the States shall constitute the primary areas for the election of members of both houses, the provision being made that two Senators shall be elected from each State and that the total number of members of the lower house shall be apportioned among the States in accordance with their relative populations as determined by the last federal decennial census of population. The general ticket plan is followed by the States in selecting their two Senators, since the entire electorate of the State participates in the election of these officers. As regards the election of members of the lower house, the federal constitution leaves it optional with the States to use either the general ticket or the district plan. At the outset, the former of these two plans was the one generally adopted. It was not long, however, before all of them passed over to the district plan due to the consideration, above mentioned, that, under the general ticket plan, minority parties were deprived of all representation, and to the further feeling that it threw too great power in the hands of the political organizations in respect to both

the selection of candidates and their election. The same considerations have led to the universal adoption by the States of the district plan in electing the members of their local legislative bodies; and a like policy has in general been followed in providing for the election by municipalities of members of their governing councils.

Proportional, or Minority, Representation.—In contrasting the relative advantages and disadvantages of the general ticket and district plans, it is important to note that the issue raised is one of principle as well as of expediency, namely, the determination of the conditions that ought to prevail in respect to the representation of majority and minority parties in legislative bodies. One of the most significant features of the new governmental systems that have recently been established in such countries as Russia, Italy, and Germany is the complete suppression of all parties other than that supporting the authority in power. The position is there held that the existence of such parties, or at least their having representation in the legislature, is an evil in that it leads to dissension and throws obstacles in the way of that united action towards a common end which is held to be a prime consideration of government. In marked contrast with this is the position taken by those who see in popular government the most desirable form of political organization. All adherents of this system place the highest importance upon the necessity for a strong opposition in the legislative body. Only by the existence of such opposition, it is held, can assurance be had that all proposals of the party in power will be subjected to critical examination; that adequate safeguards will be set up against arbitrary action and an abuse of power; and that issues raised can be submitted to the electorate for their decision.

Viewed from this standpoint, it will be seen that neither the district nor the general ticket plan will always give satisfactory results. Under the former, a minority may, and often does, secure a majority of the representatives, a result which is manifestly illogical and contrary to the spirit of popular government. Under the latter, the minority will fail to secure any representation at all, though its strength may be but little inferior to that of the

majority party. This result is believed to be undesirable from two standpoints: one, that it denies to a considerable portion of the people any participation in the conduct of their political affairs; and, two, that it relieves the majority party from the restraining influence of a strong opposition. To meet these conflicting considerations, plans for an electoral system have been devised which, while calling for the use of the general ticket plan and, as it is claimed, possessing all the advantages of that system, will obviate its disadvantages by assuring, not only that minority parties will secure representation, but that such representation will be proportionate to their relative strength.

These plans, to which the name Proportional Representation is given, while having a common end in view, vary somewhat as regards their technical features. The one that has received the most attention is that brought forward for adoption in England in 1859 which provides for either cumulative or preferential voting. Under cumulative voting, voters are given more than one vote and are allowed to cast them all for a single candidate or distribute them among a number of candidates. Under preferential voting, voters are permitted to indicate on their ballots not only their first but their second and third choices as well. It would take us too far afield to attempt here any detailed description of these several systems and the arguments that can be brought forward in favor of each. It is sufficient to say that in all probability they would, if properly operated, tend to bring about the result sought, that of making the legislative body, as nearly as practicable, a replica in miniature, so far as its political composition is concerned, of the electorate by which it is chosen.

In making this statement, it by no means follows, however, that the system is one that should in all cases be followed. Doubt regarding the desirability of its adoption arises from the fact that it cannot fail to interfere seriously with the proper working of the system of party government. Experience has demonstrated that this system works most effectively when what is known as the two-party system prevails; that is, one where one party has a clear majority in the legislative chambers and opposition to it

is organized in another single party. A system of proportional representation, if it operates at all successfully, encourages the organization of minor parties in the electorate and tends to produce a legislature of a correspondingly heterogeneous political character where action can be had only by constantly effecting changing combinations between political groups and making compromises with a consequent difficulty on the part of the voters definitely to locate responsibility. The attitude that one takes towards the adoption of any plan that is calculated to give proportional representation to all political groupings will consequently be influenced not a little by the extent to which he believes that in the two-party system is to be found the best means for the effective operation of popular government. In respect to this, it should be noted that the arguments in favor of the two-party system are much stronger in the case of national legislatures, where the issues are of a more general and fundamental character, than they are in the case of the legislative bodies of political subdivisions where the matters to be voted upon are of a more special and technical character. It may well happen, therefore, that the principle of proportional representation will find a useful application in providing for the election of such bodies as the common councils of municipalities, and even of the legislatures of our States, but be productive of harm if the attempt is made to apply it to national legislative bodies.

Residence Requirements.—A question of no little importance, as affecting the character of the composition of legislative bodies, is as to whether the requirement shall exist that members-elect shall be residents of the districts by which they are chosen. In respect to this, the electoral systems of England and the United States are in marked contrast. In England, not only does no such requirement exist, but it is the very general practice for candidates to be selected regardless of their legal place of residence. In the United States, the contrary system generally prevails. So far as the national House of Representatives is concerned, while there is no constitutional requirement that members shall be residents of the districts by which they are chosen, it has nevertheless be-

come the established political practice that such condition shall obtain. In the case of the State legislatures, this requirement is often one of constitutional or statutory character, and, when not, the practice is almost invariably followed.

If the attempt is made to compare the merits of these two systems, each will be found to possess certain advantages. The English system has the advantage that it permits of a wide range of choice in selecting candidates and makes possible the retention in office of members whose qualifications and experience render it desirable that they should continue to serve as members. It is thus a common practice of the political parties in England to have their more important members stand for election in those districts where their election is practically assured; and it is by no means infrequent, where such a leader has been defeated in one district, to put him in nomination for another district the political complexion of which will assure his election. Furthermore, under this system, a person is not prevented from entering upon a political career by the fact that the district in which he happens to reside is of a political complexion different from his own. That this system tends to encourage the entrance into public life of persons that it is desirable to have in the public service, to raise the general level of the legislative membership, to give greater stability to the legislative personnel, and cause members to view their responsibilities from the standpoint of the general welfare rather than from that of the interests of the particular districts represented by them, can hardly be questioned.

In contrast with these advantages, the American system, it is claimed, has the merit that it gives greater opportunity to the electorate to pass upon the personal qualifications of candidates, and that it prevents an undue exercise of power by the central organizations of the political parties. Rightly or wrongly, the American people, while accepting political parties as a desirable, or at least an inevitable, feature of their political system, have a profound distrust of what are denominated political bosses, and at the same time a great attachment to the principles of local self-government. Until there is a radical change in public opinion in

respect to these two matters, it is hopeless to expect a willingness to pass over to the English system, even though the advantages of that system may be frankly acknowledged.

The Requirement of a Majority or a Plurality in Order to Elect.—Still another point that must receive consideration in framing an electoral system is as to whether a majority or a plurality will be required in order to elect. When there are only two parties, one of course will always receive a majority, except in the very rare cases where a tie results. When there are more than two parties, it will often happen that no candidate receives a majority, that is, more than half of the votes cast. In such cases, the decision must be made as to whether the candidate receiving the largest number of votes cast, though less than a majority, that is, receiving what is termed a plurality, will be deemed to be elected, or whether a new election shall take place. In England and the United States, the plurality system under which the candidate receiving the largest number of votes is deemed elected, whether such number constitutes a majority or not, generally prevails. In France, and on the continent of Europe generally, the other system largely obtains. Under this system, if no candidate at the first election secures a majority, a second ballot is held to determine which of the two candidates receiving the largest number of votes at the first ballot shall be elected. This system has the great advantage that voters for the other candidates can indicate their preference as between the two leading candidates. It may well happen that such persons, finding that they cannot elect their first choice, will prefer to be represented by the candidate receiving the second largest number of votes, rather than by the one receiving the largest number of votes at the first ballot. It will, of course, not escape notice that the reason why England and the United States have adopted one system and the countries of Europe the other, lies primarily in the differences in their party systems. Where the two-party system obtains, the issue between the majority and plurality systems is of relatively little importance. Where there are a number of parties, however, the matter is one of great importance.

Method of Action: Direct or Indirect.—Modern governments, as we have seen, consist of successive layers of authorities, one superimposed on the other, with the units of local government at the bottom and the central government at the top. This form of governmental structure makes possible two methods by which the voters may select the persons by whom they desire to be represented in the successive layers: the direct method and the indirect method. Under the direct system, the electors vote directly for the candidates to hold office in all of the grades of government. Under the indirect system, the voters' direct participation in the selection of representatives is restricted to the election of representatives in the governing organ of the lowest, or local, unit, and it becomes the duty of that governing organ to select the representative in the next governing organ of the hierarchy of governmental authorities, which, in turn, will select the representative in the next superior layer, until the final layer, the central government, is reached.

It is manifest that, under the second of these systems, the voters' power to influence the choice of representatives in other than the bottom layer of government is much less than under the first. Due partially to this, and partially to the desire to keep the several layers of government independent of each other, most nations employ the direct system of election. The Russian government furnishes the most important example of use of the second system. There the electors, by direct voting, elect the members of the local soviets; these elect the members of the district soviets, and so on until the supreme popular assembly, the General Congress of Soviets, is reached. It is of interest to note that this indirect method of selection was the one originally provided for the selection of members of the United States Senate. The system, however, worked so badly that, by constitutional amendment adopted in 1913, it was changed to the system of direct election.

The Problem of Electoral Procedure.—With the composition of the electorate determined, there is presented the problem of devising the means through which this body may act. This involves doing three things: one, the adoption of a system for the determina-

tion of those members of the community who have the qualifications required of electors; second, the provision of means through which the electors will act, that is, cast their votes at elections; and, third, the provision of means for the counting of the votes and authoritative declaration of the results.

Two methods are open for determining the electoral qualifications of voters: that of having persons claiming to have such qualifications prove their claims at the time that they tender their votes; and that of having these claims presented and passed upon some time prior to when the voting takes place. The objection to the first method is that it is calculated to cause disorder at a time when the maintenance of order is at best a difficult matter, and that it greatly delays the work of voting. There are in fact many cases where a proper decision cannot be summarily made, since the production of proof may be required to establish or reject the claim. Due to these objections, most countries have adopted the second method. This means that there is established what is known as a registration system, composed of boards or other bodies before whom persons claiming the right to vote appear some time before the election and establish their right to vote. On the basis of this, registration lists of qualified voters are made up for use at the time of the election. These lists serve the double purpose of making known who are entitled to vote, and of preventing duplicate voting by having each name checked as its owner casts his ballot.

Though this system would seem to be a simple one, great difficulty is encountered in its practical operation. This arises, partly from the fact that the composition of the electorate of any district is constantly changing through persons attaining the age or other qualifications entitling them to become voters, death, and removal from one district to another; partly from the difficulty of securing registration boards that will act in a non-partizan and honest manner; and partly from the difficulty in detecting and preventing deliberate fraud. In the United States, the fraudulent registration of voters has been widely practised in the past. At the present time, conditions are much improved over what they were, though much still remains to make them thoroughly satisfactory.

The second phase of electoral procedure, that of the actual casting of votes, offers still wider opportunities for variation in practice. In England until a comparatively recent day, and in our own country in colonial days, and in the early years of the Union, voting took place by each voter appearing openly before the election board or other officer charged with the duty of conducting the election and declaring his vote. This system had the serious objection that, under it, bribery, that is, the purchase of votes, undue influence, and even intimidation, were easy. A candidate or persons acting in his behalf, who had paid persons to vote a certain way, and employers or others having persons dependent upon them, could readily determine how the persons so bribed and subject to their control voted.

This situation led to the demand for the secret ballot. To secure such secrecy, there was established the system of written or printed ballots, which were dropped in an urn or other receptacle. At first, separate ballots were employed for the several candidates being voted for. It was found in practice, however, that, under this system, it was still possible to determine how electors voted and that fraud was possible through the casting of more than one ballot. These evils were overcome through the adoption of what is known as the Australian ballot system, so named because of the country where it was first used. This system consists in the use of a single ballot, furnished by the government instead of by the individual candidates, as was the case under the old system, bearing the names of all candidates, on which the voter indicates his choice by checking the name voted for. To insure secrecy, separate booths are provided at each election post into which the voters go to mark their ballots. When marked, they are folded so that the manner in which they are marked is concealed and are dropped in the voting box. This system has given thoroughly satisfactory results and is now the one almost universally in use in the United States.[2]

[2] Much the best consideration of the problems of electoral procedure in the United States is to be found in the two volumes by Joseph P. Harris, *Registration of Voters in the United States* and *Election Administration in the United States* (Brookings Institution, 1929 and 1934).

The work of counting the votes and declaring the results is the third phase of a system of electoral procedure. The counting is done in the first instance by the boards conducting the elections, and the results are forwarded to some central authority for verification and declaration of the results. We have seen that in the case of elections for President and Vice-President of the United States, the central authority or canvassing board, to use the technical term, is Congress.

In the United States, and to a considerable extent in other countries, the principle is firmly established that legislative bodies shall be the final judges as to the qualification of their own members. Notwithstanding the care taken to prevent fraud, many cases occur where fraud is practised, or claim that it is practised, is set up. This leads to so-called contested elections. These contests are heard by Congress and our State legislatures sitting practically as courts. Testimony is taken, arguments by candidates or by their attorneys are heard, and decisions rendered. Unfortunately, these bodies, in rendering their decisions, are too often guided by political considerations rather than the evidence produced. In England, this situation has been met by providing that all election contests shall be heard and decided in the first instance by judicial officers and it rarely if ever occurs that the decision so rendered is not accepted. There is a strong demand that the same system should be adopted in the United States. That it would be a great improvement over the existing system can hardly be doubted.

In the foregoing, we have done little more than analyze the several operations involved in providing the means by which the electorate may perform its functions and the more important considerations to which they give rise. Though present conditions represent a great improvement over those formerly existing, much yet remains to be done to secure a system under which an independent and honest expression of opinion may be had from voters. Bribery, intimidation, fraud, and improper expenditure of money to influence voters are still practised. In the attempt to control these, Congress and many of our State legislatures have passed what are known as "corrupt practices acts," the purpose of which is to

define what practices shall be deemed to be proper and what illegal, to provide penalties for the infraction of the latter, and means for enforcing them. Especially have these acts sought to put a limit upon the amount of money that may be spent by, or on behalf of, candidates and to determine the purposes for which such money may or may not be spent. They have also very generally provided for the publication of accounts by candidates showing what money had been raised on their behalf, who contributed this money, and for what purpose it was spent. In England, similar acts have been passed which are equally far-reaching in character.

CHAPTER XVIII

THE LEGISLATIVE BRANCH: FUNCTIONS

In continuing our examination of the problems of government, a consideration of the legislative branch should logically follow that of the electoral branch. This, for a number of reasons. In the first place, as will shortly appear in our analysis of the functions of this branch, the legislature is preëminently the organ made use of to complete the work of determining the character of government that shall be established and the manner in which governmental powers shall be exercised. The legislature takes up this work where the electorate, in the exercise of its constituent authority, leaves off. In a unitary government, it is the organ which determines how governmental powers shall be distributed territorially. In a government of union of powers, it is the organ which determines how governmental powers shall be distributed functionally. In some governments of a purely representative type, such as that of England, it exercises all the powers possessed by the electorate itself and, acting as the latter's agent, determines all the details of governmental organization and procedure. In practically all cases, it is deemed to be the organ of government which most directly and authoritatively represents and acts for the electorate. Finally, it is the organ most usually employed in determining when a new appeal shall be made to the electorate to exercise its constituent powers for the purpose of determining what modification, if any, shall be made in the fundamental features of the political system as in force.

In the second place, in most, if not all, representative governments, the legislature is the organ through which the electorate, after a governmental system has once been established, currently makes known its will in respect to the policies that should be followed by such government. In those governments in which the

chief executive and the judges are not elected by the people, it is the only organ through which this public will is authoritatively expressed.

Finally, it is the organ which, in the practical operation of government, determines for the most part the action to be taken. In large part, the other organs have but the function of putting into execution the policies thus determined upon. The only important exception to this is the determination of foreign policies and the conduct of relations with other governments which, for reasons which will appear hereafter, are usually in the hands of the chief executive.

Analysis of the Problem.—Following the principle of procedure employed throughout this work, our first effort will be directed to analyzing the problems presented in organizing, determining the procedure, and actually conducting the work falling upon a legislative body. Only as we start with a clear idea of the several elements or factors that are involved in a complicated problem can we hope to reach any thorough understanding of it or to consider with advantage the steps that must be taken if a satisfactory system is to be had. Employing this method, examination shows that the problem of organizing and operating the legislative branch of a government can be resolved into the following distinct elements:

1. Determination of its functions or duties
2. Determination of its structural character
3. Determination of its composition and method of selecting its members
4. Determination of its life or duration
5. Determination of its prerogatives and privileges
6. Determination of its methods of procedure

It is our purpose to consider briefly in turn the nature of each of these specific tasks.

Functions and Duties of the Legislative Branch.—In respect to no branch of government is there a greater misconception regarding the real character of its duties than exists in the case of the legislative branch of a modern government. In the popular mind, this branch has but one duty to perform, namely, the enact-

ment of laws. That this is one of its important duties no one will question. If, however, we examine closely the part played by a legislative assembly in the actual conduct of the affairs of government, it will be found that its activities extend much farther.

This can best be shown by subjecting to analysis the work done by the national legislative body of the United States, Congress. Examination shows that this body performs at least seven clearly distinguishable functions. It acts as:

1. A constituent assembly
2. A canvassing board and electoral college
3. An organ of public opinion
4. An organ of inquest
5. An executive council
6. A board of directors for the government corporation
7. An organ of legislation

Congress as a Constituent Assembly.—In our consideration of the general problem of the adoption, revision, and amendment of constitutions, we have seen that the electorate in a representative government can proceed in three ways in making provision for the means by which its constitution may be modified. (1) It can retain in its own hands the work of initiating and adopting constitutional changes; or (2) it can vest the taking of such action in the hands of the government; or (3) it can provide for the participation of both itself and its government in such work. Of these three methods, the American people have chosen the second. The federal constitution thus provides two ways in which its provisions may be altered, both of which require that the work shall be undertaken at the instance of the government. The first is that Congress may at any time, by a two-thirds vote of both of its houses, propose specific amendments. The second is that it shall provide for the assembling of a special convention to consider the general revision of the constitution whenever two thirds of the States so request. In both cases the amendments so formulated must be adopted or ratified by the legislatures of at least three fourths of the States before they become effective, or by conventions in the States, as Congress may provide. Only in the case of the last amendment, that

providing for the repeal of the Eighteenth Amendment, has this latter method been prescribed.

Although the methods of constitutional amendment vary in the States of the Union and in other governments, all give to the legislative branch a leading part in determining the question of whether the process of constitutional revision shall be entered upon. Manifestly, we have here a function of the legislative branch that should be distinguished clearly from legislation.

Congress as a Canvassing Board and Electoral College.—Another specific duty placed upon Congress is that of acting as a board to canvass the vote cast in the electoral college for President and Vice-President, and declare the results. In case of the failure of that body to make a choice, it is constitutionally provided that the House of Representatives shall choose by ballot a President from among the three candidates who have received the largest vote in the electoral college; and the other chamber, the Senate, shall choose a Vice-President from among the two candidates receiving the largest vote. In making the choice for President, the vote is by States, each State casting a single vote.

Normally, this function is of but a nominal character. On several occasions, however, it has been one of great importance. This was the case in 1801 and 1825, when the electoral college failed to make a choice of President and Vice-President and the election of these officers was thrown into the Houses of Congress; and, in 1876, when the House had to decide whether Mr. Hayes or Mr. Tilden had been duly elected. The latter issue was finally decided through referring the matter to a specially constituted electoral commission composed of five Senators, five Representatives, and five Justices of the Supreme Court of the United States.[1]

It is a matter of interest to note that, should the present two-party system ever become supplanted by a multi-party system, such as obtains in most countries of Europe, or even a three-party system, such as England has had in recent years, it might easily result that the final selection of a President and a Vice-President,

[1] This was an extra-constitutional method—one devised to meet an exceptionally serious situation.

instead of exceptionally, would normally, devolve upon the House and the Senate. This arises from the fact that, under the constitution, a majority vote of all of the members of the electoral college is necessary for a choice by that body.

Congress as an Organ of Public Opinion.—Popular government has been defined as a government of public opinion. In such a government it is imperative, therefore, that means shall be provided by which such opinion may not only be formulated but authoritatively expressed. At the present time, public opinion is formed and made manifest through a number of agencies. Of these, mention may specially be made of the press and political parties. The function of the latter as the expounder of public opinion will be examined in our chapter on the rôle of political parties in modern governments. No one of these agencies, however, has the power authoritatively to declare the public will. This is the function of Congress, and it is one of its most important functions.

The importance of distinguishing between this function and that of legislation may be seen if we study the history of parliamentary institutions, or examine the real character of many legislative bodies as they exist at the present time. Thus, if we examine the history of the rise and development of the British Parliament, the mother of all modern legislative bodies, it will be found that originally the primary, if not sole, function of that body was that of furnishing an organ through which public opinion, or at least the opinion of that part of the community to which a participation in the conduct of public affairs was accorded, might be made known. In its early days, the British Parliament was in effect nothing more than the grand assize of the nation in which matters of public interest were discussed and expression given to opinions regarding policies that should be pursued. As President Wilson has pointed out in his exceptionally acute analysis of our constitutional system:

> Not until after the Revolution of 1688 was Parliament looked upon as modern Englishmen look upon it, as chiefly interesting because of the laws it could make.... For at least four of the six hundred years during which it has been an instrument of constitutional government, it was looked upon

merely as the "grand assize," the great session, of the nation. . . . They (the Parliament) were meant to be talking shops. The name "Parliament" is no accidental indication of their function. . . . It was as far as possible from the original purpose of representative assemblies that they should conduct government.[2]

This distinction, moreover, is not one of merely historical interest. If we study the practical workings of one of the greatest parliamentary bodies now in existence, the English Parliament, it can almost be said that that body has ceased to be a legislative body, practically speaking, and has reverted to its original function of serving as an organ of public opinion. As has earlier been pointed out, all legislation of importance is now drafted by the ministry in power which, normally, has received its mandate directly from the people and is put through Parliament without change except as the ministry may acquiesce in such modification. The inability of the House to modify ministerial proposals arises from the fact that the ministry in power necessarily has a majority in the House and this majority, under the practice now firmly established, is practically pledged in advance to make its action conform in all respects to the wishes of such ministry. The power of the individual member to introduce measures and secure their passage has steadily diminished until it no longer has any significance in determining political policies and the character of legislation that is enacted.

This distinction between the legislature as an organ of public opinion and as one of legislation has great importance when the formulation of policies in respect to the government of dependent territory is undertaken. There are many cases where it would be unwise at once to confer legislative powers upon a popularly elected assembly, but where the establishment of an assembly to act as an organ of public opinion would be both wise and the most effective means of training a population in the art of government and of preparing it for the time when full powers of self-government might be conferred upon it.

The leading feature of such attempts is the creation of a Na-

[2] *Constitutional Government in the United States*, 1908, pp. 10-11.

tional Assembly. In each case there is presented the fundamental question of determining the nature of the duties or powers that shall be conferred upon that body. It was the fortune of the author to have participated in attempts to work out this problem in a concrete case. From October 1, 1914, to June 1, 1916, he served as legal adviser to the Chinese government, with the special duty of giving advice regarding the framing of a permanent constitution to take the place of the provisional constitution then in force. Of the various questions presented to him for consideration and advice, none was more important than the one we are now considering. It arose in connection with both the establishment and definition of powers of a national assembly for the country as a whole, and the establishment and definition of powers of popular assemblies for the individual provinces into which China is divided. This led the author to seek to determine why it was that in practically all cases first attempts to create popular assemblies resulted in failures; that, with almost no exception, the resulting bodies proved incompetent, and that their establishment was speedily followed by disorganization, disorder, and ultimately their dissolution or a great curtailment of their powers.

The explanation of this the author believed to lie in the failure on the part of those responsible for the establishment of these bodies to make the distinction between the function of a national assembly as an organ of public opinion and its function as a legislative body. The mistake was made of attempting at once to bring into existence a national assembly that should exercise full legislative powers. There was a complete failure to recognize two things: on the one hand, the impossibility that a body created under conditions such as obtained, composed of persons utterly untrained in the art of law-making, having no clearly defined legislative program that they were pledged to carry out, with no experience in the technique of government, and no organized public opinion to control them, could possibly perform effectively the work of law-making; and, on the other hand, the great services that a national assembly, though having no legislative powers, could render in the way of serving as an organ through which public

opinion in respect to governmental policies and action might be formulated and authoritatively expressed.

The situation in China and elsewhere is clearly one where progress towards the establishment of a popular government can best be made step by step. The first step in the evolution from an autocracy to popular government is the establishment of the principle that the government shall be one of law instead of one of authority. This requires no change in the structure of government, but merely one of procedure in the exercise of powers. It, however, lays the essential basis upon which all future action must rest. The next step is the creation of a national assembly that will furnish the means through which the public may make known its wishes regarding governmental policies, and express itself regarding the manner in which governmental affairs are actually conducted. The establishment of such a body, even though it has but this single function, represents an enormous advance in the direction of giving to the public a voice in the administration of public affairs and an actual influence and control over such administration.

That this voice and influence may be effective, it is necessary that provision be made by the law establishing the assembly for two things: (1) that the chief executive shall lay before it adequate information regarding the conduct of the financial and other operations of the government; and (2) that no act of general legislation shall be enacted or put in force until the assembly has been given an opportunity to consider and express its opinion regarding it. To meet these two needs, the author recommended to the Chinese government that in drafting provisions for a national assembly and provincial assemblies, the following things be done: first, that the assembly in each case be made an organ having but the single function of serving as an organ of public opinion as that function has been described in the foregoing pages; second, that legislative power be not conferred upon it, but continue to reside in the hands of the chief executive; third, that this officer, in exercising this power, should do so in the following way: All proposed legislation of a general character should be embodied in the form of a draft or bill; this bill should then be submitted to the assembly

for its consideration and adequate time be given to it in which to consider such proposal and to draft a report expressing its conclusions; that the assembly should proceed to the discussion of the proposal and its amendment in precisely the manner in which assemblies having legislative powers consider and amend bills coming before them for action; that the bill as amended, accompanied by a report explaining and justifying the changes suggested, if any, should then be returned to the chief executive; and that the latter should thereupon accept or reject such of the suggestions as he deemed wise, and promulgate the draft as law.

Secondly, it was recommended that power be conferred upon the assembly on its own initiative to take up matters for consideration and, by means of memorials addressed to the chief executive, to recommend that certain action be taken by him, or that he formulate and lay before it proposals for legislation which in the opinion of the assembly it was desirable to have enacted.

Finally, it was recommended that the definite obligation be imposed upon the chief executive, annually, or at more frequent intervals, to lay before the assembly a report of the financial operations of the government and an administrative report giving an account of the manner in which the affairs of the government had been conducted during the period covered.

It will be seen that, according to this proposal, full authority and responsibility were to be imposed upon the chief executive for all acts, both legislative and administrative. On the other hand, it was provided that this authority should be exercised strictly in accordance with law, and that a procedure should be followed that would insure a full opportunity to the people, acting through their popular assembly, to express their opinion in respect to both action proposed and action taken.

It might be held that, in view of the fact that the powers of the assembly were to be purely recommendatory, advisory, and critical, that body would have no real determining voice in respect to the conduct of affairs and the chief executive would be subject to no adequate control. This is true from the strictly legal and procedural standpoint. From the moral standpoint, however, conditions would

be otherwise. If the assembly performs its duties in a patriotic and proper manner—that is, with regard to the public interests, rather than the personal interests of its members, and of the localities which they represent—it is certain that great weight would be given to its recommendations and criticism. If its action were not of this character, it would not be desirable that its wishes should be followed. The chief executive would always be under a strong incentive to make his action conform to the will of the assembly so far as he could do so without sacrificing the interests of the state, and to conduct the affairs of government in such a manner as not to expose his action to damaging criticism, since by so doing the difficulties of his task would be lessened, and his position fortified. The real danger would be that he would yield to popular pressure when he should not do so, rather than that he would stubbornly oppose the legitimate wishes of the people. In the final analysis, it would be the will of the people, if such will were properly formulated, that would prevail.

This question of the function of the legislative branch of government as an organ of public opinion has been considered thus fully since it is a matter of extreme importance in respect to those peoples in China and elsewhere who are seeking for the first time to establish a really popular government.

Congress as an Organ of Inquest.—Somewhat analogous to the function of the legislature as an organ of public opinion is that of acting as a body for the prosecution of inquiries into matters affecting the general welfare. The government has, of course, in its administrative branch numerous agencies that can make, and constantly are making, investigations of matters falling within the scope of their particular activities. Occasions are constantly arising, however, where it is desirable that inquiries should be made upon a much more comprehensive scale, and in a manner partaking more of the nature of a grand jury inquest; that is, one where persons representative of special interests, or having special competence, can be put upon the stand and information obtained from them through the interrogatory process. This is a method that has been used with great effect by the British government. Its royal com-

missions, so named because they are created under the sign manual of the Crown in pursuance of legislative authorization, have been particularly effective in marshaling public opinion regarding complicated social and economic problems and in furnishing data upon which public policies may be intelligently framed.[3] Investigations of a similar character are constantly being made by one or the other of the houses of the Congress of the United States and to a less extent by the State legislatures.

The scope of the power of Congress to conduct investigations of this character, and especially to compel the attendance, testimony, and production of papers by persons who are not government employees, and to punish for contempt recalcitrant witnesses, has frequently been called into question and is one that has not as yet been fully determined by the courts. A recent and important decision on this subject was that rendered by the Supreme Court of the United States, January 17, 1927, in the case of John J. McGrain, deputy sergeant at arms of the United States Senate vs. Mally S. Daugherty (273 U. S. 135). In the course of its opinion in this case, the Court declared: "The power of inquiry—with powers to enforce it—is an essential and appropriate auxiliary to the legislative function"; and added that a person summoned as a witness in the course of such inquiry to "obtain information necessary for such legislative and other action as the Senate may deem necessary and proper" could be punished by the Senate for refusal to appear and testify. This decision, though sustaining the power of Congress, or one of its houses, to compel testimony by a person not an employee of the government, apparently rests primarily upon the authority of Congress to do what is necessary in meeting its function of drafting legislation, rather than upon the authority of Congress acting as a board of directors to investigate the conduct of its administrative agents. The decision, notwithstanding the use of the expression "for such legislative and other action as the Senate may

[3] On the great value of these commissions and the reasons for their success, see Harold F. Gosnell, "British Royal Commissions of Inquiry," *Political Science Quarterly*, March, 1934, and "Report of the Departmental Committee on the Procedure of Royal Commissions," *Parliamentary Papers*, 1910 (Cmd. 5235).

deem necessary and proper," is thus not decisive in respect to the investigative powers of Congress where no reference is had to possible legislation. If this issue were squarely raised, it is probable, however, that the power of Congress would be affirmed. Other questions that have been raised are as to the right of witnesses to refuse to testify on the constitutional ground that their testimony might tend to incriminate them, and as to whether the committee, in conducting its investigation, is bound to follow the technical rules of evidence observed by the courts. Despite these questions, committees of Congress have, in general, had little real difficulty in securing the information needed for purposes of their inquiries.

Congress as an Executive Council.—In practically all governments, though the executive power is definitely vested in the hands of the chief magistrate, recognition is had of the need for some body that may act in an advisory capacity to that officer in the exercise of this power. In England, this body consisted of the Privy Council, from which was evolved by a process of evolution the present Cabinet. In our own government, it was the intention of the framers of our constitution that the Senate should act in this capacity. Thus the constitution, in conferring power upon the President to make treaties and appointments to important offices, provides that he shall exercise these powers "by and with the advice and consent of the Senate." The use of this expression, instead of one indicating merely that his action must meet with the approval of the Senate, shows clearly that the intention was that the President should actually confer with, and get the advice of, the Senate in performing these acts.

Here again is furnished an illustration of how an express constitutional provision may, in practice, be made to work quite differently from the manner planned. At the outset, Washington, the first President, made one or two attempts to carry out the spirit of this provision by meeting the Senate in person for the purpose of conferring with it in respect to certain matters. The results of such attempts were not such as to encourage him to continue them. He accordingly inaugurated the plan of first definitely formulating

his proposed action and then transmitting it to the Senate for approval, a procedure which has uniformly been followed since that time. It has resulted from this that the Senate has in fact acted rather as an approving body than as a consultative and advisory council.

The reason the Senate failed to function as an executive council in the manner intended is not difficult to see. To work effectively, an advisory body should be composed of persons selected by the officer to whom its advice is to be given. It was accordingly but natural that the President should look for advice rather to his cabinet composed of his own appointees than to the Senate, in the selection of whose members he had no voice. The framers of the constitution, moreover, failed to take into consideration the extent to which party interests would control governmental action. The fact that the Senate would include a number of members, and at times a majority of members, of the party opposed to the President, was in itself sufficient to make it unsuitable as a strictly advisory body.

Though the Senate does not act as an executive council in the manner intended, the participation granted to it in the exercise of the executive power has, nevertheless, proved a matter of great consequence in the actual operation of the government. It has resulted in a more or less permanent contest between the President and the Senate in respect to the exercise of the treaty-making and appointing powers. In respect to the first, the Senate has not contented itself with the mere giving of counsel or the approval or disapproval of treaties laid before it by the President. It has not hesitated to amend treaties, and, in other ways, has sought to make of itself a coördinate, if not the dominant, body for the performance of this duty. In respect to the latter, it has pushed its powers so far that it has, to a great extent, taken to itself the duty of deciding in the first instance who shall be appointed to a large class of important positions. It has been able to do so by the establishment of a principle or practice known as "courtesy of the Senate," under which nominations to positions in the field services of the government made by the President will be rejected by the Senate if such

nominations are objected to by the Senators of the States in which such positions are located. A contributing factor has also been the extent to which appointments to office have been looked upon as political patronage. The practice is thus an integral part of the "spoils system" which has established itself so strongly upon the country. A remedy for this condition has been sought in the restriction, to the narrowest possible limits, of the requirement that Presidential appointments shall require the approval of the Senate. Such action was strongly recommended by President Taft in transmitting to Congress a report of his Commission on Economy and Efficiency dealing with methods of appointment.[4]

Before leaving this subject, mention should be made of a practice that does obtain, in which the idea of the Senate serving as a real executive council finds at least partial expression. This is the practice of the President in conferring with the Committee on Foreign Relations of the Senate in reference to the negotiation of treaties, or in taking any important action relative to foreign affairs. Much is to be said in favor of such usage. It meets the objection that is urged against leaving matters of so great importance wholly in the hands of a single officer, gives to the President counsel and advice which is often valuable, and tends greatly to promote harmony between the President and the Senate in the joint handling of these affairs.

Congress as a Board of Directors for the Government Corporation.—In the foregoing we have pointed out how the function of a legislature as an organ of public opinion may, and should, be clearly distinguished from its function as an organ of legislation. It now becomes necessary to make still another distinction—namely, that between the function of a legislature as a law-making body, properly speaking, and its function as a board of directors for the government corporation.

Examination of the work of any legislative body reveals the fact that the great bulk of its activities has to do with such matters as

[4] "Economy and Efficiency in the Government Service," message of the President of the United States, Transmitting Reports of the Commission on Economy and Efficiency, April 4, 1912. House Doc. 670, 62d Congress, 2d Session.

the determination, subject to constitutional limitations, of how the government, and particularly the administrative branch of the government, shall be organized, what work shall be undertaken, how such work shall be performed, what sums of money shall be applied to such purposes, and how this money shall be raised and disbursed. From this standpoint, the legislature is the board of directors of the public corporation. Representing and acting for the citizen stockholders, it is its function to give orders to administrative officers; and, as a correlative and necessary function, to take such action as will enable it at all times to exercise a rigid supervision and control over the latter with a view to seeing that its orders are properly and efficiently carried out.

Manifestly, this function is quite distinct from that of acting as a law-making body, strictly speaking. It is unfortunate that the same designation, "laws" or "statutes," is given to both classes of documents through which the action taken is set forth. Laws, from the juristic standpoint, have to do with the formulation and enactment of general rules of conduct to govern the relations between individuals and between individuals and the government. They have to do with rights and duties and the means of their enforcement. They are intended to be general and permanent. Enactments for the purpose of giving directions to officers of the government are for the most part but administrative orders. The major part of them have only a temporary end in view. Of this character are the annual or biennial appropriation acts, acts authorizing the construction of bridges or public buildings, etc.

As we have pointed out in our consideration of the union or separation of powers, there are few more radical points of difference between the governments of England and the United States in their practical workings than is represented by the different ways in which this question has been answered. The British Parliament exercises this function to the least possible extent. It may be said to participate only in the most indirect way in the actual administration of affairs. It is the Crown, acting through its ministers, which prepares the governmental work-program, determines what organization shall be set up for the performance of governmental

activities, and decides what funds shall be raised and how they shall be appropriated. It is true that revenue and appropriation bills must be laid before Parliament, and receive its formal approval. This, however, is little more than a formal requirement, since no material change is ever made in them that does not meet with the approval of the ministry of the day. It does not enter within the conception of Parliament that it should have the determination of such administrative details as the fixing of the internal organization of services, the number of employees to be engaged, the salaries that shall be paid to them, etc.

In the American scheme of government, exactly the opposite of this policy prevails. There is no detail of administrative organization, procedure, or activity which is too petty for Congress to concern itself with. Collectively, one of its chambers passes upon nominations to important offices, while the members of both houses, individually, use every possible influence in their power to determine who shall be appointed to offices of all grades of importance. It, and not the executive, is the branch of the government that determines in almost the last detail what services shall be maintained, how such services shall be organized and conduct their business, what number of employees shall be engaged, what salaries shall be paid, and how all moneys voted shall be expended.

It is not practicable here to enter into any extended comparison of the relative merits of the two systems. The writer can only say that, in his opinion, the British system is the proper one. Certainly there can be no question but that that system has given a far more efficient and economical administration of governmental affairs than has the American system.[5] It should be stated, however, that there has been a tendency in recent years for Congress to delegate greater powers to the executive and to administrative officers to control administrative operations.

This distinction between the two functions of enacting laws,

[5] For a detailed account of this aspect of the British government in its practical operation, see "The System of Financial Administration of Great Britain," by W. F. Willoughby, W. W. Willoughby, and S. M. Lindsay (Institute for Government Research, 1917).

properly speaking, and administrative orders is also of direct practical importance when a legislature enters upon the problem of organizing itself and determining its rules of procedure. It goes without saying that a body should organize itself and adopt rules of procedure with reference to the duties to be performed by it. Manifest as is the distinction between the two functions when once stated, and well known as it is to students of government and jurisprudence, it has been almost wholly ignored by Congress in providing for its organization and procedure. It has treated the two classes of duties as identical and has made no attempt to differentiate between them in working out the means for their performance. With two different functions to perform, it has organized and adopted rules with only one of them in mind. It has not only made no attempt to organize with a view specially to the discharge of its duties as a board of directors, but does not even appreciate that it has here a special problem to be met. We have thus here at the outset an explanation, and that a fundamental one, of why Congress does its governing work so poorly.[6]

This function of Congress, and of the State legislatures, of acting as a board of directors, which is one of the most important duties that these bodies have, will receive full consideration when we discuss the problem involved in the organization and operation of the administrative branch.

Congress as an Organ of Legislation.—Not until we have a clear appreciation of the functions of a legislative body as an organ of public opinion and as a board of directors, and especially the distinction between those acts of legislation which constitute laws proper and those which are merely administrative orders, is it possible to appreciate the real part played by a legislature as a creator of law in the strict sense of the word. Much as we have

[6] The author has handled this particular phase of our government in his paper "The Correlation of the Organization of Congress with That of the Executive," *Proceedings of the American Political Science Association*, 1913-1914, pp. 155-167. In this paper, the author not only pointed out the failure on the part of Congress to organize and adopt rules having special reference to the performance of its board of directors' duties, but indicated the way in which this problem, in his opinion, could best be met.

narrowed the field of law-making by making these distinctions, it is necessary to narrow it yet further. As is well known, the great bulk of English and American law as it exists to-day has not been created by act of formal legislation, but has developed through the slow process of judicial adjudication of disputes. This method, moreover, is the one which to-day is the chief determiner of law; only in small part is our law at the present time in statutory form.

It, moreover, is a matter of more than historical interest that only slowly did Parliament, or indeed legislative bodies generally, reach the position that the enactment of law was one of its functions. As Edward Jenks has brought out in his brilliant study, *Law and Politics in the Middle Ages,* it was not for two hundred years after the establishment of Parliament in its modern form (that is after the establishment of the Model Parliament of 1295) that statutes were other than declarations of laws and customs claimed to be already in force.

> If we glance at the rolls of the English Parliament we shall find that the great bulk of the petitions which are presented during the first two hundred years of its existence are complaints of the breach of the customs or requests for the confirmation of new customs which evil disposed persons will not observe. . . . What is this but to say that Parliament was a law-declaring rather than a law-making body? . . . To think of a legislator, or even a body of legislators as sitting down in the plenitude of absolutism to impose a law upon millions of human beings is to conceive an absurdity. . . . Law is made unconsciously by the men whom it most concerns; it is the deliberate result of human experience working from the known to the unknown, a little of knowledge won from ignorance, or order from chaos. . . . The English Parliament was a splendid machine for the declaration of law. . . . The great problem which lay before the statesmen of the middle ages was to devise a machine which should declare and enforce law. The supreme triumph of English statesmanship is that it solved this problem some five hundred years before the rest of the Teutonic world.[7]

It, moreover, is a matter of importance to note that only in comparatively recent times did Parliament seek to do more than make known its wishes in respect to either legal or administrative matters, and that the expression of these wishes in the form of formal

[7] Jenks, *Law and Politics in the Middle Ages.*

documents known as "statutes" was left to the executive. Parliament did nothing more than consider grievances and petitions for action to be taken by the Crown. These petitions were forwarded to the Crown and, when acceded to, the latter proceeded to put its decision into effect by drawing up and promulgating the formal document for making known its will. The statute itself was thus not drawn until after Parliament had been dissolved.

Against this practice Parliament protested, alleging that the statutes, when promulgated, in many cases failed adequately to carry into effect the action petitioned for by Parliament, and promised by the Crown. To meet this situation, Parliament began the practice of sending to the Crown a draft of the statute that it desired instead of a petition. This is the origin of the modern bill. This procedure was acquiesced in by the Crown in 1414, and under Henry VII became the regular practice in at least all cases of importance.[8]

Even after Parliament had won its right to send up to the Crown its desires expressed in the form of a bill or statute, it was by no means established that the Parliament was the exclusive organ of legislation. The King continued to exercise an ordinance-making power that was little to be distinguished from legislative powers. All during the Middle Ages and down to the Restoration, it may almost be said that England had two legislative organs—the King in Parliament and the King in Council. This, however, did not go without protest on the part of Parliament.

In 1610, the Commons protested it is the indubitable right of the people of this kingdom not to be made subject to any punishment that shall extend to their lives, land, bodies or goods other than such as are ordained by the common laws of this land or the statutes made by their common consent in Parliament.[9]

Cokè, then Chief Justice of the Court of Common Pleas, was consulted on this point, and, after consultation with three other judges upheld the contention of the Commons. James I, however,

[8] F. W. Maitland, *Constitutional History of England,* p. 189.
[9] Maitland, *op. cit.,* p. 257.

continued to exercise legislative powers through the issue of proclamations, and the question as to where legislative power was vested may be deemed to have been one of the main issues between the Parliamentarians and the Stuarts. Not until the Revolution of 1688 may Parliament be said to have established itself definitely as the organ of legislation of the government. Thereafter such powers as the Crown exercised in this field were those of an agent exercising delegated authority.

Finally, Congress, in common with the British Parliament and other legislative bodies, has, in recent years, pursued the policy to a constantly increasing extent of surrendering to the administrative branch no small part of its law-enacting duties. This it does by limiting its own action to the statement of broad principles or the enactment of provisions of a general character, and delegating to administrative agencies the authority to formulate rules and regulations having the force of law with the purpose of amplifying these general provisions and applying them to specific cases. Thus, wide powers of this character have been conferred upon the Secretary of Agriculture with respect to such matters as the enforcement of the Pure Food and Drug Act, the regulation of stockyards and packing houses, and, more recently, upon the President with respect to the taking of action to meet the emergency presented by the depression from which the country has been suffering. Provision also has been made for numerous special tribunals with subsidiary legislative powers of a broad character, such as the Interstate Commerce Commission, the Federal Trade Commission, and the Federal Power Commission. In the States, the most distinctive action in this way has taken the form of the creation of boards of public health, boards of education, and boards of public welfare, with broad rule-making powers, and utility commissions, analogous, in regard to the scope of their powers, to the Federal Interstate Commerce Commission. As a result of this policy, to a very considerable extent, the law having to do with the conduct of business operations emanates from the administrative branch and is to be found in administrative orders and regulations rather than in statutory enactments.

This delegation to the executive and to administrative agencies of power of a legislative character has given rise to a sharp conflict of opinion between those who are interested primarily in the protection and enforcement of individual rights and those whose primary concern is the efficient dispatch of public business. To the lawyer, who represents the first class, the growth of this vast body of law and the instrumentalities which have been set up for its enactment and application, are deemed to be fraught with dangerous possibilities since they vest in the same hands the formulation, the application, and, to a considerable extent, the adjudication of the law, without the observance of the many important safeguards that are thrown about the enactment of law by a legislative chamber and the adjudication of disputes by a court of law. To those concerned with the practical operations of government, however, this new development offers the most effective if not the only possible method for the efficient conduct of public affairs. To them it has the following merits: (1) it relieves the legislature of a great burden of work in respect to which it has no special competence, and thus enables it more largely to direct its attention to matters of general import; (2) it entrusts the drafting of detailed provisions, which are usually of a highly technical character, to the agencies most familiar with the conditions to be met and which will have the responsibility of their enforcement; (3) it permits of great flexibility in adapting the regulations to the different classes of individuals or interests affected; and (4) it makes possible the prompt modification of a provision as soon as experience demonstrates that it is unsatisfactory. It is furthermore maintained that there is no reason why administrative authorities may not be expected to exercise these powers with the same regard for individual rights that is displayed by the legislative and judicial branches. However this may be, it is evident that there are here two conflicting interests, the harmonizing of which constitutes a political problem of the first magnitude. One thing would seem certain: wherever power to promulgate rules and regulations having the force of law is conferred by the legislature upon an administrative agency, the former should make careful provision regarding, not only the scope of the author-

ity so conferred, but the manner in which it is to be exercised; the latter provisions should ensure that no definite action will be taken until all interested parties have had an opportunity to be heard and that adequate means will be taken to give publicity to the rules and regulations formulated. Certainly the rules and regulations should be reported to the legislature so that the latter may, if it sees fit, modify or annul them.

CHAPTER XIX

THE LEGISLATIVE BRANCH: STRUCTURE AND COMPOSITION

Having obtained a knowledge of the several functions of the legislative branch in a modern representative government and an idea of the part played by this branch in the conduct of governmental affairs, we are now in a position to enter upon an examination of the more special problems that are presented in determining the structural character and composition to be given to this branch of government. Consideration can then be given to the still more special problem of the rules that should be formulated for the governance of such bodies in their practical operations.

Unicameral or Bicameral Legislature.—As regards structure, much the most important question is whether the body in which the exercise of the legislative power is primarily vested shall consist of a single chamber, or be composed of two chambers whose joint agreement is necessary for affirmative action; that is, whether it shall be a unicameral or a bicameral body. That such a question should be presented constitutes one of the most noteworthy features of the development of modern political institutions. It arises from the fact that, notwithstanding the undoubted and uncontested advantages inhering in a system under which responsibility is centralized in a single agency—advantages which are universally recognized in all private undertakings and in all other branches of public administration—modern states have, for the most part, chosen the bicameral system in making provision for their central governments, and, to a certain extent, have followed the same policy in devising systems for the government of their political subdivisions.

Political science furnishes few more interesting questions than that of why this choice has been made and the consequences that

have resulted from it. The explanation is a twofold one: (1) the historical circumstances under which legislative bodies have come into existence; and (2) the supposed technical advantages of the bicameral over the unicameral system. Each of these reasons requires separate consideration.

Historical Development of the Bicameral System.—The English Parliament is, in a very true sense, the mother of parliaments. It constitutes the first successful example of a legislature in the modern sense. It is but natural, therefore, that almost all nations, when seeking to establish a legislature, should look to it as a model. As a result, it has influenced powerfully the character of all legislative bodies subsequently created. In regard to no feature has this been more true than in respect to its bicameral character. It is safe to say that had it not assumed this form, there is little likelihood that this mode of organization would now be so prevalent. It is thus of prime importance to determine how the establishment of a bicameral legislature by the English people came about.

In seeking to do this, the first point that stands out is that the English Parliament, like almost all English political institutions, was not a deliberate creation. It came into existence by a process of evolutionary change. No such thing as a deliberate weighing of the relative advantages of different types of organization took place. That the English Parliament finally took the form of a bicameral body was due in large part to historical accident. At the time that it began to assume the definite form that it was thereafter to maintain, English society, or at least that part participating in any way in public affairs, was divided into three well-defined classes: the Lords Spiritual, the Lords Temporal, and the Gentry or Commoners. When the King found it desirable to summon his Grand Council in order to secure aid, or funds, or for other purposes, each of these three classes, or their representatives, constituted distinct groups in it. Each, it was held, ought to speak and act for itself, determine what taxes or levies it would furnish, etc. For a long time it hung in the balance whether these three groups would meet together or separately. Finally, the Lords Temporal and Lords Spiritual decided to throw in their lots with each other.

The Commons, however, elected to sit apart. The result was the establishment of a general assembly or Parliament of two houses. This evolution was completed about the end of the thirteenth century, when the so-called Model Parliament of 1295 was summoned. The continued recognition of the distinction between the nobility and common people caused this form of organization to be maintained until the present day.

The next country to develop strong legislative bodies as a distinct branch of government was America. Here the bicameral system was generally adopted, partly since it was but natural that the American colonists should copy the institutions of the mother country, and partly because there was a special reason in their case why they should do so. This reason consisted in the fact that there were two interests to be represented: the mother country and the colonies themselves. Colonial legislatures were thus very generally made to consist of two houses, an upper house, or Governor's Council, composed of members appointed by the Crown, or the Governor as representative of the Crown, and a lower house composed of members elected by the people.[1]

After the Declaration of Independence, the States retained, as far as conditions would permit, the form of government which they already had. In some cases, new constitutions were not adopted until many years after independence of England had been achieved. Even when the new States entered upon the work of framing constitutions, they adhered in great part to the form of government and the political institutions to which they were accustomed. Among the institutions so retained was the bicameral legislature. New States, as they were erected out of our public domain, copied the main features of the political system of existing States. With the single exception of Nebraska, which recently adopted the unicameral system, all the States of the union now have a bicameral legislature.

When our federal constitution was framed, so firmly established was the principle of a two-chambered legislature that there was

[1] In Massachusetts, Connecticut, and Rhode Island, the members of the upper house were elected by the General Assemblies.

little or no thought of doing otherwise than to provide for such a body as a part of the new government. Furthermore, the adoption of this type of legislature made it possible to meet two of the most difficult problems that confronted the framers of our constitution; those, namely, of framing a system under which the identity or individuality of the separate States should not be merged to too great an extent in a single government, and, secondly, of seeing that the influence of the smaller States should not be overwhelmed by that of the larger. These two considerations were met by providing that the national legislature, Congress, should consist of two houses, a lower house, or House of Representatives, composed of members elected directly by the people, and an upper house, or Senate, composed of members selected by the States, it being provided that each State, regardless of its size, should be entitled to two Senators.

To these two considerations must be added yet another. At the time of the adoption of the constitution there was a profound distrust of democracy, a distrust that was as great as, if it did not exceed, that of autocratic or monarchical rule. The feeling was general on the part of those responsible for action that this type of government offered acute dangers, chief of which was the possible exploitation of the propertied classes by those less favorably situated. Although it was thought that these dangers could be met largely through the adoption of the representative type of government, still it was felt that certain additional safeguards were desirable. Such safeguards, it was believed, could be secured by providing for a bicameral legislative system, one of whose chambers would be more directly representative of property interests and be thus in a position to protect such interests. This feeling, which persisted long after the establishment of the federal government, is excellently revealed in the debates that took place in the convention which in 1821 assembled to revise the constitution of the State of New York. Chief Justice Spencer, arguing in that body in behalf of a second chamber, said:

> Those who suppose that a second branch of the legislature, the Senate, was intended merely as a check upon the first, appear to me to have misunderstood

its origin and design. It was intended to be differently composed and differently organized for other purposes than a mere second branch of the legislature. The objects of government are the protection of life, liberty, and property. These are important and paramount rights, and every wise framer of government will extend its protecting care over all and each of them. The assembly consisting of greater numbers, elected by all the sound and wholesome part of the adult male population of the State, is more emphatically charged with the protection and preservation of the personal rights, the lives and liberties of the citizens. The Senate was intended as the guardian of our property generally and especially of the landed interests, the yeomanry of the State.[2]

Present Changed Conditions as Affecting the Need for a Bicameral Legislature.—In the foregoing, it has been seen that the bicameral system has come into general use, not so much in pursuance of any reasoned belief in its superiority from a technical standpoint as an instrument of legislation, as from the fact that it was thought to provide the means for meeting certain practical conditions and for giving expression to certain political principles that obtained at the time of its adoption. This being so, it is of importance to determine whether these conditions and beliefs still persist, since, if they do not, the system loses one of the main arguments in its support.

In England, where it took its rise, the system had as its only historical or environmental justification the sharp division of the population into two distinct classes—the landed aristocracy and the common people. So long as such cleavage existed, the bicameral system offered an excellent means for giving separate representation to these two interests. Recent years, however, have witnessed a great change in this respect. Although the English continue to cling tenaciously to class distinctions as affecting matters of social intercourse, the feeling has constantly gained ground that such distinctions do not furnish the proper basis for a system of legislative representation, or at least one in which the two classes are to be represented by bodies of equal and coördinate powers. This feeling has found expression in various ways, chief among which has been the passage of the revolutionary Parliament Act of 1911, which,

[2] For the foregoing quotation, the writer is indebted to David Leigh Colvin, *The Bicameral Principle in the New York Legislature*, 1913.

at a stroke, destroyed the position of the upper house as one of the coördinate branches of the legislature and relegated it to a subordinate position. This was done by withdrawing from that body the power to modify financial bills passed by the lower house and limiting its power in respect to other measures enacted by that body to postponing their final passage for a certain period of time. As a result, while England continues to have a legislature that is nominally composed of two chambers, it can hardly be said any longer to have a strictly bicameral system.

This action by England in abandoning the bicameral system—that is, one composed of two houses with coördinate legislative powers—has had a profound influence upon those states which, since the World War, have been compelled to adopt new political systems or profoundly modify their existing systems. Scarcely without exception, the new constitutions that have been adopted by European countries, in making provision for the exercise of the legislative power, have followed the example thus set by the mother of parliaments. While many of them have made provision for a so-called second chamber, in all or practically all cases, the powers of such chambers have been limited rigidly to the exercise of what may be termed a suspensory or qualified veto not unlike that exercised by the President and the governors of the States in the United States. Still more recently, Russia, Italy, and Germany, so far as they have provided a distinct legislative branch, have made this branch consist of a single chamber.

In the United States, too, it will be found that action has recently been taken which largely nullifies the prime considerations that led to the original adoption of the bicameral system. The Seventeenth Amendment to the Constitution, adopted in 1913, provides that members of the Senate shall be selected by popular vote instead of by the States acting directly through their legislatures; and thus has largely destroyed the character of that body as one representing the States in their corporate capacity. As a result of this change, both houses of Congress have substantially the same representative character, the only difference being that their members are elected from districts of varying size. Of scarcely less sig-

nificance is the change that has taken place in respect to the other two considerations mentioned above. Whatever may have been public opinion in early times regarding the desirability of a second chamber as a means of curbing democracy and protecting property rights, no such feeling exists at the present time. On the contrary, the feeling has long been strong that, if anything, our government, in its practical operations, has permitted too great dominance of property rights over considerations affecting the social welfare of the common people, and has not given adequate play to the democratic principle. For years, one of the gravest criticisms of the Senate was that it was composed to a large extent of men of great wealth, that it was the stronghold of the vested interests, and that it constituted the chief obstacle to many social reforms earnestly desired by the people. That this feeling was responsible in part for the change made in the method of selecting the members can hardly be doubted.[3]

With these changes, it is evident that the force of the arguments originally adduced in favor of the adoption of a bicameral system has been greatly weakened, if not entirely destroyed. This being so, the system, if it is to be upheld at all, must be justified on other grounds.

Comparison of the Technical Merits of the Unicameral and Bicameral Systems.—Although, as has been shown, the general adoption of the bicameral legislative system has been due to historical accident, to the necessity believed to exist for meeting certain special conditions, or to a mere copying of existing institutions, rather than to a reasoned belief in its superiority as an instrument of legislation, there is nevertheless a strong body of opinion to the effect that this system has certain intrinsic merits which, apart

[3] Other reasons for the change were the large use of money by candidates to secure their selection; the failure, at times, of State legislatures to reach an agreement upon a choice with the result that the States would be only partially represented in the Senate; and the tendency for the electorate, in electing members of the State legislature, to be governed largely, if not primarily, by the consideration that these bodies would act as electoral colleges for the selection of the national Senators rather than by that of selecting persons who would best represent them in respect to the conduct of purely State affairs.

from all other considerations, justify its employment in making provision for the exercise of the legislative power.

If the two systems be studied purely as pieces of governmental machinery, it would seem that the unicameral system would be the one logically to be adopted. It is simple. Responsibility is definitely located. It furnishes the means for a direct authoritative representation of the electorate. It is the system invariably employed in providing for the exercise of general direction and rule-making powers in all large private corporations. The bicameral system, in contrast with this, is complicated and expensive. Responsibility is divided. It leads to delay in action. Two separate bodies have to be brought into accord before any action can be taken. In many cases, this means that proposed action will be defeated; while, in almost all cases, the result is a compromise. What then are the supposed advantages of this system which are believed to be of sufficient weight to more than counterbalance these undoubted disadvantages? Generally speaking, they are as follows: the bicameral system compels delay and deliberation; it makes it impossible for a legislature to be swept from its feet by a sudden wave of unreasoning popular opinion; it ensures that opportunity will always be given for a sober second thought; it ensures that measures before their adoption will undergo a careful revision; it makes possible a better representation of different interests in the government. It is thus seen that, in a popular government at least, the special functions of a second chamber are those of serving as an organ of revision, a check upon democracy, an instrument by which conservatism in action may be had, and a means for securing a representation of interests that is not feasible in a single chamber composed of members elected directly by the people.

All of these are, undoubtedly, desirable ends. It remains, however, to consider whether the bicameral system, as it obtains in modern states, and particularly in the United States, is devised so as effectively to achieve these ends; whether adequate means for securing them are not already provided by other features of the political machinery; whether these ends are in fact achieved by the system in practical operation; and whether, even if they are,

the system does not give rise to other difficulties in the operation of the political system which more than counterbalance the advantages that the system is supposed to afford.

As regards the first of these considerations, we have already seen that, whatever may have been true in the past, the bicameral system as it now exists in both the national government and the governments of the States is no longer so constituted as to give separate representation to different interests; nor is it any longer the desire of the American people that special provision be made in this way for the representation and protection of property rights. Such protection, it is believed, and properly so, is afforded by the numerous safeguards set up in our constitutional documents, such as those prohibiting the taking of property without compensation, the requirement of due process, the prohibition of bills of attainder, and the like, and the provision that is made for an independent judiciary.

As regards the second important function that a second chamber is supposed to perform, i.e., that of acting as a brake or curb upon democracy, there can be no doubt but that it does act in this way, since anything that makes more difficult the carrying out of the popular will cannot but have this effect. It is more than a question, however, whether in so doing, it renders a valuable service. When our government was first established, popular government, as applied to any large body of people, was in the nature of an experiment, and it was but reasonable that serious apprehensions should exist in respect to how it might operate in practice unless all possible safeguards against an abuse of powers were taken. A century's experience has shown, however, that this system has now justified itself. If our political system is open to criticism from this standpoint, it is that too great difficulty exists in giving expression to the popular will, rather than that it is possible for such will to find too full expression.

As regards the argument that a second chamber furnishes the means for securing a careful revision of legislative proposals as first formulated and adopted, a careful examination of the system, as it actually exists and operates, will show that here too, the ad-

vantage thus claimed is more theoretical than actual. In the first place, it must be evident that if a second chamber is really to perform this function, it should be specially constituted with that end in view. Preferably, its members should be selected in some other manner than that employed in selecting the members of the lower house, the emphasis being laid on securing members of high technical qualifications rather than giving expression to the representative principle. In this way, it would be possible, not merely to secure greater competence in the exercise of the revising function, but to put such members in a position where their action would be determined by consideration of the technical merits of the propositions coming before them rather than purely political exigencies. No such conditions, however, obtain in the United States. The members of both houses are selected in practically the same manner; they have the same representative character; they are equally dominated by political considerations; and there is no assurance that the members of the upper house will be more technically qualified or be actuated by higher motives than those of the lower chamber.

The Bicameral System as an Obstacle to the Proper Working of Party Government.—There remains yet another objection of a practical character that can be raised against the bicameral system. The bicameral system came into existence in the United States as well as in England before the development of political parties in the modern sense. With the rise of the party system, an entirely new element was injected into the problem of legislation. Opinion is now fairly unanimous that this system gives its best results where what is known as party government obtains; that is, where the responsibility for action can be placed definitely upon the party commanding the majority support of the people. Even in a state having the responsible type of government, the effective operation of such a system is seriously interfered with when the legislature consists of two houses, one of which is not directly representative of, and responsible to, the electorate. In England, this difficulty was met only in part by the development of the principle that majority support in the lower house alone

should determine the continuance in power of a ministry representing the majority party, since under that system it was still possible for the upper house to prevent such majority party from having its way. It was finally overcome only by the passage of the Parliament Act of 1911 which in effect abolished the bicameral system though it retained the upper house as an organ for the exercise of what is in effect a qualified veto power. In France, where no such modification of the bicameral principle has been effected, the complications introduced into the working of party government are constantly in evidence.

It is in the United States, however, that the extent to which the effective working of the system of party government is interfered with by the existence of two coördinate branches of the legislature is most apparent. As is well known, under our system of government the contingency that the two houses of the legislature may be of different political complexions is not only always present but is, in fact, of frequent occurrence. When this is the case, it is of course impossible for the principle of party government to find proper expression, and, when party differences and animosities are acute, it may result in a practical deadlock so far as the enactment of legislation of general importance is concerned. At best, it means that the whole process of legislation will be slowed down and that much of the legislation that is enacted will be of a compromise character thoroughly satisfactory to no one. That such a condition constitutes a serious defect in our political system can scarcely be doubted. That it exists is due largely to the existence of the bicameral system, and its correction is to be found only in the abolition of that system or its modification in such a way as would destroy the position of the upper house as one exercising coordinate powers with those of the lower house or give it a representative character identical with that house—action which would largely destroy any justification for a second chamber at all.

Adoption by the States of the Unicameral System Desirable.—The foregoing critical study of the bicameral system has, it is believed, established, not only the disadvantages inhering in that system, but the further fact that the particular objects sought by

its adoption, either are not in fact achieved or are amply provided for by other features of our political system. This being so, the conclusion inevitably follows that the system is one that should be adopted only where very special conditions render the use of it desirable. No such conditions exist in the case of our States. Few things, in the opinion of the writer, would contribute more to the improvement of the whole system of State government than the abolition of this system and the substitution in its place of a single chamber with a comparatively restricted membership. By such action, the structure of government would be materially simplified, responsibility for action would be more definitely located, the establishment of effective coöperative relations between the legislature and the executive would be rendered easier, and the whole process of legislation would be facilitated and made more responsive to public opinion. Added advantages would be a reduction in the cost of government and the increased probability of securing as legislators persons fitted to perform the duties of that office. One of the gravest criticisms of our State legislatures is the mediocre character of their members. Their failure to attract to themselves persons who, as the result of their personal attainments or experience in other walks of life, are specially qualified to participate in the conduct of public affairs, is undoubtedly due in part to the difficulties that such persons encounter in making their influence felt under conditions now existing where responsibility for action is so widely diffused. With a single chamber of comparatively small size, the post of legislator would become one of enhanced power and prestige, and, as such, could not fail to make a greater appeal to men of ability.

In thus arguing for the abolition by the States of their bicameral systems, the writer but voices the conclusions that have been reached by those students of political science who have given special attention to the problems of State government. Thus the distinguished group of scholars [4] which coöperated under the

[4] Included in this group were: Charles A. Beard, A. E. Buck, R. S. Childs, W. F. Dodd, H. W. Dodds, John A. Fairlie, A. R. Hatton, A. N. Holcombe, Raymond V. Ingersol, Isador Loeb, Lindsay Rogers, A. E. Sheldon, and Clinton Rogers Woodruff.

auspices of the National Municipal League in the drafting of a Model State Constitution made the unicameral chamber the central feature of their recommendations regarding the set-up of the legislative branch.

In view of the manifest advantages of the unicameral over the bicameral legislature, it is rather remarkable that proposals for change from the latter to the former have made so little headway in the various conventions that have been held in recent years for the revision of the constitutions of the States. The explanation of this must be found in the inherent conservatism of the American people in respect to political matters. This reluctance to depart from long established practice has, however, been overcome in at least one of our States. In the fall of 1934, the people of Nebraska ratified an amendment to their constitution which provides for a legislature of one chamber. With the unicameral system actually adopted by one State, it is quite possible that other States will follow that example with comparative rapidity.

The Bicameral System in the National Government.—When one turns to the national government of the United States, the argument in favor of substituting the unicameral for the bicameral system has to meet a consideration that is not present in the case of the States. As has been pointed out, the latter, within the field of their competence, have unitary governments, while the national government is a federal government. In such a form of government, the bicameral system serves a certain purpose. Were provision made for but a single legislative chamber with representation in it apportioned according to population, a situation would be brought about in which the influence of the less populous States would be almost completely submerged, and the power to control the conduct of national affairs would rest in but one part of the country, namely, that embracing the more populous States east of the Mississippi River or, to a considerable extent, in the still more restricted area of the New England and North Atlantic States. Whatever may be the theoretical arguments in favor of such a system, it is one which the American people are not as yet prepared to accept. In the provision that exists for a second chamber in

which the several States, regardless of their size and population, have equal representation, an exceptionally effective system is provided, not only for avoiding any such geographically unbalanced representation, but for giving due emphasis to the principle of a union of states of coördinate political status. So long, therefore, as the American people desire to retain their federal form of government, it is probably necessary that the bicameral character of the national Congress be retained notwithstanding the many manifest disadvantages that the system presents in its practical workings.

The Bicameral System in the Government of Dependent Territory.—The bicameral system can also be made to serve a useful purpose in meeting the special conditions that are presented in devising a form of government for a dependent territory if it is desired to give to the population of such territory participation in the formulation of public policies but not complete self-governing powers. In such cases there are two distinct interests to be represented: that of the territory itself and that of the mother country. One of the most effective means of giving representation to these two interests is to provide for a legislature of two chambers of coordinate legislative powers, the one composed of representatives elected by the people of the territory and the other of persons selected by the executive of the mother country. While such a system increases the difficulty in securing legislative action, it has the merit that it makes it difficult for the mother country to impose its arbitrary will upon the territory, and also for the people of the territory to take action that is seriously opposed by the mother country. The form of government first set up for the administration of the public affairs of Puerto Rico and the Philippine Islands was of this type. Later, as the Islanders became more experienced in the art of government and the exercise of political powers, it was deemed possible to modify this government so as to increase the participation of the inhabitants in the conduct of public affairs. Ultimately, they could be given control of both branches of the legislature, the mother country contenting itself with such supervision as it could exercise through the power of

veto of legislative acts vested in the governor appointed by it, and by virtue of the fact that it could, through its own legislature, at any time take such action relative to the affairs of the islands as it saw fit. It would seem, however, that when the decision was reached to vest in the Islanders the power to select the members of both chambers, the need for the maintenance of two chambers passed away, and that a preferable policy at that time would have been to have provided for but a single chamber.

The Split-Session Legislative System.—Before leaving this subject of the structural character of our legislative bodies, it is desirable to give attention to a method of legislative procedure which, while it may not have been devised with that end in view, in fact tends to secure the technical advantages supposed to inhere in the bicameral system, and, in so doing, to give additional weight to the argument for the abolition of that system by our States. This consists in the provision that the regular session of the legislature shall be held in two periods separated by an interval of several weeks; that the first of these periods shall be devoted to the introduction and first consideration of bills up to the third reading, but not to their final passage except where necessary to meet an emergency, and then only by a two-thirds, or three-fourths vote of the members; and that the second period shall be devoted to the further consideration and the taking of final action upon bills introduced during the first period, the introduction of additional bills being prohibited except to meet an emergency, and then only with the consent of two-thirds or three-fourths of the members.

This system, which is known as the split-session system, was first adopted by California by a constitutional amendment in 1911. In 1920 West Virginia adopted the plan by constitutional amendment, which, however, was repealed in 1928. In 1921, Oregon, by a two to one popular vote, turned down a proposition for the amendment of its constitution along the same lines; and in 1932, a similar proposal was rejected by Arkansas. In the same year, Georgia, however, adopted such an amendment. It results from these several actions that at the present time the split-session legislature obtains in but two States, i.e., California and Georgia.

It is difficult to understand why this system, once started, should have made so little progress and, indeed, in one case after adoption, should have been abandoned, since, from the theoretical standpoint, it would seem to present important advantages. Chief among these advantages, and undoubtedly constituting the prime motive for its adoption, is that it greatly enhances the opportunity of the general public to express its wishes in respect to the enactment of proposed legislation and makes it impossible for bills, introduced at the behest of special interests, to be rushed through the legislature without an opportunity being afforded for the organizing of public opinion in opposition to them. Under the split-session system, there is ample time afforded both for the careful scrutiny of all proposed legislation by members of the legislature, by those whose interests are specially affected, and by the general public, and for those interests and the public to be heard from through the public press and otherwise. By thus compelling delay, by affording an opportunity for sober second thought, and by providing the means through which the public may express itself regarding proposed action, the system serves many of the purposes sought to be achieved by making the legislature bicameral. It would thus seem to be a system that offers most of the advantages of the bicameral system without any of the disadvantages inhering in that system. In view of this, it would seem logical that the decision to adopt the split-session system should carry with it the decision to substitute the unicameral for the bicameral system. Had action taken this form, it is quite possible that the innovation would have reached a development that it has not yet had.

Size.—That size constitutes a factor of importance in determining the character and working conditions of legislative bodies is evident. The questions involved in handling this factor are not so simple as might, at first sight, appear. As so often happens in seeking solutions of problems of political organization and procedure, conflicting considerations are present which must be harmonized if the result is to be satisfactory. Viewed solely from the operative standpoint, a relatively small chamber has undoubted advantages over a larger body. In a small body, responsibility for

action is more definitely located than is the case where the membership is large; members must perform their duties with a more acute sense of responsibility than where such responsibility is widely scattered. Furthermore, and growing out of the foregoing, is the fact that membership in a small body offers an attraction to the substantial members of the community that does not exist to a like extent in the case of larger bodies.

A further advantage of the smaller house, which has not received the attention that it deserves, is the greater opportunity that is afforded to members to become acquainted with each other, to reach conclusions regarding their respective abilities and soundness of judgment, and to discuss with each other their common problems. This is a matter of great importance. As is emphasized elsewhere, while legislative proposals may undergo minor modifications during the course of the debate upon them, fundamental decisions in relation to them are, for the most part, reached off the floor of the two houses. Nor does the consideration of such proposals take place wholly in hearings before committees or in committee meetings. If of any general importance, bills become the subject of private conversations between members which are often decisive even though informal. Such discussions can be, and are, extremely influential in ironing out differences, removing objections, and securing a meeting of minds. Manifestly, an equal opportunity for achieving these ends does not exist where the membership is large.

Finally, of course, the smaller house has the important advantage that, in it, the possibilities of real debate upon measures coming before it for consideration are far greater than in large assemblies. With a small membership, it is practicable for all members who desire to do so to express themselves fully and to propose and defend amendments to all measures that are brought up, with the result that the merits and demerits of legislative proposals can be actually threshed out and such proposals whipped into final form on the floor of the house. In a house of any considerable size, this becomes a practical impossibility. If such a house is measurably to meet the demands upon it, it must adopt rules limiting the right

of debate, or even of amendment. This means, on the one hand, that the work of examining and whipping bills into shape must be largely done off the floor in the committees, and, on the other hand, that the recommendations of these committees will, as a matter of practice or convention, be given greater controlling force than they would if made to a smaller body.

Were the points that have been discussed the only ones to be taken into account in considering the problem of size, the verdict would have to be unhesitatingly rendered in favor of a small house. Against these manifest advantages of the small house must, however, be placed certain disadvantages. Among these, the outstanding one is the fact that such a house cannot, from its very nature, have the same representative character as has the larger house. If the basis of representation is population, the constituency electing a representative must be much larger in the case of a small house than in the case of a large one. This means a corresponding diminution of the power of the voters to have personal knowledge of the character and attainments of the candidates among whom they must make a choice and, probably, an increased dependence upon the party organization in the selection of candidates.

With these conflicting considerations present, it is difficult to draw any final conclusion applicable to all governments. In a government such as that of the national government of the United States, exercising jurisdiction over a large area and population, the factor of representation would seem to dictate a chamber of some size. In the case of our States, however, the weight of the arguments would seem to be in favor of a chamber of relatively small size, perhaps twenty-five or thirty members. It is significant that the federal House of Representatives, notwithstanding the fact that it is much smaller than the lower houses of other countries having a much smaller territory and population to be represented, has repeatedly indicated its desire to keep its membership at as low a figure as possible. This was especially in evidence in the reapportionment of its members among the States made in 1920. In most prior reapportionments, the membership of the House was unwillingly increased in order to avoid the reduction in the representa-

tion of some States which would have been necessary had the total number of members been kept at the existing figure. In 1920, this obstacle was overridden, and the House succeeded in putting through a measure retaining its existing total, even though this meant that a number of States had to lose representatives in order that a larger quota of representatives might be assigned to States whose populations had increased heavily during the preceding decade. In passing this measure, the House was actuated solely by the desire to keep down its size.

The Legislature as a Discontinuous Body.—A feature that markedly distinguishes the legislative branch from the other branches of government, is that it does not have a continuous existence in the same way as do those other branches. By this is meant, not merely that there is a change in personnel, but that the legislature as a legislature has an interrupted existence. In the first place, all legislatures, without exception, are elected for fixed terms, and when these terms expire they go out of existence and new legislatures are elected. Furthermore, many systems of government provide that legislatures may be brought to an end prior to the expiration of the term for which they are elected. Such, for example, is the system of England, where the lower house may be dissolved by the Crown and new elections ordered, a proceeding which brings to an end the legislature then sitting.

The reason for this successive election of new legislatures is evident. While all officers of the government are the servants of the people, the members of the legislature are in quite a special and distinct way the representatives of the people, with the duty of interpreting and putting into effect the will of the people in respect to governmental policies. If they are properly to perform this function, provision must be made whereby the people may, with reasonable frequency, have an opportunity to pass judgment upon the manner in which their representatives have met their wishes—a judgment which they express by reëlecting or not reëlecting the same representatives.

No one will question the desirability of provision being made whereby the voters may from time to time make a new choice of

their representatives. There is, however, room for a wide range of choice in respect to the exact character that such provision should have.

Length of Term of Members.—First in importance among the questions involved is that of the frequency with which new legislatures shall be created, or, to state this in another way, the length of term of members. The considerations here involved are not unlike those presented in respect to the determination of the size of legislative bodies. From the standpoint of representation, it is desirable that the term of legislators should be relatively short. From the standpoint of efficiency in operation, all the arguments are in favor of a longer term. Legislation under modern conditions, to be intelligent, requires, not only a wide knowledge of conditions and problems to be met, but a high degree of skill in the technique of bill drafting. Only rarely do members of a legislative body, when they first enter upon the performance of their duties, have these qualifications. They are qualifications, however, which can be acquired by experience. Within reasonable limits, therefore, the longer the life of a legislature, the greater the likelihood that it will contain members qualified for the performance of their duties.

Other objections to the short term are that time is not given to the members to demonstrate their abilities as legislators before having again to go before the people for a new mandate to represent them; that members are given an inadequate opportunity to become acquainted with each other and the respective abilities of their colleagues; that the performance of their duties is seriously interfered with by the fact that hardly have they taken their seats before they have to devote no small part of their energies to the matter of their renomination and reëlection; and that, at correspondingly frequent intervals, the country has imposed upon it the cost of elections and the disturbance of business thereby occasioned.

Against these manifest disadvantages, the short-term legislature can offer but one advantage: that it permits of a more frequent expression of the will of the people in respect to political action and the persons to whom the putting into effect of this will is to

be entrusted. In seeking to determine the weight that should be given to this consideration, a distinction should be made between the legislature of a national government and those of the constituent States. The former has to do with political problems of a fundamental character, such as matters of foreign relations, national defense, commercial policies, and the like, in respect to which conditions and opinions rapidly change. That this is so is indicated by the frequency with which a House of Representatives strongly of one political complexion is two years later supplanted by another house of the opposite political faith. Were new houses elected at less frequent intervals than two years, there would frequently be times when the House would not accurately represent the constituencies supposed to be represented by it. The same is not equally true of the States. In them, the subjects of legislation are rarely of a character in respect to which the people are likely frequently to change their opinion or in respect to which immediate change of action is of urgent importance. It may well be, therefore, that, while a relatively short term for a national legislature is desirable, a much longer legislative term will more adequately meet the conditions confronting the States.

Finally, of course, this question of the length of the legislative term must be considered in connection with the term of office to be given to the chief executive. Whatever may have been the working of the theory of the separation of powers in the past, the actual working relations between the legislature and the executive are now so close that it is highly desirable that, normally at least, both should be of the same political party. If this end is to be achieved, both should be elected at the same time and hold office for the same term. This is not the place to enter into an extended discussion of the pros and cons for a long or short executive term. Generally speaking, however, it may be said that most, if not all, of the arguments in favor of the relatively long term for legislatures have equal force in respect to the executive term. The writer can only state that, in his opinion, in view of the character of the problems of State government, a four-year term for both State legislatures and State governors would be an improvement over existing ar-

rangements under which these bodies and officers are elected at more frequent intervals.

Partial Renewal of Membership.—The principle of a discontinuous legislature, if carried to its logical extreme, requires the reëlection at fixed intervals of time of the entire membership of both houses of the legislature. Actually, in the United States, and to a considerable extent in other countries, this periodic reconstitution of the legislature occurs only in respect to the lower chamber. Without exception, in the United States (and this applies both to the national Congress and to the State legislatures), the upper house is constituted on a basis of a longer term for its members than is permitted members of the lower house. Combined with this is the provision that the terms of office of only a fraction of the members of the upper house expire at the time when terms of all members of the lower house terminate. In the national Congress, while the term for all members of the lower house is two years, that for members of the upper house is six years; but these members are so classified that the term of one third of them expires at the time of the expiration of the term of members of the lower house. The result is that every two years, the voters of the country elect an entirely new lower house and one third of the upper house; and this is the system that generally prevails in respect to the State legislatures.

This system of overlapping terms, which dates from the beginning of our constitutional system, was adopted as a device for giving expression to one of the motives actuating the creation of a second chamber; that, namely, of providing a check upon the full play of the democratic principle. Under this system, it is impossible for the electorate, no matter how strong may be its feeling, to control more than a third of the members of the upper chamber at any one time. Furthermore, the longer term of office gives to members of the upper house a greater measure of independence of popular pressure than is enjoyed by those of the lower house. The system thus constitutes one of the checks and balances that is so marked a feature of the whole American political system. In a general way, it may be said that the fears of our constitution-framers,

in respect to the dangers of popular government, have hardly been justified by events. It is none the less true that these dangers are present, and, to the extent that they are present, the special provision made regarding relatively long, staggered terms for members of the upper house constitutes a real safeguard against them. Against this advantage must, however, be placed the disadvantages that these bodies can easily be unduly conservative and delay, if not prevent, action that it is in the highest degree desirable to have taken; and that they throw obstacles in the way of the effective working of the party system. Whether or not one believes this system to be a desirable one is thus largely dependent upon the attitude taken towards the existence of a bicameral system and as to the desirability of full play of party government.

Frequency and Length of Sessions.—Not only are legislatures discontinuous bodies, as regards their terms of life, but they do not sit continuously while they are in existence. The theory is that the work to be done by them is not of sufficient volume to require them to be in continuous session and that, consequently, there is need for them to convene only at intervals of time, and for limited sessions. Incidentally, this system is believed to have the advantage that it enables the members to keep in more constant and intimate touch with their constituencies. Each such meeting is known as a "session." All constitutions within the United States contain provisions regarding the frequency and dates of assembling of the legislature, and, as will shortly be shown, many also contain provisions limiting the time that the legislature can remain in session. The federal constitution thus provides that the Congress shall convene at least once a year. Once assembled, the Congress can remain in session as long as it chooses. So far as the constitution is concerned, Congress can thus remain in continuous session if it so desires. Should it do so, however, the meetings held in each legislative year would be deemed to be a separate session and the Congress would be compelled to adjourn at the end of the first year and immediately reconvene in another session. As each Congress has a life of two years, each will thus hold at least two sessions. These sessions are known as "regular" sessions, to dis-

tinguish them from the so-called "special" or "extra" sessions which occur when the President, in pursuance of the power conferred upon him by the constitution, calls Congress together for the consideration of matters of urgency.

The provisions of the State constitutions regarding the meeting of their legislatures are in marked contrast with those of the federal constitution that have just been described. In no small degree, these provisions seem to have for their primary purpose the imposition of limitations upon the right of the legislature to assemble, or to remain in session after they have assembled, rather than to ensure that they will come together and remain in session until necessary legislation is enacted. More than half of the States provide that their legislatures shall convene only every other year, unless called in special session by the governor; and practically all of them impose limitations upon the number of days that the legislature, after convening, may remain in session, the prevailing limitation being sixty days. When no limitation is fixed, the practice of providing for a fixed compensation to be paid members regardless of the length of the session acts as a strong deterrent to lengthy sessions.

While the motive underlying these provisions has been in part the desire to keep down the expenses of the legislature and to bring pressure to bear upon legislators to perform their duties with dispatch, the dominant consideration has been the distrust that the American people have come to have of their legislative bodies—a distrust that is evidenced by many other constitutional provisions imposing limitations upon the power of the legislatures. So strong is this distrust that one might almost say that, although the need for meetings of the legislature is recognized, such meetings are viewed as an evil.

It must be confessed that the action of many State legislatures has been of a character to give some ground for this feeling. Notwithstanding this, it is more than a question whether the action taken with a view to limiting legislative sessions does not do more harm than good. It may be true that, in times past, when economic conditions were comparatively simple and the matters requiring

legislative action were relatively few, a meeting of the legislature only once in two years and a session of only sixty days was adequate to meet the needs of the situation. Since then, conditions have become vastly more complicated and the sphere of governmental action has been greatly broadened, with the result that, at the present time, the sins of omission of American legislatures outweigh their sins of commission. There is probably not a State in the union where there is not urgent need for legislation to correct admittedly unsatisfactory conditions, and where desirable measures do not fail of enactment due in part at least to the limited time at the disposal of the legislators. The greater emphasis that is now placed upon matters of financial administration, especially from the standpoint of control, through the adoption of improved budgetary and appropriation systems, in itself brings with it the need for annual sessions of the legislature. At best, it is difficult to estimate the financial needs of a State a year in advance; an attempt to do so for a period of two years means that it will be done with a corresponding diminution of likelihood that the provision made will conform to actual requirements. Once a year is not too often for a government to review its operations and plan for the future.

The Qualifications of Members.—The qualifications that shall be required of members of the legislature constitutes another question that in the past has been of much greater importance than at the present time. In former times, the possession of property and adherence to a particular religious belief were among the requirements most strenuously insisted upon. At present, the tendency is to require of legislators no qualifications that are not demanded of electors or voters except that, in the United States at least, it is usual to provide that members shall have attained a specified age, which is greater in the upper than in the lower house.

Compensation of Members.—As to whether it is good public policy to provide for the compensation of members of legislative bodies, there has always been a difference of opinion. On the one hand, it has been held that the granting of compensation, if at all

substantial in amount, would cause the office of legislator to be sought by persons actuated by the motive of personal gain rather than that of the performance of a public duty; and that this, in turn, could not but result in a lowering of the quality of the membership. Against this, it has been urged that the failure to provide for an adequate compensation would produce an inequitable discrimination between those possessing independent means and those not so favored by preventing many persons qualified to render valuable service as legislators from accepting office.

During the greater part of the history of the British Parliament, neither the members of the House of Lords nor those of the House of Commons received any compensation. This system worked satisfactorily so long as the government of England had an aristocratic, or at all events middle-class, character. With the rise of the Labor Party, the members of which were for the most part men of little or no financial means, a new element was injected into the situation. For years, that party was compelled itself to compensate its representatives out of party funds in order to secure persons by whom it desired to be represented. This was felt to be an injustice, and a demand was consequently made that a system of compensation be introduced. Although this demand was strongly opposed, it nevertheless was finally yielded to, and in 1912 compensation was provided for.

In the United States, the principle of compensation of members has always been accepted. The federal constitution thus provides that "the Senators and Representatives shall receive a compensation for their services to be determined by law and paid out of the treasury of the United States." According to this provision, the amount of the compensation is such as may be fixed from time to time by law. At present, it is $10,000 per annum. In the States, the compensation of members varies widely. In not a few cases, it is fixed by the constitution itself at little more than a nominal figure. In these cases, however, it should be noted that, as the legislature for the most part meets but every other year and often lasts but sixty days, service in it does not preclude members from engaging in other occupations.

Special Prerogatives and Privileges of Members.—In the evolution of modern governments, few matters have given rise to more bitter conflicts than that of the efforts of the legislative branch to free itself from the control of the executive. For centuries, indeed during the greater part of its history, the English Parliament had to wage a bitter struggle against the King to prevent the latter from not only interfering with its work, but arresting and sending to execution those members who too strongly opposed his wishes. The whole question of political liberty was at stake. To secure its independence, Parliament found it necessary to insist upon the recognition of its possession of certain fundamental powers and privileges. Among these, the most important were the right to choose its own officers, to formulate its own rules of procedure, to be the judges of the elections and qualifications of its own members, to control the conduct of its members by disciplinary measures and, if need be, to suspend or expel them, to enjoy liberty of speech, that is, not to be subject to judicial or other proceedings for any of their utterances in the performance of their duties, and to be free from arrest while Parliament was in session.

The possession of all of these powers and privileges by a legislature is now generally recognized as essential if that branch of the government is to enjoy freedom of action and immunity from undue control by the executive and judicial branches of government. Provision for all of these is thus found in the constitution of the United States and the individual States, and is also generally found in the constitutions of other states having a popular government.

The exercise by the legislature of these special powers, and particularly those having to do with the admission and expulsion of members, the settlement of contested election cases, and demands upon private individuals for testimony and production of papers have given rise to not a few questions of constitutional interpretation and to important principles of procedure. The technical character of the considerations involved prevent examination of them here.

CHAPTER XX

THE LEGISLATIVE BRANCH: ORGANIZATION AND PROCEDURE

From the structure and composition of the legislative branch we now turn to the problems presented to such bodies in devising for themselves a scheme of internal organization and methods of procedure that will enable them most efficiently to perform their duties. There is a tendency to view these as problems having to do merely with technical matters of parliamentary procedure. No greater mistake could be made. The manner in which a legislative body organizes itself and the rules that it adopts to govern its proceedings determine in no small degree the character of the governmental system resulting. This is strikingly illustrated in the case of the English government. A study of that government shows that its most essential features, the manner in which the ministry is selected, the dependence of that organ upon having a majority in the House of Commons in order to continue in office, the control that it has over the time of the House and the legislation enacted by it, and its dominance in matters of finance—indeed the whole system of responsible government—are but matters of legislative organization and procedure. It is hardly going too far to say that the system of government that one now finds in England has come into existence as the result of the Parliament determining the organization that it shall have and rules that shall govern its proceedings.

Though this is not equally true of governments whose general character has been fixed in written constitutions, the matter of legislative organization and procedure adopted by them will nevertheless be found of supreme importance in determining the character of government actually resulting. Certainly this is true of our own government. If one were seeking to point out the most impor-

tant features of our government in its practical operations, a leading place would have to be given to such features as the position and powers of the Speaker of the House; the organization of the two Houses in committees; the rules and conventions governing the selection of these committees and determining their powers; the character and functions of such organs as the Committee on Rules of the House, and Legislative Caucuses in the formulation and adoption of legislative programs; and the whole procedure that has been adopted for the initiation, consideration, and taking of action upon legislative proposals. All of these are matters of legislative organization and procedure. More important still, as will subsequently be shown, the manner in which our legislative bodies handle their problems of organization and procedure determines the answer given to such important questions as legislative leadership and the extent to which party government shall be actually, as well as nominally, a dominant feature of our political system.

Source of Parliamentary Law in the United States.—In entering upon this study, the first point to be studied is the extent to which American legislative chambers have plenary powers each to determine for itself the manner in which it shall organize itself and the character of the rules that it shall adopt for the transaction of its business. Without exception, both the federal and State constitutions, while defining in some detail the jurisdiction and powers of the legislatures set up by them, leave these bodies practically free to make such provisions for their internal organization and procedure as they think proper. Practically the only constitutional limitations upon their authority are those absolutely essential provisions specifying the requirements in respect to the enactment of bills, their transmission to the executive for his approval, the procedure to be followed where such approval is withheld; the obligation to keep a record or journal of proceedings, and the entering thereon, under certain conditions, of the votes of members; and the provision that a majority of members present shall be necessary for the transaction of business. Furthermore, the provision that is found in all our constitutions which confers upon each chamber the general power to choose its officers and adopt

such rules of procedure as it sees fit not only makes the action of the legislative branch as a whole in respect to these matters independent of any action by the other branches of government, but renders the action by one chamber independent of that of the other.

From the foregoing it will be seen that the outstanding feature conditioning the character that American legislative bodies will have, from an organization and procedural standpoint, is that of freedom of action—freedom, not merely from initial stipulation, but freedom progressively to change provisions, as added experience is had and new problems requiring solution arise. The system that exists to-day is thus the result of a long evolutionary process, which, in the case of the federal Congress, has covered an uninterrupted period of over a hundred and forty years. This process has, however, been by no means one of steady progress, but has been marked by successive steps of advance and retreat. In many respects, it has been one of trial and error, of attempts to devise means to meet difficulties presenting themselves in the actual conduct of affairs, and, on their failure to give the results sought, or producing new difficulties of a different character, of repealing such action and seeking a solution in some other way. Throughout this process, moreover, is to be noted an almost constant contest of fundamental principles. There is the desire, on the one hand, to develop a system of strong leadership, and, on the other, to preserve the independence and influence of the individual member; the desire to bring about conditions where responsibility and power in respect to legislative action will rest with the political party having a majority of the votes of the House, even though such action may not in individual cases, or as regards particular features of legislative proposals, conform to the majority will of the House as a whole as it expresses itself from day to day, and, on the other hand, to permit the majority of the House at all times to have its way. In addition, there is on the one hand the desire to provide means by which the time of the House, the measures to be given priority of consideration, and the right of participation in debate may be controlled in order that business may be effi-

ciently dispatched, and, on the other hand, the wish to preserve to the individual member the right of initiative, of compelling consideration of measures in which he is interested, and of freedom freely to express his views in respect to all matters coming up for consideration. Finally, there is the desire to provide means by which the majority, whether political, or the result of a count of votes in the whole House, may, without undue difficulty, make its will effective, and, on the other hand, to give due protection to the rights of the minority. It is the harmonizing of these conflicting principles that has offered the real difficulties in devising a satisfactory system of legislative organization and procedure; and it is the extent to, and the manner in which, such harmonizing has actually been accomplished, that has determined the real character of our legislative system as it exists to-day. It is consequently to these features that our attention will be chiefly directed in seeking to point out how this problem of legislative organization and procedure has been met in the United States.

Before entering upon this task, one thing further should be mentioned. In so far as the national Congress is concerned, only in part are the provisions governing legislative organization and procedure to be found in the formally adopted rules of the chambers. In this respect, the rules have a character similar to the constitution of the United States. Just as one wishing to determine with precision the full purport and scope of constitutional provisions must examine the long line of judicial decisions in which the courts have construed these provisions, so in the case of the written rules of the House, one seeking to determine their real governing force must turn to the decisions of the presiding officer in applying these rules to specific cases. The analogy, moreover, does not stop here. As is well known, one of the most characteristic features of American jurisprudence is the doctrine of *stare decisis*, under which a decision of a court once made is deemed to have controlling, or at least strong persuasive, force in respect to future action by the courts regarding the same or analogous matters. The same is almost equally true in respect to the exercise by the presiding officer of his duty of construing and applying the rules

of the legislative chamber. A formal decision once made is deemed to constitute a precedent having binding force over subsequent action not only upon the presiding officer making it, but upon his successors in office. It is true that, on occasions, this principle is violated and a decision is reversed or modified, when it becomes clear that a mistake had been made, or when changed conditions cause adherence to it to do violence to the real objective that the rule concerned has in view; but the same is true in respect to the construction of constitutional provisions by the courts. Though every effort is made by these bodies to avoid a flat reversal of preceding action, this result is in fact accomplished by resort to legal fictions, the justification of the new decision by a different line of reasoning, or the employment of other devices in the use of which the courts are skilled.

In the rules of the legislative chambers, and in the decisions of the chair applying these rules to specific cases, are to be found what may be termed the written parliamentary law. This body of law, however, only partially covers actual practice in respect to the manner in which organization and procedural matters are handled. Alongside of it there has developed a body of "conventions" analogous in all essential respects to the conventions of the British and American constitutional systems which are of strong controlling force though not reduced to writing and formally adopted. Many of these conventions relate to matters of great importance. Thus the whole character of the committee system, which is the central and most characteristic feature of the organization of the House for the dispatch of business, is largely determined by these conventions rather than by the formally adopted rules. It is these conventions, and not the formal rules, that give to the minority political party representation on all committees; that ensure that the dominant political party shall have the chairmanship and a majority on all committees; that determine in large degree the influence and powers of the committee chairman; that provide that members of the committees shall have rank according to seniority of service on the committee and be in line for ultimate selection as chairmen; that give the

chairman and ranking members of the opposition party control over the time allotted for general debate of bills favorably reported by their committees; and that govern many other matters having to do with committee organization, powers, and methods of procedure. Conventions, furthermore, control, in no small degree, the recognition by the speaker of members to make parliamentary motions and, to a certain extent, to participate in debate. Finally, and in some respects more important still, are the rules and conventions which the several political parties represented in the legislature have evolved for governing their respective actions—rules and conventions which, as will be pointed out in due course, determine in no small degree the manner in which the legislative chambers actually function. A mere study of the formal rules of a legislative chamber thus affords an inadequate means of determining how that body has in fact met its problems of organization and procedure.

Organization.—As has been pointed out in the chapter immediately preceding, a prime characteristic of the legislative branch in a representative government is its discontinuous character, in the sense that each new legislature assembling in pursuance of a general election meets with a clean slate as regards any matters pending before it. In American legislatures, this discontinuity extends also to the matter of organization and rules of procedure in the case of the lower house, whose membership is wholly renewed at each general election. It results from this that each new lower house that assembles following a general election meets as an unorganized body of men and without any provision regarding even the officers it shall have, otherwise than that it shall select a Speaker to preside over its deliberations. The upper house, however, whose membership is only partially renewed at each general election, meets with an organization, but, of course, has full powers to modify that organization as it sees fit. These facts, namely, that the two branches of American legislatures must act independently of each other in effecting an organization, and that one of the branches, the lower house, has to act anew at the beginning of each legislature, do not however have the significance that might at first

sight be attached to them. Long precedent and practice have brought about a scheme of organization which, from the structural standpoint, has a permanency of character that would hardly be more stable if it were set forth in binding constitutional or statutory enactments. Such changes as are made have to do only with details or the powers of officers, rather than with the structural scheme of organization itself.

It is manifestly impracticable to attempt here any detailed description of this system. It is desirable, however, that the effort should be made to point out its more distinguishing characteristics, and especially those features which affect in a fundamental way, not merely the manner of operation of the legislative branch, but the operation of our political system as a whole.

Committee System.—The really important feature of the organization of a legislative chamber is the provision made by it for subordinate agencies to assist it in the performance of the duties entrusted to it. In respect to this, American legislatures have adopted a system that is unique among governing bodies of the world, except, possibly, where this system may have been copied by certain of the Latin-American nations, which, in organizing their governments, have used that of the United States as a model. The result is that in respect to almost no other feature is the government of the United States and its constituent States more distinctive and radically different from that of other countries than in the manner in which it has organized itself for the performance of its legislative function. This unique feature consists in the provision made by all legislative bodies of the United States for a system of so-called standing committees whose function it is to give first consideration to all legislative proposals coming before the legislature for action, accompanied by the provision that not until such proposals have been so considered by these committees, and their recommendations in reference thereto formally transmitted to the chamber of which they are a part, is it proper for the latter to give consideration to them. The result is that these committees exercise an enormous influence upon the course of legislation. To such an extent is this true that the United States, when

it is desired to distinguish its governmental system from that of other countries, is frequently declared to have a "committee government." This characterization is often made in a spirit of adverse criticism, the position being taken that, due to this system, the legislative power has, in effect, been split up and dissipated among a large number of separate coördinate bodies and the possibilities of effective leadership in legislative matters correspondingly weakened. In particular is this criticism made when the object in view is a comparison of the government of the United States with that of Great Britain, it being held that the latter has the great superiority of having responsibility for legislative action concentrated in a single relatively small body, the cabinet, while, under the American system, this responsibility is scattered among a number of bodies.

Constituting as it does such a characteristic and important feature of the American legislative system, it is desirable that this committee system should be subjected to examination with a view to determining, not only its merits and demerits from the technical standpoint as a means of promoting the transaction of the business to be done, but its effects upon the more fundamental matters of legislative leadership, party government, and the practical workings of popular government, broadly viewed.

This system, as it exists to-day, is the result of a long process of evolution. When Congress first assembled, the feeling was general that legislation ought to be the direct result of the deliberations of the two houses as a whole. Due to the relatively small size of these bodies and the relatively few matters coming before them for action, such a method of procedure was entirely feasible. It soon developed, however, that, when the matter in hand was one of some complexity, there was advantage in having it first considered by a small number of persons who were, or could become, more familiar with, or competent to deal with, it, and that the House could more effectively perform its function after the opinion of such a body had been determined and the measure itself had been more or less whipped into shape. From this, it was but a step to the development of the belief that it would be advantageous to have

such a preliminary examination of all matters coming before the chamber for action. Almost immediately, therefore, there developed what may be called a special committee system; that is, a system under which each bill introduced was referred to an *ad hoc* committee specially set up for its consideration. Use was thus made of as many committees as there were bills which the House desired to consider.

In the course of a few years, the House had the fact brought home to it that many of the bills coming before it had reference to the same general topic, and that it would consequently be advantageous to have them considered by the same body of men. In respect to such bills, the House began the practice of setting up permanent, or as they were called, "standing" committees for the consideration of all bills falling into distinct categories. Constant resort to this practice soon led to the plan of appointing, at the beginning of each legislature, of a number of standing committees, each having jurisdiction in respect to certain categories of matters, to one or the other of which all legislative proposals have to be referred for consideration and report before coming before the chamber itself for action.[1]

It is evident that a system such as this offers many opportunities for variations in respect to such matters as the number of committees for which provision shall be made, their respective jurisdictions, size, method of selection of their members, the rules that govern their proceedings, the obligations resting upon them to report bills referred to them for consideration, the force that shall be given to such reports, and the like. Important as these matters are, limitations of space prevent us from considering them in any detail. In general, it may be said that they are matters that have been handled with exceptional skill by the two houses of Congress, while the manner of their handling in the State legislative chambers leaves much to be desired.

Prime features of the committee system of the federal House of Representatives are: a high degree of permanency from Congress

[1] This is the general rule. Occasionally, American legislative chambers refer legislative proposals to committees specially constituted for their consideration.

to Congress; restriction of the number of committees having the consideration of legislative proposals within reasonable limits; careful delimitation of the jurisdictions of the several committees, combined with the provision that bills shall be referred automatically to their appropriate committees according to their subject-matter as determined by such jurisdiction; the giving to committees of a maximum of permanency of composition through the convention that members once assigned to committees shall continue to serve on these committees as long as they desire; the giving to each committee of a political composition similar to that of the chamber itself, combined with the provision that each political party shall have the selection of its representatives on the several committees; the ranking of the committee members representing the several parties according to seniority of service on the committee, with the result that the member of the dominant party having the longest continuous term of service upon the committee normally becomes chairman, and the member of the minority party having the longest continuous service on the committee, the leader of the opposition on the committee; the grant to the committees of large discretionary powers in respect to what bills referred to them they will take up for consideration and the order in which they will take them up; the requirement that all bills reported shall be accompanied by written reports, which, under the rules, are printed and furnished to all members of the chamber; and, finally, the provision that the chairman of the committee, or a member of the committee designated by him, shall have charge of piloting the bills through the chamber, in which capacity he will have special prerogatives to be heard for purposes of debate and of making the necessary motions for securing action upon the bills.

Certain important consequences flow from these provisions. The first, and in some respects the most important, is that consideration of bills by the chamber itself is, with an exception shortly to be noted, confined to those bills which are reported to it by its committees. It results from this that of the thousands of bills introduced at any session of Congress, only the limited few deemed to be worthy of consideration by the committees are taken up for

action by the chamber. This feature of the committee system by which the great majority of bills are "killed in committee" has given rise to no little criticism. There can be little question, however, that on the whole the system is a desirable one. It is a physical impossibility for the chamber to give consideration to all of the thousands of bills introduced, and it is consequently imperative that some means be provided by which a selection be made of the ones it is most desirable to have considered. It is difficult to see how a better selective process could be devised. The system, of course, is one that is susceptible to abuse. In recognition of this, the rules provide for a procedure known as the discharge of a committee from the further consideration of a bill that it refuses to report, the result of which is to bring the bill before the chamber for consideration. The requirements of this procedure are, however, so onerous that it can be used only when there is very general demand for the consideration of the bill. In fact, it is rarely evoked and still more rarely successfully employed.

A second feature of the system is that the committees constitute bodies which, so far as their political composition is concerned, are replicas in miniature of the chamber itself; and, due to the permanency of tenure of their members, have high technical competence for the consideration of the bills referred to them. Furthermore, the principle of seniority in determining chairmanships ensures that leadership in the handling of committee work and the piloting of bills through the chamber itself will, as a general rule, be vested in members of the longest experience in the chamber and on the committees.

A third feature of the system is the practice followed by committees of holding what are known as public hearings upon bills pending before them. The significance of this system from the standpoint of giving to all persons affected by, or interested in, proposed legislation an opportunity to be heard in relation thereto, and thus of affording a means for popular participation in the legislative procedure, has been pointed out in our chapter dealing with the functions of the electorate. Special interest attaches to it from the fact that it is a unique feature of the American legislative sys-

tem, no other country, so far as the writer is aware, having anything comparable to it. That it is of great value to the committees themselves and to the chambers in harmonizing conflicting interests and in reaching sound conclusions cannot be doubted.

Bill Procedure: The Problem of Priority.—One of the basic problems confronting modern legislative bodies is the formulation of a legislative program, the determination of the order in which the items embodied in such program shall be taken up for consideration, and the time that shall be devoted to such consideration.

In governments of union of powers, that is, authoritarian and popular governments of the responsible type, where the executive has responsibility for initiating and large powers for controlling legislative action, this problem presents little difficulty. This is true since, in the head of the government or cabinet of such governments, there exists an organ one of whose main duties is the reaching and enforcing of such determinations. In governments of separation of powers, or presidential governments such as our own, no such organ for directing and controlling legislative action exists. Here, such duty devolves upon the legislature itself. In early days, American legislatures sought to control through their rules the right to bring before them legislative proposals. It was not long, however, before the system now found in all American legislative bodies, under which full power is possessed by all members to introduce such bills and resolutions as they desire, was adopted. The result is that American legislatures are confronted with a volume of legislative proposals far in excess of what they can hope intelligently to pass upon within the time at their disposal. These proposals vary in importance and urgency all the way from those of a most petty character, affecting only particular persons or localities, to those affecting in a vital way the public interest. Due to this, there is probably no more important problem presented to these bodies than that of devising some selective process through which assurance may be had that bills will be taken up for consideration in an order corresponding to their relative importance, and, particularly, that priority of consideration will be given to

those imperatively demanded if the government is to continue to function.

This problem is one which has been met by the national House of Representatives in an exceptionally skilful manner. The first step in its selective process is the system that has been described of referring all bills and resolutions to standing committees whose function it is to determine which, among the thousands of bills introduced, shall come before the chamber for consideration. This selective process is all the more intensive through the general practice that the committees have adopted of reporting back to the House only those in respect to which, in their opinion, favorable action should be taken.

Even with the drastic purging of legislative proposals resulting from committee action, the House still finds itself confronted with projects in the form of bills and resolutions reported from committees which are of widely varying importance and urgency and which, in the aggregate, are greater in number than it can possibly handle. To meet this situation, a further selective process is required: one that will give preference or priority, as regards their consideration, to, first, those bills the passage of which is imperative in order that the government may continue to function; and, second, those which are of general importance, in that they concern the general welfare, as opposed to those which affect only particular individuals such as bills for the payment of claims, private pension bills, and the like.

The basic step taken by the House to secure this objective consists in the provision contained in its rules for the classification of all bills into (1) public bills of a financial nature, that is, having to do with the raising of revenue and the grant of appropriations for the support of the government; (2) public bills of a non-financial nature, that is all other public bills; and (3) private bills; the carrying of these several classes of bills to separate calendars; and the giving of high priority (as regards the right to call them up for consideration) first, to public bills of a financial nature, and second, to public bills of a non-financial nature, while private bills may be called up only on a few specified days in each month.

These provisions, moreover, are supplemented by others permitting bills of a non-contentious character to be called up on certain days under what are known as "consent calendar" and "suspension of the rules" procedures. Finally, the House has, by its rules, conferred upon its Committee on Rules the power at any time to report a special rule, not only providing for the taking up of a particular bill at a time fixed, but setting forth the conditions that shall govern its debate, and even the amendments that may be proposed to it. The result of these several provisions, together with others, the statement of which would involve a too minute examination of parliamentary procedure, is to set up a system of great effectiveness for assuring that legislative proposals will receive attention in the general order of their importance and urgency.

Regulation of Debate: Control of Obstruction.—The development of a system by which priority of consideration of bills will be had according to their importance and urgency constitutes but one step towards ensuring the most effective utilization of the time of a legislative chamber. Unless some limitations are placed upon the right of members to engage in debate, to make parliamentary motions and even to offer amendments, it is impossible for bodies of the size of modern legislatures to give due consideration to even those proposals pending before them in respect to which action is imperative. Furthermore, the absence of means of controlling these matters makes it possible for a small minority, or even at times a single individual, by resort to methods which are known as obstructive tactics, or "filibustering," to make its or his will prevail over that of the majority of the chamber.

The control of this situation constitutes one of the most difficult problems of procedure that confronts modern legislatures. In it are involved, not merely matters of parliamentary procedure, or even of economizing the time of the chambers, but fundamental principles. In a very real way, it goes to the very roots of popular government. Broadly stated, it raises the important question of the relative rights that the majority and minority should have in controlling legislative action; and, more important still, the extent

to which party government in all its implications shall prevail in our political system. If full power is accorded by the rules to the majority to shut off debate, to restrict the offering of amendments, and to force measures under consideration to a vote, the door is thrown open to the abuse of this power by the majority to the extent of riding roughshod over the right of the minority to express its views. If, on the other hand, the powers of control accorded to the majority are inadequate, it makes possible the control of legislative action by the minority rather than the majority. The situation is thus one where conflicting considerations have to be harmonized, where a system must be devised which, while giving adequate powers of control to the majority, will, at the same time, set up safeguards against an illegitimate exercise of these powers.

These conflicting considerations, it may be said, have been met in an exceptionally skilful manner by the national House of Representatives. This has resulted only partially from the nature of the formal rules governing debate, the making of parliamentary motions, and the offering of amendments. Primarily, it is due to the unwritten conventions or practices governing the operation of these rules. While the rules confer upon the majority the power at any time to close debate, to shut off further amendments and to force a vote, it is exceptional when this power is used in an arbitrary manner or in such a way as to prevent the minority from exercising its right of opposition or, within reasonable limits, making known the grounds of its opposition. The evolution of this system constitutes one of the most important chapters in the history of the parliamentary procedure of the House. Any attempt to give an account of its history or the details of the system now in force would, however, require a consideration of the technical provisions governing parliamentary procedure that would be foreign to this work.[2]

Legislative Organization and Procedure in the States.—It has seemed preferable, in attempting an analysis of the problems in-

[2] For such a consideration, see the writer's volume *Principles of Legislative Organization and Administration* (The Brookings Institution, 1934).

volved in organizing and operating the legislative branch of a government of separation of powers such as our own, to have the discussion center around the manner in which these problems have been actually met by the lower house of the national Congress. This, not merely from the position of importance occupied by that body, but because in no other American legislative body have these problems presented themselves in a more acute form, and in no other case have they been handled with greater skill and judgment. When one turns to the manner in which our State legislatures have sought to meet these same problems, it will be found that, while they have all established systems corresponding in general appearance to that of the federal House of Representatives, in practically no case have they worked out the detailed procedure or adopted the controlling conventions or practices as has been done by that body for making this system give the best results in practice.

Thus, it will be recalled that the prime features of the congressional committee system are: the restriction of the number of committees having the consideration of legislative proposals within reasonable limits; the conventions that prescribe the continuance on a committee of members once appointed so long as they desire to serve and the political complexion of the chamber permits; the ranking of members according to seniority of service; and the rigid definition of the jurisdiction of the committees, combined with the requirement that all bills falling within the several jurisdictions as so defined shall go to their appropriate committees. These provisions ensure that there will not be a too great diffusion of responsibility; that the committees will have a high degree of stability as regards their composition and contain at all times a nucleus of members experienced in handling the particular classes of measures coming before them for consideration; that the chairmanships of the committees will usually be held by the older and more experienced members; and that the assignment of bills to committees will be determined by their subject-matter rather than by the exercise of discretionary power on the part of the chamber, its presiding officer, or other agency.

These highly desirable features of the standing committee system as it obtains in Congress are largely lacking in the committee systems of the States. For the most part, the State legislatures make provision for an excessive number of committees. There may be a certain tendency to continue members on a committee if they so desire, but nothing in the nature of a binding convention to that effect obtains. Nor is any real recognition given to the principle of seniority in determining committee chairmanships. This means that the appointing power, which in most cases is the presiding officer, has practically complete freedom of action in respect to the determination of committee composition. This power of action would not be bad were it exercised solely with regard to the promotion of the public welfare. It is a commonplace of State politics, however, that it is used ruthlessly for the promotion of purely personal and partizan ends. Not infrequently, its use takes the form of deliberately "packing" a committee's membership with a view to securing certain action by the committee on measures that will be referred to it. This power of the Speaker to influence committee action is greatly enhanced by the discretion that he has in respect to the assignment of bills and resolutions to the committees. Only in a comparatively few cases do the rules of the chambers prescribe in any detail the assignment of bills to committees. Some are entirely silent on the subject, and others content themselves with the general provision that bills and resolutions shall be referred to their appropriate committees. The result is that, in the great majority of the States, the Speaker can often make the reference to that committee which he believes is most likely to take the action desired by him.

Finally, the State legislatures, with possibly a few exceptions, have done little in the way of relieving themselves from the necessity of considering bills of a petty character and of establishing a system that will give priority of consideration to bills according to their degrees of importance and urgency. In a number of States, the rules make it obligatory upon committees to report all bills referred to them, with the result that committees are compelled to devote valuable time to the consideration of inconsequential meas-

ures and the chambers themselves are under the burden of taking action upon bills that are reported adversely, and which are very rarely acted upon contrary to the recommendations of the committees. Only in exceptional cases do the State legislatures provide for any classification of bills such as has been made by the United States' House of Representatives, and for the establishment of adequate rules that will ensure high priority as regards consideration to bills of general importance and urgency.

This failure on the part of the State legislative chambers to make systematic provision in their rules for the segregation of important from unimportant proposals and to give priority to the consideration of the former has led to the general use by them of a certain device. The objections to this device are so serious that its adoption can be characterized only as an act of sheer desperation. It consists in the setting up, towards the close of the session, of a special committee, variously designated as a "sifting" or "steering" committee, or giving to the standing committee on rules the function of such a committee, to which is entrusted the power of designating from day to day the bills that shall be taken up by the chamber for consideration and action. This committee is usually a small one consisting of only three or four members appointed by the Speaker; the Speaker himself not infrequently serves on the committee as its chairman. However constituted, this system operates so as to vest in the hands of the Speaker and his two or three lieutenants almost absolute and autocratic power to control the program of action of the chamber. This power includes in many cases the rights to put upon the agenda bills which have not even been reported from committee; and the failure to put a bill upon such order of the day means its definite defeat. The grave objection to this system is, not so much the vesting of the autocratic power in respect to what bills shall have a chance of passage in the hands of the committee, as the failure to set up any safeguards that will ensure that the committee, in exercising its power, will give preference to bills that are of the greatest importance from the standpoint of the public welfare, or which will prevent it from taking advantage of its power to put through

special legislation of a vicious character. That this power is often abused for the achievement of purely personal and partizan ends, there can be no question.

In general, it may thus be said that our State legislatures have not succeeded in meeting in a satisfactory manner the problems confronting them, as respects either their organization or their procedure.

Legislative Aids.—No discussion of the problem of the organization and operation of the legislative branch of governments such as our own would be adequate that failed to emphasize the constantly growing volume of work that these bodies are called upon to perform and the increasing complexity and technicality of the subjects to be dealt with. Many of these measures, if they are to be handled properly, call for expert knowledge of the highest order. It is not sufficient for an act to make known its general purpose; it must be so framed that it will set forth specifically, and in language that is not susceptible of misinterpretation, the several duties, powers, and obligations imposed by it. Unless this is done with great care, difficulties will arise in its execution. In many cases, acts are found unworkable, or at least fail to accomplish their purposes, because the scope of the obligations, powers, and duties is not defined with sufficient accuracy, and provision is not made for needed reservations. In no small degree, the fact that so much legislation is brought into question in the courts is due to this failure. An unfortunate use of words, an improper location of a qualifying clause, or a misplaced punctuation mark, may give to a provision of a bill a meaning contrary to the purpose intended. Even in comparatively simple bills, the meeting of these requirements is not an easy matter; in the case of long and complicated measures, it is a matter of great difficulty. Especially is this true when the proposal is one modifying or supplementing existing legislation. The drafting of bills is a special art acquired only by special study and long practice.

Due to the conditions governing their selection, comparatively few members of our legislative bodies have this knowledge or skill in bill-drafting. If their tasks are to be performed properly, it is im-

perative that these bodies should recognize their deficiency and take steps for its correction. This action can take various forms. One is that they should confine their action to the enunciation of general purposes and provisions, leaving it to administrative agencies or specially created bodies, such as utility commissions, to fill in the details of their application to specific cases. Another is that they should look to the administrative agencies and commissions for the formulation in the first instance of proposals having to do with matters in respect to which they have jurisdiction. Still a third method is that the legislature create a special service, or services, to act as a staff agency or agencies, for securing the data upon which to base legislative action and for drafting their conclusions in correct legal form.

Fortunately, this need for technical assistance in the performance of their work is now being generally recognized by our legislative bodies. To a constantly increasing extent, American executives and administrative agencies are embodying their recommendations for action in bill form, and this procedure is being welcomed by the legislature. Even where proposals are not thus formulated by these bodies in the first instance, it is customary to refer them to such bodies for their consideration and perfecting as regards both their substantive provisions and technical draftsmanship. Particularly is this practice followed by the national Congress. Furthermore, recent years have witnessed the creation in many States and by the national government of special services known as legislative counsel, legislative reference bureaus, and bill-drafting services to aid the legislative chambers in the manner that has been specified. Mention also should be made of a recent development which, in certain foreign countries, has taken the form of the creation of so-called advisory economic councils, to which legislative proposals affecting economic interests are referred for consideration and recommendations before being finally acted upon by the legislature; also, in several of the American States, of the creation of bodies known as legislative councils, the function of which is, prior to the assemblying of the legislature, to consider legislation needs and to draft the bills required for meet-

ing such needs.[8] The creation of these last bodies has been too recent to permit of definite conclusions regarding the extent to which they may assist in the performance of the legislative function.

Finally, mention should be made of the great assistance rendered to our State legislatures by such bodies as the National Conference of Commissioners on Uniform State Laws which function under the auspices of the American Bar Association, the National Municipal League, the American Judicature Society, and other national organizations, in the way of drafting model bills for the regulation of matters falling within their special fields of interest. Important as is the work that has been done in this way, it is an activity which can with advantage be greatly extended. Especially would a valuable service be rendered by bringing together, with explanatory notes, in one collection these several laws, to the end that better knowledge could be had of their existence and their use by the legislatures of our States facilitated.

Other Problems of Organization and Procedure.—In the foregoing, we have sought to do little more than set forth in broad outline the nature of the more general and important problems that are involved in effecting an organization, and in formulating rules to govern the proceedings, of the legislative branch of a government of a separation of powers, and to indicate in a summary way the manner in which these problems have been met by our legislative bodies. It need hardly be said that there are many other matters in respect to which action must be had in order to perfect the organization and procedure that has been described. For the most part, these other matters have to do with questions of technical parliamentary procedure into which it is impractical for us to enter. There remains, however, one other problem which is of importance equal to, if not exceeding, those that have received consideration, that, namely, of devising means through which

[8] The creation of a body of this character was recommended by the Model State Constitution drafted under the auspices of the National Municipal League, and such bodies have been actually created by three States, Michigan, Kansas, and Wisconsin. That created by the first two of these States is composed wholly of representatives of the two legislative chambers; that of Wisconsin contains representatives of the chambers, the governor, and representatives of private interests.

leadership may be had in the formulation of a legislative program and its translation into effect. As this problem is one which concerns the executive no less than the legislative branch, and involves in its consideration an inquiry into the proper rôle of political parties in the operation of our governmental machinery, its examination has been left to the concluding chapters in which these intimately related questions are taken up for consideration.

CHAPTER XXI

THE EXECUTIVE BRANCH

In considering the executive branch of government, it is necessary at all times to keep in mind the distinction between it and the administrative branch. If this is done, it will be found that this branch, notwithstanding its importance, offers but relatively few problems for solution. This arises from the fact that the field of purely executive duties has now become fairly accurately defined and that such duties require no elaborate machinery for their performance. In point of fact, it will be found that this branch consists of little more than the single office of chief executive. In large part, therefore, the problems of this branch consist simply in the determination of the qualifications that shall be required of the chief executive, how he shall be selected, by what tenure he shall hold office, the conditions under which he may be removed, the duties and powers that shall be conferred upon him, and the relations that he shall have to the other branches of government.

Office of Chief Executive.—In all governments it has been found desirable, if indeed not indispensable, that the executive powers shall be legally or nominally vested in a single person. The leading instances of an apparent departure from this practice is found in the governments of England and Switzerland. In England, the possession and the actual exercise of the executive powers are carefully distinguished. Legally, the King is the possessor of all executive authority and all executive acts must be performed in his name. Actually, however, the ministry of the day decides how this authority shall be exercised. To use an English expression, the office has, as it were, been put into commission. In Switzerland, provision is made for a chief executive, known as President. Actually, however, this officer must exercise his authority in accordance with the wishes and instructions of the As-

sembly. The system resulting is thus one analogous to that of England. The best example of the executive power being both vested in and actually exercised by a single chief executive is afforded by a monarchy of the autocratic type or the more modern authoritarian government. Among popular governments the leading example of such a union of possession and exercise of this power is undoubtedly our own government. Though, as we shall see, the President is subject to a certain measure of control in respect to the performance of some of his executive powers, his personal individual powers in this field are enormous. There are indeed few chief executives having greater power in this respect.

In this connection it is of interest to note that one of the great elements of weakness of the government established after our Declaration of Independence, under what were known as the Articles of Confederation, was the failure to provide for a chief executive. The troubles resulting from this failure undoubtedly were largely influential in bringing about the large and definite grant of executive powers to the President in our present form of government.

Qualifications of Chief Executive.—The matter of the qualifications required of persons in order that they may hold the office of chief executive is one giving rise to little or no trouble. When this office is filled by hereditary descent, the only additional qualification required is usually that of sex. In some cases only males, and in other cases, both males and females, meeting the required conditions in respect to descent, are eligible. If the person so entitled to office is a minor under a certain age, provision is usually made for the selection of a regent to act for him or her until he or she becomes of the required age. The qualification of mental capacity, indeed, is not usually required, cases of deficiency in this respect being met by the selection of a regent as in the case of a chief executive who is under age.

In governments whose chief executives are selected by some method of election, the qualifications required rarely go beyond those of sex, age, nativity and citizenship. In our own government the only specifications are that "no person except a natural-born

citizen or a citizen of the United States at the time of the adoption of this constitution shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years and been fourteen years a resident within the United States."

Method of Selection of Chief Executive.—Undoubtedly, one of the most important problems presented in providing for the exercise of the executive power is that of determining the method that shall be employed in selecting the chief magistrate. In respect to this, the issue in the first place lies between two modes: selection in accordance with some hereditary principle, and selection by some method of election. It is not our intention to consider the relative merits of these two systems. It may be stated, however, that strong arguments can be advanced in favor of both. The greatest argument in favor of the first lies in the fact that this most important act is definitely determined in accordance with fixed principles and is thus taken out of the domain of popular strife. If one surveys the history of popular government since its widespread development in the nineteenth century, it will be found that the system of selecting a chief magistrate by some method of election has, in the case of the majority of nations, given rise to acute disturbances and often to bloodshed and revolution. The experience of Mexico and other Latin-American countries in this respect furnishes the most striking examples. The difficulties inherent in this method are such that it is a question whether it is possible to devise a system of election that will give good results in practice in a country which has not reached an advanced stage of political development. It was due to an appreciation of these difficulties that the abortive attempt of Yuan-Shih-Kai, the late President of China, to convert the government of that country from a republic to a constitutional monarchy was looked upon by many as a step calculated to stabilize political conditions.

The great objection to the system of selection by hereditary descent is the uncertainty as to whether a competent person will be secured. The importance of this consideration is very much lessened where the chief executive, as under the English system, is

only nominally the custodian of executive authority, the real exercise of this authority being in a body otherwise selected. It is due to this that the English hold that their monarchical system has all the advantages of the plan of an elected chief executive with none of its disadvantages.

This question of the relative merits of the hereditary and elective systems of selecting a chief executive is, however, one now having little more than an academic interest for those peoples who have definitely adopted a republican form of government. To them the idea of a monarchical government is so distasteful that the matter is no longer one of weighing the relative technical merits of the two systems. To such peoples, the problem thus resolves itself into that of the particular method to be employed in selecting a chief executive through a process of election.

Considering the problem from this standpoint, it will be found that, though the systems employed by republican governments differ widely in detail, they all fall under one or the other of the following three heads: (1) election by popular vote, or by what is known as a plebiscite, (2) election by the legislature, (3) election by a special electoral college. A few words will be said regarding each of these methods.

Election of Chief Executive by Popular Vote.—The election of the chief executive of a government by popular vote would seem to be the method logically to be followed by a people having a government resting upon the principle of popular sovereignty. It is the one which we would, therefore, expect to be followed unless grave practical objections could be brought against it. In point of fact, this is the method that is usually employed in the selection of the chief magistrates of all the subordinate units of a popular government, such as constituent states, municipalities, etc. To a considerable extent, it is employed in respect to such units even in monarchical and autocratic governments.

When, however, we turn from such subordinate governments to general or central governments, we find no modern states, except possibly those of Latin-America, making use of this device as its legally established system. France adopted this plan at the estab-

lishment of the Second Republic in 1848, but abandoned it when the Third Republic was established in 1871. Her reason for doing so was that Louis Napoleon made use of it, first to secure his election as President, and later to secure an endorsement of the coup d'état by which he made himself Emperor. The system, it was held, lent itself to the creation of a dictatorship and the overthrow of the system of republican government.

It was considerations such as this that led to the rejection of this system by those responsible for the framing of the government of the United States. We have pointed out that the framers of our constitution were as desirous of avoiding what were believed to be the dangers of a democracy as they were those of an autocratic monarchy. The election of the chief executive by popular vote was looked upon by them as essentially a democratic device, as one calculated to divide the country into hostile parties, and as giving rise to the danger that a President once elected might use this method of appealing to the people to perpetuate himself in power. Due to this, they devised the peculiar method of selecting this officer which will be described when we consider the third method of election—that through the use of a special electing body, or electoral college, as it is more technically known. In point of fact, this intention on the part of the framers of our constitution has been completely defeated, since the system thus created has been so worked in practice as to establish what is in effect election by popular vote. If one considers the American system as it actually exists in working operation, it is, therefore, one of election by popular vote.

Election of Chief Executive by the Legislature.—The second mode of selecting a chief executive by election is that of entrusting the election to the legislature. This system, while having a less democratic character, is thoroughly consonant with the principles of representative government, since the persons constituting the legislature have been elected by the people, and in this duty act as the representatives of the latter in the same way as they do in performing their legislative duties. This is the system that is now followed by France and Switzerland. There can be no doubt

that it has given excellent results. In those countries, the election of a President takes place with little or no popular disturbance.

Election of Chief Executive by a Specially Constituted Electoral College.—The third method of selecting a chief executive through an elective process is that of entrusting the task to a specially constituted body known as an electoral college. This is the system which legally exists in the United States. We have already pointed out why the framers of the constitution rejected the method of selecting a President and Vice-President by popular vote. The method of having these officers elected by Congress, except as a last resort, was rejected because they deemed that this would do violence to the separation of powers upon which they laid great stress. They feared that if the President and Vice-President owed their positions to Congress, they would not have the independence of that body which in their opinion it was desirable that they should have.

It was furthermore their desire to remove as far as possible the performance of this important duty from the field of party strife since political parties, as has been pointed out, were looked upon as undesirable elements in the political system of a country, if not, indeed, a grave danger to its stability and proper working. To this end, they sought to provide for an electoral college that would be composed of the wise men of the country who would be actuated solely by the desire to select men believed to be best fitted for filling the important positions of President and Vice-President. This college, they provided, should be composed of electors equal to the whole number of Senators and Representatives in Congress, each State selecting a number of electors corresponding to the number of Senators and Representatives in Congress in such manner as its legislature might provide, with the limitation, however, that "no senator or representative or person holding an office of trust or profit under the United States" should be eligible for appointment.

As originally adopted, the constitution provided that the college should ballot for President and Vice-President, with the provision that the person receiving the highest number of votes, provided that such number constituted a majority of the total

number of electors appointed, should be President and the person receiving the next highest number of votes should be Vice-President. To meet the contingency that no person might receive a vote equal to a majority of the appointed electors, the further provision was made that, in such an event, the House of Representatives should proceed to elect a President from among the five persons who receive the highest number of votes in the college, and that, in so doing, the vote should be by States, the representation from each State being entitled to one vote, and a majority of all the States being necessary for a choice; and that in every case the person receiving the next highest number of votes after that of the President should be Vice-President.

Provision was likewise made for the contingency of the office of President becoming vacant through the death or resignation of its incumbent or of his removal or inability to discharge the duties of the office. This provision reads:

> In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected.

The grant of power to Congress to determine the succession to the office of President when the offices of both the President and Vice-President become vacant has been exercised by that body through the passage of a law fixing succession in the members of the President's cabinet in an order set forth in the law.

There are few if any other cases where an important provision of our federal constitution has, in practice, developed greater technical defects in providing for all contingencies, or has worked in a manner more contrary to the intentions of its framers. Certain of the technical defects have been corrected by the Twelfth and Twentieth Amendments. The first of these, adopted in 1804, provided that the electoral college should ballot separately for President and Vice-President; that if no person received a majority vote

of the electors appointed for President, and the election was consequently thrown into the House of Representatives, that body should proceed to make its choice from the three, instead of the five, receiving the highest vote in the college; that should the House fail to make a choice of President prior to March 4th (the beginning of the political year), the Vice-President should act as President as in the case of the death or other constitutional disability of the President, thus providing for a contingency in respect to which no provision had been made; and that when the choice of the Vice-President devolved upon the Senate, that body should make its selection between the two persons receiving the greatest number of votes in the electoral college. The Twentieth Amendment, adopted in 1932, in addition to providing that the term of office of the President, Vice-President, Senators and Representatives, instead of beginning on March 4th should begin, in the case of the Senators and Representatives, on January 3, and, in the case of the President and Vice-President, on January 20th, with a view to abolishing the so-called "lame duck" Congress, made further provision for meeting contingencies that might arise in connection with the election of a President, and Vice-President or succession to that office that had not been adequately provided for, either by the constitution as first adopted, or by the amendment of 1804.

If, at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice-President-elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President-elect shall have failed to qualify, then the Vice-President-elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President-elect nor a Vice-President-elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.

The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.

Even with this amendment, the constitutional provisions regarding the incumbency of the office of President do not adequately provide for all contingencies. Thus, they fail to specify what organ shall be the judge as to when a President shall be deemed unable to discharge the duties of his office, and when the performance of them should be taken over by the Vice-President. The failure to provide for these contingencies has given rise to embarrassment on two occasions; once when President Garfield lay for so long a time physically incapacitated for the discharge of his duties as the result of an assassin's bullet, and once when President Wilson was almost equally incapacitated by illness during his second term. There being no organ competent under the constitution to declare the inability of the President, in neither of these cases were the duties of the office assumed by the Vice-President; and the government was forced to carry on as best it could without the active participation of a chief executive.

In the foregoing paragraphs we have directed attention principally to what may be termed the technical aspects of the problems presented in seeking to secure the selection of a chief executive through a specially constituted college. If we turn now to the consideration of this system in its more fundamental aspects, attention needs to be directed to at least two of its features. The first of these is that the system, almost from the beginning, utterly failed to function in the manner contemplated by its framers. This was due to the unanticipated rise of political parties and the rôle that these organizations came to play in the actual operation of our political system. Actuated by regard for party interests and the strong tendency to democratize our institutions, the States, in the exercise of the power conferred upon them by the constitution to fix the method by which they should select their representatives in the electoral college, uniformly adopted the plan of having such electors selected by popular vote. Political parties, at the same time, adopted the practice of putting in nomination as candidates for these offices persons who were pledged in advance to cast their votes, if elected, for the nominees of the parties for President and Vice-President. The result was not only to make the selection of

the President and Vice-President a matter of supreme party import, but to reduce the function of the electoral college to that of a mere perfunctory registration agency of decisions otherwise reached, and to establish a system under which our Presidents and Vice-Presidents are, in effect, selected by popular vote.

Secondly, the system, both as regards the selection of the President by the electoral college and by the House of Representatives, provides that the selective process shall be on the basis of action by the States separately. It results from this that it may well happen, and indeed on occasion has happened, that the candidate receiving the vote of a majority of the electoral college may have failed to receive a majority of the votes of the people as cast in the election of members of the college. This result is still more likely to occur where the election is thrown into the House of Representatives, since there the balloting takes place by States, each State having a single vote regardless of its size or population. The motives leading to this latter provision are the same as those leading to the treatment of all of the States on an equality in respect to their representation in the upper house of Congress—the desire to recognize the States as political entities and to prevent the relatively few States having a large population from exercising dominance in the selection of the President when the election is thrown into the House.

Both of these features, it should be said, are thoroughly satisfactory to the American people. Public opinion undoubtedly now holds to the belief that the desirable method of selecting the chief executive is by popular vote, qualified as regards its operation as above described. While this is so, there is a strong body of opinion that the electoral college should be abolished since it no longer serves either its original or any other important purpose, entails unnecessary expense, and tends to complicate the whole problem of selecting a President and Vice-President. For years, proposals for the amendment of the constitution to accomplish this have been presented to Congress.

It would be improper to leave this account of the American system of selecting the chief executive without calling attention

to the fact that its successful operation is dependent in large degree upon the continued existence of the two-party system. It will be remembered that the provision exists that a selection of the President by the electoral college takes place only when a candidate receives a majority of the votes of all the members constituting the college, and that, failing this, the selection devolves upon the House of Representatives. Should the present two-party system be replaced by one of three or more parties, a contingency that is well within the realm of possibility, a situation would present itself where, as a normal rather than as an exceptional thing, the selection of the President would not be made by the college, but would devolve upon the House of Representatives. Should such a situation arise, it is a question whether the American people would be satisfied with the existing provisions relative to the functioning of that body as a selective body which give to the smallest State a vote equal to that of the largest; and whether they would not prefer the system of a general plebiscite in which State boundaries would be disregarded.

Term of Office of Chief Executive.—There are a number of other questions to which answers must be given where the method of selection of the chief executive is other than an automatic one as determined by the principle of heredity. Chief among these is the length of the term for which such an officer should be elected. In the United States, this term has been fixed at four years. It results from this that, while the people are called upon to express their choice in respect to their representatives in the legislative branch every two years, in respect to their choice of chief executive they do so only at four-year intervals. At the time that our constitution was adopted, and when it was contemplated that the function of the executive in respect to legislative policies would be little more than of a general recommendatory character, the difference between the legislative and executive terms was not a matter of special significance. At the present time, however, conditions are fundamentally different. It is now held that one of the most important functions of the President is the assumption of leadership in respect to the formulation of a legislative program

and the translation of such program into statutes. To this end, it is necessary that he should work in close coöperation with the legislative branch and that harmonious relations should exist between the two. Manifestly, the difficulties of securing such a condition of affairs are greatly increased when the executive and the two houses of Congress are not of the same political complexion. Where the executive and legislative representatives are chosen at the same time, the probabilities that the two branches will have the same political character are greatly enhanced. Where, however, as under the existing system, the membership of Congress is renewed every two years independently of the selection of the executive, it frequently happens that the two branches are not in political accord. This cannot but be deemed to be an unfortunate feature of our political system, a feature which cannot exist in an authoritarian or responsible government.

This situation can be largely, though not wholly, corrected by shortening the term of the President to two years or lengthening the term of members of the House to four years and providing for one-third or one-half renewal of the Senate at the same time. The pros and cons of long and short terms for representatives of the people have been set forth in our consideration of the legislative branch and need not be repeated here. It may be pointed out, however, in favor of the two-year term for the chief executive that this would not involve the holding of more frequent general elections than is now the case, and that such a system would conform to the general practice obtaining in respect to the election of their chief executives by the States.

Another matter usually considered in connection with the question of the term of office of the chief executive is the eligibility of the incumbent for reëlection. In a few of the States, the constitutional provision exists that the governor may not succeed himself, though he is eligible for election at a subsequent election. In the case of the President, no limitation upon his eligibility for reëlection exists. But, as a result of the precedents set by Washington and Jefferson, who refused to permit their names to be considered for a third term, there has, however, developed a practice which

has now become one of the firm conventions of our political system that the same person should not serve as President for more than two successive terms. Correlative to this convention is a practice which has tended to grow in increasing force with passing years that the party to which the President belongs should select him as its nominee for a second term.

This latter practice has arisen only partially from a belief that it is desirable that the office of President should be held by the same person for as long a term as eight years. Primarily, it has been due to the fact that the powers of the President, both as head of the government and as leader of his political party, are such that he can, normally, dictate his renomination even when such renomination does not conform to the wishes of the rank and file of his party. This fact, that a President usually desires renomination, if for no other reason than as a vindication or endorsement of his administration, has given rise to much criticism, especially on the ground that the President's conduct of the office during his first administration is apt to be dictated by considerations of his personal political future rather than purely by those of the public welfare. To avoid this contingency, there developed some years ago a strong demand that the constitution be amended so as to lengthen the presidential term to six years, with the provision that a President should not be eligible to succeed himself. The strength of this demand is evidenced by the fact that the Judiciary Committee of the Senate, in 1912, presented a report advocating this constitutional change; and the Baltimore convention of the Democratic party which, in the same year, put Woodrow Wilson in nomination for President, inserted, at the instance of Mr. Bryan, a plank in its platform pledging the party and the candidate who was to be subsequently nominated to this principle of a single six-year term. The proposal, moreover, received the endorsement of at least one of our presidents, President Taft, who on the basis of actual experience set forth the arguments in favor of it with exceptional clearness. In a public address, he said:

> I venture the suggestion that it would aid the efficiency of the Executive and center his energy and attention and that of his subordinates in the latter

part of his administration upon what is purely disinterested public service if he were made ineligible, after serving one term of six years either to a succeeding or a non-consecutive term.

I am a little specific in this matter because it seems necessary to be so in order to be understood. I don't care how unambitious a President is, I don't care how determined he is that he himself will not secure his renomination (and there are very few indeed who go to that extent), still his subordinates equally interested with him in his reëlection, will, whenever they have the opportunity, exert their influence and divide their time between the public service and the effort to secure their chief's renomination and reëlection.

It is difficult to prevent the whole administration from losing a part of its effectiveness for the public good by this diversion to political effort for at least a year of the four of each administration. Were this made impossible by law I can see no reason why the energy of the President and that of all his subordinates might not be directed rather to making a great record of efficiency in the first and only term than in seeking a second term for that purpose. Four years is rather a short time in which to work out great governmental policies. Six years is better.

Strong as is this indictment of the existing system and persuasive as are the arguments in favor of the proposed change, they are defective in that they fail to lay proper emphasis upon the importance of the President assuming leadership of his party. The basic objection to the proposed change is that it would tend to weaken, if not wholly to destroy, the President's power to influence action. This objection is set forth with exceptional force in an editorial opposing the change which appeared in the New York *Nation* of May 16, 1912, which, after stating this objection, continued:

Concrete examples leap to the mind to reinforce the abstract arguments. What would the nation have been advantaged if Andrew Johnson's term had been six years? He had got so hopelessly out of touch with Congress, and so out of sympathy with the country, that his administration became futile; and two years more of it would have been intolerable. Mr. Hayes was in many respects an excellent President, but the conditions under which he came to office, together with his explicit promise not to seek a second term, made him a nullity as a party leader. The consequence was that his years in office were nearly barren in all matters of constructive legislation. Congress framed the silver bill over his veto. He could not command party support. In no sense was he regarded as the man to get things done for the people. The very fact that

all the politicians knew that he was not to be a candidate again robbed him of a part of his official authority; and two years more in the Presidency would only have made matters worse. Even the mighty Roosevelt became almost negligible in the last years of his Presidency. Congress would not even read his messages, much less give heed to them. The authority as party leader and fated nominee which he had in 1902 and 1903 was almost stripped from him in 1907.

Actuated by these considerations, President Wilson refused to be bound by the pledge against a second term contained in the platform upon which he had been nominated and elected and justified his refusal so to be bound, in a letter addressed to the chairman of the committee to which the resolution providing for the change had been referred, upon the grounds set forth in the editorial from which we have just quoted.[1]

[1] This letter, though written February 5, 1913, was not given publicity until January 10, 1916, when it appeared in the New York *World* of that date.

CHAPTER XXII

THE EXECUTIVE BRANCH: FUNCTIONS

It should be abundantly clear by this time that the extent and nature of the powers conferred upon, or assumed by, the executive determine in no small degree the fundamental character of a political system. Where all political powers are vested in this officer, and the other agencies of the government constitute but the intermediaries through which he exercises such powers, we have an autocracy or authoritarian government. Where the executive is deemed to have primary responsibility for the formulation of legislation policies and their translation into law, which responsibility, however, must be discharged subject to the provision that it retains the confidence of the legislative branch, we have what is known as responsible or parliamentary government. Where this responsibility is accompanied by the power, under normal conditions, to control action by the legislative branch, we have a form of responsible or parliamentary government where the executive is the dominant political authority such as is possessed by Great Britain and her dominions. Where this responsibility is not accompanied by the power to control legislative action, we have a form of responsible or parliamentary government where the legislative branch is the dominating authority such as is possessed by France and the other countries of Europe which have modeled their political systems upon that of France. Where the executive, as a matter of constitutional provision, is given no such responsibility for the formulation of the legislative program and its translation into law, and his continuance in office is not dependent upon legislative action, we have a government of separation of powers, known as presidential, such as is possessed by the United States.

It will be seen from the foregoing that the American system of

government provides for an executive whose responsibility in respect to the exercise of the legislative function is quite different from and far less than is the case in other important governments of the world. While this is true from the strictly constitutional standpoint, the office of chief executive in the United States has, in recent years, as has more than once been pointed out, undergone a profound transformation, the result of which has been greatly to magnify its responsibilities in respect to both the formulation and the putting into effect of legislative policies, a transformation which has made it more closely conform to the executive as found in other modern governments. If one wishes to determine the parts played by the executive under our system of government, it is necessary that the examination shall take account of, not only the constitutional grant of powers, but the responsibilities actually exercised.

Approaching the subject from this standpoint, analysis reveals that the American executive in effect plays a number of rôles in the conduct of political affairs that may be clearly distinguished. He is at once: (1) the chief executive from the technical, constitutional standpoint; (2) the leader of his party; and (3) the head of the administration.

The President as Chief Executive.—It has been pointed out in our consideration of the separation of powers, that where provision is made in the constitution for the vesting of the executive power in the hands of the President, reference is had to the grant only of certain specified powers which are enumerated in the constitution, the more important of which are that he shall be the titular head of the government, and, as such, shall represent it in all cases where it needs a spokesman; that he shall especially represent the government in all of its relations with other states; that, to this end, he shall have charge of the conduct of negotiations with foreign governments looking to the establishment of treaty relations with them; be the commander-in-chief of the armed force of the nation; and that he shall be the officer to exercise the quality of mercy as evidenced in the power to grant reprieves and pardons. In addition to this grant of powers, which, in

all governments, are held to be of an executive character, the President has had conferred upon him by the constitution certain other powers and duties the more important of which are: the approval or disapproval of bills passed by the Congress; the nomination of persons to fill certain important offices; the informing of Congress from time to time of the state of the nation and the submission to Congress of recommendations relative to legislation which in his opinion is desirable; and, finally, the general duty of seeing that the laws of the land are faithfully executed. Certain of these powers, it should be noted, are not of an absolute character. As parts of the system of checks and balances so characteristic of our political system, the constitution provides that the disapproval, or veto, of bills passed by Congress may be overridden by a two-thirds vote of each of the two houses; that treaties with foreign governments entered into by the President, before becoming effective, shall receive an approving two-thirds vote of the Senate; that the power to declare war shall be vested in Congress; and that nominations to office authorized by the constitution to become valid as appointments shall receive the approval of the Senate as expressed by a majority vote of that body.

A prime characteristic of these powers is that, being the result of direct constitutional grant, they are exercised by the President entirely within his discretion, subject only to the limitations that have been mentioned. Any attempt on the part of Congress or the courts to dictate to or control him in the exercise of these powers is without avail. Repeatedly Congress has attempted to exercise a voice in determining the conduct of foreign affairs by passing resolutions providing for the recognition of some foreign government, or by taking some other action of the sort. Invariably the President has ignored such action and has stated that he did so because his recognition of it would represent an acquiescence on his part in an infringement of the constitutional rights of the executive. In respect to the waging of war, while the President cannot declare war, he can so formulate foreign policies and direct such acts to be done that war is made almost inevitable.

After war has actually broken out, the powers of the President

as commander-in-chief of the armed forces are almost autocratic in respect to the determination as to how military operations shall be carried on, and what other things shall be done as a necessary means of making these operations successful. The exercise of these powers, however, is subject to the limitation that the determination of what armed forces shall be provided and the voting of the money necessary for the prosecution of military operations rest with Congress, as a part of its general legislative function.

The President as Party Leader.—The foregoing, of which the conduct of foreign relations and the direction of the armed forces of the nation are the most important, constitute the constitutional powers of the President and indicate the position it was contemplated that officer would occupy in the operation of our political system. It will be remarked that the only relation that they have to the discharge of the legislative function is, on the one hand, the making of general recommendations regarding congressional action which in his opinion is desirable, and, on the other, the negative one of expressing his dissent to legislative action, a dissent that can be overridden by a two-thirds vote of the two houses. Even in respect to these two duties, it is important to note that nothing was further from the thought of the framers of the constitution than that their possession should impose upon the President the affirmative responsibility of framing legislative policies or of dictating legislative action generally. The motive dictating the grant of the veto power was not that of establishing a system where the President could oppose his judgment in respect to legislative action to that of Congress, but merely that he should be given the power to protect his office from encroachment on the part of the legislative branch, or prevent action by the latter which, in his opinion, was beyond its constitutional power; and such was the manner in which this power was exercised for many years.

This intent of the framers of our constitution has been entirely defeated by the rise of political parties as a dominating feature of our political system. These parties, acting outside of the framework of the government proper, have taken to themselves the duty of framing political programs and have built up party organizations,

the effective head of which, in the case of the victorious party, is the President. As a result of this, the President is now deemed to have a responsibility in respect to the discharge of the legislative function wholly different from that originally contemplated. It is hardly going too far to say that his responsibility in this respect constitutes one of, if not the most important of, his duties. In no small degree, a President is judged by the courage and ability shown by him in framing a legislative program, in urging this program upon Congress, in using the powers of his office to secure affirmative action upon it, and in so exercising his veto powers as to prevent action contrary to it. In a word, the responsibilities resting upon the President as party chieftain and the powers possessed by him in virtue of that office are scarcely less important than those held by him as, constitutionally, the chief executive. Whether this change in the corpus of the President's responsibilities and powers is a desirable one will receive special attention in a later chapter dealing with the problem of leadership in the conduct of political affairs.

The President as Head of the Administration.—Another feature of the constitutional grant of powers to the President to which it is important to direct attention is the fact that these powers include no participation in the exercise of the administrative function except as this function is embodied in the general duty of seeing that the laws are faithfully executed. As has been pointed out in our consideration of the functional distribution of governmental powers, the legislative, and not the executive, branch is, under the American system of government, the source of all administrative authority. Notwithstanding this, the President, in fact, has come to occupy the exceedingly important post of head of the administration. This has resulted from two facts: first, that Congress, in the exercise of its discretionary authority, has, as a matter of expediency, conferred upon the President large powers to direct and control administrative action; and second, that the President, in virtue of the power of appointment of administrative offices conferred upon him by statute, and particularly his power of dismissal of such officers, is able to make the action of administrative officers

conform to his will. Thus the President, in addition to the offices of constitutional chief executive and party leader, has come to occupy the exceedingly important position of head of the administration. Whether the powers exercised by him in virtue of this office and the provision that has been made for their exercise are adequate, are matters that will receive consideration in our examination of the problems involved in the organization and operation of the administrative branch of governments. It should be noted here, however, that these powers result almost wholly from congressional action; that, in their exercise, the President acts merely as a subordinate agency of the legislative branch; and that, as such, he is subject to the superior direction and control of that body, a condition that does not exist in respect to the powers possessed by him as a result of constitutional grant.

The Office of Chief Executive in the States.—In this chapter, we have considered the function of the executive of the national government. The same forces that have led to the establishment of the system now in existence have been at work in modifying the political system of our States, with the result that almost all that has been said regarding the present powers and responsibilities of the President apply with equal force to the governors of the States.

CHAPTER XXIII

THE JUDICIAL BRANCH: FUNCTIONS

Of the several branches of government, none has received so little attention at the hands of students of political science as the judicial branch; yet none is of greater practical importance to the individual or more in need of critical examination. Though constituting one of the primary functions of government, there is probably no function that our governments exercise with less efficiency and economy. Both our system of courts and their methods of procedure are far from satisfactory. In their practical operation, they are expensive both to the government and to litigants; they perform their work with great dilatoriness, and miscarriages of justice are frequent.

To understand the part played by the judicial branch in the political system of a country, and the problems that are presented in providing for its organization and administration, it is desirable to start with an accurate idea of the functions performed by courts. In popular estimation, courts do little more than one thing—decide disputes. This, however, is a very superficial view. If one looks below the surface, it will be found that, in deciding disputes, courts do a number of important things beyond the settlement of particular controversies. Analysis of their work shows that, in fact, they do the following five things:

1. Investigate and determine facts.
2. Apply the law to the facts as thus determined.
3. Determine and construe law.
4. Prevent the infraction of law and the violation of rights.
5. Administer property.

Courts as Bodies to Investigate and Determine Facts.—It is very important to distinguish between the work done by courts in investigating and determining facts and that done in interpreting

and applying the law to these facts. In the great majority of cases coming before courts, whether of a civil or criminal character, the law involved is clear and no legal issue is presented. The task confronting the court in such cases is thus simply that of determining facts. The desirability of distinguishing the fact-determining function of courts from their other functions lies in the circumstance that courts in most countries, and especially in England and the United States, have developed a very special procedure for its performance. This procedure consists in treating the inquiry practically as a duel, in having the two parties bring forward witnesses to testify in support of their respective contentions, and in having the court itself reach a decision through a weighing of the testimony thus produced. The system, in a word, is one where the burden of bringing out the facts is thrown almost wholly upon the parties to the contest. The whole inquiry is given an intensely partizan character. Even the witnesses, whether they have any interest in the case or not, are supposed to be witnesses for one side or the other. The court itself assumes little or no responsibility in respect to seeing that all available evidence is produced. It makes no investigation itself, summons no witnesses. Furthermore, in carrying out this system of fact-determination, it has formulated an elaborate set of rules to govern the parties in producing witnesses and subjecting them to interrogation. The court itself thus occupies practically a neutral position, confining its action almost wholly to seeing that the rules of the game are followed by the contestants.

This system is in marked contrast to that pursued by an administrative body in seeking to determine the facts upon which to base its action. Such a body itself determines the character of the facts deemed necessary in order to arrive at a proper decision. It provides itself with a staff of investigators which, acting under its constant direction and supervision, secure the data needed. It does not tie its own hands by formulating rules of procedure to which it is bound to make its action in all cases conform. It thus takes direct charge of an inquiry and assumes full responsibility for its prosecution.

We have contrasted these two methods of inquiry, the judicial and the administrative, since there is evidently here presented a difference of method of the utmost significance. The making of a choice between them constitutes one of the problems that is presented in determining the organization and methods of procedure of the judicial branch of a government. Only by segregating this fact-determining function from the other functions performed by a court can the special character of this problem be made clear.

In the case of the judicial system in the United States, this problem is all the more important since not only has this function of determining facts been, in the case of certain classes of controversies, carefully segregated, but use is made of a special organ for reaching a decision in respect to such facts. This special organ is the petty jury. This jury consists of twelve men who are specially empaneled for each case to sit as a board for the hearing of the testimony and, on the basis of such testimony, finding the facts. Here again a very grave question is presented as to whether the use of such an organ can be justified by the results that are obtained under it. The issues that are here involved go to the very foundation of our system of judicial administration. They have received and are receiving great attention, and the literature regarding them is voluminous. Into the relative merits and demerits of the system in force, we cannot here enter. All that we can do is to state the issue as one of the important problems of judicial administration.

Courts as Bodies to Apply the Law to Ascertained Facts.—With the facts determined, the next step in the work of courts is to determine the action that shall be taken upon such facts. This is performed by courts in rendering what are known as decisions. In them the courts decide what is the application of existing law to such facts. In doing so they may exercise a certain discretion, though the limits within which such discretion may be exercised are usually carefully defined by the law. Here again it is important to distinguish between the principles governing a court in the performance of this function and those governing a non-judicial body. It has been accurately stated that the function of a court is to administer law, not justice. The court is not a free agent. It cannot

frame its decision in accordance with what it may believe will most nearly conform to absolute equity or justice in the particular case under consideration. It is bound absolutely by the law. All that it can do is to declare what the law provides shall be done where a given set of facts is determined to exist. Administrative bodies are not bound to anything like the same extent. They are much freer to make their decisions more nearly conform to justice or expediency. It is not intended by any means to convey the impression that the latter method is the one that is superior to the former in the settlement of the classes of controversies coming before courts. It is merely desired to point out that here is a choice of principles which constitutes one of the distinct problems of judicial administration.

Courts as Bodies to Determine or Construe Law.—In considering the function of courts as bodies to apply the law to particular cases, we have assumed that no issue is presented as to what the law is and its applicability to the case at bar. Unfortunately, there are many instances where this condition does not obtain. Laws necessarily must be general in character. In many cases they are so worded that it is difficult to determine their exact meaning. With constantly changing conditions, issues are presented which were not considered when the laws were framed. Laws are not always consistent with each other, and doubt often exists in respect to which of two provisions, or which of two laws, should govern in a particular case. It results from this that courts have the very important function of determining what the law is, what its scope and meaning, and, when there is an apparent conflict between different laws, which shall prevail.

This is a function of supreme importance in any country, but particularly so in England, the United States, and all countries which have inherited from England the system of jurisprudence known as the "common law." In these countries the law regulating the relations between individuals has been reduced to statutory form to but a comparatively slight extent. For the most part, this law has come into existence as the result of a long line of decisions of courts in passing upon specific cases. Under the doctrine of what is known

as *stare decisis*, a legal principle enunciated in a decision made by a court is deemed to be of controlling force in similar or analogous cases thereafter arising. Especially is this so when the same doctrine has been repeatedly applied in a long line of decisions. It results therefore that a great part of what is known as private law is to be found authoritatively expressed only in the decisions of courts, as embodied in the thousands of reports in which these decisions are published. Under these circumstances, the function of courts in determining what the law is is a difficult one. Growing out of this situation of affairs, there has long been an acute controversy among students of jurisprudence as to whether courts are agencies for making law or merely declaring law. The issue is one which lends itself to many subtile distinctions into which we cannot here enter. It is sufficient to say that courts do determine the law that exists at any given time.

This function of determining the law in its practical application is, however, one that must also be performed by courts in respect to that law which is in statutory form. Laws in this form are necessarily very general in character. Thus, for example, a law having for its purpose to safeguard individual workers from accidents, may, and usually does, go little further than provide that all employers in dangerous trades and industries shall take due precautions to safeguard all dangerous machinery and so to conduct their enterprises as to ensure that their employees are not subjected to unnecessary or undue risk of injury. It is impossible to specify in detail which industries shall be deemed to be dangerous, what machinery shall be safeguarded and what regulations governing the work shall be enforced. The best that can be done is to insert in the law such general definitions and provisions as will make clear its intent. It thus devolves upon the courts to determine in each case whether the industry involved is, or is not, a dangerous industry within the intent of the law, whether the piece of machinery causing the accident was one that should have been safeguarded, and whether the regulations in force were adequate. The courts thus amplify law and determine its scope and applicability to specific cases. In doing so, they act in a quasi-legislative

capacity, doing that which legislatures would do if they were able.

Another important way in which courts determine law is in resolving conflicts between laws. All laws are not of equal status or controlling force. Most laws emanate from bodies exercising only a delegated authority. It thus becomes necessary in many cases to determine whether the body exercising delegated authority has acted within the scope of its authority in enacting a certain law. The highest law in the United States is that contained in the constitutions of the United States and the several constituent States. Next in rank is that contained in the statutes enacted by Congress and the legislatures of the several States. Then follow the laws or ordinances of political subdivisions, such as municipalities, counties, etc. In the case of all of these subordinate bodies, the scope of their legislative powers is determined by the State constitution or by the organic acts authorizing their establishment and operation. Questions are consequently constantly arising as to whether laws enacted by such bodies are within the scope of their powers, whether they are not in conflict with provisions of the superior law. Manifestly, the power to determine questions such as these must be vested somewhere. In the United States, the exercise of this power has been assumed by the courts. This assumption of power, in so far as it has to do with the nullification of acts of Congress and the State legislatures, has, however, been bitterly criticized by many. It is claimed that, by so doing, courts have placed themselves above the legislative branch and have made themselves the dominant organ in determining what legislation shall be had. It is pointed out that the authority so to act has not been expressly conferred upon them by the constitution and that in other states the courts have assumed no such function. The issue presented is an important one, but we cannot enter into its merits here. It is necessary, however, to recognize that in the United States one of the most important functions performed by courts is that of passing upon the validity of laws, or to use the expression commonly employed, upon their constitutionality.

There is yet another way in which the courts can, and to a certain extent do, participate in the determination of the law. This

consists in the duty which has been imposed upon the justices of the supreme courts in certain of the States to give to the legislature what are known as advisory opinions. In the performance of their duties, American legislatures frequently have to consider legislative proposals concerning the constitutionality of whose provisions grave doubts may exist. It is manifestly advantageous to have these doubts resolved prior to the enactment of such proposals so far as possible rather than to act without such resolution and run the risk of having the laws declared void by the courts later. This advantage is secured by conferring upon the legislature the right to request, in advance of action by it, an expression of opinion regarding the constitutionality of proposed action by the judges who will have the final say in respect to such constitutionality and imposing upon such judges the duty of responding to such requests.

Courts as Bodies to Prevent Infractions of Law and Violation of Rights.—Another function performed by courts is that of serving as organs to prevent infractions of law and the violation of rights. Originally, courts had no such function. Gradually, however, courts, in England and the United States at least, took the position that it was not necessary that private parties should wait until their rights had been actually violated before they could appeal to the courts for protection; that if such persons had reason to believe that attempts would be made to violate their rights they could appeal to the courts and the latter would thereupon issue orders prohibiting such attempts, or at least restraining their commission until the rights of the parties were determined. The orders so issued are known as "restraining orders" or "injunctions." Compliance with such orders is enforced by courts through the power which they possess of ordering the punishment of persons who are guilty of disobeying orders of the court. This power is known as the power to punish for contempt of court.

This power of issuing restraining orders and injunctions, of deeming persons guilty of disobeying them guilty of contempt of court, and of imposing penalties for such contempt, is one which has been greatly criticized. There can be no question that in years past it has at times been exercised by courts in an unjustifiable

manner and particularly so in controversies arising between employers and their employees. Courts have not been content to issue orders directed to particularly designated parties, but have issued what are known as "blanket" injunctions directed to all parties, that is, the entire population of the country. This comes pretty close to the exercise of an arbitrary authority, aggravated by the fact that persons believed to have violated such orders are not tried by ordinary process and with the use of a jury, but may be summarily found guilty and ordered punished at the discretion of the judge. Due to an appreciation of this fact, legislation has been enacted by the national government and certain of the States restricting to some extent the powers of the court to issue injunctions and to punish for contempt. The courts themselves have come to exercise such powers reserved to them in a more conservative manner. The extent to which this function should be vested in the courts and the manner of its exercise still constitutes, however, one of the unsettled problems of judicial administration in the United States.

Courts as Bodies to Administer Property.—In many cases where the ownership, use, or rights in property are in dispute, courts will take over the administration of such property pending a final adjustment of the points at issue. This occurs especially in the settlement of the estates of deceased persons and where corporations have failed to live up to their financial obligations. In these cases, the court appoints an administrator or receiver to take the property and administer it subject to its orders. Work of this kind is done by courts on a vast scale. There have been times when a very considerable portion of the entire railroad mileage of the country was in the hands of receivers thus appointed and controlled by courts. For all practical purposes, the courts have in these cases the functions and duties of boards of directors. The receivers themselves are but officers of the courts; they have no authority other than that granted to them by the courts, and their acts must be approved by those authorities. In handling such property, the courts seek, if possible, to adjust all outstanding differences, to settle all outstanding claims, and, as soon as solvency is estab-

lished, to return the property to its owners. Where this is not possible, they order the winding up of the affairs of the corporation, the sale of its property, and the distribution of the proceeds to the persons entitled to them.

In a number of other ways courts at times perform work of an administrative character. They thus have in certain cases entrusted to them the duty of granting licenses, of nationalizing aliens, of performing marriage ceremonies, of appointing certain officials. All of these duties are known as the "non-contentious" functions of courts. They do not constitute an essential function of courts, but merely represent instances where use is made of courts as convenient agencies for performing these classes of work.

CHAPTER XXIV

THE JUDICIAL BRANCH: ORGANIZATION

Having obtained a general idea of the nature of the duties devolving upon the judicial branch, we are in a position to consider the problem that is presented in providing organs through which these duties may be performed. These organs are known as courts, or more broadly, judicial tribunals.

Dual System of Courts in the United States.—The most characteristic feature of the judicial machinery of the United States is that use is made of two distinct systems of courts, one operating as a part of the national government and the other as parts of the governments of the constituent States. This, in itself, would not constitute a great defect in the judicial system were the jurisdiction of these two sets of courts so defined as to restrict each to the trial of distinct classes of cases. In fact, however, this is not the situation. Due largely to the so-called diversity of citizenship clause in the section of the constitution defining the jurisdiction of the federal courts, the same classes of cases in respect to which the State courts have jurisdiction may be brought in the federal courts where the parties to the case are residents of different States. In not a few cases, the two sets of courts have concurrent jurisdiction, and, in not a few others, great difficulties are encountered in determining to which courts resort should be had in seeking to enforce rights. Other cases present themselves where resort has to be had to both courts in order to secure a complete adjudication of the matters at issue. That these considerations complicate the problem of the administration of law in the United States is evident.

The existence of this dual system of courts, with all the duplication of judicial machinery that it involves, and the uncertainty of jurisdiction that arises under it, is commonly held to be a necessary consequence of the adoption by the United States of its fed-

eral form of government. This, however, is not so. Germany, prior to the World War, and the Dominions of Canada and Australia at the present time, furnish examples of countries having a federal form of government but endowed with only a single system of courts. Undoubtedly at the time when our constitution was adopted, conditions were such as to seem to render desirable the setting up of these two sets of tribunals. It is more than a question, however, whether, with changed conditions, this necessity continues to exist. Certain it is that action looking to redefining the jurisdiction of these two sets of courts is desirable. Action in this way can take two forms. One is the adoption of the principle that primary responsibility for the administration of the law rests upon the national government, to be met through the extension of the present system of federal courts deriving their powers in the final analysis from the national government. The other is the adoption by the national government of the principle of restricting the original trial jurisdiction of its courts to the narrowest possible limits permitted by the constitution, and of making use of the State courts as trial courts for all matters except the few which, in accordance with constitutional provision, or for reason of a general or political character, should be finally passed upon by its supreme judicial tribunal, the Supreme Court of the United States.

The first of these methods, though theoretically possible and the most effective of the two, is one beyond the bounds of practicability at the present time. Its adoption would mean the degradation of the States, in respect to the administration of the law, to the status now occupied by the territories and dependencies of the national government. It could be secured only through an amendment to the constitution; and no such amendment can be had until the American people are convinced that our federal form of government should give way to the unitary form. Any such change in respect to the people's political convictions is exceedingly remote. If anything in the way of remedying or minimizing the drawbacks to our dual system of courts is to be had, the second method is therefore the one that must be employed. In considering the possibilities of this method, it should be noted that the statement in

the constitution of the judicial powers of the national government is, in considerable part, merely a grant of powers, and such powers need not be exercised by the national government unless it elects to do so, and that the only mandatory requirement of the constitution in respect to the creation of judicial tribunals is that provision shall be made for a Supreme Court. As a result of these two provisions, the national government could, if it saw fit, go a long way toward restricting its judicial organization, possibly so far as to provide for the single tribunal required, i.e., the Supreme Court, and leaving to the State courts the trial in the first instance of all, or practically all, litigation, whether arising under federal or State law, other than that in respect to which original jurisdiction is conferred upon the Supreme Court. What can be done in this direction is illustrated by the restriction that has been placed upon the federal courts to try cases arising under the diverse citizenship clause that has been mentioned. Under existing law, these courts may entertain actions of this character only when the matter in dispute involves the sum of $3,000 or more. By increasing this amount, it would be possible for Congress to compel practically all such actions to be tried in the first instance in State courts, with such provision for an appeal to the federal courts as it might think proper.

Administrative Courts.—Another prime characteristic of the American judicial system, which it shares with England and her Dominions, is its failure, in principle at least, to make special provision for the adjudication of matters having to do with the enforcement of public law, using that term to designate the law governing the organization and operation of the administrative branch of the government. In most if not all countries of continental Europe, a special system of courts known as administrative courts has been created for handling such matters. In the United States, England, and her Dominions, these matters have been left to the ordinary tribunals constituting the judicial branch of the government, strictly speaking.

Much has been written regarding the relative merits of these two systems, and especially as to the extent to which adequate protection of individual rights as against government officers is secured

under them. For a long time it was strenuously insisted by English and American writers that a far more effective guarantee of individual rights was secured under the English and American systems. Study of the practical operation of the two systems, however, reveals that this contention can hardly be maintained. Administrative courts in Europe are found to act with as great independence, and with as great regard to the protection of individual rights, as do English and American courts. Note should further be had of the fact that, notwithstanding the extent to which the distinction between the two systems is insisted upon in the United States, administrative tribunals of a judicial or quasi-judicial character are constantly being created to handle matters falling in the administrative field. Such, for example, are the United States Court of Claims, and various boards and commissions, such as the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Communications Commission, the United States Court of Customs and Patent Appeals, the United States Board of Tax Appeals, and the like.[1]

Civil and Criminal Courts.—All systems of jurisprudence make a clear distinction between civil and criminal law. So distinct are the tasks of enforcing these two bodies of law, whether viewed from the standpoint of the ends sought or from that of the nature of the proceedings of adjudication, that there would seem to be a strong argument in favor of keeping the two tasks distinct and vesting their performance in separate tribunals. In practice, however, this is only partially done. Throughout the United States, and the same is more or less true of other countries, it is the general practice to make use of the same court, viewed as an organization unit, for the trial of both criminal and civil cases. In acting in this dual capacity, the courts, however, make a clear distinction between sitting in one capacity or the other. This they do either by sitting in alternate sessions as a civil court and as a criminal court, or by having separate divisions of the court handle the two classes of cases. The result is that, though from the organization standpoint,

[1] For a consideration and comparison of the two systems, see Dicey, *Law and Public Opinion in England;* and Goodnow, *Comparative Administrative Law.*

there is but a single tribunal from the operative standpoint, this single institution acts as though it were two separate units. In some cases, the segregation is an institutional as well as an operative one; for example, where provision is made for special police courts or municipal courts having criminal jurisdiction only.

The arguments in favor of this system, as opposed to two completely separate sets of judicial tribunals are: that, in the case of the courts of first instance, there is not, at times, enough business to warrant the maintenance of two separate tribunals, and, in the case of superior courts, a more effective use of personnel can be had where judges may be assigned to the two classes of cases according to the pressure of work to be done. Where, however, as in the large cities, the total volume of judicial work is large, it would seem to be desirable to have separate tribunals in order more fully to secure the advantages of specialization.

Common Law and Equity Courts.—One of the most characteristic features of the system of jurisprudence of England and the countries which have derived their political institutions from England, the British Dominions, and the United States, is the distinction that is made between what is known as equity and common law, and the extent to which the administration of these two bodies of law is vested in separate tribunals.

The common law courts, which were the first to develop in England, were characterized by extreme formality; there was a particular form of action specified for each violation of a right against which the suitor sought redress. In time, this method of procedure became so rigid that cases constantly arose where the courts were unable to provide the redress that conditions demanded. To meet this situation, it became the practice for persons who believed their right violated or threatened, and who found it impossible to secure redress or protection in the courts, to appeal directly to the Crown, which, according to medieval theory, was the fountain of justice and could act when the constituted courts could not. In the fourteenth century, the Crown began the practice of referring such petitions to its Chancellor for action. As the volume of petitions increased, this officer, in turn, found it necessary to set up

special tribunals to act for him. Thus there came into existence a separate set of judicial tribunals known as courts of chancery, or of equity. These courts were not bound by the rules governing the old common law courts and worked out their own methods of procedure and methods of granting relief. The result was that England, in time, found itself equipped with two distinct sets of courts. This dual system was imported from England into the United States and became one of the prime characteristics of the American judicial system.

The distinction between law and equity, which finds no counterpart in non-English speaking communities, cannot but be deemed to be an unfortunate feature of our judicial system. It is generally admitted that the division of the work of civil law administration between two sets of courts making use of different procedures, and possessing different powers in respect to the granting of relief, is an anomaly. No country, starting with a clear slate and with full power of choice, would for a moment think of creating such a system. Probably the greatest objection to it is the complexity that it introduces in the system of judicial administration, viewed as a whole. In its practical operation, the system of two sets of courts, two sets of rules, and two classes of remedies, is productive of expense, trouble, and delay. Cases frequently arise where it is difficult even for the experienced lawyer to determine whether resort should be had to the one court or to the other for relief. At times, the action is brought in one court, only to be thrown out, upon appeal, by a superior court on the ground that it should have been brought in the other court. In such cases, the whole proceeding has to be begun *de novo*. In other cases, the entire relief required by the circumstances cannot be given by either court and two actions have to be brought, one in a court of equity and the other in a court of law.

In England, this undesirable condition of affairs has in large part been corrected by the series of judicature acts beginning with that of 1875, to which reference will hereafter be made, having for one of their fundamental purposes the unification of the judicial system of the country. These acts, while preserving to a cer-

tain extent the distinction between equity and common law, provide for the administration of both of these bodies of law by the same tribunals having the combined remedial powers of the old common law and equity courts. Action along the same lines has been taken in a number of the American States, and it is much to be hoped that similar action will be taken by the remainder.[2]

Admiralty and Other Special Courts.—The foregoing represents only in part the extent to which the judicial function in the United States has been split up and vested in different tribunals. In the national government will be encountered the term admiralty court. There is no such distinct court, the expression being used to designate a federal court sitting in a special capacity to hear cases arising under admiralty law. When so sitting, these courts have the character of distinct tribunals in that they administer a distinct body of laws and make use of a special procedure in so doing. In the States, provision is often made for special courts, usually known as probate courts but often having some other designation, for the proving of wills and the handling of estates of decedents. Also, there have been created in recent years a large number of special tribunals such as small claims courts, children's courts, domestic relations courts, morals courts, traffic courts, etc. In some cases these are independent tribunals, though usually they are but subdivisions of courts of broader jurisdiction to which have been given special names in order to indicate the character of the cases handled by them.

Trial Courts and Appellate Courts.—Yet one other feature of judicial organization remains to be considered, namely, the distinction between courts whose function it is to try, in the first instance, issues requiring adjudication, and courts whose function it is to review the action of such courts. The need for such a review is found in two facts: the necessity for a unified interpretation of the law, and the belief that means should be provided by which errors

[2] For an excellent consideration of the desirability of the merger of law and equity, and the steps taken to accomplish it in the United States, see "Merger of Law and Equity Under Codes and Other Statutes" by William F. Walsh, *New York University Law Review*, January, 1920.

committed by trial courts may be corrected. The trial of cases in the first instance is necessarily entrusted to a large number of courts, each exercising jurisdiction in a particular district. Unless provision is made by which their decisions may be passed upon by a single tribunal whose determinations have a general force, there may be as many interpretations of the law as there are trial courts. As regards the second point, trial courts are, after all, but human agencies and, like all human agencies, are liable to err. If practical means can be found to detect and correct these errors, it would seem that they should be employed.

To meet this situation, the judicial system of the United States makes provision for trial courts and other courts, known as superior or appellate courts, one of whose functions it is to pass in review the action of the trial courts, and, where conditions justify, to modify their decisions or to order that the case at issue be tried again. We have characterized this duty as one of their functions, since the provision is not unusual that these courts shall also be courts of original jurisdiction for the more important cases. Thus they often have both original and appellate jurisdiction.

Though the desirability of provision being made for review of the action of inferior trial courts is clear, the form that this provision shall take presents questions of great importance. At best, the enforcement or protection of rights through court action imposes heavy expense upon both the government and litigants, and usually entails delay. These drawbacks to judicial action are necessarily increased by the grant to the defeated party of the right to carry his case upon appeal to a superior court. Where the matter at issue is of relatively little importance, the expense entailed, not to speak of the delay, may more than offset the gain to be secured, even by the successful party. This condition of affairs can, to a considerable extent, be met by various devices: by limiting the right to appeal to those cases involving amounts of considerable importance or rights of a material character; by providing that the right of appeal, even in these cases, shall lie only where the superior court, upon the matter being brought to its attention, decides that the circumstances are such as to make an appeal desirable; and by

providing that appeals shall be only in respect to the manner in which the trial court has construed the law or applied the rules governing court proceedings. The application of these devices would mean that action of the trial court would be definitive in so far as the determination of the facts is concerned, and that the trial court's action, even in respect to the construction of the law and the application of the rules of court procedure, would be subject to review only where the superior court holds that such review is desirable.

Although these devices are well known to the legal fraternity, conditions in respect to their application are far from satisfactory in the United States. It is the general opinion of students of our judicial system that the right of appeal has been given an extension far greater than circumstances require, and that, as a result, the expense and delay now accompanying the administration of the law in the United States are such as greatly to weaken the enforcement of the criminal law and to result in what amounts, in many civil cases, to a denial of justice to private litigants. This situation is further aggravated by the provision which exists in many of the States for not merely one but two appeals, first to an intermediate court of appeals, and then to the highest court of the State. The correction of this condition of affairs by a more intelligent application of the devices that have been mentioned constitutes one of the important reforms needed in our judicial system.

Unification of the System of State Courts.—It will be seen from the foregoing that the judicial organization of the United States is one of extreme complexity. In addition to the civil system of federal and State courts, the States, in making provision for the discharge of their judicial function, have created a multiplicity of judicial tribunals each having a more or less independent status and subject to no central direction and control. This diffusion of the judicial power gives rise to conflicts of jurisdiction, diversity of practice that is confusing and a waste of judicial energy.

These conditions, which once existed to an equal extent in England, have now been largely corrected in that country by the passage of the famous judicature acts of 1875-1878, one of the most

important features of which was the integration of all but the local or county courts into a single Supreme Court of Judicature—a system under which the several trial courts, instead of being independent tribunals, became but subdivisions of a single court and thus subject to a unified direction and control. The success of this reform has led to a strong movement in this country for similar action by our States. The arguments in favor of it are many, and have been set forth convincingly in a report submitted to the American Bar Association in 1909 by its Committee to Suggest Remedies and to Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. They are, however, too numerous and of too technical a character to permit of their being presented here. It may be said, however, that, in the opinion of those who have given most thought to the improvement of our judicial system, action of this kind constitutes one of the most outstanding reforms needed to put the administration of the law in the United States upon a more satisfactory basis.

CHAPTER XXV

THE JUDICIAL BRANCH: PROCEDURE

A properly organized system of courts lays only the basis for an official discharge of the judicial function. If results are to be satisfactory, there must be rules of procedure so devised as to ensure that this system will work with economy and dispatch, while at the same time giving due protection to the rights of all interested parties. In no respect is our judicial system more open to criticism than as regards this factor. To the character of the rules governing the procedure of our courts must, in large part, be attributed the excessive cost, the interminable delays, and the frequent miscarriages of justice that characterize the administration of the law in the United States. The technical character of the questions involved prevents any detailed examination here of the problem of working out a satisfactory system of court procedure. The best that can be done is to indicate those more fundamental features in respect to which our procedural system is defective and the lines of action that should be taken for their correction.

Legal Basis and Controlling Force of Rules of Judicial Procedure.—As has been repeatedly pointed out in the preceding pages, the most important question presented in providing for the setting up and defining the powers of governmental agencies is the selection of the authority in which shall be vested these determinative powers. And, as has been shown in our consideration of the legislative and administrative branches, the rule-making power has wisely been left largely to these instrumentalities. The arguments in favor of so doing are: the greater competence of the service having actual responsibility for the performance of work to determine the manner in which such work shall be performed; the greater ease with which the rules as originally framed may be modified from time to time as new needs arise and experience is gained; the greater flexi-

bility in the application of the rules to particular cases; and the subordination of the controlling force of such rules to the substantive rights of the parties involved.

In marked contrast with this wise policy as regards legislative and administrative action is that pursued by American governments in respect to the procedure governing court action. Not only do most of the American constitutions contain provisions prescribing many of the most essential features of judicial procedure, but the legislatures have very generally taken to themselves the task of framing in considerable detail the procedure to be followed by the courts. Only to a limited extent, therefore, do the courts work under systems of rules that have been framed by themselves.

The bad results following from the adoption of this policy are evidenced only in part by the faulty character of these rules imposed upon the courts, and by the lack of flexibility in their application to specific cases. Far and away the greatest evil resulting from it is that the rules, emanating as they do from a superior authority, are deemed to have controlling force upon the courts, and that any failure in respect to their observance, even though such failure may relate to a matter of minor importance and one in no way prejudicial to the real rights of the parties, is deemed to lay the basis for the invalidation of the proceedings of the court and the ordering of a new trial. As the *Journal of the American Judicature Society* puts it, the fixing of the rules of procedure by legislative enactment "exalts mere procedural rules to the realm of substantive rights, thus multiplying the number of issues to be tried and making our litigation more and more an inquisition into non-essentials." [1] More than anything else is this feature of our judicial system responsible for the prevalence of appeals from trial courts to courts of review, for the consequent added delay and expense in reaching final decisions, and for what, in practice, amounts in not a few instances to a practical denial of justice, due to the fact that the decision so often rests upon the mere technicalities of procedure employed, rather than the substantive rights involved.

[1] June, 1917.

In no other country having a developed system of jurisprudence do such conditions exist. In England, the principle that the framing of rules of procedure should be a function of the judiciary finds full sway. It was thus possible for Lord Bowen, one of the great English judges, in his jubilee essay on "The Administration of Law" in connection with the celebration of the fifteenth anniversary of Queen Victoria's succession to the throne, to write of the English system:

> A complete body of rules—which possesses elasticity and which (subject to the vote of Parliament) is altered from time to time by the judges to meet defects as they appear—governs the procedure of the Supreme Court and all its branches. In every court, whatever its character, every possible relief can be given with or without pleadings with or without a formal trial, with or without discovery of documents and interrogatories, as the nature of the case prescribes—upon oral evidences or affidavits as is most convenient. Every amendment can be made at all times and all stages in any record, pleading or proceeding, that is requisite for the purpose of deciding the real matter in controversy. It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy and have not been diminished pari passu with other abuses. But the law has ceased to be a scientific game that may be won or lost by playing some particular move.

For years it has been recognized by those who have given thought to the improvement of our system of administration of justice that this possibility of litigation being decided upon technical grounds rather than upon substantive rights constitutes one of the gravest defects of our judicial system. Much can be done by appellate courts refusing to set aside decisions where the errors committed by the trial courts are not of a character to prejudice substantive rights. However, conditions cannot be made thoroughly satisfactory until the English system of vesting the rule-making powers in the courts, subject of course, to the reserved right of the legislature to override such rules, is adopted. Important action in this direction has been taken by Congress in respect to the federal judicial system, but much remains to be done in this way by our State legislatures in respect to their judicial systems.

Rôle of the Judge.—Closely related to the matter of the location of the rule-making power is that of the rôle that shall be assigned to the judge in directing and controlling proceedings. Here again the system of the United States is in marked contrast with those of other countries. In England, and to a still greater extent in the countries of continental Europe, the judge is given the affirmative responsibility of controlling proceedings; that is, of seeing that all pertinent facts are brought out, of restraining counsel from putting improper interrogatories to witnesses or making improper appeals to the emotions of the jury, of himself interrogating the witnesses when, in his opinion, counsel have failed to bring out pertinent facts by their questioning; and finally, in his summing up of the case, not only to point out to the jury the law governing the matter at issue, but to analyze and comment upon the testimony produced by the parties in such a way as to aid the jury in reaching its decision. In the United States, the rôle assigned to the judge is little more than the negative one of acting as a moderator or umpire, with the duty merely of seeing that the rules of the game are properly observed.[2] The result is to give to the whole proceeding the character of a judicial duel in which success is often dependent as much upon the skill displayed by the representatives of the parties in presenting their sides of the case and in taking advantage of all possible technicalities of the rules as upon the substantive rights involved.

Regarding the relative merits of these two systems there can be no doubt. The English and continental system is right and the American system is wrong. In principle, the affirmative duty rests upon the government to see that justice is done, and it fails in its duty if the issue is left to depend upon the relative skill with which the parties to the dispute conduct the contest. As Edson R. Sunderland, one of our leading students of jurisprudence, has said:

> There is no difference in principle between a decision based upon a contest of procedural skill between two attorneys and a decision based upon a contest of strength between two armed champions. We smile when we are told that

[2] This applies specially to the State courts. Federal judges, to a greater extent, exercise the powers possessed by English judges.

trial by battle, although actually obsolete, was a lawful method of trying cases in England until abrogated by Parliament only about a hundred years ago, and we marvel that a sensible nation should so long tolerate such an anomaly. But while in England trial by battle existed only in the musty pages of the law books and was rediscovered then by accident, in the United States trial by battle flourishes throughout the length and breadth of the land, with the court rooms as the lists, the judges as the umpires and the attorneys, armed with all the weapons of the legal armourer's cunning, as the resourceful champions of the parties. It is a system which is steadily destroying the confidence of the people in the public administration of justice.

Practically all of the various commissions that have been appointed in recent years to suggest means for improving the administration of justice in the United States comment upon this feature of our judicial system and recommend action looking to the adoption of the principle followed by England and other countries.

The Petty Jury System.—Another dominant feature of the American judicial system is the use of a jury of twelve men, not constituting a part of the permanent personnel of the court, but selected *ad hoc* from among the general body of citizens, for the determination of the facts and the rendering of a verdict or decision in actions at law. Though, to a certain extent, the jury is known in other countries, in none does it play so prominent a rôle as in the United States, not even of England, where it had its origin.

The rise of this institution, supplanting as it tended to do such primitive devices for determining rights, guilt, or innocence as compurgation, trial by battle, and trial by ordeal, undoubtedly represented a great advance in the development of a system of administering justice. It, moreover, proved one of the most powerful means in the hands of the people for protecting themselves against the arbitrary and tyrannous action of the government at a time when that government was an autocracy and the principle of an independent judiciary had not been firmly established. As in the case of so many political institutions, it may well be, however, that this institution, which has rendered such important services in the past, is no longer equally adapted to modern changed conditions, the most important of which, from the standpoint of the administration of justice, are: the transformation of the government from

an autocracy to a popular government; the creation of an independent judiciary; the development of a great body of law defining rights and remedies; and the increase that has taken place in the volume and complexity of cases coming before the courts for adjudication. That the use of the jury complicates the problem of the administration of justice, adds greatly to the expense of court proceedings, and is often productive of miscarriages of justice, no one can question. In no small degree, it is responsible for the complicated and technical rules of evidence that are a distinguishing feature of our jurisprudential system, which, in turn, is provocative of the setting aside of the decisions of trial courts on the grounds that they have not been properly applied.

It is due to these and other considerations, which limitations of space prevent our entering into more fully, that, in the opinion of many, the time has arrived when the scope of operation of the jury system should be restricted, and, if continued in use, should be materially modified in operation. Proposals looking to action in this way distinguish between the use of the jury in civil and in criminal actions; and, in the criminal class of actions, between those where the offense is a felony, particularly one calling for capital punishment, and those of a less serious nature calling for a lesser punishment. It is thus held that the arguments in favor of the use of the jury in civil actions are far less strong than they are in those of a criminal character. It is one thing for a body of untrained men to determine the single issue of guilt or innocence, and quite another to determine the relative rights of parties to civil issues which are often of a highly technical and complicated character. The proposal for the restriction of the use of the jury that has the greatest support is, therefore, that of discarding its use in all civil actions. In support of this proposal, it is pointed out that at the present time a not inconsiderable proportion of civil actions —those, namely, brought in courts of equity—are tried without the use of a jury, and no one holds that justice is not as well administered in those courts as in courts of law. As regards the use of the jury in criminal cases, the feeling is strong that, where the penalty that may be imposed is one of death or long imprisonment

the use of a jury offers a safeguard against possible error in declaring guilt that is not present where the decision has to be made by a single judge. In the field of criminal law, proposals thus usually take the form of the elimination of the jury in the trial of cases of less serious character.

Proposals looking to the modification of the jury system address themselves to such points as the size of the jury; the method of its selection; and the requirement of unanimity in order to render a verdict. There is nothing sacrosanct about the number of twelve. It may well be that in the case of civil actions at least, a reduced number of persons required to constitute a jury would still meet all the ends sought to be achieved by the use of a jury, while both expense and the likelihood of failure to reach an agreement would be correspondingly diminished. The arguments in favor of unanimity in order to reach a verdict are also evidently much less strong in the case of civil actions than in those of a criminal character. It should be pointed out that these proposals for the restriction of the use of juries and the modification of the system are not alternative modes of action. Action in both ways can be taken in seeking to bring this institution more into conformity with modern conditions. These proposals have received great attention in recent years by commissions appointed by the States to consider reforms needed in their judicial systems, and in not a few cases affirmative action has been had.[3]

Other Problems of Organization and Procedure.—In the foregoing we have considered only those problems that are of basic importance in determining the character of our judicial system. There are, however, many other problems and proposals for improving our system of judicial administration which limitations of space prevent us from considering. Such, for example, are the steps that can be taken for lessening the amount of crime and litigation; for providing means by which matters in dispute may be settled without recourse to formal trials in court as, for example, by meth-

[3] In certain States, notably Maryland, the law permits the accused, even in cases of serious crime, to waive his right to be tried by a jury, a right that is frequently exercised. In these cases, he is tried by the Court, i.e., the judge.

ods of conciliation and arbitration; for lessening the labor of courts in the trial of civil actions by the greater use of subordinate agencies of the courts in the way of masters along the lines of those employed in English courts; for improving the methods of securing discovery of important documents and facts prior to the actual trial; for reforming our whole system of releasing persons convicted of crime upon probation, or, subsequent to their incarceration, upon parole; for limiting the functions of courts in criminal cases to the determination of guilt and leaving it to a separate body, acting for all the courts, to fix the penalty and at the same time to have responsibility for the administration of such probation and parole systems as may be established; for fixing upon a more satisfactory basis the status of the bar, its responsibilities for the formulation and enforcement of a code of legal ethics, and the control of admissions to the bar; for devising better methods of handling the question of insanity when offered as a defense in criminal actions; and for thoroughly overhauling our whole system of bankruptcy administration by the courts. Indeed, it is hardly an exaggeration to say that there is scarcely a feature of our judicial system that is thoroughly satisfactory and in respect to which important improvements cannot be made. It is a matter of congratulation, therefore, that the existence of these deficiencies is now generally recognized, and that energetic efforts are being made for the correction of them through such agencies as the American Bar Association, the State and local bar associations, the American Judicature Society, specially created commissions of inquiry, and, finally, the judicial councils which have been created in many of our States for the study of their respective systems of judicial administration and the suggesting of measures for their reform.

CHAPTER XXVI

THE JUDICIAL BRANCH: THE PROBLEM OF AN INDEPENDENT JUDICIARY

In the foregoing statement of the problems involved in the organization of the judicial branch of a government, we have refrained from making more than incidental mention of one factor, notwithstanding its supreme importance, since it is of so special a character and so vital that special consideration needs to be given to it. Reference is here made to the imperative requirement that the judiciary shall be so organized that it will have complete independence in performing its duties. By this is meant not merely that courts in adjudicating disputes shall be free from all social, political, or other private influences but that they shall be free from all dictation or control on the part of the other branches or officers of the government. Courts have the function of adjudicating not merely private disputes but those arising between individuals and the government and, if need be, between different branches of the government itself.

In our study of the different types of government, we have seen that the greatest advance made in the political field has consisted in the establishment of the principles that governments shall be ones of law, instead of authority, and that there are certain fields of individual action into which governments should not enter. If these two great principles are to be maintained—if assurance is to be had that government officers shall not act arbitrarily but that all their acts shall be in strict accordance with law, and that all individuals shall be protected in the enjoyment of the fundamental rights and liberties guaranteed by the constitution—responsibility must be placed somewhere for taking the action that will ensure that these conditions are lived up to. It is upon the courts of the land that this responsibility falls. Manifestly, if they are to per-

form this duty, they must be so constituted that, not only can they act without fear of personal consequences, but can exercise the power required in order to secure compliance with their determinations.

Need for an Independent Judiciary in a Popular Government.—It might seem at first that this problem of securing a due compliance with law by officers of the government and the guarantee of individual rights as against the government would arise only in the case of governments of an autocratic character; that it will not arise in the case of a popular government where the final control of political affairs is in the hands of the people themselves. This, however, is not so. Popular government, as has been pointed out, is necessarily government by a majority. The danger is thus always present that a majority of the people may use its powers in an arbitrary manner to oppress the minority. When one considers the extent to which the people of a country, even with a comparatively homogeneous population, are divided into classes, separated by race, color, territorial and economic interests, religious beliefs, and other factors, it can be seen how real this danger is. It has been truly said that no tyranny is so great as that of a majority. One of the great problems confronting a people in establishing a popular government is thus that of providing means by which this danger may be avoided. Experience has shown that this can be done in but one way; namely, by entrusting to the courts the duty of seeing that no branch of government, nor all the branches combined, shall take any action contrary to law or in violation of the rights guaranteed to individuals.

The result of doing this is to give to the judicial branch of government a status quite distinct from that of the other branches. In the first place, it occupies the anomalous position of at once being a branch of government and yet in a sense, standing outside and independent of it in order that it may control the government. Secondly, courts are in the equally anomalous position of being agents of the people and yet not representative of the people in the same way as the other branches, since their duty is, not that of carrying out the will of the people as represented by a majority

of such people, but, on the contrary, of protecting the minority, no matter how small, whenever their rights are threatened or interfered with by such majority. As stated by Mr. Rome G. Brown in an exceedingly able paper: [1]

> One of the chief functions of our courts is to stand between the legislature, although that body may for the time represent the majority of the people, and the individual or individuals who may for the time comprise the minority, and to prevent an infringement by the majority, through the legislature representing them temporarily, of the rights guaranteed to the individual or it may be an entire minority.

No one has described this peculiar status of the judiciary, and expressed its special function of protecting the minority, better than former President William H. Taft. In his message to Congress vetoing the resolution providing for the admission of the Territories of Arizona and New Mexico as States in 1911, due to their constitutions containing clauses which, in his opinion, failed adequately to protect the independence of judges, he said:

> The executive and legislative branches are representative of the majority of the people who elected them in guiding the course of the government within the limits of the constitution. They must act for the whole people, of course; but they may properly follow and usually ought to follow the views of the majority which elected them in respect to the governmental policy best adapted to secure the welfare of the whole people. But the judicial branch of the government is not representative of a majority of the people in any such sense, even if the mode of selecting judges is by popular election. . . . They are not popular representatives.

Again in an address on the "Judiciary and Progress," delivered at Toledo, Ohio, on March 8, 1912, he said:

> But the judiciary are not representative in any such sense, whether appointed or elected. The moment they assume their duties they must enforce the law as they find it. They must not only interpret and enforce valid enactments of the legislature according to its intention, but when the legislature in its enactments has transgressed the limitations set upon its power in the constitution the judicial branch of the government must enforce the fundamental and

[1] Address on "Recall of Judges" before the Minnesota State Bar Association, July 19, 1911.

higher law by annulling and declaring invalid the offending legislative enactment. Then the judges are to decide between individuals on principles of right and justice. The great body of the law is unwritten, determined by precedent, and founded on eternal principles of right and morality. This the courts have to declare and enforce. As between the individual and the State, as between the majority and the minority, as between the powerful and the weak, financially, socially, politically, courts must hold an even hand and give judgment without fear or favor. In so doing they are performing a governmental function, but it is a complete misunderstanding of our form of government or any kind of government that exalts justice and righteousness to assume that judges are bound to follow the will of the majority of an electorate in respect of the issue for their decision. In many cases before the judges that temporary majority is a real party to the controversy to be decided. It may be seeking to deprive an individual or a minority of a right secured by the fundamental law. In such a case, if the judges were mere representatives or agents of the majority to carry out its will, they would lose their judicial character entirely, and the so-called administration of justice would be a farce.

Means of Securing an Independent Judiciary.—With this understanding of the special function of courts to control the government, to see that no one of the branches exceeds its powers, and that no temporary majority shall infringe the rights of the minority, the question is presented of the best means by which assurance may be had that such bodies shall have the independence that will permit them fearlessly to discharge this duty. The best answer to this is found in the provision that judges shall be selected without regard to their political affiliations, that, once selected, they shall hold office for a long term, for life, or during good behavior, that they shall not be subject to dismissal by the executive, may be removed only for misconduct as established by a very formal process of impeachment or address on the part of both houses of the legislature, and that their compensation shall not be withheld or diminished during their terms of office. In England these principles were established only as the result of a long struggle between the people and the Crown. Down to and through the period of the Stuart kings, judges held office at the pleasure of the king. They were dismissed if they thwarted the will of the king, with the result that they were in many cases but his servile agents. In the revolution of 1688, one of the great reforms insisted upon was that judges should hold

office during good behavior. This was resisted by the king, but was finally secured by the Act of Settlement. Later, provision was made that their salaries should not be reduced during their term of office and that they should be removable only upon conviction for some serious offense or upon an address, that is, petition, on the part of both houses.

The great importance of giving independence to the judiciary was fully appreciated by the framers of our constitution. In providing for the organization of the judicial branch, the provision was thus made that the judges should be appointed by the President and should hold their office during good behavior and should receive for their services a compensation which should not be diminished during their continuance in office. It results from this that federal judges may be removed from office only through the process of impeachment. This tenure and method of selection have been adopted for two reasons; one, the belief that more competent judges will be secured in this way; and, two, the removal of the selection of judges from the field of partizan politics.

It is to be regretted that this policy has not been followed by the individual States in providing for their judicial systems. In most of the States, judges are elected by the people, and in many cases the term of office is short. In all cases, however, provision has been made against the arbitrary dismissal of judges by the executive. The opinion of students of our government is almost unanimous that the federal method is superior to that of the States and that it is largely due to this difference that the federal judiciary has proved far superior to that of the States. Efforts are consequently being constantly made in the States to have the federal plan adopted.

Powers of the Courts to Control Their Proceedings and Enforce Their Decisions.—If the objects sought by an independent judiciary are to be attained, one thing further is necessary. The power of judges to render decisions free from coercion or undue influence would be largely a futile one, did the judges not have the independent power of: (1) bringing before them for trial persons charged with the commission of crime; (2) compelling the at-

tendance and the giving of testimony by persons believed to have pertinent information regarding matters at issue; and (3) enforcing compliance with their orders and decisions. From the earliest times in England, and continuing down to the present in both England and the United States, the courts have assumed, or have had conferred upon them, the exercise of these essential powers. In a criminal action, the defendant is usually already in the custody of the prosecuting office of the administrative branch of the government and is produced by it before the court at the proper time. When this is not true, the court can itself issue what is known as a bench warrant of arrest directing the apprehension and production in court of the person accused. In a civil case, the person whose conduct is complained of is notified of the complaint, and, normally, will voluntarily appear to defend himself. Should he fail to do so, the court may proceed to the hearing of the complaint and give judgment "by default." The attendance of witnesses is compelled through the issue by the court of orders known as subpoenas addressed to them and directing their appearance and the production of any pertinent records and papers that may be in their possession. Should they fail to obey such order or to answer any proper interrogatories addressed to them, the court may declare them guilty of contempt of court and order their punishment by imprisonment or fine. The enforcement by the courts of their decisions is secured through the issue of so-called writs directing the action decided upon as proper to be taken—such, as, for example, a "writ of execution" directing the seizure of the property of the defendant and its sale in satisfaction of a judgment rendered against him, or a "writ of ejectment" ordering the ejectment of the defendant from real estate which he holds, and which the court finds to belong to the complainant, or "writs of mandamus," "restraining orders" or "injunctions" directing, or restraining, the taking of action held by the court to be proper.

For the enforcement of these orders, all courts are provided with an executive officer, known as a sheriff or marshal, who, in respect to the performance of this duty, is subject to the direction and control of the court alone. The authority of this officer to use force,

if necessary, in carrying out his orders is made effective by his right to swear in as his deputies as many assistants as he may need in executing his orders, or, in extreme cases, to summon what is known as a "posse comitatus," that is, the whole power of the community, or any part of its able-bodied inhabitants on whom he may desire to call. Failure on the part of any person to obey such summons is a legal offense calling for punishment by the court.

Generally speaking, the whole situation in respect to the independence of the American judiciary and its independent powers of action is satisfactory. It need hardly be said that the absence of an independent judiciary possessing adequate power to protect the citizen against arbitrary action by the executive and administrative branches constitutes one of the greatest objections that is brought against the modern authoritarian governments.

CHAPTER XXVII

THE ADMINISTRATIVE BRANCH: PROBLEMS OF GENERAL ADMINISTRATION

Repeatedly in the course of this study we have had occasion to point out the transformation that has taken place in the character of the problems under consideration because of changed conditions. Of no problem is this more true than of those having to do with the conduct of the administrative branch, that branch whose function it is to put governmental policies into execution. As the writer has elsewhere written: [1] At the time our political institutions were taking form, attention was largely concentrated upon what may be termed the purely political problems of securing a form of government under which the popular will regarding the conduct of public affairs should find adequate expression; of reducing to a minimum the danger of the assumption by any officer or branch of the government of undue powers; and of the protection of the individual in the possession and exercise of what were believed to be his natural and inherent liberties and rights. From the standpoint of action, the idea dominant was that the sphere of government action should be kept as limited as possible.

Wholly different are conditions at the present time. The performance of the so-called essential functions of government now constitute but a relatively small part of its total activities. No longer is there an *a priori* assumption that a widening of the sphere of public action is an evil. The province of government is now held to embrace all forms of activities which contribute in any way to the promotion of the public welfare. There is hardly a field of activity into which our governments have not entered. Their operations are now on a vast scale and require for their performance an organization exceeding in size and complexity that of any private

[1] *Principles of Public Administration,* Preface.

undertaking, a huge personnel and an expenditure of no small part of the total income of the people. It results, therefore, that among the problems of present-day governments, those having to do with the administrative branch are second to none.

Analysis of the Problem of Public Administration.—In undertaking a study of any complicated problem, the first step to be taken is that of subjecting the problem to analysis to the end that the several factors entering into it may be clearly determined. Doing this, it will be found that the problem of making provision for, and of performing the work falling upon, the administrative branch of government may be resolved into the following five clearly distinguishable, though intimately related, factors:

1. Problems of general administration
2. Problems of organization
3. Problems of personnel
4. Problems of matériel or supply
5. Problems of finance

Persons responsible for the determination of the manner in which the work of the administrative branch of the government shall be performed have, in other words, to do the following five things: They must, in the first place, reach certain fundamental decisions in respect to the location and exercise of the general function of direction, supervision, and control. This part of the problem of administration is technically known as that of general administration, or sometimes as overhead administration. They must, next, determine the structural character or organization of the service or services by means of which the actual work of administration is to be performed. This is a problem which is comparatively simple where but one category of work is to be performed, and where, consequently, but one service is required for its performance, as in the case of most private industrial and commercial enterprises, but is correspondingly complicated and difficult where, as in the case of a government, a great variety of work has to be performed and a large number of services must be maintained for its performance. Thirdly, they must make provision for the manning of this organization with a personnel and must determine the

conditions under which such personnel will give their services. Fourthly, there is presented to them the problem of securing the physical property in the form of plant, equipment, and supplies to be made use of by the personnel in discharging their duties. Finally, a decision must be reached regarding the manner in which all matters of finance, such as determining and making provision for the financial needs of the services, the custody and disbursement of funds, the keeping of accounts and the rendition of reports, etc., shall be cared for.

In the present chapter will be discussed the problems presented under the first of these five heads—that having to do with general direction, supervision, and control.

The Legislative Branch in American Governments the Source of All Administrative Authority.—In our consideration of the legislative branch, it has been pointed out that one of the most important functions of our legislative bodies is that of acting as the board of directors of the government corporation, and that, contrary to popular belief, these bodies, and not the chief executive, is the source of all administrative authority. This is clearly brought out in a very able Senate report on a bill having for its purpose to authorize the heads of departments to appear personally and participate on the floor of the two houses in debates on bills in which they are interested.[2] After enumerating the executive powers of the President, as granted to him by the constitution, the report continues.

> The departments and their principal officers are in no sense sharers of this power. They are the creatures of the laws of Congress exercising only such powers and performing only such duties as those laws prescribe. . . . The Secretaries were made heads of departments; they were charged with certain duties, and invested by law with certain powers to be used by them in the administration confided to them by the laws. They were in no sense ministers of the President, his hand, his arm, his irresponsible agent, in the execution of his will. There was no relation analogous to that of master and servant, or principal and agent. The President cannot give them dispensation in the performance of duty or relieve them of the penalty of non-performance. He cannot be impeached for their delinquency; he cannot be made to answer before

[2] 46 Cong. 3 Sess., Senate Report, 837, February 4, 1881.

any tribunal for their inefficiency or malversation in office: public opinion does not hold him to stricter responsibility for their official conduct than that of any officer. They are the creatures of law and bound to do the bidding of the law.

This constitutional power of Congress to keep the reins of final administrative control in its own hands rather than in those of the President has been amply sustained by the courts.[3]

This fact, that the legislative branch, in American governments, at least, is the source of all administrative authority, and, in the exercise of this authority, acts in the capacity of a board of directors, constitutes the starting point for the consideration of all problems of the administrative branch as they arise under our form of government, since in this branch is vested the discharge, in the first instance, of the exceedingly important function of general administration.

Distinction Between the Possession and the Direct Exercise of Administrative Authority.—The fact that an organ possesses a given authority by no means carries with it the necessity that such authority be directly exercised. The organ can, if it chooses, delegate such exercise to subordinate agencies created by it, retaining to itself merely the determination of duties, the fixing of the rules that shall govern such agencies in the discharge of their delegated powers and duties, and the exercise of such supervision and control over their action as it deems necessary in order to assure itself that its orders are being properly carried out. This, it need hardly be said, is the policy that, as a matter of practical necessity, has been followed by our legislative bodies. The adoption of it, however, gives rise to many questions. The most important of these center around the problem of the extent to which the legislature shall attempt by direct legislative enactments to prescribe in detail the activities to be engaged in, the particular agencies to which the performance of such activities shall be entrusted, the character of organization of such agencies, the personnel with which they shall be manned, the rules that shall govern

[3] See especially, Kendall v. United States, 12 Peters, 524.

them in their operations, and the limitations under which they shall rest in respect to the expenditure of funds.

In handling these matters, a legislature is confronted with opposing considerations which are difficult to harmonize, but which must be harmonized if an efficient administrative system is to be secured. A too-detailed specification and control over what shall be done and the means and procedure that shall be employed in doing it, is productive of harm in three ways: it results in ill-advised action, since it involves the making of decisions which can be intelligently made only by those actually in charge of the work to be done and thus familiar with the conditions to be met; it weakens the sense of responsibility of administrative officers; and it makes it impossible for those officers to adjust their actions to varying needs and do those things which must be done if efficiency and economy are to be secured. On the other hand, a too-general specification of what shall be done and a too-large grant of discretionary powers, accompanied by an inadequate system of supervision and control, means that the legislature has failed properly to discharge its duty of determining the activities to be engaged in and the conditions under which they shall be performed and throws open the door to administrative abuses of a wide range.

It cannot be said that our legislative bodies have met these problems in a satisfactory manner. Their conduct has been marked by great inconsistencies. In some cases, powers of the broadest character have been conferred, while, in others, no provision in respect to internal organization, personnel, or procedure has been of too petty a character to escape statutory regulation. In general, their chief delinquency has been their failure to appreciate the distinction between the exercise of control through specification in advance and that through the requirement of full accounting for action taken. In the one case, the legislature controls by specifying in detail precisely what shall be done and the means that shall be employed in doing it. In the other, it gives its directions in general terms, but provides that the officers charged with their execution shall furnish it with detailed data regarding their action. As between these two systems, there can be little question that the latter

is the superior. Unfortunately, the former is the method commonly employed by our legislative bodies. They have made this choice not so much because they have desired themselves to regulate details, but because it has appeared to them as the only means of control. They have failed to recognize the effectiveness of the control that may be exercised through the second method.

Means of Legislative Supervision and Control of the Administration.—So important is this function of the legislative branch of exercising supervision and control over the administrative branch, and so inadequately is this function now being performed by our legislative bodies, that it is desirable to set forth in some detail the means that are available to these bodies for its exercise.

As has been pointed out, the relationship between the legislature and administrative agencies is that of principal and agent. Now, it is a canon of administration that all grants of authority should be accompanied by means for ensuring that such grants are properly exercised. To state this in another way, it is imperative, if proper administration is to be secured, that the organ granting the authority shall provide means by which it, as principal, shall be able to exercise a due supervision and control over its agents and be in a position to hold them to a strict accountability for the manner in which they discharge the duties imposed upon them. A legislature has thus performed but a part of its duties when it has provided for administrative agencies to act on its behalf and has instructed them in respect to their powers and duties. It is still incumbent upon it to make adequate provision for ensuring that these agents properly perform their duties.

A study of the problem shows that the means through which this supervision and control may be exercised and accountability enforced are the following: (1) the requirement that all administrative officers shall keep proper records of their official acts; (2) the requirement that these officers shall, at stated intervals, and at least once a year, submit reports giving a full account of their acts; (3) the requirement that accurate accounts shall be kept of all financial transactions and reports of such transactions be made in such form that full information regarding their character is furnished; (4) the

provision for a system of examination or audit of these accounts with a view to determining their accuracy and legality; (5) the provision for the consideration by the legislative bodies, acting directly or through properly constituted committees, of the administrative and financial reports with a view to determining not merely the legality of the action taken, but the efficiency and economy with which official duties have been performed; (6) the requirement that administrative officers shall furnish information regarding specific acts when called upon so to do by the legislative body; and (7) the provision for special investigations or inquiries of a comprehensive character into the manner in which affairs have been conducted by a particular service.

Manifest as are these obligations of legislative bodies, and well known as are the means through which they may be met, there is no feature of public administration that is handled more unsatisfactorily. In no small degree, the inefficiency and waste that characterizes the conduct of public affairs at the present time is due to the failure of legislatures to take the action which is required to hold administrative officers to a due accountability for the manner in which they perform their duties. Though the obligation is a direct one of the legislature, that body has rarely applied itself to the problem of working out the means by which it is to be met. Instead of determining and prescribing the character of records that shall be kept and of accounts and reports that shall be rendered, it has left its agents largely free to do as they please in respect to these matters. The result is that rarely do legislatures secure that information regarding the acts of their agents which it is essential that they should have if they are to determine the fidelity and efficiency with which the latter have discharged their duties. Though all of our legislative bodies make provision for the audit of accounts, the system of audit is rarely a satisfactory one. And still more rarely have these bodies made any adequate provision for considering the facts that are brought out by such audit and of taking the action that such showings reveal to be necessary.

So far as the national government is concerned, a great advance was made by the passage of the Budget and Accounting Act of

1921, which, in addition to providing for the adoption of a scientific budget system, created an independent General Accounting Office, presided over by a Comptroller-General, among whose duties are those of prescribing the system of administrative and fund accounting of the several administrative agencies; of reviewing and finally passing upon all transactions involving the receipt and disbursement of public funds; of investigating all matters relative to the receipt, payment, and application of public funds; and of reporting the result of these inquiries to Congress with such recommendations as are deemed proper.

While the creation of this agency, which is expressly made independent of the executive and the administrative branches and given the status of a direct agency of the legislative branch, has greatly strengthened the means through which Congress may keep itself informed regarding, and exercise control over, the conduct of administrative affairs, a still further step is necessary if the full benefits of this action are to be secured. This consists in taking the action that will ensure that the information thus made available to Congress will, in fact, be utilized; and that the action required to correct defects and improper action thus brought to light will, in fact, be taken. A study of the problem, as well as experience, shows that this end can best be secured by the creation by Congress of a Joint Committee on Public Accounts whose duty it will be to receive the administrative and financial reports of the administrative services and the reports and recommendations of the Comptroller-General, subject them to careful examination, and recommend to Congress the action needed to correct abuses and put the conduct of administrative affairs upon a more efficient and economical basis.

It is a matter of significance that, as set forth by the present writer in his study of the English system of financial administration,[4] real control by the British Parliament over the expenditure of public money was not secured until 1862, when Mr. Gladstone, as Chancellor of the Exchequer, secured the adoption of a stand-

[4] *The System of Financial Administration of Great Britain*, by W. F. Willoughby, W. W. Willoughby, and S. M. Lindsay, Institute for Government Research, 1917.

ing order of the House of Commons making provision for a committee of this character. This committee, which has had an uninterrupted existence since that date, has constituted one of the leading features of the system that Great Britain has built up, step by step, for the administration of her financial affairs. From the start, it has taken its duties seriously and membership on it has been highly prized. A noteworthy feature of its organization is that, with rare exceptions, its chairman has been selected from the opposition, so as to emphasize the non-partizan character of the committees' work. The function of the committee may be broadly stated to be that of annually reviewing the financial operations of the government for the purpose of determining the fidelity and efficiency with which administrative officers have performed their duties.

Regarding the beneficial results of the work of this committee, there can be no doubt. To a considerable extent, it is looked upon as the crowning feature of the whole system of British financial administration. This arises, not merely from the fact that, through it, Parliament is able currently to pass upon the acts of its administrative agents, but also from the great restraining influence that the committee has upon these officers in the expenditure of the funds granted to them.

It has been stated indeed that nothing has a greater deterrent effect on a department than the fear of having to go before the Public Accounts Committee, and that the accounting departments stand more in awe of this committee than of the House of Commons itself, probably because there is less chance of escaping its close scrutiny. The Chairman of the Committee expressed the same opinion to the House. "There is," he said, "a great deal of human nature in the world, and fear is one of the greatest helps in keeping men straight. The fear of the Public Accounts Committee, and the very searching examination that takes place there, does a great deal to keep in the path of rectitude the members of the civil service." [5]

No one can study the work of this committee, and the part that it plays in the system of financial administration of Great Britain without being convinced of the need for such a body in the

[5] Col. A. J. V. Durrell, *The Principles and Practice of the System of Control Over Parliamentary Grants*, London, 1917, p. 112.

Congress of the United States, and, for that matter, in all the legislatures of the States. Without it, it is impossible to secure the objectives actuating the creation of the Office of Comptroller General. As Mr. Martin B. Madden, the first chairman of the House Committee on Appropriations after the passage of the Budget and Accounting Act, 1921, in supporting a resolution providing for a committee of this character, said: [6]

> I have felt, I will say to the gentleman from Virginia, that is the one missing link in our fiscal organization where we are weak where we ought to be strong. If we had such a committee as the gentleman has called to our attention now, it would be a very wonderful assistance to the Committee on Appropriations in studying problems, investigating facts which would enable them to keep in close touch with the Comptroller General and between the Comptroller General and the Expenditures Committee and Appropriations Committee. I think we could, and I feel sure we would, so organize the expenditures after the money is appropriated for them as to keep all the expending officers of the government within the law, to say the least.

Unfortunately, neither Congress, nor the legislature of any of the States has, up to the present time, made provision for an agency of this character.

The Chief Executive as General Manager.—In private business, no one would think of creating a corporation, whose operations were to be on any considerable scale, without making provision for an officer, usually known as general manager, whose duty it would be, acting for the board of directors, to have immediate responsibility for the general direction and supervision of the administrative operations of the corporation. The need for an officer of this character comes from the fact that the board of directors, like political legislatures, is only intermittently in session; that the members, while competent to pass upon matters of general policy, have neither the specialized knowledge, nor the time, to direct and control technical operations; and that, if the several parts of the administrative machinery are to operate in proper relation to each other, they must be brought under a central direction and control. This same need exists in governments whose

[6] Congressional Record, Dec. 10, 1926.

operations are so varied and on such an extended scale. Manifest as this must be, no direct recognition of it is to be found in our federal constitution, nor in those of the States. Fortunately, however, as has been pointed out in our consideration of the executive branch, the President, in the case of our own national government, has come to have much the character and powers of such an officer. This has resulted, partly from his power to appoint and dismiss administrative officers, but primarily from the express grant to him by Congress of authority to direct and control administration activities.

In this evolution, the passage of the Budget and Accounting Act of 1921, which placed upon the President the responsibility of determining what requests should go forward to Congress for the authorization of activities and the grant of funds for their performance, was of special determining force.

Only in exceptional cases, however, has a like condition been brought about in the States. In them, it is usual for many of the heads of the chief administrative services to be elected by the people, with the result that they are not subordinate officers of the governor nor generally subject to his direction and control. Furthermore, where special boards and commissions have been created by the legislature, the members of which are to be appointed by the governor, it is a common practice to give to such members overlapping terms with the deliberate intention of making it impossible for any one governor to control their composition. And, finally, to a far less extent than is true in the case of the national government, the State legislatures have adopted the policy of granting to the governors powers of an administrative character. Due to these and other conditions, the attempt is now largely being made to operate our State governments without the aid of a general manager or, at least, one having adequate powers. Practically all of the surveys of State administration that have been carried out in recent years call attention to this condition and cite it as one of the major defects in our system of State government.

Bureau of General Administration.—The mere grant to the chief executive of the powers of a general manager will, in itself,

accomplish but little, unless provision is at the same time made for means by which he can discharge the duties of that office. Considering his many other duties, it is physically impossible for him, unaided, to familiarize himself with all the details of the organization, activities, and business methods of the numerous operating units, currently to keep in touch with their operations and needs, and to meet his responsibility in respect to the giving of directions and supervising their execution. These requirements can best be met by the creation of a special service, bearing some such name as Bureau of General Administration, which, attached directly to the office of the chief executive, will act as the agency through which the latter can perform his general managerial duties. The need for a service of this nature can be seen more clearly if some further indication is given of the nature of its specific duties.

Examination of the character of the work performed by the organization units which make up the administrative branch of a government reveals that such work falls into two clearly distinguishable classes: those which the services have to perform, or have performed for them, in order that they may exist and operate as organizations or institutions, and those which they perform in order to accomplish the primary purposes for which they have been established. For want of better terms, these two classes of activities may be designated as institutional and functional. The institutional activities embrace such work as the maintenance, care, and operation of plant or quarters; the recruitment and management of personnel; the receipt, custody, and disbursement of moneys; the keeping and stating of accounts; and other like matters. The functional activities consist of the performance of the special or technical duties involved in carrying on the work for the performance of which the services are maintained.

This differentiation of the institutional from the functional activities of the operating services is one of fundamental importance from the standpoint of securing an efficient conduct of public affairs. In the first place, these two classes of activities differ, not only in respect to the purposes for which they are performed, but also in respect to their essential character. Functional activities are

special and technical, and are different for each kind of service. Institutional activities, on the other hand, are similar, if not identical, in character for all services. It is important, therefore, that, as far as is practicable, they should be performed in a uniform or standardized manner. This is desirable, not only in the interest of economy and efficiency, but also in order that the operations of the several services may be compared one with another and consolidated showings of operations made. Especially is it desirable that there should be uniformity in respect to the keeping and stating of accounts. Secondly, as the result of this similarity in character of the institutional activities throughout the government, and the desirability that they should be performed in a uniform manner, it is found advantageous, in many cases, that their performance should be entrusted to specially created central services that will act for all the operating functional units. Finally, and what has a special bearing upon the matter under consideration, is the fact that it is in respect to these institutional activities that the duties of the chief executive as general manager are chiefly concerned. It is not to be expected that a general manager will have the competence to direct and control the varied, technical tasks of the several operating services. Upon him does rest the responsibility, however, of seeing that the administrative branch is properly organized and operated as an institution.

A well organized Bureau of General Administration should thus embrace sections or subordinate units, each in charge of a competent officer, having to do with at least the following matters: (1) finance; (2) personnel; (3) material or supply; and (4) investigations. The nature of the duties of each of these sections will be considered more fully in later pages. It may be stated here, however, that, of these, the first and last named are of special importance. Of all the duties falling upon the chief executive as general manager, much the most important are those of seeing that all legislative requirements in respect to the collection and disbursement of public funds are observed; of seeing that proper records and reports of all such transactions are made; and of annually or biennially, according to the legislative period, proposing and sub-

mitting to the legislature the budget setting forth his financial and work program for the period to be financed. Performance of the detail work involved in meeting these responsibilities will devolve upon the head of the finance section. Due to the nature of his duties, the designation usually given to this officer is that of Comptroller. The importance of the section of investigation arises from the fact that it is through this unit that the Director of the Bureau of General Administration, acting for the chief executive, can make the detailed investigations of the manner in which the operating units are organized and are performing their duties which are essential if assurance is to be had that the structure of the administrative branch and the methods of work employed by it are of a proper character.

Essential as is a service of this kind if the chief executive is to be put in a position where he can properly perform his duties as head of the administration, neither in the case of the national government nor in that of any one of the States has proper provision for it been made. To be sure, in the case of the national government, a beginning has been made in the creation of the Bureau of the Budget. That office, however, has little more jurisdiction than that of acting as an agency of the President for the performance of the detail work involved in preparing the budget. The direction and control of the performance of other institutional activities are intrusted to a number of other agencies. Few things would contribute more to the putting of our whole system of national administration upon a more efficient and economical basis than would the conversion of the existing Bureau of the Budget into a Bureau of General Administration by the transfer to it of responsibilities in respect to the direction and control of the institutional activities of the government that are now scattered among a number of independent services. In the States, there is still less appreciation of the desirability of a service of this character and a correspondingly greater need for action in this way.

CHAPTER XXVIII

THE ADMINISTRATIVE BRANCH: PROBLEMS OF ORGANIZATION

Having made provision for the exercise of the function of general administration, the next problem presented in providing for the conduct of the administrative affairs of a government is that of determining the nature of the organization that will be set up for this purpose.

Two Types of Organization: Independent Services and Departmental.—Examination of the manner in which the administrative branches of our governments, national and State, have been organized reveals that they have been based on two distinct principles, with the result that two distinct types of organization have been developed. For want of better terms, these two types may be designated as the independent, or uncorrelated, and the integrated, or departmental. The independent is that system where each service is treated as an independent unit, having little or no direct relation to other services. Under it the line of authority runs directly from the operating services to the chief executive, or to the legislature by which it was created and is currently directed and controlled. The integrated system is that where the attempt has been made to group all services whose operations fall in the same general field, and which, consequently, should maintain intimate working relations with each other, into departments presided over by officers having a general oversight of them all and entrusted with the duty of seeing that they work harmoniously toward the attainment of a common end. Under this system, the line of authority runs from the several services to the heads of the departments of which they are subordinate units, and from these to the chief executive or to the legislature, whose jurisdiction extends over all the departments.

Superiority of the Departmental System.—Of the relative advantages of these two systems, there can be no doubt. The second, or departmental, is from almost every point of view superior. Its advantages, if properly carried out, are: that it simplifies generally the problem of administration; it correlates the several operating services of the government into one highly integrated and unified piece of administrative mechanism; it ensures the establishment of an effective system of overhead administration and control; it makes definite the line of administrative authority and responsibility; it lays the basis for, if it does not automatically effect, the elimination of duplication in organization, plant, equipment, personnel, and activities; it makes possible effective cooperative relations between services engaged in the same general field of activity that can be obtained in no other way; it furnishes the means by which overlapping and conflicts of jurisdiction may be avoided or readily adjusted; it greatly facilitates the standardization of all administrative processes and procedure; it permits of the centralization of such general business operations as purchasing, the custody and issue of supplies, the recruitment and handling of personnel, the keeping of accounts, the maintenance of libraries, laboratories, blue-print rooms, etc.; and, finally, it furnishes the essential foundation for a properly organized and administered budgetary system.

Requirements of a Proper Departmental System.—The adoption of a correct principle of organization represents, however, but a point of departure in working out a satisfactory system of organization. There still remains the important work of putting this principle into practical application. Many, if not all, of the advantages inhering in the integrated system can be neutralized, if not wholly lost, by a failure to meet the requirements of this system. It is of importance, therefore, that these requirements be carefully determined.

The first of these is that the principle of grouping the several services into departments shall be that of bringing together under separate departments all those services, and those services only, which have the same general function. Concretely, this means that,

as far as is practicable, the departments, viewed in a large sense, shall be unifunctional. The position is often taken that there is some gain in the mere grouping of services into a relatively small number of departments. This is not so. Unless the services so grouped have a real working relation to each other, their grouping departmentally is a positive disadvantage. Such action results in a positive detriment to both the department itself and to such services. As regards the department, it interjects into it discordant and disturbing elements which complicate and render difficult the proper coördination of the services having to do with its essential function and the standardization of their administrative practices and procedure.

As regards the services themselves the placing of them under a department whose primary function is not that of dealing with matters with which they are concerned, not only subjects them to an overhead control that can add little or nothing to their effective operation, but slows down many of their administrative processes through the necessity of securing the approval of the departmental head before any step of importance can be taken. The only case where such superior control is needed, or can be justified, is where there are a number of services whose operations fall within the same general field and where, consequently, it is necessary that there should be some superior authority to see that they work in harmony, that duplication of work is avoided, conflicts or overlapping of jurisdiction prevented, and administrative practices, as far as is feasible, standardized.

A second requirement is that only those services which are of a strictly administrative character be made subordinate units in a departmental system and thus subjected to the superior direction and control, first, of a head of a department and then of the chief executive as the head of the whole administrative system. Examination shows that there are not a few services attached to the administrative branch whose duties are predominantly of a quasi-legislative or quasi-judicial character. Examples of such services, in the case of the national government are: the Interstate Commission, the Communications Commission, the Federal Power

Commission, the Federal Trade Commission, and the like. In respect to such agencies as these, it is undesirable that they should be subject to executive direction and control. In so far as they act in a quasi-legislative character, they should be subject directly to Congress, on whose behalf they are acting; and, in so far as their action has a quasi-judicial character, superior control should be vested in the courts. Mention has already been made of certain other services having to do with matters of general administration which should be attached as subordinate units directly to a Bureau of General Administration.

Existing Conditions in the United States.—It is of interest to determine the extent to which these principles have been followed by American governments. The national government has, from the start, adopted the proper principle of an integrated or departmental system. In doing so, it has not, however, adequately met the requirements as above set forth for the proper application of that system. A number of its departments are far from a unifunctional character. Instances abound where services are attached to departments with whose major purpose or function they have nothing to do, as, for example, where the Public Health Service is attached to the Treasury Department, and other instances exist where activities properly belonging to a single service are distributed among a number of services. These defects in the administrative organization have long been recognized and efforts have been made to correct them. Unfortunately, these efforts have been largely unproductive, with the result that the organization of the administrative branch of our national government is still far from satisfactory.

In marked contrast to the national government, the States uniformly adopted, at the outset, the independent scheme of organization, with the result that their administrative systems came to embrace scores, and in some cases over a hundred, separate services, each acting more or less independently and subject to no general overhead direction, supervision and control. Here too, the disadvantages of this system are now generally recognized, and efforts have been made in recent years to recast it so as to make it

conform to the departmental type—an effort which, in not a few cases, has met with success.

Bureau or Board Type of Organization.—In the foregoing we have considered but the more important problems involved in the organization of the administrative branch as a whole. When we turn to the matter of the organization of the individual operating units, other problems present themselves. Among these, an important one is as to whether the direction of these units shall be vested in a single person, and the units thus be given a bureau type of organization, or shall be vested in a collegiate body and thus be given a board or commission form. Which of these principles should be followed depends upon varying considerations.

In general, it may be said that where the work to be done is essentially of an administrative character, that is, one calling for the direct performance of work, the bureau type of organization should be adopted. Throughout private industry and in governments as well, experience has demonstrated that a prime essential of efficient operation is the definite location of administrative authority in the hands of a single individual rather than the division of such authority among a number of persons. If, on the other hand, the duties to be performed are largely those involving the exercise of discretion on an important scale in the formulation and adoption of policies, in the drafting of rules and regulations having the force of law and affecting private rights, and in the adjudication of claims, grounds exist for the adoption of the board or commission type of organization. This results from the fact that there is an element of danger in vesting such important powers in a single individual, and, furthermore, the collective judgment of a number of persons is more likely to be of a superior character. It is for this reason that services exercising quasi-legislative or quasi-judicial power are usually given this form of organization. Where a service has duties both of an administrative and a policy-determining character, the situation is best met by vesting authority, in the first instance, in a board, or commission, and, at the same time, making provision for an executive officer to be appointed by the board or commission, who will have immediate charge of the

direction of the administrative work of the service. This is the policy that is usually followed in creating services for such works as the maintenance and operation of public school systems, the care of the public health, and the like. In other cases, each member of a commission is placed in charge of a particular class of the administrative duties, while all act as a collegiate body for making decisions in respect to policy and the exercise of the rule-making function.

An excellent demonstration of the validity of the principles above set forth is furnished by the action taken by the national government for the construction of the Panama Canal. So long as the work to be done consisted in determining general policies, that is, the location of the canal, whether at the Isthmus of Panama or in Nicaragua, and the general character of the work, it was quite proper that use should be made of a board or commission. As soon as these decisions were made and the actual work of construction was entered upon, this form of organization immediately began to give trouble. After futile attempts to meet these troubles by changing personnel, President Roosevelt wisely abolished the commission and created in its place a bureau type of organization under which all authority was vested in the hands of a single officer known as Governor. This action at once cleared up the situation, and high efficiency in operation resulted.

Use of Subsidiary Corporations.—Governments are created and maintained primarily for the discharge of certain functions which are usually denominated as political since they have to do with matters affecting the general interests of the people. When governments depart from this field and undertake the performance of work of a purely business character, such as the ownership and operation of railways and other public utilities, they assume responsibilities of a different nature. Their assumption consequently gives rise to problems of organization quite unlike those presented in the case of these other activities. The distinguishing characteristics of these special business enterprises are: that they are revenue-producing, as well as expending, undertakings; that a proper relation should exist between the charges for and the cost

of the services rendered; that their operations are of a highly technical character, requiring an expensive plant and a specially recruited personnel; that many of the provisions of law governing the grant of funds for their operation, the limitations to be imposed upon the expending of such grants, and the rules and regulations governing the operations of the other services generally of the government are inapplicable to them, and, if it is attempted to apply such regulations to them, undue hampering in the performance of their work would result; and that the legislative branch has neither the time nor the capacity to direct and control their operations in the same way that it does the other services.

These considerations can be completely met only by segregating the organization and operation of each of these enterprises from the general organization and operation of the administrative branch, and granting to each what is known as financial and administrative autonomy, a mode of procedure that can best be put into effect by entrusting the conduct of its affairs to a specially created corporation. The advantages of following this policy are many. In the first place, it ensures a complete segregation of the financial operations of these services from those of the general government, and that each will have its own system of financial accounts and reports, a provision which facilitates the determination of the extent to which it is meeting its expenditures from its own revenues, information that is essential if its system of charges is to be properly established. Secondly, it enables each such service to build up its own personnel system, while at the same time facilitating the elimination of the spoils system in the recruitment and promotion of such personnel. Thirdly, it vests the function of general direction, supervision, and control in a relatively small body of men, the board of directors of the corporation, the members of which can be selected with special reference to their technical knowledge and abilities, and a high degree of stability obtained by giving them long and overlapping terms of office. Finally, it relieves an already over-burdened legislature from tasks for which it can have little competence.

So far as he knows, the proposal for action in this way was

suggested for the first time by the present writer in an article contributed by him to the *Political Science Quarterly* of December, 1917, under the title of "The National Government as a Holding Corporation." As is well known, this policy has since been widely adopted by the national government, first, for meeting exigencies arising in connection with the prosecution of the World War, and, more recently, for meeting exigencies in connection with combating the depression from which the country has been suffering. While the national government has thus recognized the advantages of this policy, it has failed to give to it the application that conditions demand. All of the arguments in favor of the action that has been taken by it in this way are of equal validity in respect to such enterprises as the operation of the Postal Service, the Panama Canal, and the Alaskan Railroad—services which are still organized and operated on the basis of the other administrative services of the government. This policy, moreover, is one that can be adopted with advantage by our States and municipalities, where they have assumed responsibility for the ownership and operation of public utilities or other enterprises of a revenue producing character.

Staff Agencies.—Where the operations to be carried on are on a considerable scale, and give rise to important problems of policy and procedure, it is often desirable that special provision be made for aiding the director in charge in the matter of reaching decisions on general policies that have to be made by him. This arises from the fact that in many cases reliance cannot be placed solely upon the subordinate officers having direct charge of work. This for several reasons. In the first place, these officers are the ones who for the most part raise the questions to be answered; they are interested parties seeking something which it is the duty of the director to determine whether to grant or not. In the second place, these officers, as a general rule, have a knowledge only of the work of their own divisions and are interested in the needs and problems of those divisions rather than those of the service as a whole, while many of the most important questions to be decided have to do with general policies, or at least the activities of more than

one subdivision. Finally, the decision in many cases can properly be made only after careful investigation of the factors involved in the question. Especially is this true where the question has to do with purely technical matters. Experience has demonstrated that only to a limited extent is it desirable to entrust prosecution of these special investigations to officers and services having the direct performance of work. These officers do not have time for work of this character; and often a very special order of ability and, at times, an elaborate special plant and equipment, is required for the work. Where conditions such as these exist, it is advantageous to make provision for special units whose sole duty it is to prosecute inquiries into the technological operative problems to be met; to propose comprehensive plans for meeting these problems; and, generally, to act as an agency to assist the administrator in charge in meeting his directorial responsibilities. An organization having these functions is known as a staff agency.

The best examples of the need for an agency of this character is furnished by the War Department. The organization and work of this department are unequaled in the government for magnitude and complexity; and the operations to be performed are of an exceedingly technical and diverse character. Legally, the Secretary of War, acting for the President as the commander-in-chief of the armed forces of the nation, is in command of this vast undertaking. It is his responsibility to see that it is properly organized, that it makes use of proper administrative methods, and that the several parts are working, each in its proper field and in proper coördination with other parts. This, moreover, represents only a part of his obligations. It is not sufficient for him to operate the machine as it exists. The art of war is constantly changing. It is his duty to see that the military establishment shall adopt the new devices and methods that will keep it in line with, if not in advance of, the military establishments of other countries. Finally, of course, it is imperative that comprehensive plans be prepared for the mobilization of the army and its most effective use in meeting the contingency of war.

Only after the War Department had offered a nearly continuous

example of inefficiency in time of peace, and had repeatedly broken down in time of war, was it appreciated that one of the most potent causes, if not the most potent cause of this unsatisfactory condition of affairs was the utter lack of a special body of men, who, freed from all administrative duties and responsibilities, could devote themselves to the study of the technical, organizational, and procedural problems of the army and, on the basis of their knowledge so obtained, be prepared to assist the Secretary of War in the exercise of his duties as director in chief of the military establishment. To Elihu Root, when Secretary of War, belongs the credit, both for recognizing this lack, and for securing the action needed to correct it. The act of February 14, 1902, passed at his instance, made provision for what is known as the General Staff of the Army.

The great improvement in the administration of the military affairs of the country resulting from the passage of this act would suggest the desirability of creating a similar agency to operate in the field of civil administration. The need for an agency of this character was at once appreciated by the Soviet Government of Russia when it inaugurated its ambitious program for giving to the country a new economic system. If the demand now being made in this country for a planned economy is in any way to be met, the organization of an agency of this kind to operate in the civil field will be imperative.

CHAPTER XXIX

THE ADMINISTRATIVE BRANCH: PROBLEMS OF PERSONNEL AND MATÉRIEL

No amount of care in providing for the organization of the administrative branch and a system for its general direction, supervision, and control will give satisfactory results in practice unless proper provision is made for manning the system. The meeting of this requirement, dealing as it does with the personnel element, is the most difficult of all the problems of public administration; certainly it is one that, in this country at least, has been most inefficiently met. Involved in it are many questions of a complex character.

Types of Personnel Systems.—Among these, that first demanding action is the determination of the fundamental character that shall be given to the personnel system. Examination of the personnel systems of the leading governments of the world shows that they differ radically according to the basic principles upon which they rest.

At one end of the scale stands the purely bureaucratic system as exemplified in the organization of the military force of a nation, in the civil personnel system of old Prussia and, probably, to a greater or less extent, in the personnel system of modern Germany. Much misapprehension exists in regard to the true character of this system due to the two senses in which the term "bureaucratic" may be employed. In its larger sense, this term is used to describe any personnel system where the employees are classified in a system of administration composed of a hierarchy of sections, divisions, bureaus, departments, and the like. Used in this sense, there can be nothing to justify the prejudices which exist in the United States against what is known as a bureaucracy. Such a system is, in fact, the one that must be established in the case of

any large undertaking if efficiency in operation is to be secured. The term bureaucracy can be, and is, however, used in a much more restricted and special sense as descriptive of a body of public servants organized in a hierarchical system which stands outside of the sphere of effective public control, public employees being agents of the political authority rather than servants of the people. Under this system, civil employment constitutes as distinct a career as that offered by the military and naval establishments. Special provisions exist for the education and training of those contemplating adopting its several branches as careers. After entrance, members of it advance in a regular gradation of positions and in conformity with general regulations. Their tenure of office is as fixed and secure as in the case of the military and naval services. Practically the same care is given to the determination of the titles employed in designating officers of different grades, and to the social and other advantages and prerogatives attaching to such offices, as in those services. The result of these provisions is to bring into existence a body of public servants who constitute a distinct class in the community in the same way as do the military and naval forces.

The advantages which such a system offers from the standpoint of efficiency, are unquestionable. Under it, conduct need be dictated only by considerations of administrative efficiency. There is every incentive on the part of the government to secure efficient employees and to enforce efficiency in the performance of duties. Notwithstanding these advantages, examination shows that there are inherent in this system certain disadvantages or dangers which go far towards justifying the deep-seated distrust that Americans have of it. The fact that, under it, government employees are servants of the government rather than of the people tends to make them not only unresponsive to public demands, but also superior or overbearing in their attitude toward the public. That this feature was much in evidence in the old Prussian system and probably exists at the present time, any one who has had contact with it can testify. All of the evils of militarism, as they concern the relations between the military establishment and the

general population, are latent, if not positively expressed, in the case of a bureaucracy of this nature.

What is of far greater importance, however, is the power which this system gives to a ruler to control both the general social and political life of the people. In Prussia, this power was exercised by the King in a ruthless manner to control elections and to secure the attainment of his political aims. It is so used by the autocrat of present-day Germany. In a very direct way, the system has been used as an instrument to restrict the liberties of the people.

A bureaucracy of this type can hardly exist except in a government resting upon the principle of autocracy. It has been described here only in order better to bring out the essential character of an autocracy as affecting the general life of the people.

In England we have another type which may be characterized as the aristocratic in contrast with the autocratic type of old Prussia. A distinguishing feature of this system is the sharp distinction which is drawn between different grades of personnel, and the difficulty which exists in passing from one grade to another. There is, first, the class of permanent under-secretaries and assistant secretaries. No attempt is made to apply the competitive principle in recruiting this class. Its members hold office by appointment based upon the personal judgment of the appointing officers as to their capacities, and selections may be made from persons already in the government service or who have never held public office. The theory is that the qualifications desired of this class are of so special a character, involve to so large an extent the matter of personal equation, and the relations between them and their appointing officers are of so personal a nature, that the latter should have broad discretionary powers in making their selections. Next there is the class of superior administrative officers to whom is given the designation of first-class clerks. This class includes all those who, subject to the authority of their superior officers, the heads of the departments, the under-secretaries and assistant secretaries, occupy the more important positions and constitute the great bulk of what may be called the directing per-

sonnel. This class is recruited almost wholly by means of special competitive examination, the conditions and character of which are so fixed that practically only graduates of the universities of Oxford and Cambridge can hope to compete with success. Only in exceptional cases are these positions filled by promotion of employees in the lower ranks. Finally, there are a number of classes of subordinate personnel, the ranks of which are recruited by special competitive examinations, and in less degree by promotion of persons within the services.

Substantially the same clear distinction is made between the directing personnel, or officer class, and the general line of employees, that is made in the army and navy between commissioned officers and enlisted men. And the same difficulty exists in passing from one class to another that obtains in those services. The theory is, though it is not always openly avowed, that the directing personnel should not only have qualifications which can be secured only by special training such as is given in higher universities but that they should be drawn from the upper classes of the population. This system, which is often described as one of water-tight compartments, is, it will be observed, congenial to the aristocratic character of the social system of England. Primarily, its adoption is due to this fact, rather than to the deliberate conviction on the part of those entrusted with the conduct of public affairs of its intrinsic merit. The arguments that are brought forward in favor of it represent thus but the effort to justify a decision that has been made upon other grounds.

In marked contrast with the two systems that have been described is that of the United States, where the principle followed is that of throwing open all grades of government employment to all classes of the people, and to which therefore the designation of democratic may be given. A distinguishing feature of both the autocratic German and the English aristocratic systems is that they are based upon the principle of recruiting their personnel from among young people just leaving school and who have deliberately selected the government service as their life occupation. It results from this that the whole system of entrance examina-

tions is framed on the basis of determining merely the general qualifications of candidates. They will receive their technical training for the performance of particular tasks after they are in the service. All these features, it will be observed, are consonant with the principle of making the public service a permanent career for its personnel.

In the United States, the whole principle upon which the personnel system is based is radically different. The theory seems to be that the government service is not one to be deliberately adopted by young persons as their life vocation. The age requirements are such that persons well along in life may enter; and, in fact, to a large extent, persons entering the government service have previously been employed in other capacities. Entrance examinations, instead of being of a general character, are highly specialized. The effort is made to secure persons already possessing the particular technical training fitting them to perform the work called for by the particular positions to be filled.

As regards the relative merits of these three systems, it has already been pointed out that, from a purely technical efficiency standpoint, the autocratic system has much to commend it, but that it presents features which, from a general political standpoint, are so objectionable as to more than counterbalance its advantages. As between the British aristocratic and the American democratic systems, it is believed that the latter, if account be taken of both general, political, and technical efficiency considerations, is the one to be preferred. It may be true that there is a certain advantage in the assurance under the British system that all positions of superior importance will be held by men of a broad liberal education, who have adopted the public service as a permanent career. Apart from the fact that this system reserves all such positions to a special class, it has, however, the serious defect that, by closing the door of advancement to employees in the lower ranks, it removes or lessens one of the greatest incentives to efficient work. The federal service abounds in examples of men entering the service at the bottom and rising to the higher administrative posts. That this condition is one that exerts a power-

ful influence in improving the civil service, no one familiar with conditions at Washington can doubt.

Essentials of a Proper Personnel System.—No personnel system of a government, regardless of its type, can be satisfactory that does not meet certain essential requirements. The more important of these are: that it shall rest squarely upon a merit basis as regards both the selection of entrants into the service and their subsequent advancement; that it be so organized as to offer a permanent career to its members; that the compensation attached to the several positions embraced within the service bear an equitable relation to the degree of education, experience, skill, and responsibilities demanded of their incumbents, and, having due regard to these factors, is reasonably uniform throughout the service; that adequate provision shall be made for separating from the service those who are incompetent or fail properly to discharge the duties of their offices; that hours of labor and other working conditions shall be reasonable; and, finally, that proper provision shall be made for retirement allowances to those who have become incapacitated or have grown old in the service.

Obvious as these requirements must be, they are largely disregarded in the organization of the personnel system of many governments, and in none more so than in those of our governments, national, State and local. Of these several failings, much the most disastrous in its effects is the non-observance of the merit factor. A prime characteristic of the personnel systems of American governments is the extent to which they are dominated by what is known as the "spoil system." This system rests upon the idea that public office constitutes a reward to be enjoyed by the political party victorious at the polls. It finds expression in the phrase "to the victor belongs the spoils." It is difficult to exaggerate the harm that the application of this principle, if it can be called such, has done, and is doing. It carries with it a profound degradation of the general political life of the nation. It tends to place the contest of political parties upon a materialistic plane of struggle for selfish advantage rather than one for the achievement of ends looking to the public welfare. It not only induces men to engage

in political activities from motives of selfish interest, rather than public service, but ensures that such self-seekers will largely control the party organizations and policies. In no small degree it is responsible for that outstanding political evil, the party boss and the political machine. As in the case of adverse selection in the biological field, it tends automatically to eliminate from active political life the best elements of the population and to bring the less fit to the top.

In the field of actual administration of public affairs, its effects are no less disastrous. The system necessarily carries with it the negation of almost all the principles that must obtain if a really efficient personnel system is to be secured. Under it there can be no such things as permanency of tenure, since each change in political power, and to a considerable extent, each change in administration in the same party, means the dismissal of existing incumbents of office and their replacing with others as rewards for party services rendered. Though some consideration may be given to the matter of the qualifications of appointees for the offices to which appointed, there is no pretense of seeking to select those most competent. Even if reasonably competent persons are secured, there is, under the spoils system, no inducement for them to render the best services of which they are capable, since they are only too well aware that their retention in office and their advancement are dependent on the political influence that they can exert or the further political services that they can render rather than on the manner on which they discharge the duties of their offices. Anything like a development of a true *esprit de corps* and the feeling of responsibility and desire to excel that must be present if real efficiency in action is to be secured is thus impossible. Finally, the system carries with it the constant temptation for government employees to make an illegitimate use of the powers of their offices to promote the welfare of their political parties or that of political chieftains to whom they are indebted for their offices.

The only relieving feature of this situation is that the evils of this system are in part now realized and that some steps have

been taken for their correction. This has taken the form of the passage by the national government and certain of the States of so-called civil service reform laws, which give permanency during good behavior to other than the higher directing personnel of the administrative services; provide that entrants shall be selected through examinations or tests having for their purpose to determine the relative fitness of candidates; prohibit demands being made upon government employees for contributions in support of political parties, or employees participating in an improper way in the promotion of party interests; and provide for the establishment of special agencies, known as civil service commissions, for the due enforcement of these provisions.

While much good has been accomplished in this way, little more than a beginning has been made in meeting the requirements of the situation. There still remain not a few States which have failed to pass laws of this character; and, where they have done so, they have often not made their provisions binding upon their political subdivisions. In practically all cases, moreover, the provisions of these laws apply to only a part of the administrative personnel. Especially are they defective in that they leave outside of their scope the great majority of the more important positions constituting the directing personnel of the several services. This leaves these positions open to the malign influence of the spoils system, decreases the chance that they will be filled by those competent for the discharge of their duties, and lessens the incentive to faithful work on the part of the subordinate personnel, due to the knowledge by the latter that such conduct by them will be productive of little result in the way of advancement to the really worthwhile positions. Finally, even where a sincere effort has been made to put the personnel system upon a proper basis and to give the laws enacted for this purpose their proper scope, results have been only partially satisfactory, due to an inadequate handling of the technical problems involved.

Classification and Standardization of Positions and Salaries.—Among these technical requirements, chief in importance is the systematic classification and standardization of all employees or,

to speak more correctly, of all positions embraced in the administrative services. Such a classification and standardization of public employment constitutes, indeed, the basis upon which the whole personnel structure should rest. Its establishment requires that: (1) a careful study be made of the duties of each individual position and the nature of the qualifications required of its incumbent for their proper performance; (2) on the basis of such study, all positions be graded into classes, each to embrace all positions calling for the performance of substantially the same duties and requiring the same character of qualifications on the part of their incumbents; (3) an appropriate title be given to each such class; (4) these classes be grouped in a hierarchy of positions so as to bring out their relative importance and their relations to each other as, for example, chief accountant, assistant chief accountant, senior accountant, assistant senior accountant, junior accountant, assistant junior accountant, and the like; (5) a proper salary to be assigned to each class; and, (6) there be prepared for each class what is known as a "job specification" setting forth these several facts regarding it and the place that it occupies in the hierarchy of positions.

The advantages of a work of this kind are many: they are, indeed such, that, without it, it is impossible to give to a public personnel system a proper scientific character. It enables the operating service definitely to determine and to make known to the recruiting agency, the civil service commission, its personnel needs, and for the latter agency to frame its tests in such a manner as to secure the character of ability that it is called upon to supply. It makes possible the fixing of compensation in accordance with the character of responsibilities to be met and duties to be performed and insures equality of compensation for persons filling positions of the same order. It makes possible the establishment and operation of a promotion system that will at once do justice and tend to bring about advancement according to merit. It furnishes the essential basis for erecting distinct services which will offer a permanent career for their personnel. And finally, it simplifies the whole budget problem by enabling

those having the duty of framing and acting upon the budget to scrutinize estimates for personnel intelligently and to confine their attention to the number of employees in each class requested without having at the same time to pass upon the difficult question of compensation that should be provided for.

Manifest as these advantages are, it is only within comparatively recent years that steps have been taken for securing them. The start was made by Chicago, which, in 1909, directed its civil service commission to undertake a work of this character. Since then, this example has been followed by various other cities and not a few of the States. Much the most important work in this field was the classification of federal employees in Washington effected by the Congressional Joint Committee on Reclassification of Services which reported in 1920, and which led to the passage of the Classification Act of 1923, and was followed by a similar classification of employees outside of Washington.

One has but to contrast conditions where the personnel has been classified and standardized with those obtaining where this has not been done to appreciate the reality of these benefits and the great monetary savings that are possible under the standardized system. Prior to reclassification in the national government, it was a common thing for employees working side by side on identical tasks to receive widely divergent rates of pay. Precisely the same positions in different departments or bureaus carried different rates of pay. Only to a slight extent did employees have a definite status as regards their opportunities for promotion. The titles given to positions had often little reference to their responsibilities and duties and in many cases were misleading.

Other Problems of Personnel.—There are many other problems of personnel which limitations of space forbid more than mentioning. Such, for example, are: the devising and operating of systems of efficiency records to ensure that employees are giving proper service and for use in making promotions; the framing of regulations to govern transfers from one service to another; the provision of means for the current revision of the classification system to bring it into adjustment to changed conditions; and the

determination of the rules to govern the separation of employees from the service. The last is of special importance where the régime of permanent tenure obtains. No matter what the care exercised in the recruitment of personnel, cases will constantly arise where appointees, whether due to personal characteristics or otherwise, are misfits, or later become so. One of the serious evils in the administration of the personnel systems of governments is the tendency to retain in the service employees who have outlived their usefulness, who give no adequate return for their compensation, and who act as a drag upon promotions. It would seem that this situation could be met by granting to the heads of services the full power of dismissal. Such a grant of power, however, throws open the door to grave abuses, since it may be exercised for personal or political motives or upon inadequate grounds. This has led to the provision in many systems that employees may be dismissed only after charges are preferred against them and a hearing and action upon such charges have been had by an independent tribunal. Where this provision obtains, experience has demonstrated that service chiefs prefer to retain unsatisfactory employees rather than subject themselves to the necessity of defending their proposed action before such a body. These conflicting considerations can be partially harmonized by providing that service heads shall have full power of dismissal but shall act only after they have placed on file their reasons for acting and have given the employee affected an opportunity to be heard. Even under these conditions, service chiefs show an unwillingness to act. The fact remains that, as yet, no system satisfactory in all respects has been evolved for handling this problem.

Problems of Matériel.—The problem of securing and effectively utilizing the material objects required in the operation of a government has much in common with that of procuring and utilizing personnel services. As has been pointed out, the first step required in establishing a proper personnel system is the preparation of job analyses or specifications describing in detail the character of all positions to be filled. The same need exists

in the case of matériel, the resulting descriptions being known as "matériel specifications." The advantages of doing this for all objects to be purchased by the government are many. In the first place, these specifications make known in a precise and definite way the exact character of the articles required, their quality or grade, the nature of their constituent materials, the manner of their construction and all other needed special attributes. Secondly, they facilitate the work of the service in calling for its supply of articles, since, with the specifications once made, reference thereafter can be made to them by general title or number, thus avoiding the necessity of setting forth each time in detail the nature of the article required. Thirdly, they lessen greatly the work involved in the purchase of the articles. And, most important of all, they make possible the accurate checking of deliveries for the purpose of assuring that the articles purchased correspond in character and quality to the ones ordered. The preparation and use of proper specifications thus lie at the foundation of the whole system of supply in the same way as the description and classification of jobs or personnel lie at the basis of the problem of personnel.

The value of carefully drafted standard specifications has long been recognized by private industry, and large sums have been spent by the important corporations of the country upon their preparation. It is only within comparatively recent years, however, that there has been a similar realization by governments and serious effort made to secure such standardization. In such effort, the national government has taken the lead, and the work now being done by it in this field is on a large scale. One by one, our States and larger cities are following the lead thus established.

The next step following that of determining supply requirements is that of securing the needed articles. This operation is here designated as that of procurement rather than purchasing, since it involves a number of factors other than purchasing proper. Analysis of the problem of procurement shows it to comprehend the operations of selecting the vendor, agreeing upon the purchase price, time, and place of delivery and other elements of the con-

tract, verifying deliveries for the purpose of determining that they correspond in character, quality, and quantity to the ones ordered, and attending to the matters involved in the settlement and payment of vendors' remuneration claims. In performing these operations, the end sought is to secure the articles specified when and where needed and at the lowest obtainable price, to make certain that no collusion exists between the vendor and vendee, and that all qualified dealers are treated on terms of equality.

It is evident that the work of writing matériel specifications, preparing standard contract forms, and attending to the various operations involved in the procurement and checking of articles, is one calling for a very specialized knowledge and a wide familiarity with sources of supply and trade conditions—a knowledge and familiarity which the individual operating services cannot be expected to have. It is consequently the opinion of those who have given most thought to the question that this work should be entrusted to a specially organized service which, attached to the Bureau of General Administration, will act for all the services of the government.[1] Such a service has been created for the national government, though it does not have the status of a subsidiary unit of a Bureau of General Administration that it should have; and the movement for the establishment by our States and their political subdivisions of similar central agencies has made rapid progress in recent years.

[1] In the case of the national government, the supply needs of the War and Navy Departments are of so specialized a character and on such a scale that the creation of special supply services for them is probably desirable.

CHAPTER XXX

THE ADMINISTRATIVE BRANCH: PROBLEMS OF FINANCE

The element of finance enters into almost every phase of governmental activities. In a very special way and to an unusual degree therefore, the efficiency with which the affairs of a government are administered is dependent upon the character of the provision that is made for the handling of this factor. To such an extent is this true that it is hardly an exaggeration to say that that government that has provided itself with an efficient system for the handling of its financial affairs has gone a long way towards the placing of the administration of its affairs generally upon an efficient basis, and that that government which has not done so lacks the very foundation upon which to build an efficient administrative system.

Analysis.—Analysis of this problem of financial administration shows that it involves the following factors:

(1) *A revenue system*—that is, a system of dues or payments to itself that will provide it with funds adequate to meet its necessary and desirable expenditures.

(2) *An assessment system*—that is, a system for the determination of the specific sums due the government by individuals, firms and corporations in the form of taxes.

(3) *A collection system*—that is, a system for the collection of the moneys found to be due the government.

(4) *A treasury system*—that is, a system for the final receipt, custody, and disbursement of the funds so collected.

(5) *An accounting and reporting system*—that is, a system for the recording and stating of financial transactions.

(6) *A budget system*—that is, a system for determining and stating, from the administrative standpoint, the financial needs of the government.

(7) *An appropriation system*—that is, a system for the granting of funds for the performance of governmental activities.

(8) *A financial control system*—that is, a system through which the chief executive may direct, supervise, and control operations with a view to ensuring efficient and economical administration.

(9) *An audit system*—that is, a system for the examination of all financial transactions to determine whether they have been performed with fidelity, in accordance with the law, and with due regard to economy.

Examination of these several factors shows that certain of these —the establishment of a revenue system, an appropriation system, and an audit system—pertain to the legislative branch and, in so far as they involve problems of government from the structural or procedural standpoint, have already received attention in our consideration of that branch. The remaining ones pertain strictly to the administrative branch. Of these, however, only certain ones —those relating to the establishment of an accounting and reporting system, a budget system, and a system of financial control— present issues of a nature rendering it desirable that they should be considered here.

Budget System.—Of the several factors entering into the problem of financial administration of a government as set forth above, none exceeds in importance that of the possession by it of a properly devised and operated budget system. By a budget system is meant one which (1) makes use of a document known as a budget, whose function it is to make known to the fund-raising and fund-granting authority, the legislature, all essential facts regarding the financial condition and operations of the government, and, on the basis of such information, presents a carefully thought out plan for meeting the government's future revenue and expenditure needs; (2) calls for the adoption by the legislature of a proper procedure for the consideration of this plan and the taking action upon it through the passage of the necessary revenue and appropriation acts; and (3) provides for the establishment of an effective system through which the expenditure of the funds so granted may be controlled.

If such a system is to give satisfactory results, it must meet certain fundamental requirements. The first of these is that the budget document shall be comprehensive in character in the sense that it shall present a complete showing of the assets and liabilities of the government, one balanced against the other so as to show the net situation of the government from the treasury standpoint; a similar balanced statement of all receipts and expenditures of the government during the last completed fiscal year, and an estimate of such receipts and expenditures during the year in progress that will thus reveal the extent to which the government is living within its income; and the proposals of the authority responsible for the preparation of the budget in respect to the appropriations required for meeting the expenditure needs of the government during the ensuing fiscal period, together with an exposition of the means by which these needs are to be financed. Fully to accomplish its purpose, the budget should present these several facts in both summary and detail form; that is, in such a way as to reveal not only the grand totals of assets and liabilities, receipts and expenditures, actual and proposed, but the items entering into these totals so classified so as to bring out their full significance and purport.

The second is that the procedure adopted by the legislature shall be such as will preserve the integrity of this consolidated financial and work-program, to the end that that body, during the course of its action, shall constantly keep in mind the relative, as well as the absolute, importance of the expenditures requested to be authorized, and maintain a proper balance between the total of such grants and the aggregate income available for meeting it. This means, in practice, that responsibility for examination of the budget proposals and reporting the necessary appropriations and revenue bills to put them into effect shall be entrusted to a single committee, or to two committees, one dealing with appropriations and the other with revenue matters, which will work in close conference and coöperation with each other. In the opinion of many, this system should be further strengthened by provisions, such as exist in England and her Dominions, which restrain the legisla-

ture from increasing or adding to the items of expenditures as set forth in the budget. Such provisions are thoroughly in consonance with the political system of those countries due to the fact that the executive, which has charge of the preparation of the budget, has at all times the support of a majority of the popular legislative chamber. They are difficult of application, however, under our system of separation of powers, though there is nothing to prevent our legislative bodies, if they are so minded, making similar provisions in their rules of procedure; and, in one or two cases, such provision has been made in the constitutions of our States.

Thirdly, it is desirable that the legislature, in voting appropriations, shall make its grants under appropriate heads and in such a way as to give to the spending authorities a reasonable degree of discretion in the expenditure of the funds granted to them or, as an alternative, set up some system by which transfers may be made from one appropriation head to another as exigencies require, or, more broadly still, vest in the chief executive, as head of the administration, power to direct and control the expenditure of the funds granted.

Finally, there can be no question that this important duty of formulating the budget and transmitting it to the legislature is one that should be entrusted to the chief executive. He is the only administrative officer representing the entire government from its operative side. As such, his responsibility is general rather than special. He is the one who is in touch with all administrative operations and in a position to weigh relative needs.

Evident as these several requirements are, they were almost wholly disregarded by our governing bodies until comparatively recent years. Fortunately, they are now appreciated, and important steps have been taken to give recognition to them. Our national government, by the passage of its Budget and Accounting Act of 1921, has provided itself with a budget system comparable in excellence with that possessed by any other country. Not a few of the States have followed this lead and have created budget systems of varying degrees of merit. Much yet remains, however, to be done in the way of perfecting these systems and in endowing

political subdivisions with this most important tool of financial administration.

Accounting and Reporting.—A second prime requisite of an efficient system of financial administration is the installation of a system of accounting and reporting through which full and accurate information may be available regarding financial conditions and operations. Without such information, it is impossible for those directly in charge of governmental operations, or those responsible for the general conduct of public affairs, to exercise proper control; for the legislature intelligently to formulate fiscal policies and meet its responsibility of determining the grant of funds that shall be made to the several spending agencies; or for the general public effectively to discharge its function of holding both its legislative and executive representatives to rigid responsibility for the manner in which they discharge their duties.

Manifest as the foregoing is, it is exceptional for a government to have met this need in a satisfactory manner. In the case of our own country, so imperfect are the systems of accounting and reporting employed by our public bodies that it is a matter of extreme difficulty to determine even the most elementary facts regarding their financial condition and operations. This difficulty is still greater where it is attempted to make comparisons between the financial condition and operations of different governments or to make consolidated statements of all governments or those of a particular class. The failure on the part of governments generally, and our own in particular, properly to meet this prime essential of good government has been due primarily to their failure to recognize that an accounting and reporting system should have two major purposes: (1) the provision of means through which the fidelity of officers having the handling of public funds may be determined; and (2) the imparting of the information regarding financial condition and operations that legislators and administrators must have if they are properly to perform their functions, and that the public must possess if it is to pass judgment upon the manner in which their governmental affairs are being conducted.

To accomplish these two purposes, two sets of financial statements are required, and the accounting system must be so devised as to produce these statements. The first, to which the name "fidelity statements" may be given, has for its purpose to ensure that all officers having the receipt, custody, or disbursement of public funds can account for all moneys coming into their possession. These statements constitute the official records and reports, strictly speaking. They are necessarily on a gross basis in that they must present a complete record of all moneys received and paid out. If, for example, the government issues—as the national government has done in recent years—millions of loans for the purpose of meeting other loans that are maturing, the receipt side of the treasury's account must show the receipt of the money realized from such loans and on the expenditure side, the payment of this money in retiring matured loans, regardless of the fact that this transaction may not have affected in any way the net condition of the treasury or the real cost of government. Again, if, as is also the case in the national government, the government, in administering its revenue system, collects, in the first instance, sums in excess of the amounts ultimately found to be due, and subsequently refunds such excess, the fidelity accounts and statements must include such excess payments to it on the receipt side and the moneys refunded on the expenditure side, regardless of the fact that, by so doing, the accounts are made to show apparent receipts and expenditures too large by the amounts so improperly collected and refunded. In the same way, the fidelity accounts and statements must record and show all receipts and payments, even though many of them may represent mere transfers from one account to another or the handling of funds of a trust character which do not have any real bearing upon the government's financial condition or its income and expenditure proper.

It results from the foregoing that these fidelity accounts and statements, essential as they are in any proper system of accounting and reporting, are inherently unfitted for supplying the information that it is desirable to have regarding the real condition, income, and cost of government. For such information, resort

must be had to other accounts and statements specially designed for that purpose. Unfortunately, few governments have adequately realized this two-fold function of accounts. For the most part, they have contented themselves with the production of data and the presentation of statements having to do merely with the fidelity factor. Though the national government, following the adoption of its budget system in 1921, has done much more than most other governments in the way of preparing analytical and interpretative statements, it still remains true that it by no means prepares the statements that are necessary in order to make known its real financial condition and its real income and expenditures; and many of the statements that it prepares with this end in view are defective and, at times, absolutely misleading. When one turns to our State governments and to their political subdivisions, it is found that still less is done in the way of installing accounting systems that afford information of a proper character.

The whole subject of accounting and reporting is such a technical one that any detailed consideration of it here would manifestly be out of place. It is desirable, however, that a few words be said regarding the general character of the financial statements that should be issued by governments for the purpose of throwing light upon their financial transactions.

The first thing that it is desirable to know regarding the financial affairs of an enterprise is its financial condition and how this condition compares with prior showings. The statement employed by private undertakings for imparting this information is known as a "balance sheet," and consists of a listing under appropriate heads of the assets and liabilities of the undertaking to which it relates, and their comparison so as to show their relations to each other and the "net worth" of the undertaking. No well run private corporation would for a moment contemplate the establishment of an accounting system that did not permit of the preparation of such a statement.

In marked contrast, few governments have provided themselves with accounting systems that permit of the preparation of a statement of this kind. Even where they have done so, the resulting

statement, more usually than not, does not have the character that it should have. This arises from the failure to recognize that the problem of presenting a picture of the financial condition of a government is quite different from what it is in the case of a private undertaking for gain. It is of the essence of a balance sheet of an undertaking of the latter kind that it should embrace all assets, among which those representing its physical properties will usually play a predominant part. In the case of governments, a similar showing is useless, if not positively misleading. Much of the property of governments, such as roads, streets, sewers, parks, etc., is a public, rather than a governmental asset, and even the property that is directly made use of by governments for the conduct of their operations, such as public buildings and the like, is not of a character that may be employed for meeting government obligations. The inclusion of such property in the balance sheet thus gives a misleading idea of the ability of the government to meet its obligations. On the other hand, the most important asset that a government has—its power to levy and collect taxes—cannot be effectively shown upon a balance sheet. The balance sheet that should be prepared and published for every government should thus be restricted to a showing of what may be termed treasury assets and liabilities, and the document itself should be given the designation of a "treasury balance sheet" in order more fully to make known its character.

Next in importance to ascertaining the financial condition of an enterprise and the nature of its assets and liabilities is the determination of the results of its operations during a fiscal period. In commercial enterprises, the statement employed for this purpose is the profit and loss statement, or, to use a shorter term, the operating statement. The function of this statement is to contrast income with outgo in such a way as to show the net result of the enterprise's operations during the period in the form of an excess of income over expenditures, or the reverse.

While governments are not operated for the purpose of realizing a profit, it is none the less desirable that there should be prepared a statement analogous to the profit and loss statement of

a private enterprise, which will reveal the entent to which the operations of the period have resulted in an excess of income over expenditures, with a corresponding improvement of its financial condition, or the reverse. If such a statement is properly to perform its function, certain fundamental conditions must be observed in its preparation. The first of these is that all transactions, such as those having to do with the administration of trust funds, or which are of a merely formal bookkeeping character, such as transfers from one accounting head to another, should be rigidly excluded from it, to the end that the showing shall be one pertaining only to items of government income and outgo, strictly speaking. A second is that a careful distinction should be made between what are known as "revenue" and "non-revenue" income on the one hand, and "governmental" and "non-governmental" costs on the other. There is manifestly a fundamental difference between the income received by a government in the form of taxes and other public dues and that resulting from borrowing, the sale of securities, or the realization upon treasury assets in any other way. The first represents a net addition to the assets of the government; the latter, a setting up of a corresponding obligation, or a conversion of assets from one form to another. In like manner, there is evidently a fundamental difference between the expenditures made by a government in carrying on the operations and in performing the services undertaken by it, and those representing disbursements made by it in improving its capital position through the reduction of debt, or the investment of its funds in interest-bearing securities, or loans.

A third requirement is that "revenue receipts" and "governmental cost payments" be so classified as to bring out their essential character. It is important to know, not only the total of revenue receipts, but the particular sources from which such revenues are derived. To furnish such information, it is necessary that a careful classification be made of such receipts, a classification that will distinguish between, not only such grand categories as taxes, royalties, fees, fines, service charges, and the like, but between the specific kinds of taxes, royalties, fees, fines, etc. In

the case of the governmental cost payments, it is desirable that the items be classified and shown from at least five standpoints: (1) character, (2) units of organization, (3) functions, (4) objects, and (5) appropriations. By character is meant the distinction between the cost involved in operating the government proper and other governmental costs such as interest on the public debt, the payment of pensions, grants-in-aid to the States or their political subdivisions, and the like. It is manifestly desirable to know the extent to which each of these two classes is responsible for total governmental costs and the absolute and relative importance of the individual items entering into such categories. That information should be available regarding the cost involved in maintaining each structural subdivision of the government, the legislative, the executive, the judicial, the administrative branches, and the several services of the administrative branch is evident. Were all organization units unifunctional, a showing by organization units would at the same time reveal expenditures by functions; that is for such great purposes as national defense, police protection, care of the public health, promotion of education, public works, and the like. Since the organization of the administrative branches of our governments are rarely on such a basis, it becomes necessary to re-compile expenditure data in such a way as to show the total of expenditures going for these several purposes. By objects of expenditure is meant the particular things, such as personnel services, materials, equipment, supplies, and transportation that were purchased by the expenditures. Only as such information is available can assurance be had that the requests for appropriations emanating from the spending services are reasonable and that a due economy is being practised in the conduct of their affairs by such services. For the internal administration of the service, such information is of the highest value. With it available, the head of a service can compare the costs of operating the several units going to make up its field establishments, one internal revenue office with another, one lighthouse with the other lighthouses, etc. By so doing, an unusual high cost for a particular object will immediately appear and can be made the subject of inquiry. The

necessity for showing expenditures by appropriation heads arises from the fact that appropriations are limitations upon the power to expend, and it is only by keeping the accounts in a manner that will show the expenditures chargeable against such several heads that these limitations may be enforced.

There is still one other factor that should be observed in the keeping and rendering of public accounts. This consists in observing what are known as fund distinctions. Most governments, in addition to making provision for what is known as a "general fund" into which all items of income not specially earmarked for particular purposes are to be paid, and from which all items of expenditure not otherwise provided for are to be met, make provision for what are known as special funds into which certain receipts must be paid and from which certain expenditures are to be met, as, for instance, when the national government provides that all receipts from the operation of the Forest Service shall be devoted to meeting the expenditures of that service, or where special funds are set up for meeting future charges arising from a retirement or pension system. These fund distinctions can be observed only by providing for a separate accounting and reporting of both receipts and expenditures according to such funds.

In concluding this exceedingly summary account of the problem of public accounting and reporting, two further observations should be made. The first of these is that, though the problem appears to be an exceedingly complex one, this complexity arises only in connection with devising and installing the system, and even such complexity readily yields to treatment once the fundamental principles as above set forth are accepted. The fact that a great variety of information is demanded does not mean that a number of different systems of accounts must be set up for their production. A single system of receipt and expenditure documents, combined with proper ledger accounts, can be made to present all the information that has been specified. The second is, that it is highly desirable that all of our governing bodies, or at least all belonging to the same class, shall, as far as possible, make use of the same classification of income and expenditure items and

the same form of presentation of the data recorded. Important efforts towards attaining this end have been made by certain States which have created services for prescribing the system of accounts and reports of their political subdivisions and for annually publishing reports of their financial condition and operations, and by the United States Bureau of the Census in connection with its compilation and publication of similar data covering all of the States and their more important cities.[1]

System of Financial Control.—In all private corporations whose operations are on any considerable scale, experience has demonstrated the need for an officer, known as Comptroller, whose function it is to control; that is, to have the final voice in determining what moneys shall be paid into, and what issue from, the treasury; and, to this end, that his shall be the responsibility of determining the system of accounting to be maintained by collection and disbursement agencies; of determining the character of reports to be made by them; of receiving such reports; of himself keeping the central, or general, accounts of the corporation; of preparing and rendering the general reports showing the financial condition and operations of the corporation; of passing in review the actions of collection and disbursement officers, for the purpose of determining their accuracy and propriety; of setting aside such action where found by him to be improper; and of deciding all questions of fact or interpretation of rules that may arise in connection with the receipt and disbursement of the corporation's moneys. The comptroller is thus the chief accounting and financial control officer of the corporation, the one upon whom the general manager places reliance for ensuring that the financial affairs of the corporation are being honestly and properly conducted.

In respect to this feature of financial administration, the situation of governments—other, possibly, than those of the petty political subdivisions—is no different from that of a private undertaking. Unfortunately, however, few of our governments have

[1] For an attempt to apply the principles above set forth to a particular government see the author's *Financial Condition and Operations of the National Government, 1921-1930*, The Brookings Institution, 1931.

appreciated the need for an officer of this character; or, appreciating it, have given to such officer his proper status or properly defined his duties and powers. The basic error committed by them is their failure to distinguish between the functions of an officer of this kind and those of an auditor. The function of a comptroller, as has been indicated, is that of currently controlling financial operations; and, as such, he is properly an officer of the administrative branch. The function of an auditor is merely to review on behalf of the fund-raising and fund-granting authority, the manner in which the financial officers of the administration have carried out provisions of law and observed limitations placed upon them; and as such he is properly an officer of the legislative branch. Due to this failure to distinguish between these essentially different functions, many of our governments have failed to make provision for any comptroller as a separate officer, his duties, in so far as any provision for their performance at all is made, being entrusted to the auditor. The most striking example of where this faulty procedure has been followed is presented by the national government, which, in creating its General Accounting Office, presided over by the Comptroller-General, has vested the performance of these two functions in the hands of the same officer—a procedure which has given rise to much trouble in operating a system which otherwise has great merits.

In our consideration of the problem of general administration, stress was laid upon the desirability of vesting in the hands of the chief executive the duties of a general manager and of providing him with a Bureau of General Administration through which he might meet such responsibilities. Among these responsibilities, none is of greater importance than that of seeing that the financial affairs of the government are conducted properly. The comptroller should thus be either the head of that service or one of its chief officers. If this is done, the executive is, at the same time, provided with an officer peculiarly fitted to perform for him the detail work involved in formulating the budget and in advising him in respect to the substantive character of the recommendations or proposals to be contained in it.

PART VI

THE PROBLEM OF PARTY GOVERNMENT AND POLITICAL LEADERSHIP

CHAPTER XXXI

THE RÔLE OF POLITICAL PARTIES

A striking feature of modern governments of the popular government type is the phenomenon of the electorate forming itself into groups known as political parties, to the end that unity of action may be had by those who think alike in respect to who shall be elected as their representatives and what shall be the policies that they desire such representatives to put into execution.

Political Parties First Viewed As an Evil.—In studying this phenomenon, it should be noted that at the start there was no appreciation of the inevitableness of the rise of these organizations, much less of the dominant part that they were to play in the political life of all peoples having a popular government. More than this, their rise was in all cases looked upon as an evil and as constituting a serious danger to the state.

> No one in the eighteenth century foresaw party government as it exists to-day, enfolding the whole surface of public life in its constant ebb and flow. An occasional man like Burke could speak of party without condemnation; but with most writers on political philosophy parties were commonly called factions, and were assumed to be subversive of good order and the public welfare. . . . To them the idea of a party opposed to the government was associated with a band of selfish intriguers, or a movement that endangered the public peace and the security of political institutions. . . . They (political parties) were never far removed from violence. When the opposition of those days did not actually lead to bloodshed, it was perilously near to plots and insurrection; and the fallen minister, who was driven from power by popular feeling or the hostility of Parliament, passed under the shadow at least of the scaffold.[1]

This is practically the conception that the framers of our constitution had of these bodies. One has but to read the constitution

[1] Lowell, A. Lawrence, *The Government of England*, Vol. I, p. 436.

to appreciate that its framers had no idea that political parties would become one of the essential features of our political system. This arose from the belief on their part that they were creating a government of a purely representative character, one where the people would attempt to do nothing in the way of directly formulating policies or determining what would be done by their government, but would content themselves with selecting representatives who would act for them in all capacities. Their ideal was that of the modern large corporation where the stockholders confine their activities to the election of a few chief officers and a board of directors and leave to these officers the whole responsibility for the formulation of policies as well as their execution.

It is hardly necessary to point out how completely these ideas, both in England and the United States, have failed of realization. Electorates have not been content to occupy this comparatively negative position. Everywhere they have formed themselves into political groupings for the purpose of effectively making known their wishes, until to-day such groupings constitute integral parts of the political machinery of most modern nations.

Political Parties Not a Deliberate Creation of Law.—A noteworthy fact about these organizations is that, notwithstanding the fact that they now constitute integral parts of the political machinery of the countries in which they have developed, they have in no case been deliberately created as political institutions. One may read the constitutions of all states having a popular form of government without finding the slightest, or at best more than the most incidental, reference to such bodies. The same is true in great part of the statutes. Political parties in fact have grown up outside of the law and to a very large extent continue to function at the present time as extra-legal institutions. Even where they have developed grave defects in their operations, governments have hesitated to step in and attempt their correction by legislation. When one considers the important part that they now play in the actual conduct of governmental affairs, this situation must be deemed one that is little short of remarkable. The importance of their rôle is such that it is essential that all students of government

should have at least a general idea of the real meaning of this phenomenon, the principles upon which political parties are organized in different countries, the true functions of these bodies in governments of different types, and the character of the methods employed by them in carrying on their activities.

Distinction Between Political Parties Inside the Government and Outside the Government.—In entering upon a study of political parties, a clear understanding should be sought regarding the two senses in which the term may be employed. In all nations where government is not absolutely autocratic and dictatorial, differences of opinion will exist in respect to matters of public policy, and contests will take place between individuals to hold office and to exercise power. Where any scope is given to such differences and conflicts of ambitions, the persons exercising political authority or influence will divide themselves into groups in order better to further their ends. Many times this division into groups, though nominally based upon differences of opinion regarding public policies, is, in reality, little more than a union of persons seeking, by this means, to secure public office for themselves and their friends, or to exercise for selfish ends the controlling influence over the direction of public affairs. Unions of this character have, in the past, usually been designated as political parties, and that term is still employed to describe such groupings.

Political parties of this character, the world has had almost from the beginning of organized government. Since the opening of the nineteenth century, there has, however, arisen a new phenomenon, that of the division of the general population into vast groupings having for their purpose to make prevail their ideas regarding the character of the government that the country shall have, the persons who shall hold the offices of chief importance, and the general policies that shall be pursued by those so exercising authority. To these groupings the same term, political parties, is given.

It needs but a moment's reflection to perceive that these two phenomena, though similarly designated, are wholly different in character and give rise to wholly different considerations. The first represents a grouping of persons inside the government, of those

actually holding office or exercising a voice in the direction of public affairs; the second constitutes a grouping of persons outside the government, of those holding no office and not participating in any way in the direct management of public affairs, but yet seeking to determine how and by whom these affairs shall be conducted. Under the first phenomenon, we have a union of the policy determining and the executing functions in the same hands. Under the second, we have a tendency to dissociate these two functions and to vest the one, the determining function, in the hands of one organ, political parties, and the other, the executing function, in another, the government proper. In the first, we have a concentration of authority and responsibility; in the second, a diffusion of these obligations.

It needs but a statement of this distinction to make evident that in the rise of the second phenomenon we have to deal with an element which has radically changed the whole problem of government. It has raised questions never before presented; questions, moreover, to which no nation has as yet found a final answer. We have but to study the operation of political parties of this latter description in any country, even in those in which bodies of this character have firmly established themselves as integral parts of their political systems, to perceive that no final determination has been reached regarding the true place or function of these bodies in such systems, the manner in which they should be organized and operated, the relation that they should occupy towards the government proper, etc. In all but possibly one or two countries, hardly the first beginning has been made towards a satisfactory adjustment of these matters.

In no two countries have political parties assumed the same form or taken to themselves precisely the same functions. It is our intention in the pages that follow to describe briefly the systems of political parties in the United States and certain of the leading countries of Europe as the best means of making known the character of the problems to which these organizations give rise. Before doing so it is necessary, however, to point out the two principles upon which representation in a popular government may take

place, since without a knowledge of the difference between the two it is impossible to understand the different systems of political parties that have been developed in the countries studied.

Two Principles of Representation: The Representative and the Agency.—In applying the principle of representation to governments, two methods are open. The first consists in the people giving the officers or organs having the duty of representing them what may be termed a full power of attorney to conduct the affairs of government as to them seems wise. It is the principle of a large body of persons selecting their wise men to act for them. When this is done, such officers and organs are representative in the truest sense of the term. They are not agents in the sense that it is their duty to take orders from, or to act as officers to execute orders given by, the people. On the contrary, bodies of this character rest upon the principle that the people, as a whole, are not competent to reach sound decisions regarding matters of state policy and legislation; or, that, granting the capacity of the people taken individually, it is an impossibility for so numerous an assembly of units to reach any general or specific opinions that will represent the collective will of the people and be generally acceptable. This principle thus rests upon the basis that while the people should have a voice in the conduct of public affairs, this voice can best and most effectively be exercised by a small body of select and highly qualified specialists rather than by the people themselves. It is of the essence of this principle that such a body of wise men should act upon their own best judgment. While it is their obligation to keep steadily in mind the interests of the people and to seek to determine what are their wishes, the responsibility for the final decisions made is theirs. A body acting in such a way is a representative assembly of a pure type.

A second principle of representation is that to which, for want of a better term, we may give the designation "agency." The theory underlying this principle is that the popular assembly is but a means for carrying out the will of the people. It thus acts as an agent, and as an agent is under the obligation to carry out such orders as it may receive from its principal, the sovereign people.

Under this theory, the people constitute not only the legal but the real seat of authority.

It is hardly necessary for us to point out how overwhelmingly important it is, as affecting the character of the political system resulting, whether the one or the other of these two principles of organizing and operating a popular assembly is followed. In the extent to which one or the other has actually been followed we find the main difference between the systems of political parties as they exist at the present time in the chief countries of the world in which the principle of popular government prevails.

The System of Political Parties in England.—We have already seen that in England, no less than in our own country, the rise of political parties in the modern sense is of comparatively recent date. They may, in fact, be said to date from the famous Reform Act of 1832 by which Great Britain inaugurated its movement for the reform of its then corrupt and illogical electoral system. Under the old system, many electoral districts had but a small number of voters, and these were, in great part, under the domination of a few large landowners or had their votes controlled through government or other influences. Not until the franchise had been broadened so as to include a considerable portion of the adult male population and guarantees had been afforded that this franchise could be exercised freely was there laid the basis for political parties in any modern sense.

For a long time prior to this period England, however, had had representative government and what were known as political parties. These parties, nevertheless, were of the character which we have described as existing inside the government. This is evidenced by the fact that the first public speech intended to influence the action of voters was that of Lord John Russell in 1831. As late as 1886, Gladstone had to defend himself to the Queen for making speeches outside of his own constituency. The fact is that not until our own generation did the idea prevail that the people outside of the government should, by the foundation of political parties, seek to exercise a direct and positive influence upon the conduct of government.

Though the fact is now well established that no ministry can long retain power unless it has the support of a majority of the voters of the nation, this concept that the function of the electorate is to approve or disapprove of policies as formulated and put into practice by the ministry in power, rather than itself to determine or originate political programs, still constitutes the distinguishing feature of the British party system. Especially does it mark off that system from the one which prevails in the United States. Under the English system, the government resulting is one of public opinion, but this opinion is exerted indirectly, or rather, in an unformulated or non-mandatory way. It controls in the last resort, since the members of Parliament, and particularly the ministry, are well aware that appeal for support of their policies must constantly be made to the people as vacancies occur in individual constituencies and at least once in five years to the whole body of voters when Parliament is dissolved. Though public policies and legislative programs are thus framed by those in power according to their best judgment, this judgment is controlled by the will of the people as expressed through the public press, petitions, meetings, etc. The important point, however, is that the initiative, the actual formulations of such program, is made by those inside the government and that the positive function of the voters is that of approving the program so made rather than of directing what such program shall be.

Another feature of significance in the English system is that the division of opinion on the part of the voters, and the consequent party alignment, takes place almost wholly in respect to public issues. Only to a minor degree is it influenced by a desire to put this or that particular man in office. Actually, all that the voters do when casting their ballots is to express their wishes as to whether the program advocated by the ministry in power or the one advocated by the opposition in Parliament shall be followed. The individuals voted for have declared their position in respect to these alternative programs, and it is well understood that they are under the obligation to adhere to such declaration, even though their individual judgments may at times be opposed to particular features of

such program or to the line of action decided upon by their party in respect to such new issues as may arise.

The most significant consequence of this system is that political parties have not made the attempt to convert themselves into organs of the government. They do not seek to determine who shall hold this or that particular office. They make no effort to control the conduct of governmental affairs except in so far as they may influence it indirectly by giving expression to their opinion through the public press and otherwise. The English have thus made the fundamental decision that their government, while being a popular government, shall be a representative government and not a democracy, and that the principle of representation shall be the "representative" and not the "agency" principle, as these terms are here used. The English have thus succeeded in harmonizing the two delicate and often opposing considerations of securing a government that is strong, in the sense that power and responsibility are concentrated in the hands of the governing authorities, and yet one which, in its operations, conforms, as regards all important matters, to public opinion.

If now the question is asked how England has been able to bring about this fortunate condition of affairs, we must seek an answer in a number of contributing facts. The first of these is that England began its career as a monarchy in which all powers of government were at the start concentrated in the hands of the ruler; and that, only gradually, step by step, as one class after another became educated and capable of exercising political powers in a proper manner, was the privilege conferred upon the people of exercising a will in the conduct of their public affairs. The second fact is that England has at all times decisively rejected the principle of democracy. There has never been any considerable portion of the population adhering to the theory that it was the function of the people to exercise political powers directly. No principle has been more firmly adhered to, or is at the present time more firmly imbedded in the British system, than that the political system of the country should be representative in character; that the people should exercise their political powers through representatives; and that it is

the function of these representatives to determine in the first instance what shall be the policies of the government, and to exercise all the powers in respect to the putting of these policies into effect. Thirdly, and as a condition without which such a system could not possibly prove successful, is the development of the principle that the powers so concentrated in the governing authorities should be exercised in the interest of the people and in general conformity with their wishes freely expressed. Finally, and equally imperative, is the establishment of the principle of accountability on the part of those exercising authority to the people in whose behalf such authority is exercised. This is secured in large part by the obligation imposed upon all government authorities of making a full exposition of the manner in which they have discharged their duties. Especially is this principle carried out in respect to all matters of public finance. Through a system of admirable reports, full and detailed information is currently submitted to the people of all moneys received in the way of public dues or otherwise and how this money has been spent. These data, together with complete publicity in respect to parliamentary proceedings and all acts of executive officers, furnish that information which the people must have if an intelligent public opinion is to come into existence, and the people are to exert that general supervisory and approving authority which is properly theirs under a representative form of government. Only so long as the people can see that the government is being conducted properly and in their interest will they be content to acquiesce in the actual exercise of powers through representatives and refrain from attempts to seize authority themselves.

The System of Political Parties in the United States.—In the United States, political parties have taken quite a different form and have assumed quite a different rôle from which they play in England. This has arisen from the fact that, though the attempt was made to establish a government of a purely representative type, the pull towards democracy has been too strong to be resisted. Denied any direct participation in the conduct of public affairs, the people have effected elaborate party organizations outside of the government through which they formulate their will regarding

who shall be elected to office and what shall be the conduct in office of the persons so elected. These organizations have worked out elaborate systems of organization consisting of a long chain of committees, extending from the small local committees in local districts, through State committees representing the parties in the several States, to the central organizations known as national committees representing the parties in the country as a whole. They have their rules of procedure which determine how the memberships of these committees shall be selected, how their officers shall be chosen, what the powers of these officers shall be, etc. These rules further provide for the summoning of conventions for the purpose of selecting the candidates of the party for office in the States and in the national government and for the formulation of party platforms, as instructions to their candidates if they are elected.

It is not intended, by this statement, to convey the impression that officers, elected by the people, either directly or indirectly, are deprived of all individual initiative and discretion and are reduced to mere spokesmen for the purpose of putting into execution commands given to them. Necessarily the platforms adopted by the parties are general in terms and do not cover all questions that may arise. Quite a wide field is thus left in which the delegates may exercise their individual judgments in respect to the specific steps to be taken in carrying out the commands of the people. The impression that it is intended to convey is that the principle of popular participation in public affairs has been changed from the "representative" to the "agency," and that the tendency is for the representative bodies to become more and more mere organs for the registering of the decrees and the carrying out of action determined elsewhere.

Though one may believe, as many in the United States do, that this change from the representative to the agency idea is to be regretted, there is nothing in this change that, in a country with a highly intelligent electorate, and a long experience in popular government, necessarily means political disaster or even bad government, provided that certain conditions are met. These conditions

are: that these political organizations shall confine their function to that of determining and expressing the public will and of formulating public issues in such a way that it is possible for the individual voter to choose between alternative candidates for elective offices and alternative lines of action; and that the same, or equal precautions shall be taken to ensure that these organizations are properly constituted and operated as are thrown around the organization and operation of the organs of government proper.

Unfortunately, neither of these conditions has been met in the United States. Not content with determining public policies and who shall be the persons to fill the offices charged with the responsibility of seeing that these policies are actually adopted, party organizations have attempted to make, and to a considerable extent have succeeded in making, themselves powerful agencies in respect to the work of executing these policies. They have thus sought to assume the same direction or order-giving function in respect to the administrative branch of the government that they do in respect to the legislative, that is, the policy-determining and law-enacting branch. This attempt has found expression in the dictation to administrative officers of what they shall do, how their offices shall be organized, what positions or stations shall be established, who shall be appointed to these offices, what salaries shall be paid, what work shall be undertaken, with whom contracts shall be made, what the terms of these contracts shall be, etc.

It may unhesitatingly be declared that this attempt on the part of political parties, or rather their organizations, to enter the administrative field is wholly bad. It has resulted in the introduction of what is known as the "spoils system"; that is, the system that looks upon public offices as the spoils of the political contest to be enjoyed by the victors. It is difficult to exaggerate the harm that has been done by the establishment of this practice. Fortunately the United States, after a long and bitter experience, has come to a realization of this fact and has begun to take the necessary steps for the correction of this evil. This it has done by taking the only effective means by which this evil may be eradicated; that, namely, of passing laws providing that only those persons

shall be appointed to administrative offices as demonstrate their fitness through the giving of evidence of their capacity through examinations, or other means, and that, once appointed, their tenure of office shall be permanent or dependent only on good conduct.

The second condition that must be met, if political parties are to make of themselves real organs of government, in the sense of determining and controlling the actual conduct of governmental affairs, without becoming an evil and a danger to popular government, is that the same or equal precautions shall be taken to insure that these organizations are properly constituted and run as are thrown around the organization and operations of the organs of government proper. Here, too, the United States has failed to meet the requirements of the situation. The fact that political parties, as has been pointed out, have not been subject in the past to legal control has been taken advantage of by those making politics their chief concern in such a way as to make it possible for them to get the control of these organizations into their own hands, and thus to use the power and influence of these bodies for the advancement of their own selfish ends. This has resulted in the establishment of what is known as "ring rule" or "bossism" in the United States. Under this system, it has often happened that a few men, who, for the most part, have sought only their own advantage, actually have dictated who should be the persons to be nominated as candidates for elective offices and what should be party policies as expressed in the party platforms. More than this, taking advantage of the spoils system, they have dictated to executive and administrative officials who should be appointed to office, what stations or positions should be established, with whom contracts should be made, etc. This power they have been able to wield, partly in consequence of the character of the rules providing for the organization and operation of the political machinery, the adoption of which they had secured, partly by the control of the party funds which was in their hands, and partly by the use of fraudulent practices of various descriptions.

Fortunately, a beginning has been made to meet this situation

also. Within recent years numerous laws have been placed upon the statute books of both our national and State governments having for their purpose to bring under control party organizations, practices, and procedures. This legislation has taken the form of the enactment of the corrupt practices acts, of which mention has already been made, acts regulating the manner in which persons shall be nominated as candidates to be voted for at elections, acts regulating the manner in which officers of political parties shall be chosen, etc. This action is of the highest significance since it represents for the first time a recognition by law of the existence of these bodies as integral parts of the political system of the country and, as such, subject to legal regulation as are other government agencies.

Comparison of the Party Systems of England and the United States.—Though we have attempted to make known the fundamental features of the party systems in England and the United States, the real significance of these features can be fully shown only by bringing them into contrast. We have in these two systems the rather remarkable phenomenon of two countries, both populated by substantially the same race, both drawing their legal and social institutions and ideals from the same source, and both having the same fundamental end in view—that of achieving popular government—and yet developing widely divergent means for securing this end.

Both, in so far as deliberate planning is concerned, have, at the start, had a profound distrust of democracy, and have sought to bring into existence that type of popular government known as representative. Here, however, the similarity ceases. In working out this problem, the two countries have developed two political systers that rest upon principles that are utterly opposed to each other.

England has adhered rigidly to the principle of representation; the United States, notwithstanding its adoption of this principle, has, almost from the start, departed from it and gone over to the other principle. Steadily, the latter country has developed practices having as their effect, first to change the principle of repre-

sentation from the representative to the agency, and then, going further, to convert its representative form of government to that of a democracy or, at least, one in which the democratic element finds a constantly larger expression. This has found expression in the movement for the introduction of the devices known as the initiative, the referendum, and the recall, all three of which represent means by which the people may exercise their political powers directly instead of through either representatives or agents.

The result of this action has been to give to political parties an entirely different character and rôle in the two countries. In England, these bodies are but means through which the people select their representatives and express their approval or disapproval of the policies adopted by them. Great care has been taken to prevent these bodies from becoming organs of government. In the United States, the reverse has been the case. Political parties have more and more succeeded in making of themselves the means through which public policies and legislative programs are formulated, and have thus converted themselves into true organs of governments. The English system concentrates in the same hands the policy determining and the policy adopting functions. The American system places these two functions to a large extent in the hands of separate bodies composed for the most part of different individuals. These two bodies, moreover, have no organic connection the one with the other. One is an organ inside, or rather constituting a part of, the government proper; the other an organ outside of the government. The latter, moreover, composed as it is of persons holding no formal office and coming together only at infrequent intervals of time, functioning for a few days and then scattering, is of a character making it difficult, if not impossible, to hold it accountable for its acts. In like manner, the fact that the organ constituting a part of the government proper, the legislature, is called upon to adopt policies and measures in the determination of which it has not participated means that it, too, cannot be held to full responsibility for its acts. That this condition of separation of functions and divided responsibility constitutes a grave defect in the American political system would seem to be self-evident.

The Two-Party System.—Before leaving this matter of a comparison of the two systems, mention should be made of another feature which the systems possess in common and which more than any one other marks them off from the party systems developed in other countries. Reference is made to the prevalence in these two countries of what is known as the two-party system. In both England and the United States, the tendency has always been for the people to range themselves into but two great parties divided from each other by general issues. These issues, moreover, have represented rather general attitudes of mind towards political policies than differences in respect to particular issues. Political issues between the two parties there have always been, but these issues have, for the most part, been but the expression in the concrete of the general lines of cleavage.

This feature of the political life of the two countries is not only characteristic of their political systems, but is believed by many to be essential to their successful operation. Certain it is that whenever a third or additional party has arisen to any degree of influence and power, grave difficulties have immediately presented themselves. That the English system has worked with greater friction since the rise of the Labor Party, there can be no question. The existence of more than two great parties means that no one party will represent the majority opinion of the country and that government can be carried on only through two or more parties forming coalitions of a more or less temporary and artificial character. At the best, it represents a confusion of issues and a failure to secure that definite responsibility that is afforded by the two-party system. It must be noted, moreover, that with the increasing scope of governmental activities, and the consequent multiplication of possible issues, there is a strong tendency for third parties to arise and constitute a permanent feature of the party system. Should this tendency prevail, the system of political parties in England and the United States will undergo a profound modification. It is for this reason, among others, that we have stated that no country has as yet reached any final determination in respect to the character of political parties that it will have and the

nature of the rôle that they will play in the political life of the nation.

Collective versus Individual Responsibility.—Another feature characteristic of both the English and American systems of political parties, and one which is of far-reaching importance, is that in both these countries the idea of collective responsibility as distinguished from the individual responsibility of members elected to office has reached a high degree of development. By this is meant that individuals are voted for as representatives of their parties and of the policies for which such parties stand rather than on account of their individual opinions or merits. The result is that political policies are given preëminence over personal considerations. Political contests thus become contests between policies rather than men. The character of the latter are considered chiefly as it is believed they will prove the best agents for carrying out such policies. In England, this principle is so firmly established that it is practically obligatory upon the individual members of the House of Commons to support the party program regardless of their personal opinions. They in effect receive an imperative mandate from those putting them in office to pursue this course. In the United States, this movement towards collective or party responsibility has not as yet gone as far as this. What is known as independent voting still takes place to a considerable extent. The trend, however, is towards collective responsibility.

At first sight it might seem that a system under which representatives are compelled in many cases to vote against their convictions is difficult to defend. Examination, however, will show otherwise. Only as it obtains can clear-cut issues be brought before the people for determination and the decisions arrived at put into execution. If action is to depend upon a warring of hundreds of different wills, it is difficult, if not impossible, to secure action that represents the real will of the people. One has but to compare the results under the system of collective responsibility with those secured under the contrary system to be convinced of the superiority of the former.

The System of Political Parties in Europe.—In our study of the party systems in England and the United States, we have had

the opportunity of examining and comparing two very distinct types of party organizations. We now pass to a consideration of the character of, and the rôle played by, these bodies in France and other Latin countries in Europe. Here we will find a condition of affairs quite dissimilar from that existing in either of the countries we have been considering.

In France, and the same is true in other Latin countries in Europe, political parties and political organizations as understood in England and the United States scarcely exist. Political parties there are groupings inside rather than outside the government proper. Powerful party organizations such as are found in England and the United States exist to but a limited extent. Each candidate practically puts himself in nomination and makes his own platform. It is sometimes said that there are as many political platforms in France as there are candidates for seats in the Chamber of Deputies. Far greater weight is thus given to the individual characteristics of the candidates than is the case in either England or the United States. Indeed, in many cases, a party consists of little more than a political leader and the following that he can attach to himself.

The result of this condition of affairs is that collective party responsibility does not exist as in England and the United States. The majority of votes in the Chamber of Deputies required for the proper conduct of governmental affairs is secured only through the effecting of combinations and coalitions between small groups led by political leaders. This support is often secured only through the meeting of the demands of these leaders for the adoption of particular pet measures, the expending of money in the districts represented by these leaders, or the appointment of such leaders or their followers to office. There is thus a strong tendency for parliamentary life to degenerate into a constant struggle on the part of individuals for place and influence. In its worst phase it also brings about a strong tendency for the "Government," that is, the particular combinations of parties or groups in power, to make an illegitimate use of its powers to win the support needed by it to retain its control. At the best, this system gives to the conduct of

governmental affairs an instability and a lack of that definiteness of purpose and policy that characterizes the two-party system as it prevails in England, her Dominions and the United States.

Why France and other European countries have failed to develop a party system under which the people can express their wishes regarding political policies in definite form is a question which it is difficult to answer. A partial explanation may be found in the briefness of the experience of these countries with a form of government calling for the playing of a prominent part by political organizations.

To the foregoing, Switzerland offers an exception. There the people have elected to retain in their own hands, and to exercise directly, as large a part in their political powers as circumstances will permit. In certain of the smaller cantons, the voting population meets *en masse* to enact legislation. In others, where this is not feasible, they make use of the initiative and the referendum. Another distinguishing feature of the Swiss system is that the legislative assembly is made the organ for exercising on behalf of the people both legislative and administrative powers. The latter powers are exercised by the assembly through a permanent corps of administrative officials selected by it, who discharge their duties under its general direction. These officials are purely administrative officers, and political considerations play no part in their selection or retention of office.

Under this system, where the people are able currently to bring forward and have considered specific measures, and where the legislative assembly can be made to respond immediately to the will of the people, there is no necessity for the formation of political parties such as exist in popular governments of the representative type. There is no need for the formulation of a political program either inside the government as in England, or outside the government as in the United States, and the organization of the voters in parties so as to insure a majority in the legislature to put this program into execution. As measures can be brought forward one by one for consideration, the voters divide differently at different times

according as they favor or disapprove of the particular measure under consideration.

The result is that, though groupings of voters exist in order to promote certain policies, there are no political parties contending for power such as constitute the principal feature of the political life in other countries. The fact is that Switzerland has a form of government which may almost be designated as non-political. More nearly than in any other country, the work of government is treated as a matter purely of business and to be handled as are the affairs of any large business concern. In one sense, the Swiss system represents the ideal form of government. It would be extremely interesting to enter into a consideration of the reasons for this great success on the part of Switzerland in working out its political problem, did space permit. This brief mention has been made merely for the purpose of making clear that the problem of political parties in a democracy, or in a government in which the democratic element finds so large expression, is fundamentally different from the problem as it presents itself in an autocracy or in a purely representative government.

Political Parties in an Autocracy.—It has been pointed out that a distinguishing characteristic of modern autocracies is the complete suppression of political parties such as exist in governments of a popular type. In them, we thus have a reversion to the opinion held by those responsible for the formation of our constitutional system that the existence of an organized opposition to the government in power is an evil in that it is productive of dissension and places obstacles in the way of the effective carrying into effect of governmental policies. That the system of contending political parties does have these drawbacks, that it complicates governmental action, and that it at times leads to party interests being given preference over those of the general welfare, there can be no doubt. Notwithstanding this, no other equally effective means has as yet been evolved through which the principle of popular government may be put into effect. This being so, efforts should be directed toward the perfecting of this system, rather than toward its abolition.

The Rôle of Political Parties in the Establishment of Governments.—Consideration of the place of political parties in governmental systems should not be concluded without some mention at least of the peculiar problem that is presented in respect to the function of such organizations where the issues at stake are, not what policies shall be pursued by governments, but what form such governments shall have. It is evident that there is a fundamental difference between the people organizing themselves in opposing parties with a view to having the government, the existence of which is accepted by all, pursue this or that line of conduct and their effecting organizations having for their purpose the maintenance or overthrow of that government. In the first case, we have a common loyalty to the government actuating all parties. In the second, we have at least one party seeking to oppose not merely the policy of the government which is in control but that government itself. It is inevitable that, under such circumstances, such a party will have a disloyal, if not an actually seditious, character. At best, it will seek to embarrass the existing government in the effort to establish a stable and efficient political system. At the worst, it will be a revolutionary movement seeking to subvert the existing government, if necessary, by force. History furnishes abundant illustrations of the desirability of avoiding the attempt to frame a constitutional system through the play of party contests and of having political powers strongly centralized during the formative period. When Rome entered upon the preparation of her famous Twelve Tables, all political powers were for the time being vested in the Decemvirs. The United States, in framing its Constitution, entrusted the task to a convention which sat behind closed doors with the deliberate purpose of preventing this important act from becoming the subject of factional discussion and contests. While the governmental systems of the insular possessions of the United States, Puerto Rico, and the Philippines, were being framed, all powers were concentrated in the hands of the military governor. No one who has had any experience with the conduct of public affairs in those possessions can doubt that the establishment of this military dictatorship during this formative period was nec-

essary not only from the standpoint of maintaining order, but from that of permitting the work of framing a scheme of civil government to proceed deliberately and calmly with reference to the interests of the whole country uninfluenced by the pressure of party contentions. Neither can any one doubt that the maintenance of this military régime at that time greatly expedited the final establishment of a civil government under which provision was made for large powers of popular participation in the conduct of public affairs.

It is due partially to these considerations that the task of effecting a general revision of the constitution of one of our States is usually entrusted to a specially convened assembly rather than to the legislative chambers where partizan considerations are apt to have an undue controlling force.

CHAPTER XXXII

THE PROBLEM OF POLITICAL LEADERSHIP

We have left to the last some consideration of what is probably the most important problem involved in giving effectiveness to a political system—that of providing the means by which a unity of purpose and execution may be had in the operation of the governmental machinery.

If the work of a legislature is not to be futile, or even detrimental to the general welfare, provision must be made in some way for the formulation by, or for, it of something in the nature of a consistent program that will guide it in its deliberations. Without such a program, a legislative body runs the danger of being little more than a mob of individuals, each having his own ideas regarding legislative needs, and of being helpless to reach an agreement that will represent any consistency of policy or, perhaps, any agreement at all. This is but to state that there is the same need for leadership in the legislative branch of government as in other fields of human endeavor.

It is the great merit of a government of union of powers, personally, such as is possessed by Great Britain, that provision is automatically made for means by which such a program may be brought into existence. In such a government, it is one of the prime functions of the ministry which has the real custody of executive power to determine the work that the legislative branch shall undertake, and to direct and control its operation so as to assure that it will take the action called for by such a program. This merit, the autocratic or authoritarian government has to a still greater degree. No such automatic provision for leadership and program-planning exists in a government of separation of powers such as that of the United States and its constituent commonwealths. Due to this lack, the burden falls upon the legislative

branch itself to devise a system by which this imperative requisite of efficiency in operation may be secured. The manner in which our legislative bodies, and particularly our national Congress, have sought to meet this obligation constitutes one of the most important aspects of the evolution of our political system.

In the chapter immediately preceding, we have seen that the electorate has evolved a system of political parties through which it gives expression to its wishes as to who shall represent it in the legislature and, in general terms at least, the character of action that it desires shall be taken by that body. Manifestly, if this system is to be effective in operation, it is necessary that the representatives of the several parties in the legislature shall organize themselves, to the end that unity of action and responsibility may be secured. Without such unity, the whole principle of party government falls to the ground. This necessity has been fully recognized, and, in our national Congress at least, a scheme of party organization and procedure has been built up that constitutes one of the most important features of our whole legislative system.

The Caucus.—In the development of this system, two requisites had to be met: first, the provision of means by which the party might reach conclusions regarding the action to be taken by it; and, second, the creation of instrumentalities through which decisions so reached might be put into execution. The first of these requisites has been met by each of the parties, in each of the two houses of Congress, creating a body known as a Caucus which, composed of the entire membership of the party in the chamber to which it relates, has the dual responsibility of selecting its candidates for the important offices of the chamber and determining the policies of the party in respect to legislative matters.

Only within comparatively recent times has this body come to have the powers and responsibilities that it now possesses in respect to these matters. Until 1910, the dominant party in the House looked primarily to the Speaker for leadership. Through his power to appoint committees, and, in so doing, to designate who should hold the strategically powerful committee chairmanships, that officer determined the whole organization of the House in its most

essential aspects and, in no small degree, the legislative opportunities of the individual members. Through his untrammeled power to grant or withhold recognition for the purpose of making the motions through which members might avail themselves of the special procedures of unanimous consent and suspension of the rules for securing consideration of bills in which they were interested—which procedures, in many cases, offered the only opportunity that existed for securing the passage of these bills—he not only could determine what measures would or would not be enacted, but he also had a weapon by which he could discipline members who failed in any respect to make their action conform to his will. Through his position as chairman of the Committee on Rules, and the fact that the other representatives of his party on that committee held office through his selection, he had to a large extent the still greater power of determining at any time when the House should lay aside all other business and proceed to the consideration of a bill that he desired to have passed, and, in so doing, could determine the character of action that might be taken on such bill. Combined with this positive power was that of preventing resort to this procedure on any other initiative than his own. This resulted from the fact that any proposal in the form of a resolution directing the Committee on Rules to report a special rule had to be referred to that committee, and the Speaker, as chairman of that committee, could prevent action upon it by refusing to have the resolution reported or by the more simple expedient of not calling the committee together for consideration of it. Taken in conjunction one with another, these several powers thus placed in the hands of the Speaker both positive and negative authority of the most far-reaching character. To such an extent was this true that, both in Congress and throughout the country, the Speaker came to be considered as an officer second in power and influence only to the President of the United States himself, and, so far as the enactment of legislation was concerned, to exercise powers superior to that officer.

This was the condition that existed in 1910. After a long process of evolution, which had moved steadily in but one direction, the

problem of leadership seemed to have been definitely solved. Scarcely, however, had this objective been achieved before there took place what must be considered one of the most remarkable reversions of policy that has ever characterized a political system except where the change was accomplished as the result of a violent revolution. Almost in a moment, this whole system, built up through a hundred and twenty years of painful effort, was brought crashing to the ground; and the work of devising a system under which leadership might be secured had to be begun anew. Opposition to this system, under which almost autocratic powers were vested in a single person, had long been brewing and in 1910 came to a head. An insurgent element within the Republican party, then in power, joined with the opposition party and succeeded in putting through a revision of the rules that had for its purpose and effect to deprive the Speaker of practically all of his powers other than those he had as a presiding officer. The power of appointment of committees was taken from him and vested directly in the House. Not only was he removed from the chairmanship of the powerful Committee on Rules, but express provision was made that he should not be a member of that committee. The result of this action was to transfer leadership from the Speaker to the caucus. The change was thus not unlike that of passing from an autocracy to a popular government.

Having assumed the responsibilities of direction, the caucus accordingly found itself under the necessity of providing the means through which it might discharge them. This it did by providing for a Committee on Committees, that should select the representatives of the party on the several committees which, in the case of the majority party, meant, also, the chairmen of the committees; a Committee on Patronage to handle patronage matters; a Floor Leader and Party Whip to look after party interests on the floor of the chamber, and, finally, and most important of all, a Steering Committee, of which the floor leader was made ex officio chairman, the function of which is to act as the executive committee of the caucus in respect to the formulation of legislative policies. Shortly after its creation, this Steering Committee accepted the offer of

the Speaker to make use of his room as a meeting place, and found that there were advantages in having the Speaker present and participating in its deliberations. This practice has been continued, with the result that, though not formally a member of the committee, the Speaker has probably as important a voice in determining committee action as has any of its members proper.

The foregoing agencies represent the voluntary action of the parties and have no recognition in the rules of the House. To complete the picture of the agencies through which the party acts, mention should be made of yet another that does have recognition in the rules—the Committee on Rules. This committee, as has repeatedly been pointed out, has a character basically different from the other standing committees, its prime function being to determine what bills shall be taken up out of order for consideration and the character of action that may be taken upon them, instead of that of whipping into shape and reporting bills. It is thus deemed to have a preëminently political character, that is, one whose action is determined primarily by political considerations. In this committee, with its power to report special rules, the caucus of the majority party thus has one of its most effective instruments for controlling legislative action.[1]

Potentialities of the Caucus System.—The most striking feature of this system consists in the potentialities contained in it for achieving party government; that is, of insuring that the majority party shall have, not only the responsibility for determining legislative action, but the power to put such determinations into effect. There is, thus, nothing to prevent the caucus of the majority party from following the policy of considering and whipping into shape all important legislative proposals prior to their consideration on the floor of the chamber or even in committee; of adopting a rule making its decisions so arrived at binding upon all party members when they come to discuss and vote upon them on the floor of the chamber; and, where necessary, of instructing the Committee on

[1] The foregoing represents the party organization of the Democratic Party: that of the Republican Party is different in detail, but is of the same character as regards its essential features.

Rules, which it dominates, to bring in special rules which will not only fix the conditions that shall govern their consideration, including even the character of amendments that may be proposed to them, but the day and hour upon which a final vote upon them shall be taken.

The Caucus System in Operation.—In practice, these potentialities have been only partially realized. At times, as during the first administration of President Wilson, the system worked with great effectiveness. All important bills, such as those for revising the tariff and the establishment of the present Federal Reserve Bank System, were worked out in their minutest details in caucus and the obligation of party members to support them was rigidly enforced. At other times, however, the party in power has been unwilling, or unable, to make full use of this system for achieving its ends. This has arisen from the fact that, though the principle of party government is generally accepted, the people's representatives in Congress have not yet reached the point where they are willing to subordinate their individual desires and opinions to those of the party; that is, wholeheartedly to pass over from the system of individual responsibility to that of collective responsibility. Until they are willing to do so, the principle of party government can find only partial application in the operation of our political system.

So important is this matter that the writer feels justified in reproducing here the rules now governing the Democratic caucus and his comments thereon as given in his recent volume dealing specially with the legislative branch.[2]

DEMOCRATIC CAUCUS RULES

PREAMBLE

In adopting the following rules for the Democratic caucus, we affirm and declare that the following cardinal principles should control Democratic action.

(a) In essentials of Democratic principles and doctrines, unity.

[2] *Principles of Legislative Organization and Administration* (The Brookings Institution, 1934).

(b) In non-essentials, and in all things not involving fidelity to party principles, entire individual independence.

(c) Party alignment only upon matters of party faith or party policy.

(d) Friendly conferences and, whenever reasonably possible, party coöperation.

RULES

(1) All Democratic members of the House of Representatives shall be prima facie members of the Democratic caucus.

(2) Any member of the Democratic caucus of the House of Representatives failing to abide by the rules governing the same shall thereby automatically cease to be a member of the caucus.

(3) Meetings of the Democratic caucus may be called by the chairman upon his own motion, and shall be called by him whenever requested in writing by twenty-five members of the caucus.

(4) A quorum of the caucus shall consist of a majority of the Democratic members of the House.

(5) General parliamentary law, with such special rules as may be adopted, shall govern the meetings of the caucus.

(6) In the election of officers and in the nomination of candidates for office in the House, a majority of those present and voting shall bind the membership of the caucus.

(7) In deciding upon action in the House involving party policy or principle, a two-thirds vote of those present and voting at a caucus meeting shall bind all members of the caucus: PROVIDED, That said two-thirds vote is a majority of the full Democratic membership of the House, and, PROVIDED FURTHER, That no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he has made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform, from his nominating authority.

(8) Whenever any member of the caucus shall determine, by reason of either of the exceptions provided for in the above paragraph, not to be bound by the action of the caucus on these questions, it shall be his duty, if present, so to advise the caucus before the adjournment of the meeting, or, if not present at the meeting, to promptly notify the Democratic leader in writing, so that the party may be advised before the matter comes to issue upon the floor of the House.

(9) That the five-minute rule that governs the House of Representatives shall govern in the Democratic caucus unless suspended by a vote of the caucus.

(10) No person except Democratic members of the House of Representatives, a caucus journal clerk, and other necessary employees shall be admitted to the meetings of the caucus.

(11) The caucus shall keep a journal of its proceedings which shall be published after each meeting, and the yeas and nays on any question shall, at the desire of one-fifth of those present be entered on the journal.

A reading of these rules shows their essentially conservative character. In the first place, as set forth in the preamble, any attempt, through the use of the caucus, or otherwise, to control the votes of the members upon all matters of legislation is expressly disavowed, such control being restricted to those matters that affect "party principles and doctrine" and "matters of party faith or party policy." In respect to all other matters, it is declared that there shall be "entire individual independence." In practical operation, this means that, though members are expected to support the position taken by their leaders—the Steering Committee, the Committee on Rules, and the Floor Leader—whenever they reasonably can, they are not bound to do so except in those comparatively few cases where a measure has been declared to be a party measure and formal action in reference to it has been taken by the caucus. In point of fact, as will later be referred to, comparatively few legislative proposals coming before Congress, even those of great importance, are declared to be party measures, and it is still more rare for resort to be had to caucus action for the purpose of whipping bills into the form desired by the party and ensuring their support by the entire membership of the party.

Secondly, it will be noted that, even in respect to those measures which are declared to be party measures, and in respect to which it is desired to secure full party support, members are given freedom of action where a construction of the constitution is involved, where contrary pledges have been given by them to their constituents, or where they have received contrary instructions from their constituencies.

Thirdly, the important provision is made that the action of the caucus shall not be deemed to have binding force upon the members except when it is taken by a two-thirds vote of the members participating in the caucus and when such two-thirds vote represents a majority of the entire membership of the party.

Finally, it should be noted that the rules that have been given

and commented upon represent only the rules governing the caucus of one of the parties in one of the houses. If exception be made of the period covered by President Wilson's first administration, the caucus system has never played, and at the present time does not play, the part in Senate proceedings that it does in those of the House. Furthermore, the Republican Party has entirely abandoned the caucus system as a means of controlling the votes of its members. While it calls meetings of its members to discuss matters of party policy and action, it makes no attempt to make the action there decided upon of binding force upon its members. To distinguish such meetings from the caucus, it gives to them the name Conferences. This distinction between a caucus and a conference, it may be observed, is also made by the Democratic Party. When it desires to call its members together for the general consideration of party matters, but not to bind the action of its members, it sends out a call for a conference, and when such binding is contemplated, the call is for a caucus.

Critical Examination of the Caucus System.—With this understanding of the potentialities inherent in the caucus system and of the manner in which this system is actually worked in Congress, we are now in a position to examine in a critical manner the principles embodied in it, and to seek to determine whether it conforms to or does violence to the fundamental principles supposed to be embodied in our political system. Such an examination can best be made by pointing out the criticisms of it that can and have been made when it was most effectively in operation.

That such a system should have given rise to opposition on the part of the minority party and of members even of the majority party who cherish independence of action and upon whom party ties hang lightly, occasions no surprise. The features that have been most vehemently denounced are: (1) it destroys the independence of members and compels them to vote in a manner contrary to their convictions; (2) it enables a minority to make its will prevail over that of a majority of the chamber; (3) under it, the real work of legislation is transferred from the body where it properly belongs to one having no recognition in the laws of the

land and operating under no restraints other than its own sweet will; (4) this body, moreover, is composed of but a part of the chamber's membership, with the result that the real work of determining the character of legislation is performed in the absence of any organized opposition, and all participation in such work is denied to a considerable element of the chamber's membership; (5) this body sits in secret and is thus free from the restraining influence of public opinion; (6) members can dodge responsibility by simply saying that they were not free agents but were bound by the action of the caucus; and, finally (7), as a result of the foregoing, the legislative chamber is deprived of the great function of legislation entrusted to it by the constitution and degraded to a position where it acts merely as a rubber stamp for the ratification of decisions elsewhere reached.

The foregoing would seem to present an indictment of the caucus system that it would be difficult to answer. Analysis, however, shows that this is not so, provided the fundamental principle underlying it be accepted. The caucus is but a means to an end, that end being the achievement of party government. There are probably but few students of political science who do not hold that in the development of political parties has been found the most effective, if not the only, means by which the institution of popular government in a large community can be made a reality. If one holds to this position—and, as stated, most students of political science do so hold—then he should be prepared to accept a system under which parties may reach determinations regarding their legislative policies and legislative programs and have the power to put their determinations into execution. In the caucus constituting the general assembly of the party's representatives in the legislature has been found the only means by which these objectives may be accomplished. Essentially, therefore, the objections raised to the caucus system apply against the whole principle of party government itself.

If, then, party government be desired, it is essential that the party's representatives in the legislature shall have an adequate organization and shall embrace all of the features, including those

of secrecy and the right of the majority to control the action of all of the members of the party against which objection is most strongly urged. As regards secrecy, this is a necessary feature if unity of action is to be had and the members are not to be subjected to embarrassment in presenting on the floor of the chamber a united front in support of the positions taken, a necessity that is illustrated also in the secret and confidential character of the meetings of the President with his cabinet. As regards the binding force of caucus decisions, it is evident that, without it, the whole principle of party government—that is, the holding of the majority party responsible for legislative action taken—is seriously impaired, if not destroyed. If a minority of the majority party, by joining with the minority party, can defeat, or materially modify, the proposals of the majority party, as represented by the majority will of that party, the responsibility for legislative action no longer rests with that party. Viewed from this standpoint, the defects of the caucus system lie, not so much in its power to control legislative action, as in its lack of power, or at least in the unwillingness of members of the chambers to permit it to exercise in a comprehensive way the power that it has.

Comparison of the Caucus System with the System of Responsible Government of England.—In support of this position, it is of interest to note that there is not an objection to the caucus system that does not lie with greater force against the system of responsible government now possessed by England, a system which is generally recognized as giving excellent results in practice. Under that system, legislative policies, and practically the entire legislative program, are determined off the floor of the chamber by a small body, the ministry, which represents but one of the political parties in the dominant House of Commons; which sits in secret, not only the entire opposition, but even all members of its own party not members of the inner conclave, being excluded from its meetings; which has the power to control absolutely the allotment of time and the order of business in the House; and which can command the almost unquestioning support of the entire membership of its party to any legislative action decided upon by

it. Moreover, under this system, not only is action by members in respect to voting according to their personal convictions almost entirely eliminated, but even the right to bring forward legislative proposals, in so far as it is permitted at all, is largely a futile one since only those proposals can be taken up for actual consideration by the House that the ministry is willing to have so considered. And, as a result of this, participation in legislative action not only of the entire opposition but even of members of the party not included in the ministry, is restricted to criticism or comment upon legislative proposals of the ministry, or the manner in which the administrative affairs of the government are being conducted. Even this is done with a knowledge that such criticism and comment is largely futile since it will result in no action that is not acceptable to the ministry.

It will be seen from the foregoing how close in actual operation is the parallel between the cabinet in the English governmental system and the caucus in the American system, both representing the instrument through which effect is sought to be given to the principle of party leadership and party government. In the one case, however, this principle has been pushed to its logical conclusion, while, in the other, it has, as yet, found only partial expression. If one seeks the explanation of this difference and the reason why the organs through which party leadership and party government are sought have a different character, it will be found in the circumstances under which the evolutionary process had to take place. In the case of England, this process started from a position where all governmental powers, including the legislative power, were concentrated in a single organ, the Crown. Such a system, automatically as it were, provided for leadership. All that was required was the reaching of conclusions in respect to the extent to which participation in the exercise of governmental powers should be accorded to the body having the function of representing the electorate. In the United States, the start had to be made from a situation where the legislative power was vested in a body separate from the executive composed of a large number of individuals, each, in theory, subject to no control other than their individual

convictions. Consequently, if leadership and party government were to be had, it had to be built up painfully in the face of the natural opposition that such members would have to any surrender of their freedom of action, and should take a somewhat different form.

While the two systems have the same objective, and the English has reached a far higher degree of perfection than the American, it by no means follows that the former presents, in all respects, superior features. On the contrary, a critical examination of the two would seem to show that the latter, if given its proper development, embraces features superior to the former.

Probably the most striking difference between the two is in the composition of the organ in which party sovereignty, if the expression be permitted, resides. In the English system, this body consists of the Cabinet, a body composed of but a part, and that a small part, of the party's parliamentary membership; in the American system, it consists of the entire membership of the party in a given house. In the former, therefore, political policies and the actual framing of legislation is the work of but an inner conclave, the great majority of the adherents of the party being given no participation in this important work other than the influence that they can exert in an informal manner. In the latter, every member of the party in the chamber is given a full opportunity to express his views, to seek to make them prevail in respect to the determination of party policies, and to participate on terms of full equality in the work of whipping legislative proposals into shape. That such a system is more in consonance with the principles of representative government and gives greater justification to the application of the principle of party determinations having binding force upon all party members, would seem to be unquestionable. Certainly, it is one that is more in harmony with American political ideals.

A second important difference between the two systems is in the scope of the binding force of party determinations. In the English system, all matters of legislative action, with some few exceptions, are deemed to be party measures, with the result that all

divisions taking place in the chambers, no matter how trivial the matter at issue may be, are along strictly party lines, and any failure to support the ministry in power is deemed the equivalent of a vote of lack of confidence and, as such, brings with it the necessity for the resignation of the ministry or of a new appeal to the electorate.[3] No such condition has characterized the working of the caucus system in the two houses of Congress, not even when that system was being operated with its maximum efficiency. At all times, the practice has been for political parties in Congress to distinguish between those legislative proposals which have a political character, that is, those which have, in any vital way, to do with party principles or concerned matters in respect to which the party faith has been pledged, and those not having that character. Only in respect to the former has the attempt ever been made by political parties, acting through their caucuses or otherwise, to coerce their members in respect to the manner in which they shall exercise their legislative powers.

That this practice, formal expression to which has been given in the preamble to the Rules of the House Democratic Caucus, is a more rational procedure than that followed under the English system can hardly be contested. A critical study of legislative proposals coming before any modern legislative body reveals that the great majority of them involve no matter of principle in respect to which division along party lines is desirable. As has been more than once emphasized, the bulk of the product of a legislature consists of appropriation and other bills making the provision necessary for this proper functioning of government. Only rarely do these bills present any question of political purport, and the same is true of not a few measures of general legislation, such, for example, as those having to do with the modification of the criminal code, the improvement of methods of judicial procedure, the making of provision for the protection of the public health, and the like. In respect to all of these, there would seem to be nothing

[3] While this is true in principle, there are occasions, though not often, when a ministry declares that a particular vote will not be deemed by it a matter of party fealty, so that its continuance in office will not be determined by the vote cast.

gained by compelling members to cast their votes according to any central direction regardless of their personal convictions. In England, no differentiation is made between these and other matters of general legislation which do involve matters of political importance. In the United States, this differentiation is clearly drawn; and only in respect to the latter is the attempt made to bring pressure to bear upon members to cast their votes in accordance with party behests. Probably the most striking illustration of the difference between the English and the American system in this respect is furnished by the attitude taken in respect to the general "supply," or appropriation, bills for the support of the government. In England, these bills are deemed to be, par excellence, party measures, with the result that the individual members are deprived of all participation in the determination of what sums shall be granted to the several administrative services and the purposes for which such sums shall be devoted. In the United States, the general appropriation bills are never treated as party measures. Not even are they so treated by the Committee on Appropriations which has their formulation in charge. The chairman of that committee at one time informed the present writer that when his committee entered upon the drafting of these bills all party lines were disregarded and the committee was actuated solely by the motive of seeking to keep appropriations within reasonable bounds and to allot such sums as were available in a manner that would best meet the needs of the several services and best minister to the welfare of the people as a whole.

Without pressing this contrast of the two systems further, it need only be said that the American system, in principle at least, has succeeded in a way that the English system has not in harmonizing the conflicting considerations of making possible political leadership and responsibility, where such leadership and responsibility is really desirable. At the same time, the American system preserves to the individual members, not only the maximum of freedom in respect to their action upon legislative proposals in so far as such freedom is consistent with the principle of party responsibility, but a real participation in the formulation of the policies and measures

in respect to which the united action of the party is deemed desirable.

The Chief Executive As Political Leader.—Even with the development through a well-ordered caucus system of means of achieving party government so far as the legislative branch is concerned, the problem of political leadership as it confronts the American people would be only partially solved. This arises from the fact that, under our constitutional system, responsibility for the formulation and enactment of a legislative program is divided between the legislative and executive branches. In our consideration of the executive branch, we have seen that, in the case of both our national and State governments, the chief executive has come to play a dominant rôle, both in the formulation of the legislative program, and in efforts to have such a program translated into action, and that the development is one wholly to be welcomed. This fundamental change in the practical working of our political system, its relations to the problem of party government and leadership, and its acceptance by the American people were set forth with exceptional force and clearness in an editorial appearing in *The Nation* of May 16, 1912, which, in opposing the proposal for a single six-year term for our Presidents, read, in part:

> The President of the United States, as the people have come to know him, or to desire that he should be, is no longer merely an executive. He is something more than commander-in-chief of the army and navy. His functions are not exhausted with the duty of enforcing the law or taking charge of our foreign relations or making appointments to office. He has become, not only a great public official, but the leader of a party. Under our system of government by party—which has developed in a way that Washington and Hamilton and even Jefferson could not foresee—the President has more and more approached the office of a Prime Minister. He is the man, that is to say, who goes before the country with a program of legislation and official achievement and then, if power be given him, is expected to carry out his pledges through vigorous leading of his party following. That is why the President has become more and more the great national figure, the chief national voice. The people look to him both to propose and to execute. It is a party which has carried him into office, but he is looked to by the country to make use of the power of his party and his authority to put through measures for the general good. The Presidency has now a much greater emphasis of initiation and leadership than

allotted to it in the earlier history of the republic. It can all be summed up in saying that we now think of the President not simply as the head of the government, but the head of the party.

Although prior Presidents, and notably Theodore Roosevelt, have sought to lead their parties and to impress their will upon Congress, it is to President Wilson that we are indebted for the most outspoken advocacy of this system and of efforts to realize it in practice. Thus, writing to A. Mitchell Palmer, who had sought his opinion regarding the proposal for a single six-year presidential term, he said, in opposing this proposal:

> He [the President] is expected to be the leader of his party as well as the chief executive officer of the government and the country will take no excuses from him. He must play the part, and play it successfully or lose the country's confidence. He must be Prime Minister as much concerned with the guidance of legislation as with the just and orderly execution of the law, and he is the spokesman of the nation in everything even the most momentous and most delicate dealings of the government with foreign nations.

Correlation of the Caucus System with That of the Chief Executive as Political Leader.—Manifestly, if we are to have real leadership and not divided counsel—a leadership that will represent the general welfare rather than a conflict of particular interests, and one that will make party government a reality—means must be devised by which the two institutions of leadership that we have been discussing, the caucus and the presidency, may be brought into adjustment so that they will work in correlation with each other and toward the attainment of common ends. This can be achieved in but one way, i.e., by the dominant party in the legislature wholeheartedly accepting the President as its political leader and making use of the caucus as its prime instrument for putting into effect the decisions reached by him. This does not mean that the party leaders in the legislature will exercise no voice in the determination of public policies, since it should always be the duty of the chief executive, in the formulation of his program, to consult with such leaders in the same way that the prime minister of England consults with his colleagues in the cabinet. It was the good fortune of President Wilson to secure such coöpera-

tive relations between himself and his party's caucus during his first term of office. To quote one who has made the office of President his chosen field of study: [4]

> The method of the President (Wilson) was to act as the spokesman for the country and the Democratic Party. Measures were introduced by Wilson's personal followers, and were pushed through the caucuses, the committees and the houses, in the form dictated by Wilson and the party leaders. The lines of caucus obligation were drawn taut and the moral pressure upon Congress was intensified by the telling use of messages delivered in person to the people over the heads of the legislators. Mr. Roosevelt had wielded the big stick, but Mr. Wilson applied a technique of presidential predominance which was a genuine contribution to the working of the American system, and which made it temporarily like the English. That technique was the theory of the presidency set forth in his books, and now he developed it with all the deliberateness of an expert student of the processes of politics and a firm believer in the superiority of parliamentary to congressional government. Since the adoption of the Constitution, the nation has been feeling after one or another means of welding together the political departments of the government, which are in law set off against one another, in Wilson's own words, like planets in the system of Newton. The great welding force has been party, and the speakership, caucuses, steering committees, conference committees, and the House committee on rules, have separately or together, been instruments of party control. In the hands of Woodrow Wilson, the presidency was proved to be, in favorable circumstances, what he himself had declared it might be: the supreme agency of leadership of party and of nation alike.

Franklin D. Roosevelt has given to the functions of his office the same interpretation and has, in large part, received the same cooperation on the part of his party's caucus in Congress. These two administrations have thus demonstrated the possibility of securing a system of leadership comparable in its effectiveness to that enjoyed by other governments whose constitutional systems provide for a union of legislative and executive powers in the same hands. It is to be hoped that the examples thus set will harden into one of the accepted conventions of our political system.

[4] Professor James Hart, "Classical Statesmanship," *Sewanee Review*, October, 1925.

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