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ESSENTIALS OF AMERICAN GOVERNMENT

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498

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PREFACE

As in the case of earlier editions, this volume is basically a condensation of our *Introduction to American Government,* the eighth edition of which was published in 1945. There have been, however, some changes of sequence, especially in the treatment of Congress; and much new material has been added, including a chapter on the timely subject of the improvement of Congress and of legislative-executive relations. Every effort has been made to bring the subject-matter completely down to date—substantially as of January 1, 1947. It has been disturbing to be obliged to put the book to press without awaiting the outcome of pending proposals pertaining to limiting presidential tenure, re-defining the presidential succession, merging the defense establishments, terminating war powers, overhauling the labor laws, readjusting the tax burden, and many other matters currently agitating the congressional and the public mind. But events never wait on the convenience of authors; and the awkwardness of stopping in the midst of things can hardly outweigh the advantage of an immediate new edition geared to the earlier postwar, as was its predecessor to the earlier wartime, position of government in our country.

F.A.O.
P.O.R.

CONTENTS

PAGE

PREFACE v

PART I

THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

1. *The Constitutional Basis*

CHAPTER

I. OUR FIRST STATE AND NATIONAL GOVERNMENTS 1
II. MAKING AND ADOPTING THE NATIONAL CONSTITUTION 15
III. HOW THE NATIONAL CONSTITUTION DEVELOPS 28

2. *The Federal System in Transition*

IV. FEDERALISM AND THE PRINCIPLE OF NATIONAL SUPREMACY . . 44
V. THE CONSTITUTIONAL POSITION OF THE STATES 55
VI. CHANGING FEDERAL-STATE-LOCAL RELATIONS 72
VII. CITIZENSHIP AND CIVIL RIGHTS 87

3. *Instrumentalities of Popular Control*

VIII. THE PEOPLE AS VOTERS 111
IX. POLITICAL PARTIES—NATURE AND ORGANIZATION 124
X. NOMINATIONS AND ELECTIONS 146
XI. NOMINATING AND ELECTING A PRESIDENT . . 160

PART II

THE NATIONAL GOVERNMENT

1. *Organization, Powers, and Procedures*

XII. THE STRUCTURE OF CONGRESS . . . 179
XIII. THE ORGANIZATION OF HOUSE AND SENATE . 194
XIV. THE POWERS AND FUNCTIONS OF CONGRESS—A GENERAL VIEW 212
XV. CONGRESS AT WORK—THE LEGISLATIVE PROCESS 222
XVI. THE PRESIDENT AND CONGRESS 239

CHAPTER PAGE

XVII. The Improvement of Congress and of Legislative-Executive Relations 253
XVIII. The President as Chief Executive . . . 269
XIX. National Administration—Functions and Agencies . 290
XX. The Executive Civil Service . . . 307
XXI. The National Judiciary . 331

2. *Functions and Services*

XXII. National Finance . . 349
XXIII. Money, Banking, and Credit . 369
XXIV. Foreign and Interstate Commerce . 376
XXV. Government and Business . 390
XXVI. Agriculture and Conservation 410
XXVII. Government and Labor 434
XXVIII. Social Security—Housing 455
XXIX. Foreign Relations . 465
XXX. National Defense 485
XXXI. Territories, Dependencies, and Special Jurisdictions 507

PART III

STATE GOVERNMENT

XXXII. State Constitutions . 525
XXXIII. The Legislature—Structure and Powers 540
XXXIV. The Legislature—Organization and Work 556
XXXV. The State Executive 567
XXXVI. State Governmental Activities 577
XXXVII. Administrative Agencies and Problems 588
XXXVIII. State Finance 598
XXXIX. The State Judiciary . 618

PART IV

LOCAL GOVERNMENT AND ADMINISTRATION

XL. The County and Its Government 634
XLI. The Government of Cities . . 654
XLII. Activities of City Governments 672
XLIII. Townships, Villages, and Special Districts . . 685

Appendix: Constitution of the United States of America . 695

Index . . 709

ESSENTIALS OF AMERICAN GOVERNMENT

PART I

THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

1. THE CONSTITUTIONAL BASIS

CHAPTER I

OUR FIRST STATE AND NATIONAL GOVERNMENTS

Colonial and Revolutionary Backgrounds

English and colonial origins of American political institutions

Organized government in this country reaches far into the past. The national government, centering in Washington, is now in the latter half of its second century. Several of the state governments—based upon colonial governments established two or three hundred years ago—are still older. The county dates from 1634 in Virginia and 1643 in Massachusetts; and New York became the first chartered municipality as long ago as 1686.[1] In its characteristic New England form, the town, or township, existed practically from the date of the first settlement on Massachusetts Bay. More than this: American political institutions have a rich European background. County, borough, parish; popular election and representative legislature; limited executive and the common law; jury trial, *habeas corpus,* the right of petition and of assembly—all were carried to our shores from across seas, being rooted in the England of the Bill of Rights, of *Magna Carta,* and even of Norman-Angevin administration.[2]

The governments of the thirteen colonies

The first governments on American soil which have any bearing on our present subject of study were those of the thirteen colonies; and they are of concern to us only as paving the way for the later state governments, and as sources of influence on the shaping of national constitutions—first the Articles of Confederation, and afterwards the basic instrument of government under which we live today. Established under widely varying conditions, by dissimilar groups of people, and at intervals covering more than a century and a quarter, the colonies naturally started off with a considerable variety of political arrangements. Except with respect to the areas and agencies of purely local government, there

[1] In fact 1652, if a Dutch charter is counted.

[2] This phase of our national development is treated fully in E. P. Cheyney, *The European Background of American History, 1300–1600* (New York, 1904).

was, however, as time went on, a tendency toward substantial uniformity. Every colony except Rhode Island, Connecticut, Maryland, Pennsylvania, and Delaware ultimately became a "royal province," administered by a governor appointed by the king; and even the five enumerated eventually acquired charters providing for governments in most respects like the others. All had legislatures which steadily strove, with varying success, to gain more power. All had the same common law, and practically the same judicial organization and procedure.

Colonial autonomy

In theory, the colonies were controlled in all important matters from the mother country. Three thousand miles of salt water, however, separated the settlements from the English seat of authority, and even if there had been any colonial office, or similar integrated establishment, charged with enforcing the king's prerogatives, the exigencies of life in a frontier world, combined with eighteenth-century conditions of communication, would have frustrated anything approaching continuous and effective overseas control. As it was, the colonists early grew accustomed to doing pretty much as they pleased. They made their own laws, and paid little attention to the few regulations—relating chiefly to trade—which Parliament sought to impose; they paid no taxes to the home government; and, except in times of emergency, they looked after their own defense.

Attempts at firmer control lead to independence

After the French and Indian War, the ministers of George III felt that the time had come to tighten the reins, and it was decided not only to enforce various long-evaded commercial regulations, but also to station British regulars in the colonies, as part of a permanent system of imperial defense, and to ask the colonists to pay taxes to help meet the costs entailed. From the English point of view, this was a reasonable plan. But the colonists did not like it. Now that the French power had been broken, they anticipated no more need for military assistance; they disliked the idea of paying taxes not voted by their own chosen representatives; they recognized no sovereignty except that of the crown, and totally rejected the notion that Parliament had any general right of legislation over them such as it enjoyed in the mother country. Inadequately informed on the state of mind prevailing in the dependencies, the king's government went ahead with its plans, and when halted by unexpected opposition, merely tried different methods without abandoning the general policy. The upshot was a series of events—familiar to every American schoolboy—which steadily widened the breach until, in April, 1775, debate gave way to action. From the ministers' ill-advised decisions flowed the Revolutionary War, the independence of the thirteen colonies, and the establishment of a new trans-Atlantic English-speaking nation.

The aristocracy and the "people"

We are prone to think of the Revolution as simply a contest for independence from Great Britain. But it was a great deal more than that. Once started, it brought into view sharp cleavages within the colonies themselves between the well-to-do and privileged on the one hand and

the "people"—the unenfranchised small freehold farmers, tenants, artisans, and laborers—on the other; and the new pattern of politics to which it gave rise proved almost as significant as the fact of independence itself. Government in the mother country was in those days far from democratic; and in the new world, despite the leveling effects of frontier life, it was hardly more so. Every one of the thirteen colonies, on the eve of the Revolution, had a property qualification for voting. In five, ownership of personal property sufficed; but in seven, no one could vote unless he owned real estate. In various instances, there were also moral, religious, and racial qualifications. Office-holders were required to meet property and other tests, and legislatures were hedged about with restrictions. Altogether, the people, taken in the mass, certainly did not rule.

When the Revolution came on, many of the more educated and privileged (clergymen, officials, landowners, merchants) who had joined in protest against the imperial policies nevertheless remained loyal to the mother country; indeed, if these elements had been able to keep the upper hand, there would have been no armed revolt, and no separation, at all. Sooner or later, however, they lost their grip in all of the colonies; and the movement which they had helped to launch was carried forward by other men, on lines that led not only to independent nationality, but to the infusion of new elements of democracy into the existing social and political order.

Political liberalism in the saddle

Some of these later leaders were, to be sure, men of means and of conservative temper; one thinks instantly of Washington, reputed the richest man in the colonies. In the main, however, they and their supporters were people owning little property and having but limited business experience, with only here and there a figure of the type of Jefferson, who, although a plantation-owner and slaveholder, was inclined to a broad liberalism in politics. They were, in general, people who risked little by change; the chances were that they would gain something from it, both socially and politically. They did not stop with arguments for constitutional rights as colonists, or even for independence. Drawing upon the great streams of English liberal thought in the seventeenth century—especially as they flowed together in the pages of John Locke—they turned their minds to what they conceived to be the general and universal rights of man, and to reconstructing government and politics in America in accordance with such rights.

Dislike of too much government

Many, indeed, advanced to the conclusion that government is hardly better than a necessary evil. Life and property must be protected; social order must be maintained. But this, many considered, was about as far as government ought to be permitted to go. Better run the risk of occasional riots and other disturbances than have too much government. The oft-quoted remark of Jefferson that that government is best which governs least expresses the idea that underlay, not only the Declaration of Independence, but the early constitutions of the states as well; and it

is no cause for surprise that, motivated by such a philosophy, the makers of our first national constitution, the Articles of Confederation, planned a system which, when put to a test, quickly broke down. Bitter experience showed that the revulsion against governmental authority had gone considerably too far. In the new fundamental law put into operation in 1789, the fault was to a large extent corrected.

The Revolutionary State Constitutions

Origins

After war broke out, in 1775, many royal governors and other officials left the country, and in one colony after another control of affairs passed into the hands of rump legislatures, specially chosen "conventions," and other more or less irregular bodies. Under these circumstances, the Continental Congress—even before independence was declared—advised that each colony reconstruct its own government on lines believed most likely to meet its particular needs. Connecticut and Rhode Island had obtained exceptionally liberal charters, and found it necessary to make only a few minor changes in order to adapt them to the new situation. But other colonies—or *states*, as they were now beginning to be called—required something more; and, by one means or another, all of these framed and adopted new fundamental laws, or constitutions, Massachusetts closing the list in 1780. Some of the new instruments were drawn up by assemblies chosen solely, or at any rate mainly, for this specific purpose. Most of them, however, were made and put into operation by bodies selected rather for the general management of affairs; and in only two states—Massachusetts and New Hampshire—were they the handiwork of conventions which confined their labors to this one task. In half a dozen states, the new constitutions were submitted to a popular vote, though in only two—again Massachusetts and New Hampshire—was final adoption made dependent upon ratification in this manner.[1] Notwithstanding that they thus were brought into being by rather undemocratic, and even irregular, procedures, the majority served their purpose, with few changes or none, for as long as fifty or seventy-five years. Massachusetts, indeed, did not give her original constitution a general overhauling until 1918.

General features

Although differing widely in detail, these Revolutionary state constitutions, and the governments organized under them, had many important features in common. First, the people were proclaimed to be the sole source of authority: the rule of the king was gone; sovereignty had passed to the politically organized populations of the states. Second, the new governments had only such powers as were expressly bestowed upon them, or at all events were not prohibited to them, by the constitutions under which they operated. And since it was considered that government, by its very nature, tends to become oppressive, powers were conferred

[1] In the case of New Hampshire, the constitution of 1784 is meant—not the provisional instrument of 1776.

sparingly, and with means provided by which abuse of them could be prevented or punished.

Separation of powers; checks and balances

Third, for what was then believed to be the better protection of the people's liberties, the powers conferred were deliberately divided among three separate and coördinate departments or branches of government—executive, legislative, and judicial. Distinct, however, as these branches were to be, they were not to function in water-tight compartments. Over against the principle of separation of powers was set that of "checks and balances"; and so vigorously was it brought into play that each branch of government, far from being allowed full freedom of action, was tied up with the others and made liable to restraint by them at a number of different points. Particularly was this true of the relations between the executive and legislative branches.

Civil rights

Another significant feature of the constitutions was the prominence given to guarantees of civil rights and liberties. Seven states prefixed "bills of rights" to their constitutions, and in all cases it was made plain that the individuals composing the sovereign people had rights—freedom of speech and of assembly, trial by jury, *habeas corpus*, etc.—which every agency of government must at all times respect. Many of these rights were embedded firmly in the common law brought over from England. But most of the states thought it worth while to reënforce this safeguard by full enumeration also in their written constitutions.

Limitations upon democracy

Finally, notwithstanding a steady growth of liberal opinion, the doctrine of popular sovereignty was not construed to imply full political democracy. On the contrary, it was still thought best to restrict the suffrage to men having some material stake in the community—practically, therefore, to property-holders. A property qualification for voting was adopted in every state except Vermont, and in most instances it operated to debar more than half of the adult male population. High property qualifications were set up also for membership in the legislatures, and for office-holding generally.

Early State Governments

The governments under the new constitutions rested on a basis different from that of the previous colonial governments, and often were actuated by a different spirit. Structurally, however, they showed little change. In every case there continued to be a governor, a legislature, a system of courts, and appropriate machinery for local administration.

1. The governor

Under the colonial régime, the governor, although somewhat differently situated in various types of colonies, had always been the outstanding political figure. In practice, to be sure, his prerogatives were sometimes not as impressive as they looked on paper; instructions from London often left him little leeway, and the power of the purse as wielded by the legislature sometimes placed him at grave disadvantage. As a rule, however, he had sufficient authority to cause him to be re-

garded as an autocrat; and it is not to be wondered at that when, after 1776, the colonists came into a position to institute governmental systems constructed according to their own ideas, one of the first things that they did was to strip the governor of the greater part of his powers. In many instances, indeed, he was deliberately subordinated to the legislature, being, in fact, elected by that body in all except four states,[1] where he was chosen by the people. In ten states, his term of office was restricted to a single year. In Massachusetts alone did he retain an independent veto power; although before 1800 four other states put this weapon back in his hands.[2] Everywhere the appointing power was shared with a council or with the assembly.

2. The legislature

On the other hand, the legislature, as a body standing close to the people, was endowed with rather extensive authority. From the opening of the eighteenth century, every colony had an elective assembly, variously termed "house of burgesses," "house of commons," or "house of representatives"; and in all except three instances this assembly formed the lower branch of a legislature whose upper chamber was the governor's council. Pennsylvania adhered until 1790 to the unicameral form of legislative organization inherited from colonial days; and Georgia, adopting that form in her new state constitution of 1777, kept it until 1789.[3] Elsewhere, when the colonies became states the bicameral plan was continued, with no important change except that the governor's council, in becoming a senate, became also popularly elective. Elections to the lower house were annual except in South Carolina, where they were biennial; and existing local-government areas were employed as electoral districts, subject to occasional reapportionments of seats in accordance with changes of population. In New England, the town was—as it still is, except in Massachusetts—the unit of representation; elsewhere, the county was employed.

3. The judiciary

Patterned closely after the English system, arrangements for the administration of justice were substantially the same in all of the colonies, and were carried over into the states with relatively little change. There were commonly three grades of tribunals. At the bottom stood the justices of the peace, named as a rule by the governor (although in some instances elected by the freeholders), with individual jurisdiction extending only to petty offenses and to civil cases involving small amounts. Above these stood the county court, or court of quarter sessions, consisting of the justices in each county sitting together, with criminal jurisdiction over all except capital cases, and jurisdiction over

[1] New Hampshire, Vermont, Massachusetts, and New York.

[2] In Massachusetts, measures could be passed over the governor's veto by a two-thirds vote in both houses of the legislature. In New York, the veto power was shared by the governor and council, and a veto could be similarly overridden in the legislature.

[3] Vermont entered the Union in 1791 with a unicameral legislature, which it retained until 1836. The state's experience with the system is analyzed in D. B. Carroll, *The Unicameral Legislature of Vermont* (Montpelier, Vt., 1933).

civil cases involving varying, but relatively large, sums. At the top stood a court of appeals, which, in colonial days, consisted commonly of the governor and council, but which, after the colonies attained statehood, gradually came to be a specially chosen group of judges similar to our present supreme courts. All of the colonial courts recognized and enforced not only colonial statutes, but the common law and such acts of Parliament as had been made to apply to America; and English judicial procedure, including trial by jury, was universally adhered to. In most cases, the severing of connection with England made necessary some new arrangement for the selection of judges. One state, *i.e.*, Georgia, forthwith introduced popular election. The others, however, adopted—in almost equal numbers—one or the other of two different plans: (1) election by the legislature, and (2) appointment by the governor, with or without confirmation by the council or the senate. Only in later times did the state judiciary become generally elective, as it is today.

4. Local government

With even less change than in the higher levels of government, colonial areas and institutions of local government and administration were perpetuated in the new states. These areas and institutions were, in turn, based largely upon those familiar in England. However, conditions of life in a frontier world made it necessary to improvise a good many novel features. Furthermore, physical surroundings differed from colony to colony, and more diversity arose in local government than in other parts of the political system.

The New England town

Devoted to small-farming and to trade, needing protection against Indian attacks, and desiring to remain in close fellowship with the religious congregations to which they belonged, the people of New England settled in compact communities, and therefore had as their main unit of local government the town; counties existed, but served only minor purposes. To be sure, the New England town was not necessarily, nor even usually, an "urban" center. Rather, it was what Middle Westerners of later days would have called a "township"—often entirely rural, although likely to contain at least a village. At all events, it was small, and its people could come together easily and frequently for worship, for social intercourse, and for political action. The governing authority was a primary assembly of voters known as the town meeting, which convened at least once a year and made by-laws on various matters, levied taxes, voted appropriations, and elected not only the town's representative (or representatives) in the colonial assembly, but also officers—chiefly a board of "selectmen"—to manage the town's affairs during the ensuing twelve months. As a rule, these little governments went along with no interference from the colonial and English authorities; and the experience which the people gained in looking after their community interests, even though within modest limits, was of inestimable value in the era of self-government on higher levels ushered in by the Revolution.

The county

In the Southern colonies, the situation was different. The plantation system there prevailing caused the population to be scattered thinly over wide areas, with the result that the county, rather than the town, became the principal local-government unit. Broadly, the county was organized like its prototype in the mother country. There was no popular assembly, and most of the officers—lieutenant, sheriff, coroner, and justices of the peace—were appointed by the governor, commonly on nomination by the justices, who, as at that time in England, were administrative as well as judicial authorities. In the Middle colonies, a mixed system of town and county government developed, although after 1688 the town was increasingly overshadowed by the county, especially in Pennsylvania.

The Beginnings of National Government

The Continental Congress

Scattered along a seaboard almost 1,300 miles in length, the colonies developed little machinery for coöperative action until forced to do so by the widening breach with the mother country. To consider measures required by the new situation, a body of delegates, known in history as the First Continental Congress, held sessions in Philadelphia in the autumn of 1774; and a second Congress, meeting in the same city in May, 1775, although later moving from place to place as the exigencies of war required, served as the country's sole organ of national government until March, 1781.

Need for a stronger government

Without some such unifying authority as the Continental Congress, the war for independence could never have been carried to a successful conclusion. As an agency of government, however, the Congress left much to be desired. Starting as only a voluntary intercolonial conference, it remained to the end a revolutionary assembly, resting on no basis of law and exercising powers only by virtue of having assumed them with the tacit consent of the governments and peoples of the states. To meet a temporary emergency, makeshift arrangements such as these might possibly have served. But the war gave promise of lasting many weary years; if successful, it would leave the country confronted with the problem of a permanent national government; and in any event, finance, commerce, and foreign relations, to say nothing of military and naval operations, called for management at the hands of a government resting on some regular basis, endowed with definite powers, and assured of some degree of permanence. And out of this practical situation arose the idea of a genuine and enduring union of the states under a national constitution—in other words, that concept of American nationality which gradually broadened and deepened until it found expression in the Articles of Confederation, the constitution of 1789, and eventually the vast and complicated mechanism of national authority and management which we know today as the government of the United States.

The Articles of Confederation

The Articles drafted and ratified

On June 7, 1776, Richard Henry Lee, of Virginia, introduced in the Continental Congress his famous resolution declaring the colonies "free and independent states," and at the same time moved the appointment of a committee to draw up "articles of confederation." Scattered proposals looking in these directions had previously attracted little support. By this time, however, the Congress had come to a point where it could no longer evade or postpone either issue. Hence on June 11 a committee was appointed to draft a declaration of independence, and on the following day another to draw up a plan for a more substantial union. The result in the one case was the Declaration of Independence, adopted by the Congress on July 4; in the other, the preparation of the first constitution of a united America, *i.e.*, the Articles of Confederation. The latter instrument, brought forward by the committee on union in the brief space of eight days, was, however, not approved by the Congress until November 15, 1777, and did not secure the endorsement of the last necessary state, *i.e.*, Maryland, until three and one-half years later. When, therefore, it finally went into operation, the war which had called it into being was fast approaching an end.

Continued sovereignty of the states

Under the Articles,[1] the United States at last achieved a government resting on a written constitution and endowed with definite powers—a government which, it must not be forgotten, was considerably superior to the extra-legal Continental Congress, even though it, in turn, proved inadequate and eventually had to be replaced. Three main features characterized it. The first was the complete and unchallenged sovereignty of the states. The latter, to be sure, delegated to the national government the right to exercise certain powers and denied certain powers to themselves. But they retained all powers and rights not delegated or prohibited; the union was only a loose confederation, or league; and, notwithstanding that the Articles spoke of it three times as "perpetual," the states plainly regarded themselves as entitled to withdraw if they desired.

The Congress

A second feature was the concentration of all national powers in a Congress of one house, meeting annually, and composed of delegates appointed in each state in whatever way the legislature thereof should direct. Each state paid its own delegates, and could recall them and appoint others at any time; and no person might serve more than three years out of any six. A state might send any number of delegates from two to seven. But voting was by states, and each state had one vote. Committees might, of course, be set up, and subordinate officers appointed. But there was no executive branch, and also no national judiciary.

[1] The text of the Articles will be found in many places, *e.g.*, J. M. Mathews and C. A. Berdahl, *Documents and Readings in American Government* (rev. ed., New York, 1940), 27-34.

Powers and limitations

Not only was machinery thus simple, but, in the third place, powers and functions were few and severely restricted. Far from being a general lawmaking authority like our present Congress, the Congress of the Confederation was, in effect, only a grand committee of the states charged with executive and managerial functions, such as looking after foreign relations, declaring and conducting war on land and sea, building and equipping a navy, carrying on dealings with the Indian tribes, borrowing money, issuing bills of credit, regulating weights and measures, and making requisitions upon the states for soldiers and for funds. It could not reach down past the state governments to control the people in any effective way. It could adopt resolutions and issue commands, but it had only limited means of enforcing them—none at all through judicial process except by resort to the courts of the states. And some of the most important powers definitely possessed—for example, making treaties and borrowing money—could be exercised only if the delegations of as many as nine states concurred.

Difficulties encountered:

As has been said, the Articles finally went into effect on March 1, 1781. Momentarily, there was improvement. The new Congress, while not a distinguished body, was superior to its predecessor; and it addressed itself courageously to the performance of its difficult tasks. Notwithstanding some notable achievements, however, inherent defects of the new frame of government quickly produced distressing results. Four main difficulties appeared. The first was the lack of effective power to raise money, in particular, to tax. The amounts needed would seem small in these days of immense national disbursements, but they were distressingly large for the time. Interest payments on sums borrowed for the prosecution of the war were in arrears; officers and soldiers, who in many cases had received nothing for their services except certificates of indebtedness, were clamoring for their pay; a new army was needed to repel possible British or Spanish attacks and to hold the Indians in check, and a navy to protect commerce from the depredations of the Barbary pirates; the current expenses of the new government must, of course, be provided for.

1. Lack of money

Obstacles to obtaining it

Congress had only two ways of obtaining funds, namely, by borrowing and by making requisitions on the states. The possibilities in the first direction had already been pretty well exhausted—although optimistic Dutch bankers continued to extend small loans which quite possibly saved the country from utter bankruptcy. Requisitions upon the states were likewise a hazardous resource. Congress could apportion sums and request remittances, but it had no way of compelling a state to turn over a penny. There was widespread objection to land values as the basis of apportionment; people disliked sending off the proceeds of local taxation to a distant government; and a state naturally hesitated to meet obligations in full while others were shirking them. The result was that, after a brief period, some states fell into the habit of contributing

hardly anything, others paid irregularly, and only two or three—chiefly New York and Pennsylvania—made any genuine effort to come forward with all that was asked of them.

2. Inability to regulate commerce

A second main difficulty was the lack of power to control commerce. Congress, to be sure, had authority to regulate trade with the Indian tribes and to conclude treaties of commerce with foreign nations. But it had no power to regulate commerce between the states; it could not lay duties on exports or imports; and it had no means of preventing the states from levying duties, or even prohibiting the exportation or importation of goods, as they severally desired. The consequences were disastrous. No money for national use could be raised from tariff duties; no uniform commercial policy could be adopted; and the states laid duties, granted favors, and set up barriers as their individual interests dictated, sacrificing by their jealousies and bickerings splendid opportunities for advancing the struggling new nation's trade, wealth, and prosperity. Enmeshed in a network of duties and tolls, trade languished; healthy commercial competition gave way to downright commercial warfare.

3. A government of states and not of men

Lack of power to raise money by taxation and to regulate commerce on uniform lines would alone have been enough to insure the failure of the new government. Coupled with these obstacles were, however, two further fundamental weaknesses: (1) the government of the Confederation rested only upon the states and not upon the people, and (2) it was wholly without power to enforce its authority, even upon the states. From the first circumstance flowed many unhappy results, in addition to inability to lay and collect taxes. Congress could not make laws and enforce them upon the people; it could only pass resolutions, advise and admonish the state authorities, and hope that such agencies would give heed. It had no power to raise armed forces independently, even when—as during the Shays rebellion in Massachusetts in 1786—the new order was gravely imperiled.

4. State infractions of the Articles

Equally serious was the lack of power to compel the states to live up to their obligations. Not only did they frequently fail to comply with requisitions for money and for armed forces, but some of them freely violated the Articles by making treaties with Indian tribes, by entering into alliances among themselves without the consent of Congress, by ignoring obligations created by treaties negotiated by Congress, and by seeking to make their issues of paper money legal tender. Congress was powerless to prevent these infractions by military, judicial, or other means; and its moral authority carried little weight.

The Movement for Revision

Revision proposed

Even before the Articles took effect, men who had the country's welfare at heart—among others, Washington, Hamilton, Madison, Jay—felt that a government so devoid of power could not succeed. The most

they could hope for was that a brief trial of the plan would convince the people of its futility and lead to the stronger system from which the states as yet drew back. A few years of experience fully vindicated the doubts entertained; and suggestions for an amending convention gradually grew in favor. Every effort to bring about a change by simple agreement having been blocked, Congress itself, in 1784, began to talk about a convention; and in the following year the Massachusetts legislature formally requested that a call be issued, although the state's representatives in Congress refused to present the resolution. Matters were fast going from bad to worse, and in 1786 Congress, in making a final appeal for an oft-proposed amendment conferring power to lay import duties, frankly told the people of the "almost disunited states" that the government was at the end of its tether and that only immediate action could save the country from ruin.

Virginia and Maryland negotiate on the navigation of the Potomac

Meanwhile, a chain of events started which led, somewhat deviously, to the long-talked-about convention. From as far back as 1777, Virginia and Maryland had been trying to arrive at an understanding concerning the navigation of the Potomac river, forming their common boundary. Washington and Madison were especially interested in the matter, and at their instigation Virginia appointed commissioners in 1784 to renew the negotiations. Maryland took similar action in 1785, and at length, in a conference held at Washington's Mt. Vernon home, the desired agreement was reached. Maryland thereupon suggested that other issues between the two states be taken up. If navigation questions could be settled by conference, why not tariff difficulties? Furthermore, if two states could advantageously confer, why not four—especially in view of the fact that Pennsylvania and Delaware were vitally concerned with some of the problems to be considered? The upshot was that, early in 1786, Madison piloted through the Virginia legislature a resolution appointing commissioners to meet such representatives as might be named by any other states to survey the trade of the country and "to consider how far a uniform system in their [the states'] commercial regulations may be necessary to their permanent harmony." A formal invitation was thereupon issued to all of the states to send as many delegates as they might desire to a convention to be held at Annapolis in the following September.

The Annapolis convention (1786)

At the designated time, representatives appeared from only five states. Four others had, indeed, appointed delegates, who failed to attend; four had taken no action at all. This was a discouraging showing, and the persons present agreed that it would not be worth while to go ahead with the contemplated discussions. Some felt that the project might as well be dropped. Madison and Hamilton, however, thought otherwise; and before disbanding, the delegates unanimously adopted a report prepared by the latter calling attention afresh to the critical situation of the country and proposing that delegates from all of the states meet at

Philadelphia[1] on the second Monday of May, 1787. The purpose in mind, furthermore, was no longer merely to promote agreement on commercial regulations. Rather, the gathering was "to take into consideration the situation of the United States," with a view to changes of any kind that would tend to make the governmental system more adequate. How sweeping such changes would probably have to be, the authors of the proposal discreetly refrained from saying.

The Philadelphia convention called

By this time, Congress was grasping at straws, and on February 21, 1787, it resolved that the proposed convention should be held "for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the states,[2] render the federal constitution adequate to the exigencies of government and the preservation of the Union." Congress had itself fallen into disrepute. But the activities of Washington, Madison, Hamilton, Franklin, and others in behalf of the plan gave it weight, and all of the states except Rhode Island eventually followed Virginia's example and named delegates, although New Hampshire failed to act until the convention was well under way. In some cases, the legislature elected, in others it authorized the governor to appoint; in no instance were the delegates chosen directly by the people. Little or nothing was said about making a new constitution. The instructions given the delegates plainly assumed that nothing would be done beyond revising the Articles; indeed, in most instances they expressly limited the delegates' powers to this one object, and Delaware went so far as to forbid her representatives to agree to any proposal that would take away the equal vote of the states. If any persons expected a new constitution to be made—and probably some did so—they were discreet enough to keep their ideas to themselves, lest apprehensions be aroused and the project ruined. Nevertheless, most men must have felt with Madison that unless "some very strong props" were applied, the existing union would "quickly tumble to the ground."

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[1] Philadelphia, it will be recalled, was the country's "federal city," or capital, under the Articles of Confederation, as also during most of the first decade under the later constitution.

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CHAPTER II

MAKING AND ADOPTING THE NATIONAL CONSTITUTION

The Constitutional Convention

The convention was announced to meet on the second Monday of May. When that day arrived, however, only a few delegates had reached Philadelphia; and since it was useless to start until a majority of the states were represented, the opening session did not take place until May 25. Though characterized by Jefferson as "an assembly of demigods," the convention naturally contained men of widely differing temperaments, abilities, and aptitudes. There were members of great personal force and political sagacity: Washington and Madison of Virginia,[1] Franklin and Wilson of Pennsylvania, Alexander Hamilton of New York, John Dickinson of Delaware. There were delegates of fair, but not exceptional, ability: Rufus King of Massachusetts, Roger Sherman and Oliver Ellsworth of Connecticut, Gouverneur Morris of Pennsylvania, William Paterson of New Jersey, George Mason and Edmund Randolph of Virginia, John Rutledge and Charles Pinckney of South Carolina. And there were a few members of narrow vision and limited constructive talent: Lansing and Yates of New York, Elbridge Gerry of Massachusetts, and Luther Martin of Maryland. Lawyers predominated; and several of the delegates were reasonably well acquainted not only with the history of English law and politics, but with the governmental systems of Continental Europe. About half were college graduates. Practically all had been active in the government and politics of their respective states. Many had helped frame constitutions, sat as members of legislatures, or held executive or judicial offices. Approximately half had been members of Congress. Men of age and maturity were included, notably Franklin, who was almost eighty-two. But a large proportion of the most active and influential delegates were comparatively young: Madison, the master-builder, was thirty-six, Gouverneur Morris thirty-five, Hamilton thirty, Charles Pinckney twenty-nine.

Membership

Furthermore, the men who now held the country's political destinies in their hands were not, in the main, the same as those who had led in bringing on the Revolution and in declaring independence. In general, they were a more conservative and cautious group. Patrick Henry "smelt a rat," and refused to attend. John Hancock was not there; nor were Richard Henry Lee, Samuel Adams, and Thomas Paine. Almost to a man, the delegates were drawn from the professional and propertied

Conservative temper—property interests

[1] Jefferson was on a diplomatic mission in Europe; otherwise he undoubtedly would have been a member. The same is true of John Adams of Massachusetts.

classes, chiefly in the seaboard towns where such wealth as existed was largely concentrated. Forty of the fifty-five who actually attended owned public bonds or other securities; fourteen or more had acquired land for speculative purposes; twenty-four were loaning money at interest; eleven had mercantile, manufacturing, or shipping connections; fifteen were slave-owners. Not one represented, in his immediate personal economic interests, the debtor, small-farming, or wage-earning classes. Few were as conservative as Hamilton, who wanted to see a highly centralized and definitely aristocratic political system set up. But few, also, could be classed as democrats, in the sense in which that term is nowadays understood.

Common objective

Plenty of disagreements were bound to arise, once the delegates had started their discussions. Upon the objective chiefly to be aimed at, however, there was, first and last, little difference of opinion—namely, a government of sufficient strength to withstand agrarian-debtor agitation, preserve social order, and keep the country on an even keel. And it is not to be wondered at that a constitution coming from a group thus inclined (although, to be sure, providing for a more truly popular plan of government than could at that time have been found in any other important country of the world) should have been devised deliberately—by means of checks and balances, indirect elections, non-interference with the suffrage restrictions of the states, presidential veto, and the implicit principle of judicial review—to keep the restless forces of democracy from capturing control of affairs.[1]

Organization and procedure

The convention's sessions were held in the old brick State House in Philadelphia, probably in a room directly above that in which the Declaration of Independence was signed. Seventy-four delegates, in all, were appointed, but only fifty-five ever attended; of these, some were present only part of the time, and the average attendance seems not to have exceeded thirty or thirty-five. At the opening meeting, Washington was unanimously chosen to preside; and this prevented him from taking an active part in the debates. Indeed, so far as is known, he addressed the convention only twice, on the opening and closing days. With the possible exception of Franklin, he, however, was less dependent on oratory than any other delegate. He performed his duties as moderator in a manner to allay strife; in private conversation and informal conference, his opinions and advice were always to be had; and it is doubtful whether, on the whole, any member exerted greater influence.

Having full power to make its own rules, the convention early decided, not only that each state should have one vote, as in the Congress

[1] The members of the convention are characterized briefly, one by one, in M. Farrand, *The Framing of the Constitution* (New Haven, 1913), Chap. II, and the significant, although perfectly natural, correlation between their economic interests and their political ideas and aims is discussed illuminatingly in C. A. Beard, *An Economic Interpretation of the Constitution of the United States* (new ed., New York, 1935), 74-149, 189-216.

of that day, but that, in order to enable the members to speak freely and plainly and to protect them against outside criticism and pressure, the sittings should be behind closed doors, and that nothing should be put into print or otherwise made public until the work was finished; and this injunction of secrecy was observed with remarkable fidelity. A secretary was appointed, and a journal kept. When, however, in 1819, this official record was printed by order of Congress, in the hope that it would throw light on the way in which various provisions of the constitution then in controversy should be interpreted, it proved to be only a bare and not wholly accurate enumeration of formal motions and of the votes by states. Happily, one of the most vigilant and efficient delegates, sensing the importance of what was being done, planned to keep a record of his own. This was Madison. Fragmentary memoranda were left by a few other members, and something can be learned from letters written by certain delegates to their friends. But what we know today about the convention's discussions, as distinguished from its formal actions, comes mainly from the clear and candid *Notes* laboriously compiled—sometimes to the extent of three or four thousand words a day—by the learned and methodical Virginian.[1]

The Constitution Framed

The convention's main problem

Deliberations had not gone far before the delegates were brought face to face with a truly challenging question. Should they merely revise the Articles of Confederation, or should they make a new constitution? There was no getting away from the fact that their instructions looked only to revision, or from the suspicion that the proposal for a convention would have failed had the people of the states supposed that anything more drastic would be undertaken. On the other hand, many thoughtful persons agreed with Washington when he confessed the hope that the convention would "adopt no temporizing expedients," but would "probe the defects of the constitution [*i.e.*, the Articles] to the bottom and provide a radical cure, whether they are agreed to or not." Both points of view were strongly represented in the convention, and a plan based on each was quickly presented for consideration.

The Virginia plan

The first scheme to appear came logically from the state that had taken the initiative in causing the convention to be held, *i.e.*, Virginia. Madison was its principal author, although Governor Edmund Randolph presented it; and it embodied the best thought of the convention's ablest student of political, and especially federal, institutions. The plan did not explicitly repudiate the Articles. But it looked to a general reconstruction of the system of government existing under them, and the fiction that a mere revision was intended was soon dropped. A national

[1] This was in addition to his exacting labors as, in effect, convention "floor leader." Madison's papers were purchased by the national government after his death in 1836, and those containing the *Notes* were first published in 1840.

executive was to be established; also a national judiciary; and, finally, a legislature, with a lower house elected directly by the people and an upper one chosen by the lower from persons nominated by the state legislatures. Thus reconstituted, the national government was to have greatly increased powers, among them that of vetoing state legislation when considered contrary to the Articles or to a treaty, and that of calling forth the militia against any member of the union "failing to fulfill its duty." Presented on May 29, in the form of fifteen resolutions, this plan gave the convention something to go to work on forthwith; and for two weeks the delegates, sitting in committee of the whole, discussed it zealously.

The New Jersey plan

One feature of the plan strongly objected to by members particularly sensitive about the "rights" of their states was the proposal to substitute for the existing equal voting power of the states in Congress an arrangement under which, in both branches, voting power should be apportioned in accordance with numbers of free inhabitants or in some similar manner; and to forestall such a change, certain interested members decided to present a counter-plan based on a "purely federal" principle Cast in the form of nine resolutions, this alternative project was laid before the convention on June 15 by William Paterson of New Jersey. It did not shrink from certain significant changes. For example, it allowed Congress power to raise money from duties on imports and from stamp taxes, and to regulate commerce, and it invested acts of Congress with the character of "supreme law of the respective states." It even envisaged a national executive in the form of a council chosen by Congress, and a national judiciary composed of a "supreme tribunal." Congress, however, was still to consist of but a single house, with all states retaining an equal voice.

Compromise the only solution

The New Jersey plan was advocated ably by Paterson and other members, and it enlisted the support of about half of the states. The introduction of it, indeed, split the convention sharply into two groups, one representing the large states and the other the small states. One wanted political power proportioned to the ability of the states to aid in bearing the public burdens, and was not afraid of a strong national government; the other held that the states, as sovereigns, were equals, and argued that if the small states gave up their existing equal voice in public affairs, they would find themselves quite at the mercy of their more populous neighbors. Happily, it was not necessary that either group have its way entirely. The delegates were, after all, practical-minded patriots, accustomed in their business relations and in their home politics to the saving principle of give and take. They expressed their widely differing views freely, sometimes acrimoniously. But, having done so, most of them were not averse to compromise; and the constitution upon which they finally united was, clause after clause, a product of mutual concession.

Decision in favor of a strong national government

Fortunately, however, the bulk of the delegates were essentially agreed on matters of decidedly larger significance than those on which they differed, and compromise was resorted to only after certain vital decisions had been reached. The most important of these was to cast aside the Articles and to establish a government resting on a more truly national basis. Some delegates were of the opinion that the instructions given by the states were binding literally, and that if the convention wanted to do more than merely revise the Articles, its members ought to go back to their constituents and ask for appropriate authority. But the majority were, as Randolph later put it, "not scrupulous on the point of power," and felt, as he further testified, that "when the salvation of the republic was at stake it would be treason to our trust not to propose what we found necessary." Within five days after the convention began work, a resolution was adopted in committee of the whole "that a national government ought to be established consisting of a supreme legislative, executive, and judiciary"; and Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation." The small-state elements protested, saying at first that they would have no part in such a union; the large-state delegates declared they would accept nothing less. The small-state people, as we have seen, brought forward the New Jersey plan; yet at the final test only three states voted for it. From first to last—sometimes at grave risk of bringing the deliberations to an end—the initial determination was wisely adhered to. The time for compromise had not yet come.

From this key decision flowed, also, certain great corollaries: (1) the powers of the national government should be decidedly increased; (2) the machinery of government should be enlarged, as indeed was proposed in all of the plans; (3) the national government, equally with the state governments, should operate directly on the people, through its own laws, administrative officers, and courts; and (4) the new constitution should be "the supreme law of the land," enforceable in the courts like any other law, and paramount over all other constitutions, laws, and official actions, national or state.

A national government resting upon the people

Adoption of the third principle, in particular, meant that the national government was to be put on a wholly new basis. Instead of resting almost entirely upon the semi-independent states, and having little control over the people except through the medium of state authorities, it was thenceforth to be a government of a single body politic, with power to levy and collect taxes and to make and enforce laws by its own direct action. Thereafter, as James Wilson pointed out to the convention, over each citizen there were to be two governments, both "derived from the people," both "meant for the people," and both operating by an independent authority upon the people. This decision, as Madison subsequently explained in a letter to Jefferson, relieved the convention of

one of its most delicate problems. If the experience of the Confederation indicated anything, it was that states might fail to live up to their obligations; and every plan thus far presented to the convention had embraced or assumed some arrangement for coercing states proving delinquent. The nature and method of coercion to be authorized would, however, have stirred grave differences of opinion; and members must have been relieved to find that in providing for a national government endowed with power to enforce its authority directly upon *people*, they had—so, at least, it was supposed—made the coercion of *states* unnecessary.

The great compromises:

These fundamentals settled, the large-state forces were ready to make concessions; and the first and most notable one related to voting power in Congress. The large states wanted representation and voting power proportioned to population; the small states insisted upon equality in voting; spokesmen of each group threatened more than once to withdraw unless their demands were met. At a very critical point in the proceedings, the delegates from Connecticut—a middle-sized state firmly attached to the idea of a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation in proportion to numbers in the lower house; and after heated debate the deadlock was broken and the compromise adopted. This eminently sensible disposition of the matter was casually suggested quite early in the session and did not originate with the Connecticut delegation. Dr. Johnson and his colleagues deserve credit, however, for placing the plan explicitly before the convention, with an array of unanswerable arguments; and the agreement has ever since been known as the "Connecticut compromise." It removed the greatest single obstacle to harmony.

1. The "Connecticut compromise"

2. The three-fifths clause

The decision in favor of proportionate representation in the lower house, however, made it necessary to determine how population should be computed; and difficulty at this point was produced by the existence of slavery. Should slaves be regarded as persons or as chattels? If the former, they ought to be counted in; if the latter, they ought to be left out. With a view to increasing their quotas in Congress, the Southern states naturally wanted the slaves included; the Northern and Middle states, having few slaves, quite as naturally wanted them disregarded; and much lively discussion ensued. A possible solution was, however, already in men's minds when the convention met. When asking the states for additional funds in 1783, Congress had proposed changing the basis of requisitions from land values to numbers of population, so computed as to include three-fifths of all slaves. This "federal ratio" was early incorporated in the Virginia plan as an amendment; it found a place also in the New Jersey scheme; and, notwithstanding individual differences of opinion, it was ultimately adopted by the convention as being, in the words of Rufus King, "the language of all America." There was

no defense for it in logic. But it represented the closest approach to a generally satisfactory arrangement that a body of practical-minded men could discover. The slave states received less representation than they thought their due. They found compensation, however, in a provision that direct taxes laid by Congress should be apportioned on the same qualified basis as representation—although, in point of fact, direct taxes were actually imposed by the national government only three times before slavery was abolished.

3. Commerce and the slave trade

Still another compromise pertained to the powers of Congress over commerce. The states north of the Potomac had large commercial interests, and, having suffered most from the commercial anarchy of the Confederation period, they wanted Congress to have full power to regulate trade and navigation. The four states farther south, however, were agricultural, and their delegates feared that Congress would levy export duties on Southern products and in other ways discriminate against the non-commercial section. Furthermore, there was the question of the slave trade. The Northern states would have been willing to see the traffic abolished immediately, and Maryland and Virginia, being well stocked, had no great interest in it. But Georgia and the Carolinas wanted it to continue, and the convention was told firmly that these states would never accept the new plan "unless their right to import slaves be untouched." The outcome was an agreement which placated all elements. Congress was to have broad powers to regulate navigation and foreign trade, including power to lay duties on imports. But duties on exports were forbidden, and the importation of slaves was not to be interfered with by the national government (except to the extent of a head-tax not exceeding ten dollars) prior to the year 1808.

The constitution completed

Many other important matters claimed the attention of the delegates through the sultry mid-summer days during which the convention patiently pursued its labors. The nature and powers, and especially the mode of selection, of the executive absorbed much time and thought, the more by reason of the fact that plans gradually took form for a chief executive different from any that the world had ever known. The manner of electing senators—whether by the people, by the state legislatures, or by some agency especially devised for the purpose—proved difficult to decide. The appointment and status of the national judiciary provoked ardent discussion. The miscellaneous powers to be vested in Congress, the mode of admitting new states, the control of the national government over state militia, the manner of amending the new constitution—these and a score of other topics required painstaking consideration. From first to last, the Virginia plan, and amendments thereto, formed the main basis of discussion. First, the essentials of this plan, as embodied in the Randolph resolutions, were threshed out in committee of the whole. Then, after being reported back to the convention considerably altered, they were again debated in full. Next, the growing docu-

ment was turned over, near the close of July, to a committee of detail, which worked it into a balanced constitutional text; and the convention spent upwards of six weeks more in discussing this draft. Finally, Gouverneur Morris, aided by his fellow-Pennsylvanian, James Wilson, wrote out with his own hand the completed fundamental law, putting it into the lucid English for which it has ever since been notable among great documents; and on September 17, thirty-nine delegates, representing twelve states, signed it.[1]

The test ahead

To a group of delegates, Franklin, whose rôle had been chiefly that of a conciliator, remarked while the signatures were being affixed that "often and often" during the session he had looked at a sun painted on the president's chair without being able to tell whether it was rising or setting. "Now, at length," he added hopefully, "I have the happiness to know that it is a rising, and not a setting, sun." The real test, however, was yet to come. The convention had ignored the instructions given most of its members, and, instead of patching up the Articles, had prepared a new and very different frame of government. Would the people of the states approve what it had done? Even the delegates were not very enthusiastic about their handiwork. Three of those present when the document was signed refused to put their names to it. Of thirteen who were absent, at least four are known to have been unsympathetic. Few, if any, were entirely satisfied: Franklin, although optimistic, had misgivings; Hamilton admitted that he signed mainly because he felt that the proposed scheme of government could not possibly prove worse than the existing one. How would the people, through their conventions, react?

The Struggle Over Ratification

Procedures agreed upon

In laying the results of its labors before Congress, the convention made two significant recommendations: (1) that in each state the instrument be submitted to a convention chosen by the people, and (2) that steps be taken to put it into effect whenever as many as nine states should have approved it. The object of the first proposal was, as Hamilton explained, to give the new plan of government a more popular basis than it would have if ratified merely by the state legislatures. The aim of the second was, of course, to enable the plan to go into operation when endorsed by a good working majority of the states, without waiting for the unanimity which it had taken three and one-half weary years to obtain in the case of the Articles. With scant show of enthusiasm, Congress accepted both suggestions; and on September 28 the constitution was transmitted to the states without recommendation or other comment.

[1] The monumental collection of sources on the work of the convention is M. Farrand, *The Records of the Federal Convention*, 3 vols. (New Haven, 1911), rev. ed., 4 vols. (New Haven, 1937). The best general account is the same writer's *The Framing of the Constitution of the United States* (New Haven, 1913).

Objections to the new plan

The controversies that had stirred the convention were now transferred to the country at large; and from New England to Georgia, the new frame of government was circulated and discussed, dissected, explained, praised, denounced. Objections arose in many quarters; scarcely a feature of the plan, indeed, escaped attack. There were men who, like Patrick Henry and Samuel Adams, were so imbued with the Revolutionary concepts of liberty that they took instant offense at any proposal looking toward a centralization of authority. On the other hand, some people thought that the new plan did not provide for as much centralization as was needed. The paper-money elements were aroused by the clause which forbade the states to issue bills of credit. Many Northerners considered that too much was conceded to the slave-holding interests; many Southerners felt that these interests had been dealt with unfairly. Large inland elements—small farmers, backwoodsmen, pioneers—feared the effects of the commercial powers given to Congress; men of property, although generally favorable, wondered how freely the new taxing powers would be used. Everywhere the complaint was voiced, and rightly, that the document failed to take any notice of those fundamental rights and liberties—freedom of speech, freedom of the press, freedom of assembly, right of petition, and religious liberty—which had been so carefully guaranteed in the bills of rights prefixed to most of the state constitutions. No single group of dissenters could have prevailed by its own efforts; but in most states the various hostile elements tended to merge into an over-all opposition extremely difficult to convert or overcome.

Ratification by nine states

In the Philadelphia convention, the interests hardest to appease were the small states. The conclusions reached there were, however, on the whole favorable to those states, which accordingly became the first to ratify. Delaware "came under the federal roof" on December 7, 1787; New Jersey, on December 18; Georgia, on January 2, 1788, and Connecticut one week later. Pennsylvania, although a large state, was centrally located and federally inclined, and its convention ratified early, *i.e.*, on December 12. This rapid pace, however, could not be maintained. In Massachusetts, Virginia, New York, and other states, time was required to rally support; and while there was never much doubt that as many as nine states would eventually ratify, there was grave danger lest some state which was indispensable to the proposed union because of its location and general importance should remain obdurate. By cleverly appeasing Samuel Adams and John Hancock, to whom the "Anti-Federalists" of the interior looked for leadership, the supporters of the new system won in Massachusetts, February 7, 1788, although by an extremely close vote, and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government. Between April and June, Maryland, South Carolina, and New Hampshire followed, each after a hard contest. This brought up the number

to the required nine. But no one supposed that the new government could be launched successfully on this minimum basis. Even after Virginia gave a favorable decision (following an exceptionally bitter fight in which Patrick Henry led the irreconcilables), the battle was but half won; New York was still outside, and New York was a pivotal state without which the union would be a mere caricature.

Ratification in New York—*The Federalist*

Moreover, the opposition in New York, especially in the rural sections, was very formidable. Knowing it to be so, the friends of the constitution made every effort before the state convention met at Poughkeepsie to convince the people that the plan of government proposed was moderate, safe, and workable. The most active champion was Hamilton, who, after having been regarded somewhat skeptically at Philadelphia on account of his ultra-conservative views, now came into his own as a leader in the campaign for ratification. He it was who conceived the idea of printing in the leading newspapers of the state a systematic explanation and defense of the constitution in the form of a series of brief public letters, associating with himself for the purpose another able New Yorker, John Jay, and also the most convincing expounder outside of New York, namely, Madison. The result was the remarkable group of papers, eighty-five in number, appearing over the pen-name "Publius," but known ever since to students of American history as *The Federalist*. The letters were prepared in haste and published, at the rate of three or four a week, as campaign documents.[1] But their authors—all young and vigorous—were full of their subject and knew how to write; and, taken as a group, the papers have never been surpassed as examples of direct, lucid, and convincing exposition. Gathered in book form even before the series was completed, and constituting one of the world's few really great treatises on government, the collection has passed through more than thirty editions. Better than anything else—unless possibly Madison's *Notes*—it shows what the constitution meant to the men who made it.

The constitution put into effect

Whether because won over by Hamilton and his collaborators or because of being unwilling to see the state remain outside of the union after all but two of the others had joined, the New York convention finally ratified, on July 26 (1788), although by a margin of only three votes. Meanwhile, on July 2, it was officially announced in Congress that the ninth state had ratified, and attention was turned to preparations for putting the new government into operation. The states were called upon to choose presidential electors, senators, and congressmen, and New York City was selected as the temporary seat of government. Then the old Congress, expiring prematurely for lack of a quorum,

[1] Hamilton alone wrote upwards of sixty of them. Madison contributed some fifteen and Jay about half a dozen. A few were prepared by Hamilton and Madison jointly. These two men were destined to draw far apart on questions of constitutional interpretation in later days, but in the present fight they stood shoulder to shoulder.

disappeared, leaving the field clear for its successor. The new House of Representatives was organized on April 2, 1789; the Senate came together three days later; and on April 30, Washington took the oath of office as president. Seven months afterwards, North Carolina, appeased by the decision of Congress to submit to the states a series of constitutional amendments guaranteeing civil liberties, and threatened with being treated commercially as though a foreign country, ratified the new fundamental law; and similar action by Rhode Island in the spring of 1790 made the union complete.

A remarkable record of survival

The new "supreme law" which the founding fathers thus arduously devised and hopefully adopted has served as a charter of free government in this country for over a century and a half. Within this time, it has seen thirteen states increase to forty-eight, less than four million people become more than one hundred forty million,[1] a simple frontier existence transformed into the bewilderingly complex national life of the present day. Nowhere else is there a written constitution with so imposing a record. To be sure, the instrument has undergone change by the addition of twenty-one different amendments. To be sure, too, its terse but pregnant phrases have in many instances proved only starting points for interpretation, usage, legislation, administrative action, and judicial decision from which have flowed ever-widening streams of new constitutional law and practice. Without such flexibility, it would never have survived; indeed, there are people who would have it completely overhauled and rewritten in our day. Despite all, however, the constitution as it came from the hands of the framers still lives, and the broader features of the plan of government for which it provided are as yet intact.

The Constitution's Characteristics and Sources

The constitution as a document

"This paper," wrote Robert Morris in commending the constitution to a friend, "has been the subject of infinite investigation, disputation, and declamation. While some have boasted it as a work from Heaven, others have given it a less righteous origin. I have many reasons to believe that it is the work of plain honest men, and such, I think, it will appear." Herein lies the reason why the instrument, once adopted, succeeded and survived beyond the hopes of its most ardent sponsors. First, as constitutions go, it was a brief and simple document. Even with the later amendments, its approximately six thousand words fill only twelve or fifteen pages of print; one can read it through in leisurely fashion in half an hour. Had the text been fuller and more detailed, some doubts and controversies of later days would unquestionably have been averted. Excess of detail, however, could easily have proved a handicap. The arrangement of subject-matter has sometimes been criticized as not

[1] 131,669,275 by the census of 1940; 140,386,509 according to a Census Bureau estimate of 1946.

wholly logical. The fault, however—if it be one—has been of no practical significance. Following a brief preamble (important as a statement of general purpose, but having no legal force), three main articles are devoted to the legislative, executive, and judicial branches, respectively. Four lesser articles deal, in order, with the position of the states, the modes of amendment, the supremacy of national power, and ratification. Finally come the amendments, appended at the end and numbered serially.

The saving quality of flexibility

Thanks to the committee of detail, and especially to Gouverneur Morris, the language of the original document is clear, direct, and concise; there is not an unnecessary word or an intentionally ambiguous phrase. To be sure, some clauses, *e.g.*, that authorizing Congress to "regulate commerce ... among the several states," lend themselves to more than one interpretation; and the conflicts and decisions arising out of resulting differences of opinion make up a considerable part of the country's constitutional history in the past hundred and fifty years. Nevertheless, our greatest constitutional controversies are traceable rather to omissions than to provisions of doubtful meaning. In part, these omissions are accounted for by the impossibility of foreseeing technological advances and economic developments which in later days have put a new aspect on the work of government—for example, the changes in transportation and communication resulting from the introduction of steam-power, electricity, aviation, and radio-broadcasting. But in part they arose also from the unwillingness of the constitution's architects to jeopardize their work by forcing decisions on delicate matters which it was possible to pass over in silence. Could a state, by its own volition, withdraw from the new union? The constitution did not undertake to say. It could be argued plausibly that the union was intended to be permanent, and that no member had a right to secede. On the other hand, the "sovereignty" of the states was nowhere expressly denied, and the thrice-repeated assertion of the Articles that the union was to be "perpetual" found no place in the new instrument. The matter was glossed over, not because men of insight like Madison and Hamilton were unconcerned about it, but because of the inexpediency of pressing it at a time when the preservation of a central government of any kind whatsoever was hanging in the balance. The "plain honest men" of whom Morris wrote were bent on an immediate practical remedy for the defects of the existing government, not on anticipating and providing for every contingency that might later arise. They did, however, endow Congress with powers capable of broad interpretation; they also provided modes of constitutional amendment; and thus, significantly, they left the way open for the national government in subsequent times to concern itself with multifold interests and problems—agriculture, labor, banking, immigration, and what not—which in the constitution itself went entirely unmentioned.

The constitution's sources

It follows that the fathers did not go out of their way to invent political forms. Nor did they borrow far afield. Some of them were students of Vattel, Montesquieu, and other Continental writers; some had read history and could cite the failures of ancient confederacies or draw illustrations from the experiences of France and other Continental states. But, as some one has remarked, this knowledge taught them rather what to avoid than what to adopt; and in so far as they drew upon European sources at all, those sources were the common law, the principles of *Magna Carta* and the Bill of Rights, the writings of Locke and Blackstone, and other characteristic products of their English motherland. In the main, however, this rich heritage had passed to America far back in colonial days, and, at the time when the national constitution took form, was already deeply embedded in the constitutions, laws, and usages of the states. In a very true and literal sense, therefore, the new instrument grew out of the political life of Americans themselves in the colonial and Revolutionary periods. "Experience," said John Dickinson, "must be our guide; reason may mislead us." Fortunately, our forefathers had accumulated enough political experience by 1787 to serve as a rich and adequate resource.

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CHAPTER III

HOW THE NATIONAL CONSTITUTION DEVELOPS

A document with a long life, but a brief biography

Our national constitution has been in operation more than a century and a half—longer than any other one in the world.[1] Moreover, if Madison and Hamilton could look over it as it has emerged from the years, they would have no difficulty in recognizing it. For although those who made it realized that it was not perfect, and wisely provided ways of amending it, the document has undergone relatively little textual change. A few short passages, amounting to perhaps one-seventh of the whole, have been rendered obsolete by repeal, and enough new matter has been inserted to fill four or five pages of print. As measured, however, against the full and rich content of the nation's history, the biography of the constitution as a document is brief. The "bundle of compromises" still stands largely intact.

The true constitution more than a document

From this must not be inferred, however, any lack of actual constitutional growth and change. The moment the new fundamental law went into operation, executive officers, lawmakers, and courts began interpreting and applying its provisions; and the resulting decisions and acts forthwith began to amplify and fill out those provisions by adding—not in the document, but in accumulating practice based upon it—a wealth of ever-expanding detail. Moreover, as the country developed and the tasks of government grew more complex, decisions and usages—still presumably based upon pertinent articles and clauses, but not actually incorporated into them—carried over into new and wider areas (including many not envisaged at all by the constitution's framers), until they were found involving no longer mere "detail" in any proper sense, but matters of fundamental importance as well. With this sort of thing going on for one hundred and fifty years, the constitutional text, even with twenty-one formal amendments added, became only a sort of core (or, to change the figure, skeleton) of the actual operating constitutional system; and while we still may correctly enough refer to the document itself as "the constitution," in a larger and truer sense the constitution is the document *as enveloped* in a vast, living, changing complex of interpretations and usages—an accumulation of constitutional principles and practices so extensive that even scholars undertaking to set forth our national constitutional law in the relatively concise form

[1] *I.e.*, longer than any other comparable *written* constitution. The constitution of Massachusetts ostensibly dates from 1780, but has been largely recast in later times. The English constitution, never reduced to a single document, is, of course, much older than either.

of a textbook rarely succeed in covering the subject in less than a thousand pages. Turning now for a closer look at the ways in which the constitution—the constitution in this broader sense—develops, we start with formal amendment of the basic text, but soon come also to the legislation, judicial construction, expansion by usage, and other procedures for which the document merely provides guide-posts marking points of departure.

Methods of Constitutional Amendment

The amending clause

Desiring that the new fundamental law should neither be virtually impossible to amend, as the Articles had been, nor yet capable of too swift and easy change, the framers devised somewhat difficult, but not prohibitive, amending procedures as follows: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing 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." [1] The only restriction placed upon the free operation of these procedures (aside from a now obsolete one relating to the slave trade) is that no state may be deprived of its equal representation in the Senate without its consent.

Stages in the amending process:

Although two methods of initiative and two methods of ratification are provided for, all amendments thus far adopted have been proposed in the same way, *i.e.*, by joint resolution of the two branches of Congress, and all except the Twenty-first (repealing national prohibition) have likewise been ratified in the same manner, *i.e.*, by action of the state legislatures. Any proposed amendment receiving a two-thirds vote in both House and Senate is transmitted by the secretary of state to the governors of the several states, to be laid by them before the legislatures or conventions. The president will naturally have an interest in whatever is proposed, but he has no veto upon it, and in fact amendments, not being legislative acts,[2] are not officially submitted to him at all.

1. Initiation

The national convention an unused device

This does not mean that there has been any lack of attempts to secure the launching of amendment proposals by the alternative method of a national convention. At one time or another, indeed, the legislatures of considerably more than two-thirds of the states have called upon Congress to convoke a convention for the purpose. Sometimes such a request has been made in behalf of a particular proposed amendment, as, for example, in more than a score of earlier instances in which the object

[1] Art. V.

[2] So ruled the Supreme Court in Hollingsworth *et al. v.* Virginia, 3 Dallas 378 (1798).

sought was the popular election of United States senators; or, as in a group of later instances, the repeal of the Eighteenth Amendment. Sometimes the aim has been more general, as in the case of appeals voiced by different states at the time of the nullification controversy of 1832, and again in 1859-60 when civil war was imminent. The opinion has sometimes been advanced that every request for a convention made at any time by a state is to be regarded as pending indefinitely, and that whenever two-thirds of the states are found to have made such a request, Congress should forthwith call a convention. This "cumulative" view, however, is not generally accepted. Even though there never has been any official determination of the period of time at the end of which a request from a state should be regarded as having lapsed, it is hardly conceivable that Congress would act unless petitions were received from the necessary number of states within a sufficiently limited period to create an appearance of concerted demand; and in practice, such wide manifestation of interest would be likely to lead Congress itself to place the desired amendment before the states, as in the instance of prohibition repeal.

2. Ratification

Whether a given amendment shall be acted upon within the states by the legislatures or by conventions specially chosen for the purpose is determined entirely by Congress.[1] It is more economical to employ the legislatures; and, as has been indicated, this method prevailed uniformly until the Twenty-first Amendment was submitted in 1933. Conventions, however, are likely to give quicker results, and they have the further advantage of being chosen by the people with reference solely to the proposal upon which they are to act. As recognized belatedly by both of the major political parties, the prohibition question was one on which it was peculiarly appropriate to use the convention system. Whichever plan is employed, reports of actions taken are sent by the governors to the Department of State, which, if and when the necessary three-fourths majority is attained, proclaims the amendment effective as a part of the constitution. A proposal failing to get the approval of three-fourths of the states continues "outstanding"; its rejection is never officially proclaimed, and states that have failed to act or, having acted unfavorably, decide to change their vote, may ratify it within any reasonable time.[2] By decision of Congress, a state that has once ratified, however, cannot reverse its action.

[1] In Hawke *v.* Smith, 253 U. S. 221 (1920), the Supreme Court ruled that a state may not arrive at its decision solely by popular referendum. An "advisory referendum" may, however, be employed for guidance of the legislature.

[2] The Eighteenth Amendment contained the then novel provision that it should become operative only if ratified by the requisite number of states within seven years. This time limitation was upheld by the Supreme Court in Dillon *v.* Gloss, 256 U. S. 368 (1921) and reappeared in the Twentieth and Twenty-first Amendments. On the status of a child labor amendment submitted to the states as long ago as 1924, see p. 36 below. The Supreme Court has said that the question of how long a proposed amendment, submitted without time limitation, shall remain subject to ratification is one for Congress, not the courts, to decide.

The Twenty-one Amendments

Number of amendments proposed and adopted

The states were not yet safely gathered under the "New Roof," as the constitution was popularly called in early days, before proposals began to be made for "extensions of the eaves," and other more or less significant alterations. In all, no fewer than 1,964 drafted amendments were introduced in Congress during the first hundred years of the constitution's history, and 2,056 others found their way to the clerks' tables between 1889 and 1941. Nowadays, anywhere from forty to seventy-five proposals are presented during an average session. The total number of amendments actually endorsed by the two houses from 1789 is, however, only twenty-seven, and the number ratified by the states only twenty-one. Indeed it would hardly be erroneous to say that only eleven actual amendments have been adopted, because the first ten so-called amendments were, to all intents and purposes, contemporary addenda to the original constitution rather than amendments to a finished document. A good deal of trouble would have been saved if they had been incorporated at the outset.

The first ten amendments

As submitted to the states in 1787, the new fundamental law contained no bill of rights, and indeed but relatively little bearing directly on what we are accustomed to think of as civil liberties. The deficiency was promptly noted by the fault-finders and made a leading argument against ratification. Hamilton contended that, on account of the limited powers granted the national government, no guarantees of the kind were needed.[1] But most people thought differently, and of the 124 amendments formally proposed by seven of the states when ratifying, the great majority had to do with this matter. Madison was chosen to the first Congress under pledge to use his influence to bring about the adoption of a federal bill of rights; and in June, 1789, he introduced a long series of proposals looking to that end. Of seventeen amendments voted by the House, twelve were endorsed by the Senate, and ten were ratified by the states. Eight of the number embodied the desired express guarantees of personal and property rights; the Ninth provided that the enumeration of certain rights in the constitution should not be construed "to deny or disparage others retained by the people"; and the Tenth was intended to clear up lingering doubts as to precisely what powers were reserved to the states or to the people.

Eleventh Amendment

The next two amendments were adopted to overcome certain practical difficulties that arose early in the constitution's history. In the case of Chisholm *v.* Georgia,[2] the Supreme Court held, in 1793, that a citizen of one state could sue another state in the federal courts. To people of strong states' rights views, this was shocking doctrine; and under their influence the Eleventh Amendment was adopted, in 1798, stipulating

[1] *The Federalist*, No. LXXXIV (Lodge's ed., 537).
[2] 2 Dallas 419.

that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Twelfth Amendment

Whether this amendment was desirable depended on the point of view. But the threatened miscarriage, in 1800, of the system of electing the president, because of a tie between Jefferson and Burr, brought a change which—even though resisted stoutly at the time—looks from this distance to have been a practical necessity. The nature of the crisis, and the device adopted to prevent it from recurring, will be explained at a later point.[1] Suffice it to say here that the Twelfth Amendment, ratified in 1804, provided for separate balloting for president and vice-president.

The Civil War amendments

The first half of the nineteenth century saw many new state constitutions framed and many older ones revised; but, apart from the amendment just mentioned, no change took place in the national written constitution, notwithstanding that hundreds of proposals made their appearance in Congress. Then, however, came the Civil War, and as a result of it, three amendments designed primarily to define and protect the rights of the recently emancipated Negroes, and all forced upon the Southern states as a condition of their restoration to their former places in the Union. One—the Thirteenth (1865)—prohibited slavery; another—the Fourteenth (1868)—defined citizenship, laid important new restrictions upon the states in the matter of civil rights, and penalized states denying the suffrage to male inhabitants except for participation in rebellion or other crime; and the third—the Fifteenth (1870)—forbade both state and federal governments to abridge or deny the right to vote on account of race, color, or previous condition of servitude.

Sixteenth Amendment

Forty-three years now elapsed without further change in the written fundamental law, and people interested in various reforms began to wonder whether amendments would ever again be found possible unless easier amending procedures were introduced—an objective itself attainable only through an amendment. A period of great national growth witnessed, however, momentous changes in political, economic, and social conditions and attitudes; and in the space of twenty years (1913-33) the constitution was amended no fewer than half a dozen times. First came an express grant of authority for federal taxation of incomes. Notwithstanding that a federal income tax had once been sustained as an indirect tax, a new law of the kind passed in 1894 was construed by the Supreme Court,[2] as imposing a direct tax which, under the terms of the constitution, must be apportioned among the states "according to their respective numbers"—a thing which obviously could not be done in the case of a tax of this nature. After prolonged agitation, Congress, in 1909,

[1] See p. 161 below.
[2] Pollock *v.* Farmers' Loan and Trust Company, 158 U. S. 601 (1895).

submitted to the states a proposal that the federal government be authorized to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration"; and in 1913 this provision—the basis of our present heavy federal taxation of incomes—was added to the constitution as the Sixteenth Amendment. The amendment does not undertake to say whether an income tax is or is not a direct tax; it simply authorizes such a tax to be laid without reference to apportionment among the states.

Seventeenth Amendment

The Seventeenth Amendment, providing for direct popular election of senators, dates also from 1913. This mode of election found few supporters in the convention which framed the original constitution. But it was advocated as early as 1826; and from 1893 onwards the House of Representatives repeatedly passed resolutions favoring it. The Senate remained obdurate until 1912, when it yielded; and in 1913 the amendment became effective.

Eighteenth Amendment

The next two amendments dated from shortly after the first World War and in part owed their adoption to wartime experiences. One, the unlucky Eighteenth, launched a gigantic experiment in the regulation of human behavior by undertaking to do away with the liquor traffic; the other, the Nineteenth, nationalized woman suffrage. A movement for suppressing the transportation and sale of intoxicating liquors had been under way for decades, and by 1917 eleven states had constitutional prohibition, ten had statutory prohibition, and five others were about to pass under prohibition laws or amendments. As soon as we entered the war, Congress forbade the manufacture and importation of all spirituous liquors for beverage purposes for "the duration"; and shortly afterwards a constitutional amendment was submitted to the states providing that "after one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is prohibited." Ratified by the necessary thirty-six states, the amendment was proclaimed in January, 1919, and six months later it took effect.

Nineteenth Amendment

The background of the Nineteenth Amendment, dealing with woman suffrage, will be reviewed when we later come to the subject of qualifications for voting.[1] A resolution submitting the proposal was passed by the House of Representatives early in 1918. Despite earnest support from President Wilson, the Senate twice refused to concur. A year later, however, agreement was reached; and ratification by the states proceeded with such alacrity that on August 26, 1920, the amendment was ready to be proclaimed. Like the Fifteenth, and in almost the same words, the Nineteenth Amendment restricts both federal and state control over the suffrage—in the case of the Nineteenth, by forbidding that the right of

[1] See Chap. VIII below.

citizens of the United States to vote be denied or abridged on account of sex.

Twentieth Amendment

Until a little over a decade ago, our national political calendar preserved the tempo of a stage-coach age. A president, elected in November, did not take office until the following March; a Congress chosen at the same time did not (unless sooner convoked in special session) meet until thirteen months had elapsed, and could not in any case start work within less than four months. Meanwhile, with a new Congress chosen and endowed with a fresh mandate from the voters, the old one, cluttered up with "lame ducks" who had failed of reëlection, sat in more or less perfunctory and futile session from December until the close of its term on March 4. For a decade, Senator Norris of Nebraska led a movement aimed at correcting this glaring defect; and on February 6, 1933, the Department of State was able to proclaim the Twentieth (or so-called "Lame Duck") Amendment, moving back the date for inaugurating a new president from March 4 to January 20, and fixing the term of a new Congress to begin even a little earlier, *i.e.*, on January 3, on which day, unless provided otherwise by law, the two houses now assemble and start work. "Short"—or "lame duck"—sessions became a thing of the past.

Twenty-first Amendment

The Fourteenth Amendment has never been completely enforced,[1] but the first and only one of the series actually to be repealed was the Eighteenth. Although ratified by the legislatures of forty-six states, and unshaken by repeated efforts to overthrow it through judicial action, constitutional prohibition on a nation-wide basis lasted less than fourteen years, *i.e.*, only until 1933. The task of regulating the personal habits of a vast, heterogeneous, far-flung population—much of it still under the influence of European traditions—proved one of the most difficult that our national government has ever undertaken, and public sentiment turned so decisively against the amendment and the measures adopted for its enforcement that in December, 1932, a resolution for repeal passed both houses of Congress by the necessary two-thirds, with votes to spare. "The Eighteenth Amendment," ran the proposal, "... is hereby repealed." And then, in order to protect states which had prohibition laws and wished to retain them: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The proposal was to remain before the states not longer than seven years, and, as we have seen, was to be acted upon in them, not by the legislatures, but by conventions chosen particularly for the purpose. Starting in Michigan and Wisconsin in April, 1933, the amendment swept through the resulting conventions with such speed that the thirty-sixth state to ratify (Utah) was reached on December 5; all, indeed, eventually ratified except two—the Carolinas. Accordingly, on the date

[1] See pp. 119-120 below.

mentioned, the Twenty-first Amendment was duly proclaimed, and the ill-fated "noble experiment" launched by the Eighteenth—having demonstrated how inadvisable it is to put into the constitution anything not clearly supported by public opinion—passed into history.

Observations on the amendments as a group

Looking over the twenty-one adopted amendments as a group, one notes three or four significant facts. (1) They are considerably more concerned with denying powers, or placing restraints upon the exercise of powers, than with bestowing new powers. Sometimes (as in the first ten or eleven) it is the national government that is restricted; sometimes (as in the Civil War group) it is the state governments. But in any case most of the amendments are prohibitive rather than augmentative. (2) The amendments, accordingly, are to only a relatively slight extent directly responsible for the growth of powers and functions of the national government so characteristic of recent decades. From one of them, to be sure, that government derives the exceedingly important power to tax incomes; and from the Eighteenth it, of course, once drew power to enforce—or at least to *try* to enforce—prohibition of the liquor traffic. This last authority, however, has now been withdrawn; and even the remarkable expansions of federal power associated with carrying out the Roosevelt Administration's program of national recovery, and also with our participation in World War II, came without any change whatsoever in the written fundamental law. (3) At the same time, the amendments of the past eighty years have, in general, by imposing restrictions on the states, contributed to national uniformity, solidarity, and priority, and in this sense may be said to have had a pronounced nationalizing tendency. Without adding anything, in so many words, to national powers as such, amendments making it impossible for the states to legalize slavery, requiring them to respect the privileges and immunities of citizens of the United States, and likewise due process of law, and forbidding them to deny the suffrage to women, unquestionably weight the scales against the states in the ever-shifting balance of federal-state relations; after all, the amendments are themselves national instrumentalities. (4) The amendments have introduced relatively few changes in the machinery and procedures of the federal government. As a result of them, the president and vice-president are voted for separately rather than otherwise; Negroes are counted equally with whites in apportioning congressional seats among the states; senators are elected by the people instead of by the state legislatures; qualified women have become voters in all parts of the country. But that is all—aside, at least, from the creation of new machinery to administer the income tax (and to enforce prohibition when the Eighteenth Amendment was in effect).

Miscellaneous proposed amendments

There is rarely a time when proposals for further amendment of the constitution are not being agitated in some quarter; as already indicated, every session of Congress sees a number introduced, even though many receive (and deserve) little attention. On various occasions, indeed, it

has been suggested that the constitution as a whole be overhauled with a view to extensive and basic changes in the governmental system. Among specific proposals having some vitality today, and even some limited chance of adoption, are: (1) an amendment doing away with the system under which people vote only for presidential electors, and not directly for presidential candidates; (2) one changing the presidential term to six years, without reëligibility, or, as an alternative, limiting a president to two four-year terms; (3) an "equal rights" amendment sponsored for nearly a generation by the National Woman's party, unfailingly introduced in every session of Congress since 1923, and reading: "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex";[1] (4) an amendment making all bonds and other securities issued by federal, state, and local governments liable to federal taxation; (5) another reducing the quota of senators necessary to assent to the ratification of treaties from two-thirds to a simple majority, or, as an alternative, requiring treaties to be submitted to both houses of Congress, with a majority in each sufficing for assent; and (6) still another prohibiting poll-tax qualifications for voting in federal elections. To be included in the list, also, is an amendment submitted to the states as long ago as 1924 and authorizing Congress to "limit, regulate, and prohibit the labor of persons under eighteen years of age." After being ratified by twenty-seven states (eight less than the requisite number), however, this "child labor" amendment came to a halt; and while it is to be regarded as still "alive," its eventual adoption is at least doubtful—the more by reason of the fact that the ends which it sought to achieve have been largely (though not entirely) attained under provisions of a Fair Labor Standards Act passed by Congress in 1938 and sustained by the Supreme Court three years later.

Criticism of the Amending Process

1. On the ground that it is too slow and difficult

Madison believed that the modes of amendment agreed upon by the framers guarded "equally against that extreme facility which would render the constitution too mutable and that extreme difficulty which might perpetuate discovered faults"; and, on the whole, history has sustained his judgment. Chief Justice Marshall, however, characterized the amending machinery as "unwieldy and cumbrous"; and at different times the procedures involved have been sharply criticized, on one or another of four main grounds: (1) that they are too slow and difficult; (2) that they are too easy; (3) that they are too far removed from

[1] When these pages were closed, an amendment on this subject seemed certain to be submitted to the states. On February 6, 1947, the House of Representatives adopted a resolution offering an amendment limiting a president to two terms, counting as a full term any portion of an unfinished term served; and on March 12, the Senate approved an amendment limiting the period of service to two full terms plus any fractional term not raising the total to more than ten years. It remained only to get agreement on a single plan.

direct action by the people; and (4) that they afford too much opportunity for decisions dictated by minorities. A generation ago, many thought that no more amendments were going to be found possible unless the amending process were made easier; and farmer and labor interests, desiring remedial legislation which the Supreme Court seemed likely to block as long as the constitution's definition of congressional powers remained unchanged, brought forward numerous proposals reducing the congressional majorities required to submit amendments to the states (usually to simple majorities), or the number of states required for ratification (commonly to two-thirds), or both. The adoption, however, of four amendments of large economic and social import within the space of seven years (1913-20), and of two others of much significance in the single year 1933, showed that, after all, the constitution's provisions are less immutably "frozen" than many had supposed.

2. On the ground that it is too easy

Hamilton devoted almost an entire number of *The Federalist* to arguing that the amending process could not have been made any easier without inviting constitutional instability;[1] and the speedy ratification of the Eighteenth Amendment by legislatures of states in which, both before and after the advent of national prohibition, the people in statewide referenda voted against the plan led many persons to believe that in point of fact the amending process was easier than it ought to be. However, persons who were disturbed because of the ease with which the Eighteenth Amendment swept through the state legislatures were happy over the equal facility with which the amendment repealing it was carried; and of late little has been heard of the earlier complaint.

3. On the ground that it is not sufficiently democratic

There has been the criticism, also, that, in the absence of any provision for direct popular initiation of amendments or for submission of amendments to a popular vote, the system is insufficiently democratic; and in 1912 the elder Senator LaFollette brought forward a now forgotten plan designed to meet the objection. Submission of the Twenty-first Amendment to conventions in the states chosen for the sole purpose of acting on the proposal, and composed of delegates prepared to vote as instructed, put the fate of that amendment very definitely in popular hands. There is, however, no guarantee that such a procedure will be followed in the future. Besides, there are still those who would prefer that action on amendments be taken by the people directly[2] rather than even by especially elected and instructed convention delegates; and several amendments looking to that end have been proposed.

4. On the ground that minorities may control

The amending process has been criticized also because, at the final decisive stage of ratification, all states, regardless of population, have an equal voice—the objection being that this opens a way for the outcome to be determined by minorities. So great are the inequalities of population among the states that ratification might be by thirty-six states contain-

[1] No. LXXXV (Lodge's ed., 544-552).

[2] As it is on amendments to state constitutions in all states except Delaware.

ing among them hardly a third of the inhabitants of the country; and in this way an amendment might be forced by a minority. Equally, under the three-fourths rule, it is possible for a small number of less populous states to defeat an amendment desired by a vast majority of the people. Thirteen states can prevent any amendment from being adopted; and thirteen could be found which together would contain only one-twentieth of the population of the country—less, indeed, than half of the population of New York alone. Should such a grouping actually take place on any proposed amendment, the remaining nineteen-twentieths of the people would be helpless. To be sure, the difficulty, in its extremer forms, is almost wholly theoretical; except in the highly improbable event of an amendment designed to injure small states as such, states both large and small will be found on both sides of every question. It does, nevertheless, remain true that, without any strict alignment of small states against large ones, (1) a sufficient number of states mostly less populous can give effect to an amendment not desired in states with a greater aggregate of population; and, on the other hand, (2) an amendment favored by states having such an aggregate may be defeated by a more or less fortuitous combination of hardly more than a third of their number containing decidedly fewer people.

Changes in amending methods improbable

Taking into account all aspects of the situation, and especially the developments of the past thirty years, it would seem that changes in amending procedure such as would require the rewriting of Article V are unlikely. In the first place, we have discovered that the constitution can, after all, be amended with reasonable facility; six major amendments within twenty-one years (1913-33) is no mean record. In the second place, decided improvements have been achieved within the limits of the amending procedure as it now stands: (1) a principle concerning reasonable time limits for ratifications has been worked out and applied; (2) after lying unused for nearly a century and a half, the device of ratification by conventions, rather than by legislatures, has been brought into play under circumstances which suggest that in the future Congress will, on each occasion, at least weigh the relative advantages of the two methods before prescribing one of them. In the third place, while the Supreme Court has ruled that a popular referendum *after* a legislature has acted cannot be allowed to upset a ratification, popular mandates to conventions when such are employed, and "advisory" referenda as guides for action by legislatures when these are used, would seem to furnish about as much democratic control as can reasonably be asked. Finally, the arrangements permitting of undesirable, but happily rare, minority decisions are so inherent in the federal system that they can hardly be eliminated as long as that system stands.[1]

[1] For a spirited proposal, nevertheless, that the amending process be itself amended, see H. Hazlitt, *A New Constitution Now* (New York, 1942), Chap. XIII; and *cf.* A. Hehmeyer, *Time for Change* (New York, 1943), Chaps. III-V.

Other Modes of Constitutional Growth

Expansion by interpretation

To this point, our attention has been fixed upon the constitution as a document—upon the ways in which its provisions can be, and have been, modified to achieve ends deemed politically or socially desirable. But if one sets out to discover the full sweep of the constitutional principles and rules under which we live, the document alone, even as amplified by amendment, will not carry him far. To be sure, when it says that the term of the president shall be four years, that the Senate shall be composed of two senators from each state, and that a member of the House of Representatives shall be at least twenty-five years of age, no room is left for any doubt, difference of opinion, or "interpretation," judicial or otherwise. When, however, it says that the privilege of the writ of *habeas corpus* shall not be suspended "unless when in cases of rebellion or invasion the public safety may require it," that Congress shall have power to "regulate commerce... among the several states," and that no person shall be deprived of life, liberty, or property "without due process of law," scores of questions at once arise which have to be answered before one can know what the provisions mean and how they apply—questions, however, to which no direct answers are supplied in the document. Who may suspend the writ of *habeas corpus?* When is a situation serious enough to justify suspension? What is included in "commerce among the states"? At what point in a commercial transaction may regulation by Congress begin? What is commerce, anyway? And what is "due process of law"? Who is to say? And on what lines is the principle to be applied to the bewilderingly varied interrelations and dealings of individuals and corporations?

Who interprets?

The answers to these and scores of other questions like them, once arrived at, are seldom written into the formal constitutional text. Nevertheless, they just as truly become integral parts of the fundamental law; indeed, most of our constitutional system as operating today, save only for its broader outlines, rests upon precisely such a basis. In one way or another, the answers are supplied, too, by nearly every operating branch of the government—even by instrumentalities like political parties which function outside of the government. In the exercise of broad discretionary powers which the courts have recognized as belonging exclusively to him, the president, by decisions and orders, contributes heavily. Heads of executive departments, commissions and boards, and even subordinate administrative authorities, interpret and apply the constitution's principles as related to their respective functions. Every time that Congress passes a bill, it in effect interprets the constitution and may add something to the ever-growing body of constitutional law and practice. Even the people who elect members of Congress may more or less unconsciously impart a slant to constitutional development. Finally, the courts, although dependent for their opportunity to construe and

apply constitutional terms and provisions upon actual cases coming before them, have hundreds of chances every year to say what the law is and to give it the meaning and effect which their experience, predilections, and surroundings influence them to read into it. Here—in orders, rules, statutes, decisions, together with custom or usage—is the truly flexible, and ever-changing, part of our constitutional system; here is mainly where the constitution grows.[1]

Two or three of the processes mentioned may well be looked into a little more closely.

Statutory elaboration

Desirous of avoiding what one of them called "a too minutious wisdom," the framers of the original constitution outlined clearly enough the general framework of the new government, but wisely left many aspects, both of organization and of function, to be provided for by Congress, and even in a subsidiary way by the state legislatures. For example, they assumed the existence of executive departments, and twice referred in the constitution to the heads of such establishments, but left Congress not only to create the departments but to determine how many there should be, what they should be called, how they should be organized, and what should be their functions and interrelations. Other great regulative and administrative structures, standing outside of the executive departments, *e.g.*, the Interstate Commerce Commission and the Federal Trade Commission, have originated, and their broad powers have been defined, in the same way. The composition of the two houses of Congress was prescribed carefully, but the time, places, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress itself,[2] and in a comprehensive statute of 1842 on the election of representatives, and another of 1866 on the election of senators, Congress amplified the constitutional law of this subject in much detail. Again, the judicial power of the United States was vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[3] Aside from the Supreme Court, therefore, the entire federal judicial establishment rests upon acts passed from time to time by Congress. A very large part of the actual working governmental system, indeed, has been created, and powers, duties, and limitations defined, by ordinary legislative process. As remarked above, whenever Congress passes a law, it in effect interprets the constitution. If a given measure touches some hitherto unsettled problem, or carries the power of the government into an area not previously penetrated, it not only interprets but adds. And while such creative acts may be tested in the courts, the great majority are not—which leaves Congress the undisputed author of whatever new constitutional interpretations and devices may be involved.

[1] The same is true of the constitutions of the states, but with formal amendment, including total revision, playing a larger part.

[2] Except that Congress might not regulate the places of electing senators.

[3] Art. III, § 1.

Judicial interpretation

Mention of the courts suggests a second major mode of constitutional growth, *i.e.*, judicial interpretation. How such interpretation comes about must already be apparent.[1] Congress, or a state legislature, passes a law, or a national or state official performs an act, which is challenged as exceeding proper authority by some citizen or group of citizens affected adversely. A case is brought in the courts, and the law or action is attacked as being unconstitutional; whereupon the judges must decide whether the charge is well founded—in other words, whether the measure is or is not in conformity with constitutional stipulation or reasonable construction. To do this, it is, of course, necessary to determine what the pertinent constitutional provisions mean; and this high task the courts boldly and habitually assume. The final arbiter is the Supreme Court. Whatever that august tribunal holds to be constitutional—even by a five-to-four majority[2]—*is* constitutional and valid, regardless of what other authorities may think and of what consequences may be entailed for both private and public interests. "We are under the constitution," once remarked an able jurist, Charles E. Hughes, later Chief Justice of the United States, "but the constitution is what the judges say it is." There is, however, no necessary finality about a Supreme Court decision. Times change; justices die or resign; new presidents nominate new justices, who, being human, have their own particular points of view, and, mayhap, their own political prejudices; and sometimes these new justices reverse the rulings of their predecessors, imparting to some constitutional clause a contrary or hitherto unsuspected meaning. It is, therefore, never safe to assume that a constitutional issue is settled for all time by what the Supreme Court says on it in a given case. Particularly is this true today, when we have a Supreme Court that, having modernized its viewpoints and procedures, is rapidly modernizing the constitution also.[3]

Judge-made law

One hardly needs to remark that this function of review and interpretation adds greatly to the power of the courts—especially the Supreme Court. In exercising it, the judges become the authors of a vast amount of "case" law, much of which enters into the texture of the working constitution. Some jurists, it is true, hold that the courts do not make law. But they explain their position in labored language, and it is better to recognize frankly, with the late Mr. Justice Holmes, that judges "do and must legislate." Furthermore, there is hardly any limit to the constitutional expansion and adaptation that may arise in this way. A disputed phrase of the constitution is interpreted in such a manner as to give it a content and application beyond that formerly attributed to it. This, in turn, furnishes a point of departure for a further elongation when the next similar case comes up. And so the process goes on, the lines of de-

[1] This is further considered on pp. 340-345 below.

[2] Indeed, a four-to-four division has the effect of sustaining a decision of a lower court from which there has been an appeal.

[3] A very instructive discussion of this matter is R. E. Cushman, *What's Happening to Our Constitution?*, Public Affairs Pamphlets, No. 70 (New York, 1942).

velopment, being "pricked out by one decision after another until the last has carried matters a long way from the point at which the interpreting process began."[1] Nearly all of the more important implied powers of Congress, as distinguished from the modest list of eighteen powers enumerated in the eighth section of the first article, are traceable to this source.[2] The fundamental reason why the written constitution has not been amended more frequently is that throughout the nation's history the federal Supreme Court has sat as a "continuous constitutional convention," interpreting, developing, and expanding the basic law.

Growth by usage

"Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions"; and so it comes about that another mode by which our national constitution expands and develops—indeed the main one, apart from judicial construction—is usage or custom. This method of change attracts less attention than the others; it does not—at all events immediately—result in amendments, laws, or judicial decisions. Superimposed, nevertheless, upon the instrument of 1787 and its formal amendments, upon the laws that amplify and the decisions that extend it, is a great and steadily developing "unwritten constitution," consisting of usages determining the actual workings of the governmental system quite as truly as do the stipulations of written law—in fact sometimes more truly, considering that no small number of such usages have had the effect of turning written law into unintended channels, or even of reducing it to a dead letter. Plenty of illustrations will come to view as we proceed; for the present, it must suffice merely to mention the manner in which the electoral college functions in choosing the president, the extensive use of "executive agreements" in lieu of treaties, the assembling of the department heads in the advisory body known as the cabinet, the caucus and seniority systems in Congress, the custom requiring members of the House of Representatives to be residents of the districts in which they are elected, and substantially all of the paraphernalia—caucuses, conventions, committees, platforms, funds—of political parties.

"The living word and deed of living men"

The general theme need not be elaborated farther. The upshot of all that has been suggested is that the bare outline of a governmental system contained in the written constitution as it came from the hands of the fathers, and as it can be read in the books, has been amplified and filled in—by amendment, executive action, statute, judicial construction, usage—until it has come to be one of the most elaborate and complicated plans of political organization and procedure known to history. Simultaneously, the earlier balance of power between nation and states has been transformed; that between executive, legislative, and judicial branches has been basically altered; and other fundamental readjustments

[1] W. B. Munro, *Government of the United States* (5th ed.), 71.
[2] See pp. 48-49 below.

have taken place. Furthermore, the processes of change go on unceasingly. The actual constitution at any given time, as some one has remarked, is what citizens, lawmakers, administrators, and judges think it is and observe—"the living word and deed of living men." Woodrow Wilson, Mr. Justice Holmes, Senator Norris, and Franklin D. Roosevelt are its architects no less truly than Hamilton, Madison, Franklin, and Morris. When the fundamental law no longer lives and grows, flexibly and spontaneously, the nation which it serves will have become a memory.

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2. THE FEDERAL SYSTEM IN TRANSITION

CHAPTER IV

FEDERALISM AND THE PRINCIPLE OF NATIONAL SUPREMACY

Nation and states

Rumor has it that at a critical moment in the proceedings of the Philadelphia convention, Alexander Hamilton—irked by obstacles to the national centralization which he favored—petulantly exclaimed that the states ought to be abolished. Of course, neither Hamilton nor any one else ever for a moment supposed such a step possible. Far to the contrary, if there was any one thing above all else that the constitution's makers were bound to do, it was to keep a place in the new system—and a very important one at that—for the states, whose delegates they were, and without whose approval their work might as well never have been done. All of the existing states were carried over from the preëxisting constitutional order into the new one, with their names, boundaries, and governments unchanged, and with functions and powers curtailed to be sure, but nevertheless still extensive and basic. Furthermore, the constitution authorized Congress to admit new states to the Union; and from 1791 onwards this power was exercised, as the Southern and Western portions of the country filled with population, until in 1912 the admission of New Mexico and Arizona brought the number to the present forty-eight.

When, however, the constitution's framers wisely decided upon a national government resting directly upon the people, as the state governments also did, they opened up a question around which much of our later history has revolved, namely, that of the legal and practical relations between nation and states. Indeed, out of differences of view upon this matter arose long and bitter disputes which not only tested to the utmost the Supreme Court's capacity for constitutional interpretation, but at one stage plunged the country into devastating civil war. Never yet has the question been answered at all points, nor in truth can it ever be; for in a dynamic, changing society governmental powers simply cannot be defined and circumscribed with such precision and finality as to prevent people from construing them differently in the face of new circumstances and needs. In a country like England, with all public authority concentrated in a single national government,[1] no difficulty arises. But our system is "federal," not "unitary"; except in a few areas such as foreign relations, powers are divided, or distributed, by fundamental law, between a national government and forty-eight state governments. And no legerdemain of constitutional phraseology can prevent the division from

[1] Though of course exercised to a considerable extent through counties, boroughs, and other units of local government.

giving rise to endless doubts and challenges. In America, as elsewhere, federalism has proved an exciting adventure.

Historic Problem of the Nature of the Union

The fundamental issue

Weighty as are many of the questions of national power and state power brought to the fore, for example, by experiences under the New Deal and in World War II, such questions have, after all, related only to the distribution of power within a political order the ultimate basis and nature of which are matters of general agreement. But there was a time when dispute went farther than that. Throughout the first half of our national history, it reached to the very nature of the Union itself. Was the United States, under the constitution, a true and indivisible nation; or was it only a league of sovereign states as before 1789? The question may sound hollow to our ears, but it once stirred the profoundest thought and emotion of American political leaders. That the states were not mere administrative subdivisions, nor yet simply subordinate areas with a limited autonomy conferred by the central government, was conceded by all. They were, as everybody knew, distinct, original, indestructible political entities, with broad surviving inherent powers. But did this mean that they were "sovereign"? Or were their people so merged in a common, superior, national fabric that the states also, as political units, had become inextricably embedded in it?

Triumph of the nationalist view

Happily, the logic of events has gone far toward clearing up all reasonable doubt on this score. As every student of our history knows, the trend since 1789 has been decidedly in the direction of a strong national government based on an indissoluble union of the states. In a remarkable series of decisions in cases turning on constitutional questions, the Supreme Court, notably during John Marshall's long tenure as chief justice (1801-35), consistently—and with powerful effect—gave its support to the nationalist view. The denial and total extinction of the alleged right of a state to nullify acts of Congress and decisions of federal courts, notwithstanding momentary successes of nullificationists in South Carolina and Georgia in 1829-32, worked to the same end. And—passing over a great number of other contributing factors—the failure of secession in 1860-65, and the general acceptance of the doctrine that a state cannot secede, clinched the victory of nationalism and stamped the union with the quality of permanence which it unmistakably possesses in our own day.

The people ultimately sovereign

The verdict of history is that the ultimate, *i.e.*, sovereign, authority in this country is, not each separate state, nor yet the government of the United States, but the people of the country considered as a whole. In line with the famous assertion of the Declaration of Independence that "governments derive their just powers from the consent of the governed," they—the people—and they only, have the last word in determining the nature of the political system and the powers to be exercised under it.

The thing that is divided is, not sovereignty itself, but merely the exercise or use of powers conferred, or otherwise assented to, by a sovereign authority. For obvious reasons, the people cannot, in the mass, execute laws, operate public services, or administer justice. They can, and in some states occasionally do, legislate, through the medium of the popular initiative and referendum. Even in this domain, however, they nowhere try to perform the whole task in such direct fashion. What happens, therefore, is that they intrust the exercise of varying portions of their sovereign authority—executive, legislative, and judicial—to agents which we know as the national and state governments.[1] And, aside from making provision for the structure of the national government, the constitution of the United States is devoted mainly to drawing boundary lines between the powers which the governments on the two levels are required, permitted, or forbidden to wield.

The Distribution of Powers

National powers

Three or four major aspects of this distribution of powers call for emphasis. The first is that the national government is strictly limited to powers delegated to it. Such was the almost inescapable presumption from the language of the constitution as originally adopted. Some doubt, however, having arisen on the point, the Tenth Amendment, ratified in 1791, fixed the principle beyond all possible challenge. Specific grants of power are made in the constitutional text to Congress, to the president, to the courts; but, says the Amendment, "all 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." No reader of this book will need to be told that the powers wielded by the national government are immeasurably greater today than in the times of Washington and Jefferson. At some points, they appear to a good many people to have been carried considerably beyond the grants contained in the constitution. In the eye of the law, however, whatever expansion has taken place—except in taxation and one or two other areas where changes have been explicitly authorized by constitutional amendment—has resulted solely from progressively wider and more penetrating applications of powers already possessed. President, Congress, and courts have no proper authority except such as can be found somewhere (as express provision or by reasonable implication) within the four corners of the constitution.[2]

[1] In all discussions of American government, so much is said, necessarily, about constitutional limitations or restrictions that one is in danger of forgetting that the primary purpose of a written constitution is to grant, or otherwise authorize, adequate power to govern. Checks on this power, essential as they are, follow—they do not precede. The principle holds for all governments to be studied in this book.

[2] In United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304 (1936), the Supreme Court has, however, asserted that even if the constitution were silent on the conduct of foreign relations (which it is not), the power to carry on diplomatic intercourse and to make war and peace would belong to the federal government as being "necessary concomitants of nationality."

State powers

A second fact, already indicated, is that the state governments, on the other hand, have powers that are original, inherent,[1] and largely undefined. A certain number of powers belonging to state governments are, to be sure, alluded to in the national constitution. But there is no attempt to present a list. Carrying over into the new system the great bulk of powers which they possessed under the old one (and they would never have ratified the constitution unless permitted to do this), the original states have ever afterwards enjoyed the ample and undefined range of powers guaranteed in the Tenth Amendment—a range of powers which, although curtailed at some points by nationalizing amendments, and in effect also by legislation and judicial decisions, has expanded considerably more than it has contracted, notwithstanding the common impression that it is the powers of the national government alone that have been magnified in these later decades. And, of course, under the principle of state equality, all states subsequently admitted to the Union are entitled to, and possess, a similar range of authority.

No government endowed with unlimited powers

A third fact is that no government in our system has unlimited powers. The national government has only such powers as have been delegated to it, expressly or by implication; the state governments, although with powers undefined and unenumerated, are restricted at many points by the federal constitution and at still more by the state constitutions; and measures enacted by either Congress or a state legislature (acts, too, performed by executive or administrative authorities), if regarded as exceeding the limits of powers constitutionally fixed, are practically certain sooner or later to be challenged in the courts, and may be held null and void.

Powers withheld from all governments

This is but another way of saying that by no means *all* power has been intrusted by the people to government of any kind. Plenty of powers are withheld from the national government, simply by not being conferred in the national constitution; many are withheld from state governments by being prohibited in state constitutions. But—and this is the present point—some also are withheld from both national and state governments, either by being forbidden to both in the national constitution (*e.g.*, depriving a person of life, liberty, or property without due process of law), or by being prohibited to national and state governments concurrently by the respective constitutions (as in the case of taking private property for public use without compensation). Taken together, the federal and state constitutions thus leave, and in fact create, "spheres of anarchy"—of no government, so to speak—within which people may not be interfered with at all by any public authority. As suggested by the above illustrations, these areas of immunity are associated mainly with civil rights and liberties; and the Ninth Amendment gives them a significant flexibility by stipulating that the enumeration of certain rights in the federal

[1] Derived from and authorized by the people, of course, but at any rate not dependent on the national constitution.

constitution "shall not be construed to deny or disparage others retained by the people."

Implied Powers

How the question arose

The careful phrasing of the constitution did not prevent—no linguistic niceties could have prevented—differences of opinion as to the limits of power of both the national and state governments; and lively controversies arose before the new system had been in operation a year. In 1790, Alexander Hamilton, secretary of the treasury, proposed the establishment of a national bank. Opponents of further centralization at once objected that the constitution, in enumerating the powers of Congress, said nothing about a bank; they could show, indeed, that its authors had deliberately refused to give Congress even limited power to create corporations. Hamilton and others who supported his policy replied that while the constitution did not, to be sure, authorize Congress in so many words to create a bank, the power to do so could easily be deduced from certain grants of authority about which there could be no question.[1] This view prevailed, and the bank was established. Opinion on the matter, however—springing partly from sheer theory, but more largely from practical interest and political strategy—continued divided; and from this beginning the issue of "implied powers" expanded and ramified until it became the most basic and dominant (except for a decade or two when the not unrelated issue of secession overshadowed it) in the entire constitutional history of the country.

Led by Jefferson, the strict constructionists argued that the national government had no powers except such as were expressly conferred upon it in the constitution, or, at most, such as could be shown to be indispensably involved in the exercise of these delegated powers. To take a single step, urged the Virginian (in a letter in which he gave Washington his views on the constitutionality of the proposed bank), beyond the boundaries "specially drawn" around the powers of Congress by the Tenth Amendment, "is to take possession of a boundless field of power, no longer susceptible of any definition." On the other hand, the loose, or broad, constructionists, such as Hamilton, contended that the national government had all powers which could by any reasonable interpretation be regarded as implied in the letter of the granted powers, and also that it had a right to choose the manner and means of performing its functions, even though involving the employment of agencies not necessarily *indispensable* for its purposes.

[1] In particular, those relating to currency and other aspects of national finance—backed by the "sweeping clause" with which the constitution's enumeration of the powers of Congress concludes, and in which the two houses are authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." Art. I, § 8, cl. 18. The clause quoted became the principal basis for the entire development of implied powers in later times.

Implied powers a practical necessity

On purely legal grounds, Jefferson's argument was plausible; and events proved him right in predicting that the doctrine of implied powers, once accepted, would lead to endless expansion of the national government's activities—often at the expense of powers originally considered as belonging to the states. The logic of practical necessity lay, however, with the Hamiltonian view. If the national government, perennially confronted with new conditions and unforeseeable problems, was to attain the ends for which it was established, it must without fail have the benefit of all authority that could reasonably be deduced from the grants that had been made to it; otherwise, it would be halted at points where inaction would be ruinous. This was eventually conceded, although grudgingly, by the Jeffersonians themselves; and when they gained control of the government in 1801, they soon were found availing themselves of implied powers almost as freely as had their Federalist rivals. On no other basis, for example, could Louisiana have been annexed in 1803 or an embargo laid on foreign trade in 1807.

Chief Justice Marshall's historic pronouncement

In the course of time, the question reached the Supreme Court; and in a memorable series of nationalizing decisions between 1809 and 1835 that tribunal—while acknowledging limits beyond which powers could not properly be implied—lent the doctrine the full weight of its authority. Classic expression was given the Court's views by Chief Justice Marshall in the case of McCulloch *v.* Maryland, in 1819, as follows: "This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the constitution, are constitutional." [1]

The doctrine here laid down gained general acceptance and is today firmly embedded in our constitutional law. Not only so, but, as a result of social and economic changes, of wartime and depression crises, and of growing belief in the usefulness of governmental regulation, the doctrine is nowadays applied in directions and in situations of which Marshall and his black-robed colleagues never dreamed.[2]

[1] 4 Wheaton 316.

[2] Many illustrations will be encountered as we proceed. See especially Chaps. XXIV-XXXII below.

Ultimate Supremacy of the National Government

The "supreme law"

Under our federal system, the national government is supreme within the sphere assigned to it, the states no less so in the sphere reserved to them. Contrary, however, to a view once widely held, and still occasionally cropping up,[1] this does not mean that nation and states stand on a footing of equality. "This constitution," reads one of the instrument's most significant clauses, "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." [2] "This clause," observes a distinguished historian, "may be called the central clause of the constitution, because without it the whole system would be unwieldy, if not impracticable. Draw out this particular bolt, and the machinery falls to pieces. In these words the constitution is plainly made not merely a declaration, a manifesto, dependent for its life and usefulness on the passing will of statesmen or of people, but a fundamental law, enforceable like any other law in courts." [3] What the clause means, in practice, is that, while the state governments may be, and are, supreme within their reserved spheres, these spheres are circumscribed not only by the delegation of many important powers to the national government, but by rigorous application of the rule that whatever the national government ordains—within the broad and still expanding area of its authority—is *supreme law,* enforceable as such and binding no less upon state executives, legislatures, courts, and people than upon officers and people of the nation itself. Nothing of the kind can be said for the laws of any state. So long, to be sure, as these laws go unchallenged by federal authority, or indeed if, upon being challenged, they are held to be not inconsistent with that authority, they may be said—so far as any restraint from the national government is concerned—to be "supreme," within the boundaries of the state. If shown, however, to be incompatible with any legitimate exercise of power by the national government, they lose all claim to validity; [4] and many have in this way been rendered of no force and effect.

Who is to decide in cases of dispute?

But who is to say whether a state government—or, for that matter, the national government—has overstepped the bounds marked out for it? The constitution gives no explicit answer, and there has always been difference of opinion as to what the framers intended. To be sure, there was a proposal in the Philadelphia convention that, as a means of up-

[1] As, for example, in K. C. Wheare, *Federal Government* (London, 1946), 2.
[2] Art. VI, § 2.
[3] A. C. McLaughlin, *The Confederation and the Constitution* (New York, 1905), 247.
[4] The same holds true for provisions of state constitutions, and for state executive and administrative actions as well.

holding the "supreme law" and protecting the Union, Congress be given power to disallow, or veto, any act passed by a state legislature. But although at one time agreed to without dissent, so much opposition developed that the idea was given up. Again, the Virginia plan proposed to associate with the national executive a council of revision which should scrutinize every measure passed by Congress, with the further provision that any to which the council objected should be allowed to take effect only if subsequently reënacted by a two-thirds vote in both houses. The convention's final decision was, however, to give the veto of acts of Congress to the president alone; and the question of whether the courts, as an incident of their general judicial power, should have the right to declare either a federal or a state enactment unconstitutional was left without definite answer. In consequence, there have always been people who maintained that the fathers did not intend that the courts should have such power, and that the exercise of it by them is not only unsupported by the letter, but contrary to the spirit, of the constitution, and therefore sheer usurpation.

A task for the courts

An opposite view has, however, won more general acceptance. From the records, it appears that the constitution's makers did not remain silent on the subject simply because they had not thought of it, nor yet because they considered it unimportant, but only because they regarded inquiring into the constitutionality of legislation as necessarily involved in, and going along with, the work both of the state courts already existing and of national courts later to be established. Within the brief period of their existence, state courts already had declared legislation void as being incompatible with state constitutions;[1] and in the Philadelphia convention it was simply taken for granted that the forthcoming national courts would, on their part, refuse to enforce as law any act of a state legislature "contravening," as Roger Sherman put it, "the authority of the Union," or, for that matter, any act of Congress transcending the proper powers of that body. In so doing, the courts would merely be upholding the principles of federalism and check-and-balance fundamental to the entire constitutional system. Judicial review, indeed, appears to become, under our plan of government, one of the great "resulting" powers[2]—a power arising from the very nature of the judicial function when operating in a government based upon limitation of powers and distribution of them between two sets of authorities inevitably tending to encroach upon one another.[3]

As is so often the case, however, fact is here more important than theory; and the fact is that not only did the Judiciary Act passed by

[1] *E g.*, in the New Jersey case of Holmes *v.* Walton in 1780 and the Rhode Island case of Trevett *v.* Weeden in 1786.

[2] See p. 217 below.

[3] In No. LXXVIII of *The Federalist*, Hamilton expressly indicates that the courts were intended to exercise the function of review, and in his *The Supreme Court and the Constitution* (New York, 1912), C. A. Beard analyzes the opinions of the delegates to the federal convention and reaches the same conclusion.

the very first Congress in 1789 authorize the federal Supreme Court to review any case in which a state court had upheld a state law alleged to be in conflict with the constitution, with a statute, or with a treaty of the United States, but the power was early brought into play, steadily broadened in scope and application, and has been employed with tremendous effect for more than a century and a quarter. An act of Congress was held void by the Supreme Court on the ground of unconstitutionality in the case of Marbury *v.* Madison, decided in 1803;[1] state statutes were declared void, on constitutional grounds, in a long line of cases beginning with Fletcher *v.* Peck in 1810.[2] And thus was built up in the federal domain—paralleling a similar development in the states—a function which sharply differentiates our American courts from the courts of Great Britain and many other countries. Judicial review has, indeed, been termed America's distinctive contribution to the science of politics.[3]

The national government as judge of its own powers

From judicial review as developed by the federal Supreme Court arises a situation of major importance with respect to the boundary lines between federal and state powers. In all disputes touching this subject, the last word is, or may be, spoken by nine (indeed by a majority consisting of *five*) federal judges in Washington—which is tantamount to saying that in conflicts of authority between national and state governments, the *national* government makes and enforces the decision, subject only to reversal by a constitutional amendment.[4] As once remarked, the Supreme Court has throughout our history been "as impartial an umpire in national-state disputes as one of the members of two contending teams could be expected to be."[5] As an organ of the national government, it has, however, undeniably shown a predisposition, if not downright favoritism, toward that government. "The states," continues the writer quoted, "have had to play against the umpire as well as against the national government itself. The combination has been too much for them." Over against the clear principle that the national government is a government of limited powers stands the hard fact that not a limitation is fixed in the fundamental law which Congress, the president, and the Supreme Court—indeed, merely Congress and the Court—acting concurrently, may not override if they wish. There are, of course, powerful restraining factors: it is politically expedient—to put it mildly—to be able to convince the general mass of the people that the bounds set up in the constitution have not been transgressed; and the

[1] 1 Cranch 137. To be more exact, that part of the Judiciary Act of 1789 which authorized the Supreme Court to issue a writ of mandamus under certain circumstances.

[2] 6 Cranch 87.

[3] The nature and effects of judicial review are discussed more fully in a later chapter dealing with the federal judiciary. See pp. 340-345 below.

[4] It should be observed, too, that the states as such may not challenge the acts of the national government, but must rely upon suits brought by individual citizens or corporations considering themselves injured by such acts.

[5] O. P. Field, "States versus Nation, and the Supreme Court," *Amer. Polit. Sci. Rev.*, XXVIII, 233 (Apr., 1934).

concurrence of the Supreme Court may be, and often is, impossible to obtain. Marvelous discoveries of previously unsuspected national power have, however, been made; others are no doubt impending; and, irrespective of all future uncertainties, the frontiers of national authority will unquestionably prove to have been widened permanently since 1933 as in few, if any, other periods in the nation's history. All experience, too, goes to show that national power, once asserted and safely past the hurdle of the courts, is almost never relinquished. No important instance of surrender of a peacetime power so fortified can be cited except abandonment of the prohibition of the liquor traffic; and that retrenchment came about only because the national government itself, driven by public opinion, experienced a change of heart on the subject.

How national authority is enforced

How is the supremacy of national authority maintained and enforced? Normally, of course, by the ordinary processes of legislation and administration, operating directly upon the people irrespective of states and state governments. When, however, these processes are challenged or obstructed, the courts may be brought into play to determine in how far the actions taken or contemplated are constitutionally legitimate; and, once it is established (whether through judicial decision or otherwise) that the laws under which the national authorities are claiming to act are valid, the president may, indeed must, proceed to execute them, by military means if necessary. Both the Virginia and New Jersey plans as presented in the Philadelphia convention provided for forcible coercion of any state opposing or preventing the execution of national laws or treaties. When, however, it was settled that the new national government was to operate directly upon the people, and not simply upon states, this idea of coercing states as such was, as we have seen, given up; and the Civil War itself was prosecuted by the Lincoln Administration on the theory that the government's object was to suppress rebellion on the part of individual men and women, not of states. In dealing with concrete situations requiring forcible execution of national law, it is not always easy, or even possible, to ignore the existence and actions of state governments; certainly the theory underlying the Civil War became considerably blurred in the Reconstruction measures adopted after Lincoln's death. The principle that national power acts compulsorily upon people, not upon governments, is, however, clear; and effort is commonly made to adhere to it in practice.

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CHAPTER V

THE CONSTITUTIONAL POSITION OF THE STATES

Importance and uses of the states

The power and prestige of the national government must not be allowed to blind us to the immense importance of the states in our constitutional system. After all, our nation is the *United States* of America; and while the expansion of national activities and controls attracts more attention, the states, too, have in these days more tasks to perform and more services to render than at any time in the past. Impregnably entrenched as distinct, self-governing units or jurisdictions, with broad and undefined (although, of course, not unlimited) powers, the states still stand at least as close to the people as does the national government, touching their lives and interests at even more points. They provide means by which, within limits, Vermonters, Virginians, Iowans, and Californians can have governments and laws to their own liking, instead of being subjected to a single uniform pattern. Vast as is the machinery of government centering in Washington, it would have to be vaster still, and its operations more congested, if the states did not, in their respective spheres, take care of much of the work to be done. Within their areas, too, states can pioneer and experiment, "under the urge of a local opinion that does not have to wait to convert the entire nation to its hopes and beliefs": Oregon can try the popular initiative and referendum; Arizona can experiment with the recall of judges; Nebraska can test the merits of a one-house legislature; Illinois can find out the advantages of a new plan of administrative consolidation. In many legislative and administrative fields, indeed, *e.g.*, in the regulation of railroads and other utilities, in enacting labor laws, and in promoting social insurance and public health measures, various states have gone far before others even started and—what is more significant—before the national government got around to doing much or even anything at all.

The fact is that the national government presupposes the states, both structurally and functionally, as legal and political entities, and is so dovetailed with them—in matters like elections and constitutional amendment—that if they were suddenly blotted out, some of its most necessary processes would come to a halt. County, city, and town governments, on their part, would collapse completely, because it is only by state authority that they exist. Nation, state, local areas—all are interlocked, not only geographically, economically, and socially, but also politically, under a system of government which, however diverse its parts, must still be regarded as basically a unit.

Aspects to be considered here

The ways in which the states, viewed internally, are organized and governed will be dealt with in a later portion of this book.[1] For the present, we are concerned, rather, with a closer look at the place which the forty-eight jurisdictions occupy in the country's governmental system considered as a whole. In the present chapter, attention will be focused upon formal constitutional provisions regulating their relations with the nation and with one another; in the chapter that follows, we shall be interested in seeing how these relationships have developed as a matter of experience and practice. In this latter connection, many things will come to light that the constitution's makers certainly did not anticipate.

Admission of New States

First of all, there is the question of how a state becomes a state. To be sure, until rather recently, the question might have seemed rather academic; even now, no new state has been added to the list in thirty-five years. In 1944, however, both major political parties went on record for eventual statehood for Alaska, Hawaii, and Puerto Rico; all three have strong backing for the coveted promotion, locally and in government circles in Washington; and one or more of the number will probably be admitted comparatively soon, with the chances for priority at present favoring Hawaii.

"Original" and "admitted" states

What has happened in the past is, of course, known to every student of our national history. The thirteen "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the present constitution. The other thirty-five were brought in, one by one, by acts of Congress. Considered from the point of view of previous status or condition, these later commonwealths fall into four groups: (1) five which were formed by separation from other states, *i.e.*, Vermont set off from New York in 1791, Kentucky from Virginia in 1792, Tennessee from North Carolina in 1796, Maine from Massachusetts in 1820, and West Virginia from Virginia in 1862-63; (2) one, *i.e.*, Texas, which before its admission in 1845 was an independent republic; (3) one, *i.e.*, California, which was formed—also without passing through the territorial stage—out of a region ceded by Mexico in 1848; and (4) twenty-eight which previously were territories.

Process of admission

The constitution confers on Congress general power to admit new states, subject only to two restrictions: (1) that no state may be erected within the jurisdiction of any other state except with the consent of the latter's legislature, and (2) that no state may be formed by the union of two or more states or parts of states without consent of the legislatures of all states concerned as well as of Congress.[2] Ordinarily, the procedure of admission is started by the people of a territory, who, if a substantial proportion desire statehood, send a petition to Congress ask-

[1] In Part III (complete edition).
[2] Art. IV, § 3, cl. 1.

ing that the territory be received into the Union as a state. If the petition is regarded with favor, Congress passes an "enabling act" authorizing the territorial officials to arrange for a popularly elected convention to frame a state constitution. The resulting instrument, having been submitted to the people, is, if approved, laid before Congress; and if it is there found acceptable, a joint resolution is passed declaring the said territory a state. Occasionally a territory has omitted the initial petition and gone at once to Congress with its proposed constitution.

Special conditions may be imposed

If, as has happened several times, Congress finds something in the constitution as submitted that it dislikes, or fails to find something that it thinks should be there, it will communicate its criticism to the authorities of the territory, either in the form of a suggestion or in that of a definite requirement to be met as a condition of admission. In the latter situation, there is nothing for the territory to do but comply—or wait for a possible change of opinion in the two houses; for without the consent of Congress no territory can become a state, and there is no way of compelling that consent to be given. In this manner, several incoming states have been subjected to requirements not imposed upon others.[1] The president, too, can take exception to a proposed constitution, and can veto a resolution providing for admission.

Yet all states legally equal

Such minor differences as arise in this way do not, of course, prevent the states from being true equals in the eye of the law. In size, population, wealth, and general importance they, of course, vary enormously. The largest, Texas, has an area of 265,780 square miles; the smallest, Rhode Island, contains only 1,250. The most populous, New York, had 13,479,142 inhabitants in 1940; the least populous, Nevada, had 110,247. Average density of population varied, at the same date, all the way from 674.2 per square mile in Rhode Island to 1.0 per square mile in Nevada. Some states are almost wholly agricultural, others are mainly industrial and commercial. Some are of great weight in the councils of the nation, others count for comparatively little. Some are more able to provide the services expected of modern governments than are others. All have their separate and more or less differing constitutions, laws, courts, systems of

[1] Naturally, incoming states do not relish such treatment; and considerable political and constitutional controversy has resulted. Nor, indeed, have conditions so imposed always been lived up to, once the state was safely in the fold. When, for example, in 1910, the people of Arizona, yielding to the objections of President Taft and many members of Congress, voted to eliminate the recall of judges from their proposed constitution, it was locally understood that the surrender was to be only temporary. And so it turned out. In his very first message, the governor of the new state recommended a constitutional amendment restoring the recall; and forthwith such an amendment was adopted by the legislature and approved by the voters. President Taft and Congress to the contrary notwithstanding, Arizona has had recall of judges ever since. Nor was it worth while for the national government to attempt to do anything about the matter, not only because an act admitting a state is a step that cannot be retraced, but also because the Supreme Court had earlier held that, while Congress is free to impose any conditions initially that it chooses, once a state is admitted, there is no way of compelling fulfillment of them if they are of such a nature as to compromise the independence of the state in managing its own internal affairs.

taxation, and arrangements for local government. Nevertheless, in their constitutional and legal status they are equal.

Obligations of the National Government Toward the States

1. Respect for geographical unity and identity

The position of the states is further fixed by certain obligations which the constitution imposes, in their behalf, upon the national government. In the first place, that government is definitely required to respect a state's geographical unity and identity. As indicated above, it may neither instigate, promote, nor sanction the erection of any state within the jurisdiction of an existing state except with the consent of the latter's legislature. Nor may it allow a state to be formed by uniting two or more states or parts of states unless the legislatures of all of the states affected indicate their approval.[1] In other words, a state cannot be deprived of its separate existence, or even of territory, without its consent.

2 Protection against invasion and domestic violence

A second obligation of the national government is to protect every state against invasion and (when asked) domestic violence.[2] An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and it is entirely logical that the national government should be authorized and required to repel the attack without waiting for any independent effort, or even a request for protection, to be made by the state itself. The repression of insurrections, riots, and other forms of domestic violence is a different matter. One of the principal things that the government of a state is expected to do is to maintain order; and unless such a government, finding itself unable to cope with a disturbance, calls upon the national authorities for assistance, those authorities will not intervene, so long as national laws are not violated, national functions (*e.g.*, carrying the mails) interfered with, or national property endangered. If, however, assistance is requested, the president will comply, unless he is of the opinion that the state can and should handle the situation alone; and if national interests are menaced, he will act without invitation, and even against the wishes of the state authorities.[3]

3. Guarantee of a republican form of government

A third requirement made of federal authority is that it shall guarantee to every state a republican form of government.[4] The men who framed and adopted the constitution had no desire to see monarchy or oligarchy arise within the limits of the new nation; and, having lately witnessed the Shays rebellion and other subversive movements, they were determined to put it within the power—indeed, to make it the solemn duty—of the national government to prevent any form of political organization other than republican from establishing itself anywhere in the country. They did not define the term "republican," and it is clear that they did not contemplate requiring any one precise governmental set-up, to the exclusion of all others. There were at the time considerable

[1] Art. IV, § 3, cl. 1.
[2] Art. IV, § 4.
[3] See p. 279 below.
[4] Art. IV, § 4.

differences from state to state; yet all of the existing governments were regarded as republican. Madison assured the people that they had a right to "substitute other republican forms" whenever they chose and to claim the federal guarantee in behalf of them.

Who decides whether a state government is republican?

The final judge of whether the government of a state is republican is not the people of the state, but the national government. The constitution does not say, however, what branch of the national government shall make the decision. Conceivably, it might be the courts. In handling cases turning on the nature of republicanism, the Supreme Court, however, has always held that the question is of a political nature, and hence one to be decided by the political branches of the government, not by the judiciary.[1] This leaves it to the president or Congress, or both. As for the president, he undoubtedly might declare the government of a given state to be not republican, and might use force to dispossess it. Indeed, in the single instance in which the guaranty clause was brought into play down to the time of the Civil War, *i.e.*, the Dorr rebellion in Rhode Island in 1841-42, President Tyler recognized the old government of the state as the rightful government and took steps to give it the aid which it asked against a rival government set up by an insurrectionary element led by Dorr. The really decisive factor in the national government's handling of the Rhode Island situation, was, however, the action of Congress in continuing to receive the state's senators and representatives. This, said the Supreme Court when a case growing out of the dispute came before it, constituted valid and final recognition of the state's government as being republican.[2] It was Congress, too, that at the close of the Civil War forced the Southern states, as a condition of regaining representation, to adopt suffrage (and other) arrangements which the radical Republican majority at Washington professed to consider essential to a republican form of government. Certainly its power to cut off a state from any share in controlling national policy, enacting national laws, and raising and appropriating national money gives Congress the whip-hand in the matter.

Tendency to liberal construction

In the Reconstruction period, the term "republican" was construed arbitrarily and narrowly. At all other times, however, it has been interpreted broadly and liberally. Thus, when a generation or so ago, opponents of the popular initiative and referendum as newly adopted devices of direct legislation in Oregon sought to make out that republican government means only *representative* government, with all laws enacted by elected assemblies, the Supreme Court said simply that the question was one for the political arms of the government, and that as long as Congress continued to receive senators and representatives from the state, it (the Court) would be satisfied.[3] And Congress itself took the sensible

[1] *E.g.*, in Pacific States Tel. and Tel. Co. *v.* Oregon, 223 U. S. 118 (1912).
[2] Luther *v* Borden, 7 Howard 1 (1849).
[3] Pacific States Tel. and Tel. Co. *v.* Oregon, cited above.

view that as long as representative institutions are maintained by a state, it does not matter if they are *supplemented* by provision for direct action now and then by the people.

Constitutional Limitations Upon the States

As we have seen, the federal constitution distributes powers between nation and states on the general principle that whatever is not conferred exclusively upon the national government remains to the states—with one obvious qualification, namely, that it does so only if not forbidden to them. Much, in point of fact is forbidden, in the interest of national unity and effective national government, giving rise to the "constitutional limitations" about which the lawyers talk; and while one large group of such limitations, having to do with the protection of civil liberties, calls for separate treatment in a later chapter,[1] certain additional ones of major importance require attention here.

1. Foreign and interstate relations

It is, of course, the intent of the constitution that official relations with foreign powers shall be conducted only through the national government, and one will not be surprised to find the states unequivocally forbidden to enter into "any treaty, alliance, or confederation."[2] A state, to be sure, may enter into an "agreement or compact" with a foreign power, but only with the consent of Congress, and only, of course, if not having the effect of creating an "alliance or confederation," *i.e.*, a relationship of a political character. No such agreement or compact has ever been undertaken.

Agreements or compacts among the states themselves are a different matter. These, too, are authorized (by implication), subject to the consent of Congress; and so useful has the device been found that upwards of a hundred such "interstate compacts" are now on record. For more than a hundred years, agreements were few and had to do almost exclusively with boundary lines. In the last quarter-century, however, they not only have grown more numerous, but have dealt with a steadily widening range of interstate interests. To cite but a few illustrations: (1) an agreement of New York and New Jersey in 1921 created a still existing Port of New York Authority charged with improving the facilities of New York harbor; (2) a Colorado River Compact of 1922 (finally effective in 1928) allocated rights to the waters of the Colorado among seven states containing portions of the river's basin; (3) a six-state compact, first authorized by Congress in 1935 (with other states later adhering), for the conservation of oil and gas resources; (4) an Atlantic States Marine Fisheries Compact, assented to by Congress in 1940 and adhered to by upwards of a dozen states, with a view to promoting better utilization of marine fisheries. Other varied matters with which compacts deal include pollution of rivers and coast waters, park and parkway develop-

[1] See Chap. VIII below.
[2] Art. I, § 10, cl. 1.

ment, flood control, tobacco production, inland fisheries, minimum wages, and supervision of parolees and probationers. According to the nature of the subject, the states involved may be contiguous or closely grouped, or on the other hand widely scattered—though with a tendency to agreements of regional scope, and often entailing some sort of advisory or directive interstate commission for carrying them out. Opponents of centralization, it has been remarked, see in such devices "a kind of intermediate arrangement which avoids the centralizing tendencies of federal regulation, whereas the advocates of centralization consider compacts a basis for possible evolution of control from the state to the region and then from the region to the nation." [1]

When congressional consent is necessary

The constitution seems to make all interstate agreements contingent upon the consent of Congress. In practice, however, there is no such rigid requirement. Without going to Congress about the matter at all, two or more states may agree to clean up a disease-producing district on their common border; and in point of fact, New York, New Jersey, and Connecticut some years ago settled in this manner a long-standing dispute concerning sewage pollution in New York harbor. In 1931, Maryland, Virginia, and West Virginia similarly adjusted fishing rights on the Potomac. In 1941, six Midwestern states signed an agreement aimed at higher standards in the dairy industry. As construed by the courts, the requirement of congressional consent applies only to agreements "tending to increase the political power of the states, which may encroach upon or interfere with the just supremacy of the United States." [2] Furthermore, where consent is necessary, it may be given either before or after the agreement is entered into, and may be either express or implied. Indeed, blanket permission to make agreements on a given subject may be given in advance; in 1936, for example, an act of Congress authorized any two or more of fourteen specified states in New England and in the Ohio Valley to enter into compacts for the abatement of pollution in interstate streams.

2. Defense

In general, defense, like foreign relations, is a national rather than a state function; and without the consent of Congress no state may keep troops or ships of war, or "engage in war unless actually invaded or in such imminent danger as will not admit of delay." [3] The prohibition, however, was never intended to preclude the states from maintaining organized militia, for use primarily in repressing domestic disorder; and, as we shall see, such militia, although long since assimilated to the armed establishment of the nation, remains basically a state instrumentality.

3 Taxation

Speaking generally, the states are free to levy and collect taxes as they choose, for revenue or with other objectives in mind; and many differing tax systems have resulted. There are, however, constitutional limita-

[1] J. P. Clark, "Interstate Compacts and Social Legislation," *Polit. Sci. Quar.*, L, 503 (Dec., 1935).
[2] Virginia *v.* Tennessee, 148 U. S. 503 (1893).
[3] Art. I, § 10, cl. 3.

tions—either expressly imposed or implied from general clauses, or even from the inherent nature of the federal-state relation. The restrictions expressly stipulated are that no state shall, without the consent of Congress, lay (1) "any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," or (2) any duty on tonnage.[1] Import and export duties laid by state authority are subject to revision and control by Congress; and, further to discourage such taxation, all net proceeds are required to be turned over to the national treasury. State-imposed import and export duties—tonnage duties likewise—were not uncommon in the earlier decades under the constitution, but nowadays are almost unknown.

(a) Export, import, and tonnage duties

(b) General constitutional provisions

Among clauses of general application which have bearing on the taxing power are those forbidding a state (a) to deprive any person of ... property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; (b) to pass any law "impairing the obligation of contracts"; also the well-known clauses stipulating (a) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states," and (b) that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The taxing power may no more be employed in violation of these blanket provisions than may any other power.

(c) Exemption of federal property

But there are also restrictions arising, not from specific constitutional provisions, but from interpretations placed upon the inherent nature of our federal system. One of these relates to federal property, which is completely immune from state taxation. To be sure, Congress in 1864 authorized the states to tax national bank stock and also the physical property belonging to national banks. Such property, however, is in reality private rather than public; and every effort of a state to tax real estate or other property belonging directly to the national government has met with defeat.[2]

(d) Immunity of interstate commerce

Still another limitation long ago arrived at by deduction was that states may impose no direct tax burden on interstate commerce. As the Supreme Court observed in the State Freight Tax decision of 1873: "It is of national importance that over the subject there should be but one regulating power; for if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed."[3] In later days, however, the Court has not been averse to such taxation when it could be shown that the cumulative effects referred to would not follow; and

[1] Art. I, § 10, cls. 2-3. A tonnage duty is a tax on ships levied on the basis of carrying capacity.

[2] See, for example, City of Springfield *v.* United States, 306 U. S. 650 (1939).

[3] Reading Railroad Co. *v.* Pennsylvania, 15 Wallace 232 (1873).

this more tolerant attitude helped pave the way for present sales and use taxes.[1]

(e) Exemption of certain federal "instrumentalities"

Until 1939, there would have been added to the foregoing a restriction preventing the states from taxing federal "instrumentalities" such as bonds and other securities (or the income therefrom), franchises granted by the federal government, and salaries of federal officials and employees. On its part, the federal government was considered equally debarred from taxing state officials' salaries, as well as income from state and municipal bonds, and other state "instrumentalities." Early in the year mentioned, President Franklin D. Roosevelt revived a proposal often heard before that the inter-governmental tax immunities enjoyed by salaries and by income from securities be terminated; a few weeks later (notwithstanding the opinion of many that the step could properly be taken only in pursuance of a constitutional amendment), Congress passed a Public Salary Tax Act[2] giving effect to the recommendation in so far as relating to *salaries;* and presently the Supreme Court—which for a good while had been gradually narrowing the actual tax immunity of state salaries—upheld the new legislation as constitutional.[3] The federal government now, therefore, taxes state and local salaries, and the states are reciprocally free to tax federal salaries—which most of them (if employing income taxes at all) are now doing. Income derived from securities of the national government is, however, still exempt from state (although in the case of more recent issues, no longer from federal) taxation. President Roosevelt continued to urge federal taxation of such income, which unquestionably would have opened the way for reciprocal state taxation. No action, however, having resulted, the states remain under the restriction indicated.

4. Commerce

The authority given Congress to "regulate commerce with foreign nations and among the several states, and with the Indian tribes,"[4] is not designed to interfere with control by the states over commerce that is strictly intrastate. To be exempt from federal regulation, however, commerce must originate, end, and have its entire course in a single state; commercial transactions which at any stage take on an interstate aspect are subject to federal regulation from the moment they begin until they are completed.[5] To be sure, with a view to public safety, a state may impose regulations on a railroad (*e.g.*, forbid the employment of color-blind engineers) which will incidentally affect the carrying on of interstate commerce across its territory. But the courts will uphold such

[1] A use tax is a levy upon commodities purchased outside of a state, but brought into it for use.

[2] 53 *U. S. Stat. at Large,* 574.

[3] Graves *v.* People of the State of New York *ex rel.* O'Keefe, 306 U. S. 466 (1939). Cf. State Tax Commission of Utah *v.* Van Cott, 306 U. S. 511 (1939). The point to these decisions was, not that national and state governments may tax each other, but only that the taxing by either of salaries paid by the other imposes no burden upon any *government,* but merely one upon the persons who pay the tax.

[4] Art. 1, § 8, cl. 3.

[5] See p. 381 below.

regulations only in so far as based upon the state's police power, and not upon any right to regulate interstate commerce as such.

5. Currency

One of the main advantages of union is a common currency system. Hence the federal constitution gives the national government full control over the country's currency and forbids the states to coin money, to emit bills of credit, or to "make anything but gold and silver coin a tender in payment of debts."[1] Under their reserved powers, the states can charter banks; and banking institutions so created exist beside and compete with national banks in all of the states. Furthermore, the states can authorize these banks and banking associations to issue notes for circulation as currency, although not as legal tender. In 1866, however, this latter power was stripped of all practical significance by an act of Congress laying a ten per cent tax on such notes and thereby making it unprofitable to issue them. The Supreme Court upheld the measure,[2] and as a result, state bank currency has passed entirely out of existence.

6. Contracts

Society exists and business is carried on by virtue of a network of human relations which find expression in agreements, or contracts; and little thought is required to show how insecure and otherwise difficult our everyday existence would be if these agreements could be disregarded with impunity. It is not strange, therefore, that the framers of the national constitution put into that instrument a clause explicitly forbidding the states to pass any law impairing the obligation of contracts,[3] *e.g.*, by weakening their effect or making them more difficult to enforce. They did not lay a similar prohibition on the national government; but this was mainly because they expected the business relationships of people to be controlled by the state governments rather than by Congress.

Status of charters and franchises

A contract may be defined as an agreement enforceable at law; and no state legislation which weakens the obligations arising from such an agreement is valid unless considerations of public health, safety, or morals demand it and compensation is rendered for the injury done. Both the definition and the rule are, however, easier to state than to apply. Ordinary agreements, executed in due legal form, between individuals or groups of individuals are obviously included. But how about a charter granted by a state to a bank or a railroad company? Or an appointment to a public office? Or a license to practice medicine? These and many similar questions have been passed upon in numerous judicial decisions, with results which must be stated briefly. In the Dartmouth College case, in 1819, the Supreme Court held that the charter of the college, granted by the English crown, was a contract which the state of New Hampshire, as represented by its legislature, had no power either to revoke or to impair without the college's consent.[4] This was tantamount to saying that franchises and charters obtained from state legislatures by

[1] Art. I, § 10, cl. 1.
[2] Veazie Bank *v.* Fenno, 8 Wallace 533 (1869).
[3] Art. I, § 10, cl. 1.
[4] Dartmouth College *v.* Woodward, 4 Wheaton 518 (1819).

private corporations were protected by the constitutional guarantee; and corporations long tried to maintain that any withdrawal or curtailment of privileges once granted them was an illegal impairment of contract. If this contention could have been sustained, the results would have been serious. But later the courts took the sensible view that charters and franchises are, after all, only a species of property and, like all other kinds of property, are subject to reasonable state regulation under the police power—from which it is to be deduced that while normally a charter granted to a private corporation may not be changed or cancelled by a state unless the corporation consents, it may nevertheless be modified, or even revoked, with compensation rendered, or even without compensation if required by a reasonable construction of the public interest. Furthermore, it is open to legislatures, when granting new charters, to insert in them clauses making them revocable, or at least limiting their duration; and this is now usually done. Having taken this precaution, a state can readily amend or abrogate a charter or franchise, subject only to the provision of the Fourteenth Amendment that no person (individual or corporation) may be deprived of life, liberty, or property without due process of law—which means, among other things, that while a corporation may be extinguished, the tangible property interests of the stockholders cannot simply be wiped out.

By judicial determination, the charters of *public,* or governmental, corporations, *e.g.,* cities and towns, investing them with subordinate legislative and other governmental powers are not contracts within the meaning of the "obligation" clause. So far as the national constitution is concerned, the state legislature can repeal them or amend them in any way at any time. Various forms of agreement between a state and its citizens are also construed not to be contracts. Thus a person who is appointed to a public office, even for a fixed term and at a stipulated salary, acquires no vested right; no contract is violated if the state subsequently abolishes the office outright. Furthermore, a license issued by a state, or by one of its political subdivisions, is not a contract, but only a grant of privilege which legally can be revoked at any time.

7. Privileges and immunities of citizens of the United States

As will be explained presently, the constitution makes it the duty of every state to extend the privileges and immunities of its own citizenship to citizens of other states coming within its jurisdiction.[1] To this, the Fourteenth Amendment adds the provision that a state may not make or enforce any law abridging the privileges and immunities of citizens of the United States. Originally designed primarily for the protection of the recently liberated Negroes, this clause has caused the courts a good deal of trouble. What are the privileges and immunities of citizens of the United States? Do they include all the civil rights recognized by the common law or by constitutional and statutory provisions as going along with state citizenship, *e.g.,* freedom of speech, freedom of religion, and

[1] See p. 68 below.

the like? If so, state guarantees would in effect be swallowed up in federal guarantees, rights would be almost completely nationalized, and the states would be reduced to a weakened position indeed. Starting with decisions in the famous Slaughter House cases of 1873, the Supreme Court has refused to concede that the authors of the clause meant thus to transform the character of the federal system, and has held that the "privileges and immunities" contemplated are only such as are conferred by the federal constitution, laws, and treaties—such as the right to engage in interstate and foreign commerce, the right of access to the federal courts, the right to protection when traveling or living abroad, and the like—and not the great mass of ordinary rights derived from or recognized in state law, even when reënforced by, for example, the first eight amendments to the federal constitution. Such comparatively few privileges and immunities, however, as attach to United States citizens *as such* may not be infringed by any state. But as construed by the courts, in a long line of decisions declaring various asserted privileges not to be privileges of United States citizenship, the clause imposes only a very limited check upon state action.

Obligations of the States in Their Relations with One Another

Every state is legally separate from every other state, and each has jurisdiction only within its own boundaries.[1] Massachusetts cannot project her laws into Connecticut; an Illinois state judge cannot hold court in Indiana. Every state, however, must constantly have dealings with other states, and the populations of all of the forty-eight are perpetually commingling in pursuit of the various trades and professions. It therefore becomes a practical necessity that the states accept in common certain obligations toward one another. Four specific obligations were, indeed, imposed by the national constitution as originally adopted. One of them—the duty to deliver up fugitive slaves escaping from one state into another—became obsolete when the Thirteenth Amendment abolished slavery in 1865. The other three continue in effect, and pertain to (1) recognition of legal processes and acts, (2) interstate citizenship, and (3) rendition of persons accused of crime.

1. Recognition of legal processes and acts

"Full faith and credit," says the constitution, "shall be given in each state to the public acts, records, and judicial proceedings of every other state." [2] This does not mean—so the Supreme Court has held—that one state is obliged to aid in enforcing the penal laws of another state.[3] But it does mean that records of deeds, wills, contracts, mortgages, charters,

[1] Slight exceptions are afforded by occasional state laws permitting law-enforcement officers, in "hot pursuit" of an alleged offender, to follow him across the border, arrest him, and turn him over to the local police.

[2] Art. IV, § 1.

[3] Wisconsin *v.* Pelican Insurance Company, 127 U. S 265 (1888). As will be pointed out presently, a state may surrender an accused person to the state from which he has fled; but it will not try him or enforce a penalty imposed upon him elsewhere.

legislative enactments, and other legal papers or instruments must, when duly authenticated according to forms prescribed by Congress, be recognized and accepted at their face value in every other state precisely as in the state from which they emanated. It means also that the authorities of Illinois (for example) must recognize and carry out the decisions of the courts of Michigan in civil cases, on presentation of certified copies of the relevant records, exactly as they would honor decisions of the courts of their own state. Thus a will made in Illinois but probated in Michigan is just as good in the latter state as in the former, no matter how widely the laws of the two states on the subject of wills may differ. Or, to take another illustration: A and B are residents of Detroit. A brings suit against B and gets a judgment in the amount of $500. Without paying, B moves to Chicago, taking his property before it can be attached. Under the "full faith and credit" clause, A can go into a court in Illinois, and with simply the judgment of the Michigan court as evidence, obtain a decree against B for the amount of the judgment. B may challenge the authenticity of the record; and he may demand a new trial on the ground that the Michigan court did not have jurisdiction. But on no other grounds can he secure a reopening of the case. An obligation—whether as debtor, partner, trustee, guardian, husband, or what not—cannot be evaded by the easy method of simply moving from one state into another.

On a broad range of subjects, the laws of the states, even in the same section of the country, differ widely. Some progress has been made in bringing about uniform legislation on such matters as commercial transactions;[1] but the obstacles are many, and as long as our federal system exists, the authorities of any one of the states will have to be prepared to coöperate in giving "full faith and credit" to actions taken under laws which differ sharply in content and spirit from their own. Impelled by considerations of comity, most states habitually give the benefit of the doubt to acts of other states even in situations where not judicially compelled to do so, and where the methods or principles involved are very different from those to which they themselves adhere. One of the most troublesome matters is marriage and divorce, on which the states have widely differing laws indeed; and there are a good many situations in which divorces granted in one state will, or may, not be recognized in other states. The Supreme Court has lately said that when a state fixes a period of "legal domicile" (*e.g.*, Nevada's six weeks) which it will accept as qualifying a couple for a divorce, the "full faith and credit" clause does not obligate other states to recognize the stipulated period as a proper one for the purpose, or to recognize a divorce granted in accordance with it;[2] and instances are constantly occurring in which a state refuses to recognize a divorce decree granted in a different state, usually

[1] See pp. 564-565 below.
[2] Williams *v.* North Carolina, 325 U. S. 226 (1945).

on the ground that proper legal domicile of one party or both was lacking.

2. Interstate citizenship

The framers of the national constitution rightly thought that no state should be allowed to discriminate, in favor of its own citizens, against persons coming into its jurisdiction from other states. To do so would be inherently unjust, and would seriously interfere with genuine national unity. Hence it is provided that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[1] This means that citizens of any state may move freely about the country and settle where they like, with the assurance that as newcomers they will not be subjected to discriminative taxation, that they will be permitted to carry on lawful occupations under the same conditions as older residents, and that they will not be prevented from acquiring and using property, or denied the equal protection of the laws, or refused access to the courts. It does not mean that privileges of a political nature, *e.g.*, those of voting and holding office, must be extended forthwith. Nor is a state prevented from imposing quarantine or other police regulations which will have the effect of denying free ingress or egress or the right to bring property in or to take it out. But such police restrictions must be justified by provable public necessity; furthermore, they must be so framed as to fall alike upon the citizens of the given state and those of all other states. It is hardly necessary to add that a citizen of New York, migrating to Pennsylvania, does not carry with him the rights which he enjoyed in New York. The point is rather that he becomes entitled to such rights as the citizens of Pennsylvania enjoy.[2]

3 Rendition.

A third obligation resting upon a state is the rendition of fugitives accused of crime. "A person charged in any state with treason, felony, or other crime," says the constitution, "who shall flee from justice, and be found in another state, shall, on 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."[3] The object is, of course, to prevent criminals from "beating the law" by taking refuge on soil over which the states from which they have fled have no jurisdiction and on which they can execute no processes. Rendition as practiced among the states is similar to, and was suggested by, extradition as carried on from very early times in the domain of international relations. There are,

[1] Art. IV, § 2, cl. 1.

[2] During the depression decade, interstate migration—with more than two million persons crossing state lines every year in quest of work—created exceedingly difficult social and economic problems, especially for states (most of all, California) receiving the heaviest influx; and in twenty-seven states restrictive legislation of one sort or another was enacted. In November, 1941, a California statute making it a misdemeanor to "bring or assist in bringing into the state any indigent person who is not a resident of the state, knowing him to be an indigent person," was declared unanimously by the federal Supreme Court (in Edwards *v.* California, 314 U. S. 160) to exceed the police powers of the state and to violate the commerce clause of the federal constitution, and hence to be unconstitutional. The effect, of course, was to upset the "Okie" laws of all twenty-seven states having them.

[3] Art. IV, § 2, cl. 2.

however, important differences. Nations are sovereign authorities and, as such, they practice extradition only within rather rigid limits. In the first place, they will rarely or never hand over a fugitive unless they have a reciprocal extradition agreement with the nation demanding him. In the second place, they will not surrender him unless the crime of which he is accused is one of those enumerated for extradition purposes in the agreement. Furthermore, nations usually refuse to extradite their own citizens or subjects; and by almost universal usage, political offenders, *e.g.*, persons accused of participating in a rebellion, are exempted. Finally, it has become an accepted rule that an extradited person cannot be tried for any offense other than that named in the warrant of extradition. Rendition as practiced by the states, on the other hand, is provided for by the national constitution, not by interstate agreements; the offenses for which an accused person is to be delivered up are broadly defined as treason, felony, and "other crimes"; states commonly give up their own citizens on proper demand; and there is no rule against trying a person so delivered up for an offense other than that with which he was charged when his delivery was requested.

Procedure

The constitution says that the demand for the surrender of a fugitive from justice shall be made by the executive authority of the state from which the person fled; and an act of Congress provides that it shall be addressed to the executive authority of the state in which the accused has been apprehended. If, therefore, A kills a man in Ohio and flees into West Virginia and is there placed under arrest, the governor of Ohio will send a requisition, accompanied by a certified copy of the indictment, to the governor of West Virginia asking the return of A so that he may be placed on trial in an Ohio court. If the requisition is honored, the fugitive will be turned over to the Ohio police officer (commonly a sheriff) who has been dispatched to bring him back.

Limitations

There is no certainty, however, that the demand will be complied with. To be sure, the constitution says plainly that the fugitive "shall ... be delivered up"; and the act of Congress says, with equal directness, that it "shall be the duty" of the executive authority to cause him to be handed over. But despite such lucid and mandatory language, many cases of refusal are on record. The governor upon whom the demand is made may decline to comply, on the ground that the person wanted is not a fugitive, or that the evidence against him is not sufficient to establish a presumption of guilt, or that he will not get a fair trial if returned, or that the alleged offense is not known to the law of the refuge state, or that there has been unreasonable delay in making the requisition. The actual reason may be something still different—perchance a mere whim, or even a personal grudge. But in any event there is no way by which a refusal can be overcome; no court will issue a writ of mandamus to compel compliance. In the final analysis, the constitutional mandate is effective only in so far as chief executives choose to make it

so. Yet this does not mean that it is a dead letter, or even that it is commonly ignored; on the contrary, it is obeyed in the great majority of cases, and when not obeyed, is usually evaded for reasons that have substantial merit.

Disputes Between States

Modes of settlement

The history of the Confederation was filled with controversies between states regarding boundaries, commercial regulations, and other matters, and the makers of the constitution were not so naive as to suppose that under the new frame of government the members of the Union would always live in perfect accord. Among sovereign nations, disputes have traditionally been settled by (a) direct agreements reached through negotiation, (b) arbitration undertaken by some neutral ruler or similar authority, (c) adjudication in an international court, or (d) in the last resort, by war. The states of the Union are not supposed to make war on one another—although they did so in 1861-65. They may, and do, reach agreements through negotiation. But the method of settlement chiefly contemplated by the constitution's authors was that of judicial determination; and in pursuance of this intent, the judicial power of the United States is extended to all "controversies between two or more states," with the further stipulation that in all cases in which a state is a party (regardless of the character of the opposing party) the Supreme Court shall have original jurisdiction.[1] The road to amicable adjustment of interstate differences by regular judicial process is thus always open, and many troublesome disputes relating to boundaries, water diversions, fishing rights, and other matters have been cleared up by resorting to it. Down to 1940, some eighty suits were brought by one state against another in the Supreme Court, with every state except Maine either plaintiff or defendant in at least one such suit.

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CHAPTER VI

CHANGING FEDERAL-STATE-LOCAL RELATIONS

The conditions under which the United States became a nation predestined it to federalism; and although there are those who disagree, the general opinion of the American people is that for us, if not indeed for any country of continental dimensions, a federal system is not only inevitable but desirable, as being perhaps the only alternative to an excessively centralized and perhaps autocratic system. The federalism that we have today is, however, far from being that with which we started; and, having observed the basic outlines of it as presented in the constitution, we turn to take a look at what has come about in actual practice—at the changed, and still changing, position and interrelations of units of government on the three great levels, federal, state, and local. State-local relations can appropriately be reserved for consideration at a later point.[1] But the relations of nation and states, and some particularly novel connections between the nation and local units, call for attention here.

A perennial problem

Woodrow Wilson once said that the relation between nation and states is the cardinal question of our constitutional system. Certainly, as we have seen, that issue, overshadowing all else in the Philadelphia convention, injected itself afresh almost as soon as the constitution went into operation; and there has never been a time in later days when our politics, legislation, judicial proceedings, and administrative actions did not, to a considerable extent, revolve around it. Moreover, never since the Civil War has it stirred greater interest or stronger feeling than in the years since the launching of President Roosevelt's New Deal.

Growing paramountcy of the national government

Seeking in 1788 to reassure people who were troubled about the outlook for the states in case the proposed constitution were adopted, Hamilton asserted that it would "always be far more easy for the state governments to encroach upon the national authorities than for the national government to encroach upon the state authorities";[2] and in a century and a half of varied experience there have been periods in which the states have more than held their own. Hamilton's prediction, however, has, on the whole, not been borne out. For while all of our governments, state and local as well as national, have continued to take on new functions and to develop new controls,[3] the national government has

[1] In Parts III-IV of the complete edition of this book.

[2] *The Federalist*, No. XVII (Lodge's ed., 98).

[3] Except only at the lowest levels, where the township, for example, has declined in importance and in some places practically disappeared.

gained in range and depth of power in a wholly disproportionate degree. Under the impact of inventions, of new economic and social conditions, of changing political concepts, and of war and depression crises, it has ceaselessly penetrated new areas and undertaken novel activities—by no man's clairvoyant planning, but in progressive response to demands that could not be—at all events were not—met by state and local action. Some of the very interests, *e.g.*, small-scale agriculture and the less well-to-do in general, which in earlier days opposed the formation of a stronger union are now numbered among the most ardent advocates of augmented national power, and the most insatiable beneficiaries of such power. It is going too far to say, as some do, that the historic question of federal-state relations has been settled. The issue has, however, been shifted to new ground; and some of the aspects that it now presents—not so much in the realm of the ancient legalism as in that of practical interaction and coöperation—merit comment.

Methods of Growth of National Power

1. Constitutional amendment

In what ways, chiefly, has the balance between national and state power been turned so decisively in favor of the former? One, of course, is amendment of the national constitution. To be sure, most of the twenty-one amendments thus far adopted have had to do with limitations upon, rather than extensions of, national powers. But the Fourteenth Amendment imposed many restrictions upon the states at points at which they had previously been free; the Fifteenth and Nineteenth took significant steps in the direction of nationalizing the suffrage; the Sixteenth made possible an effective system of taxing the incomes of the people of the states; and the Eighteenth—although eventually repealed—for a time empowered the national government to prohibit the manufacture, sale, and transportation of intoxicating liquors.

2. Development of implied powers

On the whole, however, formal constitutional amendment has played a relatively small part. Far more important has been the discovery and progressive expansion of implied powers, principally through legislation backed by the Supreme Court. Herein lies the national government's greatest resource, without which it could not possibly meet the people's demands upon it, and in the absence of which the constitution as adopted a century and a half ago would long since have gone the way of the Articles of Confederation. To be sure, the doctrine has sometimes, in the opinion of the courts, been stretched to the breaking point; and judicial decisions have more than once made it necessary to recede from ground to which the Supreme Court could not, for the moment at least, follow Congress. Nevertheless, the gains realized, from the days of Hamilton's bank to those of Roosevelt's Tennessee Valley Authority, have been immense; and the Court as at present constituted is conspicuously open to argument on nationalizing lines.

3. Expansion of interstate regulation

Especially fruitful in this connection has been the extension (on the basis of both express and implied powers) of *interstate* regulation to the point where it is separated from *intrastate* control by only the thinnest sort of wavering line. In this, the national government has been abetted by the whole development of transportation, communication, and corporate industry on a nation-wide basis, rendering it increasingly difficult, if not impossible, to regulate interstate aspects without at the same time controlling intrastate phases with which they are intermingled. In their efforts to retain control over the railroads, telegraph and telephone lines, and radio networks within their boundaries, the states have long been waging a losing fight; and even over manufacturing, mining, lumbering, and the like they lost a good deal of control when, a decade ago, the Supreme Court began to consider these as within the orbit of federal regulation in so far as their products flow through the channels of interstate commerce.[1]

4. Other means and methods

Other ways in which the federal government reaches down into the states with telling effect could be mentioned. In some cases, it is a matter simply of influence; in others, of positive control. A good illustration of the first type is afforded by the increasing reliance of states and their subdivisions upon the output of federal research. Utilized by the national government in its own ever-widening activities throughout the land, the results of large-scale investigative work carried on, for example, by bureaus in the Departments of Agriculture and Labor, the Bureau of Standards in the Department of Commerce, and the Office of Education under the Federal Security Agency, are turned to their own uses by the states and often become the basis for widely standardized state legislation and administrative policy. There are also various forms of voluntary federal-state coöperation, initiated by either party, based commonly on federal or state legislation (or both), and aimed at preventing conflicts of authority, duplication of personnel and facilities, and therefore inefficiency and waste. Devices involving the exercise of not merely influence but regulative power include (1) occasional sharing by the federal government in the enforcement of state laws, especially relating to fish and game, and (2) the not uncommon deputizing of state officials to assist in the execution of national laws.

Federal Financing of State and Local Activities

Two main forms

One of the most important means by which the national government has gained a hand in state (and of late also local) affairs, thereby further enhancing its own preëminence, takes the form of spending money for purposes of "federal assistance." During the depression of the thirties, the national government embarked upon heavy outlays in the states for provision of employment and other forms of relief—outlays made directly and without the intervention of state authorities. With better times

[1] See p. 377 below.

returning, and employment at length rising to top levels as a result of the defense effort launched in 1940 and later the war starting in 1941, it became possible to bring this form of assistance gradually to an end. The federal assistance with which we are here concerned is of a more permanent nature—the "grant-in-aid," as commonly termed, under which federal money, earmarked for particular and continuing activities, is turned over to state treasuries to be expended by state agencies, or is paid to such agencies directly, or even nowadays to local governments. Federal assistance in this form has become a regular feature of our governmental system.

Earlier grants of land and money

Grants by the national government to the states are no novelty in our time. Beginning with Ohio in 1802, Congress made a regular practice of bestowing on newly admitted states land within their boundaries equivalent to one section in every township, to be used for the development of permanent school funds—in fact, two sections after 1848, and even four in the cases of Utah, Arizona, and New Mexico. In the famous Morrill Act of 1862, it set aside still more land for the benefit of the states, stipulating that the proceeds should be used by each in endowing and maintaining one or more colleges devoted primarily, although not exclusively, to instruction in "such branches of learning as are related to agriculture and the mechanic arts"; and funds derived from this source help support our "land-grant" colleges today. Not only land, but also money (in periods of surplus revenues), was bestowed in earlier times; and not only for education, but also for roads and canals.

The newer type of conditional grant

In later decades, a new form of *conditional* grant gained large fiscal, administrative, and social importance. Referred to commonly as a "grant-in-aid," its cardinal principle is that Congress will appropriate money for the promotion of a specified service or activity carried on by the states, apportioning the sum for any given purpose among the whole number of states on some fixed basis, but permitting a state to share in the subvention only, as a rule, on four conditions—(1) that the state shall spend the federal money only for the exact purpose stipulated and under whatever conditions may have been laid down; (2) that the state itself, or its subdivisions, shall make concurrent appropriations for the purpose in hand (usually in amounts at least equal to its share of the national grant); (3) that the state shall create, or at all events maintain, a suitable administrative agency—highway commission, extension director, vocational education board, or whatever it may be—with which the federal government can deal in relation to the function to be performed; and (4) that, in return for the assistance received, the state shall recognize the federal government's right (with suitable regard for local conditions) to approve plans and policies, interpose regulations, fix minimum standards, and inspect results—for inevitably "control follows the dollar." Often, of course, it will be necessary for states to enact new legislation in order to qualify for sharing in such a grant; almost always,

administrative machinery will have to be reconstructed so as to open a way for supervision by national officers over activities that previously—if undertaken at all—were entirely in the state's own hands. Almost no direct compulsion is exercised. A state may, if it likes, decline to meet the conditions imposed, in which event it simply does not participate in the federal subsidy; and this voluntary aspect of the plan has been of great help to the courts in getting around the constitutional difficulties which some of the legislation, dealing with matters far out on the rim of federal authority, presents. Compliance by the states is, however, less voluntary than appears. For the federal funds represent the proceeds of taxes paid by the people of the entire country, and if any state refuses to go into a given arrangement, it thereby cuts itself off from the benefits which its taxpayers are helping to bestow on the states that go in. Naturally, it will be reluctant to do this. Here, as elsewhere, the power of the purse usually prevails; and the same considerations that initially induce a state to accept its share of a grant impel it to live up to the standards and specifications required rather than run the risk of having its subvention withheld. Practically all existing forms of grants-in-aid are shared in by all, or substantially all, of the states.

Prior to the depression of the thirties, federal grants-in-aid, although significant, were on a relatively modest scale. In 1920, they aggregated only $37,600,000; in 1930, approximately $135,000,000. By 1937, however, the states, as a group, were deriving more of their revenue (fourteen per cent) from this source than from any other except gasoline taxes (fifteen per cent) and general sales taxes (sixteen per cent); and in the fiscal year 1939—notwithstanding the great growth in the meantime of assistance of the "direct" type—grants of the kind were made for no fewer than twenty-one different state or local purposes, while the total outlay mounted to $582,519,000—an increase of more than three hundred per cent in ten years.[1] Only a few of the principal forms which such grants have assumed can be mentioned here.

1. Defense—the National Guard

In 1916, a National Defense Act,[2] carrying farther the invasion of state autonomy begun by a Militia Act of 1903, discarded the old term "militia," substituted the significant name "National Guard," and welded the various bodies of state troops into a unified, nationally organized force auxiliary to the national Army and closely tied in with it. Liberal federal aid is extended on condition of substantial federal control,[3] and federal standards of equipment, training, and discipline are rigorously enforced. As an organized militia, the National Guard still serves the states; but it has likewise become (as its complete mobilization by the

[1] The total for 1941 (the last year before the war disrupted activities like highway construction) was $851,005,000 (including $95,850,000 to local governments and $10,989,000 to the territories). The total for 1944 was $649,758,000. Current figures are given in the Census Bureau's annual publication entitled *State Finances*.

[2] 39 *U. S. Stat. at Large*, 197.

[3] Not in any fixed ratio; but in 1939 (a typical prewar year), state expenditure was $11,861,000 and federal $43,376,000.

national government in 1940 so forcefully illustrated) an integral part of the war machine of the nation.[1]

2. Highways

A Federal Aid Road Act of 1916[2] provided for appropriations rising by stages to $25,000,000 in 1921, to be expended by the Bureau of Roads (then in the Department of Agriculture),[3] in coöperation with the highway departments of the several states, in the construction of rural post-roads; and here for the first time (except in the Weeks Act of 1911 in aid of forest-fire prevention) appeared the device of requiring the states to match evenly the amounts allotted to them if they wanted to share in a subsidy. As was to be expected, the scheme proved popular in an automobile age. Every state accepted the provisions of the act; the national grant (distributed according to three equally weighted factors—area, population, and rural delivery route mileage) was increased repeatedly, reaching $161,730,958 in 1939; and under the federal impetus, road construction went forward on a scale never before witnessed in this or any other country. State highway legislation, conforming to federal requirements, grew voluminous; and state indebtedness incurred in carrying out the joint program rose in some instances to alarming proportions. During American participation in World War II, non-military road-building almost completely ceased. Resumption of such building on a large scale after the war was, however, envisaged in an act of 1944 authorizing the appropriation of $500,000,000 a year, on the customary "fifty-fifty" basis, for each of three postwar years for federal aid in the construction of interstate highways, secondary or "feeder" roads, and highways in metropolitan areas.

3. Social welfare

With a view to ameliorating conditions of existence for various classes of handicapped or otherwise unfortunate people, and putting even larger numbers in a better position to meet the vicissitudes of life, the Social Security Act of 1935[4] instituted a broad permanent program of social welfare. One major feature, *i.e.*, old age insurance, was made exclusively a federal enterprise, and another, *i.e.*, unemployment compensation, was planned to be financed entirely from payroll taxes on employers and employees, except that the national government was to bear the cost of administration. Practically all other features, however, were developed on a basis of federal grants-in-aid. For assistance to the needy aged, such aid (to a maximum of twenty-five dollars monthly per beneficiary) is granted on condition of equal sums being contributed by the states. Aid on a fifty-fifty basis is provided for the care of dependent children, and up to a limit of twenty dollars per person monthly for assistance to the blind. And while no federal program of general health insurance has as yet been adopted, the legislation of 1935 extends aid to the states for

[1] See pp. 487-488 below.

[2] 43 *U. S. Stat. at Large*, 653.

[3] The present authority is the U. S. Public Road Administration in the Federal Works Agency.

[4] 49 *U. S. Stat. at Large*, 620. See Chap. xxviii below.

strengthening and improving state and local public health services. One would be justified in assuming that henceforth social security and well-being in this country are to be a joint concern of the federal and state governments, with the former meeting much of the cost, largely determining how the money shall be spent, and therefore holding the whip-hand.

4. Employment offices

During World War I, state employment offices throughout the country began to be supplemented with federally maintained offices under supervision of a U. S. Employment Service. The federal system did not develop impressively, and although a Wagner-Peyser Act of 1933 reinvigorated it, the same measure instituted a plan of federal grants to the states in aid of their own offices. Taken over by the national government during World War II (1942), the state offices were restored to state management late in 1946; and federal aid to them was resumed.

5. Conservation of national resources

From 1911, the federal government incurred small direct expenditures in the states for forest-fire protection, and in 1924 it instituted contributions on a grant-in-aid basis, with activities extended to include the distribution of forest plant-stock among farmers. Grants on the same basis for the support of agricultural experiment work contributing primarily to the conservation of resources began as early as 1887, and for support of various forms of agricultural extension work in 1914.

6. Education

Although education has traditionally been looked upon as a state and local function, federal aid, as we have seen, started at a very early date in the form of grants of land for school purposes, including those later provided for in the Morrill Act of 1862 and aimed at promoting vocational education in the fields of agriculture and the mechanic arts. The federal grants-in-aid for the support of agricultural experiment stations and extension services referred to above have, of course, their educational, as well as their conservational, aspects; and further provision for vocational education, on a grant-in-aid basis, and in the fields of agriculture, trade, industry, and home economics, was made in the Smith-Hughes Act of 1917, with numerous later increases of the amounts expended. Financial difficulties of both urban and rural areas during the depression of the thirties seriously affected the public schools and prompted demand for a general system of grants-in-aid for the benefit of both elementary and secondary education, and especially to enable poorer states to pay teachers and provide equipment on a scale comparable with more favored ones. Sundry bills on the subject fell by the wayside; but organizations like the National Education Association and the American Council on Education are still pressing for action, and it is at this point that the grant system is in the future most likely to be significantly expanded.[1]

[1] Several additional forms of federal aid might be mentioned, *e.g.*, a federal outlay of $75,000,000 a year (under legislation of 1946) for assistance to the states and territories in providing lunches for school children—the states matching federal

Federal grants to local authorities

Grants-in-aid have developed another interesting feature: they are nowadays made not only to states but also to their subdivisions such as cities and counties. There was a time when the government at Washington was supposed to have, and speaking generally did have, virtually no direct relations with local governments—outside, at all events, of the District of Columbia and the territories; the relations of such governments reached upward only to the states in which they were located. More than anything else, the depression of the thirties brought about a different situation. Problems with which the states proved incapable of dealing effectively were taken over by the federal government, which often, simply by-passing the states, reached directly down to the local areas and dealt with them directly. Cities all over the country were given or loaned sums for waterworks, sewerage, street improvements, airports, and public buildings, and federal money was made available to municipal housing authorities. Insolvent cities were given means of reaching agreements with their creditors in federal bankruptcy courts. Moreover, while the return of better economic conditions brought activities like these largely to an end, both cities and counties are now found receiving and disbursing other sorts of funds coming to them directly out of the federal treasury and not channeled through state agencies. In states that have so authorized, counties are the recipients, under the Social Security Act, of the federal funds for old age assistance, aid to dependent children, aid to the blind, and public health work. Through the soil conservation service of the Department of Agriculture, the federal government financially assists local soil-conservation districts in their soil-conservation and erosion-prevention activities. County agricultural agents are usually appointed by the county board, but are paid partly by the federal government, to which they naturally have some responsibility. Numerous developments during World War II, also, had the effect of bringing the federal government and local units closer together—in some cases involving federal loans or grants (as for meeting the costs entailed by the rise of "boom towns" in connection with war industries), in others taking the form of the employment of local draft boards, ration boards, and the like, in carrying out wartime national laws. In so far as newer forms of federal-local relations are so conducted as to "short circuit" the states, the traditional federal-state equilibrium tends to be upset in the federal government's favor; although fairness requires it to be added that, in general, due regard for state constitutions and laws has been shown and local authorities have not been put in leading strings from Washington.

A phase of a general trend

The rise of the present towering structure of federal financial assistance to states and local areas is no isolated phenomenon. Practically every modern government has found it increasingly necessary to extend

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funds dollar for dollar during the first three years, but with the ratio differing from then on. Grants-in-aid continue also for the protection of forests against injury by fire.

central aid to subordinate governments; and our system of federal assistance is paralleled by similar systems of state aid to local units. Fundamentally, the explanation in our country is the decline of the general property tax in a period of swiftly increasing outlays, especially upon highways, education, and social services. Adequate new sources of local revenue not having been found, state governments, and ultimately the national government, have been compelled to come to the rescue. Starting with only a few small scattered grants a generation ago, the federal grant-in-aid system has grown into a huge device of joint financing, basic to the fiscal operations of nation and states alike, and, for better or worse, reversing much of the decentralization of former days.

Some earlier arguments.

1. In criticism

In earlier years, the grant-in-aid policy was opposed vigorously on such grounds as (1) that under it the national government practiced a species of bribery, *i.e.*, in effect bought the right of prescribing and supervising activities over which it otherwise would have no control; (2) that the system coerced the states (however gently) into overloading themselves with expenditures and obligations; (3) that it encouraged manipulation and vote-trading in Congress for special favors for particular causes or interests; (4) that it tended to create masses of voters dependent on federally aided enterprises, thereby assuring the party in power an unfair initial advantage in elections; (5) that, in addition to depriving the states of their proper powers, it engendered the habit of relying on doles, encouraged the demoralizing notion that the government at Washington owed every business and profession a living, and if adhered to meant "the gradual breakdown of local self-government in America"; (6) that "federal aid" was a misnomer, since all that the federal government did was to take money from the people of the states in the form of taxes, put it in the general fund, draw it out again, and give it back, in proportions not always easy to justify; (7) that the richer states—in which opposition to the policy largely centered—were made to bear most of the burden and progressive states were penalized for the benefit of more backward ones; and (8) that, if grants were to be made at all, they might better be "block," or lump-sum (rather than functional), grants, to be spent by the states entirely at their own discretion.

2. In defense

To all this there was, of course, a rebuttal, running somewhat as follows: (1) the system encouraged the states to undertake social services which many of them otherwise would ignore or feel that they could not afford; (2) it enabled minimum national standards to be set up in fields of social and economic regulation in which the people of the entire country had a vital interest; (3) it divided burdens which states were often unable to bear alone, quite justifiably requiring the richer states to help the poorer ones improve conditions in which all had a large common concern; (4) it made for economical expenditure of federal funds, and, by imposing reciprocal obligations, checked the scramble for public money which frequently took place when such money was bestowed without imposing

local responsibilities, as was the practice, for example, in making river and harbor appropriations; (5) the initiative and responsibility left to the states kept the scheme elastic and furnished all necessary safeguards against undesirable dictation from Washington; and (6) broadly, at least, no state was obliged to subject itself to the operation of the system unless it desired to do so.

Some major facts

In the last twenty years or so, the critics have been largely silenced by the expanding conception of the services that government ought to render and by the manifest need of the states for increased funds with which to undertake them. And today certain facts are clear. (1) The grant-in-aid system is here to stay. Not only so, but it will continue to grow in magnitude and importance. Even if it should not be extended into new fields of governmental activity, existing grants—especially for maternity and child welfare, public health, and other social services—will almost certainly mount to higher levels. New extensions, however—as for example in the domain of education—are practically inevitable. (2) The time-honored objections to the system still hold with some people; yet, speaking broadly, opposition has melted away. Specific proposals draw attack, but usually only because the critics would like to deflect attention to different ones. The Supreme Court is committed to the grant-in-aid principle; [1] and so far as one can see there is no limit to the lengths to which grants may in future be carried except only the resources of the United States Treasury. But (3) in the entire matter there is as yet lack of any coherent, over-all policy. Certain state activities, *e.g.*, maintaining a militia, have been made beneficiaries because of manifest national interests involved; others, *e.g.*, highways, partly at least in response to persuasive lobbying; still others, *e.g.*, various phases of social welfare, because of pressure exerted by socially-minded people envisaging a program obviously beyond the capacity or inclination of the states to carry out. The federally-aided social security system, however, does not yet embrace the general interests of public health; elementary and secondary education is not yet assisted. In short, the federal aid system lacks logic and symmetry. Twenty years ago, this did not greatly matter; subsidies were few and small. But the mammoth proportions lately assumed, with prospects for still farther growth, call for a thoroughgoing appraisal of the entire situation, to be followed by more or less formal adoption of a general, consistent, and rational line of policy under which existing and proposed grants would be tested by accepted norms and cut off, reduced, increased, or refused according to principle rather than simply as dictated by whim or by pressure group. Similarly, the federal government's rôle of inspection and supervision should be discharged more consistently and efficiently than at present; and for bringing this about, more adequate financial provision should in certain cases be made.

[1] Massachusetts *v.* Mellon and Frothingham *v.* Mellon, 262 U. S., 447 (1923), in effect sustaining the Sheppard-Towner Act of 1921 and by inference the grant-in-aid system generally; also cases cited on p. 459, note 1 below, upholding the Social Security Act of 1935.

The General Problem of Centralization

A time-honored issue in the United States is certainly that of "centralization"; loose constructionists and strict constructionists were arguing over it before the constitution had been in operation a twelvemonth. An old question assuredly, but also ever new; and no one needs to be told that fierce fires of controversy have raged around it in the last three decades of rapidly growing federal power, and particularly in the era of emergency and reform measures associated with the New Deal.

Criticism of the present trend

On the one hand, it is contended (1) that the only feasible plan for a land of continental proportions and a people of vast numbers and divergencies is one—such as the makers of our constitution had in mind—which allows a large measure of local and regional autonomy and restricts centralized, uniform, national control over social and economic matters to a minimum; (2) that even if Congress has the constitutional right to extend its regulating activities in certain of the present and proposed directions, it is not wise, or even safe, for it to insist upon going farther than it has already gone, especially in the broad domain of the police power, once supposed to be occupied mainly or entirely by the states; (3) that the national government has already (especially as a result of depression-time measures and of the later war) become overgrown, top-heavy, unwieldy, with the people in danger of finding themselves hopelessly weighed down with a vast, professionalized federal bureaucracy, not too careful about the ways of democracy; (4) that in many large fields the state governments are still the more natural and effective agencies of control, because closer to the problems involved and especially to the people concerned; (5) that, in pursuance of this consideration, it is desirable that the states be left wide latitude for service as "experiment stations"; and (6) that in seeking to enforce uniform standards through an ever-widening network of federal law, backed up by steadily expanding federal administrative machinery, the national government is strangling the states and reducing them to mere local areas charged only with "the neat and humble care of detail in obedience to a nationally determined policy."

Counter-arguments

In opposition to all this, it is maintained (1) that time, inventions, and other forces have so thoroughly nationalized the United States that most fundamental social and economic interests are no longer local, but instead cut across state and sectional boundaries, and are of common concern to the entire country; (2) that along with this great change of conditions has gone a corresponding change of political thought, so that people no longer expect or desire the state or regional autonomy that prevailed in earlier and simpler days, but, on the contrary, are prepared to see the *competitive* federalism of the past give way increasingly to the *coöperative* federalism of the future; (3) that the states have not been so efficient as to have demonstrated their right to be let alone in

matters of wide national concern; and (4) that so long as social and economic conditions arise which, if they are to be regulated effectively at all, must be regulated by the national government, it is of no use to say that the national government is unfitted to take on more responsibilities, the proper course being, rather, to improve that government so as to remedy the deficiency, if it exists.

Some broad conclusions

Here again, out of a wealth of *ex parte*, and often emotional, argument arise certain conclusions. The first is that the subject is not one upon which to dogmatize. The proper attitude is not a generalized condemnation or a generalized approval, but willingness to consider each proposed extension of national activity on its own merits. A second point is that centralization and decentralization are not mutually exclusive principles, only one of which can be adhered to at a given time. Large business establishments have found that efficiency requires uniformity and concentration in certain of their operations and quite the reverse in others. So it is with governments. A high degree of centralization in one field is entirely compatible with no centralization at all in other fields. In the third place, the growth of national control—quite apart from the special circumstances that have stimulated it so powerfully in this country during the past twelve or fifteen years—is inevitable, however one may feel about it. It is the universal experience, once national unity has been attained; and the device of federalism can no more stop it in the United States than in pre-Nazi Germany, Switzerland, or other countries that started with highly decentralized systems. Let social and economic interests develop to a point where they are no longer bounded by state lines, but are of regional or national concern, and any attempt to keep up a monopoly of state regulation not only is hopeless, but, if persisted in, will certainly precipitate damaging conflicts between state power and national power. "The outcome of such a conflict can never be long in doubt. The greater will prevail over the lesser."[1]

The Outlook for the States

Some serious charges

What, then, of the states? Are they to be completely overborne by the advancing supremacy of the national government? Have they become so enamored of federal aid as to have lost their constitutional vigor and self-respect? Notwithstanding much vitality displayed during World War II, there are those who think so; indeed, there are those who look hopefully to the day when the "waste and confusion" of forty-eight separate state governments will be no more. Charges are brought that, as constituted geographically, the states, speaking generally, do not correspond to economic or social unities; that provincial viewpoints of their populations and restrictive clauses in their constitutions too often prevent them from coöperating for the public well-being, either with one another or with the national government—in a period, too, when public

[1] W. MacDonald, *A New Constitution for a New America*, 169.

problems are increasingly taking on a nation-wide aspect; that often they do not deal wisely with even their purely internal affairs. And remedial proposals include such drastic suggestions as (1) redrawing the map of the country so as to bring state boundaries into better accord with the present distribution of population, and with other social and economic conditions; (2) displacing the states, largely or wholly, with a smaller number of political divisions (perhaps nine or ten) laid out to correspond to socio-economic *regions;* and (3) giving the national government undivided power to legislate on health, safety, morals, and the general welfare, thereby largely depriving the states of their principal reason for existence and in effect scuttling the federal system.

Proposed remedies

The states not yet "finished"

There is truth in all of the charges mentioned above; something, too, can perhaps be said for all of the proposals indicated. On the whole, nevertheless, it is safe to assume that, however much farther their position may be undermined in certain directions by constitutional amendment and interpretation, and by legislation and practice in such matters as federal aid, the states will persist, not merely as geographical and political entities, but as custodians of the greater part of their present powers and functions, together with new ones springing from ever-continuing development of technology, economic relationships, and social policies. Hardly anything short of sheer dictatorship could enable the map of this country to be remade as that of Germany was remade by ruthless Nazi officials after 1933. Not only so, but even after their harrowing experiences of the depression decade, the states have grounds for facing the future with assurance. Their fundamental position in the constitutional system is secure as long as they do not themselves choose to relinquish it; the United States, reaffirmed the Supreme Court in 1936 [1] (employing the historic language of Chief Justice Chase), is still "an indestructible union of indestructible states." As observed above, the states nowadays carry on more activities, spend more money, have more employees, and do more for their people than at any time in the past.[2] Even if they could be abolished, something—as all regionalists concede—would have to be put in their places. As semi-autonomous political units regulating the activities and relations of their citizens by laws of their own devising, they unquestionably have lost some ground; in larger matters of social and economic control, they probably will continue to lose. As areas of administration, however, they have gained; and even though, as seems likely, they in future may function more and more, in their administrative work, as collaborators with, and even as agents of, the national government, they need not on that account suffer loss of genuine vitality—even if there were not always going to be plenty of things for them to decide upon and undertake independently.

[1] In United States *v.* Butler (297 U. S. 1), invalidating the first Agricultural Adjustment Act.

[2] A reading of Chap. XXXVI below will surely leave the impression that the states are still busy and important.

Some ways of strengthening their position:

There are ways, too, in which they can definitely improve their present position. One of these is to keep up the intelligent and fearless overhauling of governmental machinery and procedures which has been going on encouragingly in later years. Notwithstanding a good record achieved during the late war, prestige and power have been lost, over the decades, to no small extent because of failure of the states to deal effectively with difficult problems thrust upon them by the exigencies of the times. To be sure, a good deal of what has happened has flowed from circumstances beyond the states' control. By setting their houses in order, however,—regenerating their legislatures, toning up their civil services, improving their administrative methods, modernizing their county and other rural local governments, and utilizing the newer techniques of long-term planning—they may still, to a considerable degree, stem the tide that has been running against them. The best way to preserve state power is to increase state competence.

1. Overhauling their own governments

2 Developing cooperation

A second promising line of defense is coöperative remedial policy and action calculated to lessen the need for federal regulative interference. One particularly challenging aspect of this matter in recent years has been the removal of various barriers to interstate business and trade, erected largely during the depression, and inimical not only to the free life of a united nation but to the long-term interests of the states themselves; and it is gratifying to be able to record that much progress toward eliminating such restrictions has been made. By enacting uniform legislation on business practices and other appropriate subjects, states may not only raise the general level but counteract arguments for national, or perchance regional, regulation. By reciprocally extending rights and privileges to one another's citizens, as, for example, in the practice of the professions, they may obviate jealousies and promote the general well-being; in the domain of taxation, in particular, they may serve the ends of justice by mutually refraining from imposing double or triple burdens. Information may be exchanged, common problems discussed in conferences, joint investigations carried on, voluntary interstate organizations maintained for a wide variety of purposes.

Many new instrumentalities have come into existence to facilitate coöperation on such lines. A Council of State Governments, dating from 1933, links the governments of all of the states in a voluntary league for the promotion of coöperative action; the 7,455 members of state legislatures have been brought together in a professional American Legislators' Association; different types of state and local executive and administrative officials—governors; auditors, comptrollers, and treasurers; chiefs of police; city managers; housing officials; etc.—have formed similar nation-wide organizations;[1] interstate commissions on

[1] All of these, and other, organizations have headquarters in a building located at 1313 East 60th St., Chicago, with, in some cases, branch offices in Washington, D. C., and other cities.

social security, crime, and conflicting taxation have been set up; and a strong consciousness of common interests and reciprocal obligations has been developed among state legislative and administrative groups the country over. All told—through this series of activities and in other ways—the chances for friendly and intelligent solution of problems transcending state lines have been considerably improved; and in so far as matters that otherwise the national government would be tempted or compelled to take over are cared for through such channels of interstate comity and coöperation, the outlook for the states themselves will have been brightened.

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CHAPTER VII

CITIZENSHIP AND CIVIL RIGHTS

Citizens and Aliens

Aliens: numbers and registration

Speaking broadly, every inhabitant of the United States is either a citizen or an alien—if an alien, presumably a citizen of some foreign state living temporarily or permanently in our midst. In times past, no one knew how many aliens there were in the country or where they were located except as disclosed every ten years by the census. Growing tenseness of the international situation in the later thirties, however, combined with the increasingly difficult task of curbing subversive activities and influences, and climaxed by the outbreak of a major war in Europe in 1939, led in 1940 to a decision to require every alien over fourteen years of age to register and be fingerprinted within a stipulated period, and thenceforth to keep the federal authorities constantly informed of his address and occupation.[1] The resulting registration revealed a total of 4,741,971 aliens fourteen years of age or over in a total population (by the census of April 1 of the same year) of 131,409,881, or about three and one-half per cent. One effect of the European, and later global, war was to make American citizenship uncommonly attractive, and as a result of more numerous naturalizations, combined with an almost complete cessation of immigration during the war years, the number of aliens dropped to 3,400,000 by the middle of 1944—the smallest known figure in thirty-five years.

Status in peacetime

In many respects, it does not greatly matter—under ordinary peacetime conditions—whether a person is an alien or a citizen. He must obey the laws and pay his taxes in any case; even though an alien, he is entitled to "the equal protection of the laws," and may sue and be sued in the courts, enter into contracts, and send his children to the public schools; and unless he happens to belong to a racial group that has been made ineligible, he may be naturalized, thereby acquiring full citizenship status. There are, however, limitations. An alien cannot vote or hold public office;[2] seldom can he act as a juror; his right to own property is almost as broad as a citizen's, but not quite, because California, Illinois,

[1] The same Alien Registration Act (54 *U. S. Stat. at Large,* 670) requires all newly arriving aliens to register also.

[2] In as many as twenty-two states and territories, aliens who had declared their intention to be naturalized have, at one time or another, been allowed to vote. Constitutional amendments gradually withdrew this privilege, however, and a state supreme court decision of 1926 terminated it in the last state (Arkansas) in which it survived.

and a few other states impose varying restrictions; and while, in general, he can engage in any gainful occupation or profession that does not require a license, increasing numbers of businesses and professions have been put under license requirements, and in virtually every state there are laws debarring aliens from receiving certain kinds of licenses. The alien, further, may be excluded from employment on public works and in munitions plants, and increasingly he is prevented—rather unjustly—from sharing in various benefits, such as workmen's compensation and old-age pensions; and of course if he goes abroad, he cannot claim protection from our government as can a citizen.

Inadequate protection against mob violence

Indeed, even here at home, an alien may fail to receive protection of person and property to which, legally, he is as much entitled as is a citizen. At various times, "foreigners" have been the victims of mob violence; and as matters stand, with the states primarily responsible for maintaining law and order, such injured persons, or their relatives, have recourse only to state authorities (including grand juries and courts) which may easily be influenced by local sentiment to deny justice due. At least four presidents have asked Congress to give the federal courts jurisdiction in such cases, but to no avail, and meanwhile the national government continues in the uncomfortable and undignified position of being responsible under international law for protecting aliens, but unable under our system of constitutional law either to punish the perpetrators of outrages or to compel a state to assume the burden of damages. What usually happens is that after the federal government, pressed by the envoy of the foreign nation concerned, tries but fails to induce state authorities to act, Congress, on request of the president, votes a sum of money to be awarded *ex gratia*, and the affair ends.

Deportations

As our immigration laws grew stricter, the grounds on which aliens, once admitted to the country, might be deported to the country of their origin multiplied, and whereas formerly deportees were usually mental or physical defectives, criminals or immoral persons, persons who had become public charges, or persons who had entered the country illegally, they now include a wide variety of people identified with organizations or movements (Communist, Fascist, Nazi, and the like) whose objectives are regarded as inimical to the political system, laws, and institutions of the United States. Formerly, there was doubt about whether an alien was deportable simply because of having, at some earlier time, belonged to a Communist party or other organization under suspicion. By terms of the Alien Registration Act of 1940, however, he is clearly made so.[1] Between

[1] The most famous deportation case of recent years involved a West Coast labor leader of Australian antecedents, Harry Bridges, against whom deportation proceedings, based on his alleged connections with the Communist party in this country were begun as early as 1938. In 1945, the Supreme Court reversed an order for his deportation, on the ground that his associations with Communist groups "seemed to indicate no more than coöperative measures to obtain objectives which were wholly legitimate." For a brief review of the case, see *Amer. Polit. Sci. Rev.*, XL, 239-241 (Apr., 1946).

the two wars, deportations varied from 15,000 to 20,000 a year, and the number would have increased after 1939 save for the general cessation of ship sailings for countries other than Great Britain.

Alien status during war

When war comes, aliens immediately fall into two basic categories—those of neutral or friendly nationality and those of enemy nationality, or in other words "alien enemies." The war in which we became involved in 1941 had no very important effects upon the legal position of aliens in the former category. If they wished to leave the country, they had to secure a permit prior to departure; those having assets of over one thousand dollars were required to report them. But, in general, there was no sharp differentiation from citizens; even military service was exacted, as from the latter. The case of alien enemies was, of course, quite different. All over fourteen years of age were subjected to a special registration (revealing approximately a million of them—mostly Germans, Italians, and Japanese);[1] all had constantly to carry certificates of identification, and were forbidden to enter "restricted" or "prohibited" areas, as around army camps; none could change employment without giving notice; none could keep in his possession firearms, cameras, short-wave radios, or other designated articles; any falling under suspicion were subject to arrest and possible internment; and all of Japanese nationality were evacuated from military zones on the West Coast to "relocation centers" further inland—and this with the Supreme Court's later approval, even though citizens of Japanese extraction were evacuated along with aliens indiscriminately.[2]

Citizenship and How It Is Acquired

Citizenship as defined in the constitution—its dual aspect

Curiously, there long was a great deal of doubt as to precisely who were entitled to be regarded as citizens, and of what jurisdictions. In its original form, the constitution used the term no fewer than seven times, but without ever once defining it.[3] In some clauses, it spoke of citizens of states, and in others of citizens of the United States, and nowhere were the relations between the two made clear. Even yet, there is often popular confusion on the point. In the Fourteenth Amendment, however, we read that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside"; and while this leaves the way open for a state citizenship as something distinct from national citizenship, it at least indicates who are to be regarded as possessing either or both.

[1] As of October 19, 1942, some 600,000 Italians, because of their generally recognized loyalty to the United States, were removed *en masse* from the classification.

[2] Korematsu *v.* United States, 323 U. S. 214 (1944). Korematsu was a United States citizen, and the question of constitutional power pertained, of course, rather to the removal of citizens than to that of aliens.

[3] The Supreme Court's definition is as follows: "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other." Luria *v.* United States, 231 U. S. 9 (1913).

In general, the two go together: any citizen of the United States living within the boundaries of a state is a citizen of that state. Legally, there is nothing to prevent a state from conferring its own citizenship (not, of course, *national* citizenship) on persons who are not citizens of the United States; and in times past this has been done. Furthermore, citizens of the United States residing permanently in the District of Columbia or in a territory are not citizens of any state. For practical purposes, however, the two citizenships have been almost completely merged; and in any event, it is only national citizenship that has much significance under the national constitution and laws, and also in international relations.[1]

How citizenship may be acquired

Citizenship is acquired in various ways in different countries; but the most important are birth and naturalization. Citizenship by birth arises from the operation of one or the other of two quite different principles. Under the first—known as *jus sanguinis*—a child takes the nationality of its parents, regardless of the place of its birth; under the second—called *jus soli*—nationality is determined by the place of birth, irrespective of the citizenship of the parents. The historical and fundamental rule of the United States, in common with other English-speaking, and also the Latin American, countries, is *jus soli;* and the rule is construed to be applicable even to children born on American soil to alien parents who are themselves ineligible to citizenship.[2] The phrase of the Fourteenth Amendment requiring that a person be not only born or naturalized in the United States, but "subject to the jurisdiction thereof," gives rise, however, to some rather important exceptions. Thus, children born to foreign diplomatic representatives stationed at Washington are not citizens, because even though born on American soil, they are considered to be subject to the jurisdiction of the state which the ambassador or minister represents, and not to the jurisdiction of the United States. On the other hand, persons born abroad *before* May 24, 1934, are citizens if the father had American citizenship and resided in the United States or its outlying possessions at some time before the child's birth; and persons born abroad *after* the date mentioned are such if either of the parents was an American citizen who before the child's birth resided ten years or more in the United States or its possessions, at least five years

1. By birth

[1] One encounters also the term "nationals," which is not to be confused with "citizens." In a general way, it denotes all persons who, for purposes of international intercourse, are identified with a given nation. It is therefore broader than "citizen"; for example, the people of the Philippine Islands, prior to independence, were nationals of the United States, but never citizens thereof.

[2] United States *v.* Wong Kim Ark, 169 U. S. 649 (1898). In Perkins *et al. v.* Elg and Elg *v.* Perkins *et al.,* 307 U. S. 325 (1939), the Supreme Court held (contrary to what previously would have been supposed) that a woman born in the United States did not lose her American citizenship merely because when she was four years old her parents returned to their native Sweden and renewed their allegiance there. For purposes of citizenship, the "soil" of the United States includes the continental area, Alaska, the Hawaiian Islands, Puerto Rico, the Virgin Islands, all American embassies and legations, American war vessels, and (since 1940) American merchant ships.

of which were after attaining the age of sixteen—although in this latter case the child must reside in the United States not less than five years between the ages of thirteen and twenty-one. In any case, an oath of allegiance must be taken at the age of twenty-one.

2. By naturalization:

The second main way in which citizenship is gained is by naturalization, which means the conversion of aliens into citizens by some kind of official act. Naturalization may be either collective or individual. The most usual form of collective naturalization is the extension of citizenship to the inhabitants *en bloc* of regions acquired by purchase or conquest. Down to 1898, the United States regularly conferred citizenship upon the whole body of inhabitants of the territories which it annexed;[1] and as recently as 1927 (ten years after annexation) citizenship was similarly bestowed collectively upon all inhabitants of the Virgin Islands who did not elect to retain their Danish citizenship. On the other hand, the treaty of peace with Spain in 1898 by which the United States acquired Puerto Rico, Guam, and the Philippines expressly provided that the cession of these islands should not of itself operate to naturalize their native inhabitants, whose civil status and political rights were left to be determined by Congress. In later statutes, Congress declared the Puerto Ricans and Filipinos citizens of their respective islands, and conferred upon the former most, and upon the latter some, of the privileges and immunities of citizens of the United States. Furthermore, the Supreme Court held that Puerto Ricans were not aliens in the sense in which the term is used in the immigration laws.[2] So that, although full American citizenship was withheld, both Puerto Ricans and Filipinos became, in international law, "nationals," no less entitled to the protection of the United States than are full-fledged citizens; and in constitutional law the distinction—at least in the case of the Puerto Ricans—was in nearly every respect one without a difference. Finally, in 1917, the Puerto Ricans were made "citizens of the United States"—the Filipinos remaining nationals only, until even that status was terminated in 1946 by independence.

(a) Of inhabitants of annexed territories

(b) Of individual aliens

Naturalization is, however, usually individual, rather than collective; and in this form, too, it is, under our system of government, solely a national function. The first act of Congress relating to the naturalization of individual aliens—dating from 1790—assigned the work to the courts; and under supervision of an Immigration and Naturalization Service in the Department of Justice it is now carried on by courts of designated grades, *i.e.*, all federal district courts, the supreme court of the District of Columbia, and all state and territorial courts of record which have a clerk and a seal and have jurisdiction in actions at law or equity in which the amount in controversy is unlimited. The original law was

[1] Except non-white inhabitants of Alaska and persons not Hawaiian citizens in Hawaii.

[2] Gonzales *v.* Williams, 102 U. S. 1 (1904).

brief and general, and for a hundred years much was left to chance, or at all events to the discretion of the naturalization authorities. As a result, grave abuses arose. Following an extensive investigation by a commission appointed by President Theodore Roosevelt, Congress in 1906, however, enacted a far more adequate statute, under which—as revised and extended most recently by the comprehensive Nationality Act of 1940 [1]—the work is now carried on in a considerably improved fashion.

Present mode of naturalization

The stipulated procedure is more complicated than in most other countries, and involves three main steps. The first—commonly referred to as "taking out first papers"—is a declaration of intention to become a citizen, which must be filed with the clerk of a duly authorized federal or state court at least two years before the applicant is given his final examination.[2] The second is the filing of a petition (not less than two years nor more than ten years after the declaration), affirming that the applicant has been a resident of the United States for at least five years continuously and of the state or territory in which he applies for at least six months, that he is not not an anarchist or a disbeliever in government, and that he expects to remain permanently in this country and is loyal to it and its institutions. Full information must be given about both the candidate and his family (if he is married); and the application must be supported by affidavits of two citizens testifying to the applicant's period of residence and his moral character. The third step, taken not less than thirty days after the petition is filed, is a public hearing and examination by the judge, after which, if all goes well, that official authorizes the clerk of the court to issue letters of citizenship, or "final papers." During the interval, the petitioner's claims (when being presented to a *federal* court) are investigated by a federal naturalization examiner, who may merely present his findings in writing but may also appear at and take part in the hearing; and in nearly every case, the commissioner's findings determine the action taken by the court.[3]

[1] 54 *U. S. Stat. at Large*, 1137.

[2] The applicant must be at least eighteen years of age.

[3] In some jurisdictions, the candidate is heard by the examiner only and does not appear before a judge until he is ready to take the oath of allegiance.

Applicants are required to take an oath to "support and defend the constitution and laws of the United States," and are asked (though it is not made a matter of oath) whether they are willing, in event of necessity, to "take up arms in defense of this country." Much discussion of the status of "pacifists" in relation to this requirement was stirred by the case of Rosika Schwimmer in 1929 and those of Douglas C. MacIntosh and Marie Bland in 1931, in all of which the Supreme Court, on appeal, denied the right to be naturalized. United States *v.* Schwimmer, 279 U. S. 644; United States *v.* MacIntosh, 283 U. S. 605; United States *v.* Bland, 283 U. S. 636. But in 1946 a divided Court (five to three) reversed its earlier position by holding, in Girouard *v.* United States (66 Sup. Ct. 826), that an alien cannot be denied citizenship on the ground that, if naturalized, he would be unwilling to bear arms in the country's defense.

After 1939, war in Europe and the later realized threat of global war powerfully stimulated the interest of aliens resident in the country in gaining the advantages of American citizenship. The number of naturalizations rose to 275,000 in 1941, 318,000 in 1943, and 435,000 in 1944.

Still room for improvement

Although tightened up considerably of late in respect both to qualifications for naturalization (as freshly defined in the Nationality Act of 1940) and methods of actual administration, the system still leaves a good deal to be desired. The examination by the judge, or even the examiner, may be as thorough, or as perfunctory, as he cares to make it. The applicant must swear that he "speaks English"; but ability to utter "yes" and "no" sometimes suffices, and indeed one judge is reported to have been satisfied with a candidate who merely "nodded his head in English!" The law presumes intelligence, but provides no standards by which that somewhat flexible qualification is to be judged. It presupposes some knowledge of the form of government of the United States, but leaves the way open for the widest latitude in testing such knowledge. "Final papers" cannot be issued within sixty days preceding any federal or state election; nevertheless, over-zealous ward-leaders and other politicians contrive, by plenty of sharp practices, to get tractable aliens through the mill in time to round them up at the polls. For the courts, the work of naturalization is a sideline activity which they carry on as effectively as they do only because of being provided with the assistance (in the case of the federal courts, where most naturalizations take place) of the naturalization examiners. The entire naturalization process, being essentially a matter of fact-finding, and therefore by nature administrative rather than judicial, it has been suggested that full power to admit to citizenship be transferred to such examiners, with merely a right of appeal to the courts on questions of law.[1]

Aliens who are ineligible

Not all aliens, it must be observed, are eligible for naturalization, but only such as, in addition to meeting all other requirements, are white persons, persons of African nativity or descent, Chinese, Filipinos, or persons descended from races indigenous to the Western Hemisphere or to India. Chinese (both older residents and the few newcomers legally admissible as immigrants) have been eligible only since 1943; persons descended from races indigenous to India only since 1946; and other Asiatics (except Filipinos)—Japanese, Koreans, Burmans, etc.—are still excluded by judicial interpretation as not falling in any of the categories mentioned above.[2] As we have seen, however, children born of Asiatic parents resident in the United States and subject to its jurisdiction are citizens by birth.

Citizenship of married women

Formerly (from 1855 to 1922), an alien woman marrying a native-born or naturalized American citizen automatically became herself (if a person eligible for naturalization) an American citizen; and, conversely (from 1907 to 1922), an American woman marrying an alien

[1] The best discussion of naturalization in all of its aspects is L. Gettys, *The Law of Citizenship in the United States* (Chicago, 1934), Chaps. III-IV, VI.

[2] Among decisions, see Ozawa *v.* United States, 260 U. S. 178 (1922); Toyota *v.* United States, 268 U. S. 402 (1924). In the case of mixed races, it is held that in order to be eligible for naturalization, the applicant must be as much as one-half white, African, Chinese, Filipino, or Hindu.

forthwith lost her citizenship. In other words, a married woman's status was determined entirely by that of her husband. As a result of persistent agitation led by various women's organizations, this is no longer true. Prompted by unhappy experiences of women under the operation of the rule during the World War of 1914-18, and by growing recognition of women's claim to their own individuality as members of the body politic, Congress, in 1922, 1930, and 1931, conferred upon them progressively expanded rights of independent citizenship, and, finally, in 1934, made nationality rights as between the sexes equal and uniform in all essential respects.

How citizenship may be terminated

Citizenship, once possessed, becomes a constitutional right and cannot be abrogated except by procedures that are themselves constitutional, *e.g.*, in accordance with due process of law. Whether acquired by birth or by naturalization, it, however, may be voluntarily relinquished, or simply lost, or, if obtained by naturalization, may be cancelled as a punishment or penalty. Although doubt long hung about the matter, Congress in 1868 expressly recognized the right of a citizen to "expatriate" himself, except at a time when the country is engaged in war;[1] and in 1907 it provided explicitly how this may be done, *i.e.*, by being naturalized in, or by taking an oath of allegiance to, any foreign state. Citizenship is forfeited, too, if a naturalized American lives continuously for three years in a foreign state of which he was formerly a national or in which he was born (providing that through such residence he has acquired the nationality of the foreign state); also if he lives as long as five years in any other foreign state. Naturalized persons, also, may be "denaturalized" by court action, *i.e.*, have their certificates of citizenship canceled for disloyal utterances or acts, the presumption being that they did not take the oath of allegiance in good faith.[2]

Civil Rights—General Aspects

How civil rights arise

The basic fault of the "authoritarian," or "totalitarian," régimes which plunged the world into the recent war was that they made the state an end in itself, with no allowance for any rights or liberties of men and women as against all-powerful and arbitrary governments. Democracies have rather the concept of the state as a sort of social framework within which government operates with only such authority and powers as the sovereign people, by direct act or tacit consent, have conferred upon it, leaving, consequently, to the people rights and liberties which they can assert and maintain against any governmental agency. Here in America the people have reserved to themselves broad areas of

[1] The Nationality Act of 1940 discarded this exception.

[2] On denaturalizations after the entrance of the United States into World War II, see L. Preuss, "Denaturalization on the Ground of Disloyalty," *Amer. Polit. Sci. Rev.*, XXXVI, 701-710 (Aug., 1942).

Contrary to a general impression, conviction of crime, followed by imprisonment, does not abrogate citizenship. What the offender loses, along with his personal liberty, is merely his civil and political privileges, including the privilege of voting.

freedom which government is forbidden to invade—forbidden in some cases negatively through simple lack of any constitutional authorization, in other cases positively through express injunctions and prohibitions contained in constitutional "bills of rights," both national and state. On the one hand, any one of us owes the various governments resting upon us loyalty, obedience, and service; on the other, he has a valid claim upon them for recognition and protection of rights and liberties which are often thought of as having been granted to the people, but which, more truly, they have simply reserved for themselves.[1]

Complexity of the American system

The American system of rights, too, is exceedingly complex. There are rights which can be claimed by citizens only and others to which all inhabitants, aliens included, are alike entitled—although normally the differences are not great. There are rights which are applicable only to natural persons, as human beings, and others (relating particularly to property) which apply, as well, to "artificial persons" such as corporations. The main complicating circumstance, however, is, of course, our federal form of government; for from this it results (1) that there are rights guaranteed as against the national government only, others as against state governments only, and still others—many of them—as against both national and state governments; (2) that of rights which can be asserted as against state governments, some rest upon restrictions laid down in the national constitution, others upon restraints originating in the states themselves; and (3) that consequently there is latitude for variation from state to state, even though in practice such differences as exist are rarely of much significance.

No full enumeration possible

Still another fact is that if any one of us were to undertake to compile a complete and definitive list of the civil rights to which he individually is entitled, he would be doomed to failure. He could carry his catalogue to a considerable length, but in the end he would become lost in doubts and obscurities. Naturally, he would turn to the national constitution, and afterwards to the constitution of his state. But what would he find? In the former, he would discover—chiefly in the first eight amendments[2]—a long and impressive list, followed, however, by the baffling provision of the Ninth Amendment that "the enumeration . . . of certain

[1] *Rights and liberties,* be it observed, rather than *privileges.* Confusion often arises here. One has a right, as we shall see, to freedom of speech, religious liberty, and due process of law. He has no such right to vote, to hold public office, or to practice medicine. One may vote only if given the privilege, hold office only if appointed or elected thereto, practice medicine only if licensed to do so. One's *rights* in such matters are confined to seeking the privilege in the first place, and to exercising it, when once attained, without restraint except as duly prescribed by law.

Nor is the popularly termed "GI Bill of Rights" germane to the present discussion. It does not have to do with fundamental general constitutional guarantees, but only with benefits of various kinds pledged to ex-servicemen in an ordinary act of Congress—the Servicemen's Readjustment Act of 1944. President Roosevelt's famous "four freedoms" are likewise of only potential concern, because as yet they have no constitutional or statutory basis and are not recognized and enforced by the courts.

[2] Also in Art. I, § 9, cls. 2-3; Art. III, § 2, cl. 3, and § 3.

rights shall not be construed to deny or disparage others retained by the people." What others? No man can say conclusively. Similarly, he would find in all of the state constitutions articles and sections in form or in effect comprising bills of rights, besides scattered clauses pertinent to his inquiry. But in no instance would he come upon any indication that the rights mentioned form an exact and exhaustive list. Quite the contrary. Nor would he be helped out of his dilemma by consulting judicial decisions; for although the Supreme Court, in the Slaughter House cases in 1873,[1] went into the matter in some detail, it made no pretense to covering it exhaustively. On the contrary, the Court, speaking of guarantees contained in the federal constitution, said that interpretation of them must be "a gradual process of judicial inclusion and exclusion"; and the same is true of rights guaranteed by constitutions of the states. The truth is that there is nowhere, in the constitutions or outside of them, any enumeration that purports to be complete. The national government has limited and delegated powers. The state governments have powers both delegated and residual—but nevertheless limited. As against these governments, taken together, the people have whatever rights and liberties are expressly guaranteed to them, and, in addition, all that are not definitely denied or otherwise inconsistent with the instrument under which they are claimed.

Changes constantly going on

Even, however, if one had a complete picture of rights and liberties as they exist today, it would not hold true tomorrow; far from being fixed and static, the conditions and concepts determining the nature and scope of established rights (especially as construed by courts prone to differ among themselves, and not above reversing their own positions) are perennially undergoing change. As a single illustration may be cited the fact that whereas formerly the states were free, so far as the federal constitution was concerned, to go as far as they liked in restricting freedom of religion, speech, press, and assembly, the federal Supreme Court has now for more than twenty years held that the due process clause of the Fourteenth Amendment makes the guarantees of these liberties, as embodied in the First Amendment, no less applicable to the states than to the national government.[2]

Rights not absolute

Liberty is not license, and rights are relative, not absolute. After all, one of the main purposes of government is to prevent the safety and well-being of the many from being jeopardized by the few. Freedom of speech and press does not carry with it any right to incite persons to crime or panic; freedom of assembly does not entitle any gathering to interfere with public order and safety; freedom of religion implies no license to violate established law. To be validly claimed, moreover, a right must be so exercised as to cause no impairment of the same or any other right possessed by others.

[1] 16 Wallace 36.
[2] Gitlow *v.* New York, 268 U. S. 652 (1925).

The special problem of civil rights in wartime

Freedom can always be abused, and it is not difficult to see why, with the country at war and its life perhaps at stake, civil rights (especially those relating to speech, press, and assembly) are likely to come in for some curtailment. Sometimes, indeed, there is more repression than necessary, as, for example, during World War I, when, playing fast and loose with the terms of an Espionage Act of 1917 and a Sedition Act of 1918, the Department of Justice not only ferreted out and brought to punishment persons who by any reasonable standards were guilty of offenses against the national morale; but embarked upon, and for a time after the end of hostilities kept up, with even greater vigor, a veritable "witch-hunt" in the course of which gross wrongs were committed, especially as relating to aliens. The record during World War II was considerably better. The Espionage Act of 1917 was, to be sure, called back into operation; drastic restrictions embodied in the Alien Registration Act of 1940 were in full effect; and both nation and states enacted new protective regulations. Properly enough, there was tightening up, especially as against suspected "fifth columnists." On the other hand, both the President and the Department of Justice insisted that the excesses of World War I be not repeated; the Supreme Court, although often dividing on cases coming before it, commonly upheld the liberties claimed unless palpable abuse could be shown; and on the whole the record was good. Probably the fabric of rights was subjected to its severest strain when, in 1942, all Japanese residents of designated areas adjacent to the Pacific coast—loyal as well as disloyal, and citizen as well as alien—were uprooted from their homes and businesses and herded in interior relocation centers; although even this action, based on alleged military necessity, was, as we have seen, when tested before the Supreme Court, held to be constitutional, given the circumstances existing.

Numerous and varied as they are, civil rights fall rather naturally into (1) those relating to personal status and (2) those having to do with property. On a different basis of classification, they are also either (1) substantive, *i.e.*, pertaining to the fact and essence of freedom or (2) procedural, *i.e.*, relating to the methods by which freedom is protected. The brief survey that can be presented here will follow these broad categories.

Rights of Personal Liberty: I. Substantive

1. Immunity from slavery and involuntary servitude

So long as Negro slavery prevailed within our borders, no general immunity from personal servitude was, or could be, asserted. The Thirteenth Amendment, however, dating from 1865, prohibits throughout the United States and in all places under its jurisdiction not only slavery, but every form of "involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted." According to the Supreme Court, involuntary servitude does not arise when a person is held against his will to the completion of a period of service upon

which he has entered (*e.g.*, as a seaman), but on the other hand does arise if a laborer who is indebted to his employer is required, on penalty of going to jail, to work out the debt in the employer's service. Involuntary service in the Army, or compulsory work on the highways—falling within the legitimate exercise of the military or police power—does not constitute "servitude."

2. Freedom of religion

The First Amendment forbids Congress to make any law "respecting the establishment of religion or prohibiting the free exercise thereof"; and the same restriction is imposed upon the states, not only by similar provisions in the constitutions of all of them, but by judicial construction in later years making the Fourteenth Amendment's due process clause applicable to state actions in this field. The Supreme Court has held that these guarantees of religious liberty do not confer any right to violate a criminal statute in the name of religion; for example, they do not entitle a Mormon to practice polygamy. But so long as there is no violation of law, breach of the peace, or offense to public morals, freedom of belief and worship must be unrestricted.[1]

3. Freedom of speech and press

Cultural achievement and democratic government alike presuppose reasonable freedom of the people to express opinions orally, to write, and to print; and in the first amendment to the federal constitution, as well as in nearly all of the state constitutions, will be found clauses intended to protect political discussion and criticism, along with the interchange of ideas and opinions generally, against censorship and repression such as that which used to stifle all dissenting thought and expression under the Nazi and Fascist dictatorships in Europe. No guarantee of a right better illustrates, however, the presumption of propriety and rationality upon which all civil rights are predicated. It was manifestly not intended that freedom of speech and press should extend to the utterance or publication of libels and indecencies, the incitement of insurrection, the encouragement of disobedience to law, the defamation of the government, or giving aid and comfort to foreign states in making war upon the United States; and the federal constitution had been in operation less than a decade before Congress passed a Sedition Act (1798) laying heavy penalties upon encouraging insurrection or other disorder, publishing "false and malicious writings" against the government, or inciting any foreign power to make war upon the country. This particular measure

[1] Questions of religious liberty have in recent years been brought into much prominence by the beliefs and practices of an aggressive sect known as Jehovah's Witnesses. In 1940, the Supreme Court held that school boards might exclude from the public schools pupils refusing to salute the American flag, regardless of religious scruples on the part of the children or their parents (Minersville School District *v.* Gobitis, 310 U. S. 586); but in 1943 it reversed the decision (West Virginia State Board of Education *v.* Barnette, 319 U. S. 624). In 1942, the Court held that since the sect's canvassers were in effect selling their literature from door to door, their activities were primarily commercial rather than religious and therefore might be subjected to municipal license entailing the payment of fees (Jones *v.* Opelika, 316 U. S. 584); but the next year a Court somewhat differently constituted reversed this decision also. In general, the Court now allows the sect free scope as long as disturbances are not created or reasonable police regulations violated.

flowed from an unfortunate outburst of Federalist partisanship, and after the Jeffersonian Republicans came into power they not only allowed it to lapse, but liberated the prisoners held under it and repaid the fines that had been assessed.

For more than a century thereafter, legislation on similar, though milder, lines was enacted only to meet temporary wartime situations. During the Civil War, the "war powers" of the government were construed to extend to the suppression of newspapers, the arrest and imprisonment of editors, and the punishment of speakers accused of encouraging rebellion or seeking to weaken the morale of Unionist supporters. And during the first World War the Espionage Act of 1917 and the supplementary Sedition Act of 1918 laid heavy penalties, not only on all persons who, by speaking or writing, sought to turn sentiment against the war, but on all who wrote, printed, or published any "disloyal, scurrilous, or abusive" language about the constitution or form of government of the United States.

The act of 1918 was repealed in 1921. But the 1917 measure was still on the statute-book, ready to be invoked, when we entered World War II. In the meantime, two significant things had happened. In the first place, as indicated above, the Supreme Court, after long hesitation, had in 1925 construed the due process clause of the Fourteenth Amendment as making the fundamental guarantees of the First Amendment covering speech and press applicable to the states—which meant that the rights involved had been nationalized, with the states no longer free, as in the past, to abridge or destroy them. In the second place, a vigorous drive dating from the 1920's had led to inclusion in the Alien Registration Act of 1940 of a series of five sections comprising our first *peacetime* sedition law since that of 1798, and placing the most drastic national restrictions on freedom of speech and press in our history. Of course, this measure was adopted at a time when the country was especially imperiled by subversive elements. Nevertheless, its enactment, when we were still at peace, and, more particularly, its strong terms, startled a good many people. At all events, when war burst upon us in 1941, we had on the books a very large part of the legislation required for the new emergency. The principal addition thereafter made took the form of a section of the First War Powers Act (1941) under which President Roosevelt set up an Office of Censorship charged with prescribing regulations for the press and for radio broadcasting and with inspecting all private communications entering or leaving the country by mail, cable, radio, or other means.[1]

Few problems present greater difficulty than that of drawing a line between what is permissible and what is not in the matter of speech, communications, and publication. The general principle is clear; fundamentally, speech and press are free. Even in normal times, however, there are

[1] See 497-498 below.

limits: freedom must not be allowed to become license; character and reputation must be protected against slanderous attack; where individual right clashes with the interests of public order or defense—perchance even with the authority of the government itself—the latter must prevail. And in wartime, the bounds to which curtailment may go seem to be fixed only by the dictates of national defense and military necessity.

4. Right of assembly and petition

Congress, further says the First Amendment, shall make no law abridging "the right of the people peaceably to assemble, and to petition the government for a redress of grievances"; and state constitutions commonly lay the same restraint upon state legislatures. Like other rights, that of holding public meetings is not absolute; a meeting cannot be allowed to block traffic on city streets, to spread disease, to become riotous, or to be employed for purposes of agitation against law and government. In cities, therefore, it is usual to require a permit from the mayor or other officer for holding any meeting in streets or parks; and while there is supposed to be no restraint except that which a reasonable exercise of the police power entails in the interest of public health, safety, morals, and convenience, over-zealous authorities undoubtedly make it difficult at times for people of radical inclinations to hold meetings of actually innocent character. As for petition, the main question that has arisen is as to whether the right to present a petition involves the right to have it heard and considered. Theoretically, such a deduction would seem obvious, but in practice it does not follow. Congress, every year, is flooded with petitions and memorials on all sorts of subjects. Received without objection, printed in the *Congressional Record*, and usually referred to appropriate committees, they, however, are almost invariably pigeonholed and not heard of afterwards; otherwise the two houses would have time for little else.

5. Right to keep and bear arms

"A well regulated militia," says the Second Amendment, "being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed"; and more or less similar provisions are found in many of the state constitutions. The arms referred to are those of the soldier. Under the police power, the "bearing" of arms intended for private use may be regulated and restricted by both the federal government and the states; and, as is well known, there are plenty of laws forbidding the carrying of concealed weapons (pistols, revolvers, dirks, bowie-knives, sword-canes, etc.) and the sale, possession, or use of sawed-off shot-guns and other weapons not employed for military purposes but habitually used by criminals.[1]

6. Equal protection of the laws

No state, says the Fourteenth Amendment, may "deny to any person within its jurisdiction the equal protection of the laws." The original intent of this provision hardly extended beyond protecting the lately emancipated Negroes against discriminatory treatment at the hands of

[1] See United States *v.* Miller, 307 U. S. 174 (1939), for a Supreme Court decision upholding the constitutionality of the National Firearms Act of 1934.

the Southern states. In practice, it has developed into a general guarantee against arbitrary classification and other forms of discrimination, and as such it is applicable to all persons (citizens and aliens, individuals and corporations) and to all kinds of civil rights alike. Furthermore, although the Fourteenth Amendment lays the injunction upon the states only, equal protection is regularly construed as contained within the broad concept of due process of law, and therefore as binding upon the federal government as well. On its face, the provision might seem to preclude all grouping or classification of persons or things with a view to differing status or treatment under the law.[1] But of course such literal construction would be an absurdity. As an American jurist has remarked, the very essence of legislation is classification; and as the courts have repeatedly asserted, the purport of the "equal protection" clause is merely to require that when statutory classifications are made, they shall be reasonable with respect to the end sought, and that all persons or things standing in substantially the same relation to the law shall be treated alike.

7. "Treason" restricted by constitutional definition

In the next place, every one is protected against the possible danger of being adjudged a traitor under impetuous or partisan acts of Congress; for treason against the United States is defined by the constitution, and Congress has no power to add to the definition. As so defined, treason consists only in levying war against the United States or adhering to the country's enemies, giving them aid and comfort. Furthermore, no person may be convicted of treason except on the testimony of two witnesses, or on confession in open court;[2] and while Congress fixes the penalty, it cannot in doing so impose any disability upon the convicted person's heirs or descendants. It is to be observed, however, that sedition is closely related to treason, and that Congress may go as far as it likes not only in making acts seditious, but in providing for the punishment of persons committing them. Treason trials in the federal courts of the United States have been neither numerous nor (except perhaps in the case involving Aaron Burr) dramatic. John Brown, of Harper's Ferry fame, was executed for treason; but he was tried in a Virginia court and convicted of treason against "the commonwealth." Each state may not only define treason for its own purposes, but prescribe such penalties as it sees fit.

Rights of Personal Liberty: II. Procedural

1. Bills of attainder forbidden

During the political struggles of the seventeenth century in England, persons were "attainted" of treason and sent to the scaffold, or otherwise severely punished, by simple act of Parliament, with no judicial trial. Often, too, their descendants were made ineligible to hold public office, and otherwise deprived of rights and privileges. Properly enough—con-

[1] It is to be observed that the restriction applies only to discrimination practiced by governments, or by public authorities as their agents—not as practiced by private individuals, businesses, and the like, *e.g.*, railroads, hotels, and theaters.

[2] Art. III, § 3, cl. 1.

sidering that similar practices had been by no means unknown in the American colonies—the authors of our national constitution took the position that, aside from removal from office as a result of impeachment, punishment ought to be inflicted only in pursuance of the verdict of a court of proper jurisdiction. Hence, national and state legislative bodies alike are forbidden to pass bills of attainder in any form.[1]

2. *Ex post facto* laws forbidden

Similarly, there is full protection against *ex post facto, i.e.*, "after the fact," legislation.[2] An *ex post facto* law, as defined by the Supreme Court, is one which "makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action"; or one which "aggravates a crime, or makes it greater than it was when committed"; or one which "changes the punishment, and inflicts a greater punishment than the law annexed to a crime when committed"; or, finally, one which "alters the legal rules of evidence and requires less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender."[3] *Ex post facto* legislation is therefore criminal legislation passed after the alleged crime was committed, which, if brought to bear against an accused person, would be to his disadvantage; and the enactment of such legislation is expressly forbidden to both the nation and the states. Retroactive legislation on civil matters, and retroactive criminal legislation which is not detrimental to an accused person, *e.g.*, a law reducing a penalty, is, however, permissible.

3. Judicial processes regulated:

It is an axiom of Anglo-American jurisprudence that a person suspected or accused of crime shall have a fair trial, according to humane methods, and with the burden of proof resting on his accusers; and in both the federal constitution and the constitutions of the states the entire process of criminal justice is surrounded with restrictions to this end. Pettifogging lawyers and spineless judges too often try the public patience by twisting these restraints to the advantage of hardened criminals. The fault lies, however, with those who abuse the sheltering provisions, rather than with the provisions themselves; administered properly, the safeguards set up are barriers against the conviction of innocent persons and against other miscarriages of justice. Reënforced by stipulations of similar purport in state constitutions in behalf of persons accused of violating state laws, the national constitution throws around those accused of violating federal law the following broad blanket of guarantees:[4] (1) a person in civil life may be held to answer for "a capital or otherwise infamous crime" only on "a presentment or indictment of a grand jury"; (2) the privilege of the writ of *habeas corpus* may be denied only when the public safety, in times of rebellion or invasion, requires its suspension; (3) the accused is entitled to a speedy

[1] Art. I, § 10, cl. 1.
[2] *Ibid.*
[3] Calder *v.* Bull, 3 Dallas 386 (1798).
[4] In Art. I, § 9, cl. 2, and Amendments V-VIII.

trial, by an impartial jury of the state and district in which the crime has been committed; (4) he has a right to be confronted with the witnesses against him, to have counsel for his defense, and to avail himself of compulsory process for obtaining witnesses in his favor; (5) he may not be compelled to give evidence against himself, either orally or by producing books or papers; (6) he is given security against "unreasonable searches and seizures"; (7) he may not be "deprived of life, liberty, or property without due process of law"; (8) excessive bail may not be required, or excessive fines imposed, or cruel and unusual punishments inflicted; and (9) a person may not be twice put in jeopardy of life or limb for the same offense.

(a) Indictment by grand jury

Some of these guarantees call for a word of comment. Indictment by grand jury came into American usage as a highly valued English common-law procedure, and originally was provided for not only in the federal constitution but in all of the state constitutions as well. To this day, no person may be proceeded against under federal authority 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 the militia, when in actual service in time of war or public danger." [1] Presided over by the judge functioning within the given jurisdiction, a federal grand jury consists of from twelve to twenty-three persons, before whom the public prosecutor (normally a district attorney) makes accusations of crime, which thereupon are weighed privately by the jurors and either dismissed as being insufficiently supported by the evidence or made the basis of indictments charging specified persons with committing stipulated crimes. The object is, of course, to insure that no one will be inconvenienced and humiliated by being held for trial unless a substantial number of his fellow-citizens agree with the prosecutor that there is good reason for it being done. The procedure, however, tends to be cumbersome, slow, and otherwise unsatisfactory, and several of the states (amending their constitutions in so far as necessary) have substituted, all around or for certain types of cases, a simpler process under which the grand jury is dispensed with and the prosecutor (usually a county attorney) merely files an "information," or affidavit, against a person under suspicion. The grand jury, however, could not be discontinued in *federal* procedure without amending the national constitution.

(b) *Habeas corpus*

The privilege of the writ of *habeas corpus*—"the most important single safeguard of personal liberty known to Anglo-American law"—is guaranteed or assumed, within the appropriate spheres, by both national and state constitutions. By virtue of it, any person arrested or otherwise detained on suspicion of crime may demand an immediate hearing in court with a view to determination of whether there is adequate ground for his detention. The writ is addressed by the court (federal or state, as

[1] Amendment V.

the case may be) to the officer having custody of the suspect and directs that the petitioner's "body" be brought into the court's presence. If it develops that the prisoner is being held contrary to law, he will be given his freedom; otherwise, he will be held for trial, with or without release on bail. Under constitutional provision, the privilege of the writ may be suspended by federal authority only "when in cases of rebellion or invasion the public safety may require it." [1] On the question of *who* may suspend, the constitution is silent; and usage has varied. Largely supported, however, by the Supreme Court in the famous Civil War case of *Ex parte* Milligan,[2] the best opinion is that the function properly belongs to Congress but, under proper conditions, may be exercised by the president in pursuance of express congressional authorization. Some of the states, within their own spheres, have forbidden the writ's suspension altogether.

(c) Jury trial

Like indictment by grand jury, trial by petit, or trial, jury passed into American usage with the English common law. The federal constitution provides for it in three different clauses,[3] and no state constitution fails to ordain it. In the federal field, the constitution requires it to be employed in "the trial of all crimes, except in cases of impeachment," and "preserves" it as a right, too, in civil cases in which the value in controversy exceeds twenty dollars. It is, however, by common law that a federal jury must consist of twelve persons and must arrive at its verdict by unanimous vote. It is also by common law that the right of jury trial does not apply to cases in courts of equity, to cases in contempt of court, and to petty offenses, or misdemeanors, punishable only by small fines. Formerly it was supposed that wherever applicable under constitutional provision or common law, jury trial must prevail. The federal Supreme Court has now held, however, that since the device is intended fundamentally for the accused's protection, he may, if he considers it to his interest to do so, waive the right in federal proceedings; and many states allow the same discretion.

(d) Searches and seizures

Another treasured inheritance from English common law is grounded upon the ancient maxim that every man's house is his castle. "The right of the people," says the Fourth Amendment, "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated"; and state constitutions commonly say much the same thing. The language employed suggests that there are searches and seizures which are *reasonable;* and the Fourth Amendment goes on to define them as being any which are conducted in pursuance of warrants (1) issued "upon probable cause, supported by oath or affirmation," and (2) "particularly describing the place to be searched and the persons or things to be seized." The Supreme Court has, however, recognized

[1] Art. I, § 9, cl. 2.
[2] 4 Wallace 2 (1866).
[3] Art. III, § 2, cl. 3, and Amendments VI and VII.

situations in which the police may legitimately make searches and seizures without a warrant. Thus if it is known or thought probable that a person guilty of a felony or breach of the peace has taken refuge in a certain house, officers of the law may go in after him without waiting for written authority. Likewise, if a search is to be made of a boat, automobile, airplane, or other vehicle which could take advantage of delay in order to move out of the officer's reach, a warrant is held to be unnecessary.

(c) Due process of law

Underlying and cementing together the long list of judicial guarantees enumerated is that of "due process of law." The Fifth Amendment to the federal constitution forbids that under the operation of the national government any person shall be "deprived of life, liberty, or property" without due process; and in 1868 the Fourteenth Amendment imposed the same restriction upon the states—a restriction which in point of fact is also laid upon themselves by all of the states in their own constitutions. Operating as a limitation equally upon executive, administrative, legislative, and judicial branches of government on every level, due process has therefore become a safeguard of individual and corporate rights as against all governmental authority in the country.

The term nowhere fully defined

Notwithstanding its great significance, the term has never been fully and conclusively defined. Broadly equivalent to the "law of the land" as guaranteed in *Magna Carta* and to the "rule of law" upon which English jurists have traditionally placed the utmost stress, it has, like those phrases, been subject to steadily broadening and deepening interpretation. Certainly the constitutions do not fix its bounds, and no more do the courts. Efforts to apply it to the multifold actions and relationships of life have given rise to a stupendous amount of litigation and to an unending stream of judicial decisions; more cases find their way into the courts involving the due process clause than any other provision of the federal constitution. But, though sometimes pressed to do so, the judges have never cared—or dared—to try to frame any complete definition. Rather, they have preferred, as the highest federal tribunal has said, that "the full meaning of the term should be gradually ascertained by the process of inclusion and exclusion in the course of decisions in cases as they arise." [1]

Due process and procedural rights

On looking into the ways in which the term has actually been applied, one finds that sometimes it is invoked in defense of rights of a procedural character and at other times in behalf of those that are by nature substantive. In earlier days, it was thought applicable (as in England) to procedural matters only. The Supreme Court so construed it in 1856,[2] and the view stood until the last quarter of the century, when decisions of the same tribunal turned it also to the defense of substantive rights, giving it a scope and importance which it had never before possessed.

[1] Twining *v.* New Jersey, 211 U. S. 78 (1908).
[2] Murray's Lessee *v.* Hoboken Land and Improvement Company, 18 Howard 272.

Quite apart from due process, the rights of a person accused of crime are, as we have seen, rather extensively protected by guarantees such as those of indictment by grand jury, trial by petit jury, and exemption from self-incrimination. Contrary to what might be supposed, due process does not directly confirm or strengthen these particular rights. What it does is rather to require, on even more fundamental lines, that an accused person be given a *fair* trial before a court of proper jurisdiction, with opportunity to confront his accusers and to secure evidence by compulsory process. If in a given circumstance, this means jury trial, due process requires it; if the end can better be attained by some other procedure, due process does not insist upon a jury. In civil cases, the situation is in principle the same: due process requires merely (but of course this is the nub of the matter) a regular proceeding before a proper court, with a fair hearing for both parties.

Due process and substantive rights

It was, however, when due process ceased to be a weapon merely against arbitrary and unfair judicial procedure and was turned to the curbing of arbitrary and unfair governmental action of any kind that the rule came into its own. As indicated above, the change occurred during the closing decades of the nineteenth century, in a period during which the states were vigorously meeting new conditions and problems (arising from rapid expansion of their industrial life) with drastic regulation of business, trade, and labor, and when disapproval or downright fear of what was happening gradually swung the courts to the view that the principle of due process might properly be invoked as a norm or test for determining the validity of the acts in question Under the due process clause of the then recent Fourteenth Amendment, the police power of the states came in for rigorous restraint, and simultaneously the corresponding clause of the Fifth Amendment was interpreted afresh to enable new restrictions to be placed upon federal power as wielded through legislation by Congress.

Due process and the police power of the states

For many years now, there have been plenty of due process cases turning on the question of whether a given act of Congress deprives an individual or corporation of life, liberty, or property—freedom of person, liberty of contract, or what not—in a manner to be construed as violating due process. But the principal field in which the rule operates today is that occupied by the police power of the states; in that area, cases and decisions involving applications of it are legion. The matter is complicated by the fact that, just as the courts refuse to attempt any general definition of "due process," so they find it impossible, or at any rate impracticable, to mark out any very definite boundaries for the police power, preferring, rather, to decide when a case comes up whether the action on which the case turns is or is not to be construed as coming within the scope of that power. Under commonest usage, however, the police power is viewed as including all regulative authority of states and their subdivisions to protect and promote public health,

safety, morals, order, convenience, and general welfare; and among the most frequent concrete applications of it are laws on sanitation, on public morals, on the sale of intoxicants, on dangerous or objectionable trades, on zoning and housing, on railways and other common carriers, on hours of labor and minimum wages. When, however, a state undertakes to regulate the rates and services of public utility corporations, or to protect the health of women and children by restricting the number of hours a week that they may lawfully be employed in a factory, or to restrain citizens from making use of their property in ways considered deleterious to public health or morals, it is not unlikely to find itself accused of having deprived individuals or corporations of liberty or property, or both, without due process of law; and, a test case being brought, it falls to the courts to determine whether or not the contention is well founded. Manifestly, great latitude of judgment is open to the judicial authorities in handling cases of this type. Due process is nowhere precisely defined; the same is true of the police power; and the variety of considerations that will have to be taken into account is simply limitless. In consequence, there is wide opportunity for the personal opinions, susceptibilities, and social philosophies of the judges to influence the decisions rendered, and a court today may take a position diametrically opposite to that taken by it at an earlier time. From having originally been simply the modes of procedure which were *due* at common law, due process of law has come to mean, in effect, whatever has the approval of the Supreme Court as reasonable. And enforcing it becomes not merely a matter of settling disputes at law, but a matter as well of fixing public policy.

For several decades, the Supreme Court, in passing upon due process cases, held the states within narrower bounds in the exercise of their police power than they would have been likely to observe of their own accord. The appointment of a number of younger and more liberal justices by President Franklin D. Roosevelt led, however, to a different attitude, and nowadays the police functions of both nation and states are construed quite broadly and tolerantly.

Rights of Property

Civil rights extend to the protection of property interests as well as of personal freedom, and in some of the constitutional provisions the two are bracketed together. Due process, for example, applies to deprivation of property no less than to that of life and liberty; so likewise do the guarantees pertaining to interstate citizenship. State constitutions abound in provisions relating mainly or solely to property rights; and the national constitution, leaving the states generally free to say what constitutes property,[1] simply throws around it, as severally defined by them, a further shield of protective stipulations.

[1] Except that a state may not authorize property in man or man's labor.

Limitations upon the power to take private property:

Government everywhere has power to take private property from individuals and corporations; otherwise it would have no adequate means of subsistence. As a rule, it takes property (usually in the form of money) by procedures constituting one form or another of taxation. Sometimes, however, it finds itself in need of some particular piece of property, *e.g.*, a plot of ground suitable for a public building, a navy yard, or a military post, and possesses itself of it—irrespective of whether the owner wants to part with it—by virtue of the right of "eminent domain." A word must be said about civil rights as related to each of these procedures.

1. By taxation

The taxing power of both nation and states is broad and undefined. In the case of the states, the national constitution forbids laying imposts or duties on imports or exports except as necessary for the execution of inspection laws, and also the laying of tonnage duties; and judicial construction prohibits the taxing of certain (although no longer all) federal instrumentalities.[1] Otherwise, the states are free, so long as their tax laws and procedures keep within the bounds of due process, equal "privileges and immunities" for the citizens of the United States, and other broad requirements already indicated in the present chapter. Taxation by the national government likewise is subject to any and all limitations that may arise from the operation of due process. In addition, it is expressly restricted by constitutional stipulations (1) that no tax may be imposed upon articles exported from any state;[2] (2) that all direct taxes (apart from income taxes) shall be apportioned among the several states in accordance with the respective numbers of their inhabitants;[3] (3) that all indirect taxes, such as customs and excises, shall be uniform—that is, shall fall upon the same kinds and amounts of property with equal weight in all parts of the country;[4] and (4) that no money may be drawn from the public treasury except in pursuance of "appropriations made by law."[5] Whatever comfort the taxpayer may be able to derive from these restrictions he is clearly entitled to, because his property cannot constitutionally be levied upon in violation of any of them.

2. Under eminent domain

The power of eminent domain is one which every government must have. In the absence of constitutional restraints, however, it would be peculiarly liable to abuse: compensation might be altogether inadequate; indeed, it might be denied altogether. Hence, the Fifth Amendment not only forbids private property to be taken by the national government for public use without due process of law, but requires that "just compensation" be rendered; and state constitutions commonly impose the same restrictions (sometimes in a more detailed way) upon state and

[1] See p. 63 above.
[2] Art. I, § 9, cl. 5.
[3] Art. I, § 2, cl. 3.
[4] Art. I, § 8, cl. 1.
[5] Art. I, § 9, cl. 7.

local governments.[1] To be sure, the courts have usually interpreted eminent-domain clauses very broadly. For example, they uphold the taking of land not only for purposes which are strictly governmental, *e.g.*, the erection of a court house, but for purposes which have any clear relation to governmental functions, *e.g.*, the laying out of a park; and they raise no objection to the exercise of the power by railroads or other corporations to which the government has delegated it, provided that such corporations are engaged in a business "affected with a public interest," provided, too, that the property sought is essential to the corporation's activities, and so long as the same conditions are observed that the government itself would be required to meet.

What is to be regarded as just compensation in any particular instance is likely to be a matter for judicial or administrative determination. The government or corporation will ordinarily make the owner an offer. This is very likely to be refused. Counter-proposals and mutual concessions may lead to an agreement, as in an ordinary sale. But if they do not, the owner can appeal to the courts, which will fix the amount that he may receive and must accept; or the decision may be reached by commissioners or other administrative boards. All that is necessary to meet the requirements of the constitution is that the dissatisfied seller shall have an opportunity to be heard on the subject and to present such evidence concerning the value of his property as he may desire to bring forward.[2]

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[1] Even if they fail to do so, the due-process clause of the Fourteenth Amendment is sufficient to impose the obligation of compensation. Chicago, B. & Q. Ry. Co. *v.* Chicago, 166 U. S. 226 (1897).

[2] United States *v.* Jones, 109 U. S. 513 (1883). Still another form of protection for private property is the prohibition which rests upon the states—although not upon the national government—to "pass any law impairing the obligation of contracts." This matter, however, has been considered in an earlier chapter (see pp. 64-65 above).

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3. INSTRUMENTALITIES OF POPULAR CONTROL

CHAPTER VIII

THE PEOPLE AS VOTERS

Popular government and its limitations

It has long been a proud boast of Americans that, whatever the situation elsewhere, theirs is a country in which the people rule. Through constitutions freely made and amended, through party organization and elections, and by the force of public opinion, an electorate potentially embracing almost ninety-seven per cent of the adult population creates its own governments, endows them with powers, fixes the limits of their authority, chooses lawmakers and other policy-framing officials,[1] and determines the broad objectives and currents of public action.

To be sure, any one having some acquaintance with the nation's political history, and not altogether blind to what goes on around him, knows that, even among us, the democratic process has its limitations. He is aware, for example, that the federal constitution was put into operation without ever being submitted to a popular vote; that amendments to that instrument have commonly been adopted or rejected by state legislatures whose members had been chosen with no reference whatever to the changes proposed; that presidential candidates sometimes win with only a minority of the popular ballots; that rarely more than seventy per cent, and sometimes hardly more than fifty-five per cent, of the potentially qualified electors go to the polls, even when a president is to be elected; that some of our cities (happily far fewer than in the past) are still dominated by bosses, rings, and "interests"; that the fate of many a significant bill in Congress is determined by seniority traditions governing committee chairmanships, by log-rolling maneuvers, lobbying activities, and legislative by-play over which the voters have at least no direct and immediate control. He knows, in short, that if the people rule, they rule a good deal of the time at rather long range and by decidedly roundabout means and processes.[2]

Nevertheless, at bottom, the claim is justified. Ours *is* a government of the people, in the sense that the citizenry is the final authority, with power not only as a matter of law, but in practical fact, to make the government what they want it to be and to compel it, at least eventually, to do what they want it to do. This is equally true whether one is think-

[1] As well as numerous officials who, not being policy-determining, might better be appointed rather than elected. All told, the people elect the president and vice-president, 531 members of Congress, some 10,000 state legislators and officers, and probably at least 800,000 officers of counties, cities, and other local areas.

[2] C. A. Beard, "The Fiction of Majority Rule," *Atlantic Mo.*, CXL, 831-836 (Dec., 1927).

ing of the national government alone or of the governments of the states and their political subdivisions as well; and we shall be better equipped to study these different governments as going concerns if we first bring into view the bases of popular control on which they rest. Four matters, chiefly, call for attention: (1) the composition and characteristics of the electorate, (2) the influence of non-party organizations, and of public opinion; (3) the organization of the electorate in political parties; and (4) the nomination and election of candidates for public office.

Constitutional basis of the suffrage

By the electorate, we mean, of course, those of the people who are entitled to vote. The matter, however, is less simple than it sounds, because under our federal system every one of the forty-eight states has wide latitude to make its own suffrage regulations, or, in other words, to create its own electorate. To be sure, the Fifteenth and Nineteenth Amendments to the federal constitution forbid a state (or the United States) to deny or abridge the "right" of citizens of the United States to vote on account of (a) race, color, or previous condition of servitude, or (b) sex. But to this extent only is the suffrage regulated on a uniform, nation-wide basis. The federal constitution confers the right to vote on no one: it merely stipulates certain grounds on which people otherwise qualified shall not be disfranchised—with the result that the electorate for national purposes becomes simply the aggregate, or sum total, of the more or less differing electorates maintained in the individual states. Any one who can vote for a member of the "most numerous branch" (*i.e.*, the lower house) of his state legislature can vote also for the only members of the national government who obtain their positions by popular election, namely, congressmen, senators, and (in effect) the president and vice-president—and also, speaking generally, for officers of his state, county, city, town, or village as well.[1]

The suffrage a privilege, not a right

Notwithstanding that the constitutional amendments cited refer to the "right" to vote, the suffrage is to be regarded as not properly a right but rather a privilege. It is, no doubt, a right—a *legal* right—for those who have been endowed with it—so long as they do not disqualify themselves by, for example, committing a crime or going insane. But there is no inherent right to be so endowed. To be sure, people urging an extension of the suffrage in one direction or another have always been prone to picture voting as a natural, if not also a constitutional, right. The argument was heard repeatedly during the long campaign for the enfranchisement of women. A sober view of the matter, however, suggests that, in the last analysis, who may vote and who may not is properly to be determined by considerations of general policy and expediency, and not on the theory that any particular class or classes of the people have an inherent right to be included. Even citizenship, as our courts have de-

[1] This plan is prescribed for the choice of representatives by Art. I, § 2, cl. 1, of the federal constitution; for that of senators, by the Seventeenth Amendment; and for that of presidential electors (regarded as *state* officers), by state constitutional or statutory provisions.

clared repeatedly, carries with it no such right.[1] To be sure, no state now allows non-citizens to vote. But children are citizens; and no one proposes that they be made voters.

Historical Development of the Suffrage

Disappearance of property and religious qualifications

The history of the suffrage, particularly in the older states, has been in the main a record of progressive extension of voting privileges to new groups of people—non-property-holders, small taxpayers, ex-slaves, women—although interspersed with extensions have also been contractions arising from the introduction of new tests, especially that of literacy. Originally, voting was confined almost entirely to male property-holders, with occasionally a religious test in addition. The period from 1815 to the Civil War, however, saw property qualifications lowered and finally to all intents and purposes abandoned, taxpaying requirements given up in all but a few states, religious tests abolished, and in many states aliens somewhat imprudently allowed to become voters as soon as they declared their intention to be naturalized. Influenced by the "Know-Nothing" movement, Connecticut in 1855 and Massachusetts in 1857 adopted reading and writing tests designed to disqualify the illiterate foreign-born. Nevertheless, by 1860 most states had arrived at what may fairly be termed manhood suffrage for whites.

Enfranchisement of Negroes

Since the Civil War, the suffrage has been broadened mainly by the enfranchisement of Negroes and of women. A few Negroes voted in certain Northern states (mainly in New England) before 1860. General enfranchisement of people of color came only, however, as a result of new state constitutions and laws adopted, under pressure from the radical Republican majority in Congress, during the era of Reconstruction; and voting privileges for ex-slaves and their descendants, as indeed for Negroes in every part of the country, were supposed to be guaranteed for all time by the Fifteenth Amendment.

Enfranchisement of women

Demand for the enfranchisement of women was heard as early as the Jacksonian era, and here and there it was pressed rather vigorously during the later stages of the Abolition movement. No legislature or constitutional convention, however, in this period gave serious attention to the petitions presented on the subject; if noticed at all, they evoked only ridicule. After the Civil War, the situation changed. The Negro had been enfranchised; nearly all men were voters; and the advocates of votes for women could no longer be simply laughed out of court. The first notable triumph of the cause was in Wyoming, where in 1869 women were given the privilege of voting for territorial officers on the same terms as men. On being admitted to the Union in 1890, this territory continued its woman suffrage provisions; and before the close of the

[1] United States *v.* Anthony, 24 Fed. Cases, No. 14459; Minor *v.* Happersett, 21 Wallace 162. These decisions were rendered, in 1873 and 1874, in cases in which the question at issue was the right of women as *citizens* to vote.

century Colorado, Idaho, and Utah also became equal suffrage states. The movement then slackened. But about 1906 it gathered fresh momentum, and in five years (1910-14) the number of equal suffrage states was raised to eleven.

Meanwhile the suffragists turned to the larger objective of a general nation-wide enfranchisement. To this end, some urged amendment of the national constitution so as to require a state to submit the question of woman suffrage to its electorate on petition of as few as eight per cent of the voters. Others, feeling that this "states' rights" method was too slow and uncertain, threw their support to the "Susan B. Anthony amendment" (first brought forward in 1869), which proposed to forbid the United States or any state to withhold the ballot on account of sex. The movement finally centered upon this latter plan; and a brief period of sane but determined agitation brought complete success. The Nineteenth Amendment, embodying the Susan B. Anthony proposal, was adopted by Congress in 1919 and ratified by the requisite three-fourths of the states during the next fourteen months. Proclaimed August 26, 1920, it met its first test at the national and state elections of the following November.

Women's part in the political life of the nation

The women of the entire country—or such of them as possess the necessary age and other qualifications—have thus had the suffrage a full quarter of a century. It would be interesting to know precisely how they have voted during this time, and to what extent they have influenced electoral results. Unfortunately, such information is not to be had; for while an industrious person can get significant information on relative degrees of *political interest* by counting the numbers of men and women, in any electoral area, whose names appear on the lists of registered voters, and even the numbers of those who present themselves at the polls at a given election, nowhere are the ballots cast by women and by men tabulated separately. Such evidence as exists, however, indicates that, by and large, women voters are not very different from men voters. Some are vigilant and intelligent, many are uninformed and apathetic; some make up their own minds, others merely do as a ward leader, a member of their family, or a clergyman, tells them; many go to the polls voluntarily and with scrupulous regularity, many go but seldom and only when pressed to do so, and many do not go at all.[1] Suffrage for women is sound in principle, and entirely correct as a matter of policy; but it has not worked, and should never have been expected to work, a revolution.

Participation of women has, however, added some new and interesting features to the political life of the nation. It has more than doubled the potential electorate [2] and greatly increased the cost of elections. In party

[1] In the five presidential elections of 1924 to 1940 inclusive, women cast an estimated vote varying between thirty-five and forty-three per cent of the total. With the male population heavily dislocated by wartime conditions, the female vote in 1944 probably slightly exceeded fifty per cent of the total.

[2] There are in the country more women than men of voting age.

conventions, on party committees, and in the rough and tumble of electoral campaigns, women increasingly share almost every form of activity engaged in by men.[1] Laws (particularly relating to social reform) have been enacted, in Congress and especially in state legislatures, that might not have prevailed without the driving influence supplied by women. In addition to appointment to sundry administrative posts, both in the states and at Washington, women have been elected to high public offices, including two governorships (in Texas in 1924 and 1928 and Wyoming in 1924) and a United States senatorship (in Arkansas) in 1932[2]—although the rather remote dates mentioned indicate no present trend toward increased service on such levels. Since 1930, from five to nine members of the national House of Representatives have been women (seven were elected in 1946), and the 1940 elections brought a total of 140 women into twenty-nine state legislatures, with the largest quotas in New England. The country is covered with a network of non-partisan state and local leagues of women voters, linked up since 1918 in an active and influential national organization—the League of Women Voters of the United States—all concerned primarily with educating women (and incidentally some men) to vote with intelligence and discrimination, and with securing remedial legislation and other reforms, national, state, and municipal.

The Suffrage Today

General qualifications: age, citizenship, residence

Looking over the electoral systems of the several states at the present time—under which nearly sixty-five per cent of the total population can qualify to vote, as compared with only six per cent during the Revolutionary period—one notes suffrage qualifications that are found in all states and others that are encountered only here and there. Three that are universal and basic have to do with age, citizenship, and residence.[3] In every state except Georgia, the minimum age is twenty-one; in the state named, it was reduced in 1943 to eighteen. Since Arkansas fell into line in 1926, citizenship also is everywhere required. The commonest requirement relating to residence is that the voter shall have lived in the state at least one year, some stipulated portion of which (frequently three or six months) must usually have been spent in the county, and

[1] Since soon after their enfranchisement, women have been represented equally with men in the national committees of the two major parties, and in numerous state and local committees as well. In the national nominating conventions of both parties in 1944, they were represented equally with men on the platform and resolutions committee.

[2] Three women have held senatorships for brief periods by virtue of temporary appointment.

[3] The requirement that the voter be registered might seem to belong in the list. Registration, however, is not strictly a "qualification," but rather only a means of compiling and maintaining accurate voting lists. See pp. 150-151 below.

Certain categories of people are, of course, almost everywhere debarred, *e.g.*, persons convicted of felony or other crime and inmates of asylums for the feeble-minded and insane; and in various states offenses against the election laws (*e.g.*, bribery), malfeasance in office, and vagrancy are further grounds for debarment.

some briefer portion in the district, in which one's ballot is to be cast.

More special qualifications: tax payment and literacy

Taxpaying—once a widely prevalent qualification—has been generally discarded as such except in the South, where payment of a poll tax of one or two dollars annually, and by a specified date, is required in seven states,[1] partly in aid of school or other special funds, but also with a view to keeping down the Negro and "poor white" vote.[2] In earlier times, literacy qualifications were uncommon. Today, however, they are in use, in some form, in nineteen states (including six in the deep South and four in New England), and are authorized by constitutional provision in three others where the legislature has not yet seen fit to introduce them. Indeed, such qualifications may be said, broadly, to have succeeded to the position once held by property qualifications, although, popular education having reached its present stage, they operate to debar a far smaller proportion of the people.[3] Assuming honest administration, there is much to be said for the principle of the literacy test. The electorate having now been expanded almost as far as possible, the next step would seem to be to "trim it at the edges" by eliminating the least fit. Ascertainment that a citizen can read and write no more guarantees that he will always vote wisely than testing an applicant for an automobile driver's license insures that he will invariably manage his car with safety for himself and others. But it is as effective a means as we have of debarring people who, by and large, are most likely to be unfit. And while at first glance the plan might seem undemocratic, and consequently out of harmony with American principles, the fact that nearly all states now make it possible for practically any man or woman, even of low intelligence, to receive an elementary education without cost—in evening schools, if in no other way—relieves it from any such opprobrium. The road to the ballot-box may very appropriately lead through the schoolhouse.

[1] Alabama, Arkansas, Mississippi, South Carolina, Tennessee, Texas, and Virginia. Early in 1943, the legislature of Tennessee repealed the half-century-old poll-tax law of that state, but a few months later the state supreme court held the act unconstitutional. Georgia was in the list of Southern poll-tax states until February, 1945.

[2] A measure passed by Congress in 1942 to facilitate absent voting by men and women of the armed forces and their auxiliaries forbade any such persons, for the duration of the war, to be deprived of their votes because of having failed to pay any poll tax. Since January, 1941, a bill permanently outlawing poll-tax requirements in national elections had been held up by the Southern-dominated House judiciary committee. Agitation of the subject in connection with wartime voting led, however, in the autumn of 1942, to recall of the bill from committee, followed by its passage in the House by a vote of 258 to 84—over vigorous Southern protest on the ground that the measure was an unconstitutional attack on states' rights. In the Senate, the bill was prevented, by a Southern filibuster, from coming to a vote; and the same thing happened to bills on the subject passed by the House in each of the next three years. Meanwhile the issue continues to flare up, in an atmosphere heavily charged with partisanship; and as recently as the summer of 1946 a measure on the subject was again shunted aside in the Senate by parliamentary tactics.

[3] In some states, the test is confined to ability to read (commonly a few lines of the state constitution); in others, it covers also ability to write.

The Problem of Negro Voting in the South

The search for an effective method of disfranchisement

At the close of the Civil War, the Southern states were compelled to give the freedmen the ballot as a condition of being restored to their previous status in the Union, and the Fifteenth Amendment sought to perpetuate the arrangement by prescribing that the right of citizens to vote should not be "denied or abridged by the United States *or by any state* on account of race, color, or previous condition of servitude." Unhappy results followed, especially where control of legislatures by inexperienced and gullible Negroes, abetted by Southern "scalawags" and Northern "carpet-baggers," brought on an orgy of financial extravagance and foolish legislation; and it is not to be wondered at that, once the white populations regained the upper hand, they began looking for ways in which the Negro could be quietly but effectively deprived of political power. The main hurdle to be surmounted was, of course, the Fifteenth Amendment; so long as it stood (and there was not the remotest hope of securing repeal of it), no Negro could, *simply as a Negro,* be kept from the polls.

The Mississippi plan

Negroes, however, were commonly illiterate, and also poor; and this opened a way out of the dilemma. In 1890, Mississippi set the pace for her sister states by writing into her constitution clauses under which, in order to vote, one must have lived two years in the state and one year in the election district, must have paid all taxes assessed against him (including a poll tax of two dollars), and must be able either to read any section of the state constitution or to understand it when read to him and to give a reasonable interpretation of it. And these requirements very well served their purpose. The exceptionally lengthy period of residence barred large numbers of Negroes accustomed to drift from plantation to plantation. Even if a colored man succeeded in paying his poll tax on time (and it was artfully required to be paid a year before election), he was likely to be careless enough to be unable to produce his tax receipt when called for. Few Mississippi Negroes could read, and still fewer could give an interpretation of a perhaps craftily selected passage from the state constitution likely to be accepted as "reasonable" by a white official with a strong predisposition against Negro voting. Although every one knew that the primary purpose of the regulations was to keep the Negro from the polls, not a word was said in them about "race, color, or previous condition"; and when the federal Supreme Court passed upon them in a test case, it was unable to find that they in any manner violated the Fifteenth Amendment.[1] Clauses of similar purport accordingly found their way into the constitutions of most other Southern states.

"Grandfather clauses"

There was, however, one drawback: the restrictions operated to debar not only Negroes, but also large numbers of whites. But for this, also, a

[1] Williams *v.* Mississippi, 170 U. S. 213 (1898).

remedy was found—in the famous "grandfather clauses" adopted at one time or another, as constitutional amendments, in no fewer than seven states. South Carolina led off in 1895 by exempting for three years from her literacy test all men, otherwise qualified, who were voters, or lineal descendants of persons who were voters, on January 1, 1867. The first act of Congress enfranchising Negroes in the Southern states became law on March 2 of the year mentioned. No Negro, therefore, could avail himself of the new provision. But the poorest and most illiterate white could do so—commonly because of being the son or grandson of a voter of the earlier date. The devices employed in other states differed in details, but the object was always the same, *i.e.*, to open a way for whites to get on the voters' lists without letting down the bars for Negroes of similar condition. In all cases, the clauses were only temporary. Having served their purpose, all have long since disappeared. Contrary to common impression, the grandfather clauses did not disfranchise Negroes. That object had already been largely attained by specially contrived literacy, tax, residence, and other requirements under which, as they stand today, in some states hardly one Negro in a hundred ever casts a ballot, and perhaps not more than ten per cent of the adult black population of the entire South is on the registration lists. Thousands of Southern whites, however, became voters only by virtue of being gathered into the electorate on the strength of their grandfathers' political status; and this is the end which the "grandfather clauses" were mainly intended to serve.[1]

[1] As recently as 1915—after the grandfather clauses had served their purpose—the Supreme Court declared Oklahoma's clause unconstitutional. Guinn *v.* United States, 238 U. S. 347.

Aside from the matter of the poll tax, the most controversial aspect of Negro suffrage in the Southern states in later years has been the participation of Negroes in Democratic primaries. Under the one-party system prevailing in most Southern states, nomination to public office virtually insures election, and hence it becomes important, from the Southern viewpoint, to exclude Negroes from primaries as well as from final elections. When, however, in 1923 the Texas legislature enacted a law to this end, the federal Supreme Court held it unconstitutional as denying the equal protection of the laws (Nixon *v.* Herndon, 273 U. S 536, 1927); and when the legislature authorized the state executive committee of a party to prescribe such exclusion, the result was the same (Nixon *v.* Condon, 286 U. S. 73, 1932). When, however, a Democratic state convention in Texas adopted a "white primary" rule for the party, the outcome was favorable (Grovey *v.* Townsend, 295 U. S. 45, 1935), on the ground that, as the highest authority of a voluntary private organization, the convention had a right to determine the organization's membership. The difference ascribed to state and party action seemed not very convincing; and in point of fact it did not stand for long, because in 1944 the Court completely reversed itself, holding that, in spite of all party regulations to the contrary, Negroes were entitled to vote in Democratic primaries in Texas (Smith *v.* Allwright, 321 U. S. 649, 1944). This remarkable action, added to a Court decision of 1941 (United States *v.* Classic, 313 U. S. 299) for the first time affirming the right of Congress to regulate *nominations*, brought the entire white primary system as prevailing in seven or eight states into jeopardy; and of late Negroes have been voting, in limited numbers, in Democratic primaries not only in Texas but in several other Southern states, notably Alabama, Georgia, and Florida. For a realistic study of the subject, see D. S. Strong, "The Poll Tax—The Case of Texas," *Amer. Polit. Sci. Rev.*, XXXVIII, 693-709 (Aug., 1944).

Merits of the Southern policy

For some decades after the Civil War, the suffrage policies of the Southern states stirred lively discussion and protest in other sections of the country. Eventually, as it came to be realized that Southerners of all parties looked upon the restrictive system as politically and socially indispensable, and that—with, of course, many exceptions—the disfranchised were not greatly concerned about political rights, Northern disapprobation declined; in 1912, the Republican party significantly stopped putting in its national platforms the time-honored denunciations on the subject. The issue, however, was always smouldering, with developments like the poll-tax controversy capable of fanning it to a flame. The ultimate outcome of the anti-poll-tax drive and of the Supreme Court's new attitude on the white primary cannot as yet be foreseen, and meanwhile one may say simply that the restrictive regulations still prevailing—particularly as administered by sometimes prejudiced and incompetent registration and election officials—are indisputably objectionable in so far as they set up discriminations based on considerations of race and deliberately evade the fundamental law of the country. Moreover, Negro education has now advanced to a point such that some of the Southern states might well adopt a more generous attitude, as indeed one or two of them (notably North Carolina) have done. Many Southern Negroes, however, are still poorly qualified for political power; many of them manifest no desire to vote, considering rather that "politics is white folks' business" (or at any rate that it is dangerous colored folks' business); and with people of color numerically rivaling the white populations in a number of states, the latter must be expected to give up only slowly and grudgingly the idea that their security depends upon maintaining some sort of restrictionist policy. A generation that attaches increasing importance to literacy as a qualification for voting can hardly repress the conviction that the initial mistake relating to the matter was made when the Southern states were in effect compelled by national authority to enfranchise Negroes *en masse* three quarters of a century ago.[1]

Penalty for denial of franchise not enforced

With a view to penalizing states restricting the suffrage, the Fourteenth Amendment provides that if a state denies or abridges the right of any of its male inhabitants, being twenty-one years of age and citizens of the United States, to vote, "except for participation in rebellion, or other crime," the basis of representation in such state shall be reduced in the proportion which the number of unenfranchised male citizens bears to the whole number of male citizens twenty-one years of age in the state. Attempt has been made to show that this provision is relevant or pertinent only in cases of denial of the suffrage because of race or color. But

[1] A weighty factor in the perpetuation of Negro disfranchisement in the South is the prevalence of the one-party system in that section. If there were two evenly balanced parties, each would covet the benefit of the Negro vote (as they now do in the North), and fairly rapid relaxation of the existing restrictions might be expected But, to complete the vicious circle, the Negro question is the principal reason for the one-party system.

the phraseology of the amendment admits of no such interpretation: New York or California is quite as liable to a reduction of its quota of representatives in Congress because of its literacy test as is Mississippi on account of its restrictions aimed at the Negro. In point of fact, this provision—although in form and tone no less mandatory than any other part of the constitution—has never been enforced, and probably never will be. Largely because of Negro disfranchisement, the average number of voters in the South who elect a representative to Congress is very much smaller than the average number in other parts of the country, and there has been a good deal of complaint, mainly from Northern Republicans. Any attempt to enforce the constitutional penalty would, however, raise embarrassing questions and precipitate political controversies that most people prefer to avoid. Consequently, every one of the many bills on the subject that have appeared in Congress has fallen by the wayside.

The Electorate's Tasks—The Problem of Non-Voting

Numbers of elective officers

Such are the complex and devious lines on which our country determines who shall have the political power that goes with voting. What is there for the electorate as thus defined to do? From state to state, there is much variation. In every state except Delaware, a new constitution or constitutional amendment must be submitted to a popular vote. In twenty-two states, the voters may ratify or veto measures that have passed the legislature, and in twenty they may also directly initiate laws. In hundreds of municipalities, they occasionally exercise similar powers of direct decision on proposals. In all states, they elect the members of both branches of the legislature,[1] the governor and varying numbers of other state officials (including many judges), and widely differing—but usually extensive—lists of county, city, town, and other local officers and boards. By discussion, petition, criticism, and other more or less indirect means, they help the policy-framing authorities discover the public will and carry it out. In the domain of the national government, their tasks are fewer. They agitate for or oppose constitutional amendments, but do not directly vote upon them. There is no national initiative or referendum for ordinary laws. Aside from formulating and expressing opinion (through political parties and in other ways), the voters, indeed, merely elect officers. And the number that they elect is not large, *i.e.*, only the president and vice-president and the members of Congress.

Non-voting

How generally do those of our people to whom it falls, as voters, to supply the popular control which our system of government presupposes live up to their responsibilities? Thereby hangs a somewhat dismal tale. The census of 1920 showed the total population of the continental United States to be 105,710,620. Of this great body of people, somewhat more than 54,000,000 were citizens twenty-one years of age or over. Of this latter number, many (no one knows precisely how many) were, of

[1] Except in Nebraska, where there is only one house.

course, ineligible to vote, because of inability to meet the qualifications imposed in their respective states. When, however, it is noted that in the presidential election of that year only a little over 26,500,000 men and women voted for any candidate for the highest office in the land, we come upon one of the most surprising, and many people would say one of the most distressing, aspects of our political life. Many of the non-voters had failed to register; many who registered neglected to go to the polls; many who went to the polls voted only for certain offices and not for all. In 1924—notwithstanding unusual effort to "get out the vote"—the proportion was almost exactly the same as four years previously. On the other hand, the exceptionally spirited Hoover-Smith campaign of 1928 yielded a popular vote for president of over 36,879,414, out of a total electoral registration of slightly more than 43,000,000; the almost equally lively Hoover-Roosevelt campaign of 1932 brought out a vote of 39,816,522, out of a registration of some 47,500,000; the reasonably vigorous Roosevelt-Landon campaign of 1936 brought out a vote of 45,-646,817, out of a registration of nearly 55,500,000; and the heated Roosevelt-Willkie contest of 1940, with third-term and New Deal issues dominant, yielded a record-breaking vote of 49,815,312 out of a registration of 60,576,979. On the last-mentioned occasion, the number of potential voters (*i.e.*, citizens twenty-one years of age and over) outside of the District of Columbia was estimated by the Census Bureau at 79,863,451. While, therefore, the figure representing the total vote appears impressive, fully a quarter of the adult men and women of the country failed to register, and of those who registered, one out of every six neglected to go to the polls. With about eleven million men and considerable numbers of women in the armed services (millions of them overseas), and with the country's population further dislocated by the exigencies of war industry, the election of 1944 was held under such abnormal conditions as not to be statistically comparable with preceding ones. The civilian vote, however,—stimulated by an unusual get-out-the-vote effort —proved heavier than expected, and the same was true of the soldier vote, with a resulting total of 48,025,684.[1]

Causes

The reasons for so great an amount of non-voting in the United States are many. To begin with, no elections are held in the District of Columbia, and more than a quarter of a million men and women are kept from the polls because they have no legal residence outside of that area. Large numbers at every election, especially in the cities, are debarred because of not having resided long enough in the state, county, or election precinct. Most of the Southern states to all intents and purposes have but one party, and because of the lack of genuine contests, together with the disfranchisement of most Negroes, yield an exceedingly small vote. Many voters in all parts of the country are prevented from casting their

[1] *I.e.*, for president; for representative, 45,103,023; for senator, 34,973,613 (with, of course, no election in some states).

ballots by bad weather, illness, or other legitimate reasons; although it should be noted that, even before World War II prompted extensive new arrangements for voting in the armed services, all but three states had laws largely removing one serious obstacle of earlier days, *i.e.*, absence from the voting precinct. To some extent, voters are discouraged or thwarted by legal and administrative obstacles—too great crowding at the polls, too short hours for voting, too much red-tape in absent voting, and of course non-registration. To some extent, they are deterred by the lack of vital issues in an election, by belief that their vote would not affect the result, by fear that employers or others will find out how they voted, by disgust with politics and parties, or even by contempt for political methods of action in general. An obstacle, too, is the "jungle ballot" with which the voter is too often confronted—crowded with names of candidates he never heard of, seeking offices he knows nothing about. After all allowances are made, however, one is tempted to surmise that the most common cause is no one of these things, but simple indifference and inertia; and an extensive first-hand study of non-voting in the city of Chicago, based on the local municipal election of 1923, bears out this opinion.[1] Sometimes there is indifference toward a particular election only. But more often it extends to elections generally; and the Chicago investigation shows it to be especially prevalent among younger voters, in poorer neighborhoods, and among housewives, but only slightly more so among people of foreign than among those of native birth.

Suggested remedies

Whatever the factors involved, the stay-at-home vote is of such proportions as to stir complaint every time an important election comes around. It has been suggested that, as in some other countries, voting be made compulsory; although because of our federal system, and for other reasons, the plan would offer serious difficulties, even if it did not run counter to our American notions of personal liberty. From one point of view, the matter is given more emphasis than it deserves: contrary to a very general assumption, there is no particular virtue in mere numbers of votes. Most get-out-the-vote efforts begin and end in an attempt to induce men and women to go to the polls, regardless of whether they know anything about the issues or the candidates. The thing to be aimed at is not simply voting, but intelligent and interested voting; and energy spent upon getting ballots into the hands either of persons who are insufficiently informed to make intelligent decisions or of those who are informed but have no clear opinions is misdirected. Viewing the problem sanely and soberly, the solution would seem to lie rather in the direction of (1) electoral reforms, such as permanent registration, a shorter ballot, and perhaps (in local areas) proportional representation; (2) an improvement of party procedures, including the selection of better candidates and the adoption of less evasive platforms; and especially (3) the

[1] C. E. Merriam and H. F. Gosnell, *Non-Voting; Causes and Methods of Control* (Chicago, 1924).

further development of civic education reaching from early youth through adult years.

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CHAPTER IX

POLITICAL PARTIES—NATURE AND ORGANIZATION

Channels of Popular Control Over Government

The broad field of politics

Eighty-five million men and women potentially endowed with the ballot constitute an enormous reservoir of political power. Even such power, however, would merely scatter, frustrate itself, and fail of significant achievement unless harnessed and directed; and we now turn to some of the ways in which the political ideas and energies of our huge electorate are galvanized and channeled into political action. Other portions of this book are concerned primarily with matters of public law, and with the workings of government as an operating mechanism. Here we pause for a glance into the pulsating, often exciting, realm of politics —a term designating that entire segment of our public life embracing the machinery and processes by which the people, under the principle of democracy, express themselves on what they want done and select those of their number to be intrusted with carrying out the mandates voiced.

Five main agencies for giving coherence and direction to what otherwise would be only a chaos of separate, discordant, and futile individual wills, and for translating an ascertained collective will into governmental action, may be mentioned: (1) public opinion, and the instrumentalities by which it is formed and made articulate; (2) groups and associations of many kinds having political interests and objectives, though not of the nature of political parties; (3) political parties; (4) nominations and elections, as means by which the people choose among programs and candidates put before them usually by the parties; and (5) executive officials, legislatures, and sometimes courts, placed in power by electoral pluralities to carry programs and policies into effect. Among these, our principal concern in the present chapter is with political parties; nominations and elections will occupy us in the two chapters that follow; and from there on, our attention will be fixed mainly on government in action.

Public opinion

Public opinion, as a factor in the political process, is something that in later years has come in for a great amount of investigation and study, by people ranging all the way from enterprising newspaper men taking "polls" during electoral campaigns to serious students of social psychology and political phenomena. It means, in general, attitudes shared, and perhaps expressed, by at least some appreciable portion of the adult citizenry. On some matters, *e.g.*, respect for law and order, the same general attitude is taken by almost everybody, and on these public

opinion rates close to unanimity. On others, there is a heavy preponderance for a given view, but nevertheless a dissenting minority. On still others—many in fact—there is sharp and perhaps almost equal division; and in this category are likely to fall many, if not most, of the issues that come up in electoral campaigns, in legislative bodies, and in general political discussion. The most basic political technique, indeed, consists in trying to win the skeptical or the hesitant to acceptance of a given principle, policy, program, or candidate—in other words, to build a public opinion widely enough held to tip the balance in a favorable direction. Another such technique is the attempt to concentrate a stream of vocal public opinion upon Congress or a legislature in behalf of a pending measure, or upon executive authorities urging them to speed up action to some desired end, *e.g.*, bringing to settlement a wave of damaging strikes. Powerful molders of public opinion, on general lines, include the schools, the press, radio-broadcasting, motion pictures, the authors and publishers of pamphlets and books, and, of course, a wide variety of individuals and organizations (including political parties) engaged in systematic and protracted propaganda in behalf of ideas, "causes," interests, movements, reforms, and what not. All of these instrumentalities can be, and are, used extensively for political purposes—with precisely what results it is usually difficult to determine, although the aggregate effects must be considerable. At all events, public opinion, however formed and influenced, is—especially when giving evidence of solidarity and intensity—bound to be a factor of major importance in shaping the course of political events.[1]

Non-party organizations with political interests

Public opinion is, of course, for the most part unorganized and more or less incoherent; except when given a definite outlet, on political matters, at election time, it can, on controversial subjects, be discerned and appraised in only rather haphazard ways. Americans, however, have a strong propensity for forming and joining clubs, associations, leagues, orders, societies, and other bodies, and the national scene is plastered over with organizations which in some instances have no political interests or implications at all, but which more frequently exist mainly or solely to exert political influence, or have political interests subsidiary to others, or at least are prepared on occasion to support or oppose suggested legislation or other phases of public policy. The American Medical Association is, in general, non-political, yet ever ready to throw its weight energetically against government policies looking toward "socialized medicine." The American Bankers' Association has plenty to say about the relations of the Treasury Department and the Federal Reserve

[1] Public opinion as a factor in government is conveniently surveyed in C. L. Shoup, *The Government of the American People* (New York, 1946), Chap. x. A fuller general study is H. L. Childs, *An Introduction to Public Opinion* (New York, 1940). For a concrete study of the rôle of public opinion in the court reorganization controversy of 1937, see F. V. Cantwell, "Public Opinion and the Legislative Process," *Amer. Polit. Sci. Rev.*, XL, 924-934 (Oct., 1946).

System to fiscal and banking practice. The Civil Liberties Union watches for laxness on the part of national and state governments in upholding personal liberties guaranteed by the respective constitutions, and the National Association for the Advancement of Colored People fights the poll-tax laws of Southern states and other discriminatory legislation, wherever appearing. The Single Tax League works for the abolition of all taxes except on the economic rent of land, and the Chamber of Commerce of the United States urges government policies favorable to the interests of business. The National Woman Suffrage Association prepared the way for the Nineteenth Amendment, and the League of Women Voters of the United States pushes vigorously for administrative reforms, national, state, and local, for legislation on many subjects of wide concern, and for a strong policy of international coöperation. No public policy relating to agriculture can be considered without stirring to action the National Grange, the American Farm Bureau Federation, and perhaps the National Council of Farm Coöperatives. And as for the field of labor, no one needs to be told how exceedingly active are the A. F. of L., the C.I.O., and the great railroad brotherhoods in all that relates to protective and regulative labor legislation and to the labor policies and actions of the executive and judicial arms of the government—a situation dramatized climactically in the spring of 1946, when for weeks John L. Lewis, head of the United Mine Workers of America (a branch of the A. F. of L.) had the national government by the throat and released it from this humiliating situation only after seeing a wasteful strike settled on terms agreeable to him and his supporters. Finally may be mentioned the P.A.C. (Political Action Committee), formed in 1944 as a unit within the C.I.O. expressly to promote the reëlection of President Roosevelt and of congressmen favorable to labor, as energetic in the campaign of that year as any political party could possibly have been, and (after suffering serious rebuffs in the congressional elections of 1946) poised again for an active rôle in 1948.[1]

Plenty of other illustrations could be cited; but even the list given is sufficient to bring out the significant fact that, in addition to contributing as it may to the force of public opinion, belonging to political parties, and participating in the processes of nomination and election, an exceedingly large share of the American electorate has avenues of influence and control over national and state governments through the medium of voluntary associations in almost no instances calling themselves political, yet prepared to employ political power to their utmost when considering it to their interest to do so. Needless to say, it is these organizations—or at any rate many of them—that are primarily responsible for most of the lobbying that goes on in Washington and the state capitals.

[1] During the 1944 campaign, it became necessary for the P.A.C. to sever its formal connection with the C.I.O., in order to evade restrictions of law upon campaign contributions.

The Nature and Uses of Political Parties

Essential features.

However influential it may be, no organization like those mentioned can claim to represent the country as a whole, or amass enough power to take over control of the government and run it. Associations able to do these things are likely to be, rather, what we know as political parties. And in saying this, we are not thinking of monopolistic instruments of tyranny calling themselves parties—Fascist, National Socialist, and the like—such as those existing under the dictatorial régimes with which Europe was recently cursed. We refer rather to parties in the truer sense as found in all democratic states. The term "political party," as thus employed, is not easy to define; but essentially it designates some portion of the electorate consciously bound together by at least traditional adherence to certain political principles, by at least some common attitudes toward questions of public policy, and unfailingly by a desire to gain control of the offices, by peaceful, constitutional methods, in order that a program conceived in the nation's, as well as the party's, interest may be carried into effect. A party may be large or small, national or sectional,[1] unified or discordant, highly organized or less so. But more important ones nearly always operate on a national scale, and commonly permeate all levels of government. Moreover, in democracies any number of parties may spring up and contend freely with one another; a main characteristic of democracy is, indeed, free party life.

Parties criticized and deplored

To be sure, the political party, like many another useful device, has been the object of a great deal of suspicion and criticism, in our own country as elsewhere. When, during the presidency of Washington, the people were unexpectedly found grouping themselves, under the leadership of Hamilton and Jefferson, respectively, in rival Federalist and Republican parties, thoughtful men deplored what was happening; and Washington himself felt it necessary, in his Farewell Address, to admonish that the "common and continual mischiefs of the Party are sufficient to make it the interest and the duty of a wise people to discourage and restrain it." The period from Madison's presidency to that of Jackson has been painted as a golden age of "good feeling" for the simple reason that (despite plenty of local and personal political strife) parties had for the time being largely disappeared. And after party rivalries again grew vigorous, and especially in the decades following the Civil War, critics and reformers aimed their shafts, not only at rings and bosses and spoils, but at parties themselves as being perhaps the basic

[1] For purposes of statutory regulation of party activities, it, however, becomes necessary to have some fairly definite standard for determining what associations are, and what ones are not, to be considered parties. To this end, the laws of a state usually fix as a criterion the polling of some stipulated percentage of the state's entire vote in a previous election, sometimes as low as two per cent, sometimes much higher. Apart from such standards, a party can, of course, be debarred by law from participating in elections, and in a number of states the Communist party has been so outlawed.

public evil of the time. Even today, one sometimes hears it charged that party names and platforms mean little, that principles receive mere lip-service, that policies are adopted or discarded mainly with a view to winning votes, that leadership is bankrupt, that indeed most parties are mere shams.

Some uses enumerated

Sordid as are many chapters in their history, parties, however, are both inevitable and necessary—inevitable because the voters of not even a city or a county (to say nothing of a country as a whole) can ever be expected to be of one mind upon political principles and policies, or to agree upon the persons who should be placed in the public offices; necessary, because—while so-called non-partisan elections have proved their worth in jurisdictions of limited area and for the choice of certain types of officials, such as judges—no one has been able to show how the democratic process could be carried on over a wide expanse like a state or nation except with the aid of party organization and activity. Thinking of the matter particularly in relation to our own country, parties serve a variety of useful purposes. (1) They help keep the people informed on public affairs; even though their propaganda be one-sided, they afford voters an opportunity to hear different sides and make up their minds. (2) In this way, parties stimulate opinion, and not only opinion but also action, since the thing that most often prompts the average voter to go to the polls at election time is party incentive. (3) Parties not only formulate policies and platforms, but select candidates for the public offices, thereby enabling voters holding the same general views to pool and concentrate their electoral power in a manner most likely to achieve results. (4) They stand, to some degree, as sureties for the satisfactory performance of official duties by persons elected under their sponsorship. (5) They (at all events those out of power) provide constant watchfulness over and criticism of the conduct of government, a criticism often merely captious, it is true, yet on the whole serving usefully to keep the "ins" on their mettle. (6) Still another point often made in their favor is that they introduce a harmonizing element in government, particularly in a system such as ours, based upon the principle of separation of powers. To be sure, they may tend rather to promote discord when, for example, the president is of one party and Congress dominated by a different one. But when, as most often happens, president and majorities in both branches of Congress—or, in the states, governor and majorities in both branches of the legislature—are of the same party, such harmony of political affiliation and viewpoint makes powerfully, as a rule, for expeditious and effective conduct of affairs. Still other uses of parties will occur to any one who thinks about the matter—for example, the fashion in which they bridge the cleavages and soften the frictions in our society, serving (to change the figure) as a sort of cement holding together people of divergent race, religion, culture, and occupation throughout the broad expanse of the country.

Two sets of political institutions

From the foregoing, it follows that any one desiring something more than merely a superficial knowledge of the American system of government must study two distinct yet mutually interdependent sets of political institutions. One may conveniently be described as the machinery of government; the other, as the party system. The first includes the formal organization or structure of our national, state, and local governments, with their executive, legislative, and judicial branches. These formal governmental institutions are outlined more or less fully in the national and state constitutions, in municipal charters, and in national and state statutes which amplify constitutional provisions. But a study restricted to documents like these would leave one quite uninformed about the actual workings of government in the United States. A main reason is that the formal institutions with which the documents deal frequently do not operate as one would be led to suppose, or indeed as originally intended; and as often as not the reason, in turn, why they do not do so is the rise and growth of political parties. Constitutions and statutes create machinery and confer powers; but flesh is put upon the dry bones and energy imparted to the mechanism largely by the instrumentalities and driving force of parties.

The Party Pattern in the United States

Factors influencing party affiliation

Many attempts have been made to explain why people divide on party lines in the manner they do, and even why they divide at all. There is a theory that men go in different directions politically because of innate dispositions or qualities, causing some to become conservatives and others liberals or radicals. But there is the difficulty that the same individual may be conservative on some matters and quite otherwise on others. In the case of the United States, an explanation has been found in the basic issue of centralized national government versus states' rights. Yet recent political history shows how easily the same party may, within a short period, be found on both sides of that question. The truth is that there is no single explanation. Why are some Americans today Republicans, some Democrats, and others something else? Some because their fathers and grandfathers were such, and they have grown up in the tradition; some because they live in a community or section where it is the normal and natural thing to belong to a certain party; some because they believe a given party more friendly to their race, or even creed; some because they think it expedient to go along politically with their employers; some because of deliberate choice grounded upon disinterested belief in a given set of political principles or devotion to a given leader or group of leaders.

The economic-sectional basis of American politics

Viewing the developing party pattern over the whole stretch of American history, however, the most competent students of party phenomena have been almost unanimous in finding the basic ground for party cleavage, not in psychology, nor in constitutional theories, nor in any of the

specific motivations just enumerated, but rather in interests and reactions of an economic and sectional nature. It was on this basis primarily that parties started in the early years of the Republic—the backbone of the Federalist party being the commercial, financial, and industrial elements of New England and the Middle States; that of the Jeffersonian Republican party, the agrarian interests (planters and farmers) of the South and rural North. Moreover, in a general way the pattern thus initiated projected itself down the course of time in the lineage of Federalists-Whigs-Republicans (Hamilton, Webster, Lincoln, McKinley, Theodore Roosevelt, Hoover) and, over against it, that of Jeffersonian Republicans-Democrats (Jefferson, Jackson, Cleveland, Wilson, Franklin D. Roosevelt)—the one line associated with high protective tariffs, centralized banking, currency based on gold, a large navy, taxes bearing lightly on wealth, strong national government devoting itself to the promotion of commercial, manufacturing, and business interests; the other line associated equally with states' rights, low tariffs, state banks, "free silver," anti-imperialism, graduated taxation of incomes.

The picture blurred in recent times

Even a hundred years ago, however, this broad characterization had only rough and approximate validity. No one party ever enlisted the undivided support of any entire economic interest or group or of any entire geographical section; too many other motivations for party alignment cut across economic and sectional lines and blurred the picture. From its beginnings, nearly a hundred years ago, the Republican party attracted heavy support in the rural and agricultural North; on the other hand, as newer industries arose, they sometimes, for varying reasons, were drawn into the Democratic orbit. And today the scene is confused indeed. Economic life has grown infinitely more complex; in capital invested, value of product, and numbers of people employed, agriculture has been displaced by industry and trade; the interests of agriculture, industry, and trade overlap and dovetail in novel ways; sections are no longer so sharply identified with either agriculture or industry—the latter, for example, having undergone notable development in the South itself, as well as, of course, in the once almost wholly agricultural Middle West. And all this has been reflected in the warping and twisting of the traditional party pattern into almost unrecognizable forms. For reasons associated with the aftermath of the Civil War, with the Negro problem, and with loyalty to tradition, the South remains a Democratic stronghold. But elsewhere new lines have been drawn, or at least old ones shattered or obliterated. Industry, grown huge, is divided against itself, with heavy representation in both parties; Democratic hostility to protective tariffs has softened into a program of "trade agreements," for which there is also plenty of Republican support; farmers are predominantly Republican, industrial laborers predominantly Democratic, but not so decisively as a generation ago; world developments over which we had no control cast the Democrats in the strange rôle of

the party of nationalism, strong armies and navies, international intervention, and war, leaving the Republicans—at least for the time being—to the less glorious and less familiar rôle of advocating caution, restraint, and isolationism.

Today both of the leading parties are notoriously conglomerate and disunited. Even yet, they are not properly to be written off as merely two bottles carefully labeled but empty, as James Bryce asserted of the parties of thirty-five years ago. By and large, they still stand for some distinctive things—in traditions, attitudes, principles, and policies. Cutting through all strata of society, penetrating all geographical sections, enlisting in some degree all economic interests, they, however, must increasingly be all things to all men in order to hold, or hope to gain, power. Some significance attaches to polls during the presidential campaigns of 1940 and 1944 showing the Democratic and Republican candidates as having, respectively, the support of (1) a little over one-third and almost three-quarters of the voters in upper income groups, (2) a little over and a little under half of those in middle groups, and (3) seven-tenths and three-tenths of those in lower groups. This, however, only emphasizes the composite nature of both parties and leaves the way wide open, not only for sharp differences of view between income groups within the same party, but for the divergencies and conflicts widely existing among geographical, occupational, or other elements within income groups taken individually.[1]

The bi-party system—minor parties

Despite all that has happened, the mass of American voters have consistently been able to give their support to one or the other of two major parties, with the result that we have always had a bi-party system, as indeed has been true of English-speaking peoples generally.[2] To be sure, from the first quarter of the nineteenth century onwards, dissatisfied elements have been prone to launch independent, or "third-party," movements. There were the Anti-Masons of 1826 and after; the Liberty party, appearing about 1840; the Free Soil party, active in the election of 1848; the Native-American, or "Know-Nothing," party which flourished in the fifties; the Republican party itself, which began as a third party in 1854-56; the Prohibition party, dating from 1872; the Greenback party of the seventies; the People's, or "Populist," party of the nineties; the Socialist party, starting about 1897; the National Progressive party of 1912; the Farmer-Labor and Communist parties formed about 1920;[3] the Progressive party, launched by the elder Senator LaFollette, which made an impressive showing in 1924; the Progressive party which existed

[1] The economic and sectional aspects of American parties are dealt with illuminatingly in the books of A. N. Holcombe listed on p. 145 below.

[2] After the rise of the Labor party early in the present century, Great Britain had three major parties, and in a sense this is still true, although the gradual withering of the Liberal party gives promise of a full restoration of the bi-party system eventually.

[3] The Communist party, superseded in 1944 by a "Communist Political Association," was reconstituted in 1945.

in Wisconsin from 1934 to 1945; more recently, the American Labor party and an offshoot, the Liberal party, local to New York State and largely New York City. Some of these parties momentarily attained sufficient strength, especially in pivotal states, to affect the results of even a presidential election,[1] and one—the Republican—grew into a major party. Since 1924, however, all minor parties combined have polled no more than from one-half to two and one-half per cent of the total popular vote in presidential elections; and as a rule such parties have found their importance mainly in revealing and crystallizing dissenting opinion (usually on economic and social matters), and as threats to the rather evenly balanced major parties, impelling them, whether they liked it or not, to bid for support by taking up issues and assuming positions calculated to find favor with elements of the population chiefly appealed to by a given third-party movement. Minor parties are almost invariably more or less to the left of, *i.e.*, more radical than, the old-line organizations; and frequently the internal heterogeneity and conflict displayed by the latter are more than matched by the discord plaguing minor groups—which supplies part of the reason, along with the concessions made by the major parties, why so few third parties achieve much importance, or even survive.

Party membership

Mr. A may avow himself, or be understood to be, a Democrat, Mr. B a Republican, Mr. C a Socialist; and this is taken to mean that they are "members" of their respective parties. Party membership in this country is, however, for most people, a rather vague and elusive matter. A person "belonging" to almost any other sort of association—a church, a lodge, a professional society—expects to go through some definite procedure of "joining," to declare formal allegiance to some creed or code or set of principles, to make contributions or even pay "dues," to abide by a code of regulations, perchance to serve on committees, hold offices, and otherwise participate in the organization's work. Minor political parties, being recruited usually from people having a missionary zeal for some program or cause, also tend to definite organization on such lines; at all events, they (the Communists, for example) usually have a regularly enrolled membership subscribing to certain purposes and doctrines and pledged to contribute to the party fund. Of the major parties, however, nothing

[1] The political history of New York affords several examples. In 1844, the Liberty party's vote in that state was sufficient to throw the state's electoral vote to James K. Polk, the Democratic candidate, and so to insure his election over the Whig candidate, Henry Clay; in 1848, the Free Soil party drew away so many votes from Cass, the Democratic nominee, that the Whig candidate, General Taylor, carried the state; in 1884, the Republicans held the Prohibitionists responsible for the loss of the state and the consequent election of Grover Cleveland; and in both 1940 and 1944 the American Labor party, supporting the Democratic candidate, President Roosevelt, gave him the margin of victory in the state. In 1912, the National Progressive party, a Republican seceding element supporting Theodore Roosevelt, and in 1924 the Progressive party supporting Senator LaFollette, sharply split the bulk of the popular vote throughout the country (with 35 and 17.1 per cent polled, respectively), but without deflecting the eventual result from what it would certainly have been in 1924, and probably in 1912, in any case.

of the kind can be asserted. They have no procedure or ceremony of "joining" (except as one may join a political club or other such auxiliary); they have no general roll of members, but only such lists as result, in less than half of the states, from pre-primary party enrollments;[1] they get no signatures to their programs of policy; they collect no dues (though efforts have sometimes been made to institute a system of regular contributions); they enforce no rules; they have no means of disciplining a "member" or expelling him—except as he may be disciplined by failure of support if he chooses to run for office. The picture that one gets is that of a series of concentric circles. At the center is a core of party officers, organizers, voluntary and paid workers, public office-holders, office-seekers, partisan newspaper editors, persons receiving or hoping for favors at the party's hands—in other words, people who not only are Democrats or Republicans, but "work at it." Outside of this is a far wider circle containing people who, without being active full-time participants, nevertheless are regular adherents, in that they consistently go along with the party, register as belonging to it, vote for its candidates, join clubs supporting it, and give it the weight of whatever influence and prestige they may have in their communities. Still farther out is a circle of "in and out-ers"—people who commonly go along, yet often disagree, criticize, vote for opposition candidates, and otherwise prove undependable. And finally there is a wide periphery of voters who, even though at times they may prove active supporters, do not accept the party name at all•and are clearly to be classed as independents.[2] In the election of 1944, Franklin D. Roosevelt polled 25,602,646 popular votes and Thomas E. Dewey 22,017,592. But this does not mean that the two parties at that time had those respective numbers of *members*. It means only that the given numbers of votes were amassed *from all sources*, numerous Democrats voting for Dewey, numerous Republicans for Roosevelt, and perhaps still greater numbers of independents for one or the other as they chose. One is a Democrat or a Republican if he says

[1] Of course, more or less accurate local lists are likely to be compiled by local committees or managers for local use. But these are nowhere assembled in general lists for even an entire state, and the closest approach to dependable state lists are those resulting from the pre-primary enrollments mentioned. Such enrollments, however, take place, as indicated, in only a minority of the states, *i.e.*, in those which not only have the closed-primary system (see p. 149 below), but also employ this particular method of trying to insure that only Republicans will vote in Republican primaries and Democrats in Democratic primaries. In other closed-primary states, voters calling for Republican or Democratic ballots may be challenged to convince the election officials that they commonly support the candidates of the given party. But of course this results in no actual lists.

[2] Independence in politics first challenged attention on a considerable scale in the later nineteenth century, when, in revolt against the evils encouraged or condoned by the parties of their day, many men of lofty civic ideals not only cut loose from party affiliations, but preached the doctrine that all good citizens should stand ready to uphold principle and support good candidates without regard to party labels. And although most people still have rather fixed, if not inflexible, party affiliations, the number of genuine independents is probably larger in our time than ever before, to say nothing of the even greater number who, although normally identified with a given party, have no hesitation about "scratching" tickets and voting from time to time for candidates put up by the opposition.

he is (for example, when filling out a blank registering as a voter, or when challenged at a closed primary), or at any rate if he consistently supports the one party or the other; and that is all there is to it. Furthermore, he may change his mind and allegiance as often as he wishes. How many "members" either party has is anybody's guess—and still would be even if there were more dependable criteria for determining who is to be regarded as a "member" and who is not.[1]

Parties and the Different Levels of Government

The legal status of parties

Parties have attained their present significant position not only without constitutional recognition, but without ever becoming parts of the governmental system in any proper sense. In the national constitution, not a word is said about them, and nearly all state constitutions are equally silent. For a hundred years, furthermore, their activities were but little regulated by the states; and although long an arena of party combat, Congress passed its first law touching them in any important manner not much over a generation ago. Notwithstanding a good deal of federal, and especially state, law on the subject today, investing them legally with a public status, parties are still basically private, largely autonomous and self-governing, organizations.[2]

Permeation of all levels of government

Aside from occasional "third" parties operating on a state, or even a local, basis, *e.g.*, the Farmer-Labor party in Minnesota, the Progressive party of 1934-46 in Wisconsin, the American Labor party in New York State, and a City Fusion party in New York City, parties in this country are nation-wide in name, membership, and scope. They also are nationally organized, and their national programs, candidates, and activities take priority in public attention. A Democrat or Republican thinks of himself primarily as identified with a national party. Nevertheless, viewed structurally, the basic constituent elements of a major party are *state* parties, each with ramifications to counties, cities, towns, villages, wards, and voting precincts. In other words, state parties are federated over the country *upwards* into national parties, and within their respective areas are subdivided *downwards* into the localities, resulting in the characteristic permeation of our parties through all levels of public organization.

The intermingling of national, state, and local politics

This unity of party, running up and down through all layers of government, is an important factor in promoting coöperation of federal, state, and local authorities and in binding the nation together. It nevertheless results in the projection of national politics into state and local affairs in ways that to many people seem wholly undesirable; and certainly it is not always easy to see any logical connection between the conduct of state, county, and municipal government and Republican and Demo-

[1] On the general subject, see C. A. Berdahl, "Party Membership in the United States," *Amer. Polit. Sci. Rev.*, XXXVI, 16-50, 241-262 (Feb. and Apr., 1942).

[2] J. R. Starr, "The Legal Status of American Political Parties," *ibid.*, XXXIV, 439-455, 685-699 (June and Aug., 1940).

cratic policies relating to national affairs. Explanations for the permeation and overshadowing of state by national politics are, however, not difficult to discover. To begin with, the manifest priority of the national government, the far-reaching significance of national party issues, the exalted position of the presidency, the dramatic and often spectacular methods employed in national campaigns, the powerful attraction of occasional national leaders, and the varied and fervent appeals to the electorate combine to arouse a keener interest and to stimulate a larger participation in national than in state and local elections. To the national party with which the citizen is identified in such campaigns, there springs up a deep attachment, an abiding loyalty, perchance a zealous devotion, against which state or local parties, when launched on independent lines, have always found it difficult or impossible long to prevail. In the second place, from the viewpoint of national party leaders, the habitual and active participation of national party organizations in state and local elections is a measure of preparedness for the great presidential battles occurring every four years, and also for the hardly less important congressional campaigns falling both in presidential years and midway between them. State and local officers also are often chosen simultaneously with national officers, as well as in the intervals between national elections; and national party activity in connection with the nomination and election of state and local officers serves to keep the party in its nation-wide aspect more alert and active, recruited more nearly up to its maximum strength, the different parts better articulated and running more smoothly, than if it were called to battle only once in two or four years. Moreover, a steadily increasing proportion of people in most states now live in cities; and a party's chances of winning the great national contests will be materially enhanced if the national organization can maintain from year to year, in every important city, well-organized units led by veterans trained in local political skirmishes.

Devices for segregating state and local political activities

Many people, however, remain convinced that the injection of national party cleavages and activities into state and local politics has been productive of more evil than good, and that, in particular, it has been largely to blame for the existence in populous communities of unscrupulous and corrupt political machines operating comfortably behind the protective screen of a Democratic or Republican label. As one method of breaking the undesirable connection, many states have made provision for holding state and local elections, so far as practicable, in intervals between national elections, with the idea that this will enable state or local issues to be considered on their own merits, even though candidates continue to run and be elected as Republicans, Democrats, or Socialists. Resorting to still more drastic measures, several states have adopted for state, or at least authorized for local, elections a non-partisan form of ballot, *i.e.*, a ballot bearing no indication of the party affiliations of candidates; and many county and city officers, judges of state or local

courts, together with some state executive officials and the members of the legislature in Minnesota and Nebraska, are now nominated and elected in this way. Wherever the non-partisan ballot has been adopted, it has been generally assumed by its advocates that the influence of national party organizations will be entirely eliminated, or at any rate reduced to a minimum. In many instances, this has turned out to be the result, especially in relatively small communities. In states or large cities having highly organized national party machines operating the year around, however, the outcome is likely to be, and often has been, quite different. Each political organization is almost certain to have favored representatives on the non-partisan ballot, and the word is passed around—sometimes publicly, at other times in whispers—that such and such men are the "organization" candidates, with the result of the persons named receiving partisan support almost equally with candidates publicly bearing the party label. Too great hope of regenerating state and municipal politics must not, therefore, be staked upon the mere removal of national party labels from the ballot.

State and Local Party Organization

Although overshadowed by the national party organizations superimposed upon them, the state organizations are, in a real sense, primary and basic. Formed independently in the several states, they are regulated (in so far as regulated at all by anything except their own rules) entirely by state laws. The national organizations must accept and work with them as they are, with no authority to dictate to them, even when they prove rebellious. Those organizations have also to abide by whatever state regulations may have bearing on their own activities within any particular state. In spite of all this, however, a party's national organization may in reality hold the whip-hand in that, being usually far more able to raise campaign funds, and having wider access to offices and favors, it is in a position to furnish or withhold the sinews without which the efforts of state organizations would be likely to prove weak and unavailing.

The state convention

In earlier days, the highest party authority in a state was a state convention elected, in counties or other districts, by the party voters or by local conventions; and this body nominated candidates for state offices, adopted platforms, and in general regulated the affairs of the party. In many states, however, the rise of the direct primary [1] as a device for nominating candidates has robbed the convention of one of its main reasons for existence; and even in other states the increased regulation of party activities by statute has contributed to the decline of a once vigorous institution; indeed, in a good many states it has been abolished altogether, although likely to be replaced with some new sort of party council or caucus, particularly for the preparation of the party platform. Here and there, however, the state convention retains considerable

[1] See pp. 149-150 below.

significance; and one will recall how the Supreme Court not so long ago recognized the right of the Democratic convention in Texas, as the supreme governing body of the party, to exclude Negroes from Democratic primaries.[1] In general, however, the states now have other more important party machinery.

The state central committee

In every state, the two major parties, and in some states minor parties as well, maintain a central committee which, under a chairman, serves as the true head of the state party organization. In size, composition, and powers, these central committees vary greatly, as also do the subordinate committees farther down the scale. Such matters are now regulated by law in most states; but in the absence of law, party rules govern. Members of the state central committee commonly represent either counties or legislative or congressional districts, and are either elected directly by the voters of the respective areas or chosen by local conventions—with women in nearly all states sharing equally with men. When the convention system held undisputed sway, the state central committee, or a group within it, often exerted decisive influence upon the action of the state convention in selecting candidates; but in states that have adopted the direct primary, the committee's influence upon nominations has declined, or at all events has become much less conspicuous and decisive. Nowadays, the committee's energies are concentrated upon promoting election of party candidates (national and state) and maintaining efficient party organization throughout the state between elections. In some instances, it chooses the party delegates to the national convention.

Subordinate committees

Subordinate to the state committee, and operating in a more restricted sphere, are often similarly constituted committees in congressional, legislative, or senatorial districts. But in any event, of special importance are the county committees, with their chairmen—found in practically every county, and city central committees, found in almost all cities, and especially influential in the largest municipalities. Nearly every city ward and voting precinct also has its dual or triple set of party committees—at all events, its ward leader and precinct leader or captain;[2] and the same is true of almost every village and township. Members of county and other local committees are usually elected directly by the party voters in the subdivision concerned. Originally, all such committees consisted exclusively of male voters; but with the adoption of woman suffrage, many committees have expanded their membership so as to admit women; while in other instances the hierarchy of men's committees is paralleled with a series of women's committees.[3]

[1] See p. 118, note 1, above.

[2] S. Forthal, *Cogwheels of Democracy; A Study of the Precinct Captain* (New York, 1946).

[3] It should be understood that the party machinery here described is quite a different thing from the political "machines" (like Tammany in New York county, the Kelly organization in Chicago, the now almost defunct Pendergast machine in

Committee activities

With a view to bringing about the nomination of an "organization slate," or ticket of candidates favored by those in control of a given committee or series of committees, committee activities sometimes begin long in advance of the primaries or conventions in which candidates are nominated. The greater part of committee work, however, has to do directly or indirectly with the conduct of the campaign that starts shortly after nominations are made. State and local committees are particularly active in seeing that new residents and first-voters are properly registered; in assisting aliens to qualify by obtaining naturalization papers; in instructing voters as to registration formalities, the location of polling places, and the proper way to mark a ballot or operate a voting-machine; in raising campaign funds in the local field; in making canvasses of voters before election day in order to ascertain the drift of public sentiment; in employing speakers and distributing campaign literature; in appointing party watchers to serve at the polls, and often also virtually appointing precinct election officials.

Party Organization on the National Level[1]

The national convention

As has been observed, the rise and spread of the direct primary, together with other changes, has left the state party convention with considerably diminished importance. On the national level, however, there have been no corresponding developments, and the supreme organ of the national party is very definitely the national convention. When studying presently the subject of presidential nominations and elections,[2] we shall have to look somewhat closely into the nature of the national convention, and hence it must suffice here to observe merely that the convention of a major party is a large representative body, composed of delegates chosen in various ways, convoked in every presidential election year, and with authority not only to nominate candidates and adopt platforms for particular campaigns, but to control the party's fundamental organization and rules, or "constitution."

The national committee:

The convention meets only every four years and naturally must have an arm or agency to carry on, more or less in its name, during the long intervals. The result is a standing executive committee known as the national committee; and just as the convention itself is a federally constructed body—being composed of delegations representing the party in the respective states, territories, dependencies, and District of Columbia—

1. Membership

so the national committee is also federally constituted, in that all such units are represented equally in it—formerly by one member each, but

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Kansas City, and the Hague machine in Jersey City), of which we often hear. These extra-legal machines and bosses may work from inside and through the regular agencies enumerated, or may be largely independent of them. The dominant figure in the politics of a state may be a senator, a governor, or indeed a man occupying no public position at all.

[1] The following comment applies to the two major parties. Minor parties, even when national in scope, show some variations.

[2] See Chap. XI below.

now by two (a man and a woman). Prior to 1912, members of both Republican and Democratic national committees were "nominated" by the several delegations in the national convention and formally "elected" by the entire convention. Subsequently, the wide adoption of state direct primary laws led to some modification of this practice, although in theory the national convention continues to elect. Where state laws require committeemen to be chosen in a party primary or in some other specified manner (as by a state convention), the persons so designated are regarded as "nominated" to the national convention, and the convention proceeds to elect them to the national committee as a matter of form.

2. Functions

The principal functions of the national committee are to decide, several months in advance, upon the time and place of holding the national convention, to issue the formal call for the election of delegates, to appoint local committees to make preliminary arrangements for the convention, to make up the temporary roll, and, after the convention adjourns, to select a national chairman (in consultation with the presidential candidate, who really makes the choice) and assist him in the conduct of the campaign. Between presidential elections, the committee usually falls into a state of suspended animation until the approach of the time for the next national convention, although in recent years permanent headquarters, in charge of a limited staff, and with a publicity bureau, have been maintained continuously between presidential elections.

The national chairman and other officers

At the head of the national committee, and serving as commander-in-chief of the party's forces throughout the campaign, is the national chairman; and upon him the committee devolves full authority and responsibility for managing the campaign, although naturally assisting in such ways as it can in carrying out the plans and policies which he (in conjunction with the presidential candidate) formulates. The principal auxiliary officials include one or more vice-chairmen (elected by the national committee or appointed by its chairman), a secretary and an assistant secretary, and a treasurer. An executive committee is usually named by the national chairman, the members of which serve as his staff officers and advisers during the campaign; and the work carried on under the national committee's auspices is commonly handled by a dozen or more bureaus, departments, or divisions, including a speakers' bureau, a publicity department, a purchasing department, an advisory committee, a congressional committee, a foreign-language division, a research division, a commercial travelers' bureau, a labor division, a farm division, a club division, and colored women's, colored men's, and colored speakers' bureaus.

Congressional and senatorial campaign committees

Comparatively inconspicuous in presidential campaigns, but prominently active in connection with congressional and senatorial elections occurring between presidential elections, are the congressional and senatorial committees which assist in the election of members of Congress

bearing their respective party labels. The Republican congressional committee is composed of one congressman from each state having a Republican member in the House of Representatives, nominated by the state delegation and formally elected by a caucus of the Republican representatives. The Democratic congressional committee consists of one member from each state. He or she is usually a member of the House of Representatives, and if so, is selected by the delegation from that state. But if the state is without a Democratic representative, the committee chairman may appoint some one, usually an ex-member, to represent it. Since the adoption of popular election of senators, similar committees—usually of six or seven members—have been instituted by both parties to assist in the election of party candidates for the Senate; and although these committees are reorganized every two years, the members are generally retained as long as they remain in Congress and are willing to serve, unless they become candidates for reëlection, in which case they retire from the committee during that campaign.

Upon the opening of a presidential contest, these congressional and senatorial committees place all of their resources at the disposal of the national committee and become its close allies, foregoing much of their own initiative, even in what concerns the election of senators and representatives. After all, in "presidential years" practically all elections follow the fortunes of the contest for the presidency. But in "off years" the committees are much more conspicuous; they then have entire charge of the congressional campaign, relying, of course, upon the coöperation of state and local committees. They distribute political literature, maintain speakers' bureaus, and raise and disburse money in considerable amounts, giving special attention to doubtful states or districts; and often they intervene to smooth out local factional differences. In intervals between elections, too, they keep more or less in touch with the central and district committees in the different states, encouraging vigorous activity, promoting morale, and in every way endeavoring to advance the party's interests.

Party Finances—Corrupt Practices Legislation

Forceful and efficient conduct of any political campaign in which a large number of voters must be appealed to—especially a presidential or a state campaign, or even one restricted to a single large city—necessitates the collection and disbursement of large sums of money; indeed, the first, and often the principal, task of many of the party committees mentioned above is to raise money, *i.e.*, "campaign funds." As a rule, the duty devolves primarily upon the treasurer of the national or other committee most directly concerned, or is assigned to a director of finance and a committee on ways and means; and such officials leave no stone unturned in their search for "the sinews of war." Appeals go not only to people of wealth, but to any and all party members considered likely to respond.

Expenditures in recent presidential campaigns

No official records of expenditures in connection with national campaigns were published until 1908. Since that date, however, there has been something more substantial to rely upon than mere estimate or conjecture; for full publicity was voluntarily given to both contributions and expenditures in 1908, and since 1910 such publicity has been required by national law. There is, however, the difficulty that the regular channel for expenditure of money on a national campaign, *i.e.*, the national committee of the party, is by no means the only one through which money contributes, directly or indirectly, to the support of such campaigns; state and local committees also spend money which at least indirectly assists the national effort, and, especially of late, all sorts of voluntary, unofficial committees and organizations raise and spend sometimes even larger sums. Taking, however, what was reported officially to have been paid out, the Hoover-Smith campaign of 1928 saw more money raised and expended than on any previous occasion—more than $10,000,000 in the case of the Republicans and nearly $7,500,000 in that of their leading opponents. Four years later, the country was in the depths of depression, and the amounts fell to $2,900,052 and $2,245,975, respectively. In 1936, however, outlays again reached an all-time high, the Republicans spending $14,198,202 and the Democrats, $9,228,406. In 1940 (the second Hatch Act [1]—passed as the campaign was getting under way—having fixed $3,000,000 as the maximum that any party committee might spend in any calendar year), the Democratic and Republican national committees paid out only $2,783,654 and $3,451,310 (including old bills unpaid), respectively—but with *total* expenditures (national and state committees, voluntary groups, and individuals, though without figures from county and other local committees) mounting to $6,095,357 and $14,941,142, respectively. Finally, in 1944, under the same restrictions on the national committees, the over-all totals were $7,441,800 and $13,195,377, respectively.[2]

Why expenditures are so large

Uninformed concerning the inescapable cost of conducting a national campaign—to say nothing of more than two-score state campaigns and a stupendous number of municipal and other local campaigns—many people deplore outlays on the present staggering scale as presumptive evidence of widespread attempts to debauch the electorate and as fraught with sinister possibilities for our democratic institutions. And rival party organizations, or candidates, with more restricted financial resources commonly take advantage of this popular apprehension and loudly denounce the "slush funds" of their opponents. In a country as large, and with an electorate as huge, as ours, however, campaigning on a national

[1] See p. 144 below.

[2] For full analysis of 1944 campaign finances, see L. Overacker, "Presidential Campaign Funds, 1944," *Amer. Polit. Sci. Rev.*, XXXIX, 899-925 (Oct., 1945). Articles by Miss Overacker in earlier issues of this journal (Oct., 1933; June, 1937; Aug., 1941) deal similarly with expenditures in 1932, 1936, and 1940, as does also her book, *Presidential Campaign Funds* (Boston, 1946).

scale cannot be other than "big business," and any fair-minded person looking into the realities of the situation will discover that it takes only one or two items of a perfectly legitimate nature, *e.g.*, radio-broadcasting, to account for an outlay of a million dollars or more. When all such objects of expenditure—radio, stationery, printing, postage, clerical aid, travel, rentals, newspaper and billboard advertising—are duly listed and footed up, one is prepared to learn that, in spite of searching investigations by Senate committees at the conclusion of all presidential campaigns in the last quarter-century, almost no evidence has come to light justifying suspicion of extensive corruption. The record of electoral results also indicates that elections are not won with money alone.

The sources of campaign funds

Whence come the funds with which to meet outlays on such a scale? Speaking broadly, from anybody who can be induced to give. Party officials and candidates and party office-holders are, of course, expected to dig into their pockets. In later years, widely heralded efforts have been made to democratize party funds by securing contributions of a dollar or similar small amount per person from the rank and file, though the plan has never met with great success. Far and away the largest proportion of the money raised comes from people who have, or think they have, something at stake—usually, of course, some business or other economic interest—in the success (or defeat) of a given party. Corporations are forbidden by law to contribute; but this does not stand in the way of gifts by officers, directors, stockholders, and others, acting as individuals. As indicated below, since 1943 labor unions, as such, likewise may not contribute; though this places no restraint upon their officers and members individually.

Laws regulating party finances: corrupt practices acts

Manifestly, the raising and spending of money for winning elections opens possibilities of abuse; and both nation and states now have laws, known as "corrupt practices acts," regulating campaign contributions and outlays; such laws, indeed, have been a principal means by which parties and their activities have been brought within the orbit of state, and to a certain extent federal, statutory control.[1] The corrupt practices legislation of forty-eight states is too diverse to be described in detail here; although it may be said that the principal things provided for are (1) restriction of sources and amounts of contributions, (2) limitation of expenditures in both primaries and elections, (3) prohibition of bribery, treating, intimidation or impersonation of voters, stuffing ballot-boxes, tampering with voting-machines, and other corrupt practices, and (4) publicity for contributions, or expenditures, or both.

Regulations imposed by Congress, and applicable, of course, only to campaigns and elections involving the choice of president, vice-president, senators, and representatives, may be summarized under four heads.

[1] The corrupt practices legislation dealt with in the remainder of this chapter might appropriately be treated in the following chapter on nominations and elections, but is included here for the sake of unity in covering the general subject of money in politics.

(1) *Limitations on the raising of money.* Under federal civil-service law, persons on the federal payroll may not be solicited for contributions for political purposes by any officer or employee of the government. An act of 1907 forbids any national bank or other corporation organized under national law to contribute to any campaign fund whatsoever, and also makes it unlawful for any corporation (organized under state law) to contribute to such a fund in connection with the election of president, vice-president, senators, or representatives; and the Smith-Connally War Labor Disputes Act of 1943 irrelevantly extended these restrictions (for the duration of the war) to labor unions.[1] Under the first Hatch Act (described below), no contributions from relief workers are to be received. And under the second Hatch Act, no individual or association may contribute more than $5,000 in any calendar year to the campaign of any candidate for a federal office. (2) *Restrictions on amounts that may be spent.* The Federal Corrupt Practices Act of 1925 limits the expenditures of a candidate for the Senate to $10,000 and of a candidate for the House to $2,500, unless a lower maximum is fixed by law of the candidate's state, in which case that law is to govern. A candidate has a right, however, to the benefit of an alternative rule under which he may spend up to three cents per vote cast for all candidates for the given office in the last preceding general election, with a maximum of $25,000 for a senatorial candidate and $5,000 for a candidate for the House. In line with the Supreme Court's implication in the Newberry decision of 1921 that Congress had power to regulate elections only, and not nominating procedures,[2] the act specifically exempts primaries from its provisions—which, of course, leaves a big loophole. One other relevant restriction, found in the Hatch Act of 1940 (described below) is that no "political committee" operating nationally may expend more than $3,000,000 in any calendar year. (3) *Limitations on the purposes for which money may be spent.* State laws on this subject are usually quite ample, but federal restriction does not extend much beyond prohibition of the more obvious types of corrupt practice; indeed, in limiting the amount of expenditure as mentioned above, the law specifically exempts outlays of candidates on travel, subsistence, stationery, postage, circulars, telegraph and telephone service, and for "personal" items, thereby failing (at least under the last-mentioned category) to close another sizeable loophole. (4) *Requirement of publicity.* This takes two main forms. First, every candidate for the Senate or House is required to file with the secretary of the Senate or the clerk of the House, as the case may be, a full report of all contributions received in support of his candidacy

[1] At the date of writing (November, 1946), this act, with the "contributions" clause contained, was still in effect. Criticism stirred by a coal-miners' strike was, however, making repeal or drastic revision of it fairly probable—even before the time for the measure to expire by its own terms (six months after official proclamation of the end of hostilities in World War II).

[2] An implication completely reversed in 1941 in the case of United States *v* Classic (see p. 118 above).

and an itemized statement of expenditures. Second, all party committees (and likewise all other committees, organizations, and associations which receive donations or spend money for political purposes in two or more states) must make full periodic reports, under oath, of their financial operations. The difficulty with these requirements is that they have never been very adequately enforced; the reports of many organizations are very casual and unsystematic, and even when otherwise, little actual publicity is likely to be given them.

The (Hatch) Political Activity Acts of 1939-40

With a view, among other things, to bolstering and extending the earlier and in general not too effective federal corrupt practices laws, Congress in 1939 and 1940 passed the two Hatch Acts already mentioned.[1] Under terms of the first—designed primarily for a period when large numbers of people were on relief—(1) solicitation or acceptance of political contributions from relief workers is prohibited; (2) dispensing or withholding relief funds as a means of coercing voters is banned; and (3) all persons on the federal payroll in whatsoever capacity are protected against intimidation or coercion in connection with voting at any election. The second measure (1) extended protection against partisan coercion and assessments to all officers of state and local governments receiving pay in any degree from federal funds, and (2) sought further to discourage extravagant use of money in national elections, principally by restricting the lawful receipts of any political committee operating in more than one state, and likewise the expenditures of any such committee, as indicated above, to $3,000,000 in any calendar year, and further by restricting the contributions of any individual for use in a campaign for the nomination or election of federal officers to $5,000 a year.

Their ineffectiveness

At its first test (in the elections of 1940), however, the portion of the law relating to contributions and expenditures proved so full of loopholes, arising from vague phraseology and specified exceptions, that its practical effect was almost negligible. In the case of Republicans and Democrats alike, organizations set up for the occasion and acting independently of the regular national committees, collected and expended sums which, as we have seen, pushed the total outlay of each party far beyond $3,000,000; and persons who had contributed or loaned $5,000 to a national committee made similar contributions to one or more state committees, which then used the funds for expenses previously assumed by the national committee. The same thing happened in 1944; and the entire experience indicated that if the laudable objects sought in the new legislation were ever to be attained, laws would have to be enacted that could not so easily be evaded.

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CHAPTER X

NOMINATIONS AND ELECTIONS

Political parties are only a means to an end; and the end is to furnish the voters organized and legalized methods of (1) selecting candidates and passing judgment on proposed policies, and (2) choosing from among the candidates those favored for the public offices and for carrying approved policies into effect. This is, of course, chiefly where the stored-up power of the electorate is brought to bear directly in controlling the conduct of government. The number of elective public officers of all kinds in the United States is estimated at above 800,000—somewhat over a thousand (principally members of Congress and presidential electors) operating on the national level, at least ten thousand on the state level, and the huge remainder in the humbler ranges of county, city, town, village, and district organizations. The number that any individual citizen is expected to help choose may run anywhere from fifty to a hundred.

How nominations and elections are regulated

Just as party activities are left to be regulated almost entirely by the states, so both nomination and election procedures are basically under state control. State and local elections are indeed thus controlled completely; and even the choice of presidential electors and the nomination and election of members of Congress are governed in nearly all respects by the states (with the regular state machinery employed)—as also, in many states, the methods of selecting delegates to national nominating conventions and members of national party committees. As a result, all states have collections of election laws making up rather sizeable volumes, which few people ever have the courage to study. And the intelligence with which these election laws are framed and enforced is a matter of vital importance to the workings of our democracy.

There is also, however, some federal regulation of elections. The freedom which the states otherwise have in controlling the suffrage on uniform lines for all elections is restricted by the Fifteenth and Nineteenth Amendments. Congress has power to make regulations and alter state regulations concerning the times and manner of choosing members of that body;[1] and it has ordained, not only that senators and representatives shall be chosen on the Tuesday after the first Monday in November of every even-numbered year[2] and presidential electors every fourth year), but also that representatives shall be chosen by secret ballot

[1] Art. I, § 4, cl. 1.

[2] For the exceptional case of Maine, see p. 185, note 3, below.

(voting machines are construed to be tantamount to the same thing), and by districts except in the case of congressmen-at-large.[1] As we have seen, Congress has also legislated against corrupt practices, and made other practices illegal, in elections in which federal officials are chosen. The general principle emerging is that the states have full control over federal and state elections alike except in so far as federal constitutional or statutory limitations are imposed; and it is significant that even the stupendous complications raised by the problem of soldier voting during the recent war resulted in no real expansion of federal control over presidential and congressional elections—much less anything approaching a single, uniform federal ballot—but, on the contrary, in an armed services vote act of 1944 assuming and emphasizing at every point the authority of the states over the election process.[2] There is the further important point too, that, as we have seen, whereas formerly nominations, even by direct primary, were not considered "elections," and hence were regarded as beyond the power of Congress to regulate, a Supreme Court decision of 1941 construed them to be a feature or aspect of the electoral process, and accordingly subject, after all, to any control that Congress may see fit to impose,[3] even though the power has not yet actually been exercised.

The Nomination of Candidates

Importance of the nominating process

In any outline of an electoral system, the method of designating candidates is the first phase or stage calling for attention. To be sure, the making of nominations is, in a sense, only a preliminary incident in the realization of a political party's ultimate objective, *i.e.*, winning control of the government. It is, nevertheless, of prime importance; because whether we have honest and efficient elected officials naturally depends upon the character and qualifications of the persons who receive nominations. Particularly true is this in not a few of our states where nomination by one party is usually equivalent to election, *e.g.*, in such one-party states as Vermont and most of the Southern states; also in such cities as Boston and Philadelphia.

Nominating methods

The earliest regular device for choosing candidates for principal state offices, and also for Congress, was the legislative caucus, each party delegation in the state legislature canvassing the matter in conference when an election approached and deciding upon a slate of candidates to

[1] See p. 182, note 3, below.

[2] 58 *U. S. Stat. at Large*, 136. This measure, to be sure, provided for a "federal short ballot" which might be used in voting for president, vice-president, and members of Congress, but only in cases where state ballots were not available, and only when the voter's state had indicated its willingness to receive and count such ballots. The number of "federal" ballots cast in 1944 was only 109,479. In 1946, Congress passed an act abandoning the use of federal ballots, urging all states to enact any legislation needed for enabling persons in the armed forces or the merchant marine to vote when absent from the state, and pledging federal assistance in the form of printed materials and free use of the mails. Public Law 348—79th Cong.

[3] See p. 118 above.

be "recommended" to the voters. Already, however, there had arisen a caucus of different nature—a more or less informal, sometimes secret, meeting of party leaders for selection of candidates for local offices in townships and cities. Frequently, too, these gatherings designated some of their number to confer with representatives of similar caucuses in the choice of candidates for county offices or for offices in larger areas; and eventually it became the customary thing for delegates to be chosen in local caucuses, in accordance with some definite plan of representation, to attend a formal county nominating convention. The next step was the supplanting of the legislative caucus by a state-wide convention for nominating to state offices and to Congress, and, in the national field, by a national convention to select candidates for the presidency and vice-presidency. By 1835, and for upwards of eighty years thereafter, the representative convention was the almost universal device for the selection of party candidates for all offices above those of townships and other minor local areas.

Rise of the convention system

At its advent, the convention system was hailed as a decided improvement upon earlier nominating methods, as indeed it was—if for no other reason, because it applied to the selection of party candidates the principle of representation upon which all government in America was based. Theoretically, the voice of each voter could be transmitted from delegate to delegate until it found expression in the party's duly chosen nominees for legislative, executive, and judicial offices.

Arguments for the system

But, however admirable in theory, the convention system in practice was soon found to afford little or no protection against boss or machine control of nominations (which no doubt is partly why professional politicians still prefer it). In many states, men who represented the best type of citizenship were seldom chosen as delegates; and when chosen, they often turned over their credentials to "proxies" named by party or factional leaders. Conventions became the "market-place of politics," where political "trades" were consummated by the purchase, sale, or transfer of delegates from one candidate to another; convention proceedings were often marred by serious disorder and fraudulent practices; and in the larger states the system became so complicated that ordinary voters were unable to exert any appreciable influence upon the selection of the candidates put forward by their party. Chiefly for these reasons, a few states—notably New York and Indiana—have restricted the operation of the convention system to the nomination of candidates for the principal state offices; and since about 1903, the great majority of states have abolished the system outright, not only for congressional and state offices, but also for county and municipal positions.[1] In its place, the direct primary election system has been adopted, in one form or another,

The system's decline

[1] In some cities, candidates for municipal offices are nominated by the simple method of filing a petition signed by a specified number of qualified voters. This system is found in San Francisco, Cleveland, Boston, Pittsburgh, and a number of New Jersey cities.

in all but two states (Connecticut and Rhode Island), although it, too, is not without shortcomings.

The direct primary

Under the direct primary method, candidates are nominated directly by the voters of each party, instead of indirectly through delegates assembled in convention. The primaries of the different parties are usually held on the same day, and at the places where the regular elections are held later on; they are presided over by the regular election officials, and are surrounded by practically all of the formalities and safeguards attending a regular election; and hence the appropriateness of the full name for the system, *direct primary election*. The ballots are generally printed at public expense, and are usually of uniform size and shape. Persons seeking a party nomination to any office, as a rule, get their names on the primary ballot by filing petitions signed by a specified number of qualified voters, the number being roughly proportioned to the importance of the office sought, and varying all the way from one-half of one per cent of the qualified voters up to ten per cent.[1] Usually a candidate who receives the highest number of votes for a given office is declared the party nominee for that office, even though, where three or more persons are seeking the same nomination, this may result in selection by considerably less than a majority. Nine Southern states and Utah require a majority vote to nominate; if no candidate obtains a majority at the first test, a second, or "run-off," primary is held, in which only the two highest candidates are voted for.

"Open" and "closed" primaries

The right to participate in making party nominations is commonly restricted by law to persons able to comply with some kind of a test of party allegiance. Primaries so conducted are called "closed" primaries, to distinguish them from the "open" primaries found in Minnesota, Wisconsin, and six other states, where no attempt is made to prevent Democrats from taking a hand in Republican nominations, and *vice versa*. A number of other states, however, in reality have the open primary, because the tests which they prescribe notoriously fail to prevent voters from shifting temporarily from one party to another.

"Non-partisan" primaries

From what has been said, it will be seen that the direct primary usually presupposes the existence and activity of national party organizations in state and local nominations. Where, however, non-partisan elections have been introduced, they are commonly preceded by a "non-partisan" primary conducted in practically all respects like an ordinary party primary, except that the ballots carry no indication of the party affiliations of the candidates; and no attempt is made to inquire into the party preferences of those who wish to participate in naming the "non-partisan" candidates. Party and non-partisan primaries may even be held at the same time and place, with separate ballots prepared for

[1] California, in 1927, simplified the primary system by substituting for petitions signed by a large number of voters declarations of candidacy signed by "sponsors," the numbers ranging from ten to twenty for the lowest offices up to from sixty to one hundred in the case of the highest ones.

the two kinds of nominations. In any event, the two candidates on the non-partisan ticket polling the highest number of votes for each office have their names printed on the official ballot used at the ensuing election, where party designations are again entirely absent.

Merits and defects of the direct primary

The direct primary method of choosing party candidates unquestionably affords the rank and file of the party opportunity for more direct and decisive influence in controlling nominations than ever exists when candidates are picked merely by delegate conventions. Beyond this point, however, the supporters and opponents of the device hold widely varying views as to its superiority over the convention system. The former argue that, even though the popular turn-out at primaries is commonly disappointing and sometimes pathetically scant, the voters at least respond somewhat more generously than when asked to come out merely to choose convention delegates under the old system; that the primary has materially weakened machine control of nominations; that it affords opportunity to bring forward superior candidates, at all events a better chance to defeat conspicuously unfit ones; and that corruption, which often was a decisive factor in determining the selection of candidates by convention, is robbed of most of its potency. Opponents of the direct primary, on the other hand, are in the habit of denying outright most of these assertions, and of arguing that the direct primary has produced no better officials, involves added costs and therefore leads to increased taxation, imposes greater expense upon candidates, favors candidates with plenty of money to spend, weakens party organization, destroys or impairs party responsibility, intensifies machine control, multiplies the number of candidates, and favors populous centers at the expense of rural sections. Obviously, most of the arguments employed, both ways, are matters of opinion, and cannot simply be brushed aside by categorical counter-assertion. Under widely differing laws prevailing in different states, results vary from state to state, and even from time to time and place to place within the same state; and on this account the only trustworthy method of appraising the system is to compare results under it, state by state, with conditions prevailing in the same states under the convention régime.

Election Machinery and Processes

Registration of voters

Official lists of properly qualified voters, now required in every state except two, are used in both primaries and elections; and no person not "registered" is permitted to vote unless certain formalities prescribed by law are complied with. All but three states (Vermont, Arkansas, and Texas) have personal registration, in the sense that one who desires to vote must appear in person before the proper registration official at a county seat or other designated place and establish his right by giving whatever information and assurances the law requires. In a majority of the states, until recently, registration was periodic, which meant that the

voter might keep his name on the list only by re-registering at yearly or other fixed intervals; and many still think this the surest method of keeping the lists free from the names of persons who have died, moved away, or for any reason have become disqualified. A good deal of inconvenience, however, is caused the voter; many fail to register; and thirty-eight of the states have now introduced some plan of "permanent" registration, under which a voter, once registered, remains on the list as long as it is not discovered that he should be removed.[1] Whatever plan may be in use, the task of guarding against fraud is a difficult one, and the officials in charge need to be persons not only of intelligence but of high integrity; honest registration is the first line of defense against corrupt elections.

Further preparations for elections

Still other preliminary work is necessary before an election can be held. A division of the voters, on geographical lines, must be worked out, so that each will be able to vote in his proper district or precinct —which in rural regions may be a fairly large area, but in towns and cities is likely to be a ward or some subdivision thereof.[2] Polling places must be designated, with preference in these days for school-buildings, police and fire stations, and other locations of a little more dignity and attractiveness than the livery stables, barber shops, and other places commonly employed before the feminine touch was added to our politics. Polling officers must be appointed, commonly on a bi-partisan basis and from residents of the precinct; polling hours and places must be duly advertised; sample and official ballots must be printed and distributed; other polling equipment, down to lead pencils, must be made ready. In large cities, these functions are performed as a rule by special election boards, appointed by the governor or otherwise; elsewhere, they commonly fall to county authorities, such as boards of supervisors or commissioners. Few people realize the magnitude of the preparations entailed in a major city or even a populous county.

Polling officials

On election day, the polls in each district or precinct are in charge of the polling officials previously appointed. Varying in number, titles, terms, method of selection, and rate of compensation—from state to state, and even in different parts of the same state—such officials usually include an inspector, who has general charge; two judges, who help decide disputes; two or more clerks, who have custody of the voters' lists, initial, number, and pass out the ballots, and check off the voters to whom ballots have been issued;[3] and as a rule one or two police officers, although the duty of quelling possible disturbances and maintaining general decorum may be left to regular sheriffs' deputies or police. Not

[1] In some instances, however, permanent registration is restricted to urbanized communities.

[2] It is not to be understood that these arrangements are made afresh for every election, although changes may be fairly frequent.

[3] Not all elections involve the literal use of ballots. Approximately half of the states have authorized the substitution of voting machines, and extensive use of these is actually made, especially in cities, in seven or more.

strictly as election officers, but with a view to looking after party interests, recognized party organizations, and even individual candidates, are allowed to be represented by "watchers" or challengers, who are entitled to see everything that is done by the election authorities at both the casting and the counting of the ballots. Their main function, of course, is to detect illegal voting which otherwise might somehow escape the officials. At first glance, the duties of polling officers may seem so simple and so purely clerical that almost any person can perform them. Certainly this is the theory on which the officials are nowadays too often selected; in many places, the posts are simply distributed by local politicians among their friends as political favors. Full knowledge of the election laws—no simple matter—ought, however, to be possessed, as well as the intelligence and judgment necessary to deal satisfactorily with doubts and controversies which almost inevitably arise. The electoral system could be considerably improved by raising the standard for polling officials, possibly by the use of qualifying examinations, such as were authorized in Milwaukee in 1937 and in Minnesota in 1940. Circulars of instructions are generally distributed in advance to persons who are to serve, but that is about as far as present precautions commonly go.

Casting the ballots

When, on election day, the voter enters the polling place, he takes his turn in identifying himself to the clerks, carries a blank ballot to a screened compartment, or "booth," marks the ballot according to his preferences, and, emerging, folds the ballot with its number and the clerk's initials on the outside, deposits it in the ballot-box, and is duly checked off as having voted. Under only one circumstance may his privacy in the voting booth be invaded: if on account of blindness, illiteracy, or other handicap, he asks for assistance, one clerk of each party may, under the laws of most states, enter the booth to give it, although without trying in any way to influence his decisions.

Absent voting

But not all voters are so situated, at a given election, as to be able to present themselves at the polls. The number who cannot do so is, of course, particularly large in wartime; and as far back as the Civil War, provision (although not very effective) was made for soldiers to cast their ballots *in absentia*. In addition to soldiers and sailors, there are, however, the ill and the disabled, students in attendance at distant colleges and universities, persons engaged in operating trains, migrant workers, people away from home on business trips, and many other persons "unavoidably" or "necessarily" absent (as the laws put it) from their voting precincts at election time. Vermont led off in 1896 with a statute making provision for distributing ballots to such persons in advance and receiving them back by mail; and by 1940 all states except Kentucky and New Mexico had laws of the kind. In advance of the elections of 1942 and 1944, Congress passed measures to facilitate voting by the millions of men and women then in the armed and allied services,[1]

[1] See p. 147 above.

although, as indicated above, carefully preserving the basic principle of state control.

Tabulating and reporting the results

When the polls close, the results are canvassed and tabulated, usually by the regular polling officials, although about a dozen states, including Iowa, Kansas, Nebraska, Missouri, and West Virginia, have a "double election board" system under which the "receiving board" has charge of the polling and a "counting board" confines its labors to reckoning up results, usually starting its work while the voting is still going on. If voting machines are employed, there is little to be done except to open them and find what they have recorded. In the majority of cases, however, there are printed ballots to be counted, perhaps a huge number of them; and the authorized persons attack the job—sometimes, as in New York, in the presence of any voters who care to look on, but usually with only the polling officials present. The task completed, all ballots, used and unused, including spoiled and defective ones, together with the poll-books and tally-sheets, are placed in sealed packages or in sealed ballot-boxes; and all are preserved and carefully guarded for a specified period, after which the ballots are destroyed. Meanwhile, the chief election officer sees that "return blanks" are filled out in duplicate or triplicate, showing the exact number of votes received by each candidate; and, his signature having been affixed, one set is sent off to the city or county clerk or to a board of elections, while another goes to some higher canvassing authority, *i.e.*, the county board of supervisors in California and other states, the judges of the court of common pleas in Pennsylvania, the county clerk assisted by two justices of the peace of the county in Illinois, and the board of election commissioners in most large cities. By telephone, or otherwise, the results are reported to the press and party leaders the moment they are ascertained; and, consolidated with others pouring in from all over the electoral area, they enable an interested, and perhaps excited, public, hovering before radio sets and loudspeakers, to know how things are coming out.

Final stages of the count

On a day fixed by law, the canvassing bodies in each county or city proceed officially to add up all the votes cast and, in so far as state and national offices are involved, certify the results to some state official (usually the secretary of state), who is required to consolidate and transmit the returns to a state canvassing board. The last stage in the process is reached when the state and county canvassing boards file their reports with the officials designated by law, usually the county clerk in the case of county offices and the secretary of state in the case of state and national offices; whereupon these officials issue to each person declared elected a certificate of election which is *prima facie* evidence of the legal right of the person named therein to hold the office and perform the duties connected with it.

Disputed elections

Such a certificate is not, however, conclusive; for all state election laws include detailed provisions for "contested elections," that is, for

disputes arising when a defeated candidate alleges that he has been illegally denied a certificate of election. Such cases are commonly determined in the courts, although in some states, *e.g.*, Illinois, the legislature is the authority which decides conflicting claims to the highest state offices. Where such contests involve the right to a seat in the state legislature or in a city council, the legislative house or the council concerned almost invariably has the power of decision.

The Australian ballot in general use

In sharp contrast with the days when voting was oral and public, secrecy is now everywhere provided for, either in the state constitution or by statutes; and it has been effectually attained through the adoption since 1888 of the so-called Australian ballot in every state except South Carolina.[1] The essence of the Australian system is that the only ballots allowed to be used at the polls are prepared by responsible public officials at public expense, in accordance with forms prescribed by law, and hence can be cast without possibility of detection of the ticket for which one has voted. The ballot is normally in blanket form, *i.e.*, bearing on a single sheet the complete list of offices to be filled and of candidates, although when national, state, and city elections are being held simultaneously, the names of candidates for presidential elector, and also of candidates for municipal offices, are sometimes printed on separate sheets.

Principal ballot forms

The arrangement of the names of candidates on the ballot varies in different states, but usually conforms to one or the other of two major plans. In the party-column type of ballot, introduced in Indiana in 1889, and now used in twenty-seven states, candidates of the different parties have their names printed in separate columns, at the head of which appear, in each case, the party name and a "party circle" or " party square," and sometimes a party emblem or vignette. The voter has merely to place a single cross in this circle or square (or, if voting machines are used, pull the lever once) to vote for all of the candidates of a given party. This obviously facilitates what is called "straight-ticket" voting, and accordingly the plan is regarded with high favor by party leaders. Wyoming and a few other states, although retaining the party column for the guidance of voters, omit the party square or circle at the head of the column, so that there is no possibility of voting a straight ticket merely by making a single cross.

In twenty states,[2] including Massachusetts, New York, and California, a different arrangement is employed—an "office group" scheme which puts less stress on party regularity and more on the weighing of individual candidates. The names of candidates of all parties are grouped together alphabetically according to the offices for which they are running, the designation of the party to which each candidate belongs

[1] In that state, there is no statute requiring use of the Australian ballot. The Democratic party, however, requires use of it in its own primaries—which, in a one-party state, invariably predetermine the results of elections.

[2] The missing state in the figures here given is, of course, South Carolina.

appearing alongside his name. There is no way of voting a straight party ticket with a single cross or a single pull of a lever; on the contrary, to vote a straight ticket, a voter must place a cross (or pull a lever) opposite the name of every candidate of a given party. For this reason, the Massachusetts type of ballot, as this form is called (because it was employed first in that state, in 1888), is regarded as favoring independent, or "split-ticket," voting. Pennsylvania ballots retain the grouping of candidates by offices, as in Massachusetts, but also provide in the left-hand margin a list of the parties represented on the ballot; and a single cross placed opposite one of these party names is counted as a vote for every candidate nominated by that party—a device which, of course, makes straight-ticket voting quite as easy as where the party-column ballot is employed.

"Recall" elections

Normally, elections are held only when officers' terms are about to expire, or occasionally to fill a vacancy arising from the death or resignation of an incumbent. One sometimes hears, however, of an election precipitated by an attempt to "recall" an official in the midst of his term. Appointive officials who prove incompetent, or otherwise remiss, can usually be removed by the appointing authority; although in the states the power of removal, as vested in the governor and principal local officials, is often so hedged about with restrictions as to be almost useless. Elective officers on higher levels, including state judges, are usually subject to impeachment. In particular situations, however, there may be reasons for wishing to get rid of such officers, though hardly justifying resort to a procedure so extreme as impeachment; besides, those dissatisfied would be helpless unless the impeaching authorities, *i.e.*, the two houses of the legislature, were prepared to act. Back in the early part of the present century, therefore—in a period when the tide of "direct" popular government was running strong, with the popular initiative and referendum winning their way in state after state, especially in the West—many people became enamored of the idea that the voters themselves ought to be in a position to institute recall proceedings against an official, subjecting him to the test of reëlection in competition with any candidates who might want to compete against him; and as a result, in a dozen or more states a recall procedure was instituted for use against state officers and especially city officers under the commission form of municipal government. As in the case of the initiative and referendum, the hopes of the reformers have not been fully realized. The recall has been employed against a number of municipal officials, especially in California.[1] But there have been only two instances in which it has been brought to bear against an official elected by the people of an entire state; [2] Nor does its future look promising; no state has adopted it since

[1] A mayor was recalled in Detroit in June, 1930; in Seattle, in July, 1931; and in Los Angeles, in September, 1938.

[2] In 1921, the governor, attorney-general, and commissioner of agriculture in North Dakota were recalled because of their connection with developments growing

1926. The procedure involved in a recall election—not widely different from that prevailing in regular elections—is, in brief, as follows: (1) a petition filed by a stipulated proportion of the electors of the area concerned leads to the fixing of a date for a special election; (2) if the official whose recall is sought chooses not to face the issue, he may simply resign; (3) if, however, he prefers to fight for vindication, his name is placed on the ballot along with the names of any other persons nominated (usually by petition) to succeed him; (4) if the incumbent under fire polls the largest number of votes, he continues in office, but if one of his opponents outstrips him, the latter forthwith assumes the office and fills out the remainder of the term, the incumbent being, of course, "recalled."

The Electoral System Criticized—Some Proposed Changes

Despite notable improvements in the past thirty or forty years, the electoral system outlined still comes in, and justly, for a good deal of criticism—not only on the ground of excessive, wasteful, and occasionally corrupt, use of money, but with respect also to such features as the frequency of primaries and elections, the holding (too often) of local, state, and national elections simultaneously, the unnecessarily large number of offices filled by popular election, and the almost invariable practice of electing by plurality vote. Each of these latter grounds of objection may receive a word of comment.

1. Frequency of elections

Concerning the frequency of elections, nothing more need be said than to call attention to the familiar fact that the election of president and vice-president and of various officers of a number of states occurs every four years; that some state officers are elected triennially, and others, along with congressmen and most county officers, biennially; that many county and local offices are filled annually; and that practically all of these elections are preceded by primaries or nominating conventions. Not only do these frequently recurring primaries and elections impose a heavy financial burden upon the taxpayers, and give more scope than is desirable to the professional politician, but they make it impossible for the average preoccupied citizen to keep up an intelligent interest, and to take an active part in the nomination and election of the men who in various ways act for him in the conduct of public affairs.

2. Simultaneous national, state, and local elections

National, state, and local elections often fall on the same day, with the result that the names of candidates for offices of all three kinds, or at least for national and state offices, are not infrequently printed on the same ballot. This tends seriously to confuse national with state and local issues, commonly to the detriment of state and local government. A remedy has been sought in many states by arranging elections so that the most important state and local contests will be held in years in

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out of the Non-Partisan League movement; and the next year, two members of the state public utility commission of Oregon were recalled because of popular dissatisfaction with certain rate increases which the commission had authorized.

which presidential and congressional elections do not occur. Some states, indeed, have not stopped here, but have also separated purely local from state elections. Separation on this line may, however, be carried so far as unreasonably to increase the number of elections occurring in a single year, as has happened in Illinois, where in some years the voters are called to the polls as many as seven times.

3. The long ballot

Of far greater seriousness than either of the foregoing defects is the long and confusing ballot with which most voters are confronted when they go to the polls at presidential elections and at many state and local elections as well. The bewildering list of candidates to be voted on is accounted for partly by the number of offices now filled by popular election, partly by national, state, and local elections falling at the same time, and partly by the fact that there are usually two or more candidates for every office to be filled. The result is that ballots bearing from one hundred to three hundred names are by no means uncommon.[1] Certain serious consequences are entailed. For one thing, it is extremely difficult, if not impossible, for a majority, or even a considerable minority, of the voters to form an intelligent opinion as to the merits of the candidates, especially when elections take place frequently. Consequently, there is a great deal of blind voting, especially in the form of straight-ticket voting. Another result is that the merits of the candidates for only a few principal offices are considered seriously, even by well-informed voters. Popular interest is usually concentrated upon candidates for president, governor, and mayor, to the almost complete neglect of the remainder of the ticket. At best, in other words, there is more or less intelligent voting for a few prominent offices and blind voting for the great majority of minor positions.

Need for shortening the ballot

The remedy for much of this blind voting is to shorten the ballot by sharply reducing the number of elective positions. Officers who have a share in translating public opinion into law, or who enjoy large discretionary powers in the administration of laws—in other words, all policy-determining officials—should continue to be elective. But there are surprisingly few of these. The president, the members of both branches of Congress, the governor and members of the legislature, and the mayor and members of the city council are obviously policy-determining officers. To a less extent, this is true of boards of county commissioners or county supervisors. But here the list practically ends; very few other officials have anything to do with the formulation of public policy in the field of either legislation or administration.[2]

[1] In addition, in states in which the popular referendum prevails, anywhere from two or three to a dozen or more legislative measures may be submitted to the voter's judgment.

[2] The recent adoption of commission and manager government in several hundred cities has been accompanied by a noteworthy reduction in the number of elective municipal officers, and this has familiarized many voters with the advantages of a shorter ballot. In state and county governments, on the other hand, there has been but little corresponding development.

4. Plurality elections

The last of the several criticisms of our system of elections mentioned above is directed against the plurality rule in deciding elections. Whenever there are three or more candidates for the same office, the successful one—that is, the one receiving the most votes—is very likely to have been elected by only a minority of the voters. This seems inconsistent with the commonly accepted theory that in a democracy the majority rules. In national, state, and county elections, practically nothing has been accomplished toward remedying the situation. In city elections, however, a partial solution has been found in "preferential" voting. Since 1909, more than fifty cities have done away with primary elections and have substituted nomination by petition, followed by the use of a preferential ballot on election day. On this ballot, names of candidates are grouped by offices, as in the Massachusetts type of ballot, and the voter may indicate his first, second, and other choices. If any candidate is found to have received a majority of the first-choice votes, he is forthwith declared elected. If no one has a majority, the result is usually determined by adding the second-choice votes to the first choices. If even then no candidate has a majority, to the first- and second-choice votes are added the third choices, and the candidate who now has the *highest* number is declared elected. The plan does not absolutely guarantee, but it strongly promotes, election by majority.

The preferential ballot

Proportional representation

Another electoral device sometimes brought into play, but with a different objective, is proportional representation. Applicable only to situations in which three or more members of a board, commission, or legislative body are being chosen in a city or portion thereof, or in a legislative district, its object is, not to promote majority election of any party slate, but rather to open a way for the area's total quota to be distributed among the various candidates in approximate proportion to the votes polled by each. No state has seriously considered adopting the plan. But fourteen cities, of various sizes, are using it—although the prospect for further adoptions is obscure.[1]

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CHAPTER XI

NOMINATING AND ELECTING A PRESIDENT

The pageant of a presidential election

Every two years, the people of the United States elect 435 members of the national House of Representatives, one-third or more of the ninety-six senators, and multiplied thousands of state and local executives, administrators, lawmakers, and judges. Every four years, they choose, in addition, a president and a vice-president—or at all events the 531 "electors" who later, meeting in the various state capitals, go through the formality of registering and confirming the popular verdict. The pageant of a presidential election in this country is the most remarkable thing of its kind anywhere. Hardly is a new chief executive settled in the White House, with four long years of toil and anxiety ahead of him, before plans are afoot for the next supreme test of electoral strength; and as the red-letter date approaches, potential candidates emerge, "booms" are launched, personal and party groups spar for advantage in the press, on the floor of Congress, and in the swirls and eddies of congressional, state, and local politics. Four or five months before the choice is to be made, tumultuous national conventions battle over nominations and platforms. A pause intervenes for taking stock and for throwing the nation-wide party machinery into high gear; then the fight is on. With steady crescendo, the drama advances from scene to scene, until at length, on election day, forty to fifty million people go to the polls and settle the fate of the candidates. Thousands of speeches have been made, floods of ink spilled, millions of dollars spent.

The original method of election

Needless to say, this is not at all the sort of thing that the makers of our national constitution had in view. Having decided against election of the president (1) by Congress, on the ground that if so chosen he would not be sufficiently independent, or (2) directly by the people, because of fear of "tumult and disorder" and apprehension lest the voters would not be able to inform themselves on the qualifications of candidates, the convention finally accepted a plan suggested by Hamilton under which (a) each state should choose as many presidential electors as it had senators and representatives; (b) each such elector should cast a ballot for two persons; and (c) the person receiving the highest vote throughout the country should be declared president and the second highest vice-president. For a short time, this method worked as intended. But when political parties unexpectedly came upon the scene, they canceled out the freedom of choice which the electors were intended to have by designating "candidates" whom every elector of a given political

faith was expected to support; and from that time until today the electors have been only a "row of ciphers"—merely a recording machine.

The Twelfth Amendment (1804)

One effect was to make it not unlikely that a tie would result between the two candidates of a winning party; and almost immediately such a situation arose, in 1800, when Jefferson and Burr received the same number of votes. The constitution provided a way out: a tie was to be broken by the House of Representatives, voting by states; and in this manner Jefferson was finally elected. The opposition, however, came near to thwarting the design of the victors by maneuvering Burr into office; and before the next election any repetition of the difficulty was made impossible by an amendment to the constitution specifying that thereafter electors should in all cases "name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president."

Machinery for Nominating Candidates—The National Convention

Nominations become a necessity

The next significant development had to do with a matter for which the framers of the constitution made no provision, *i.e.*, the nomination of candidates. As set up, the electoral system did not, indeed, contemplate "candidates" at all. When, however, political parties arose, their object naturally came to be to capture control of the offices. To do this, they must center their support upon given individuals, which, in turn, they could do only if such individuals, or candidates, were agreed upon in advance; and hence arose the need for machinery for selecting them.

From congressional caucus to national convention

The first device hit upon was the one easiest to contrive, *i.e.*, a caucus composed of the (national) senators and representatives of a given party; and it was employed straight along from 1800 to 1824. There were, however, serious objections to it: the caucus acted only by assumed authority; it provided little or no voice for party members in states in which the party was in a minority; and it gave members of the legislative branch an influence in selecting the chief executive which they clearly were not intended to have. In a period of steadily broadening democracy, revolt against it became inevitable; and in 1831 both the National Republican and Anti-Masonic parties turned for a substitute to popularly chosen nominating conventions, already employed acceptably in state elections. Candidates were nominated and platforms adopted; and in 1832 the Democrats fell into line with a convention of their own. Many political leaders, including Webster and Calhoun, opposed the new device on the ground that it gave too much power in party matters to the rank and file. Nevertheless, by 1840 the national convention became the generally accepted means of putting both candidates and platforms before the voters; and such it has remained.

To understand the way in which presidential and vice-presidential candidates are nominated nowadays, it is necessary, therefore, to know something about the national convention—how it is called, of whom it

is composed, how it is organized, how it goes about its work, and what are its merits and defects.

Arrangements for conventions

The national conventions of the two major parties, and likewise of such minor parties as have built up a permanent organization, are held on call of the national party committee. In January or February preceding a presidential election, the committee meets (invariably in Washington in the case of the Republicans and Democrats), decides upon the place and date of the coming convention, and authorizes the party organizations in the states and territories to see that delegates and alternates are chosen in accordance with an apportionment set forth in the call. The Republicans commonly hold their convention about the middle of June, the Democrats two or three weeks later; and the place is selected—usually from a list of cities competing for both the advertising and the business that such a meeting brings—with an eye not only to practical matters like railroad connections and hotel and convention-hall facilities, but also the preferences of influential candidates and of leading politicians, the need for stirring enthusiasm in a given state or section, and other considerations of party interest or strategy.[1]

Convention membership

Except in so far as state laws regulate the method of electing delegates, every party determines for itself how its conventions shall be made up; national law has nothing to do with the matter. In earlier days, the party forces in each state were commonly allowed a quota of votes (and of delegates) equal to the state's electoral vote, or, to put it differently, the number of its senators and representatives in Congress. From 1852 to 1872, the state delegations in the Democratic convention consisted of double this number, but each delegate had only a half-vote. After 1872, the number was determined in the same way, but each delegate had a whole vote;[2] and this likewise was the Republican plan from 1860 until after the convention of 1912. In both parties, the regular practice long was to allow each state (a) four delegates-at-large, with two others for each congressman-at-large, if any, and (b) two district delegates for every congressman representing a district.

Earlier incongruities

It would seem an elementary principle that seats in a representative body should be apportioned according to the numbers and location of the people to be represented. Manifestly, however, the national nominating convention has been constructed on no such plan. Before changes made in the last two or three decades, a Northern state containing few Democrats was entitled to exactly as many delegates in a Democratic convention as a Southern state, of equal total population, containing ten or twelve times as many. Similarly, Southern states yielding few Republican popular votes (and, with rare exceptions, no electoral votes at all) sent to Republican conventions more delegates than Northern

[1] Chicago, centrally located and with excellent hotel and auditorium accommodations, draws more of the conventions than any other city.

[2] Except that in all of the conventions from 1924 to 1944 inclusive each state was allowed eight delegates-at-large (half being women), each with a half-vote.

states, of less total population, which unfailingly rolled up substantial Republican majorities; slender Southern Republican minorities had great weight in selecting candidates and making platforms, but contributed little or nothing to party victory.

Republican reforms

For many years, protest among Republicans against these illogical arrangements was fruitless. But after the defeat of 1912—following a party split aggravated by the South's gross over-representation in the nominating convention—the matter was belatedly taken up; and eventually, in 1923, the national committee (acting on instructions from the 1920 convention) introduced a scheme under which each state became entitled to (a) one district delegate from each congressional district; (b) an additional delegate from each congressional district casting 10,000 Republican votes for president or congressman in the last preceding election; (c) four delegates-at-large; (d) two additional delegates-at-large for each congressman-at-large that a state might happen to have; and (e) three further delegates-at-large (as a sort of bonus) if the state had cast its electoral vote for the Republican presidential nominee in the last preceding presidential election or elected a Republican senator in the ensuing off-year election. Under this somewhat complicated plan, many states—chiefly in the South—continued to be over-represented. In the convention of 1944, however, the situation was further improved by a rule (adopted by the 1940 convention) under which only districts which cast at least 1,000 Republican votes in the preceding presidential or mid-term congressional election were to be entitled to any delegate at all.[1]

The Democrats take up the problem

With only minor modifications in a few instances, the Democrats adhered to the traditional plan until 1940. Under a rule then adopted, every state (beginning in 1944) carried by the Democrats in the preceding presidential election became entitled to a bonus of two extra convention votes—an arrangement designed primarily to compensate the Southern states for their loss of a virtual veto on nominations when, in 1936, a new regulation provided for nomination thereafter by simple majority rather than by the previous two-thirds.

Numbers

Speaking strictly, the composition of a national convention is defined in terms of votes, rather than of delegates; and, whereas usually a Republican convention contains only as many delegates as there are votes, Democratic conventions have commonly contained a good many more (in 1940, 1,844 delegates to 1,100 votes), each delegate from an over-represented state casting only a fractional vote. The Republican and Democratic conventions of 1944 contained 1,055 and 1,176 delegates, respectively. For every delegate, there is normally an alternate, holding himself in readiness to take part as a substitute if and when needed.

[1] By courtesy, representation is given also by both parties to the District of Columbia and to various territories and dependencies, although the inhabitants of these areas have no part in the final election.

Methods of choosing delegates

Originally, delegates to national conventions were chosen in several different ways—by mass-meetings, by caucuses, by district and state conventions, even by state party committees. Gradually it became the practice of the Republicans to elect delegates-at-large in state conventions and district delegates in conventions held in the several congressional districts; and by rules adopted in 1884 and 1888 the national committee made this plan obligatory. Viewing the state as the basic unit of representation, the Democrats, however, were more likely to authorize selection of all delegates at a state convention or by the state committee.

Rise and decline of the presidential primary

Shortly after 1900, the direct primary began to be used in various states in nominating candidates for state and local offices, and inevitably the question arose of applying the new device, by state law, to the choice of delegates to national conventions. This was first done by Wisconsin in 1905, and so rapidly did the idea take hold that in 1916 more than half of the entire number of delegates of both of the leading parties were chosen, in more than a score of states, under the primary plan. Some states, beginning with Oregon in 1910, provided not only for popular election of delegates but for an expression of the voters' preferences among persons seeking nomination; some even sought to bind the delegates to be guided by preferences so expressed. From time to time, too, the suggestion was broached that the presidential primary, in some one of the numerous forms that it had assumed, be made nation-wide by federal law.[1] After having started off, however, with apparently irresistible force, the movement lost momentum. Since 1916, no additional states have adopted the device in mandatory form, while eight have abandoned it.[2] Nor does its future look promising. Those who believe in it (and many people do so) very properly argue that it has never been given a fair nation-wide test. But the only way in which it could be given such a test would be by virtue of an act of Congress; and notwithstanding that the way seems to have been cleared constitutionally for such legislation,[3] neither Congress nor people is sufficiently convinced of the intrinsic merits of the plan. Meanwhile, with the presidential primary surviving in mandatory form in only fourteen states (although the list includes several of the most populous ones, *e.g.*, New York, Pennsylvania, and Illinois), the delegates of thirty-four states continue normally to be chosen in state and district conventions or by state central committees.

[1] In his first annual message, President Wilson went so far as to propose that presidential and vice-presidential candidates be designated to the respective conventions by direct nation-wide action of the voters, leaving the conventions, as gatherings of party officers and nominees, charged merely with accepting the verdicts of the primaries and formulating the platforms.

[2] Iowa and Minnesota in 1917, Vermont in 1921, Montana in 1924, North Carolina in 1927, Indiana in 1929, Michigan in 1931, and North Dakota in 1935. In addition, a law on the subject was declared unconstitutional in Texas in 1916, and an Alabama law was abandoned when the attorney-general of the state rendered an opinion to the effect that it also was unconstitutional. Alabama, Michigan, Florida, and Georgia, however, now have laws under which primaries may be employed when so ordered by the state committee of a party.

[3] See p. 118, note 1, above.

The National Convention at Work

Composed mainly of state and local party leaders and workers, business men, lawyers, and journalists, with a liberal admixture of governors of states, senators and ex-senators, congressmen and ex-congressmen,[1] and state bosses, the convention of a major party meets in a large hall, lavishly decorated with flags, bunting, and portraits, and capable of seating usually from fifteen to twenty thousand people. The thousand or more delegates are accommodated on the main floor, grouped around placards bearing the names of their states; the equally numerous alternates are seated directly back of them; representatives of the press, together with radio reporters and commentators, are given generous space; the galleries are packed with intermittently interested and restless spectators; radio "hook-ups" are in readiness to carry the proceedings to every corner of the land. Except during principal speeches and at occasional tense moments, there is a general buzz of conversation; bands fill in intervals with popular airs; deafening "demonstrations" break forth from frenzied supporters of "favorite sons" or other candidates; sheer chaos sometimes prevails for an hour at a stretch. Small wonder that, many years ago, the late Lord Bryce was moved to remark that the setting seems hardly compatible with the deliberative work to be performed; and indeed it is only because practically all of the problems are thrashed out and decisions made behind the scenes—in committee rooms, in the smoke-filled suites of influential delegates, indeed wherever private conferences can be held and understandings reached—that the body performs its functions effectively at all.

Surrounding conditions

Although under wartime conditions, the conventions of 1944 were streamlined to cover only three days, such gatherings usually last four or five days—sometimes longer. On the first day (with procedure normal), the meeting is called to order by the chairman of the national committee, who, after prayer has been offered and the call for the convention read, announces the list of temporary officers agreed on in advance by the national committee; whereupon—the list having been accepted by the convention, usually as a matter of routine—the temporary chairman delivers a "key-note" speech (prepared before the convention met) eulogizing the party, drawing applause by referring to the great names associated with its past, assailing the record and ridiculing the promises of its opponents, urging harmony, and in general sounding a call to battle. Pending permanent organization, the rules of the conven-

Temporary organization

[1] Formerly, the delegates always included a large number of postmasters, revenue-collectors, and other federal office-holders. The Hatch Act of 1939 (see p. 322 below), prohibiting political activity on the part of such office-holders (except those having to do with framing policy), now operates to debar them from serving. The constitution (Art. II, § 1, cl. 2) forbids members of Congress to act as presidential electors, but, contrary to the spirit of the provision, they take part freely in selecting presidential candidates—which has come to be far more important than serving as an elector.

tion held four years previously are adopted; and the day's work may close with a roll-call of the states and territories, each delegation nominating, through its chairman, one of its members (in the case of the Democrats, two) to serve on each of the four great committees:[1] (1) credentials; (2) rules and order of business; (3) permanent organization; (4) platform and resolutions—although the less wearisome plan is generally followed of permitting the chairmen of the several delegations merely to hand in written lists of proposed committee assignments.

Permanent organization

Reports from the first two committees mentioned are likely to consume considerable time, especially if contesting delegations choose to carry their controversies to the floor; but by the second or third day the convention is ready to organize permanently. The committee on that subject reports, nominating a list of permanent officials; and ordinarily the persons named are elected without debate, although it was only after a sharp contest that Senator Walsh was chosen permanent chairman of the Democratic convention in 1932. The permanent chairman will have many difficult decisions to make, and he must be both a master of parliamentary law and a man of energy and decision.

Framing and adopting the platform

Following a lengthy and usually more restrained speech by the new presiding officer, the convention is ready for a report from the committee on platform and resolutions.[2] Starting as promptly as possible, and working day and night over a vast array of platform proposals—bombarded also with suggestions and demands from both delegates and outsiders[3]—the committee will usually have succeeded in whipping together a document which it can report unanimously; and while there is usually some show of discussion on the floor, and occasionally a lively contest, only rarely is anything finally voted that the committee has not itself proposed. As approved by the convention, the platform is likely to be a document filling ten or a dozen pages of print and touching upon a wide variety of topics.[4] On some matters it will make clear and definite pronouncements; on others—usually *most* others—it will be wordy and evasive; on still others, although perhaps of vital interest and importance, it will be completely silent, for the reason that anything that

[1] The Democratic quota of two is accounted for by the extension to women, in 1940, of equal representation with men on the platform and resolutions committee, followed in 1944 by application of the same arrangement to the entire group of committees. In the last-mentioned year, the Republicans introduced the plan also, but as yet for the platform and resolutions committee only.

[2] Prior to 1932, the Democrats customarily nominated candidates before adopting a platform. In 1932-44, however, they adopted their platform first (as the Republicans have regularly done); and it seems safe to assume that this will be their practice hereafter.

[3] Especially from organized economic, business, professional, and reform groups such as the A. F. of L. and the C. I. O., the American Farm Bureau Federation, the American Legion, and the Chamber of Commerce of the United States. "Lobbying" by special interests is by no means confined to the halls of Congress and of state legislatures. A president having his party's support for reëlection, too, will naturally have a good deal to say about the platform on which he will run.

[4] The brief, crisp platform (1,600 words) adopted by the Democrats at Chicago in 1932 is a notable exception.

could be said would tend to alienate votes. But there will be plenty of generalities, glibly extolling the party's achievements, unsparingly indicting the opposition, and in other ways appealing to party pride and loyalty. By and large, the platform is viewed by the sophisticated, not as a program to be carried out to the letter if the party wins, but rather as a bid for the confidence and support of the more susceptible elements in the electorate. Fully understanding this, the people are rarely so naïve as to take a platform seriously; sometimes, indeed—as in 1928 and 1932—platforms are so overshadowed by the personalities and announced policies of the candidates that, once the campaign is under way, they almost fade out of the picture.

Nomination of candidates

At last, by the third or fourth day, the convention arrives at its main objective, *i.e.*, the nomination of candidates. The secretary calls the roll of states, beginning with Alabama, and each delegation, in its turn, has an opportunity to place a favorite son or other person in nomination. If the delegates of a state which stands near the top of the list choose to do so, they may yield to a delegation which under alphabetical order would not be called until later; and this opportunity to get a candidate's name officially before the convention in advance of others, and to touch off a demonstration in his behalf, may prove a decided advantage. Anywhere from two or three to upwards of a dozen names may be presented, each in a vigorous, eulogistic, and sometimes flamboyant nominating speech followed by briefer seconding speeches by delegates carefully selected to give an impression of widely distributed support; and no effort is spared by either the orators or the delegates and spectators favoring a given candidate to whip up enthusiasm for him.

Voting on the candidates

When, finally, all of the names have been presented, the convention proceeds to vote. The roll of states is called again, and the delegations, through their chairmen, announce their votes. Under earlier Republican procedure, each delegate might usually vote as he liked; in any case, he had a right to have his vote recorded separately. The Democrats followed the different plan of permitting the state convention to require the delegates to the national convention to cast their votes in a block for one candidate; and even if no such requirement was imposed, the delegation itself might, by majority vote, determine how the votes of all of its members should be recorded. This historic "unit rule" conformed to the states' rights antecedents of the Democratic party, and had the practical advantage of augmenting the power and importance of a state in the convention's proceedings. The rise of the presidential primary made it necessary for the Republicans to look more tolerantly on instructed delegations, and, on the other hand, forced the Democrats to permit numerous exceptions to their unit rule. In so far as feasible, both parties still hold to their earlier practices; but in point of fact the majority of delegates, regardless of party, are now free to vote as individuals.

The Democratic "unit rule"

The Democratic "two-thirds" rule abandoned

Until rather recently, another important difference between Republican and Democratic procedure was that whereas a simple majority of all votes cast was sufficient to nominate in a Republican convention, the Democrats required two-thirds. The Democratic rule dated from 1832, being at first applied to the vice-presidency only; in 1836, however, it was extended to presidential nominations as well. Although of certain theoretical merit, it, as well as the unit rule (with which it was closely associated) came in for vigorous criticism in later days, and party opinion increasingly demanded the abrogation of both. As already pointed out, the unit rule partially collapsed, mainly under the impact of the direct-primary, instructed-delegation plan of choosing delegates; and a movement for doing away with the twin regulations failed at the Chicago convention of 1932 only because of reluctance to change the rules while the game was being played, *i.e.*, while a contest for nomination was actually going on. The Philadelphia convention of 1936, however, found itself in a position to act; President Roosevelt was about to be renominated without opposition, and hence the chances of no candidate would be in any way affected. The convention, therefore, rescinded the historic two-thirds requirement and prescribed that thenceforth nomination—for both the presidency and vice-presidency, of course—should be by simple majority. No action was taken on the unit rule; but eventually its complete abandonment is likely to prove necessary as a means of preventing nominations from being too much controlled by a few of the most populous states.

The balloting

After the votes of all of the states have been recorded and counted, the result is announced. Sometimes—especially when a president is being renominated—a single ballot suffices. But often the votes are so divided among a number of candidates that no one obtains the requisite majority, and additional ballots must be taken. In the course of these, weaker candidates drop out; and eventually some one of the contestants—or, perchance, a "dark horse"—emerges a victor. Sometimes the balloting is very prolonged, the extremest case on record being the nomination of John W. Davis by the Democrats in 1924 on the 103rd ballot, after a deadlock lasting no less than nine days. Abandonment of the Democratic two-thirds rule will, however, tend to prevent such occurrences in the future.

The convention's closing acts

The nomination for the presidency having been made, the wearied convention hurries its labors to a conclusion. A candidate for the vice-presidency is still to be named; and the same procedure—roll-call, nominating and seconding speeches, and balloting—is followed. But the contest is usually not very keen, and a decisive vote is soon reached.[1] An

[1] The nomination of Henry A. Wallace for the vice-presidency in the Democratic convention of 1940 stirred unusual excitement because many of the party leaders were opposed to him and resented President Roosevelt's virtual dictation that the Secretary of Agriculture be made his running mate. Equal excitement was stirred in the convention of four years later, when, with Mr. Wallace vigorously supported by

Eastern presidential nominee usually calls for a Western vice-presidential nominee; a dyed-in-the-wool conservative must ordinarily be counterbalanced with a man of known liberal views, or *vice versa*. But, as some one has remarked, the vice-presidency is likely to be "lightly esteemed and carelessly bestowed."[1] Having gone through the formality of electing a national committee for the ensuing four years (from nominees offered by the state delegations or state primaries),[2] and having—at least in the old days—authorized the convention chairman to appoint two special committees to bear formal notification to the nominees,[3] the convention adjourns *sine die*.

The Campaign and Election

The campaign

At an early date, the new national committee meets, and a chairman is chosen, nominally by the committee, although actually by the presidential candidate. In due time, sub-committees and auxiliary committees are set up; a treasurer is appointed; headquarters are opened, usually in both an Eastern and a Western city; a "campaign textbook" (containing the platform, notification and acceptance speeches, biographies of the candidates, and other materials for the use of party workers) is published and given wide distribution; a speakers' bureau is organized; and an appeal for votes is launched which, once the campaign has got actively under way (usually by early September) is kept up with increasing resourcefulness and fervor to the moment when, on election eve, the last local "spellbinder" descends from the rostrum, the last national "hook-up" brings the leading candidates' appeals to the voter at his fireside, and the last rosy forecast is given out by an at least outwardly confident party chairman.[4]

Naming and electing the presidential electors

Meanwhile, in each state, party conventions or committees make up the respective "slates" of presidential electors, and ballots are prepared on which (in twenty-six of the states) the lists of electors are printed in parallel columns, under the familiar party symbols. When the people finally go to the polls, they think of themselves as voting for president and vice-president; and, barring certain contingencies, they do actually determine who shall fill the two offices. In form, however, they vote only

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liberal and radical elements for a renomination, the President gave him only a gesture of assistance and in the end threw his support to a successful rival, Senator Harry S. Truman.

[1] Notwithstanding that seven vice-presidents have been called on to assume the presidency.

[2] The Republicans sometimes elect this committee at an earlier stage of the convention.

[3] Electoral customs in this matter seem to be changing. In 1932 and 1936, Franklin D. Roosevelt appeared before the convention in its closing hours and then and there accepted his nomination; in 1940 and 1944, he accepted by radio-broadcast to the convention; and in 1944 Thomas E. Dewey likewise visited the Republican convention and delivered his acceptance speech.

[4] Campaigns for the election of senators and congressmen, state officials and members of state legislatures, and municipal and other local authorities are, of course, going on simultaneously, stirring all party machinery, from national committees to precinct committees, to new vigor and activity.

for electors; and in a few states the names of the presidential and vice-presidential candidates do not appear on the ballots.[1]

Choice by legislatures gives way to choice by the people

To many persons it would come as a surprise to be told that the presidential electors were not always chosen exclusively, or even mainly, by popular vote. A national law dating from 1845 requires that they be elected in all cases on the Tuesday following the first Monday in November; but as for the mode of selection, there has never been any nation-wide rule except a simple constitutional provision that each state shall determine the matter for itself by action of its legislature. At the outset, the legislature itself elected in a majority of states, and the people took no direct part at all. As democratic sentiment grew, however, popular election was substituted in one state after another, with the result that after 1832 the legislature elected only in South Carolina, and there only until the Civil War.

District and general ticket systems

In states in which the electors were from an early date chosen by the people, it was at one time not unusual to employ a district system, under which one elector was chosen by the voters of each congressional district and two were elected by those of the state at large. The competition of political parties, however, caused this plan to lose favor. Under the district system, the electoral vote of a state was likely to be divided among two or more candidates; to win the full vote, it was necessary for a party to carry every district. The alternative was, of course, a general ticket system, under which a party could make a clean sweep merely by securing a plurality throughout the state as a whole. Enhancing as it did the importance of a state in national politics, this plan won the support both of party leaders and of public sentiment. In 1832, only four states retained the district system; and they soon gave it up. Michigan reverted to it in 1891, but only temporarily. In every state, therefore, each voter votes for as many electors as his state is entitled to, *e.g.*, forty-seven in New York, twenty-eight in Illinois.

"Minority" presidents

A majority in the electoral college is necessary to victory—unless achieved through election by the House. But this does not prevent us from having "minority" presidents, *i.e.*, presidents who (speaking strictly, the electors who chose them) received fewer than half of the total popular vote cast. Lincoln, in 1860, obtained more popular votes than did any one of his competitors, but nevertheless polled half a million less than half of the whole number cast. Wilson, in 1912, received two million more popular votes than did his nearest competitor, Theodore Roosevelt; yet he lacked a popular majority. In both of these cases, the opposition was unusually divided. But the same thing can happen even if there are only two major tickets in the field. Hayes was elected over Tilden in 1876, although his popular vote was about three hundred thousand smaller; and Harrison triumphed over Cleveland in 1888,

[1] On the other hand, twenty-two states omit the names of electors from the ballots and print only the names of the presidential and vice-presidential candidates.

although with one hundred thousand fewer votes. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote in that state; and popular pluralities, no matter how small, in a sufficient number of states—no very great number if the list includes populous states like New York, Pennsylvania, and Illinois—insure election. Wilson's six million popular votes in 1912 were so distributed as to yield 435 electoral votes; Roosevelt's four million were so distributed (involving pluralities in only six states) as to yield only 88; Taft's three and one-half million curiously contained only two pluralities, *i.e.*, in Vermont and Utah, and yielded only eight electoral votes.[1]

The fact that the entire electoral vote of a state falls to the candidates who poll a mere plurality of the popular vote [2] leads the parties to concentrate their campaign efforts upon doubtful states, especially those which have a large electoral vote. New York is such a state; and the party managers are never likely to forget that in 1884 fewer than six hundred popular votes swung that state's thirty-six electoral votes to Grover Cleveland, and that it was these votes that made him a victor over the Republican candidate. This intensification of party activity in pivotal states is disadvantageous in that it presents a special temptation to party workers to resort to vote-buying and other corrupt or dubious practices.

Casting the electoral vote

The theory of the constitution is that the electors are officers of their respective states, and it was on this account that the states were left free to determine how they should be chosen. The place where each group meets within its state is fixed by the legislature thereof (being, naturally, the state capital); and if the electors receive any remuneration for their services, it must come out of the state treasury. A federal statute of 1934, however, requires that they meet in the respective states and cast their ballots on the first Monday after the second Wednesday in December following their election. And the Twelfth Amendment to the constitution enjoins that the voting be by ballot; that presidential and vice-presidential candidates be voted for separately; that distinct lists be made up showing all persons supported for either office, with the number of votes received by each; and that these lists, signed and sealed in duplicate, be transmitted to the president of the Senate at the seat of the national government. As evidence of their power to act, the electors transmit also their certificates of election, bearing the signature of the governor.

Counting the electoral vote

The constitution is explicit enough on most matters, but curiously vague on the counting of the electoral vote. The Twelfth Amendment

[1] In 1940, 27,243,466 popular votes yielded President Roosevelt 449 electoral votes, and 22,304,755 yielded Mr. Willkie only 82. In 1944, 25,602,646 popular votes yielded Roosevelt 432 electoral votes, and 22,017,592 yielded Mr. Dewey only 99.

[2] It is *possible* for the voters so to split their votes that electors supporting different candidates will win in the same state. But this has happened only four times in the last half-century—in Maryland in 1904 and 1908, in California in 1912, and in West Virginia in 1916.

says that "the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted." But who shall make the count? The constitution is silent. If conflicting returns are sent in from a state, who shall decide which shall be received and which rejected? Again, the constitution does not say. For nearly a hundred years, no particular difficulty arose because of this. In the Hayes-Tilden contest of 1876, however, two sets of returns were sent to Washington from each of four different states; and only after an extra-constitutional electoral commission, consisting of five senators, five representatives, and five justices of the Supreme Court, had passed upon the evidence was Hayes declared elected (185 to 184), without a vote to spare. The country was kept in suspense until within two days of the time for the new president to be inaugurated.

The Electoral Count Act (1887)

When the excitement died down, public-spirited men of both parties began looking for some way of preventing similar trouble in the future. The problem, however, was a thorny one, and a decade passed before any agreement could be reached. Finally, in 1887, an Electoral Count Act supplied at least a partial solution.[1] Recognizing that presidential electors are state officers whose right to act is certified by the governor, and who meet and perform their sole task within the state boundaries and under state authority, the new law placed responsibility for settling disputes as far as possible upon the states themselves. Any determination of a dispute (it provided) in accordance with a state law covering the subject, and arrived at not less than six days before the time fixed for the meeting of the state's electors, should be accepted as conclusive. Manifestly, however, the authorities of a state might still fail to arrive at a settlement which everybody would accept, and conflicting returns might still make their appearance at Washington. In such an event, the two houses of Congress, acting separately, should decide which set of electors was entitled to be recognized. If, as might easily prove the case, the two houses could not agree, any set of returns having the advantage of being certified by the governor of the state should be accepted; and if no returns came with such endorsement (and the two houses still could not agree), the state involved should lose its vote in that particular election.

Although imperfect, this legislation went perhaps as far toward solving the problem as was feasible. There was doubt about the power of Congress under the constitution to exercise control over such aspects of presidential elections, and there was still no guarantee against a state's vote being forfeited because of inability of both the state itself and Congress to resolve a conflict. To be sure, it might be held that if a state cannot settle its own electoral disputes, it may reasonably be expected to shoulder the consequences; and it must be added that to this day only

[1] *24 U. S. Stat. at Large*, Pt. II, 373-375.

a few of the states have provided by law for handling controversies of the kind. Disfranchisement under any conditions, is, however, undesirable.

The electoral count as now carried out

Ordinarily, of course, the counting of the electoral votes is a mere formality; the country knows a long time in advance what the outcome will be. On the day fixed by law—formerly the second Wednesday in February, but now the sixth day of January—the members of the two houses gather in the hall of the House of Representatives, with the president (or president *pro tempore*) of the Senate in the chair. Two tellers—a Democrat and a Republican—have previously been appointed by each house. Starting with Alabama, and proceeding in alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies, hands them to the tellers (who read them aloud and record the votes), and announces the outcome, which is duly entered, with a list of the votes, in the journals of the two houses. The person receiving the largest number of votes for president, provided the number is a majority of the whole number of electors chosen, *i.e.*, 266 out of a total of 531, is declared elected; and similarly in the case of the vice-presidency.

Provision in case of lack of a majority

In the event that no candidate for president receives a majority, the election is, of course, thrown into the House of Representatives, where each state has one vote, to be bestowed as the majority of the state delegation determines. Until 1804, the choice of the House in such a contingency was to be made between the candidates who were tied, if there was a tie, or among those highest on the list (up to five) if there was simply lack of a majority. The Twelfth Amendment, however, provided for selection among "the persons having the highest numbers not exceeding three"; and a majority of all the states is necessary to elect. Since 1801, the president has been chosen by the House only once, *i.e.*, in 1825, when John Quincy Adams emerged victor over Jackson, Crawford, and Clay. If no candidate for the vice-presidency obtains a majority of the electoral vote, the Senate—the members voting as individuals—choose from the highest two, the victor being required, however, to receive the votes of a majority of the whole number of senators. Vice-President Richard M. Johnson was elected in this way in 1837.

Some recent safeguards

Notwithstanding all the constitutional and statutory regulations on the subject, it is still possible for the country to come up to the expiration of a presidential term with no president-elect ready to be inaugurated. Not only may the choice itself still be hanging fire, but a man duly elected may have died before the inauguration date, or may possibly have refused to serve. Providing belatedly for such contingencies, the Twentieth Amendment, adopted in 1933, stipulates (1) that in case of the death of a president-elect, the vice-president-elect shall become president, and (2) that if at the time for inauguration a president-elect has not been chosen or has failed to qualify, the vice-president-elect

"shall act as president until a president shall have qualified." Conceivably, however, the same situations might arise as to both president-elect and vice-president-elect; and for this contingency the Amendment authorizes Congress to make provision by law—which, nevertheless, it has thus far failed to do.

Proposed Changes in the Method of Electing the President and Vice-President

The question of the electoral college

Proposals for altering the method of electing the president and vice-president have been discussed from time to time throughout our national history. The Twelfth Amendment remedied certain defects; the Twentieth removed others; and various statutes, notably the Electoral Count Act of 1887 and an act of 1934 passed in pursuance of the new calendar introduced by the Twentieth Amendment, improved matters still further. But the chief anomaly remains. On being asked, the average person would probably reply at once that this anomaly is the electoral college; and there is no denying that that device has never, except at the beginning, functioned as intended, or that, so far as its formal acts are concerned, it could readily be dispensed with. The matter, however, calls for a little analysis. If it be desired to go on with the plan under which the undivided electoral support of a state is thrown to candidates polling a mere state-wide plurality of the popular vote, the electoral college, as now operated, is at least harmless, serving as it does merely as a means of translating one kind of votes into another, without affecting the result. If, on the other hand, it be desired that different parts of a state be recorded for different candidates because they have voted differently, the electoral college again need be no obstacle, although its members would have to be elected by districts rather than on a general ticket; because they would simply register and record the expressed preferences of their respective districts. In other words, the crux of the matter is not the employment of electoral "ciphers" to record the electoral votes; it is, rather, the employment of intervening "electoral votes" at all, rather than allowing the results to be determined directly, and once and for all, by the popular vote; indeed, the popular vote could conceivably be translated into electoral votes, and recorded, without actually employing personal "electors."

Some questions

Hence, if there were to be any change, some of the questions suggesting themselves might take form about as follows: (1) Should the country be thrown into a single great constituency and elect directly by plurality or majority of the total popular vote, with no reference to state lines? Or (2) should voting continue to be by states, and election take place, again by direct vote of the people, on a basis of plurality in a majority of states? Or (3) should the electoral college be discarded, yet the popular vote in each state be translated, as now, into electoral votes and the undivided electoral vote of a state be awarded to a candidate receiving

a popular plurality in the state? Or (4) should this last-mentioned plan be followed, except with the electoral votes in a state awarded, not on the state-wide principle, but in proportion to the popular vote polled by each of the candidates?

Revival of the district plan desirable but not probable

The first of these possibilities, defying all considerations of state interest and pride, may be set down at once as impracticable, even if desirable.[1] The second is objectionable because it would enable a number of the smaller states to swing an election by means of only a minority of the nation-wide popular vote; although it is not to be forgotten that the present system overweights the small states,[2] and that we have had eight "minority" presidents under it. The third alternative has something to be said for it. It would at least get rid of a fifth wheel to the wagon; and it was in this form that a constitutional amendment sponsored by the late Senator George W. Norris twice narrowly failed to secure the necessary two-thirds vote in the Senate in May, 1934. Greater gain, however, would flow from adoption of the fourth plan enumerated above, *i.e.*, one under which the electoral vote of a state would be computed and allotted on a proportional, or district, rather than a general-ticket basis, and a state's entire electoral vote thus would be prevented from going to a given candidate simply because he happened to obtain a bare plurality of the popular vote and notwithstanding that he might have run a poor second, or even third, in important sections of the state.[3] As Michigan's experience with her law of 1891 reminds us, there is, even now, nothing to prevent a state from independently adopting the proportional or district plan, although the formality of choosing electors could not, of course, be abandoned without amending the federal constitution. But here again the great obstacle is state interest and pride; New York will be a far weightier factor politically if all of her forty-seven electoral votes unfailingly go to the same candidate than if her votes could be divided and scattered; and so with every other state. The same considerations, therefore, that originally influenced one state after another to give up the district plan may be counted upon to block any attempt to revive it or anything resembling it, except perhaps locally and sporadically; and one is bound to conclude that, although the way in which we choose our chief executive could undoubtedly be improved in a number of respects, the outlook for reform—beyond a possible discontinuance of the electoral college, which would be relatively unimportant unless the state-wide plurality system were abandoned with it—is not promising.

[1] Small states would lose heavily, and large states gain, in electoral power; debarring Negroes from voting as they do, the Southern states would be at special disadvantage. The plan could hardly be operated at all except on the basis of a uniform national suffrage and election law—which, however, certainly could not be secured.

[2] Because Senate as well as House seats figure in the apportionment of electoral votes.

[3] Constitutional amendments embodying this fourth plan have several times been introduced in Congress.

Results of Popular Election in Terms of Presidential Fitness

An uneven record

Some sixty years ago, Mr. (later Lord) Bryce included in his widely influential book, *The American Commonwealth,* a chapter entitled "Why Great Men Are Not Chosen President." [1] He did not mean to imply that none such is ever chosen. But, looking back over a line of twenty presidents who had served the nation in its first hundred years, our friendly English critic could not see that the people had shown any consistent disposition to elevate even their strongest men (leaving aside the question of sheer "greatness") to the highest office in their power to bestow. Nor do they seem to have developed any strong inclination of the kind in later days.

Some people believe that if the plan of election originally adopted had been adhered to, the general level would have been higher. Perhaps it would; though there is no way of proving it. In any event, the early rise of political parties and of such party machinery as the national nominating convention doomed that system to collapse and brought into play a wholly different one under which the president became the choice, not (except in form) of the electoral college, nor yet, in any very exact sense, of the people as a whole, but essentially of a political party which, having made a candidate its standard-bearer, went on to amass enough votes to carry him to victory. To be sure, such a party candidate is initially named by a gathering of delegates presumed to reflect the sentiments of a large segment of the voters. To be sure, too, he cannot reach the White House unless the voters support him in sufficient numbers. But at election time they have opportunity to choose among only two or three or half a dozen candidates picked and put before them; and whoever becomes president does so by virtue of having been chosen in the first instance by a party as an available candidate.

Unhappily, however, the considerations and circumstances making a man available as a party candidate are not always—perhaps not even usually—those that will give him high rank as a president after he is elected. Any one familiar with our national politics can recall plenty of presidential candidates who emerged as party standard-bearers almost as from a lottery. Convention deadlocks among strong candidates open the way for compromise on a weaker one; decisions by bosses in hotel hide-outs are passed on to harassed conventions as virtual mandates; the necessity for carrying a large pivotal state may outweigh all considerations of broader statesmanship.

Under conditions such as these, the rough-and-tumble of party politics kept Hamilton, Gallatin, Clay, Calhoun, Webster, Seward, Sumner, Hay, and Root from the presidency, while bringing into the office mediocrities like William Henry Harrison, Pierce, Buchanan, Johnson, and Harding. Of course it is only fair to remember that the system, within three-

quarters of a century, gave us Lincoln, Cleveland, the two Roosevelts, and Wilson; also that a good many presidents—Hayes, Arthur, McKinley, and Taft, among more recent ones—while lacking any special claim to distinction, nevertheless proved of at least good average capacity. Perhaps, after all, as Lord Bryce commented in a later book, "things have on the whole gone better than might have been predicted." [1]

Qualities to be sought in a president

Certain qualities, it is manifest, a president must have if he is to be successful; with rare exceptions, he will realize the possibilities of his high office only in the degree to which he possesses them. He must be able; he must be diligent; he must be honest; he must be courageous; he must be tactful; he must be capable of making large decisions promptly, intelligently, and in clear-cut fashion; above all, one is tempted to say, he must be a good politician, adept at working with men, managing them, and inspiring their confidence. Not all presidents, of course, have fully measured up to these requirements. The office has happily been preserved unsullied by personal turpitude; but some incumbents have been too lenient toward self-seeking and corrupt men surrounding them. No president has been wanting in patriotism; but some have lacked courage and decision, and one or two have been notably deficient in tact. Strange as it may seem, two within the recollection of the present generation (Taft and Hoover) were not clever enough at politics for either their own comfort or the country's good.

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PART II

THE NATIONAL GOVERNMENT

1. ORGANIZATION, POWERS, AND PROCEDURES

CHAPTER XII

THE STRUCTURE OF CONGRESS

Sequence of topics to be considered

Preceding chapters have dealt with various features of the American governmental system in general—constitutional foundations, federalism, separation of powers, citizenship, civil rights, suffrage, parties, elections. We now turn to government as organized and operated on each of the three great levels characteristic of our system, (1) national, (2) state, and (3) local. To be sure, governments on these various levels do not function in water-tight compartments, but rather are interrelated, and even at some points interlocked. Each, however, will stand out in clearer relief and be more readily understood if made the immediate object of attention through a separate series of chapters. And we start with the government to be chiefly emphasized in this book, *i.e.*, the national.

Not even the national government can be studied, however, without a further breakdown of subject-matter. In accordance with what Madison called "a fundamental principle of free government," the framers of the constitution set up (though they certainly did not invent) three broad categories of national functions or powers, *i.e.*, executive, legislative, and judicial, assigning them to the same number of largely separate and ostensibly coördinate branches or establishments, similarly designated. In due time, we shall find ourselves considering various functions and services of the national government as a whole, in such areas as finance, defense, foreign relations, agriculture, labor, business, and social security. Before reaching that point, we, however, must look carefully into the executive, legislative, and judicial machinery and personnel through which the government carries on its work, and which themselves, in their organization and activities, furnish many problems and issues constantly agitating the public mind.

First, the legislative branch, *i.e.*, Congress, will be taken up, as the primary policy-framing agency; then the executive, *i.e.*, the president, and thereupon also the executive departments, the independent establishments, the civil service, and the agencies of administration generally; and finally the judiciary.

Congress-bicameral form

Having parcelled out the powers of the national government among legislative, executive, and judicial branches, the framers of the constitution pursued farther the policy of distribution and balance by providing for a national legislature consisting of two houses rather than one; and, on the whole, they acted wisely. To be sure, two legislative houses have the disadvantage of promoting deadlocks and delays, duplication of effort, and diffusion of responsibility. A municipality or other local area, having only limited powers, has little need for one house as a check upon another; and many of our cities, large and small, have done away with their former cumbersome two-chambered councils. Indeed, the plan has been challenged in connection with state legislatures as well; and in 1934 Nebraska pioneered by adopting a constitutional amendment under which, since 1937, the legislature of that state has consisted of but a single house. In the domain of the national government, however, policies and measures frequently involve such fundamental matters, *e.g.*, the protection of civil rights, that it is a good thing for them to be weighed and shaped and checked by two legislative bodies approaching them separately, and perhaps from widely different angles, rather than by only one.

The House of Representatives

By whom elected

The constitution's authors intended the president to be chosen, actually as well as nominally, by a college of electors, and senators by state legislatures. The House of Representatives, however, was designed to spring directly from the people, and accordingly the constitution has from the first provided that its members shall be elected every two years "by the people of the several states," defined as including all persons qualified to vote for a member of the "most numerous" branch of their state legislature.[1] Restricted only by the Fifteenth and Nineteenth Amendments prohibiting denial of the right to vote on grounds of race, color, or sex, the different states regulate the suffrage as they choose, primarily for their own legislative and other elections, but incidentally for congressional (and presidential) elections as well.

Apportionment of seats

Although a broadly national, popular body, the House is still further constructed with reference to state lines. Every representative is elected within a given state, and every state has, as such, a definite quota of members.[2] Provisional quotas were assigned in the constitution, as originally adopted, to serve until a census could be taken; and thereafter representatives were to be apportioned among the several states "according to their respective numbers," which were to be computed by "adding

[1] Art. I, § 2, cl. 1. The Seventeenth Amendment, under which senators are now likewise chosen by direct popular vote, contains this same provision.

[2] By courtesy, Hawaii and Alaska are allowed to send one "territorial delegate" each, and Puerto Rico a "resident commissioner." Although permitted to speak on matters pertaining to their constituencies, and also to serve on committees (beginning in 1946, all are added in any case to the committees on agriculture, public lands, and armed services), these persons are not voting members of the House.

to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." [1] The "other persons" referred to were, of course, slaves; and this provision became one of the important compromises of the constitution. When slavery was abolished, the three-fifths clause was rendered obsolete, and the constitution now provides simply, in the Fourteenth Amendment, for apportionment among the states "according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed." [2] As we have seen, it provides also (though in a clause never enforced) for a reduction in the representation of any state which withholds voting privileges from adult male citizens of the United States "except for participation in rebellion, or other crime." [3]

Method of reapportionment

The constitution does not expressly say that representation in the House shall be reapportioned after every decennial census, but that is clearly what it means; and for more than a hundred years Congress never failed to take the necessary action, usually after an interval of not more than one or two years. As population grew and the number of states increased, the membership of the House mounted to the present 435; and when, following the census of 1920, Congress discovered that there was no way of holding the number at that point (certainly as high as it was desirable to allow it to go) without reducing the quotas of as many as eleven states, it drew back from the problem and simply allowed the country to drift along a full decade without any reapportionment at all. Only in 1929 was the situation remedied—and then only by an act providing for reapportionment under the coming 1930 census, and at decennial intervals thereafter. In accordance with this legislation (as amended in 1941), reapportionment proceeds as follows: (1) the membership of the House remains fixed "permanently" at 435; (2) after each census, the Census Bureau in the Department of Commerce prepares for the president a table showing the number of inhabitants of each state and the number of representatives to which each state accordingly is entitled; [4] (3) the president transmits the tabulation to Congress; and (4) the reapportionment as transmitted goes into effect with the next Congress elected, unless, of course, Congress intervenes with legislation to the contrary. Under this general plan (which has the advantage of preventing the matter from again going by default), a reapportionment based on the 1930 census resulted in a gain of from one to nine seats by eleven states and a loss of from one to three by twenty-one; and another, ten years later, enabled eight states to gain a total of ten seats while ten others were losing one apiece.

[1] Art. I, § 2, cl. 3.
[2] All Indians are now subject to federal taxation.
[3] See pp. 119-120 above.
[4] Computed by the method of "equal proportions," rather than that of "major fractions" long employed, but yielding results only slightly different if at all.

General-ticket and district systems

Except for requiring direct popular vote, the constitution leaves the "times, places, and manner" of choosing representatives to be determined by the legislatures of the several states—although with superior authority in Congress to make or alter regulations on the subject.[1] For half a century, elections were in some states in single-member districts, in others on a general, or state-wide, ticket. But the apportionment act of 1842 required every state populous enough to be entitled to more than one representative to be divided by the legislature into districts "composed of contiguous territory," each returning one member; and the apportionment acts of 1901 and 1911 added the qualifying term "compact." Curiously enough, the act of 1929 failed to use any of the terms "contiguous," or "compact," or "equal"; and when, three years afterwards, an effort was made to have a redistricting law in Mississippi set aside on the ground that the seven congressional districts provided for were not composed of contiguous and compact territory, the federal Supreme Court held that the failure to repeat the requirements in the 1929 act by implication repealed them.[2] In legal circles, there had been much doubt on the point; and the country at large was hardly aware of what had happened. In the opinion of the Court, however, the omissions had not been inadvertent, but intentional; and since new legislation in 1941 was silent on the subject, the former requirements seem no longer to apply. It may be added that even when federal law on the subject was entirely explicit, Congress made no effort to enforce it upon the states, and that federal district courts holding state reapportionment acts contrary to law because of creating districts lacking in compactness or in equality of population were usually reversed.[3]

Problems raised by the district system:

For reasons to be explained presently, the district system is decidedly superior to the general-ticket plan. It, however, has drawbacks. To begin with, there is the difficulty of laying out districts fairly and equitably. In each state, the job falls to the legislature, which, if that body does its

1. Difficulties of redistricting

duty, will, every time that the state becomes entitled to more or fewer representatives, reconstruct the pattern of districts accordingly. But even when intentions are of the best, the task is not easy. In order that a citizen's vote may count for as much in one district as in another, it is desirable that districts be as nearly equal as possible in population. It is also advantageous not to split counties between two or more districts, and likewise not to partition municipalities except in the case of those too populous to comprise a single district. But often the constructing of a district becomes a sort of jig-saw puzzle, with perhaps several different

[1] Art. I, § 4, cl. 1.

[2] Wood *v.* Broom, 287 U. S. 1 (1932).

[3] A state receiving an increase in its quota of representatives when a reapportionment is made may, until a new districting is carried out, elect its additional representatives at large; and a state suffering a decrease may, similarly, elect its entire quota at large. Hence the congressmen-at-large of whom one occasionally hears. In four states (Delaware, Vermont, Wyoming, and Nevada), too, congressmen are elected at large for the reason that the state is entitled to only one seat.

groupings of counties about equally plausible geographically, but with widely differing political implications.

2. Gerrymandering

Furthermore, the redistricting of a state can never be carried out in the rarefied atmosphere of mathematical abstraction. On the contrary, it is beset, both in and out of the legislature, by all manner of personal, community, regional, and partisan interests and motivations. In particular, there is—in all too many instances—the well-known practice of gerrymandering. This term dates from 1812, when Governor Elbridge Gerry of Massachusetts inspired, or at all events condoned, a notorious piece of partisan districting in his state;[1] the practice itself goes back even farther. The principle behind the gerrymander is simple: "In districting a state or city, spread the majorities of your own party over all or over as many districts as possible. If you have not enough votes to control every district, concentrate the strength of your opponents in as few districts as possible, so that it will do them the least good."[2] Plenty of laws have been enacted to curb the practice; but, human nature and party motivations being what they are, the temptation offered politicians who find themselves in a position to control the redrawing of political boundary lines is usually too strong to be resisted. Even the statutory requirement before 1929 that states be divided into districts composed of "contiguous and compact territories" seldom deterred legislative majorities from mapping out "shoe-string," "saddle-bag," and "dumb-bell" districts ingeniously contrived to yield the controlling party the largest possible number of seats at ensuing elections. Even then, too, the courts seldom intervened; while as for the present, all federal regulation having been terminated, only such restraints remain as are imposed by public opinion and by a very limited number of provisions in state constitutions.

3. Failure to redistrict at all

A final difficulty with the district system is that the legislature of a state may fly in the face of propriety, and even of plain constitutional stipulation, by neglecting or refusing to redistrict at all. It may do this because the party in power stands to gain by keeping things as they are, or because the dominant rural portions of a state do not want to admit large urban populations to more power, or because of simple inertia. Three states have not redistricted since 1912 and 1913, one not since 1911, one (Maryland) not since 1902, two (Illinois and Arkansas) not since 1901, and one (New Hampshire) not since 1881. With population constantly shifting, the result of such negative, or "silent," gerrymandering is often gross inequality of population among congressional districts (ranging in Illinois, which offers the widest disparity, from 112,116 to a

[1] One of the resulting districts had the shape of a lizard. "Why, this district looks like a salamander," remarked an observer. "Say rather a Gerrymander," replied an opposition editor, thereby coining a political term which has ever since been current. For a map showing this historic gerrymander, see J. Winsor, *Memorial History of Boston* (Boston, 1880), III, 212.

[2] R. C. Brooks, *Political Parties and Electoral Problems* (3rd ed.), 475.

Chicago district with 914,053), with manifest frustration of one of the most basic principles of our democracy.[1]

The question of fuller representation for minorities

Under the general-ticket system prevailing in many states before 1842, a party polling a bare plurality of the popular vote for congressmen captured the entire state delegation, notwithstanding that in some sections of the state the candidates of a different party might have been far in the lead;[2] and the main object of Congress in making the district system obligatory was to enable parties with such localized strength to win at least a handful of seats. In a very rough sort of way, the district plan undoubtedly makes for the representation of minorities; a Republican state is likely to have a few Democratic congressmen, and *vice versa*. The proportions which result are, however, very rough indeed. The strength of a minority party may be fairly impressive in the aggregate, yet so distributed throughout a state as to yield no district majorities whatever; as, for example, when, in Indiana in 1932, the Republicans cast 683,517 votes for congressmen, but the Democrats, with 849,821, made a clean sweep. From this, as well as from inequalities in the total (as also in the *voting*) populations of districts, it comes about that no House of Representatives, even when newly elected, can claim to mirror the political opinion of the country in more than a very general sort of way. And one will not be surprised to learn that those who deplore this situation bring forward as a remedy the device of proportional representation, under which, if adopted for congressional elections, there would be a return to the general-ticket plan, coupled, however, not with plurality election, as in earlier days, but with some method of allotting seats (on a state-wide basis or in multi-member districts) in a fixed proportion to the numbers of popular votes polled by the various tickets. Congress could, of course, in some future reapportionment act, require the states uniformly to elect according to the proportional plan. There is no present prospect of this being done; but short of it, existing law might be changed so as to permit election either by districts or otherwise,

[1] This "silent gerrymander" is practiced also notoriously in connection with wards of cities and with state legislative districts. In Illinois, judicial action has more than once been invoked to force a congressional redistricting, but without success. The latest effort took the form of an action under the federal Declaratory Judgment Act of 1934 (brought by a professor of political science at Northwestern University, a professor of law at the University of Chicago, and a Chicago attorney) to secure a declaratory decree that would, in effect, require election of all of the state's twenty-six representatives at large until a new districting statute could be enacted. Rebuffed, on legal grounds, in a district court avowing full sympathy with their objective, the plaintiffs carried the matter to the federal Supreme Court, only to be informed, in a divided opinion, that "the petitioners ask of this Court what is beyond its competence to grant," since, in the majority view, the matter was a political one and not appropriate for judicial determination. See F. L. Burdette, "The Illinois Redistricting Case," *Amer. Polit. Sci. Rev.*, XL, 958-962 (Oct., 1946).

Maps showing the arrangement of congressional districts in the various states, as existing in 1945, will be found in *Official Congressional Directory* (1st ed. corrected to Feb. 2, 1945), 801-852. One other dubious consequence of the district system, although merely a by-product of it, is the custom which requires congressmen to be residents of the districts which they represent. See p. 256 below.

[2] This is, of course, what still happens in the choice of presidential electors.

thereby opening a way for individual states to experiment with a proportional scheme if they so desired.[1]

Further congressional regulation of elections

Congress has gone farther, in regulating congressional elections, than merely to require use of the district system. In 1872, it enjoined that all such elections be by secret ballot;[2] in 1873, that they be held throughout the country on the same day, namely, the Tuesday following the first Monday in November of every even-numbered year[3] (previously, voting was in some instances *viva voce*, and elections were held at widely varying dates); and in 1925, that candidates should not allow their expenditures to exceed $5,000, exclusive of necessary personal outlays. Candidates are nominated as the laws of the several states provide; for although, as has appeared, Supreme Court decisions of the past six or seven years seem clearly to open a way for congressional regulation of nominating procedures, no national legislation on the subject has as yet been enacted. In most cases, the direct primary is employed; but in several states the nominations are still made by district nominating conventions composed of delegates representing counties, towns, or other subdivisions.

Contested elections

The constitution makes the House of Representatives the judge of the "elections, returns, and qualifications" of its members,[4] and accordingly every dispute involving a seat is decided by the House itself. If a candidate is unwilling to concede his defeat, he may ask for and obtain a local recount of the votes as provided for in the state election laws; and if still dissatisfied, he may carry his case to the House, where (since 1946) it will be referred to one of the new standing committees, the committee on House administration. In its turn, this body will weigh the evidence, hear the claimants and their counsel, take other testimony if desired, and prepare a report recommending that one candidate or the other be considered elected. Party considerations are not unlikely to color the decision, and the English plan of turning over such cases to a non-partisan and disinterested board selected from the judiciary is to be preferred.

Qualifications of members

Four qualifications, including one of a negative nature, are required of a representative by the constitution. He[5] must be twenty-five years of age, or over (if not when elected, at all events when he takes his seat); he must have been a citizen at least seven years (not necessarily immediately preceding election); he must be, at the time of his election, a legal resident for voting purposes (not merely an inhabitant) of the state in which he is chosen;[6] and he cannot, while a member of the House,

[1] To the present time, proportional representation has been tried in this country only in a few cities. See p. 158 above.

[2] This does not preclude the use of voting machines.

[3] Unless the constitution of a state fixes a different date, as is true in Maine, where election day (though not for president) is the second Monday in September.

[4] Art. I, § 5, cl. 1.

[5] Women are eligible on the same terms as men, and a considerable number have been elected. See p. 115 above.

[6] Art. I, § 2, cl. 2.

hold any "office under the United States." [1] The last-mentioned restriction is construed to debar Army and Navy officers, as well as holders of civil office; and it is hardly necessary to point out that, in disqualifying heads of executive departments, it contrasts sharply with the unwritten rule in Great Britain which requires ministers to have seats in Parliament.

Can other qualifications be required?

On sundry occasions the question has arisen whether qualifications in addition to those stipulated in the constitution can be imposed. The answer is both no and yes. On the one hand, plenty of court decisions lay it down as a principle of law that neither the states nor Congress can add to or subtract from the qualifications enumerated. On the other hand, usage, as every one knows, has decreed almost inexorably—notwithstanding complete silence of the constitution on the subject—that members shall be residents of the districts which they represent. Furthermore, in passing upon the qualifications of newly chosen members, the House may also, as a matter of practice, make additions; at all events, it did so in 1900, when it refused to seat Brigham H. Roberts of Utah on the ground that he was a polygamist, and again in 1919, when Victor L. Berger of Wisconsin was excluded because of having been judicially convicted of sedition and disloyalty.[2] To be sure, these decisions were of doubtful constitutionality. The proper procedure would seem to be to seat an objectionable person and then expel him. But the actions taken in the cases mentioned stand on the record as evidence that, regardless of both the theory and the law of the matter, the House can actually impose a test for admission of which the constitution makes no mention.

The Senate

Equal representation of the states

Turning to the Senate, we find a branch of Congress constructed, not on the plan of representation according to population, but on the purely geographical and federal basis of states as political entities: every state, large or small, populous or otherwise, is entitled to two senators, and none can be deprived of its equality with the others in this respect except with its own consent.[3] To many people in all periods of our national history, this equality of unequals has seemed unreasonable, and indeed indefensible. To begin with, Alexander Hamilton has been proved right in his contention—contrary to prevailing opinion in his time—that, once the new government was in operation, there never would be a conflict of interests between large states and small states as such. Throughout our history, cleavages have run on quite different lines. They have been regional, or sectional, *e.g.*, between parts of the country that were mainly agricultural and other parts devoted chiefly to industry and trade. Whether a state was large or small has made little or no difference in its political attitudes and alignments. And so it very well can be argued

[1] Art. I, § 6, cl. 2. A state office does not disqualify.

[2] The Supreme Court eventually cleared Berger, and after being elected a third time by his district, he was seated.

[3] Art. V.

that the precaution taken by the constitution's authors for the protection of the small states is unnecessary and need not be continued.

In the second place, the spread between the smallest and largest state populations has grown far greater than was ever anticipated, with equality of representation correspondingly more incongruous, at least as a matter of mathematics. New York, with 13,479,142 population (in 1940), has two senators; Nevada, with 110,247, also has two senators. Pennsylvania has about a million and a half more inhabitants than all New England; but New England has twelve senators and Pennsylvania two. The six states of New York, Pennsylvania, Illinois, Ohio, Texas, and California have over fifty million inhabitants, or nearly forty per cent of the total population of the continental United States. Yet, in a Senate of ninety-six members, they have only twelve, *i.e.*, about twelve per cent. A Senate majority could, indeed, be made up to represent not more than one-fifth of the people of the country. More significant, too, than this mere disproportion of numbers is the distorted representation given major economic and social interests. Industry and commerce preponderate in only a few, but usually densely inhabited, states; agriculture preponderates in many states, more sparsely populated; and equality of state representation in the Senate inevitably gives rural interests disproportionate influence in that body.

Proposed changes

People who have been troubled about this situation have suggested various remedies, among them that a state be allowed an additional senator for every million inhabitants in excess of some fixed number. This would not result in an exact proportioning such as is presumed to apply in the case of the House of Representatives, but it would materially alleviate the existing inequalities; and at first glance the proposal seems reasonable. If carried out, it would have the undoubted advantage of introducing a fairer balance between rural and urban, agricultural and industrial, interests. There are, however, several things to be noted before conclusions are reached. In the first place, the number of senators would be greatly increased, and such efficiency as the Senate now shows as a deliberative and revising body would be seriously impaired. In the second place, the change—added to popular election of senators, as already provided for by the Seventeenth Amendment—would tend to make both houses representative of the same people in the same proportions, and hence would remove one of the main reasons for having a second chamber at all. Criticism of the existing arrangement commonly springs from the idea that representation, to be worthy of the name, must be based on and proportioned to numbers; whereas there is no essential reason why a senator may not quite as satisfactorily represent 5,000,000 people as 500,000, just as the president sometimes better represents the people of the entire nation than do several hundred locally elected congressmen. Finally, the question is hardly more than academic, for the reason that the proposed change, requiring not only a constitutional

amendment but the express consent of every state whose representation would become less than that of some other state, would be practically impossible to bring about.

Original mode of election

Five or six different ways of choosing senators were considered by the constitution's framers, and election by the state legislatures was finally hit upon as the least objectionable, with the proviso that a vacancy arising in any state, by resignation or otherwise, when the legislature was not in session should be filled by temporary appointment by the governor.[1] Certain distinct advantages were, indeed, expected to flow from this method of selection. Members of legislatures, it was thought, would be most likely to know the qualifications of senatorial candidates, and, being themselves men of substance and responsibility, would choose persons of superior character, and especially of conservative temper. Elected by the legislature, a senator would feel himself the representative, not of a faction or group or section, but of the entire state. The national and state governments would be geared together in a significant way, and people who were troubled lest the strengthening of the former might lead to eventual extinction of the latter (such fears have not been confined to the days of the New Deal) would find ground for reassurance.

Popular election under the Seventeenth Amendment

In earlier days, these considerations seemed sound and indeed conclusive. As, however, government became progressively more democratic, the idea developed that senators, like representatives, ought to be chosen by the people directly. Nor was it merely a matter of theory; in practice, legislative election showed plenty of defects—tendency to deadlocks, virtual purchase of seats, preoccupation of legislators with senatorial elections to the neglect of other business. Toward the close of the nineteenth century, a sustained movement for direct election got under way: political parties endorsed the plan in their platforms; state legislatures themselves went on record for it; the lower house at Washington repeatedly passed resolutions proposing constitutional amendments on the subject. In more than half of the states, too, the legislatures were by 1912 finding themselves confronted with senatorial "nominations" volunteered by the voters in direct primaries, with the result of being practically (although not legally) obliged to choose among nominees so designated. The decision came hard, but in the year mentioned it was made; the Seventeenth Amendment was got through both branches of Congress and in 1913 was proclaimed in force. Under the plan adopted, senators are chosen directly by the people of the several states; and, as in the selection of members of the House of Representatives, the electors include all persons qualified to vote for members of the "most numerous branch of the state legislature." If a vacancy arises, the governor of the state issues writs of election to fill it for the remainder of the unexpired term; although a state legislature may empower the governor to make temporary appointments, and most of the legislatures have done this.

[1] Act I, § 3, cls. 1-2.

Results of the new system

The effects of the change to direct popular election cannot be measured with precision. Liberation of the state legislatures from the distractions entailed by senatorial elections has been a genuine gain. Deadlocks have been made impossible, and a state's full representation at all times (except for brief intervals following the death or resignation of a senator) has been assured. The consequences for the Senate itself are not so clear. Since 1913, many hundred senators have been elected or reëlected. But whether they have been of higher quality than they would have been under the old method of election, no one can say. Certainly the amendment produced no abrupt shift of personnel. Practically every senator who could have expected to be continued in office at the hands of his state's legislature was continued on the popular basis; indeed, contrary to expectation, reëlections have consistently been more numerous under the popular system than before. Furthermore, abuses arising from the lavish use of money in senatorial nominations and elections have not disappeared. Money is employed in a different way, because it is now the state-wide electorate that has to be reached; and in this situation considerable outlays are not only inevitable, but justified. Speaking broadly, however, senatorial politics tends to remain a game for the well-to-do, or at all events those able to muster strong financial support. Certain undesirables, *e.g.*, self-seeking plutocrats and virtual appointees of avaricious capitalistic interests, are now pretty well excluded; but others, *e.g.*, the demagogue, the whirlwind campaigner, and especially the shrewd manipulator of federal patronage, have perhaps better chances than before.

Term and continuity of service

The term of senators is six years. Some of the framers of the constitution favored a longer period; indeed, a few advocated election for life. But to most persons six years seemed sufficiently long to insure the desired stability and continuity. A term of such length puts a senator in a very different position from a representative. Unlike the latter, he has time in a single term to acquire experience, and even to attain a certain degree of leadership; and he can devote himself single-mindedly for several years to public affairs without too much distracting anxiety over reëlection. Most senators, furthermore, have more than one term, and periods of service running to eighteen, or even twenty-four, years are not uncommon. Continuity of personnel arising from long terms and numerous reëlections is further secured by an arrangement under which the terms of one-third of the members expire biennially, with the result that the Senate never finds itself in the position in which the House of Representatives is found every two years—a new body, with greatly altered membership, obliged to organize from the ground up.[1] On the

[1] The original senators were divided into three classes, with terms expiring in two, four, and six years respectively. In no case were both senators of a state placed in the same class, and the senators of states admitted later were always assigned, by lot, to different classes. Hence, barring vacancies arising from death or resignation, only one senator is elected in a state in any given year.

contrary, it is continuous and always organized. Considerably more than two-thirds of its members at any given time have served at least as long as two years; leadership develops slowly and as a rule changes gradually; precedents and traditions are carried along on the current of a never-ending stream.

Qualifications

Senators must be at least thirty years of age, and must have been citizens of the United States at least nine years. Otherwise, their constitutional qualifications are identical with those of representatives. They must be inhabitants of the states that elect them, and during their tenure they may not hold any office under the United States. Like representatives, too, they may not at any time be appointed to a civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during the time for which they were elected. Equally with the House, the Senate is judge of the elections, returns, and qualifications of its members;[1] and here also the question has arisen whether qualifications can be imposed in excess of those prescribed by the constitution. We have seen that the House once took the doubtful course of refusing to seat a member-elect because he was a polygamist. Asked, in 1903, to seat a senator-elect (Reed Smoot) who, although not a polygamist, was known to be an adherent of the Mormon Church, the Senate took what seems to be the better constitutional ground, namely, that any person duly elected and having the qualifications required by the constitution must be received, even though he may subsequently be expelled. In refusing in 1927-29 to seat Frank L. Smith of Illinois and William S. Vare of Pennsylvania, who, although duly certified as elected, had allowed too much money to be spent in behalf of their respective candidacies, the upper house seemingly receded from its previous more correct position—although effort was made to justify the course taken on the ground that improper receipt and use of funds had invalidated the election of both men. However, when, in 1941, it seated William Langer of North Dakota, elected regularly enough, but charged (by a group in his own state) with being unworthy of membership, it reverted to its earlier more defensible practice. Expulsion of a senator or representative requires a two-thirds vote and may be for any cause. But neither senators nor representatives are regarded as civil officers of the United States, in the meaning of the constitution, and consequently they are not subject to impeachment.

Status and Pay of Members of Congress

Privileges and immunities

Members of both houses have certain privileges and immunities, based on hard-won English usages, and aimed at protecting freedom of attendance, speaking, and voting. A senator or representative may be arrested at any time for treason, felony, or breach of the peace—which, as

[1] Contested elections are investigated and reported upon by the standing committee on House administration.

construed, means indictable offenses of every sort; so that he enjoys no exemption from the processes of the criminal law. But while attending a session, or going to or returning from a session, he cannot be arrested on civil process or compelled to testify in a court or serve on a jury. Moreover, "for any speech or debate in either house," he cannot "be questioned in any other place."[1] That is, he cannot be proceeded against, outside of the house to which he belongs (it, of course, may censure or even expel him), because of anything he may have said in the course of debate, committee hearings, or other proceedings properly belonging to the business of the house. He cannot, for example, be sued for libel or slander by a person whom he may have criticized. The exemption is sometimes used as a shield for unwarranted personalities, and even for downright scurrility, but it is fundamentally justifiable. If a member knew that he might be proceeded against at law by any person taking offense at his remarks in the exercise of his proper functions, he would speak and act (in view of the general publicity of congressional proceedings which now prevails) under an altogether undesirable sense of restraint. The immunity relates, of course, to legal proceedings only, and quite properly confers no protection against criticism by press and public on grounds of public interest and policy.

Pay and perquisites

One other constitutional right of members is that of receiving compensation for their labors, at a rate fixed by law (of their own making) and paid out of the national treasury. Until 1855, they contented themselves with a small per diem allowance, but at that time a salary of $3,000 was authorized, which in 1865 was increased to $5,000, in 1907 to $7,500, and in 1925 to $10,000 (in the case of the speaker of the House of Representatives, and also the president *pro tempore* of the Senate when there was no vice-president, $15,000). In later years, demand arose for further increase. Senators and representatives testified plausibly that living costs in Washington, combined with unavoidable expenses incident to their station, made it impossible for them to get along on what they were paid; and disinterested observers, supporting the contention, urged that something be done to correct the situation. A new salary figure most commonly in mind was $15,000, and in 1946 the Senate passed a comprehensive Legislative Reorganization Act[2] carrying provision for that amount. Approving the measure in somewhat emasculated form, the House of Representatives cut the figure to $12,500, coupling with it, however, provision for an additional tax-free $2,500 for incidental expenses; somewhat reluctantly, the Senate concurred in the amendment; and therefore, since the date indicated, compensation for all members has been on the last-mentioned basis.[3] When, in 1942, a somewhat ill-timed bill was passed to improve the financial outlook of members by

[1] Art. I, § 6, cl. 1.

[2] See pp. 260-261 below.

[3] Members of the two houses have always been paid at the same rate. The speaker of the House and president *pro tempore* of the Senate now receive $20,000.

assuring them retirement annuities on a graduated scale after fifteen years of service, a storm of public disapproval caused the measure to be repealed within two months. The legislation of 1946, however, gives all members opportunity to qualify, on a contributory basis (six per cent of salary), for entry into the general federal retirement and pension system,[1] with annuities starting (after at least six years of service) at the age of sixty-two. In addition to salary, funds for incidental expenses, and provisions for retirement allowances, members are entitled to perquisites including (1) a travel allowance for one round-trip each session between the member's home and Washington at the liberal rate of twenty cents a mile—intended, however, to help meet the cost of transporting his family; (2) an allowance of $9,500 a year for representatives and of at least $14,340 a year for senators for clerk hire, with more for committee chairmen; and (3) the franking privilege, enabling members to send free through the mails personal correspondence and other materials stamped with their names.

Congressional Personnel

What kinds of men and women do the voters send to Washington to represent them in the House and Senate? One might reply, "Nearly all kinds"; for the 531 representatives and senators constitute in many ways (although not in all) a good cross-section of the nation itself. A recent careful study of a particular Congress (the Seventy-seventh, 1941-43), brought to notice characteristics that can safely be regarded as those of Congress generally under present-day conditions;[2] and a few of them may be noted here. To begin with, the average age of representatives was fifty-two and of senators fifty-eight—which is far beyond the average adult age (forty-three). Nearly all were firmly rooted in the states, and even in the localities (in the case of representatives), which they represented, by virtue either of having been born there or of having become resident there at an early age. Different religions were represented in rough proportion to their numbers of communicants throughout the country. In other ways besides age, the situation was less typical of the general body politic. Eighty-eight per cent of the representatives and senators had attended a college, professional school, or both—which, of course, is a far higher proportion than among people generally. As one would expect, a disproportionate number had held previous public positions of one kind or another; for example, 156 had served in state legislatures and 109 as prosecuting attorney. Vocationally, the outstanding fact was the preponderance of lawyers—although not all of the 311 members listed as such were actively practicing at the time of their election. Other

[1] See p. 262 below. The standard pension is two and one-half per cent of the average annual salary during service multiplied by the years of service, but in no case exceeding three-fourths of the salary received at the time of retirement.

[2] M. M. McKinney, "The Personnel of the Seventy-seventh Congress," *Amer. Polit. Sci. Rev.*, XXXVI, 67-75 (Feb., 1942).

professions were represented more sparingly, and along with them, a variety of business and financial interests. Although "dirt farmers" were not numerous, agriculture claimed approximately one-tenth of the membership—with, of course, all members from agricultural states counted upon to be sensitive to agricultural interests. The man most conspicuously absent was the manual laborer; only a single member listed himself as a factory worker, although probably a few others had at one time or another been such. Hardly any interest is more vocal around the Capitol than labor. But those who speak for it do so either as lobbyists from the outside or as members concerned about labor-employer relations and policies without themselves ever having riveted a girder or stood at the assembly line. And at this point, Congress contrasts sharply with the British House of Commons, which for more than a generation has contained sizeable numbers of members (since the elections of 1945, a large number) not only belonging to trade unions and the Labor party, but drawn directly from labor ranks.

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CHAPTER XIII

THE ORGANIZATION OF HOUSE AND SENATE

Sessions

Under terms of the constitution, Congress meets in regular session once a year and in addition may, "on extraordinary occasions," be called into special session by the president. Until 1933, the first regular session of a Congress, starting on the first Monday of December of the odd-numbered year following election, usually lasted through most of the ensuing summer, and was commonly referred to as the "long" session; the second regular session, opening in December of the next even-numbered year, lasted only until March 4, when the terms of all members of the House and of one-third of the senators expired, and accordingly was known as the "short" session. This archaic arrangement, under which—unless sooner called into special session—a new Congress did not meet until thirteen months after it was elected, has now been dispensed with, and by provision of the Twentieth Amendment the terms of all representatives (and of one-third or more of the senators) begin on January 3 following election, with the first regular session of a new Congress starting on the same day unless a different date has been agreed upon by the two houses. The second regular session operates on a similar schedule the next year; and both sessions may run as long as desired within a twelve-month period—although the Legislative Reorganization Act of 1946 stipulates that, except in time of war or of national emergency proclaimed by the president, the two houses shall adjourn *sine die* each year not later than the end of July "unless otherwise provided by Congress." [1] At one stroke, the present system does away with the old rigidly limited and largely futile "short" session, puts an end to legislation by "lame-duck" members defeated for reëlection, and reduces the need for special sessions except at times of genuine emergency. Since the first one met in 1789, Congresses have been numbered consecutively; and the sessions of each are identified officially as the first or second (or third) as the case may be. The Congress elected in November, 1946, was the Eightieth.

Improved arrangements

[1] Constitutionally, the termination of a session, *i.e.*, adjournment, is left to the two houses, save only that if they cannot agree, the president may adjourn them to "such time as he shall think proper" (Art. II, § 3. Cf. Art. I, § 5, cl. 4). No occasion for this exercise of presidential authority has ever arisen.

Under pressure of defense preparations and of war, the sessions of 1940 to 1944, inclusive, lasted either a full year or nearly so, although in some cases with recesses of a few weeks. In its report of March 4, 1946, the Joint Committee on the Organization of Congress (see p. 260 below) recommended a regular recess period from June 30 to October 1 to permit members to return to their states or districts and renew contacts with their constituents; and the somewhat differing legislation mentioned above was later enacted.

How a New Congress Organizes for Work

1. The Senate

One who would understand the machinery with which Congress carries on its work will do well to begin by noting how a newly assembled Congress organizes. In the Senate, to be sure, not a great deal happens. Because of overlapping terms, that body has a continuous existence and has never been without organization since it started operations in 1789. At the opening of a new Congress, there is accordingly no occasion for organizing the Senate from the ground up; all that is necessary is to swear in the new members, fill vacant offices (if any), and revise the committee lists in accordance with changes in personnel and in the number of seats held by the different parties.

2. The House of Representatives:

The situation in the House is quite otherwise. All of the members of that body reach the end of their terms at the same time, and with them disappear all officers, all committees, and even all rules; when a new Congress convenes, the House is merely a group of unorganized members-elect. Some one must, of course, take responsibility for getting action started, and by long-established usage (now embodied in a statute) this duty falls to the person who has been clerk of the preceding House. Taking the chair, he calls the assembly to order and reads the roll of members-elect by states alphabetically, using a list made up from certificates of election placed in his hands by the proper state officials. If it appears that any seat is claimed by a person other than the one holding a certificate, the matter is referred for investigation and report (after the House has fully organized) to the standing committee on House administration. In the meantime, the person named in the certificate is presumed to have been duly elected, and he participates both in the organization of the House and in its regular work after organization until such time as it is determined that he is not entitled to a seat.

(a) Reading of the roll

(b) Election of officers

The roll having been read, the work of organization proceeds. As a rule, it is completed quickly—sometimes in a single sitting—although a close balance of political forces may precipitate a deadlock extending over days, and even weeks. The first important step is the election of a regular presiding officer, *i.e.*, a speaker, who forthwith takes the chair. After that, a clerk is chosen, and also a sergeant-at-arms, a doorkeeper, a postmaster, and a chaplain. While the constitution explicitly provides that all of these officials shall be elected by the House, what actually happens is that the House merely ratifies a slate previously agreed upon by a caucus of the majority members.[1] The speaker is voted for separately; the others commonly as a group.

(c) Taking the oath

The speaker-elect is escorted to the chair by the defeated candidate and sworn in, usually by the member of longest service. In turn, the speaker administers the oath to the members as a body, except those whose qualifications have been challenged; such persons are required to

[1] See p. 204 below.

stand aside, and the oath is not administered to them until their right to membership has been established. Having once taken the oath, a member can be cut off from official connection with the House (in advance of the expiration of his term) only by death, by resignation, or by expulsion by a two-thirds vote of his fellow-members.

(d) Adoption of rules

After officers have been elected and the oath administered, it is customary for one of the older members of the majority party to move adoption of the rules as they stood during the preceding Congress. If—as is usually the case—some members consider that these rules ought to be changed, this is the time for them to try to get action; for, once the old rules have been readopted, they are almost certain to stand throughout the remainder of the session without significant amendment. Regardless of party, the older and more "regular" members—especially the leaders—commonly prefer to keep intact the procedures under which they perchance have risen to power; most new members are too inexperienced to have strong opinions one way or the other; and insurgent groups bent upon change usually lack the votes necessary to attain their purpose. The old rules having been readopted, all further proposals for change are automatically referred to the committee on rules—an agency regularly dominated by tried leaders of what is commonly called the House "machine," and even more hostile to innovation than the general run of members. Any suggested departure which in any way threatens the continued control of these men in House affairs is likely to be smothered promptly by the committee and never heard of again, at least until the next Congress organizes.

How the rules have developed

The sources from which the rules, as they stand today, have been drawn are: (1) the constitution, in so far as a very limited number of its provisions are pertinent; (2) the *Manual of Parliamentary Practice* prepared by Thomas Jefferson for the use of the Senate when he was its presiding officer;[1] (3) the regulations adopted by the House itself from the beginning of its existence, and in early days based largely on the practice of the colonial legislatures and of the British House of Commons; and (4) the decisions of successive speakers and chairmen of the committee of the whole—decisions which bear much the same relation to the rules that court decisions bear to statutes.[2] Originally, the rules were few and easily learned; today, the formal regulations alone (disregarding the *Manual*, which in 1837 was adopted *en bloc* as governing the House in all cases to which it is applicable, and also leaving out of account the exceedingly numerous decisions of speakers and chairmen) number forty-three, fill upwards of two hundred printed pages, and form "perhaps the

[1] Jefferson's *Manual* is printed in 70th Cong., 2nd Sess., House Doc. No. 629, and in various editions of the *House Manual and Digest* and the *Senate Manual*.

[2] To this list should perhaps be added legislation by Congress, since the Legislative Reorganization Act of 1946 contained sections amending House and Senate rules concerning committee organization and various other matters. See pp. 260-262 below.

most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world." [1]

The growth of the rules has not, in the main, resulted from periodic revisions, or from wholesale additions or renovations; such general overhaulings have been few. Rather, it has come about chiefly by gradual adjustment and accretion—old rules being cautiously revised and perhaps eventually discarded, new ones occasionally finding places in the list. Most obvious and significant throughout has been the trend toward concentration of control over the time and business of the House in the hands of the leaders of the majority party—the speaker, the majority members of the rules committee, the chairmen of the other great committees, the "floor leader," the "steering committee"—with a corresponding narrowing of the opportunities left open to minority forces to interfere with carrying out the program of the majority, either by frontal attack in debate or by resort to obstructive or dilatory parliamentary tactics, known as filibustering.

(e) Election of committees

A final principal stage in the organization of a new House of Representatives is the election of committees—a procedure to be explained, however, when the committee system comes up presently for consideration.

We accordingly are ready to turn to a closer view of the machinery with which a completely organized Congress carries on its work—first, and most fully, that operating in the House of Representatives, and afterwards (for distinctive features only) that employed in the Senate. In both cases there will have to be mention not only of formal agencies known to the rules, but also of instrumentalities not so recognized yet equally important to the picture.

The Speaker of the House of Representatives

Powers and functions

The constitution touches upon the internal organization of the House only to the extent of requiring that there shall be a speaker; all the power and prestige that this top-flight official has gained through the years have flowed, not from constitutional grants of authority, but from rules made by the House itself, and from usage and precedent applying and amplifying them. Notwithstanding a partial eclipse a generation ago when the right to appoint the standing committees was taken from him, the speaker is still the most commanding figure in the House, and as such has many important things to do. He takes the chair at the hour appointed for a sitting of the House, sees that the journal of the preceding sitting is read, preserves order and decorum, and, in case of disturbance or disorderly conduct, causes the galleries or lobbies to be cleared. He "recognizes" members desiring the floor. He signs all acts,

[1] The rules of the House will be found in successive editions of the *House Manual and Digest*, which is always kept strictly up to date. A convenient guide to House procedure in all of its phases is *Cannon's Procedure in the House of Representatives* (4th ed.), House Doc. 675, 78th Cong., 2nd Sess. (1944).

addresses, joint resolutions, writs, warrants, and subpœnas ordered by the House; interprets and applies the rules; decides questions of order, subject to appeal (rarely successful) by any member to the House itself; puts questions to a vote; and appoints such select and conference committees as from time to time are authorized. As a member of the House in full standing, he has the same right to speak and to vote that other members have,[1] although he cannot be required to vote except to break a tie, or when the House is voting by ballot. He may appoint any other member to serve as presiding officer in his place for a period not to exceed three days (in case of illness, ten days); and in practice he often calls upon other members to occupy the chair temporarily. Chosen in the first instance by a caucus of the majority party members, and thereupon formally elected by the House (usually in competition with a minority nominee), a speaker may ordinarily expect to be reëlected at the beginning of each succeeding Congress as long as he remains a member and his party continues in control.

The "revolution" of 1910-11

Forty years ago, one would have put high in the list of powers enjoyed by the speaker that of appointing all standing (as well as special and conference) committees, including the most privileged and influential committee of all, namely, the committee on rules—of which, indeed, the speaker himself served as chairman. This power, however, added to all of the others, made of strong-willed speakers like James G. Blaine (1869-75), Thomas B. Reed (1889-91 and 1895-99), and Joseph G. Cannon (1903-10) virtual autocrats, without whose assent practically no legislation could be enacted, or even considered; and a House "revolution," engineered in its earlier stages by a coalition of insurgent Republicans and Democratic minority leaders, culminated, in 1910, in the removal of the speaker from the rules committee, and eventually, in 1911, in the transfer of the selection of all standing committees from him to the House itself. This was a hard blow, and the speakership has never since been quite the same. But plenty of important prerogatives remain—granting or refusing members the floor, declining to put motions regarded as dilatory, ruling members out of order, deciding vital questions of procedure, and what not—so that, even though no longer ruling with the rod of a "Czar" Reed or a Cannon, the occupant of the chair is still a force of the first magnitude in the actual work of legislation.[2]

The speaker as a party man

Though often enough swayed by partisan considerations in earlier centuries, the speaker of the British House of Commons—prototype of parliamentary speakers throughout the English-speaking world—long ago became a wholly disinterested and impartial moderator, unidentified with any party organization or movement inside or outside of the body

[1] The speaker (Sam Rayburn) preceding the present one (Joseph W. Martin) frequently took the floor during debate.

[2] Along with the president of the Senate and the majority floor leaders of the two houses, he is sometimes in almost daily conference with the president on legislative programs and strategy—especially if all are members of the same party.

over which he presides. He attends no party gatherings, contributes to no party funds, makes no campaign for reëlection in his constituency, refrains from so much as setting foot in a political club. The American speakership, both in Congress and in the state legislatures, has developed on very different lines. It is, and has been almost from the beginning, quite frankly partisan. To be sure, the speaker must not be swerved by party considerations from faithful enforcement of the rules of the House. If he is wise, he will strive to be fair in his treatment of the opposition. He may even win encomiums from his political opponents—as did Speaker Longworth—for protecting their interests and rights. But, wholly unlike his British counterpart, he is actively and openly identified with his party's organization in the House—an indispensable cog in the majority machine. In the days of Reed and Cannon, he was a party figure second only to the president himself; even yet, he must usually be accorded front rank not merely in legislative influence, but in politics as well.

Some well-known speakers

With few exceptions, the speakers of the House have been men not only of well-tested ability, industry, and tact, but also of sufficient aptitude for leadership to have brought them to the front in their respective parties even before their elevation to the speakership; in proof of which one needs only to glance over the long list of persons who have held the office and observe the names of Henry Clay, James K. Polk, Robert C. Winthrop, Schuyler Colfax, James G. Blaine, Samuel J. Randall, John G. Carlisle, Thomas B. Reed, Joseph G. Cannon, Champ Clark, and John N. Garner. Despite, however, the high political importance attaching to the position in times past, only one speaker (Polk) ever reached the presidency, although Blaine missed it narrowly.

The Committee System in the House of Representatives

Legislative bodies the world over save time and otherwise promote efficiency by referring most matters coming before them to committees for examination and report; and both our House of Representatives and Senate at Washington not only make use of special and conference committees, set up from time to time as need arises, but maintain an array of standing, or "regular," committees as well.[1] In the Senate, these standing committees are continuous, with only intermittent changes of personnel; in the House, they are made up anew at the opening of each Congress—although also with much continuity of membership.

Standing committees:

Although small in earlier days, the number of standing committees mounted to the amazing total of sixty-one before a reorganization in 1927 brought it down to forty-seven (increased in 1945 to forty-eight).[2]

[1] There is also in the House, although not in the Senate, an exceedingly important device known as the committee of the whole. See p. 229 below.

[2] Forty-six if three then existing committees on elections be viewed as, in effect, one committee organized in three branches. Lists of House committees, with the names of members, have long been printed in successive issues of the *Official Congressional Directory*.

1. Number and size

Even when this reduction took place, it should have been carried farther, because many committees survived which had little or nothing to do, important fields of legislation were split between rival groups, jurisdictions overlapped, and confusion continued. Committees, however, and especially committee chairmanships, represented vested interests; and not until 1946 was it found possible to "streamline" the overgrown structure (in both houses) on the greatly altered pattern recently (January, 1947) put into operation. In a later chapter devoted principally to the general problem of improving Congress, the background of this significant step will come more fully to view,[1] and for the present it must suffice to observe simply that the number of committees—reduced to nineteen—has been rather more than cut in half, and that whereas formerly membership ranged from two to forty-three (in the case of the old committee on appropriations), with twenty-one the commonest number, the present range is from nine to forty-three, with twenty-five or twenty-seven the most usual figure.

2. The new committee list

The present complete list of committees, with number of members, is as follows: (1) agriculture, 27; (2) appropriations, 43; (3) armed services, 33; (4) banking and currency, 27; (5) post office and civil service, 25; (6) District of Columbia, 25; (7) education and labor, 25; (8); expenditures in the executive departments, 25; (9) foreign affairs, 25; (10) House administration, 25; (11) interstate and foreign commerce, 27; (12) judiciary, 27; (13) merchant marine and fisheries, 25; (14) public lands, 25; (15) public works, 27; (16) rules, 12; (17) un-American activities, 9; (18) veterans' affairs, 27; and (19) ways and means, 25. Thirteen of the list passed over into the new plan with names unchanged; three, *i.e.*, armed services, education and labor, and post office and civil service, represent in each case a union of two former committees; the remaining three are more or less new; and the statute enumerating the series undertakes to define with some logic and precision the range of matters to be referred to each.

3. Assignments per member—meetings

Under previous arrangements, congressmen might be assigned to only one major committee, although also to any number of lesser ones, and nearly all served on no fewer than three or four. In the new system, with committees less than half as numerous, members uniformly serve on only one, except that members of four committees likely to be less hard pressed, *e.g.*, on the District of Columbia, may serve on a maximum of two. Previously, somewhat over a third of the more important committees met regularly on a certain day (or days) each week throughout a session, while others met, if at all, only on call of their chairmen. Under the new scheme, all committees will have a good deal to do, and probably all will find it necessary to meet at least once a week;[2] in any event, all are required by the legislation of 1946 to "fix regular weekly, biweekly,

[1] See pp. 260-261 below.

[2] The plan was not yet in actual operation when these lines were written.

or monthly meeting days." Without special leave, however, no committee except that on rules may sit while the House is in session.

4. Method of selecting committee members

As we have seen, standing committees, since 1911, have been elected by the House itself, even though what that body actually does when a new Congress opens is merely to ratify lists of committee assignments prepared in advance by committees of selection set up by the respective party forces having claim to be represented. With only rare representation of third parties, the committees consist of Republican and Democratic members, in proportions fixed by the committee of selection of the majority party so as to reflect, at least with reasonable exactness, the relative number of seats possessed.[1] Each party is free to determine for itself who of its members shall represent it on each of the committees. The committee of selection, or "committee on committees," to which the Republicans intrust the drawing up of their lists is named by the party caucus, or conference, and consists of one member from each state having Republican representation in the House—each such member having, however, as many votes as there are Republican congressmen from his state.[2] The Democrats, in caucus, first select their quota of members of the forthcoming ways and means committee,[3] and then delegate to this group, as a committee of selection, the task of preparing the Democratic lists for all of the remaining committees. With majority and minority lists (approved by the respective party caucuses) before it, the House rarely consumes much time in carrying out the formality of election.

5. Committee chairmanships and the principle of seniority

Each committee is therefore composed of majority and minority members, with the majority always holding the chairmanship and (except in rare instances in which party lines break) completely in control, yet, significantly, with the minority usually in a position to obtain a hearing for its views. Except occasionally when questions of party regularity are involved, chairmanships are awarded on a basis of seniority; that is to say, the majority member of longest continuous service on a committee will as a matter of course be put up by the party nominating authority for the chairmanship. The same seniority principle applies to the ranking of all committee members: majority members are listed according to their periods of service, minority members likewise; and all move up on the respective lists as members nearer the top drop out, by death, failure to secure reëlection, or possibly withdrawal in favor of more active service on other committees. A new congressman, therefore, regardless of how eminent or able he may be, has no chance at all to secure the chair-

[1] Thus in the Seventy-ninth Congress (organized in January, 1945), with 243 Democrats and 190 Republicans in the House, the commonest ratio on House standing committees was twelve Democrats to nine Republicans. The all-important rules committee in that Congress consisted of eight Democrats and four Republicans.

[2] Thus in the Seventy-ninth Congress the representative of New York's Republican delegation had twenty-two votes, while the solitary Republican congressman from West Virginia had but one. In that Congress, a total of thirty-two states had one or more Republican congressmen, and hence the committee of selection contained that number of members.

[3] Numbering fifteen in the Seventy-ninth Congress.

manship of a single committee, or usually even a very high place in the committee rank and file. Indeed, he counts himself fortunate if he draws assignment to lowly positions on committees of second, rather than of third-rate, importance. Starting at the bottom of one or perchance two committees, he will, of course—if his constituents send him back to Washington often enough—gradually make his way up toward a chairmanship. When finally he stands next to the chairman of a given committee in point of seniority, he is spoken of as the "ranking majority member"; and when the next vacancy occurs in the chairmanship, his claim will be held superior to that of any other member (providing his party is still in control of the House), even though he may be out of step with and *persona non grata* to the bulk of his party. Capture of the House by the opposing party will, of course, leave him high and dry, as simply ranking minority member, who, however, if party fortunes change soon enough, will yet step into the chairmanship. If worse calamity befalls and he drops out entirely for a term or two, he must start again at the bottom.[1]

The committee on rules

Of the numerous House committees, only one calls for special comment here, *i.e.*, the highly privileged and peculiarly powerful committee on rules; certain others, *e.g.*, the ways and means committee and the committee on appropriations, will receive attention at later points.[2] For upwards of a hundred years, the rules committee was merely a special committee set up at the opening of each Congress to offer the customary motion that the old rules be readopted, with such changes, if any, as the committee cared to propose. Even after it was added to the growing list of standing committees in 1880, its potentialities as an agency of unified and centralized control of House business were not immediately realized. In the next thirty years, however, successive rulings of the speaker and orders of the House invested it with prerogatives of little less than dictatorial character. Consisting, until 1910, of the speaker and two majority and two minority members appointed by him, it was, of course, dominated by the three majority representatives—actually by the speaker himself; and it was this arrangement in particular that enabled the vigorous and picturesque Cannon to determine almost single-handedly what might and what might not be considered by the House, and therefore to wield almost absolute control over all important legislation. The speaker's removal from membership in the committee, the transfer of the selection of its members to agencies of party caucuses, and the increase of these members to ten, and later to twelve (from 1937 to 1943, fourteen) left the speaker with perceptibly diminished power, but did not of themselves lessen the control of the committee over the legislative work of the House. As we shall see, that control has in later

[1] The committee reorganization of 1946 has been criticized in various quarters for failing to include any change affecting the seniority system.

[2] See Chap. XXII below.

days been cut down somewhat in actual practice by the rise of two new agencies of the majority caucus, the "steering committee" and the majority floor leader, with the result that, aside from the chairman, the members of the committee are no longer, as they once were, dominant personalities in the House. Inasmuch, however, as the rules committee is commonly the medium through which these guiding agencies achieve their objectives, the committee is still to be regarded as an instrumentality of considerable potency and importance.

How the committee functions

To begin with, once the general body of rules has been readopted at the opening of a Congress, all proposals for amendment are referred to the rules committee, which is likely to hold up action in any event, but certain to do so if the changes suggested would tend to impair control of business by the majority "machine." More important, however, is the committee's power to present to the House *special* rules or orders of its own devising, and aimed at fixing the order in which pending measures shall be considered, or limiting the time allowed for debate on a given matter, or indicating the sections of a bill that may, and those that may not, be amended, or stipulating the number and even the nature of permissible amendments, or in other ways vitally determining the conditions under which the work of the House in a given situation shall proceed; and usually the regimented House majority votes whatever the committee proposes. Specially privileged in obtaining the floor, the committee may at any time (except only when a conference committee's report is being considered or the House has voted to go into committee of the whole) interrupt debate by introducing a special rule thrusting forward some entirely different bill or resolution irrespective of the regular order of procedure. Insurgents now and then catch the majority managers napping, and succeed in getting a bill before the House contrary to the managers' intentions. But in such an emergency, the rules committee can always be hurriedly convened and a special order to meet the situation devised and reported, not only interrupting consideration of the insurgent measure, but indefinitely sidetracking it in favor of other business. Furthermore, the committee may itself draft a bill overnight, introduce it in the House the next afternoon, and force its passage the same day, without opportunity for so much as reference to a "subject" committee. Small wonder that House minorities are all the time crying out against "gag rules"! Their only hope of relief, however, lies in transforming themselves into majorities—which, irrespective of party, could be depended upon, in their turn, to employ exactly the same tactics!

Party Instrumentalities

The speaker and other officers, the committees and their chairmen—even the powerful rules committee—are agencies of the House as such, designed to enable it to carry on business in an orderly and effective manner. This formal machinery, however, is only part of the actual or-

ganization employed in the day-to-day conduct of proceedings. There are also agencies which exist quite outside of the rules and on that account are sometimes termed the "invisible government" of the House—although their activities may be, and usually are, quite as open and "visible" as those of any regular officer or committee. Of such nature are chiefly the majority caucus (Republican congressmen prefer the term "conference" [1]) and certain instrumentalities through which it works, especially the steering committee, the floor leader, and the whip and his assistants. The minority has a caucus, too, a floor leader, whips, and even sometimes a steering committee, although naturally these are not ordinarily in a position to have much to do with running the House at any particular time. The speaker is of the majority party, and the committees are dominated by members of that party as well. Nevertheless, as already indicated, they are agencies of the House as a whole. The informal, or so-called "invisible" agencies mentioned are, however, *party* agencies pure and simple—majority or minority as the case may be. Combined with the speaker and committees in their party aspects, these agencies, on the majority side, round out the machinery by which a given party at a given time controls and manages the House.

1. The majority caucus or conference

A caucus consists of the members of the House belonging to the majority or minority party as the case may be, and functioning either directly through privately held meetings or indirectly through agencies such as those mentioned above. From the fact that nowadays both parties convoke their caucuses less frequently than formerly and leave decisions to be made more largely by a few leaders, it has been deduced that the caucus is no longer a significant factor in the legislative process; and certainly it is true that the device has waxed and waned through the years. The emphasis given the point by some observers is, however, exaggerated. In the first place, the majority caucus still functions actively in organizing a new House of Representatives. It prepares the slate of officers (including the speaker) which a new House unfailingly elects. Through the medium of its "committee on committees," it designates the majority members of all standing committees, subject, of course, to House election. It names the majority steering committee and floor leader. It considers whether changes in the rules of the House are desirable, and decides what ones, if any, to instruct the rules committee to propose for adoption. On its part, the minority caucus similarly nominates officers, makes committee assignments, and sets up "invisible" machinery. And any crisis in which the party may be involved, or any need for significant changes of official or committee personnel during a session, may bring into action the caucus of the party concerned.[2]

[1] The Democrats use this term also, but only to designate a caucus that does not seek to bind the participants to a given course of action. For purposes of simplicity, the traditional name "caucus" may, however, be adhered to in the present discussion.

[2] Thus when, in April, 1946, numerous Democratic members resented criticism directed toward them from the office of the chairman of the party's national com-

In the second place, the caucus may still be convoked—and occasionally is—to formulate plans for united party action on policies or measures before the House, especially if the party is plagued by division within its ranks. It may, and sometimes does, direct the majority members of important committees to see that committee reports are presented first to the majority caucus, and afterwards to the House only after caucus permission has been given. It may debate the details of bills and whip them into shape according to its own notions before the House receives the measures at all. It may influence, or even control, decisions upon what measures shall be pressed, what ones held back, what ones prevented from ever reaching debate. Even when, as of late, the majority caucus seldom meets, and a handful of managers seem to be acting quite independently, these latter are nevertheless to be regarded as serving as agents, and presumably spokesmen, of the caucus silently standing behind them.

2. The steering committee

Two principal instrumentalities through which the majority caucus functions are the majority "steering committee" and the majority floor leader.[1] The steering committee consists of a varying number of leading majority members (recently, twenty-two, including seven serving *ex officiis*), designated by the caucus, with due regard for geographical distribution, to represent it in exercising continuous supervision over the handling of business by the House. Working more or less behind the scenes, it keeps the parliamentary situation in hand, whips faltering members into line, and in sundry effective ways sees that the will of the majority leaders—perchance of the caucus if it has expressed itself—is carried out. The committee's main business is (1) to select from the great mass of bills which encumber the House calendars those which the majority managers wish to advance to final consideration, and, after they have been decided upon, (2) to keep the tracks clear—with the powerful assistance of the committee on rules—for favorable action upon them.

3. The majority floor leader

The majority floor leader, also chosen by the caucus, and acting under general direction of the steering committee, is almost equal in power to the speaker, from whom, indeed, he has inherited some of his prerogatives, and to whose office he may reasonably aspire to succeed. He keeps informed on the drift of opinion among the majority members, persuades and admonishes in the interest of party harmony, plans the course of debate and indicates to the speaker what members are to be given the floor on particular measures, directs the activities of the whips, and confers with the minority floor leader on the length to which debates shall

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mittee, Postmaster-General Hannegan, they obtained a meeting of the Democratic caucus to consider the matter. In the Senate (where party caucuses also prevail), a good illustration was afforded in February, 1944, when the Democratic floor leader, Alben W. Barkley, abruptly resigned in protest against strictures on Congress voiced by President Roosevelt in vetoing a tax bill, and when a caucus reelected him to the post by acclamation

[1] A third is the party contingent in the rules committee; but we are here talking about only *party*, not *House*, machinery.

be permitted to run and the times at which votes shall be taken. If one were asked to indicate the two individuals wielding most power in House affairs, he would not go far wrong in naming the speaker and the majority floor leader.

4. The whips

The majority whip is named by the floor leader and subject to removal by him; and the whip may appoint any number of assistant whips —fifteen in recent Democratic usage, so selected as to represent a similar number of geographical regions. A familiar duty of the whips is to see that the party members are at hand when significant votes are likely to be taken; but equally important is the canvassing of members to find out their attitudes on issues and policies, for the guidance of the floor leader and the speaker.

The power of the party leadership

From all this it is obvious that a person who views House organization and procedure merely through the medium of official machinery and formal rules will gain only a very imperfect understanding of how the work of Congress is actually performed. Speaker, rules committee, other committees, function—not as agencies or authorities apart—but as cogs in a larger machine which includes also the extra-legal party instrumentalities mentioned. Back of all else stands the majority caucus, whether continuously active and assertive or intermittently dormant; because even the speaker owes his position to caucus selection and is expected to lend himself loyally, in so far as the rules give him leeway, to seeing that opportunity is provided for decisions made by the caucus, directly or through its agents, to be carried out. Even in its periods of liveliest activity, the caucus, of course, does not concern itself with everything coming before the House; no more do its agents such as the steering committee. There is no point to stirring party machinery to action on the many pieces of business on which party lines will not be drawn.[1] Furthermore, in their present mood, most congressmen prefer to be free agents, voting as they please rather than under caucus or other dictation; many indeed do not hesitate to identify themselves with bipartisan *blocs*, to which they indeed may regard themselves as owing first allegiance. Recognizing this situation, the Republicans seldom attempt to bind their members even when a caucus is held and a line of action laid down; while the Democrats, although occasionally making a caucus action binding by two-thirds vote, nevertheless obligate no one on a question of constitutional construction or on a matter on which he has received instructions from or made pledges to his constituents. Whether or not caucus action is involved, members of both parties are, however, in general *expected* to support the decisions reached by their accepted party leadership in the House (whether approving of them or not), and habitual failure to do so can usually be depended upon to have unpleasant consequences.

[1] The proportion of proposals treated as "controversial" in the party sense is far smaller than commonly supposed—rarely more than a fifth or a sixth.

The System Criticized

The need for leadership

Needless to say, the power of the interlocking majority-party agencies enumerated—caucus, steering committee, floor leader, speaker, and chairmen of rules and other key committees—and the ways in which that power is sometimes employed, stir much discontent. Stifling of individual initiative, penalizing of independence, relentless use of the "steam roller," drive spirited members to insurgency and inspire attempts to build up *blocs* cutting across caucuses and party lines. The simple fact is that, although the effective functioning of such a body as the House of Representatives imperatively demands leadership, no provision whatsoever for congressional leadership is made in the constitution or the laws. Under parliamentary systems of government, such as the English, legislative leadership devolves naturally upon the cabinet. But our government is not of that sort. To be sure, the president supplies a good deal of leadership in larger matters; certainly such chief executives as Woodrow Wilson and Franklin D. Roosevelt have done so.[1] The president, however, is at the White House, not on Capitol Hill, and such leadership as the House must have within its own ranks it has been obliged to develop for itself. This it has done according to no preconceived plan, but largely as the exigencies of party politics have determined. The results have been different in different periods. Once it was the speaker who dominated. Again (after the rules committee became elective) the speaker and the committee named, sharing control. Still again, it was the majority caucus. Nowadays—as for a good while past—control is doubtless to be regarded as potentially in the caucus. Actual, practical leadership, however, is largely in the speaker, floor leader, and the chairmen of rules, ways and means, and other major committees—which, of course, means that it is considerably dispersed and not always easy to locate, although in any event gathered in the hands of an interlocking, majority, managerial directorate. In all periods, there has been dissatisfaction on the part of individuals and groups that have found themselves with less independence and power than they believed they ought to have; revolt against "dictatorship" has followed revolt, only—speaking broadly—with the result, at best, of transferring supreme control from one point in the system to another.

Justification for the existing arrangements

The present mechanisms of control do not, of course, lack apologists, and some of the arguments employed have a good deal of validity. There must, we are told, be not only routine rules and procedures, but people who will assert themselves as leaders, and means by which those who lead can get things done. To members whose policies and desires meet with frustration, such leaders will inevitably seem arbitrary and their methods harsh. But, once in power, these same members would most likely develop a leadership of precisely the same character. The system

[1] On presidential leadership in legislation, see pp. 240-243, 248-251 below.

as it stands must therefore be regarded as reflecting the general will of the membership. At all events, a dissatisfied majority can change it at any time. An arbitrary speaker can be overruled, or even deposed, by a majority vote. Any special order brought in by the rules committee can be thrown out in the same way. Either this committee or any other one can be compelled to report upon any matters referred to it. Majority or minority could, if it chose, decide to have no caucus, no steering committee, no floor leader. Therefore, runs the argument, since the full mechanism, in both its official and unofficial—its legal and its extra-legal or party-made—features, goes on with little change from Congress to Congress,[1] it must be regarded as fairly satisfactory to all save a few unreasonable members who are unable to adapt themselves to the ways of majorities.

But what of majority rule?

The argument is plausible, yet it does not quite cover the case. The difficulty is that, upon analysis, the alleged majority may very well turn out to be no majority at all. A speaker, for example, mounts the tribune because a majority of a party majority has agreed to vote for him. But such a majority may easily fall short of being a majority of the whole House. Similarly, if polled individually, the bulk of the House membership might well be found to prefer quite a different grouping, and quite different chairmen, in the great committees. By the same token, measures approved in caucus and voted on the floor because members of the majority party, even though really opposed to them, feel obligated, either by caucus actions or by other pressures, to give them their support, may become law with the actual approval of what is numerically only a House minority. In other words, legislation tends to be only in form by House majority; in reality, it is often by mere *majority-caucus* majority.

Government by majority is, however, a tricky concept. We fondly suppose that we have it in this country, and at times we actually do so. Congressmen and senators, nevertheless, are often elected by mere pluralities; eight of our presidents have had only a minority of the popular vote behind them; and decisions in Congress by something less than absolute majorities are merely part of an order of things which may be faulty, but is capable of being corrected only by procedures too drastic to stand much chance of being undertaken.[2]

Organization of the Senate

Officers: the president

Crossing over to the opposite end of the Capitol, one finds in the Senate both a formal organization and a superimposed mechanism of party instrumentalities broadly resembling those in the House, yet work-

[1] Except, of course, for upheavals like that of 1910, or occasional reorganizations of the committee system, as in 1927 and 1946.

[2] For conveniently assembled current information on the machinery of the House and its workings, see articles by A. W. Macmahon, E. P. Herring, O. R. Altman, and F. M. Riddick, dealing with successive sessions and published yearly in the *American Political Science Review*. The *Official Congressional Directory* also is useful.

ing quite differently at a number of points.[1] To begin with, the officers are much the same, except that the "president" of the Senate occupies a position decidedly unlike that of the speaker of the House. Being, by terms of the constitution, the vice-president of the United States, he is, of course, not chosen by the body over which he presides; hence, partisan and factional contests over filling the chair, such as have punctuated the parliamentary history of the House, have no place in the annals of the Senate—save as occasionally stirred by election of a president *pro tempore* to preside when the president is absent or when the office is vacant. Furthermore, the president of the Senate has no such control over legislative procedure as that which the speaker wields in the House; sometimes he is not even a member of the party having a majority in the chamber. As a moderator, he maintains decorum, recognizes members, decides points of order, puts questions to a vote, and announces the results. His power of recognition is, however, exercised with less partisan motivation than in the House; and not only are his decisions on points of order subject to appeal by any senator, but especially difficult questions of order are as a rule referred for decision to the Senate itself. As a nonmember, he never participates in debate, and votes only when necessary to break a tie. Unless a person of unusual force, which he rarely has been, and also of high standing in the councils of his party, the figure ensconced in the Senate chair seldom seeks to exercise any sort of leadership or to influence the course of legislation.

Rules

Like the House, the Senate has a set of formally adopted rules, carrying over from session to session except as changes are made at rather lengthy intervals. For reasons already explained, they do not have to be adopted *in toto* at the beginning of each Congress; and, reflecting the smaller numbers, the more intimate traditions, and the special functions of the body, Senate rules are fewer, simpler, and more easily mastered than those of the House—likewise better fitted to protect the rights of minorities and promote free discussion. There is, of course, in the Senate also no lack of parliamentary precedents, forming the basis for a rich endowment of unwritten custom or usage.

Committees

Needless to say, there are committees—special and conference committees as in the House, and fifteen standing committees, many of them corresponding closely to, and bearing the same names as, committees in the other branch.[2] Prior to 1946, the number of standing committees—thirty-three[3]—was relatively as excessive as in the House, and with the same disadvantages. The Legislative Reorganization Act, however, which streamlined the House committee structure performed the same service for the Senate; and, beginning with the first session of the Eightieth

[1] The effect of the Senate's continuity upon its organization has been noted elsewhere. See p. 195 above.

[2] In 1930, the Senate discontinued use of the committee of the whole except in considering treaties.

[3] Prior to a pruning in 1921, the number mounted to seventy-four.

Congress (organized in January, 1947), the list, with number of members, has been: (1) agriculture and forestry, 13; (2) appropriations, 21; (3) armed services, 13; (4) banking and currency, 13; (5) civil service, 13; (6) District of Columbia, 13; (7) expenditures in the executive departments, 13; (8) finance, corresponding to the House committee on ways and means, 13; (9) foreign relations, to which are referred all treaties and all presidential nominations to posts in the foreign service, 13; (10) interstate and foreign commerce, 13; (11) judiciary, to which are referred all nominations to judgeships and to other positions connected with the federal judicial system, as well as bills relating to judicial organization and procedure, 13; (12) labor and public welfare, 13; (13) public lands, 13; (14) public works, 13; and (15) rules and administration, 13. Nearly all represent survivals, with in some cases broadened functions, from the committee list as existing before the reorganization; and in contrast with the former régime, under which committee memberships ranged from three to twenty-five, all (except in the single case of appropriations) are now fixed at thirteen. Much reshuffling was required when the new plan went into operation in January, 1947, but, once the scheme was instituted, it again became true, as always before, that, like the Senate itself, senatorial standing committees never die—new members being infused into them biennially, but the bulk of the membership always carrying over from the preceding Congress. Committee positions are divided between the two major parties in about the same proportions as in the House; and, whereas formerly it was not unusual for a senator to serve on as many as five, or even more, committees, under the new plan he may not serve on more than two.[1]

How committees are made up

The method of making up committee lists in the Senate is substantially the same as that prevailing in the House. At the opening of a new Congress, the leaders of each party appoint a "committee on committees" to distribute vacant positions among newcomers, to settle questions of seniority, and, in the case of the majority party, to name the various chairmen. When these party agencies have completed their work, the slates are reported back to the respective caucuses for approval and afterwards go to the Senate as lists of majority and minority nominees. Election on the floor of the Senate usually follows on a single ballot, without hesitation or discussion.

Party instrumentalities

The Senate is, of course, no less susceptible to considerations of party than is the House, and special party instrumentalities—caucuses or conferences, steering committees, whips—are hardly less in evidence. Like the machinery known to the rules, these extra-legal agencies work, however, under limitations imposed by the differing nature and traditions of the smaller body. The House is a highly integrated mechanism, with power concentrated in few hands. Perhaps its numbers and its suscep-

[1] Three in the case of majority members of the committees on District of Columbia and expenditures in the executive departments.

tibility to waves of emotion or passion require it to be so. The Senate is a relatively small conclave of older and more experienced men, with more marked individuality, more respect for tradition, and considerably less willingness to be herded and controlled. The presiding officer is, of course, in no position to dominate. The committee on rules—now "rules and administration"—is but a pale image of the rules committee of the House. Although choosing leaders and whips, and occasionally deciding upon a concerted course of action, a party caucus rarely amounts to more than a sort of informal conference; insurgents or irregulars often refuse to go into caucus at all. In short, senators insist upon maintaining their own individuality and upon delegating control to no committee or other agency. Proceedings are leisurely; debate is most of the time practically unrestricted; coercive force is virtually unknown.

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CHAPTER XIV

THE POWERS AND FUNCTIONS OF CONGRESS—A GENERAL VIEW

We shall want to look more closely into the actual workings of the congressional machinery described, including the ways in which they are affected by relations between Congress and the president. Before doing this, however, it may be useful to glance briefly at the varied functions which it falls to Congress to perform. To be sure, Congress is commonly thought of as our national lawmaking authority; and such, indeed, it is.[1] The enactment of legislation is, however, only one of its numerous duties, and sometimes not even the one making heaviest demands upon its time and energy. No fewer, indeed, than six principal forms of activity occupy one house or both from time to time: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) directive and supervisory, and (6) legislative—an enumeration which of itself is sufficient to indicate that Congress, like the presidency, although established with a view to a separation of powers, deviates from that principle widely and often in its actual functions and workings.

Non-Legislative Functions

1. Constituent

Some of the functions enumerated are considered sufficiently at other points in this book, and are mentioned here only in order that the full range and diversity of congressional activities may not be lost to view. When considering the method of amending the national constitution, we saw that, while Congress cannot under any circumstances independently make a change in the fundamental written law, not a syllable of that document can be altered without congressional action in some form.[2] When viewing the mode of electing the president and vice-president, we saw that Congress acts as a board to canvass the electoral vote and declare the results; and that, in the event of the lack of an electoral majority, the House of Representatives chooses the president and the Senate the vice-president.[3] When discussing the executive functions of appointment and treaty-making, we presently shall observe how they are shared by the president with the Senate.[4]

2. Electoral

3. Executive

The remaining three of the six major functions enumerated, *i.e.*, judicial, directive and supervisory, and legislative, may properly receive some attention here.

[1] Not, however,—as indicated below—our *only* such authority.
[2] See pp. 29-30 above.
[3] See p. 173 above.
[4] See pp. 280, 474-476 below.

4. Judicial

The constitution endowed the president and Senate with broad powers of appointment; and in practice a general power of removal soon developed in the hands of the president and of appointing officers responsible to him. But how could an unfit official be got rid of if the appointing officer failed to act? How could the president himself, in case of abuse of power or other official delinquency, be put out of office before the end of his elective term?

Impeachment

The answer lay within easy reach in the historic device of impeachment; and with little division of opinion, the constitution's makers wrote into the document the well-known provision that "the president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." [1] Two points in this clause are especially to be noted. First, only civil officers are subject to impeachment: military and naval officers are liable to trial by court-martial, but cannot be impeached; and members of the legislative branch, although "civil," are construed not to be "officers" in the meaning of the impeachment provision.[2] Second, the grounds on which impeachment proceedings can be brought are specified—as definitely, perhaps, as is feasible. Bribery is self-explanatory, and treason is defined by the constitution.[3] "High crimes and misdemeanors" is a flexible phrase, but one which has generally been construed to include only offenses of a grave nature involving something more than mere inefficiency or partisanship.

Impeachment procedure

The process of impeachment starts in the House of Representatives, where, upon charges being preferred against a given official, a committee is appointed to investigate. The committee reports to the House; and if, upon consideration of the findings, the majority so votes, the charges, in the form of "articles of impeachment," are sent to the Senate (which has no option but to hear the case), and at the same time a committee of "managers" is named by the House to conduct the trial. The Senate furnishes the accused with a copy of the charges against him, fixes a date for the trial to begin, and when the time arrives converts itself into a court under the chairmanship of its regular presiding officer, unless the president of the United States is on trial, in which event the chair is occupied by the chief justice of the United States. The accused is allowed counsel, and he may appear and give testimony in person; and witnesses, for and against him, are brought in and questioned. At the close of the proceedings, which may last through many weeks, the galleries are cleared and the Senate votes. A two-thirds vote is necessary to convict; anything less results in acquittal. The penalty in case of conviction is removal from office, to which may be added disqualification for ever holding "any office of honor, trust, or profit under the United States";

[1] Art. II, § 4.

[2] The impeachment of Senator William Blount of Tennessee, in 1798, is the only case involving a member of Congress.

[3] Art. III, § 3, cl. 1.

and the president's power of pardon and reprieve does not apply. Once retired to private life, furthermore, the convicted person, if he has committed an indictable offense, may be proceeded against in the ordinary courts like any other person. In the entire history of the country, impeachment proceedings have been brought against only twelve federal officers; and only four have been convicted, although President Johnson, in 1868, escaped by only a single vote. All of the officers convicted belonged to the judiciary.

5. Directive and supervisory

Another congressional function, and one which people sometimes confuse with lawmaking in the proper sense, is that of direction and supervision. Acting directly, or by delegating carefully restricted authority to the president to act for it, Congress establishes administrative agencies, fixes their powers and functions, and to some extent regulates their procedures; and while the funds for maintaining such agencies are requested by the president, on the basis of estimates prepared by the Bureau of the Budget, Congress alone can make the needed appropriations. When considering such appropriations, it can scrutinize and criticize the work of any agency, and, if it chooses, curtail its activities or even, in effect, abolish it by leaving it without funds. At any other time, too, it can institute inquiries into the policies, actions, or procedures of offices, bureaus, or other establishments, through the medium of investigating committees which, serving somewhat after the manner of grand juries, have on various occasions been instrumental in exposing inefficiency or corruption, and sometimes have brought about remedial action. Not only in connection with such investigations, but at all other times, Congress can call upon administrative establishments for information and reports, to be transmitted either directly or through the president; and its supervisory relations with the great regulatory commissions, like the Interstate Commerce Commission and the Federal Trade Commission, are especially close. In establishing agencies, defining their functions, and making rules governing their activities, Congress employs the same machinery and procedures as when enacting measures having the character of law. In doing these things, it is, however, not making law, but only taking actions involved in running the government, somewhat as a board of directors acts in running a great business establishment; and attending to matters of this sort absorbs a surprisingly large amount of the time and energy of the two houses.

The Legislative Function—Basis and Scope

A primary function—but not unlimited

But, after all, Congress is primarily a legislature; and from here on, in this chapter and the succeeding one, it will be considered in that aspect. To it, indeed, the constitution assigns "all legislative power herein granted." [1] Two or three things, however, are to be noted at the outset. The first is the significant qualifying effect of the last two words, "herein

[1] Art. I, § 1, cl. 1.

granted." As has been emphasized so many times, our national government is a government of limited, delegated powers; and the principle holds for Congress no less than for every other part of the establishment. Not only do the House and Senate have no power not expressly delegated, or legitimately inferred from some express delegation, but the section of the constitution (Art. I, § 8) conferring a lengthy list of powers is balanced off with a section immediately following in which numerous powers are just as definitely denied—in addition to which many prohibitions are laid down in the earlier amendments and at other points in the document. Thus Congress is restrained from suspending the writ of *habeas corpus* except when the public safety requires it in time of rebellion or invasion, passing any *ex post facto* law or bill of attainder, laying taxes on exports, giving any preference through commercial regulations or revenue laws to the ports of one state over those of another, appropriating money for support of the Army for a longer period than two years at a time, laying any duties, imposts, or excises not uniform throughout the United States, providing any basis of tenure for judges other than good behavior, adding to the constitutional definition of treason or visiting penalties for treason upon a convicted person's heirs, passing any laws abridging freedom of speech, press, religion, petition, or assembly, and from doing a number of other things which a careful reading of the constitution will readily disclose.

Fundamental, indeed, to our system is the fact that Congress has not full and unrestricted legislative power, like the British Parliament, but only the legislative power *herein granted*. In other words, every exercise of legislative power by Congress must be based upon some authorization in the constitution. When, therefore, legislation is proposed or demanded, its advocates must be able to point to some clause (or clauses) of that instrument which, either expressly or by fair implication, grants the necessary authority. If, on their part, opponents can show that constitutional sanction is lacking, or at least can point to Supreme Court decisions so indicating, it will probably be useless to enact the proposed measure; for, once a test case is brought, the Supreme Court—the final judge of congressional powers—will almost certainly rule that Congress has exceeded its constitutional authority. This restricted scope of congressional power easily explains why debates on the constitutionality of proposed laws occupy so much time and attract such wide attention in connection with congressional proceedings.

In the second place, notwithstanding what seems to be the explicit assertion of the constitution, Congress does not actually possess *the whole* of such national legislative power as there is. In a chapter soon to follow, we shall see how the president, by equally explicit constitutional provision, shares in the work of lawmaking, and indeed often takes a leading part in it. We have already seen, too, how the courts, in their task of construing and applying the laws, often necessarily bend and

amplify them, in effect adding to, and actually making, law. We shall find, also, that rules and regulations laid down not only by the president, but even by heads of departments and other administrative officers or bodies, are in effect laws and are treated by the courts as such if made in pursuance of authority validly conferred by Congress.

Express grants

The situation, in a nutshell, regarding the scope of congressional legislative power is that (a) such power is defined positively by numerous express grants, (b) it is defined negatively by almost equally numerous express prohibitions, and (c) between these two fields lies a broad, ill-defined, disputed domain of implied and resulting powers. Upon many matters there can be no question as to general congressional power (however much there may be as to practical applications of such power), because power has been conferred in definite and unmistakable terms. This is true of the long list of subjects already referred to as enumerated chiefly in the eighth section of Article I, including taxation, borrowing, currency, patents, copyright, bankruptcy, postal service, naturalization, the regulation of foreign and interstate commerce, the maintenance of an army and navy, and the declaring of war.

Permissive and mandatory powers

Most of the powers expressly conferred upon Congress are permissive; that is to say, the two houses are constitutionally free to exercise them or not, in whole or in part—however necessary it may be, practically, to make use of them, as in the matter of taxation. Some grants, however, are mandatory. For example, it is made the duty of Congress to call a convention of the states to amend the constitution whenever the legislatures of two-thirds of the states so request;[1] likewise to provide for taking the census every ten years,[2] and to make regulations for carrying appeals from the lower courts to the Supreme Court.[3] In no instance of the kind, however, is there any way in which Congress can be compelled to act if it fails to obey the constitutional mandate. The sole remedy lies with the electorate, and consists in choosing congressional majorities which will observe the constitution's requirements.[4]

Implied powers

Where there are express grants or express restrictions, the authority of Congress to legislate, or its lack of power to do so, is usually sufficiently clear. On many subjects, however, the authority, if possessed at all, must be derived by implication or inference from some of the powers granted in express terms. That legislative power may legitimately be derived in this manner, the constitution itself practically asserts in the "implied powers" clause, which gives Congress authority to "make all laws which shall be necessary and proper for carrying into execution" the powers expressly vested by the constitution in Congress or in any

[1] Art. V.
[2] Art. I, § 2, cl. 3.
[3] Art. III, § 2, cl. 2.
[4] It may be noted in this connection that, like other legislative bodies, Congress can pass no irrepealable act. Any measure put on the statute-book by a Congress is legally subject to removal therefrom, or to any amount of amendment, by the same or any subsequent Congress.

other branch of the government.[1] Likewise, five of the last nine amendments expressly state that Congress shall have power to enforce them by "appropriate legislation." Sharp differences of opinion over what measures may, and what ones may not, fairly be deemed "necessary and proper," or "appropriate," for carrying into effect the enumerated powers of the national government have made the powers of Congress "the great battleground of the constitution." The Supreme Court, however, early adopted a liberal interpretation of the clauses involved, to the general effect that if it can be shown that Congress has been given authority to deal with any specific subject, in exercising that authority the two houses are free to select any means or instrumentalities whatsoever which are not prohibited by the constitution, are appropriate, and are consistent with the spirit as well as the letter of that instrument. Furthermore, whether a given law is "necessary," within the meaning of the constitution, is a "political" question for Congress alone to answer; the courts will not rule upon it.[2]

Resulting powers

The scope of congressional authority has been considerably widened, too, by decisions of the Supreme Court to the effect that it is not necessary for Congress to trace back every one of its powers to some single grant of authority, direct or implied, but that such authority may be deduced from a number of the specified powers taken collectively, or from all of them combined.[3] Powers derived in this way are commonly called "resulting powers." The criminal code of the United States affords a good illustration. The constitution gives the national government express power to punish only five kinds of crime. Congress, however, unquestionably has power to provide for punishing the violation of any national law and for safeguarding the constitutional rights of persons under accusation, even though such authority is neither expressly granted nor inferable from any single express grant in the constitution.

So-called "emergency powers"

In enacting a good deal of the legislation aimed at combating the depression of the thirties, and also legislation during the two world wars, Congress was often represented as making use of its "emergency powers"; and the impression was thus conveyed that the constitution confers some special class of powers designed to be invoked by Congress in time of great national stress. The fact is, however, that Congress has no power or group of powers labeled "emergency powers." To be sure, there has been more than one great national emergency in our history; and the existence of such has been recognized officially by both president and Congress, as also by the courts. Nor can there be any denying that in times of economic and international crisis Congress has enacted laws which it would not have passed under ordinary circumstances. Nevertheless, as the Supreme Court has definitely said, "emergency does not

[1] Art. I, § 8, cl. 18.
[2] Illustrations of implied powers will be abundant in Chaps. XXII-XXXI below.
[3] Cohens *v.* Virginia, 6 Wheaton 264 (1821).

create power"; nor does it increase power already granted in the constitution; nor does it diminish the restrictions imposed upon the exercise of power.[1] At most, an emergency may merely require new applications of powers already in use, or bringing into play powers never before, or rarely, used. The constitutional basis for what are popularly called emergency powers must, therefore, be sought among the clearly granted powers; and it is to be found chiefly in the power to regulate foreign and interstate commerce and the currency, in the power to tax, to borrow, and to appropriate money, and in the power to provide for the national defense. In new and unprecedented ways, these historic powers were turned to account by Congress in stimulating national recovery during the period after 1932, and in promoting national defense in the period beginning in 1940, thus creating the popular illusion—but only an illusion—that some special reservoir of "emergency powers" had been tapped.

Exclusive and concurrent powers

The mere fact that Congress has been invested with authority to legislate upon a given subject does not necessarily mean that the states are thereby deprived of the right to legislate upon the same subject. Naturally, in all instances where the power has been expressly prohibited to the states, as, for example, with respect to coining money and laying duties on imports, Congress alone may legislate; and in such instances its power is said to be exclusive. Congress likewise has exclusive power in cases in which, from the nature of the power or from the nature of the subject to which the power relates, legislative power must necessarily be exercised by the national government alone—for example, naturalization and the regulation of foreign and interstate commerce. But in practically all matters which do not fall within these two classes, Congress and the state legislatures are said to have concurrent power; so that acts of Congress and state statutes relating to the same subject may be in full force at the same time. Thus there may be both national and state control over congressional elections; and both Congress and the states may levy taxes on the same property or incomes. The term "concurrent power" covers also certain powers which may be exercised by a state only until Congress exercises the same power. On bankruptcy, for example, every state originally was at liberty to make its own laws, and such laws had full force and effect until Congress (in 1898) chose to exercise its own right to legislate on the subject. Once Congress had acted, any "concurrent" state bankruptcy laws, even though not formally repealed, fell into a condition of suspended animation.

Delegation of legislative power

One further aspect of congressional legislative power hinges upon an interesting question. Must Congress exercise its legislative authority exclusively by its own direct action, or may it hand over portions of such authority to be exercised by the president, an executive department, a board or commission, or some other branch or agency of the government?

[1] Home Building & Loan Assoc. *v.* Blaisdell, 290 U. S. 398 (1934).

The query is an old one, and the constitutionality of many a federal statute has hung upon the way in which the Supreme Court, at a given time, has answered it. On the one hand, the constitution, as we have seen, vests in Congress "all legislative powers herein granted"—which might seem to set up a presumption against any right to "farm out," or delegate, any powers of the kind. On the other hand, such delegation is nowhere prohibited; and the "sweeping," or "implied powers" clause, authorizing Congress to make all laws "necessary and proper for carrying into operation" powers vested in Congress or in any department or office of the government, might be construed to open a way for Congress to decide that the most effective use that it could make of some of its powers would be to delegate the exercise of them to the president or, through him, to an executive department or other administrative agency, or indeed to some "independent" commission or other such establishment. The latter is the view that has commonly prevailed; and the Supreme Court has sustained many delegations of the kind.

Illustrations

When, sixty years ago, it was proposed to vest in an expert independent commission the regulation of railway freight and passenger rates in interstate commerce, it was objected that this would be an unconstitutional delegation of legislative power. Nevertheless, Congress, convinced of the impossibility of dealing satisfactorily with such complicated matters by direct and detailed legislation, passed the Interstate Commerce Act of 1887, simply prescribing that all rates and services should be reasonable, and then delegating to the new Interstate Commerce Commission the duty of determining the reasonableness or unreasonableness of rates in specific cases.[1] For similar reasons, powers of like nature have been conferred upon the Federal Trade Commission, the Federal Communications Commission, and a long list of other regulative bodies, as well as also upon departments or establishments therein.[2] The president, too, has been the direct beneficiary of many such delegations, as when, in 1934 (with later renewals), he was given authority to conclude trade agreements with foreign states altering tariff rates by as much as fifty per cent, thereby operating in a field, *i.e.*, tariff-making, traditionally regarded as of a legislative nature. Numerous as such delegations are in ordinary peacetime, too, they become vastly more imposing in time of war, when to the chief executive's inherent authority as commander-in-chief must inevitably be added many and great powers essential to unified and effective direction of the war effort, and powers which Congress alone is competent to confer. In World Wars I and II, Presidents Wilson and Roosevelt, respectively, attained their lofty pinnacles of

[1] See pp. 383-385 below.

[2] During the recent period of price control, the Office of Price Administration furnished another good example. Congress could not itself fix and readjust exact prices, any more than railway rates. What it did was rather to enact an underlying statute providing for price regulation and requiring prices to be "fair and equitable," but leaving determination of specific price levels to the administrative body set up for the purpose

authority largely by virtue of powers bestowed (usually for limited periods) by Congress.[1]

Limitations upon delegation

In upholding such delegations, however, the Supreme Court has insisted upon a restrictive and significant distinction: powers, it has said, that involve merely making detailed applications of law (in other words, decisions and acts properly to be regarded as administrative) may be delegated; powers involving the general determination of policy (in other words, true acts of legislation) may not. It is of the essence of legislation to lay down the rules, fix the standards, or specify the conditions by which those in charge of administration shall be guided; and these things only Congress is constitutionally competent to do. But after Congress has prescribed the general framework of regulations within which railroad rates, for example, shall be determined, it is proper enough (and indeed definitely necessary) for it to pass on to a more specialized agency (in this case the Interstate Commerce Commission) the task of fixing or approving the precise rate on a ton of steel shipped from Pittsburgh to New York—though, of course, any power so delegated can be modified or even withdrawn at any time. It was this distinction between delegation of basic legislative authority and delegation of supplementary administrative authority—or rather the failure to recognize the distinction—that brought to grief much of the legislation associated with the earlier stages of the New Deal. Various "recovery" laws of 1933-34 undertook to confer upon the executive a sort of "roving commission" to make laws in the form of codes and regulations for trade and industry, but in doing so, failed to set up definite standards, or "yard-sticks," to govern in exercising the powers bestowed. As a consequence, the Supreme Court, in case after case, overthrew the legislation;[2] and while the Court, as constituted today, would certainly view similar measures somewhat more tolerantly, the principle still is that a congressional delegation of power, to be sustained, must go no farther than to confer discretion in administering laws which themselves cover the essentially *legislative* aspects of the subjects with which they deal.

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[1] Congress, in a given situation, may have virtually no alternative to resorting to a given delegation, yet may have misgivings about it; and, as indicated elsewhere, during the recent war period it sometimes attached specifications opening a way for independent recall of delegated powers by concurrent resolution. See p. 222, note 2, below.

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CHAPTER XV

CONGRESS AT WORK—THE LEGISLATIVE PROCESS

General aspect of congressional business

Although each branch of Congress is intrusted with certain tasks which the other does not share,[1] the two spend most of their time at the same sort of thing, *i.e.*, considering bills which, to become effective, must be passed in identical form at both ends of the Capitol—or resolutions, which may be (1) joint resolutions tantamount to bills and, like them, submitted to the president, or (2) concurrent resolutions, which, relating merely to internal congressional housekeeping, or being mere expressions of attitude or opinion, are not so submitted,[2] or indeed (3) even simple House or Senate resolutions, asserting a policy or purpose of one house alone. Some of the measures on which the two bodies deliberate are designed to make or declare new law; others, merely to amend, clarify, or consolidate existing law; many do not make or modify law at all in any proper sense, but rather appropriate money, formulate rules, give directions, or even, as has been indicated, merely express attitudes or opinions. Speaking broadly, however, whenever matters are up which call for formal proposal, discussion, and decision in both of the houses, the same machinery is, or may be employed, and likewise the same basic plan of procedure, however frequently the "regular order" may be, and is, deviated from in particular cases. Accordingly, a reasonably adequate understanding of how Congress carries on its work will be obtained if we briefly trace the steps that normally are taken between the time when a legislative proposal is put into the form of a bill or joint resolution and the final publication of the measure (if it has emerged successfully) as a completed statute.[3]

Introduction, Authorship, and Number of Bills

How bills are introduced

Nothing is easier than to give a bill its start, *i.e.*, to "introduce" it. Whether a measure be "public," *i.e.*, of general application, or "special"

[1] For example, confirmation of appointments and consideration of treaties by the Senate and preparation of impeachment proceedings by the House.

[2] In later years, however, a practice has arisen which gives an occasional concurrent resolution far greater significance. In a number of acts conferring broad discretionary powers on the president has been inserted a clause providing that the measure (and the powers carried with it) may be terminated by concurrent resolution, allowing the president no opportunity to employ a veto, rather than by the customary method of repeal bill or joint resolution. The constitutionality of this bold assertion of congressional authority is still in doubt.

[3] The somewhat specialized process of finance legislation necessarily falls within the scope of a later chapter discussing national revenues and expenditures, and accordingly is treated at that point. See Chap. XXII.

(or "private"), *i.e.*, applying only to particular persons or localities,[1] all that is required is that a copy of it, endorsed with the name of the introducer, be laid on the clerk's (in the Senate, the secretary's) table. Any bill may make its first appearance in either house, except only that bills for raising revenue are required by the constitution to "originate" in the House of Representatives.[2] Indeed, through its right to amend revenue bills, even to the extent of substituting new ones, the Senate may, in effect, originate them also. Once introduced, a bill continues "alive" throughout the duration of the existing Congress or until sooner disposed of; in a succeeding Congress, however, it can get on a calendar only by being reintroduced.

Authorship

Nothing would be farther from the truth, however, than to suppose that some member of the House or Senate is the actual author of every measure presented. Congress, we are rightfully assured by a former member of long experience and high standing, is "not to any material extent an originating body." [3] In the first place, a large proportion of all major public bills introduced emanate—sometimes in fully drafted form—from the executive branch of the government, *i.e.*, from the White House or from one of the executive departments or independent establishments. To be sure, contrary to the situation in countries having a cabinet system of government, no member of the executive branch can directly introduce a bill. This, however, imposes no serious impediment; a senator or representative, or a committee, can always be found to take care of the simple ceremony. In practice, Administration bills—indeed nearly all important public bills, whatever their origin—normally come to the house in which they make their first appearance through the medium of one of the standing committees, being introduced usually by the chairman; some measures, in fact, *e.g.*, revenue, appropriation, and currency bills, are actually worked out by majority members of the appropriate committee.

In the second place, numerous bills originate neither with the Administration nor with Congress, but rather with persons, groups, or organizations entirely outside of government circles; and these are commonly presented by members individually. Here we come upon a main reason for the flood of bills that descends upon Congress at every session. Senators and congressmen themselves, sometimes sharing the great American illusion that the way to cure any ill is to "pass a law," originate a certain number. But to a far greater extent they are merely the purveyors of proposals from the outside. Judging it worth while to please those with interests or "causes," and at the same time to have their names in the newspapers (in their home districts, at all events) as the authors of bills, senators to some extent, but especially congressmen, are usually willing to introduce any number of measures, however ill-

[1] The Legislative Reorganization Act of 1946 almost completely bans private bills. See p. 262 below.
[2] Art. I, § 7, cl. 1.
[3] R. Luce, *Congress—An Explanation*, 3.

considered and fantastic, at the request of persistent lobbyists or constituents with "a grievance, an ambition, or a hope." They need not approve, or even understand, everything they introduce; hundreds of bills every session bear "by request" labels, which may usually be taken to indicate that the members formally presenting them disclaim any personal responsibility for them. Not a whit less on that account, such bills —the bulk of them in times past private, or special, rather than public, and nearly all contemplating the spending of money—inundate the clerk's table and help clutter up the calendars.[1]

Multiplicity

The number of bills and resolutions introduced at every session is, indeed, amazing. As many as 2,500 have been known to make their appearance in the House of Representatives alone on an opening day; and even counting pension bills only as grouped in omnibus measures, the total for recent Congresses has run from ten or twelve to upwards of fifteen thousand each—about two-thirds of the number, as a rule, being introduced first in the House and the remainder in the Senate.[2] Of the yearly grist, the best that one can say is that few of the measures presented contain possibilities of wise legislation, fewer still receive attention, and fortunately still fewer ever pass.[3]

Committee Stage in the House of Representatives

Reference to committee

All bills introduced are given a number and referred to one or another of the standing committees.[4] Private bills providing for settlement of claims for damages, for the construction of bridges across navigable streams, or for the payment of individual pensions, used to be turned over automatically at this stage to the committee designated in each case by the sponsor of the bill. With a view to economizing congressional time, however, the Legislative Reorganization Act of 1946 in general forbade bills thereafter to be received or considered in either house; hence there no longer are many bills of this nature to be disposed of.[5] Public

[1] Administration bills are almost invariably drafted by experts in the departments (with more or less consultation with the chairmen or other members of the appropriate committees), and bills originating with private individuals or interests will often have been put into shape, by hired counsel or otherwise, before being intrusted to a member. Senators and representatives—whether as individuals or as committees —desiring assistance in preparing measures can always get it from a service known officially as the Office of Legislative Counsel, carried on in the Library of Congress.

[2] During the first session of the Seventy-ninth Congress (January 3-December 21, 1945), 5,995 bills and resolutions were introduced in the House and 2,118 in the Senate. The House passed 1,184 and the Senate 1,005. With most private, or special, bills recently banned, the totals should hereafter be considerably smaller.

[3] The output of the Seventy-ninth Congress (1945-47) was 1,625 acts, of which 733 were public and 892 private.

[4] Procedure to this point is on the principle that all bills are created free and equal. All start on the same footing. Once the race for enactment has begun, however, the vast majority are found to have been left at the post.

[5] The same statute delegated the settlement of claims to heads of executive agencies or to courts, depending on circumstances, and gave blanket congressional consent to bridge-building approved by specified officials of the War Department. General pension bills are still considered by Congress, but individual pension claims are handled by the Veterans' Administration.

bills are sorted out and assigned, according to the subject with which they deal, nominally by the speaker, actually as a rule by the clerk or one of his assistants; and after being referred, all are printed and distributed to House members.[1]

Committees at work

Each standing committee now has a commodious room in the Capitol or in one of the large office-buildings provided for the use of members, with books, pamphlets, records, and whatever stenographic service is needed; and there it holds meetings as required, using forenoons for the purpose in order to avoid conflict with sittings of the House (starting regularly at noon).[2]

Even with minor committees now eliminated, some have relatively light loads. Others, however, receive scores, and even hundreds, of bills every session, or have unusually long and complicated measures to handle (perchance, as in the case of finance bills, to write), and accordingly find themselves crowded for time. To expedite matters, these create sub-committees (usually of five members) to which particular measures or classes of measures are assigned, or even individual sections of the same measure if it be one of exceptional complexity and importance. At all events, it is in the committees, and more or less behind the scenes, that much of the actual record of Congress—especially in the case of the House of Representatives—is written. "Congress in its committee rooms," declared Woodrow Wilson, "is Congress at work."[3]

Sources of information

On receiving a bill, a committee has first to inform itself on the measure's nature and contents, and then to decide what to do with it. For the great majority of bills, this means nothing more than a cursory glance, revealing that the proposal has no claim to attention. A bill here and there, however, will interest the committee, or at all events the chairman, and, if time permits, will receive consideration. In the case of such a measure, the first requisite is information from which to judge whether legislation on the subject is needed, whether the present bill is calculated to meet the need, and what results and implications will follow if the bill is passed. And such information is, or may be, obtained in several ways. Availing themselves of the resources of the committee library, of the Library of Congress (including a Legislative Reference Service, which amasses, digests, and makes useable vast quantities of material of all sorts relevant to almost any measure that may come up in any field), and official files, the committee members may study the proposal at first hand and come to a conclusion as to what action to take. In addition to

[1] To avoid repetition, the legislative process will here be described with reference to the House, and only important differences of procedure in the Senate will be noted.

[2] The Legislative Reorganization Act of 1946 requires every standing committee to have a regular weekly, biweekly, or monthly meeting day, and to adhere to its schedule, with special meetings also as needed. As already observed, only the rules committee is privileged to meet during a House sitting, unless by special leave.

[3] *Congressional Government* (Boston, 1885), 79. A reading of relevant portions of this book is strongly recommended.

a clerical staff of not to exceed six persons, each committee, furthermore, now is entitled, under the legislation of 1946 to a "professional" staff of not to exceed four well-paid persons[1] qualified to assist in carrying on research, and intended ordinarily to be associated in part particularly with the committee chairman and in part with the ranking minority member; and this arrangement facilitates obtaining information, studying materials, and making up considered judgments. In addition, parts of a bill (or the whole of it) may be assigned for special study to one or more sub-committees; and every committee, either as a whole or through sub-committees, has (as the act of 1946 reaffirms) full power "to make investigations into any matter within its jurisdiction." As has appeared, numerous bills originate with members of the executive branch; but whether or not a given measure is of such origin, interested officials may appear in person, either by request or on their own initiative, to give information, offer testimony, or present arguments concerning it. Lobbyists also can usually be depended upon to volunteer information or materials, however biased.

Public hearings

Finally, if a bill deals with a highly controversial subject, or will seriously affect large numbers of people, the committee having it in charge will almost certainly hold public hearings on it. That is to say, arrangements will be made for interested individuals or spokesmen of organizations having something at stake, or presumed to be in possession of useful information, to appear before the full committee or a sub-committee designated for the purpose and give testimony while the members listen and draw them out with questions. Certain persons are commonly invited to appear, but opportunity will usually be offered others who desire to do so, including paid attorneys engaged to support or oppose the measure, or specific clauses of it. On a great tariff bill, hearings—usually held by sub-committees visiting different sections of the country—may extend over many weeks, the stenographic reports running into thousands of pages of print. As employed both in Congress and in state legislatures, the public hearing is indeed a characteristic feature of the American legislative process.

Possible courses of committee action

Notwithstanding varying amounts of publicity in the earlier stages of its deliberations, the committee eventually goes into executive session on a bill and reaches its conclusions in private.[2] Any one of several results may follow. It may report the bill unchanged, which is, of course, tantamount to recommending its passage. Or it may strike out some sections, add others, or alter the phraseology, and report the measure in this amended form. Or it may frame a bill of its own and present it as a

[1] The appropriations committee may go above this number.

[2] In the executive sessions of committees, writes an experienced former member already quoted, falls "the most interesting, important, and useful part of the work of a congressman, and the part of which the public knows nothing. Indeed, the ignorance of the public about it is one of the causes of its usefulness. Behind closed doors nobody can talk to the galleries or the newspaper reporters. Buncombe is not worth while. Only sincerity counts." R. Luce, *Congress—An Explanation*, 12.

substitute. In all of these cases, the report is likely, although by no means certain, to lead to favorable action by the House, especially if the committee (or even the majority element, in instances where party lines are drawn sharply) has come to its decision by a unanimous vote. The committee has, however, one other possible course: it may make no report at all—in other words, may "pigeonhole" the bill; and this is the fate that befalls three-quarters or more of all measures introduced. The decision to make no report may come after, and as a result of, investigations and hearings; but in the great majority of instances it arises from agreement (tacit or otherwise) at the very beginning not to take up the bill at all.

Forcing a committee to report

The case with which a committee can kill a bill by simply not reporting it has always been a sore point, and controversy on the subject has filled many pages in the annals of the House. To be sure, committees are only agents of the House, and as such are subject to orders and instructions; if the House desires to discharge a committee from the further custody of a bill—in other words, require it to report—there is nothing to prevent it from doing so. The matter is, however, not so simple as it sounds, because it is usually a minority, rather than a majority, that wants to get a bill out of a hostile or lethargic committee; and as the rules stand, there is no means by which anything less than a majority (218) can force a vote on a "discharge" question. In 1931, the House did adopt a rule under which as few as 145 members (one-third instead of one-half) could force such a vote in the case of any bill that had been in a committee's hands as long as thirty days; but on the ground that this gave too much scope to pressure groups and compelled the House to call back bills which only a minority wanted to have considered, the plan was abandoned in 1935. Consequently, it remains true that almost any measure can be killed in its initial stages by simple failure of the committee having it in charge to report.[1] Without, indeed, the rigorous sifting of bills achieved, at least in part, in this way, the House would be hopelessly swamped with work, and it would become necessary to place severe restrictions upon the number of measures that members might introduce. Occasionally a committee fails to report a meritorious bill for the simple reason that the majority members are personally or politically out of sympathy with its content or purpose. But most measures that come to their end because of failure to report deserve no better fate.[2]

[1] It has sometimes happened that a bill definitely approved by a committee failed to reach the floor because of failure of the chairman to report it. The Legislative Reorganization Act of 1946, however, makes it incumbent upon a chairman to report an approved bill "promptly."

[2] In the two sessions of the Seventy-eighth Congress (1943-44), there were twenty-one motions to discharge committees from further consideration of particular bills, but only three received the necessary 218 votes. In the first session of the Seventy-ninth Congress (1945), the rule was invoked (successfully, as it developed) only once.

The Handling of Bills After Committee Stage

Selection of bills for consideration

Having been returned to the clerk of the House, a reported bill is placed, in accordance with its nature, in one or another of three series, or lists, known as "calendars." It must not be supposed, however, that bills are invariably called up from the calendars in the order in which they are listed—still less that all calendared bills are actually debated and voted on. With nearly a score of standing committees reporting bills, the calendars grow congested, and the best that the House can do is to pick off a bill here and one there for actual consideration, making sure that the most essential measures, *e.g.*, appropriation bills, are included, but letting the others take their chances. No House rule, indeed, is more frequently set aside than that which directs that bills shall be taken up in their calendared order; and no power of the majority steering committee is more important than that by virtue of which it decides when, and in behalf of what bills, the committee on rules shall bring in for adoption by majority vote a special order making a given bill the regular business of the House forthwith or at whatever later time the order may specify. Most weightier measures—and some not so weighty—are thus lifted out of their sequence on the lists and put in a preferred position; otherwise, they would never be reached. Hundreds of measures "die on the calendars" in every Congress.

Regular order of business not adhered to closely

There is, to be sure, a daily order of business, duly prescribed in the rules. But, as would be inferred from what has been said, this "regular" order is so frequently departed from as to have comparatively little significance. In the first place, certain days are set aside for the consideration of (1) specified classes of measures, *e.g.*, the first and third Mondays of each month for unopposed bills, the second and fourth Mondays of each month for District of Columbia business, and the first and third Tuesdays for private bills,[1] and (2) measures called up under a special procedure known as "Calendar Wednesday." Again, at any time after the journal has been read, it is in order to move that the House go into committee of the whole to consider revenue or general appropriation bills. Seven standing committees, too, have the privilege of reporting at practically any time, and—what is more important—asking for immediate consideration of their reports. Bills introduced at the instigation of the president or of a department head, or for any other reason considered as Administration measures, are often given right of way. From the rules committee may come at any time proposed orders which, if adopted, will turn proceedings in an entirely different direction. Finally, on specified days, the House may, by two-thirds majority, suspend all rules and depart as widely as it likes from the regular procedure, even to

[1] With private bills virtually eliminated under terms of the Legislative Reorganization Act of 1946, this last-mentioned arrangement undoubtedly will be discontinued.

the extent of passing a major bill through all of its stages at a single vote, or at all events on the same day.[1]

Committee of the whole

Mention has been made of the committee of the whole; and inasmuch as the sessions of this committee occupy the greater part of the time of the House, something more should be said about it. In reality, there are two committees of the whole: (1) the Committee of the Whole House, which considers private bills,[2] and (2) the more important Committee of the Whole House on the State of the Union, which handles public bills for raising revenue, for appropriating money, and indeed for most other purposes as well. Both are, of course, simply the House of Representatives sitting in a different guise. A member moves that the House resolve itself into committee of the whole for the consideration of a designated bill; the motion is put and passed; the speaker yields the chair to a special chairman whom he designates; one hundred members constitute a quorum, instead of the majority required when the House is in regular session; debate proceeds, very informally, under a rule allowing only five minutes to each speaker at a time, unless with unanimous consent; there are no time-consuming roll-calls, divisions being taken only *viva voce*, by rising vote, or by tellers, with no record kept of how members voted; motions to refer or to postpone are not permitted; and when discussion is completed the committee votes to "rise," the speaker resumes the chair, the mace (the symbol of the speaker's authority) is restored to its place on a marble pedestal at the right of the chair, and the chairman of the committee reports the decisions reached. The House must, of course, act upon the committee's report in order to give it effect. This very useful device enables all finance, and most other important, bills to be considered for amendment under circumstances such that, as a rule, every member of the House who desires to do so can be heard; it permits great numbers of amendments to be presented, explained, and disposed of speedily; it facilitates rapid-fire, critical debate which commonly shows the House at its best; and the absence of recorded yeas and nays enables members to register their judgment without check or restraint such as published votes sometimes impose.

The three readings

A bill or joint resolution can be adopted only after three readings. Of these, the first is by title only; speaking strictly, it is no longer a "reading" at all, for the requirement is deemed to be met by printing the title in the *Congressional Record* and the *Journal*. Then the measure goes to committee and, if reported back, is placed upon its calendar for a second reading. The second reading—which (provided it is ever reached) takes place in committee of the whole, or for bills not there considered, in the

[1] A bill urged by President Truman, and empowering the chief executive to draft strikers in basic industries into the armed services in case other methods of settling strikes failed, was passed in this fashion on May 25, 1946. After all the speed, the measure was permitted to die on the speaker's table after refusal by the House to concur in Senate amendments.

[2] With private bills largely banned since 1946, this form of committee of the whole will in the future have little or no importance.

House itself—is an actual reading in full (unless dispensed with by unanimous consent or suspension of the rules), with opportunity for amendments to be offered; and this is followed by a vote on the question, "Shall the bill be engrossed [*i.e.*, reprinted as amended] and read a third time?" If this stage is passed successfully, the third reading takes place, by title only unless a member (probably to the disgust of his colleagues) demands a reading in full. Then—after engrossment—and only then, comes the vote on the measure's final passage. If the result is favorable, the bill or resolution, duly signed by the speaker, is ready to be sent to the Senate, or, if that body has already enacted it in identical form, to the president.

Closure

As a rule, debate takes place only on the question of ordering a bill to a third reading, although, if not cut off by the "previous question," it may be renewed on the question of final passage. When a measure reaches the stage at which it can be discussed on the floor, the chairman (or other designated representative) of the committee which has reported it favorably speaks in its behalf, being followed by a minority member of the committee if, as is usually the case, the report has not been unanimous. Other members of the committee speak alternately for and against the bill, and finally members of the House who do not belong to the committee are recognized—provided any time remains. And this matter of time presents problems. A rule dating from 1841 forbids a member to speak longer than one hour, except with unanimous consent. This alone, however, would not keep debate within desirable bounds, and two additional, more drastic, devices are employed: (1) advance agreements between the opposing leaders—frequently embodied in special orders brought in by the rules committee—fixing the length of time that discussion shall be permitted to run, and perhaps indicating how the time shall be divided, and (2) a practice, borrowed in modified form from the British House of Commons, known as the "previous question." At any stage of discussion (except in committee of the whole), any member of the House may "move the previous question"; and if the motion carries, a quorum being present, debate is closed (with forty minutes allowed if there has as yet been none), no more amendments can be offered, and a vote is taken on whatever is pending.

Checks on obstruction

Formerly, opponents of bills under discussion employed all manner of expedients to kill time and prevent action. Dilatory motions were made; unnecessary roll-calls were forced; efforts were put forth to stop proceedings by leaving the House without a quorum; time-consuming amendments were offered; and as a result much time was wasted. Rulings of vigorous speakers,[1] duly incorporated into the standing regulations, have considerably reduced the effectiveness of such modes of obstruction,

[1] Notably those of Speaker Reed in 1890 refusing to entertain motions regarded as dilatory and instructing the clerks to count as present all members observed to be within the chamber, whether responding to roll-calls or not.

although ways of slowing up business (chiefly demanding incessant time-consuming roll-calls) are still within the reach of members disposed to employ them.

Methods of voting

Upon conclusion of the consideration of a bill or resolution, or an amendment thereto, a vote is taken. In regular sittings of the House, four, and in the committee of the whole three, modes of voting are used. The first, and most common, is a division by simple sound of voices, *i.e.*, a *viva voce* vote. If any member is dissatisfied with the announced result of this, he may demand a rising vote; whereupon the supporters of each side of the question are counted. Again, if one-fifth of a quorum demands it, a vote is taken by tellers: a teller is designated for each side; the two take their places in front of the speaker's desk; the members in favor of the measure pass between them and are counted, and then those opposed; and the result is declared by the tellers and announced by the chair. Or, finally (in the House as such, though never in committee of the whole), if one-fifth of those present demand it, the "yeas and nays" are ordered: the clerk calls the names of the members, who respond with "aye" or "no"; these individual votes—sometimes different (since they are to be put permanently on record) from those previously cast *viva voce*—are recorded; and the result is duly announced. The yeas and nays may be demanded before any one of the other methods has been employed, and, if ordered, are taken forthwith. Effort used to be made to compel all members present to vote, but this has been given up as impracticable.

Procedure in the Senate—Filibustering and Closure

After a bill is passed in the House, it is certified by the clerk and carried by him to the Senate chamber. Procedure there, being in most respects like that in the House, need not be described in detail. Whether sent over from the other end of the Capitol or originating in the Senate itself, a bill is referred to one of the standing committees; if acted upon favorably, it is reported; if reported, it is placed on a calendar, from which it may be called up either in or out of its turn; three readings must be passed, the second one, at which amendments are offered, being the critical test; votes are taken substantially as in the lower house; and in the end the bill may be adopted as it stands, or adopted with amendments, or defeated.

Differences between Senate and House procedure

There are, nevertheless, some important differences between Senate and House procedure. For one thing, whereas the Senate formerly made more use of the committee of the whole than does the House, it abandoned the device altogether in 1930 except only in dealing with treaties. In the second place, with the exception that appropriation bills enjoy a certain priority, there is virtually no privileged business in the Senate, leaving the calendars to be followed almost automatically. More important still is the absence of any very effective arrangements for limiting debate.

There are no restrictions on the length of speeches, except such as are occasionally agreed upon in advance with respect to a particular measure; nor any upon their number, except that a senator may not, without consent, speak more than twice on the same subject in a single day; and—save for (1) occasional resort to a "unanimous consent" procedure (under which the members agree to a specified restriction of debate), and (2) the very infrequent use of a closure rule adopted in 1917—debate proceeds with less restraint than in any other important legislative body in the world. The comparatively small number of members has made this possible; and it cannot be denied that such liberty has some genuine advantages. The knowledge that ordinarily debate will not be cut off as long as any member, majority or minority, has something to say stimulates discussion and encourages the consideration of measures from all angles. It operates, too, as a wholesome check, not only upon party autocracy, but sometimes upon tendencies to executive dictatorship as well. At all events, the Senate has been adamant in its refusal to adopt anything resembling the one-hour rule prevailing in the House.

Obstruction in the Senate: filibustering

Unfortunately, liberty is sometimes abused. In the Senate, the commonest form of such abuse is boresome garrulity—wasting time by sheer talkativeness, as often as not on some subject entirely foreign to that supposed to be under discussion. More troublesome, however, is the practice of deliberately taking advantage of freedom of debate with a view, not to throwing light on the topic in hand or to converting the opposition, but to delaying and perhaps preventing action. This procedure, commonly termed "filibustering," and taking many forms (dilatory motions, demand for quorum roll-calls, reading from books or articles, and mere irrelevant *talking*), was by no means unknown from the middle of the nineteenth century, but has been brought into play most spectacularly and successfully in the last sixty years, and especially since about 1910. A filibuster may be organized and conducted by a group or *bloc* of members, working in carefully arranged relays, or it may be carried on by a member singlehandedly; and it may have as its object to defeat a measure by "talking it to death," to force amendment of it, or to compel the majority to agree to tack on some feature or to pass some other measure, perhaps quite unrelated, in which the filibusterers are interested. At best, valuable time is wasted; in addition, useful measures are sometimes defeated and needed appropriations held up. A favorite time to launch a filibuster used to be the closing weeks or days of a "short" session, since all that was necessary in order to achieve the purpose in hand was to hold out until an unalterable hour for adjournment of the session (noon of March 4) arrived. The Twentieth Amendment put an end to short sessions; yet senatorial filibustering is by no means a lost art.[1]

[1] In point of fact, Senator Huey Long carried on a memorable filibuster against the National Industrial Recovery Bill in the very first Congress after the Twentieth

The only restraint thus far imposed upon the practice took the form of a rule adopted in 1917, following defeat by filibuster of a bill for the arming of American merchant ships. The procedure prescribed is as follows.[1] First, a petition to close debate must be signed by one-sixth (sixteen) of the senators. On the second calendar day after this petition has been filed, the roll of senators is called on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If there is a two-thirds vote in the affirmative, the measure before the Senate becomes the "unfinished business" until disposed of, to the exclusion of all other business; and thereafter no senator is permitted to speak for more than one hour in all on the measure itself, on amendments to it, or on motions relating thereto. Furthermore, no amendments may be presented except by unanimous consent; no dilatory motion or amendments are in order; and all points of order are decided by the chair without debate.

The closure rule of 1917

This is closure in rather a mild form; the two-day delay provided for gives the opposition a chance to mobilize its forces; and the required two-thirds vote is a high hurdle for the supporters of the effort to surmount. In the first nine years, the device was successfully invoked only twice, *i.e.*, in the debates on the Versailles Treaty in 1919 and on adherence to the World Court in 1926, and in the entire period 1917-46 only twenty-five closure petitions were voted upon and only four received the necessary two-thirds.[2]

Rare use of the device

A set of rules permitting minorities, or even individuals, to frustrate the will of overwhelming majorities has often enough been ridiculed and denounced by observers of the congressional legislative process. On the other hand, it is contended, by senators and others, (1) that notwithstanding time consumed by filibusters, the Senate contrives to transact a very creditable amount of business—in five recent Congresses, for example, passing 182 more bills and resolutions than did the House; (2) that the present oft-used device of "unanimous consent," by which the members agree in advance to limit speeches on a given measure after a certain day and to take a vote at a specified hour, serves all necessary purposes, being indeed itself a species of closure; (3) that by far the greater portion of the measures killed by filibuster are not favored by the country and are never revived; and (4) that the vigorous protests against filibustering sometimes voiced on the Senate floor come usually from members whose pet projects have suffered, but who, with circumstances

Pros and cons of the matter

Amendment took effect. An anti-lynching bill was killed by a Southern filibuster in 1938, and in 1942-6, anti-poll-tax bills, duly passed in the House, were several times prevented from coming to a vote in the Senate by Southern filibusters or threat of such. See p. 116, note 2, above.

[1] *Senate Manual*, Rule XXII.

[2] One of the more notable recent attempts to apply the closure rule was made by Administration forces in May, 1946, when, however, an effort to limit debate on the $3,750,000,000 loan to Great Britain failed by a vote of 41 to 41, *i.e.*, 23 votes short of the necessary two-thirds.

reversed, would be perfectly ready to plan and launch filibusters of their own. It is perhaps utopian to suggest that the best solution for the problem would lie in an extension of "senatorial courtesy"[1] to include a decent respect for the right of one's colleagues to vote on a legislative proposal.

Conference Committees

Resolving differences between the houses

A bill which passes both branches of Congress in identical form is sent to the president and becomes law if it receives his signature or is repassed by two-thirds majorities over a veto. The Senate may, however, amend a House bill, and the House may amend a Senate bill; and unless the first body forthwith accepts all of the amendments added by the second one, or the second one recedes from its position (neither of which will often happen in the case of an important measure), some means must be found of overcoming the disagreement. The device regularly employed to bring the houses into harmony is the appointment of "committees of conference"; and statistics show that, on the average, from one-tenth to one-twelfth of all the bills and resolutions that Congress adopts—including almost all of the weightier ones, *e.g.*, on taxation, commerce, agriculture, labor relations, etc.—are referred to such mediating agencies.

A bill having been passed in two differing forms, either house may ask for a conference; and, the request having been agreed to (very rarely is it refused), the presiding officer of each house names as a rule three or five, but occasionally, for very important bills, seven, or even nine, "managers" to represent it, including almost invariably in each case the chairman, the ranking majority member, and the ranking minority member of the committee having the bill in charge. The two sets of managers then meet and discuss the points upon which there is disagreement, seeking by process of give and take to whip the bill into a form which both houses will accept.[2] Sometimes the task is easy and is performed in a few hours; more often it is difficult and entails days, or even weeks, of hard work. If in the end it proves impossible, the bill fails, unless other conference committees are appointed and prove more successful. As a rule, however, a consensus is arrived at; and the reported bill is always accepted or rejected by the houses without further attempt at amendment. Ordinarily, the house which has insisted on amendments recedes less from its position than the one which first passed the bill.

Defects of conference committee procedure

As a device for oiling the machinery of legislation, committees of conference are, under our American system, useful, if not indispensable. Nevertheless, they have shortcomings. Without exception, they work behind closed doors, hold no hearings, and give their proceedings no pub-

[1] See p. 281 below.

[2] The numbers of "managers" from the two houses may differ, but this does not greatly matter since agreements are reached, not by majority vote of the entire group, but by concurring majorities of the two sets of conferees acting separately.

licity. Doubtless it would be difficult for them to make headway if they did otherwise. Nevertheless, in view of the power which they wield, strong objection can be, and is, raised. For, while the committees are supposed to deal only with actual differences between the houses and to stay well within the bounds set by the positions which the houses respectively have taken, they often work into measures, as reported, provisions of their own devising, even going so far as to rewrite entire sections with the sole purpose of incorporating the views which the majority members happen to hold. Log-rolling enters in, as in the work of the two houses separately, and sometimes the compromises reached embody rather the worst than the best features of the two contending plans. Conference committee reports are likely to reach the houses near the close of a session; under the rules, they are highly privileged, especially in the House of Representatives; and while either house may disagree to a report and call for another conference, there is usually a strong presumption in favor of adoption. There may be little time for critical scrutiny or debate, and failure to act—especially if financial provisions are involved—might seriously interfere with the operation of the government. In practice, this often results in the adoption of important provisions, more or less surreptitiously added, without consideration by either house—in other words, legislation nominally by Congress but actually by conference committee.

Other Aspects of Procedure

When a bill has been passed in identical form by both houses, it is "enrolled," *i.e.*, written or printed on parchment, and is thereupon signed by the presiding officers and sent to the president. If it is approved, or if it becomes law without presidential action, it is transmitted to the Department of State to be deposited in the archives, and also to be published. If it receives a "messaged" veto, it goes back to the house in which it originated and becomes law only if, upon reconsideration, it is passed in both houses by a two-thirds vote. If it is pocket-vetoed, it simply dies.

Publicity of proceedings

On the ground that parts of its work, *e.g.*, the consideration of treaties, were of such a nature as to require secrecy, the Senate at first sat exclusively behind closed doors; indeed, even the House of Representatives occasionally barred the public. Strong objection, however, arose; and in 1793 the Senate adopted the wiser plan of opening its doors whenever engaged in ordinary legislative business and closing them only during "executive" sittings, *i.e.*, sittings in which only business of an executive nature was considered. The last closed meeting of the House was held not long afterwards, in 1811. On the theory that the Senate should be free to discuss treaties, presidential appointments, and sometimes other matters, without publicity being given to anything said, privacy for executive sessions was maintained for nearly a century and a half.

Eventually, however, it broke down, partly because in later decades enterprising press correspondents found ways of ascertaining practically everything that was said and done in private sessions, but especially because of growing opinion, both in and out of the Senate, that, save under the most exceptional circumstances, the public is quite as much entitled to know the views expressed and the position taken by individual senators on appointments and treaties as on anything else. The matter was brought to a head in 1929 by unauthorized publication of senatorial votes on the hotly contested confirmation of a judge of the Court of Customs Appeals, and the outcome of an exciting debate was the adoption of a new rule under which all business previously handled behind closed doors was thenceforth to be considered in open session unless decided to the contrary by a majority vote.

Published records:

The constitution requires both houses to keep a journal and to publish it "from time to time."[1] The journals are, however, bare records of bills introduced, reports presented, and votes taken—that is, minutes of official actions, not records of debates. For a long time, debates in the House of Representatives were not reported, except in a haphazard way in some of the better newspapers; and Senate debates were practically not reported at all, although general accounts of what went on in that body were frequently printed, as were occasional speeches.[2] In 1833, the *Congressional Globe*, presenting the debates verbatim, was started as a private venture; and in 1873 its place was taken by the present *Congressional Record*, prepared by officers of Congress and printed by the government. Published daily during sessions, the *Record* purports to give an exact stenographic account of everything taking place on the floor of the two houses—save, of course, during closed sessions of the Senate. This, however, it does not actually do, partly because members sometimes edit their remarks in such a way as to make important changes in them, and also because, in the case of the House, speeches are frequently printed, under special leave, which were never delivered by word of mouth at all. The Senate does not permit the inclusion of undelivered speeches, but is quite as liberal as the House in allowing members to put into the *Record* correspondence, editorials, public documents, speeches of members on public occasions, and even large portions of books, which have not been read in debate; and this is one of the reasons why the *Record* runs every year to several volumes of generous triple-columned pages.

1. Proceedings

2. Statutes

After being received by the Department of State, all acts and joint resolutions are printed for distribution in the form of separate "slip

[1] Art. I, § 5, cl. 3.

[2] The collections entitled (1) *Debates and Proceedings in Congress, 1789-1824* (42 vols., 1834-56)—commonly cited as *Annals of Congress*—and (2) *Register of Debates in Congress* (14 vols., 1825-37) bring together these fugitive materials from newspaper, pamphlet, and other sources. There is, of course, nothing official about these publications, and the reports on which they are based are very incomplete and sometimes highly partisan.

laws"; and at the close of each session, the texts are collected, indexed, and published under the title of *Statutes at Large of the United States*—one volume containing all public acts and joint resolutions, and a second, private acts and joint resolutions, concurrent resolutions, treaties, and presidential proclamations.[1]

Relative Importance of Senate and House

An unstable equilibrium

In the early portion of our national history, the legislative center of gravity was plainly in the House of Representatives, as the makers of the constitution intended it to be. After 1825, however, the Senate attained greatly increased importance, becoming, indeed, the main forum of legislative activity in the period preceding secession and the Civil War. From about 1870, the House recovered ground, partly because of a natural reaction against the Senate's high claims to authority (especially in the domain of foreign relations), but mainly because of the increasing proportion of senators whose principal claim to distinction was wealth or cleverness in political manipulation. But again, noticeably after about 1905, the pendulum swung back, and today the Senate, if not actually predominant, is at all events of greater weight than a generation ago, and probably still gaining.

The Senate's advantages

Nor is senatorial ascendancy a mere matter of luck or chance; substantial reasons for it can be found in various advantages which the upper house enjoys as compared with the lower. Its members are, on the average, somewhat older, have wider knowledge of public affairs, and, in particular, have more legislative experience because of longer terms, more numerous reëlections, and continuous recruiting of vigorous members from the lower house. Its members, too, are commonly more important as party leaders within their states (and in some cases outside) than are congressmen. Their smaller number gives men of talent a better chance to show their mettle and become known to the nation at large. With rare exceptions, senators enjoy far more patronage than do congressmen; and the Senate's special powers of confirming appointments and assenting to the ratification of treaties place in its hands weapons which can be employed formidably in relation to other matters. Finally, while it unhappily remains true, as Lord Bryce remarked many years ago, that neither branch of Congress attracts the best talent of the nation,[2] the upper house tends to absorb, sooner or later, the best that enters political life. Certainly the Senate today contains fewer men of wealth, and decidedly fewer political bosses of the Hanna-Quay-

[1] A complete compilation of the "general and permanent laws" in force will be found in *Code of the Laws of the United States* (4 vols., Washington, D. C., 1940), and its supplements covering the laws enacted in successive sessions.

[2] *Modern Democracies*, II, 52. Lord Bryce's discussion of the reasons makes illuminating reading. In brief, they are: (1) the dullness of congressional duties; (2) the scant opportunities for attaining distinction; (3) the requirement of residence in the member's state or district; (4) the exceptional opportunities which America offers for careers in other directions.

Platt type, than thirty or forty years ago. By the same token, it is less conservative than formerly; indeed it is but slightly (if at all) more so than the other branch. The greater proportion of congressional investigations are, in point of fact, senatorial investigations; and while the Senate has a less commendable record than the House on civil service reform, it alone for many years showed genuine interest in curbing the abuses of lobbying. Though sometimes swayed by partisan passion, and prone to "play politics," as is the House, the Senate contains a larger proportion of members whose speeches and votes show independence of spirit and judgment; and, while handicapped by the propensity of mediocre members to stand stiffly on their rights under the rules and try the patience of the country with their obstinacy or buffoonery, it is composed, in at least as large degree as the House, of men who are able, industrious, fair-minded, sparing in speech, and anxious to get on with the public business.[1]

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[1] For interpretative sketches of fifteen representative members of the House and Senate, see J. T. Salter [ed.], *Public Men In and Out of Office* (Chapel Hill, N. C., 1946).

CHAPTER XVI

THE PRESIDENT AND CONGRESS

"Presidential" and "cabinet" government

When the framers of our national constitution decided to distribute federal powers among three coördinate sets of authorities—president, Congress, and courts—they in effect ordained that we should have a "presidential," rather than a "cabinet," or "parliamentary," form of government. In a cabinet or parliamentary system,[1] there is commonly a king, president, or other titular chief executive; conversely, in a presidential system there is likely to be a cabinet, as in the United States. The difference between the two, however—and it is a basic one—is that in a cabinet system the working executive consists of ministers (functioning together as a cabinet) who are at the same time members of and leaders in the legislature, and responsible to it (at least to the more popular branch), whereas a presidential executive not only is outside of the legislature, but draws its authority from the same source as the legislature itself, *i.e.*, popular election, and in its relations with the legislature is not "responsible" but rather coördinate; and with the further logical difference that whereas under the cabinet system the responsible ministers remain in office only so long as they continue to enjoy the confidence and support of a legislative majority, a presidential executive has a fixed term and can be ousted from office only by the extreme and unusual procedure of impeachment.

The manifest advantage of the cabinet system is that the executive and legislature can never long be at odds on important matters of policy. Ministers losing legislative support give way, almost automatically, to others at least presumed to have such support;[2] and harmony again prevails, at any rate for a time. Under the presidential form, on the contrary, there is much possibility of protracted discord, division, and frustration, with no assurance of relief until fixed terms of office expire; and for this reason, as well as others, a good many people regard it as unfortunate that we were started off with such a system, and consider that, if it were at all practicable to win the necessary public approval, it would be desirable for us to go over to the cabinet plan, even at this late day.

However that may be, the point for emphasis as we open the present chapter is that, under the system we have, the national executive and national legislature, *i.e.*, the president and Congress, are not, in practice,

[1] The two terms are used interchangeably, according as one is viewing the system primarily from the side of the executive or from that of the legislature.

[2] Before doing so, however, they may cause a national election to be held.

completely isolated from each other, but on the contrary—while constituting far more distinct and separate *foci* of political power than are to be found in a cabinet government, do actually maintain many close contacts and, by and large, become jointly the architects of most of our national legislation and public policy. For this reason—and while our attention is still centered on Congress—we here bring the president into the picture, even though doing so means to postpone speaking of some general aspects of the office—term, compensation, succession, and the like which otherwise might have priority. The presidency in general, the president and his cabinet, and the president as chief executive will later tie in with our study of the general subject of national administration.

Presidential Control Over Legislation

1. Control over sessions of Congress

By constitutional provision, a Congress lasts two years and has one regular session each year, beginning in the first week of January. Over the beginning and ending of regular sessions, the president has no absolute control, except that he may adjourn the houses "to such time as he shall think proper" if they find themselves unable to agree on a time of adjournment.[1] Practically, however, he may wield a good deal of influence upon the length of sessions, either by insisting upon legislation that would keep the houses at work—a "must" program, it is sometimes termed—or, conversely, by withholding proposals which, if submitted, would have the same effect. Almost invariably, the date of adjournment is a matter of more or less amicable agreement between the president and the Senate and House leaders.[2] Furthermore, the president may, at his discretion, convene the houses, or either of them, in special session. In former times, when a new Congress would not otherwise meet until thirteen months after election, special sessions were by no means infrequent, and much important legislation was enacted in them—notably in sessions convoked by President Taft in 1909, President Wilson in 1913, President Harding in 1921, President Hoover in 1929, and President Roosevelt in 1933, with a view to getting a new Administration's legislative program under way (and incidentally securing confirmation of appointments) without waiting the many months that must elapse before the opening of the first regular session. Nowadays, however, a different situation obtains. Under the Twentieth Amendment, a new Congress meets as soon as the terms of its members begin; its two regular sessions start in January of consecutive years and run into the summer, or beyond; and for special sessions there is little need—unless in an emergency like that created by the outbreak of a major war in Europe in the autumn of 1939, when such a session was called to repeal our embargo on the

[1] Art. II, § 3.

[2] On the new rule since 1946 relating to adjournment by July 31 of each year, see p. 194 above. The rule, however, leaves the way quite open for later adjournments if decided upon by the two houses.

export of arms to belligerent states and in other ways amend the Neutrality Act of 1937.

2. Messages

The constitution's requirement that the president give Congress information on "the state of the Union" and recommend for its consideration "such measures as he shall judge necessary and expedient" [1] is entirely logical. His position and activities enable him to know many things about both foreign and domestic affairs that are beyond the ken of the members of the legislative branch; he can speak with authority in pointing out defects and needs, and can suggest remedies in line with actual executive and administrative experience; and he is no less under obligation than is Congress itself to put information and ideas at the country's service. How frequently he shall communicate with Congress, at what times, at what length, and in what way, the constitution does not specify. Accordingly, each president exercises his own discretion. It long ago became customary, however, to transmit at the opening of each regular session a comprehensive "state of the Union" message summarizing the situation of public affairs, calling attention to matters requiring prompt consideration, and indicating specific plans or measures which, in the president's judgment, ought to be adopted. This is nowadays followed—usually within a day or two—by a message transmitting the annual budget; [2] and in addition, shorter messages—sometimes fifty or sixty of them in a session, each usually dealing with a single subject or project—are transmitted as occasion demands or the president desires. Washington and John Adams appeared in person before the two houses in joint session and delivered their messages orally. Jefferson, however, sent in his messages in writing; and this practice prevailed until 1913, when the oral form was revived by President Wilson. Oral messages were commonly employed by President Harding; and, with the aid of the radio, President Coolidge read his first two annual messages to both Congress and the country. President Hoover reverted to the written message; President Franklin D. Roosevelt employed first one form and then the other; and President Truman has thus far commonly, but not invariably, employed the written form.[3]

The effects of messages

How influential the general run of presidential messages are is a matter upon which it is difficult to generalize. Certainly they receive more publicity than do most government documents. Congress, however, is under no obligation beyond giving a respectful hearing; it may take action quite out of line with the recommendations made, or it may refuse to act at all. Much depends, of course, upon whether the president's party is in control of both houses. But even if it is, there is no guarantee that his

[1] Art. II, § 3.

[2] On January 21, 1946, President Truman departed from custom by submitting to Congress his "state of the Union" and budget messages as a single document, 25,000 words in length.

[3] Six times in the country's history the president has appeared before the Senate alone on official business, the most recent being President Truman's visit on July 2, 1945, in behalf of assent to ratification of the Charter of the United Nations.

advice will be followed.[1] Sometimes, it may be added, a message is really aimed at the country, or even at the world at large, rather than at Congress. The president may desire to stimulate public interest in and discussion of a given subject, with or without a view to legislation, and may use the congressional message as a means to that end. Theodore Roosevelt did this repeatedly. Or he may want to make his attitude known to a foreign state or group of states without incurring the embarrassments that might flow from resort to the customary diplomatic channels; as, for example, when Monroe, in 1823, slipped into his annual message to Congress statements serving notice to the European Powers that the American continents were no longer open to new colonization, thus laying the basis for the significant national policy ever since known as the Monroe Doctrine. In numerous oral messages during World War I, President Wilson summed up and unified the thought of the country on submarine warfare and other challenging aspects of the international situation; likewise, in his message of January 2, 1918, he set forth, practically on behalf of the Allied and Associated Powers and in the form of the famous "Fourteen Points," the major terms or conditions deemed indispensable to a peace settlement. From Franklin D. Roosevelt's messages during his second and third administrations, one could arrive at a reasonably complete picture of the country's developing foreign policy in a period of growing tension and ultimate war.

3. Initiating and pressing for legislation

By requiring the president to recommend to Congress "such measures as he shall judge necessary and expedient," the constitution in effect confers upon him the power, and indeed the duty, of legislative initiative. In point of fact, a very large proportion of the public bills that crowd the calendars of Congress originate with the executive branch of the government—the departments and their subdivisions, the independent establishments, and the president himself. To be sure, many of these are of more or less routine character, extending, interpreting, or modifying statutes to meet needs that administrative experience has brought to light. But others are of first-rate importance—breaking new ground, introducing new policies, providing for action that will vitally affect large numbers of people. The president may be deeply concerned about far-reaching changes and reforms, as was Theodore Roosevelt about conservation and the regulation of corporation procedures, or Woodrow Wilson about the improvement of banking, business, and trade practices.[2]

[1] During his first year in the White House, President Truman made more than twenty-five major proposals to Congress, practically all of them through the medium of messages. Not more than ten of the number, however, prevailed; and of these, half were revised to include features of which the President disapproved.

[2] During the administrations of Washington and Jefferson, executive influence was an important factor in shaping legislative policy, but thereafter few presidents, except in a measure Jackson, Lincoln, and Cleveland, concerned themselves actively with legislative initiative until Theodore Roosevelt's dynamic and aggressive spirit was injected into the picture. Thereafter, Wilson, the second Roosevelt, and Truman actively asserted such leadership, while Taft, Harding, Coolidge, and Hoover played lesser rôles.

National difficulties may press upon him, as they did upon Herbert Hoover. A national crisis may confront him, as a disastrous banking situation confronted Franklin D. Roosevelt when he first took office in 1933, and again an international threat, when, in 1940, the world situation suddenly thrust upon the country the necessity of embarking upon a stupendous program of defense; or it may be a crisis such as confronted President Truman, when, in May-June, 1946, a series of great strikes had tied up the country's railroad transportation and paralyzed its industry, and when the President appeared before a joint session of Congress to ask for immediate adoption of an emergency strike control bill by which his message was accompanied. But whether or not such special conditions exist, the chief executive will find it incumbent upon him to meet public expectation in at least some degree by thinking about laws that ought to be passed, by working with the appropriate subordinates and advisers in formulating suitable measures, by seeing that the proposals are duly introduced in the House or Senate, and by using his influence to get them on the statute-book.

4. Guidance in finance

In the domain of finance, the president's relations with Congress are particularly close. Never having developed any very effective agency of its own for attaining coöperation between the two houses, or for formulating policy, with respect to the budget as a whole, the legislative branch depends heavily upon the executive for leadership; and, as indicated elsewhere, the Budget and Accounting Act of 1921 made the president, through the director of the budget, virtually the general business manager of the government.[1] In that capacity, he annually transmits to Congress full information concerning the national finances, together with a coördinated fiscal plan for the coming year; in special situations, such as that existing during the recent period of defense preparations, and of war, he transmits supplementary requests for appropriations; and while the two houses are not obliged to meet his demands in full, or, on the other hand, to stay within the limits of expenditure which he recommends, they are likely to hear from him in no uncertain terms if they fail to do either.

The Veto Power

5. The veto power—constitutional basis

Next we come to the weighty function of approving or disapproving bills and resolutions passed by Congress, involving, of course, the veto power. The veto as wielded by executive authorities, especially the later colonial governors, was not in very high repute when the constitution was adopted. The designers of the new federal system had in mind, however, a balanced government in which each branch should be prevented from encroaching upon the rights, or absorbing the powers, of the other branches; and the most feasible means of defense for the executive against encroachments by the legislature seemed to be the power of veto.

[1] See p. 350 below.

Accordingly, the constitution requires that every bill which shall have passed the two houses of Congress shall, before it becomes a law, be presented to the president, who, if he approves, shall sign it, and if he disapproves, shall return it, with his objections, to the house in which it originated, and it shall then become law only if both houses, by two-thirds vote, again pass it.[1] To be sure (except under certain conditions explained below), the veto is not absolute, but only suspensive. It makes necessary a reconsideration of a disapproved bill or resolution; it gives the president an opportunity to present a formal argument against the measure; and it makes a second passage more difficult than the first. But it does not kill a bill or resolution for which a sufficient amount of legislative support can be mustered.

Courses open to the president on a bill or resolution

When a bill or resolution is passed by the two houses and presented to the president, any one of four things may happen. (1) The president may promptly sign it, whereupon it becomes law. (2) He may hold it without either signing or vetoing it, in which case it becomes law at the expiration of ten days (Sundays excepted), without his signature, provided Congress is still in session.[2] He may adopt this course because he dislikes the measure and is unwilling to put his name to it, although recognizing that a veto would be useless or politically harmful; or because he is undecided about its constitutionality or general merit and prefers not to commit himself. (3) He may hold the measure on his desk —figuratively, tuck it in his pocket—and by so doing quietly kill it if Congress adjourns within ten days. Because of obviating the necessity of making a formal explanation to Congress (sometimes politically disadvantageous), a "pocket" veto may, from the president's point of view, be preferable to a direct, or "messaged," veto;[3] and many bills come to grief in this way, particularly by reason of the fact that as a rule considerable numbers of measures are rushed through Congress in the closing days of a session and require only to be "pocketed" by the president to be kept off the statute-book. Finally (4), a bill may be vetoed outright. That is to say, the president may, by positive act, disapprove it, in which case it goes, with a message giving his reasons, to the house in which it originated. As has appeared, a pocket veto, even though arising from mere inaction, is the strongest veto of all, because there is no opportunity for Congress to undo it. A direct veto has the effect, rather, of starting a reconsideration of the bill, first in the house of its origin, and afterwards, if successful there, in the other house; and if the hurdle of

[1] Art. I, § 7, cl. 2. As being (at least in theory) not legislation proper, "concurrent resolutions" are not submitted; nor are "joint resolutions" when proposing constitutional amendments.

[2] The fact that the ten-day period is reckoned from the presentation of the bill—not its passage—became of much importance when President Wilson went abroad in 1919 to participate in negotiating the Treaty of Versailles, and again in January-February, 1945, when President Franklin D. Roosevelt was absent from the country some five weeks in connection with wartime conferences abroad.

[3] President Franklin D. Roosevelt, however, initiated the practice of attaching an explanatory memorandum to each bill pocket-vetoed.

a two-thirds vote can be surmounted at both ends of the Capitol, the measure becomes law notwithstanding the president's disapproval.

Frequency of vetoes

In one of the *Federalist* papers, Hamilton ventured the prediction that the veto would generally be employed with great caution, and that there would be more danger of the president "not using his power when necessary, than of his using it too often, or too much."[1] For many decades, at least, this forecast was borne out. Not until Andrew Johnson's administration did any president deem it necessary to resort to a veto in defense of his own constitutional rights; and altogether it has been used for this purpose no more than a dozen times. Indeed, there were only fifty-one vetoes, all told, before the Civil War. The first six presidents vetoed bills only on the ground that they were unconstitutional or technically defective. Jackson, who in sundry ways made the presidency something different from what it had been before, gave the veto a new twist by employing it to defeat measures admitted to be constitutional and technically correct, but considered objectionable in their aim and content. Yet Jackson, in eight years, vetoed only twelve bills. In the turbulent era of Reconstruction, the veto was employed more freely, and later presidents have not taken the conservative attitude of their remoter predecessors. Except in the cases of Grover Cleveland and Franklin D. Roosevelt, however, the number of vetoes has rarely averaged more than five or six a year; between them, those two presidents are responsible for more than two-thirds of all presidential vetoes in the country's history—in the case of Cleveland a total of 414, in that of Roosevelt a total of 631 (371 "messaged" and 260 "pocket").[2]

General expansion of the veto power

The most significant thing is not, however, the tendency toward increase in the number of vetoes. The really important matter is the freedom with which presidents, as one writer has put it, "offset their own judgment against that of Congress, not merely on great questions involving the public welfare, and on disputed constitutional questions, but on trivial matters whereon their means of information are not greater or better than those at the command of Congress, and whereon their individual judgment does not appear to be superior to that of the average congressman or senator."[3] In other words, the veto power has been so expanded by usage as to become a general revising power, applicable to all legislation, whether important or not, and whether relating to public matters or to private and personal interests. The result has been to make the president a far more active and potent factor in legislation than he originally was, or was intended to be.

[1] No. LXXIII (Lodge's ed., 460).

[2] President Truman vetoed 60 measures (39 "messaged," 21 "pocket") between his accession to the presidency in April, 1945, and the end of the Seventy-ninth Congress in August, 1946. His record (for the limited period indicated) is therefore also exceptionally high.

[3] E. Stanwood, *History of the Presidency from 1898 to 1916* (new ed., Boston, 1928), 324.

Few vetoes overridden

This does not mean, however, that the veto power has, in these later days, been used loosely and irresponsibly. On the contrary, it has commonly been employed reluctantly and with due discretion. Most vetoes of measures important enough to have attracted popular attention have been supported by public sentiment, and comparatively few have been overridden by subsequent action of Congress. Not until Tyler's administration did any vetoed bill receive the two-thirds vote in both houses necessary to make it law. Wilson was reversed six times and Cleveland seven, but Coolidge only four times, Hoover three times, Harrison, Theodore Roosevelt, and Taft once each, McKinley and Harding not at all, and Franklin D. Roosevelt nine times.[1] In practice, therefore, the direct veto tends to become almost as absolute as the "pocket" variety; only rarely and with great difficulty can sufficient votes be mustered in the two houses to override an unfavorable presidential decision. This has led to the suggestion that the veto power be weakened by making it possible for a vetoed measure ultimately to prevail by being repassed in the two houses by a simple majority (as is the rule in a number of states), rather than the present two-thirds. On the other hand, it has been suggested that the veto be strengthened by requiring that a bill, in order to be carried over a veto, should be repassed by an affirmative vote of two-thirds of the entire membership of each house, rather than, as now, by two-thirds of a quorum in each.

The question of the veto of items

Another, and more important, proposal looking to strengthening the veto power is that authority be conferred to veto individual items of a bill while nevertheless approving the measure as a whole. As matters stand, the president must assent to or veto a bill in its entirety; he cannot approve part and reject part. When anyone of the twenty or more annual appropriation bills is placed on his desk, he may find that, although ostensibly based on estimates prepared by his budget bureau, the measure as passed contains clauses slipped in by Congress interpolating additional expenditures or altering the amounts requested for particular purposes (perchance also encumbered by a "rider" or two on some wholly extraneous subject, inserted because there was little hope of getting it through in any other way); and it might be in the public interest for him to strike these out. This, however, he cannot do; and, rather than leave important services without funds or inflict hardship by preventing salaries from being paid, he is practically certain to sign the bill as it stands. The situation is not as bad as it used to be, before the Budget and Accounting Act of 1921 became law;[2] because under the operation of that statute, appropriation acts, in general, follow rather closely the specifications transmitted by the executive. Indeed, if only there could be incorporated into the budget system, by law or practice, the salutary English plan under which the legislature adds no new items of expenditure to those

[1] None of President Truman's 60 vetoes to August 2, 1946, was overridden.
[2] See p. 350 below.

requested by the executive, and makes no increases in the amounts asked, the problem would be solved. There being, however, little prospect of this being done, the item veto in connection with expenditures remains a practical question. All but ten of the states have empowered their governors to veto appropriation items—in some instances also to reduce the amount carried by an item; and similar power for the national executive has been advocated for many decades. When, however, President Roosevelt, in 1938, urgently requested a grant of such authority and the House assented, the Senate refused to concur, on the ground that the item veto would constitute an invasion of congressional authority, and that in any event it could properly be authorized only by a constitutional amendment. The general objections have been raised, too, (1) that the power would enable a president, if he were so minded, to discriminate unfairly between appropriations favored by his supporters and others of concern mainly to his opponents, and (2) that, with the power known to be in the president's hands, Congress might fall into the habit, as have some state legislatures, of gratifying departments and pressure groups by voting extravagant appropriations and deliberately saddling the executive with the burden of whittling them down and with the unpopularity likely to arise from doing so.

It would likewise be useful to the president to be able to veto specific provisions of bills other than appropriation measures. President Coolidge would have liked to veto a provision of the immigration act of 1924 which he well knew would give deep offense to Japan; President Wilson, in 1920, felt constrained to veto an entire bill providing for a national budget system in which he thoroughly believed, rather than approve what he conceived to be an unconstitutional clause relating to the method of removing the controller-general. President Roosevelt, in 1944, signed an appropriation bill because to do otherwise would hamper the war effort, although in doing so he pronounced both unwise and unconstitutional a "rider" attached to the measure stopping the salaries of three federal officials who had fallen under congressional displeasure.

Other Means and Bases of Presidential Control

Threat, persuasion, and public appeal

Convening Congress in special session, sending messages (or delivering them orally), initiating bills, transmitting budget proposals, and wielding the veto power by no means exhaust the president's resources in influencing legislation. (1) By letting it be known that he will veto a pending bill unless certain changes are made in it, he may be able virtually to dictate the form that the measure will finally take, or even to prevent it from being passed at all.[1] (2) By turning a deaf ear to the

[1] A different form of threat manifested itself in September, 1942, when, with a view to averting the disaster of inflation, President Franklin D. Roosevelt bluntly told Congress and the country that unless by October 1 there should be legislation repealing a provision of the Emergency Price Control Act of the previous February 2 prohibiting ceilings on food products until farm prices had gone, on the average,

pleas of senators and representatives for patronage, he may subject them to backfire from their office-hungry constituents and imperil their chances of reëlection. (3) By withholding words of endorsement at election (including primary) time, or perchance by openly expressing disapproval, he likewise may make it difficult or impossible for members of his party who have opposed his policies to win at the polls.[1] (4) Although forbidden by custom to appear on the floor of either branch of Congress for any purpose other than to deliver a formal message, there is nothing to prevent him from discussing measures and policies with any number of members, individually or in small groups, in his office at the White House, over the cakes and sausages at the breakfast table, or in the room set apart for him in the Capitol. His arts on such occasions may range from genial encouragement or gentle persuasion to bold ultimatum; although, of course, he may be induced to accept amendments to bills in which he is interested, or even to make important changes in his general legislative program. (5) By utilizing his unsurpassed opportunities for publicity and by systematically cultivating popular approval for his policies—through public addresses, press conferences, greetings to organizations and meetings, letters nominally to private individuals but intended for the public, and notably in these latter days heart-to-heart talks to the people by radio (in the fashion so successfully employed by the mellifluous-voiced Franklin D. Roosevelt)—he may build and maintain a public opinion which congressmen will hesitate to antagonize or ignore. If all else fails, he may appeal directly to the nation against Congress, and both Theodore Roosevelt and Woodrow Wilson did so; although such a course is risky, and hardly to be undertaken save by a president of genuine stature and having a decidedly good case.

Party leadership

Certain practical situations operate to the president's advantage in employing the constitutional powers and extra-constitutional techniques enumerated. First of all is his position as leader of his party. Originally, the chief executive was not a party man; Washington thought of himself as identified with no party and chief of no faction. When, however, parties came into the field and presidents began to be elected as party representatives, party leadership became as truly a function of the president as it is of the English prime minister; and it is nowadays a hardly

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sixteen per cent beyond "parity prices," he would fall back upon his powers as commander-in-chief and take whatever action he deemed necessary. Under the threat thus held over it, Congress grudgingly complied.

[1] One recalls in this connection President Franklin D. Roosevelt's not very successful attempt in 1938 to "purge" Congress of Democratic members who had resisted his court reorganization bill (see pp. 342-344 below) and other measures. In advance of the congressional elections of 1946, President Truman was under some pressure to proscribe Democratic members (mainly Southern) who had not gone along with the Administration. He refrained from any blanket purge, but openly opposed the renomination of one Missouri congressman who, as a member of the House committee on rules, had opposed his measures, and who went down to defeat in the primary. One may generalize to the extent of saying that, although no active purges may be involved, presidents are always in politics—some more deeply, however, than others.

less important source of power than is the authority conferred in the constitution itself. Chosen as a party man to head a government operated frankly under the party system, the president surrounds himself with advisers of his own political faith, consults chiefly his fellow-partisans in Congress on proposed appointments, confers mainly with them on the framing of policy, and depends primarily on their loyalty and support for realization of his legislative program. He represents the party throughout the entire country, as members of Congress do not; and the country looks to him, even more than to Congress, for fulfillment of the pledges which his party has made. This gives him an important leverage in his dealings with Congress—although obviously the effectiveness of it at any given time will depend largely, not only upon his own skill in capitalizing upon it, but upon how favorable the party situation is in the two houses. The time for a president to translate his party leadership into legislative performance is normally when party loyalty and spirit are running strong, and party votes are plentiful, as a result of victory at the polls. Later on, his leadership will probably have to be directed principally to repairing damage wrought by defeats, schisms, and other set-backs.

The need of Congress for outside leadership

Another circumstance strongly favorable to presidential influence upon legislation is the need on Capitol Hill for leadership and direction from some outside source. Experience shows that Congress, when left to its own devices, tends to disintegrate into minority, partisan, and sectional elements and to flounder in a bog of contrary purposes. Even if there is capable and recognized leadership in the houses singly, there is usually no one save the president to bring the two branches together in effective support of great policies and measures. On plenty of occasions, senators and congressmen show resentment when exhorted, advised, or requested from "downtown"; yet when a new path is to be hewed, they almost invariably hesitate and show confusion until and unless a directing hand points the way and a commanding voice urges to action. In other words, Congress works well only under stimulus and pressure, which may, of course, come ultimately from public opinion, or even from considerations of party welfare, but in any case usually needs to be transmitted or applied by the president.

Popular expectation centered in the president

Finally, there is the circumstance that, more and more, the people look to the president, not simply to coördinate and direct the national administration and to speak for the country in dealings with foreign governments, but to develop well-conceived lines of domestic policy, to propose the legislation necessary for carrying out such policy, and to exert enough pressure upon Congress to get this legislation enacted. They expect him, indeed, to "manage" Congress, and if through lack of political skill, or because of adverse circumstances too difficult to be overcome, he does not do so, they (justly or unjustly) pronounce him a failure. In other words, they regard him as "head of the government" (legislative

branch as well as executive) and hold him responsible accordingly—a situation from which he draws grave perils but also high challenge and inspiring opportunity.

An illustration of presidential leadership in legislation

There are times when ordinary legislative leadership, and even the leadership of party, merges into a broad national leadership transcending all political and other dividing lines. Naturally, these are most likely to be periods of grave national stress. Such a leadership was Lincoln's in the earlier stages of the Civil War and Wilson's while the United States was involved in the first World War. Such a leadership also was that of Franklin D. Roosevelt in the first two years of his presidency—easily the most remarkable that the country has known in days of peace, although of course rivaled by the same chief executive's leadership in the defense effort of 1940-41 and in the later war. Taking office at a time when long accumulating economic derangement had come to a head in a banking crisis of major proportions, Mr. Roosevelt struck a bold note in his inaugural address by declaring not only that there must be quick action, but that, while it was to be hoped that the "normal balance of executive and legislative authority" would prove adequate to the situation, he was prepared, in the event that Congress should fail to do its part, to ask that body "for the one remaining instrument to meet the crisis—broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe."

The new Congress having been convoked in special session, the president became chief lawmaker to a degree perhaps never before witnessed in the country's history. A rapid fire of messages descended upon Capitol Hill; and when each was presented, a supporter of the Administration stood ready to introduce a bill (originating also in, or at all events sponsored by, the White House) covering the proposals made. In a session lasting a hundred days, only one important measure was passed which did not have such a history. To be sure, some bills encountered opposition within the president's party and were amended in committee, or even on the floor. By and large, however, the function of Congress was merely to agree; on as far-reaching a measure as the Farm Relief Bill (giving rise to the memorable Agricultural Adjustment Administration), only four hours of debate were allowed in the House, with no amendments permitted. Messages and proposals were strategically timed; telephone calls from the White House admonished or warned the hesitant; radio talks to the nation reassured the troubled and inspired sentiment that no congressman could ignore. And all was done with manifest public approval. A frightened people wanted action, and a bold president was prepared to see that they got it.

As was to be expected, popular applause later died down, and a hesitant or frankly critical attitude developed toward much that had been done; the Supreme Court, indeed, declared important parts of the recovery

legislation unconstitutional. But the matter of interest to us here is the height to which presidential leadership ascended and the techniques by which it was sustained. It is important to note, too, that legislative leadership from the White House did not abdicate when the first round of remedial measures had been passed. On the contrary, many of those more or less temporary measures were dovetailed into schemes for far-reaching and permanent rehabilitation and reform—schemes, *e.g.*, that for a nation-wide system of social security, which later were relayed to Congress in the form of urgent recommendations or of fully drafted bills, and in part were later enacted into law.

Control Over the President by Congress

Constitutional specifications

The emphasis thus far placed upon the president's lofty rôle must not be allowed to obscure the fact that, as between executive and legislature, influence and control do not flow in only a single direction; for the president, in his turn, is subject to considerable restraint, and in the final analysis to a good deal of positive control, from Congress. Few indeed of his powers can be exercised without spending money; and for money he is absolutely dependent upon Congress. Few, likewise, can be exercised except through departments, boards, and other agencies, for the establishment and maintenance of which he is similarly dependent. For enactment of the legislation he desires, he must rely upon Congress. He must get senatorial consent to his appointments and his treaties. He can wage war only if Congress declares it. His vetoes can be overridden in the two houses. His every act (personal or through subordinates) can be looked into and criticized, and some of them can be reversed. If worst comes to worst, he can be impeached and removed from office.

Practical restraints

In the give and take of personal relations with senators and representatives, furthermore, the president, as has been indicated, may be argued into changing his views or modifying his policies. Defeat of his measures or refusal of his requests may compel him to give up a program in which he firmly believes—witness Franklin D. Roosevelt's enforced relinquishment in 1937 both of his favorite plan for administrative reorganization and of his cherished project for reconstruction of the Supreme Court; his reversal in 1943 on a $25,000 ceiling for salaries; and the involuntary abandonment, in the same year, for lack of funds, of two agencies dear to his heart, the National Resources Planning Board and the National Youth Administration. Either house, or both, may make "requests" (not—at least in form—*demands*) upon him for documents or information which he cannot well withhold, however much he might prefer to do so,[1] or may institute investigations of executive or administrative work for which he is directly or indirectly responsible. Congress may pass laws

[1] Such requests, when relating to the negotiation of treaties or to other aspects of foreign relations, usually recognize the necessity of discretion in this domain by incorporating the phrase, "if not incompatible with the public interest."

imposing new duties upon him or his subordinates, and may limit the discretion of heads of departments or other officers and require them to do given things in a given way, irrespective of the president's wishes. Even a supposedly friendly Congress may frustrate the Administration's program again and again (President Truman had this experience repeatedly during his first year and a half in office), the Senate, in particular, being prone to assume an attitude best described as "baiting the president." The spectacle may not be edifying, and the country's interests may suffer. But the confusion, delay, and futility involved are the price we pay—justifiably or otherwise—for our historic system of separation of powers.[1]

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[1] Practically all of the matters referred to in this paragraph have been, or will be, discussed elsewhere, and hence are merely mentioned here.

CHAPTER XVII

THE IMPROVEMENT OF CONGRESS AND OF LEGISLATIVE-EXECUTIVE RELATIONS

Some extreme charges

It long has been a familiar experience to hear Congress ridiculed, criticized, berated—by editors, columnists, radio commentators, publicists, and occasionally even by congressmen themselves. In tireless chorus, we have been told that the two houses are inefficient, irresponsible, dilatory, extravagant, provincial, aimless, wanting in vision, and suffused with demagogy. If the situation is half as bad as some people would have us believe, the heart has indeed gone out of our American representative system, and our plight is assuredly unhappy, particularly in an era when perhaps our greatest national need is intelligent and effective democratic government.

The situation not as bad as painted

Fortunately, the indiscriminate and reckless criticisms dinned into our ears are not supported by the facts. To be sure, Congress, as it operates, shows plenty of imperfections;[1] and undoubtedly it has declined in public esteem. But there is no reason to believe that the character and caliber of its members are any lower than fifty or a hundred years ago; many among them will risk political defeat rather than vote contrary to their convictions; and of corruption, in at least its grosser forms, there is little or none. Times have changed, and the ponderous oratory that once resounded through crowded halls has given way to less ornate discussion; but, as an eminent authority has remarked, the quality of serious speeches in both houses, considering the increased complexity of most of the problems that have to be dealt with, is still "amazingly high."[2] Much of the censure that one hears is merely partisan, captious, and abusive. Much of it springs from the disappointment or exasperation of people whose pet projects have come to grief (often deservedly), or whose notions of what ought to be done have not happened to coincide with those of the congressional majority. No Congress, however efficient, could hope to please everybody—nor, indeed, in all respects to please anybody. Do what they may, or do nothing at all, the members are bound to encounter disapproval and complaint. The truth is that, notwithstanding frequent waste of time and misdirection of effort, a vast amount of careful and intelligent work is done on Capitol Hill, especially

[1] The reforms embodied in the Legislative Reorganization Act of 1946 (already mentioned many times, and to be considered further in the present chapter) will undoubtedly prove to have remedied certain of these shortcomings. But their full effects are yet to be disclosed, and besides, a good many faults went largely or wholly untouched in that important measure.

[2] C. A. Beard, in *Amer. Mercury*, LV, 531 (Nov., 1942).

in the great committees, and that the houses somehow succeed in placing on the statute-book numerous measures representing honest attempts to promote the public well-being and backed by a great volume of favorable public sentiment. A stream does not rise higher than its source; by and large, Congress is no better, and no worse, than the people from which it springs.

Nevertheless some shortcomings:

This said, however, certain shortcomings have also to be recognized. (1) Too much business is transacted—too many bills of deep concern to the people are passed—without the full debate that would familiarize members with what they are voting on and acquaint the country with the issues involved. No doubt it is true that—particularly in view of the complexity of modern legislative problems referred to—most of the work on important bills is, and must be, performed in the committee rooms.

1. Inadequate debate

When, however, measures of the magnitude of the Labor Relations Act of 1935 and the "Wages and Hours" Act of 1938 can slip through the House of Representatives with only three hours and six hours of general discussion, respectively, one is justified in believing that one of the basic purposes of wide popular representation is failing to be realized. In the more leisurely Senate, to be sure, there is genuine debate (when not blocked by a filibuster); but the mechanized procedures of the overgrown and over-regimented House have practically left that body without opportunity to debate large measures (except sometimes financial bills) in a large way.[1] (2) Congestion and hurry often seem the order of the day; and still another defect sometimes disclosed is dilatoriness in recognizing and confronting major issues and pushing through to needed action upon them. Over the years, Congress has been proverbially slow in getting around to legislation on basic matters long calling for attention—matters often, *e.g.*, social security, on which progressive state governments had previously blazed the way. The fault is traceable primarily to the leadership; and this may bring the president, as well as House and Senate managers, under blame. But criticism attaches also to a rank and file that does not always respond to leadership and that too

2. Dilatoriness

[1] A main reason is that the fate of most important bills is predetermined by decisions and acts of the majority leaders, with the aid of the majority caucus, or conference, and the rules committee. Bills reported from standing committees are explained briefly by the committee chairman, and perhaps other majority members, in an agreed order, and spokesmen of the minority are allowed a chance to present their views. But, with rare exceptions, no one expects votes to be changed by the arguments of either side. The general run of members have not studied the measure; they assume that the committee majority (or minority, as the case may be) has gone into the matter and knows what it is talking about; they hesitate to involve themselves in a discussion in which they might be worsted, and still more to incur suspicion of party irregularity or disloyalty. Accordingly, they usually vote almost automatically to uphold their fellow-partisans on the committee, in pursuance of the general program mapped out by the party leaders.

As long ago as 1884, Woodrow Wilson wrote: "The theater of debate upon legislation [has shifted] from the floor of Congress to the privacy of the committee-rooms," and that "the House sits, not for serious discussion, but to sanction the conclusions of its committees as rapidly as possible." *Congressional Government* (21st impression), 79. 81.

often allows petty concerns of one kind or another to paralyze action. (3) Congress is an assemblage of politicians; by and large, if members were not politicians, they would not be in Congress. That is quite all right, too—unless as legislators they fail to rise above the politician-complex. There need be no criticism of party regularity on the part of members, of sharp divisions on party lines, of legislation enacted by a party majority and opposed by a party minority; these are of the essence of party government and party responsibility, which, on the whole, have justified themselves in all democratic countries fortunate enough to have them. Where criticism is rightly lodged is against the bickerings, delays, distortions, and futility displayed by Congress in periods when politics is allowed to dominate the scene and no word can be spoken or move made without suspicion of partisan motivation. Naturally, such periods are most likely to befall when a congressional or presidential election is in the offing; and at such times—no matter how critical the state of the country—the two houses are likely to be seen at their worst. In the spring and early summer of 1946, for example, Congress played fast and loose with tremendously vital matters such as price control and inflation, the recruitment of the armed services, and housing for veterans, simply (or at least mainly) because Democrats and Republicans were sparring for advantage in the fall elections.

3. Excessive partisanship

(4) Another difficulty is diffusion of responsibility. This again brings the president into the picture, because responsibility for what is done or not done on Capitol Hill is inevitably divided between Congress and the White House—an awkward but inescapable situation touched upon in the previous chapter. Enough has been said at other earlier points to make it clear that within Congress itself, however, there is no effective concentration of responsibility. Matters can be tossed back and forth between the two houses; both houses are splintered into committees, not so many now as formerly, but still functionally overlapping and duplicating as between the two houses, and even at some points within a single house. In the House of Representatives especially, the "managers" presumably direct proceedings. But often one is moved to ask who among them can be held responsible for given decisions or acts; with party lines often shattered by *blocs* and other unorthodox groupings, *e.g.*, the informal but effective alliance of conservative Northern Republicans and even more conservative Southern Democrats in the recent Seventy-ninth Congress, even party responsibility becomes attenuated and at times hardly more than a fiction.

4. Diffusion of responsibility

Some Handicaps Under Which Congress Works

It is only fair to recognize that Congress operates under a number of disadvantageous circumstances, for some of which it is responsible and for others not. The size and regional diversity of the country multiply and complicate the tasks to be performed. The federal nature of the

government raises serious problems of constitutional law and policy, as does also the principle of separation of powers. Absence of the sort of leadership supplied by cabinets in countries like Great Britain and Canada forces the houses to seek leadership where they can find it, and sometimes to submit to a presidential leadership (as during President Franklin D. Roosevelt's earlier years) reducing Congress to hardly more than a rubber-stamp.

1. Two-year term for congressmen

Still other disadvantages are perhaps less obvious. One of them is the short term of members of the House of Representatives. Elected for two years only, a congressman cannot progress far toward becoming a useful member, much less a leader, before his mandate expires. Furthermore, he must almost immediately turn his thoughts to reëlection; and this distracts his attention and divides his energies. A four-year term would in many ways be better. But neither Congress nor the country has ever manifested much interest in the matter.

2. Residence in one's district expected

Another limitation arises from the insistence of our politicians and people that a congressman be a resident of the district which he represents. There is nothing in the national constitution or laws to prevent the voters of a district from choosing as their representative a desirable man living in a different part of the state, and there have been a few cases of congressmen from New York and Chicago who dwelt in a section of the city not included in their respective districts. In general, however, if a man were to seek election in a district in which he did not live, he would make little headway against the voters' assumption that only one of their own number can safely be trusted to look after their interests. The results are sometimes unfortunate. Good men who happen to live in districts not dominated by their own party are cut off from any chance to serve the country in Congress; valued members are forced to drop out simply because defeated in their home constituency; and the pernicious concept is fostered of the congressman as merely the district's official agent—errand-boy, one is tempted to say—for procuring appointments, buildings, relief allotments, and anything else that can be got when the plum-tree is shaken. For this unfortunate parochialism in our political practice, there is, however, no apparent remedy.

3. Lack of intelligent and sustained public interest

Most of the time, Congress suffers, too, from a dearth of interest in its work in quarters where such interest ought to be keen, and an excess of interest in other quarters where it is likely to have harmful effects. Considering that the two houses every twelve months enact hundreds of laws which operate throughout the entire United States and authorize the spending of multiplied billions of the people's money, it might be expected that their work from year to year, and almost from day to day, would command the attention of the general mass of citizens. That it commonly fails to do so is not open to argument. Only when some unusual fight over the rules, or some sensational investigation, or a filibuster, or a particularly tense debate, is to be recorded does the average

small-town newspaper—on which most people depend for what they know about affairs at Washington—give much prominence to congressional proceedings. As remarked above, a stream does not rise higher than its source; and if the people do not take a continuous, discriminating, and appreciative interest in what their representatives say and do at the national capital (as well as, of course, at state capitals and local seats of government), they have themselves to blame if things go wrong.

4. "Pressure groups" and lobbying

There are, of course, those whose interest is unflagging. But to a regrettable extent they turn out to be men and women with an axe to grind—persons who want a constitutional amendment proposed or killed, a statute passed, defeated, or amended, a favorable or an unfavorable committee report made, an appropriation voted, or some other benefit conferred; and another of the handicaps under which Congress works is the inescapable, and sometimes improper, pressure brought to bear by these "lobbyists." It is to be noted that the lobby of which one so frequently hears in Washington—the "third house" of the paragraphers —consists not so much of persons seeking favors directly for themselves as of professional paid agents (sometimes ex-congressmen and ex-senators, who are presumed to know the right lines of approach) of great interests or organizations, whose business it is to haunt the legislative halls and members' offices and work unceasingly for whatever objects their clients have in view. Especially active in this way are the lobbyists of the American Legion, the Chamber of Commerce of the United States, the American Farm Bureau Federation, the American Association of Railway Executives, the A. F. of L. and the C. I. O., the Joint Committee of National Utility Associations, the American Coal Distributors, the American Gas Association, the National Petroleum Association, the interests centered in the woollen, cotton, meat-packing, sugar, leather, steel, and other great industries, and even the National Federation of Federal Employees, the Federal Council of Churches, the League of Women Voters of the United States, and the National Education Association. There is even an organization working for various causes of concern to the public, and known as "People's Lobby, Inc." [1]

Magnitude of lobbyists' operations

Not all lobbying, be it noted, is reprehensible, either in object or in method. There are lobbyists for the most worthy causes as for the least worthy; and their work may be entirely open and above-board, and may have a desirable educational effect, just as it may follow devious courses, by dubious means, toward mercenary, or even corrupt, ends. The fact remains, however, that the footsteps of every congressman are dogged by men—increasing numbers of women too—whose flattering attention is aimed exclusively at influencing him, by entreaty, promise, or threat, to vote for or against this or that particular bill, tariff schedule, subsidy,

[1] In April, 1946, it became necessary for President Truman to admonish naval officers to desist from lobbying against a bill for merging the War and Navy Departments and unifying the country's armed forces.

or privilege. Upwards of two hundred organized groups maintain a total of eight hundred to a thousand liberally paid legislative agents permanently at the capital; and twice as many more are similarly represented from time to time when measures affecting their interests are under consideration. Scarcely an important bill passes without complaint arising in some quarter that an importunate and lavishly paid "locust swarm" of lobbyists has had a hand in enacting it; and often as not the complaint is fully justified.

The problem of regulation

Lobbyists have long infested the state capitals no less than Washington, and all but some fifteen of the state legislatures have enacted laws designed to place limits on their operations—usually by requiring persons engaged in lobbying to acknowledge the fact by registering with some designated official, by forbidding the legislative floor to such persons, and by requiring them to make their expense accounts a matter of public record. In perhaps no more than half a dozen states, however, are such regulations consistently enforced, and nowhere are they very effective. At Washington, the matter has long received intermittent attention, with the Senate from time to time sponsoring committee investigations and even passing bills requiring lobbyists to register and to reveal by whom they were employed and to what end. In the lower house, however, such measures almost invariably perished—partly because of honest doubt (inspired to some extent by the not too impressive experience of the states) as to how effective any general attempt at regulation would prove; partly by the manifest difficulty of getting at and prohibiting improper practices without also interfering with legitimate ones; partly by the helpfulness attributed by many congressmen to the information and materials supplied to them by lobbyists; and partly, if the truth be told, by the fear of many congressmen that any law enacted might place obstacles in the path of lobbying activities in which they themselves might want to engage after going out of office. As a result, until of late, federal regulation never went farther than to require public utility lobbyists to register, and workers in behalf of foreign interests and of shipping interests both to register and to place on record the nature and objects of their activities. In some quarters, there was a rather futile hope that mere airing of the subject in frequent discussion, combined with the publicity forced upon the particular groups of lobbyists mentioned, would operate measurably as a corrective.

The Federal Regulation of Lobbying Act of 1946

To any one familiar with the maze of influences and pressures amidst which Congress works, it must, therefore, have come not only as somewhat of a surprise, but also as a cause for gratification, when the Legislative Reorganization Act of 1946 was found to contain, as Title III, a Federal Regulation of Lobbying Act going about as far as any reasonable person would deem feasible. Like the main body of the statute, the lobbying section originated in the Senate; and its acceptance there was perhaps to be expected. Reversing all former attitudes, however, the

House also accepted it; and in January, 1947, its provisions went into effect. The salient features of the new regulatory system (applying to lobbying by every sort of interest on every sort of subject[1]) are: (1) every person receiving any form of compensation for attempting to influence the passage or defeat of any legislation by Congress must, before he begins, register with the clerk of the House and secretary of the Senate; (2) in doing this, he must disclose by whom he is employed, in whose interest he works, and how much and by whom he is paid and for how long, both as salary and for expenses; (3) every three months, he must report in detail and under oath all monies received, and the ways in which they have been spent; (4) every person soliciting or receiving contributions to any organization or fund for lobbying purposes must keep an exact account of all contributions received, the name and address of every contributor of as much as five hundred dollars, all expenditures made by or on behalf of such organization or fund, and the name and address of every person to whom money has been paid out; and (5) full and detailed reports covering these matters must be filed yearly with the House and Senate officials mentioned, and for two years must be kept open for public inspection.[2] Violators of any of these provisions are liable to a fine of five thousand dollars or imprisonment for a year, or both, and are debarred from further lobbying activities for a period of three years after conviction.

Within two weeks after the new legislation was approved, registration forms were supplied to more than four hundred individuals and organizations; and this was a mere beginning. Many border-line cases existed in which there was uncertainty as to whether the law applied; and no complete and final tabulation was available when these lines were written—although, of course, any list will be subject to continual change.[3] Nor is it possible as yet to offer comment on the legislation's actual workings. On its face, it seems to be a more comprehensive and air-tight scheme of regulation than that as yet adopted by any state. Its effectiveness, however, will, of course, depend on the vigor with which it is enforced.

Congressional Self-Improvement

For the impediments thus far mentioned, Congress, speaking broadly, is not itself to blame; even lobbying (which, of course, has both its good and bad sides) will go on, perhaps undiminished, in spite of the new

[1] But defined to exclude mere appearance before a congressional committee, activities by any public official in his official capacity, and news or editorial comment published by any newspaper or other regularly issued periodical.

[2] From requirements 4 and 5 are exempted state and local committees of any political party, and any other political committee as defined in the Federal Corrupt Practices Act. Contributions to party and other political committees are, of course, regulated to some extent by the act mentioned and by other separate legislation. See p. 143 above.

[3] The first lobbyists actually registered represented the People's Lobby and the W.C.T.U.

regulatory legislation, and certainly could not be completely suppressed. Not so long ago, however, one would have been obliged to add that Congress labored also under impediments of its own making, or at all events of such a nature that it could, by its own action, remove or alleviate them; and in point of fact the present chapter was originally drafted when that situation still existed. It is gratifying, however, to be able to record that, in the summer of 1946, Congress finally capped a prodigious amount of talk about self-improvement with action in the form of a statute deserving to rank with the most important, *e.g.*, the Budget and Accounting Act of 1921, ever passed for bettering the character of federal legislation and the conditions under which legislative work is carried on. Several features of this Legislative Reorganization Act [1] have necessarily been described in earlier connections, and it remains here merely (1) to note the circumstances under which the measure was passed, (2) to summarize its major contributions, and (3) to indicate a few problems which it failed to touch.

The background of the new legislation

Long ago it became obvious that if Congress was in future to hold its own in growing competition with executive power, to meet the challenges of difficult times, to serve the nation in the fashion which its basic function in our political system presupposes, and to recover lost popular confidence and prestige, it would have to be liberated from various conditions and methods operating to shackle it in the performance of its work. And equally obvious was the fact that—at many points at least—such improvement lay entirely, or almost so, in the members' own hands. Perhaps wartime exigencies were required to drive the challenge home. At all events, during the two years covered by the Seventy-eighth Congress (1943-45), more than fifty proposals for particular reforms, or in some instances for a general program of reform, were introduced in the two houses; and while none prevailed, a joint resolution of February, 1945, took the significant step of setting up a bi-partisan Joint Committee on the Reorganization of Congress, composed of six members of each branch (Senator Robert M. LaFollette, chairman), and charged with making a full study of the subject and recommending plans "with a view toward strengthening Congress, simplifying its operations, improving its relationships with other branches of the United States government, and enabling it to meet its responsibilities under the constitution." Taking its task seriously, the committee held hearings and carried on studies for more than a year, until finally, early in 1946, it was ready to come forward with a report going to the root of many organizational difficulties and proposing far-reaching changes.[2] Meeting at first a somewhat cool

[1] Public Law 601—79th Congress.

[2] *Report of the Joint Committee on the Organization of Congress*, 79th Cong., 2nd Sess., Rep. No. 1011. Influential in preparing the way for this move in Congress was a committee of the American Political Science Association which from 1942 met frequently with senators and representatives for discussion of the subject. For the report of this committee, with recommendations, see *The Reorganization of Con-*

reception—especially from committees that did not want to be abolished and committee chairmen who did not want to lose their prestige and perquisites—and encountering numerous obstacles of a parliamentary nature, an omnibus bill incorporating the recommendations appeared for a time to have an uncertain prospect. Clever handling of the measure, however, brought it eventually to a vote in both branches; and although the lower house was responsible for trimming out a number of worthwhile provisions, the amended bill became law as the Seventy-ninth Congress closed its last session.

An outline of the changes provided for

In summary, the principal features of the reorganization provided for, and later put into effect, were as follows:

1. *As to committees.* Hardly any one, in Congress or out, used to discuss congressional improvement without stressing the need for a drastic overhauling of the overgrown and cumbersome committee system. There were far too many standing committees (eighty-one in the two houses, with two to three hundred sub-committees); many overlapped or were otherwise useless; many bore no logical relation to recognized areas of public policy and of administrative jurisdiction; members of the House served on as many as five or six, and senators sometimes on as many as seven or eight; although some committees met rarely or not all, it still was true that the average member had so many committee obligations that he could not possibly discharge them all; even with lax attendance, there was continual interference with other phases of legislative work, including service on important special committees which further taxed the member's time. To correct these glaring evils and introduce other desirable improvements: (1) the former forty-eight standing committees of the House are now replaced by nineteen, and the thirty-three of the Senate by fifteen; (2) committee jurisdictions are defined to eliminate, as nearly as possible, all overlapping and duplication; (3) with slight exceptions, each representative is restricted to a single committee and each senator to two; (4) every committee chairman is required to report promptly all bills approved by his committee, instead of using his discretion about the matter as formerly; (5) committees are required to have a regular schedule of meeting days, and to adhere to it; (6) committees are authorized to employ clerical staffs of up to six persons and professional staffs of up to four; and (7) with a view to assisting Congress in keeping track of the administration of the laws which it passes and in considering desirable amendments, all committees are required to exercise continuous watchfulness over the execution of any and all laws falling within their respective jurisdictions. No change in the method of making up committees was provided in the legislation; no joint standing committees of the two houses, often proposed, but not suggested in the

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gress; A Report of the Committee on Congress of the American Political Science Association (Washington, D. C., 1945). The same committee, somewhat reorganized, is now working on the problem of improving state legislatures.

Joint Committee's report, were contemplated; and the touchy matter of committee chairmanships went unmentioned.

2. *As to "petty business."* The ever-multiplying functions of government, the increasing complexity of public problems, the steady taking over by the national government of functions previously exercised by the states, mean that Congress is under the necessity of formulating, considering, and passing more and more legislation of fundamental and massive character. In the past, a wholly disproportionate amount of its time and energy was spent on petty business; every session saw thousands of private, or special, bills introduced—most of them involving nothing more serious than pension claims, small pecuniary claims of individuals against the United States for injuries suffered, or authorizations of bridges across navigable streams.[1] Even if a large legislative body were the best kind of agency to handle such matters, the two houses could ill afford to have their proceedings clogged with them, at the expense of weightier measures often crowded out for lack of time. And the new legislation meets the situation by debarring all troublesome kinds of private bills (*e.g.*, most of those relating to pensions or to the construction of bridges across navigable streams) from being received or considered by either house—the disposition of matters of the kind being left to appropriate administrative authorities or to courts.

3. *As to assistance for members.* Congressmen testify that on the average eighty per cent of their time is spent in performing services of one kind or another for their constituents, manifestly leaving little opportunity for what really is their most important function, *i.e.*, studying and making up their minds on proposed legislation; and with a view to relieving members of much of this burden, the Joint Committee proposed that, in addition to ordinary clerical help already provided for, each be authorized to employ an expert and well-paid "administrative assistant." No provision of precisely this sort was contained in the act as passed; but more adequate assistance, in a different form, was contemplated in the authorization of professional staffs of up to four members for committees, and of more adequate financial support for the Legislative Reference Service.

4. *As to lobbying.* Provisions of the act on this subject, following closely the recommendations of the Joint Committee, have been reviewed in full above.

5. *As to compensation and retirement.* Salaries of members were raised from $10,000 to $12,500 a year; a special expense allowance of $2,500 a year was provided; and members were made eligible to contributory pensions after six years of service and at the age of sixty-two. It was a sad commentary on public appreciation of problems of national legislation that people commonly saw in the reorganization act when passed only

[1] R. Luce, "Petty Business in Congress," *Amer. Polit. Sci. Rev.*, XXVI, 815-827 (Oct., 1932).

a "salary grab"; and, by and large, the press did not help them to a more adequate understanding of the act's true significance.[1]

Some problems remaining

All in all, the reorganization of 1946 was the most extensive that Congress has undergone at any given time in the more than one hundred and fifty years of its history. The Joint Committee, in its report, however, did not touch upon all of the improvements that might have been suggested, and Congress did not write into the new law all that were recommended. Room remains, therefore, for further changes, and this discussion may be concluded with mere mention of four or five directions along which such changes might go.

1. To begin with, the membership of the House of Representatives (435) is too large. This is not so serious a drawback as some others that have existed, but it is generally agreed that something like 300 (first exceeded under the reapportionment of 1881) would be a figure more compatible with efficient conduct of legislative business. Congressmen at present represent, on an average, ten times as many constituents as in the early days of the country; and, with adequate assistance, they could just as effectively represent twice as many as now. A reduction in the number of members is improbable; but it could, of course, be accomplished by simple legislative act in connection with any decennial reapportionment.

2. From a dozen to twenty days of every session in each house are given to detailed matters relating to the government of the District of Columbia—matters of a sort which in every city of the land except Washington are handled by a city council. To be sure, the constitution requires Congress to "exercise exclusive legislation in all cases whatsoever" over the area containing the seat of the national government. But everyone recognizes that this need not be construed so literally as to prevent turning over District legislative work to the existing commissioners[2] or perhaps a newly created council, with merely a veto by Congress upon more important enactments. The reorganization of 1946, however, did not touch this situation; on the contrary, it retained in the compressed committee lists of both houses a committee solely for the consideration of District legislation.

3. In setting up the Joint Committee which brought forth the reorganization bill, Congress expressly withheld the right to recommend any changes in the parliamentary rules governing proceedings in either house. This was not because these rules stand in no possible need of improvement, but only because neither house wanted its ways of transacting business made a subject of inquiry and criticism by any agency even

[1] Other provisions of the measure, relating to adjournments, committee hearings, improvement of records, better utilization of the Capitol building, the handling of claims, the authorization of bridges, and the like, have been touched upon elsewhere or do not call for consideration; and a significant provision relating to budgetary procedure will be explained later (see pp. 352-353 below).

[2] See pp. 522-523.

partly outside of its own membership. No student of the legislative process can fail to perceive points at which congressional procedure could be bettered; indeed, plenty of members of both houses would like to see changes made. For such improvement, however, the country will have to wait, and perhaps a considerable time.

4. In another connection, it will be pointed out that Massachusetts, Connecticut, and one or two other states derive distinct advantage from a plan under which, instead of duplicating and rival committees on given subjects in the two legislative houses, unity and despatch are brought to committee work by a system of joint subject-matter committees, each having full jurisdiction in a given area. No plan of this sort, however, was proposed to Congress in 1946, and of course none was adopted. The only approach made was in a provision of the law for joint meetings of the committees of the two houses having to do with revenue legislation and appropriations, with a view to studying the president's budget recommendations and agreeing on a "legislative budget" to be reported for House and Senate consideration.[1] If this logical device for coöperative action succeeds, it may suggest the wisdom of applying the principle to other legislative fields, like banking and currency or interstate and foreign commerce, with even the substitution of a single joint committee for separate ones.

5. To the foregoing list may perhaps be added the problem posed by the practice (for it is only a practice, not a rule) of succession to committee chairmanships on the basis of seniority—although, as we have seen, this is a matter on which there are arguments both ways. At all events, the Joint Committee reporting the reorganization bill of 1946 could not agree concerning it; the reorganization measure as enacted was silent upon it; and in so far as it offers a genuine challenge to change, developments are for the future.[2]

The Improvement of Legislative-Executive Relations

Important as has been the reform of Congress, an even more fundamental problem is that of reshaping and improving the relations between the legislative and executive branches. By no one's planning, but by the logic of practical experience and necessity, those relations have become far more numerous and intimate than the makers of the constitution anticipated. Under our system of separated powers, they continue, how-

[1] See pp. 352-353 below.

[2] As the time for organizing the Eightieth Congress (January, 1947) approached, there was considerable apprehension lest, with control passing from one major party to the other, the gains realized under the legislation of 1946 should be at least partially undone, more particularly with respect to the committee system. The new leaders, however, declared their intention that the altered arrangements be given a fair trial; and this intention was fully carried out. To stimulate effort in behalf of further changes regarded as desirable, a National Committee on Strengthening Congress, composed of representatives of business, journalism, labor, and agriculture, was formed in December, 1946, under the chairmanship of Robert Heller, Cleveland industrial engineer and author of a book listed on p. 268 below.

ever, to be relations between two distinct authorities, Congress and president, occupying "two islands of separate and jealous power"; and hence they often result in delays, deadlocks, weak compromises, and divided responsibility. Perhaps these disagreeable consequences are the price we have to pay for a basic safeguard which most people still consider a virtue of our constitutional system. But they are often impediments to effective government, and much thought has been devoted to methods of obviating, or at least minimizing, them. It must suffice here to call attention briefly to some of the many suggestions that have been offered.

Proposal for adoption of a cabinet system

Of course, the boldest way of seeking harmony and unity between Congress and the executive would be to abandon our historic principle of separation of powers and frankly go over to a cabinet system like the British. This done, the president would become a mere titular chief executive, with only formal and ceremonial functions. The working executive would become the cabinet, which, with its members seated in Congress, would function as the supreme agency of policy-framing and of leadership in legislation. The cabinet would be responsible to Congress, and would remain in office only so long as enjoying majority support in that body. Failing such support, it would give way to a new cabinet more to the legislature's way of thinking. Conversely, if the cabinet were to become convinced that one or both houses of Congress had got out of step with the country, it could cause one or both to be dissolved and a new election held. This, truly enough, would be a way of largely obviating the tension, friction, and futility now too often characterizing legislative-executive relations in Washington; and interesting books have been written advocating the plan, or at all events something approaching it.[1] The proposal has only to be mentioned, however, to be dismissed as visionary. No sensible person really supposes that our people are prepared for so momentous a step in the foreseeable future; and even if they were, it does not follow that cabinet government would work as well here as in the land of its birth.

Other proposals: 1. Admitting heads of departments to the floor in Congress

But there are other proposals, more practicable even if enjoying scarcely more prospect of adoption. One is that, while the president should continue appearing before Congress only, as now, to present messages, the heads of executive departments should be extended the privilege of the floor in both houses for the purpose of giving information, answering questions, and engaging in general debate. As civil officers of the United States, department heads are ineligible to membership in either house. But for the purpose mentioned, it would not be necessary to make them members. Already they are sometimes seen mingling with senators and representatives in the corridors and cloakrooms of the Capitol. With increasing frequency, too, they appear before congressional committees to supply information, answer questions, or urge the passage

[1] For example, H. Hazlitt, *A New Constitution Now* (New York, 1942).

of bills in which the Administration is interested. Would it not be better, it is asked, to give the entire membership of either house, or of both houses, a chance to hear what they have to say and to question them in the same direct manner in which ministers are questioned in the British House of Commons?[1] Proponents of the plan seem, however, not to have given sufficient consideration to the fact that, instead of expediting business, the effect might be rather to slow it up, because of the disposition of members hostile to the Administration to ply its spokesmen with questions provocative of debate.

2. Using members of Congress as department heads

A more radical plan, which had the support of President Taft, would be for the president, in selecting his heads of departments, to take them, or at any rate most of them, from the members of his party in Congress, the persons so chosen remaining members of the legislative branch entitled to participate in debate, to introduce bills, to serve on committees, and to vote. This would be a step in the direction of a cabinet system, yet stopping a long way short of it, since the president would remain what he now is and his Administration and Congress would merely become somewhat interlocked in personnel, with added facility for cooperative action. For adopting the plan, a constitutional amendment would be necessary.

3. Insuring priority for Administration measures

Most public bills of major importance now come to Capitol Hill from the other end of Pennsylvania Avenue (the White House, the departments, or other agencies), and the legislative success of a session depends largely on the fate of these measures. Why not, it is asked, frankly accept this situation and, by suitably amending the rules of the two houses, definitely guarantee Administration bills priority such as is assured Government (*i.e.*, cabinet) bills in Great Britain? If executive leadership in legislation is inevitable (and very likely desirable), why not freely and wholeheartedly clear the way for it? Without necessarily condemning the general idea, three things are, however, to be said: first, that when the Administration has the advantage of a working majority in the two houses (as throughout the period 1933-46), it even now can count with great assurance upon highly preferential treatment (not always acceptance, but at least attention) for its bills; second, that when it has no such majority, its bills are not likely to prevail in any case; and third, that, so long as Congress clings to its still important function of legislative initiative, it will certainly not be willing to tie its hands by any general rule relegating measures of its own devising to the notoriously unfavorable position occupied by private members' bills in the Government-led and -controlled House of Commons at Westminster.

[1] A resolution introduced in the House of Representatives in 1943 by Congressman Kefauver of Tennessee, and amending the House rules to provide a period, at least every two weeks, for questioning heads of departments and independent agencies, won warm support among younger members and in the press, but was frowned down by the House leadership. In essence, the proposal had often been made before. For argument by Mr. Kefauver supporting it, see *Amer. Polit. Sci. Rev.*, XXXVIII, 317-325 (Apr., 1944).

4. Setting up a joint legislative-executive council

Several students of the legislative-executive problem have suggested supplementing existing machinery with some sort of a council that might be of service in tying the two branches more closely together. We have had a proposal that the chairmen of standing committees in each house (reduced to ten) be organized into a "legislative" or "congressional" cabinet, with responsibility for mapping out programs of legislative business, and with continuous contact with the president in formulating public policy.[1] We have had the suggestion of a "joint legislative council," to consist of eleven senators and eleven congressmen, with three additional members appointed by the president, to serve as a central legislative policy committee through which all proposed legislation would have to pass, and as an agency for organized consultation between Congress and the president.[2] We have had a proposed plan for a congressional cabinet to consist of the chairmen of about nine joint Senate-House committees (superseding the present separate committees of the two houses), and to be combined with an equal number of members of the executive cabinet in a joint executive-legislative cabinet, to serve as a bridge linking the two branches in harmonious action.[3] And more recently the Joint Committee on the Organization of Congress put forward a plan for a set of four well-staffed "policy committees" (one for the majority and one for the minority in each house), all consisting of seven members appointed by the appropriate party caucus (or conference) at the opening of each new Congress; all concerning themselves within their respective spheres with formulating over-all party legislative policy; and the two majority committees acting, in addition, as a formal council to meet regularly with the president and some or all members of the cabinet to facilitate the formulation and carrying out of national policy, and to improve relationships between the executive and legislative branches.[4] "Improved understanding of each other's problems will," assert the authors of the plan (who, being experienced members of Congress, should speak with authority), "be promoted by consultation before legislation is introduced to carry out pledged party promises and on matters of high administrative policy. By giving congressional leaders a part in the formulation of policy, in-

[1] R. Young, *This Is Congress* (New York, 1943), Chap. VIII. The suggested "cabinet" would bear a good deal of resemblance to legislative councils developed in Kansas and some other states. See p. 562 below.

[2] A. Hehmeyer, *Time For Change* (New York, 1943), Chap. IX.

[3] T. K. Finletter, *Can Representative Government Do the Job?* (New York, 1945), Chap. XI; and cf. E. S. Corwin, *The President: Office and Powers* (New York, 1940), 303-306. An interesting step in the direction indicated was taken early in 1944, when, at the suggestion of Secretary Hull, an informal committee on foreign policy, linking the Department of State and the foreign affairs committees of the two houses of Congress, was instituted. Mr. Finletter goes on to propose still more drastic measures, *e.g.*, amendment of the constitution to provide for election of president, senators, and congressmen for identical terms, with power in the president to dissolve not only both legislative branches but also the presidency itself and order new elections in case of deadlock between Congress and the joint cabinet. *Ibid.*, Chap. XII.

[4] Something like this is proposed by C. A. Beard in his *The Republic* (New York, 1944), 256-258.

stead of calling upon them to enact programs prepared without their participation, better coöperation can be obtained."

The pressure of events has brought the national executive to a high peak of power. Congress, on its part, needs to be strengthened also. The object to be sought, however, is not the building up of two powerful authorities, confronting and battling each other, but rather two interlocked and complementary agencies which can serve the country through common consultation, planning, and action. At present, the most promising means of advancing such relationships would seem to be a mediating legislative-executive council of some one of the several types suggested. And the prospect of something really happening is enhanced, not only by the steady growth of public and congressional interest in the matter, but by the obvious relation between congressional reform, already partially achieved, and the rehabilitation of congressional independence and power after a decade and more of unprecedented executive predominance.

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CHAPTER XVIII

THE PRESIDENT AS CHIEF EXECUTIVE

In preceding chapters, focussed on the legislative branch of the national government, the president has appeared only in so far as he shares in or influences the workings of that branch. After all, however, his primary position in the government is as an executive; in him, indeed, the constitution tersely vests "the executive power." And we now turn to the executive side of our system—the president as chief executive, the heads of departments as his top-ranking advisers and agents, and afterwards the ramifying controls through which the executive powers of management and enforcement are carried down the avenues of administration to the people in every community of the country.[1]

Presidential Term, Qualifications, and Burdens

Term and re-eligibility

One of the consequences of a presidential system like ours is a fixed term of office for the chief executive; and although a few members of the Philadelphia convention were willing that the president should hold office during good behavior, the question narrowed down to (1) a seven-year term without eligibility to reëlection or (2) a four-year term with no such restriction. At one stage, the seven-year plan was adopted. But when it became clear that the president was not to be chosen by Congress, the main objection to reëligibility disappeared, and the briefer term, without restriction as to reëlection, was substituted. In the course of time, it became a tradition that a president should not have more than two terms. The only earlier presidents who doubtless could have had a third term, *e.g.*, Washington, Jefferson, and Jackson, refused to seek one; the only ones who sought one, *i.e.*, Grant and Theodore Roosevelt, failed of their objective. In 1940, however, the unexpected happened. With war raging in Europe and the Far East, and with the United States itself confronted with graver dangers than at any time since Civil War days, President Franklin D. Roosevelt took the view that continuity of presidential experience and leadership was indispensable to the country's well-being, and accordingly sought and won reëlection to a third term. Four years later, with the country straining every sinew in a global conflict, and enmeshed in a multitude of operations and commitments with the United Nations, the argument seemed even stronger; and the upshot was the

[1] Before going directly to these matters, it will, however, be useful to direct attention to certain general aspects of the presidency, vice-presidency, and cabinet not hitherto explained.

reëlection of Mr. Roosevelt to a fourth term also—although he lived to serve not quite three months of it.

Proposals for restrictions upon reëlection

Naturally enough, the battles for the Roosevelt third and fourth terms called out proposals—often heard before—to amend the constitution so as to restrict a president to two four-year terms, or even to a single term of six years. There have always been people who, considering that a president eligible for reëlection can hardly escape temptation to make appointments, wield the veto power, and otherwise shape his course with an eye to continuance in office, believed that it would be better if there were no reëligibility to even a second term; and single-six-year-term proposals began making their appearance in Congress as early as 1828. It is a matter of record that at least two former presidents (Jackson and Taft) favored a constitutional amendment of this nature; during the 1940 campaign, a former Democratic candidate for the office (John W. Davis) took a similar position; and in 1913 the Senate actually adopted a resolution which, if the House had concurred, would have put such an amendment before the states. After the experiences of 1940 and 1944, opinion on the subject continued divided, even as it was among the framers of the constitution themselves; but in the spring of 1947 the two houses—although not yet agreed upon the precise form to be taken—seemed certain to submit a restrictive amendment for ratification.

Presidential qualifications

Whatever additional qualifications a president may be expected to have, he must meet three tests explicitly imposed by the constitution: (1) he must be at least thirty-five years of age; (2) he must have been a resident of the United States for at least fourteen years (not necessarily consecutive); and (3) he must be a "natural-born" citizen. Inasmuch as the vice-president may at any time be called upon to take up the duties of the presidency, he too should have all of the qualifications required for that office.

Salary and allowances

Benjamin Franklin argued in the Philadelphia convention that, since wealth and power are the corrupting allurements which human nature finds it hardest to resist, the president should be allowed nothing whatever from the public treasury beyond his expenses. But though the famous Pennsylvanian had the reputation of being the wisest man of his day, his proposal was not even put to a vote; and by constitutional provision the president receives a salary, with the safeguard that it may be neither increased nor diminished during the period for which he has been elected. He is forbidden to receive any other emolument, either from the United States or from any state. But this is construed not to prevent the United States from providing him with a dignified colonial mansion (the White House), a suite of executive offices, a secretariat, and special allowances for automobiles, furniture, repairs, entertainment, and travel, amounting to some $500,000 a year. Originally fixed at $25,000 annually, the president's salary was raised in 1873 to $50,000, and in 1909 to $75,000.

The president at work

Some presidents put in longer hours and work harder than others, but for none is the office a sinecure; few are as fit when they leave the White House as when they entered it. There is, first of all, a vast amount of administrative routine. Much can, of course, be turned over to subordinates; but much also is of such a nature that the president cannot escape it. The daily grist of correspondence is exacting and time-consuming. Heads of departments, members of Congress, party leaders, spokesmen of business interests, and a wide variety of other people must be given personal interviews. Delegations, official and unofficial, must be welcomed. State receptions and dinners must be held. Appointments to public office make heavy demands. When Congress is in session, there are bills to be studied, programs of legislation to be mapped out, innumerable conferences to be held; and even during legislative recesses, much may need to be done for the furtherance of legislative projects which the chief executive has at heart. Foreign relations call for much—in periods of stress like the last few years, almost constant—attention. Preparation of messages and of public addresses chains the president to his desk; cabinet meetings, official entertainment of foreign and other guests, press conferences, and participation in public ceremonies take their toll of energy and time. And as if all this were not enough, the president is expected to exercise a general watchfulness over the state of the country and at times of crisis—such as the stock-market crash of 1929, the great droughts of 1930 and 1934, the banking *débâcle* of 1933, and the epidemic of strikes in 1945-46—to devise, guide, and lead in carrying out measures of relief and remedy. In time of war, the presidential load assumes truly staggering proportions.

The Executive Office of the President

Of course, some provision has always been made for assistance. Until of late, however, it was inadequate; and it is gratifying to observe, not only that a special staff of six executive assistants has been added to aid in dealings with the executive departments and other agencies, but that under powers conferred by the Reorganization Act of 1939, multifold and vital managerial activities have been correlated under presidential direction in the Executive Office of the President, in divisions, or branches, shifted from time to time, but including as principal units: (1) the White House Office, including the presidential secretaries, clerks, and administrative assistants, and serving the president in the performance of the many detailed duties incident to his daily routine; (2) the Bureau of the Budget, charged not only with drawing up the annual budget, but with the improvement of management, planning, and statistical services throughout the entire national administration; (3) the Liaison Office for Personnel Management, assisting the president in coördinating personnel-management policies throughout the government; and (4) the Office for Emergency Management, dating from 1940 and comprising a framework within which most of the great civilian war agencies of 1940-45, like the War Production Board and the Office of Defense Transportation, were

set up and operated, and in which a few survive today; and (5) the Council of Economic Advisers, created under terms of the Employment Act of 1946 and charged with assisting the president in preparing for submission to Congress an annual report on the country's economic situation and outlook.

The Vice-Presidency and Arrangements for Presidential Succession

Since presidential elections take place only at regular four-year intervals, some arrangement is necessary for filling out a term in case the president dies, resigns, or is removed by impeachment; and the constitution provides for a vice-president, who is to take up the duties of president whenever the office falls vacant or the president is himself unable to discharge them. No president has resigned; none has been removed, although the impeachment proceedings against Andrew Johnson failed by a single vote; and no president has been incapacitated to such an extent or for so long a period as to lead to the assumption of presidential functions by the vice-president, although such a transfer of authority was seriously discussed after the wounding of President Garfield by an assassin's bullet in 1881, and also during the earlier stages of President Wilson's illness in 1919-20.[1] Seven presidents, however, have died in office, and a like number of vice-presidents have in consequence assumed the duties of the presidency. Since Van Buren, no vice-president has been elected president unless he had first succeeded to the office by the death of the incumbent.

The vice-president's share in the work of government

Unless an emergency makes it necessary for him to assume the powers and duties of president, the vice-president has no constitutional function except to preside over the Senate; even there he is not a member and has no vote except in the case of a tie. He is, in reality, an executive officer, with, however, only potential, rather than actual, powers and functions. But he may at any moment be called upon to take the helm of the government, and it goes without saying that he will do well to keep informed on the state of public affairs and on the policies and plans of the Administration. From the vantage point of the presiding officer's chair in the Senate, he will, of course, learn much of what is going on in legislative circles. He needs also, however, to be in close touch with the executive side of the government; and an obvious means to this end is attendance at meetings of the cabinet. Somewhat curiously, nevertheless, Calvin Coolidge, John N. Garner, Henry A. Wallace, and Harry S. Truman are the only

[1] No definition of presidential inability is laid down in the constitution or the laws, and there is no specification of who is to decide when the president's disablement is so serious and prolonged that an "acting president" is needed. Likewise, no provision is made for a substitute when the president is temporarily absent from the country, as was Woodrow Wilson during the Paris Peace Conference of 1919 and as was Franklin D. Roosevelt repeatedly in connection with wartime conferences such as those at Casablanca, Cairo, Teheran, and Yalta. Modern means of communication, however, enable a president to keep in close touch with Washington, wherever he may be.

vice-presidents in the country's history who have sat with the cabinet with any regularity.

Further provisions for succession

If occasion arises, the duties of the presidency devolve upon the vice-president. But, obviously, there is no guarantee that at any given moment there will be a vice-president; this official may himself have died,[1] resigned, been removed, or become incapable of attending to public business. Moreover, after a vice-president has assumed the presidency, there would be no one—unless further arrangements were made—to step into the highest office should it again fall vacant. Accordingly, the constitution empowers Congress to provide for the case of removal, death, resignation, or inability of both the president and vice-president, "declaring what officer shall then act as president."[2] The first legislation on the subject, dating from 1792, provided that the president *pro tempore* of the Senate should succeed, or in case no such official should be available, the speaker of the House of Representatives. The plan was open to various objections; but not until 1886 was a new one substituted under which, after the vice-president, the heads of the seven executive departments then existing (all present ones except agriculture, commerce, and labor) succeed, in a sequence stipulated in the law, and beginning with the secretary of state—due regard being, of course, paid to the constitutional qualifications of age, citizenship, and residence. Never as yet, however, has the succession actually passed beyond the vice-president.

President Truman's proposal for change

The main thing to be said for the earlier scheme was that it would bring to the presidency no one who was not at least an *elective* official; and in 1945 President Truman, disturbed by a situation in which (the vice-presidency being vacant) he, in appointing a secretary of state, would in effect be selecting his successor in the event of his own death or incapacitation, urged Congress to amend the law of 1886 so as to place the speaker of the House at the top of the list, after him the president *pro tempore* of the Senate, and only then the heads of departments in stipulated order.[3] After a vice-president (if any), the speaker, it was plausibly argued, would be the most logical successor, considering that he would have been elected to Congress by the voters of his district and chosen as speaker by the majority party in the House—the same party, as a rule, to which the president and vice-president had belonged. A bill to make the recommendation effective was passed promptly in the House of Representatives, but pigeonholed in the Senate, partly because of doubts about the status of the speaker and president *pro tempore* as constitutional "officers of the United States" (which any presidential successor must be), and partly because the existing secretary of state

[1] In point of fact, seven vice-presidents have died in office, but luckily not one, as it turned out, who would have been called upon to assume the duties of a deceased president.

[2] Art. II, § 1, cl. 6.

[3] It was part of the proposal, too, that Congress make provision for the regular election of a president, under proper conditions, to fill out an unexpired term.

(James F. Byrnes) was so popular that his former senatorial colleagues were unwilling to see him sidetracked. A political overturn, bringing the Republicans into control of both branches of Congress (and therefore of the speakership and presidency *pro tem.*) in January, 1947, left the Democrats somewhat less interested—although President Truman continued to urge action.

The Cabinet

Early question of an advisory council

As early as 1781, when the first executive departments were created by the Continental Congress, it was suggested that their principal officers consult together as an advisory council, and in the convention of 1787 several plans for a council—a council of appointment, a council of revision, or a general advisory council—were considered. No proposal on the subject, however, was adopted, and it remained for an official advisory group, consisting of the heads of the then existing departments, to form around the president, not in response to any constitutional or statutory provisions, but as a mere matter of convenience and usage. To this day, the "cabinet" is, as such, quite unknown to the formal constitution and recognized only casually in statutes.

Varying relations with the president

To this day, too, the cabinet has remained what it was at the outset—a purely advisory body. The president can make much use of it, or little, or none at all, as he chooses. Looking upon the heads of departments as mere administrative officers, and preferring the advice of his personal friends, official and otherwise, Jackson early discontinued cabinet meetings altogether; and some other presidents, *e.g.*, Grant, much of the time Wilson, and in his first years Franklin D. Roosevelt, have leaned but lightly on their cabinet advisers. On the other hand, certain presidents, *e.g.*, Pierce and Harding, have consulted their cabinets at every turn and have usually followed the advice received. An able cabinet can go far toward making up for the deficiencies of a weak president, and can also give added strength to a strong one.

Meetings and influence

Nowadays, the cabinet meets ordinarily once a week (except during vacation and campaign periods), though naturally oftener in time of war or other stress. Ranging widely over problems and policies of the Administration (not omitting their party aspects), discussions are directed mainly to matters, large or small, which the president himself introduces, although others may be brought up—usually with consent secured in advance—by the department chiefs. Proceedings are decidedly informal. There are no rules of debate; free interchange of opinion takes place in a conversational manner; only rarely is there a vote; no minutes or other official records are kept, and sometimes differences of opinion develop afterwards as to whether a given subject was considered at all. Furthermore, such decisions as are reached are mere recommendations. Just as the president is free to submit or not submit a matter for consideration, so is he free to make any final disposal of it that he likes. Ordinarily, he will be influenced by the views of the men whom he has

chosen to be his principal advisers. But if he thinks that their advice is not sound, he is under no compulsion to follow it. It is he, not they, who will have to bear ultimate responsibility before the country for whatever is done. "Seven nays, one aye—the ayes have it," announced Lincoln, following a cabinet consultation in which he found every member against him. Cabinet discussions bring out useful information and opinion, clarify views, and promote morale in the Administration. They help the president pick his course in both international and domestic affairs. But they do not culminate in decisions upon policy by mere show of hands.[1]

The selection of members:

Department heads—that is to say, cabinet members—are selected with both their administrative and advisory functions in mind. Several other considerations, however, enter in. First, the appointees must normally be of the president's party. Washington made Jefferson secretary of state and Hamilton secretary of the treasury. But friction arose, and it soon proved desirable to bring the chief offices into the hands of men who saw eye to eye in political matters. Since 1795, the principle of party solidarity has been adhered to rather closely. To be sure, Cleveland appointed as secretary of state a man who had been thought of as a Republican candidate for the presidency. But the appointee (Walter Q. Gresham) had supported Cleveland in his electoral campaign. McKinley appointed a "gold" Democrat secretary of the treasury; Theodore Roosevelt and Taft each appointed a Democrat secretary of war; Hoover made a Democrat attorney-general. But in all of these instances, except possibly the first, the appointee had not been prominent in national politics. The same was true of Henry L. Stimson, appointed secretary of war by Franklin D. Roosevelt in 1940; although another Republican (Frank Knox) simultaneously made secretary of the navy had only four years previously been his party's candidate for vice-president.[2] Regard for party affiliation does not mean, however, that only party leaders are appointed. The tendency to look upon the cabinet as a council of party leaders has pretty much come to an end. The appointees normally belong to the party in power at the White House; but, as a rule, half or more of them are not party leaders in any proper sense of the term, and some have had no active part in politics at all.[3]

1. Party status

Other practical considerations more or less influencing the president's selection are geographical distribution, the representation of various

2 Other factors

[1] No president, of course, relies upon his cabinet alone for advice. Members of Congress, old friends and associates, bankers, business men, labor leaders, experts on social and economic problems—these are only a few of the people who will often be found wending their way to the White House, on call or on their own initiative.

[2] When appointed secretary of agriculture in 1933, Henry A. Wallace was a registered Republican, but he had been supporting Democratic candidates since 1926. Secretary of the Interior Ickes, also, was at least of Republican antecedents.

[3] On the other hand, of course, members are occasionally chosen mainly or solely because of their services as party leaders or officers. It has, indeed, become almost traditional for the chairman of a national party committee to turn up as postmaster-general in the cabinet of a president whom he has helped to elect.

wings or factions of the party, and obligations incurred for political support. It will not do to take all of the cabinet officers from the East, or from the West, or from any other single section of the country. Appointment of representatives of different elements in the president's party is designed, of course, to conciliate opposition and to promote solidarity. A good illustration is President Wilson's appointment of William Jennings Bryan as secretary of state in 1913, with a view to winning for the Administration the support of the more radical wing of the Democratic party. Selections must frequently be made, too, with a view to rewarding individuals (or groups behind them) who have aided conspicuously in the president's election. Still another powerful factor is personal friendship and favor. Every president takes into his official family men whom he knows but slightly; but he is likely to include also one or two men who, whatever other claims they may have, are first of all personal friends. All told, however, a steadily increasing proportion of cabinet officers are chosen for their special knowledge and experience or their administrative ability, proved or presumed. Frequently, they are persons who have attained eminence in the professional or business world. The secretary of the treasury is very likely to be of this type, as, for example, William G. McAdoo and Andrew W. Mellon; the secretaries of commerce and agriculture also, as in the instances of Herbert Hoover, David F. Houston, and Henry A. Wallace; and perhaps one may add the secretary of labor, as in the case of the first woman to receive a cabinet appointment, Frances Perkins. The attorney-general is at least always a lawyer. Rarely does a member appear, however, who has ever had any connection with the work of the department over which he is called to preside; and, contrary to earlier practice, few heads of departments are now carried over from one administration to another, even when a new president is of the same party as his predecessor.[1] For the experience, as well as the technical competence, essential to satisfactory performance of its work, a department is dependent mainly upon subordinate officers who do not come and go with changes at the White House.

The President as Chief Executive—Some General Aspects

The sources of executive power

Whatever else he may be—guide and collaborator in legislation, party leader, general custodian of national interests—the president is first of all an executive; and the sources of his executive authority are many and varied. To be sure, everything comes ultimately—or is supposed to do so—from the constitution. There one finds powers conferred explicitly, *e.g.*, appointment of civil and military officers (with advice and consent of the Senate), making treaties (also with the Senate's approval), and seeing that the laws are "faithfully executed." Even more signifi-

[1] Except that a vice-president succeeding to the presidency in mid-term usually continues the cabinet of his predecessor, at least for a time. Cabinet changes after President Truman's accession were more rapid than usual.

cantly, one finds broad provisions vesting "the executive power" in the president and requiring him to "preserve, protect, and defend the constitution"; and, as might be expected, much of the power actually wielded by the chief executive arises from implication or interpretation based on these general phrases, either as developed quietly in practice or as confirmed by a usually sympathetic and generous Supreme Court. Still other powers—indeed by far the greatest number—spring from acts of Congress, passed in pursuance of its own direct or implied powers, and assigning to the president specific tasks and responsibilities. When, for example, Congress establishes a new executive department, a new diplomatic post, or a new regulative commission, it automatically extends the president's power of appointment and removal. When (as in 1934, with later renewals) it authorizes the president to conclude international trade agreements lowering tariff rates on specified commodities by as much as fifty per cent, it puts into his hands an important power over foreign commerce. And when, as in the Act to Promote the Defense of the United States (the first "Lend-Lease" Act of 1941), it authorizes the president, at his discretion, to place war materials and supplies at the service of hard-pressed foreign powers, it confers authority of truly immense proportions.

The question of inherent power

A question which has stirred considerable difference of opinion, even among presidents themselves, is that of whether the president has inherent, as well as conferred, executive power. That is, has he power, outside of the constitution and laws, simply because he is the chief executive? Alexander Hamilton and Andrew Jackson thought so; on one occasion, the Supreme Court inclined to the same view;[1] and Theodore Roosevelt, after going out of office, recorded that as president he had "insisted upon the theory that the executive power was limited only by specific restrictions and prohibitions . . . ," and that he had "declined to adopt the view that what was imperatively necessary for the nation could not be done by the president unless he could find some specific authorization to do it."[2] The basic characteristic of our national government is, however, that it is a government of limited powers—of only such powers as are enumerated in the constitution or can properly be implied from it, which clearly means that no executive power (or power of any other sort) is inherent, in the sense of antedating and transcending the constitution. "The true view of the executive function is, as I conceive it," wrote President Taft, "that the president can exercise no power which cannot be reasonably and fairly traced to some specific grant of power or justly implied or included within such express grant as necessary and proper to its exercise. Such specific grant must be either in the constitution or in an act of Congress passed in pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public

[1] *In re* Neagle, 135 U. S. 1 (1890).
[2] *Autobiography* (New York, 1913), 388-389.

interest."[1] President Roosevelt was politically-minded, President Taft legally-minded; and the view of the latter seems clearly the more correct —even though at various times in the past the Supreme Court has gone far toward conceding the president full independence in interpreting his constitutional powers, and in that qualified sense has sometimes been said to have recognized the chief executive as having "inherent" power.[2]

Presidential powers classified

Viewed in the large, the president's powers and functions, as conferred in the constitution and laws, fall into two general groups: (1) those that are mainly or wholly executive, and (2) those that involve sharing in the work of legislation. Unknown to the constitution and laws, although of course related to these two categories (especially the second) in actual practice, is a third set of functions, *i.e.*, those arising from the president's position as principal leader of his party. Executive powers, (with which we are here concerned) fall, in turn, into six main groups: (1) enforcement of the laws and maintenance of domestic order; (2) appointment and removal of civil and military officers; (3) supreme direction of administration, including the function of issuing orders and regulations; (4) pardon, reprieve, and amnesty; (5) management of foreign relations; and (6) control, as commander-in-chief, of the military and naval establishments, together with the conduct of war. The last two of these will necessarily be dealt with in later chapters devoted to foreign relations and defense; the other four must engage our attention here.[3]

1. *Enforcement of the Laws and Maintenance of Order*

Execution of the laws

The prime duty of any executive is, of course, to *execute;* and the most solemn obligation that the constitution imposes on the president is to "take care that the laws be faithfully executed." His oath of office obligates him to "protect and defend" the highest law of all, *i.e.*, the constitution; and the general nature of his position makes it his function not only to enforce all federal laws (including treaties), but also to protect all federal instrumentalities and property. Normally, he does these things by quiet, and even routine, supervision and direction of the executive and administrative machinery which the laws have provided for the purpose.[4]

[1] *Our Chief Magistrate and His Powers* (New York, 1916), 139-142.

[2] In the case of United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304 (1936), the Supreme Court said that if the power to conduct foreign relations had not been conferred in the constitution, the national government would have possessed it anyway; and since the conduct of foreign relations is by nature an executive function, this assertion of the Court has sometimes been construed as tantamount to attributing at least potential inherent power to the president. Actually, of course, the president's authority to manage the country's foreign relations has to rest on no such basis, for it is plainly conferred.

[3] Legislative and party functions have been considered in Chap. XVI above.

[4] In cases of suspected violation of federal law, as by corporations acting in restraint of trade, he may instruct the attorney-general, as head of the principal law-enforcing agency, to start prosecution. It goes without saying, however, that the vast bulk of governmental work, including law enforcement, goes on year in and year out through the constituted channels with no personal intervention or notice from

But if need arises, he may make full use of the Army and Navy, and likewise of the National Guard when called into federal service. Congress has passed numerous measures authorizing the use of both the national and state forces in law enforcement—even though, so far as the Army and Navy are concerned, the president would have the necessary power in any case.

Suppression of domestic disorder

As we have seen, the constitution stipulates that the United States shall guarantee to every state a republican form of government, and shall protect the states against both invasion and domestic violence. If the republican form of government in a state is threatened or danger of invasion arises, the president acts without awaiting a request from the state authorities. If the situation involves merely domestic disorder, he cannot act until he is asked to do so, unless the execution of national law, the carrying on of a national activity, or the safety of national property is imperiled; in this contingency, he may intervene independently, as did President Cleveland, over the protest of Governor Altgeld of Illinois, when, in 1894, the carrying of the mails and the flow of interstate commerce were obstructed by the Pullman strike at Chicago. A request for national assistance in repressing domestic violence is made by the legislature of the state if it is in session, otherwise by the governor. The president, however, is not under compulsion to comply; indeed, he is not likely to do so unless, after investigation, he considers that the authorities of the state have reached the limit of their capacity to handle the situation.[1]

2. *Appointment and Removal*

Except for the members of Congress, only two officials connected with the national government are elected by the people, namely, the president and the vice-president. All others are appointed.[2] The power to appoint is vested basically in the president, and notwithstanding that in exercising it he acts under a number of restraints, no authority in-

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the president. Enforcement of law naturally entails likewise the interpretation of law; that is to say, the enforcing authority must continually be deciding what the law means and to what extent it is applicable in given situations. Questions that provoke sufficient differences of opinion are, of course, likely to reach the Supreme Court, which becomes the final arbiter.

[1] A race riot in Detroit in June, 1943, led President Roosevelt to issue a proclamation calling upon the rioters to "disperse and retire peaceably to their respective abodes"; and when the governor of the state, having imposed a modified form of martial law on the Detroit metropolitan area, requested the aid of federal troops, some six thousand were moved in to assist in restoring order. See E. Brown, "The Truth About the Detroit Riot," *Harper's Mag.*, CLXXXVII, 488-498 (Nov. 1943).

Domestic disorder, furthermore, may be construed to mean not simply riotous or other lawless conduct, but also interference with public safety and convenience, as by prolonged strikes. In such situations—whether in war or in peace—the president may take over temporarily (through appropriate arms of the government) the operation of railroads, mines, industrial plants, or even mercantile establishments.

[2] Strict accuracy requires it to be noted, however, that each house of Congress chooses it own officers, except that the vice-president of the United States is *ex officio* president of the Senate.

trusted to him is, year in and year out, of greater practical importance. With it goes not only control over the work of administration in its larger aspects, but also weighty influence upon legislation as a result of the conferment, or withholding, of offices sought by importunate senators and congressmen for their constituents. A president's appointments may go far toward making or breaking him as head both of the government and of his own party

Limitations upon the appointing power:

Fateful as the power is, however, far-reaching restrictions hedge it about. To begin with, by constitutional provision, the president appoints, not independently (except under certain circumstances indicated below), but "by and with the advice and consent of the senate"; to speak with complete accuracy, he *nominates*, the Senate confirms (by a majority vote of the members present [1]), and he thereupon appoints. As was explained by Hamilton in *The Federalist*, this arrangement was adopted, not to relieve the president of responsibility for appointments, but to check any spirit of favoritism that he might manifest and to prevent the appointment of "unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity." [2]

1. Advice and consent of the Senate

It long ago became customary for the Senate to assent almost as a matter of course to the president's selections for the highest positions in the executive departments. The heads of departments serve, at least ostensibly, as his principal advisers; besides, as the chief of the executive branch, he bears full responsibility for their official acts. On both grounds, it is only fair that in choosing them he shall normally have complete freedom; and only six nominees for such posts have ever been rejected. Nominations to judgeships and diplomatic positions have been refused assent—or at all events strongly opposed—with somewhat increased frequency in later decades, yet as a rule are not seriously challenged. In other fields and on lower levels, the power to confirm or reject is employed freely; and the president must be prepared, in case one nomination fails, to offer another or to see the office involved stand vacant for a time. The number of senatorial rejections naturally varies with circumstances. If the president and Senate are on good terms, and especially if the president's party enjoys the advantage of a loyal senatorial majority, nominations are likely to be approved almost automatically. If, however, there is lack of harmony, rejections or refusals to act will be relatively numerous.[3]

[1] Confirmation or rejection must be absolute, without any conditions attached.

[2] No. LXXVI (Lodge's ed., 474).

[3] The record of the first session of the Seventy-ninth Congress (Jan. 3-Dec. 21, 1945) was fairly typical. Of 11,056 nominations received by the Senate, 10,966 were confirmed, two were rejected, 11 were withdrawn, and 77 were left without action taken.

During a recess of the Senate, the president may make temporary, or "recess," appointments to positions requiring confirmation. These lapse at the end of the Senate's next session unless confirmed, although there is nothing except considerations of expediency to prevent reappointment of the same man the moment the Senate adjourns.

2. Appointment of inferior officers by courts and heads of departments

A second limitation upon the president's power of appointment arises from authority given Congress by the constitution to vest the appointment of such "inferior officers" as it thinks proper, not only in the president alone, but in the courts of law, or in the heads of departments.[1] The constitution nowhere defines the term "officer," nor does it say who are to be considered "inferior officers"; and no very clear definitions have established themselves in practice. About all that can be said is that the constitution requires certain kinds of officers—ambassadors, other public ministers and consuls, and judges of the Supreme Court—to be appointed by the president and Senate, and that outside of this small group it is for Congress to say who are "inferior officers" and to provide, if it likes, for appointment of them by any one of the three special agencies named. This power has been exercised repeatedly: the president has been given sole control over some miscellaneous appointments, although no large number; the courts have been authorized to select their own clerks; and the heads of departments have been empowered to designate large numbers of subordinates, commonly nowadays in accordance with civil service regulations to be described in a later chapter. How far this dispersion of the appointing power has gone is indicated by the fact that, in a total of more than a million officers and employees of all grades in the national civil service before the war, only some 16,000 were put in their positions by the president and Senate.[2] The proportion is smaller than most people realize; and since 1938 one important group, *i.e.*, postmasters of the first, second, and third classes, although still appointed by president and Senate, has been included in the classified civil service, rendering presidential selection hardly more than a formality. Nevertheless, burdened as he is with multifold other tasks, the chief executive is still charged with many more appointments than he ought to be called upon to make; a couple of hundred, in the topmost levels, would be quite enough.

"Senatorial courtesy"

In making appointments, the president is limited by further conditions of a highly practical nature. He cannot simply pick men for thousands of posts "out of the air," so to speak. Rather, he must depend upon other people to bring candidates to his attention and to make clear their claims to selection; and this opens a way for the great majority of presidential appointees actually to be chosen by senators or representatives belonging to the president's party—the principal rôle being played by senators, yet with representatives often making proposals in the case of federal officials operating entirely within a congressional district, or indeed in the case of more important ones when the state has no senator belonging to the president's party.[3] Ordinarily it is useless, too, to nominate a person objected to by a senator from the state concerned, because, adhering to

[1] Art. II, § 2, cl. 2.

[2] In addition, many military offices, to be sure, are filled in this way.

[3] The coveted influence of members of Congress in selecting appointees furnishes the main reason, of course, why the president continues to have thousands of appointments to make.

the well-established principle of "senatorial courtesy," practically all senators will, in such a situation, stand together in refusing confirmation. Finally, appointments are often virtually dictated by the necessity of placating a wing of the party, meeting a demand of a particular section of the country, or keeping some influential politician in line. Small wonder that every president finds his appointing power—in other words, his "patronage"—one of his greatest burdens!

Removals: the question of concurrence by the Senate

The constitution makes all civil officers of the United States liable to removal by impeachment, but only upon conviction of treason, bribery, or other high crimes and misdemeanors. Obviously, there must be removals for incompetency, neglect, and other reasons which have no relation to the specified grounds for impeachment; and the question of how such removals should be made forced itself upon the attention of Congress almost immediately after the new government under the constitution was set up. Two opposing views appeared. One was that, since the constitution said nothing at all on the subject, the power to remove was to be regarded as implied in the power to appoint, and therefore should be exercised by the same authorities that were associated in making appointments—which in the case of "presidential" offices would mean by the president and Senate. Alexander Hamilton was strongly of this opinion. The other view was that since the president was to be held responsible for the efficiency of all national administration, it would be unfair to tie his hands by requiring the Senate's consent to removals. Madison argued convincingly for this opinion, and it finally won general acceptance.

Various limitations

The president cannot remove judges, who hold office during good behavior and are removable only by impeachment; he may dismiss members of commissions exercising quasi-legislative and quasi-judicial powers (such as the Interstate Commerce Commission) only for reasons fixed by statute;[1] and he may remove officials who secure appointment under the merit system only "for such causes as will promote the efficiency of the service."[2] But otherwise he can remove any civil officer of the United States at any time, for any reason, and without giving any explanation; and this is no less true of officers appointed for the customary four-year term prescribed by various tenure of office acts than of those whose tenure is indefinite.[3] Furthermore, the Senate can no more compel

[1] This was established in the case of Rathbun *v.* United States (295 U. S. 602, 1935), arising out of an attempt by President Franklin D. Roosevelt to remove William E. Humphrey, a Republican member of the Federal Trade Commission, for lack of sympathy with the Administration's policies.

[2] See p. 321 below. This restraining clause is, however, so elastic that in practice it is possible for the president to bring about the removal of almost any merit appointee.

[3] Myers *v.* United States, 272 U. S. 52 (1926). Professor Corwin sums up the situation since the decision in the Humphrey case as follows: "(1) As to agents of his own powers, the president's removal power is illimitable; (2) as to agents of Congress's constitutional powers, Congress may confine it to removal for cause, which implies the further right to require a hearing as a part of the procedure of the removal." *The President: Office and Powers*, 96.

a removal to be made than prevent one. Nor can it, after confirming a nominee, reverse its action.[1]

3. *Direction of Administration—Issuing Orders and Regulations*

Quite as important as the president's authority to appoint and remove officials is his power to direct them in performing their duties. As exercised today, this power is the outcome of long and somewhat hazardous development. The idea of the founders was that the control of executive and administrative work should be divided between the president and Congress; and when the first executive departments were established, it was specified that the former should have power to direct two of them, *i.e.*, State and War, but that the head of the third, *i.e.*, the Treasury, should report directly to Congress. The earlier presidents used their directing power sparingly, and the courts viewed it as substantially limited to the fields in which it was specifically conferred.

Diffusion of control over administration

Notwithstanding the spectacular growth of executive power in these later days, Congress still wields a great deal of control over the administrative mechanisms and operations of the government. It is Congress that creates the executive departments and, as a rule, their more important subdivisions—the independent establishments, too—and determines what their functions shall be. It is Congress that says, in many situations, what shall be done and—in so far as it likes—how it shall be done. Congress alone can provide the requisite funds, and it can investigate, criticize, and suspend or permanently stop many, if not most, kinds of administrative activity, regardless of the wishes of the president and his administrative associates. Moreover, many lines of responsibility and control run directly from administrative agencies to Congress, with in fact "a maze of criss-crossing relationships between the president, Congress, and the departments, independent commissions, public corporations, and other agencies composing the federal establishment." Nevertheless, Congress does not, and cannot, itself *administer;* day in and day out, it is the president—personally or through his higher subordinates—that exercises immediate, continuous direction and control; and Congress not only accepts this fact, as it must, but steadily contributes to exalting the executive power of direction by providing new governmental machinery to be operated by the president, and by assigning all manner of directive duties and tasks to him.

Basis and extent of the power of direction

In point of fact, the directing power is one which must have developed in a large way in any case. Not only does the power to remove necessarily involve the power to direct, but the latter power has a clear constitutional basis in the injunction that the president shall "take care that the laws be faithfully executed," and in his inaugural pledge that he will "faithfully execute" the office of president and "preserve, protect, and defend the constitution." His foremost duty, indeed, is to see that

[1] United States *v.* Smith, 286 U. S. 6 (1932).

the laws are enforced—not only the acts of Congress, but treaties, decisions of the federal courts, and all other national instruments having back of them the authority of the constitution; and to this end he must be regarded as endowed with power to direct his administrative subordinates, even as he is authorized to use the armed forces if such a course becomes necessary. Acts required by law of heads of departments and other executive officers, *i.e.*, acts which are "ministerial" in character rather than political, are, indeed, theoretically outside of the president's jurisdiction; in case of neglect, there are recognized judicial procedures for compelling performance of them. Nevertheless, even here the president may assert himself; he may, in fact, go so far as to threaten removal of an officer for performing an act required of him by Congress, thereby forcing upon him a disagreeable choice between prosecution at law and loss of his position.

The power to issue orders

Closely related to the power of direction is the power to issue commands and regulations in the form of executive orders. The nature and scope of the government's multifarious activities are defined, at least broadly, in the constitution and in acts of Congress, but the details of organization, the forms of procedure, and, in general, the *minutiæ* of administration are, and must be, left to be worked out and put into effect by those who stand closer to the work to be done. Thus, an immigration law, in seeking to debar paupers and criminals from admission to the country, will declare general policy and may specify rather fully the means and manner by which the policy is to be carried out, yet it will remain for the executive branch of the government to prescribe most or all of the detailed regulations covering the work of inspection, the handling of appeals from the decisions of the examining authorities, the detention of applicants refused admission, and similar matters; and such regulations are normally to be regarded as having the full force of law. Most of this "subordinate," or "administrative," legislation emanates from the heads of departments, or even from their inferiors. But a considerable amount comes also from the president, who in addition is, of course, ultimately responsible for all regulations and orders issued in the departments and most other establishments. The president himself revises and promulgates the Consular Regulations and the Civil Service Rules, together with rules for the Patent Office and the customs and internal revenue services. In some cases, he acts by virtue of powers inherent in his constitutional position, *e.g.*, as commander-in-chief of the armed forces;[1] in other instances, *e.g.*, in fixing the duties to be paid on imported goods under our trade agreement legislation, he acts by express statutory authority; in still others, he proceeds on the basis of powers implied from the nature or tone of the law to be executed.

[1] For example, when in 1942 an order was issued reconstructing the entire organization of the Army. See p. 499 below.

The constitutional issue involved

Of course, there is the principle of separation of powers to be reckoned with. As traditionally interpreted, legislation is the function of Congress. Yet many executive orders have the appearance, nature, and force of law; and when their sole warrant is to be found in acts of Congress, they raise the question whether Congress has not, in effect, handed over some of its legislative authority to be exercised by the executive—a thing which numerous judicial decisions deny it the right to do. To be sure, the Supreme Court has many times taken refuge in the position that, in conferring ordinance-making powers, Congress is not violating the principle of separation, for the reason that what is delegated is not lawmaking power, but only authority to "fill in the details" of legislative policy already laid down by the legislative branch. As related in an earlier chapter, there came a time, however, when the Court, as then constituted, felt it necessary to call a halt. In 1933, the country was in the throes of an economic depression that had assumed the proportions of a national calamity. In the nature of things, Congress could not intelligently do more (even if there had been time) than enact skeleton statutes sketching the broad outlines of a recovery program. The Roosevelt Administration had brought into office with it such a program (at least in its initial features) and had the support of congressional majorities, fresh from the people in the case of the House, adequate to obtain virtually anything that it asked, especially with the national mood as it then was. The upshot was a swift succession of boldly conceived statutes, —*e.g.*, the National Industrial Recovery Act and the first Agricultural Adjustment Act—each developing a line of policy in the large, but also committing to the president, or to some administrative agency under his direction, broad authority to give effect to the policy laid down by promulgating rules and regulations, or indeed, in many instances, by making choices of grave import as between alternative devices and procedures.

The outlook

From the days when these great recovery statutes were passed, however, grave doubt existed in many quarters as to whether the old formula about "filling in details" could possibly be stretched to cover them and the actions taken under them; and in a series of decisions handed down in 1935-36 the Supreme Court held that the unprecedentedly broad delegations attempted, notably in the Recovery Act, exceeded all justifiable constitutional bounds.[1] As a result, the delegation of regulatory power to the executive suffered a set-back, and with it, the power to issue orders having the force of law. In the end, however, the reversal proved more apparent than real. Several of the measures invalidated were transformed by Congress into acts so phrased that later tests were successfully with-

[1] In Panama Refining Company *v.* Ryan (293 U. S. 388), only one member of the Court dissented; in Schechter *v.* United States (295 U. S. 495), the decision was unanimous; in United States *v.* Butler (297 U. S. 1), the Court divided six to three. The first two cases arose out of the Recovery Act, the third out of the Agricultural Adjustment Act.

stood. Death or retirement of Supreme Court justices opened a way for appointment of others disposed to look more tolerantly upon the expansion of executive regulatory authority. The tightening of the international situation led, in 1940, to the launching of a stupendous program of national defense, inviting legislation conferring upon the executive wide discretionary powers. And when, in December, 1941, the country was plunged into war—a situation that in any event would have magnified executive authority—sweeping powers of regulation by executive order (carried over in part from the first World War) found expression in a multitude of controls which no American who has lived through these recent years needs to have described.[1] Even yet, this situation has not been fully liquidated; while, as for the future, there is little reason to doubt that executive ordinance-power, judicially curbed only in more extreme and dubious cases of congressional delegation, will continue at a high level.[2]

4. *Pardon, Reprieve, and Amnesty*

Finally (with foreign relations and war powers reserved for discussion in later chapters), there is the president's power, as chief executive, to grant pardons and reprieves.[3] The effect of a full pardon, the Supreme Court has said, is to make the offender, in the eye of the law, "as innocent as if he had never committed the offense." A reprieve, of course, is only a postponement of the execution of a sentence. In wielding the pardoning power, the president acts in complete independence of Congress and of the courts; it is for him alone to say who shall be pardoned, at what time, and under what circumstances, subject only to two constitutional limitations: he cannot pardon a person who has been convicted by impeachment and thus restore him to office; and he can pardon only in cases in which the offense has been against the authority of the United States as distinguished from that of a state. An application in behalf of a convicted person may have any one of several results: (1) full and unconditional pardon; (2) pardon qualified by conditions, and revocable if the beneficiary fails to live up to them; (3) parole without pardon; (4) commutation of sentence, having the effect of shortening a period of imprisonment, substituting a fine for imprisonment, substituting life imprisonment for death, or otherwise lightening a penalty; (5) reprieve, or mere delay of punishment; and (6) refusal to take any action at all. Every application received is looked into by the pardon attorney, and if

[1] On presidential ordinance powers in wartime, see, however, pp. 492-494 below.

[2] Congress itself may, of course, recall a delegated power, or may legislatively annul any order issued which in its opinion constitutes an abuse of such a power. On the concurrent resolution as a device in this connection, see p. 222, note 1, above.

Formerly, much inconvenience arose from the lack of any provision for systematic assembling and publication of current executive orders and administrative regulations. The defect, however, was remedied in 1936 by the establishment of an official daily *Federal Register* in which all significant orders are printed as soon as issued.

[3] Art. II, § 2, cl. 1.

necessary the attorney-general, in the Department of Justice, and usually the findings and opinions reported enable the chief executive to dispose of the petition as a mere matter of routine. On other occasions, however, grave doubts may exist or important issues of public policy may be involved. In any event, the president alone makes the final decision; and in doing so, he must be prepared, in the interest of impartial justice, to withstand touching appeals and powerful influences.[1] A modified form of pardon is amnesty, which is a sort of blanket pardon extended to numbers of people who, without having been individually convicted, are known to have violated federal law, as by engaging in rebellion. Amnesties may be declared by act of Congress; but the usual method is that of presidential proclamation.

A General View of Presidential Power

A hundred years of cumulative development

"The waters of democracy," once wrote Woodrow Wilson, "are useless in their reservoirs unless they may be used to drive the wheels of policy and administration." And it is the experience of practically all democracies not only that leadership is the only means by which latent power can be turned to account, but that the requisite leadership can be supplied only by the executive. In Great Britain, Canada, and other countries having cabinet systems, this means the ministers; in the United States, it means the president. At the stage which our study has now reached, it must be sufficiently obvious that the salient fact about the presidency is its prolonged accumulation of power—by constitutional endowment, by legislation, by judicial construction, by custom and practice, in the enforcement of law, in the management of administration, in the conduct of foreign relations and of war, in the use of the veto, and notably in the shaping of public policy as controlled ostensibly by Congress. The earliest chief executives, being "just about what the framers of the constitution expected the incumbents of the office to be,"[2] took a comparatively modest view of their own authority. Jackson, however, brought to the White House not only a resolute disposition, but an impatience with restrictions and conservative traditions which was characteristic of the section from which he came and of the generation in which he lived. In his hands, the presidency became a far more potent instrument than before; and although after his day the office had its ups and downs, as it passed from stronger to weaker hands and back again, and as the times demanded of the chief executive a vigorous rôle or permitted a more passive one, hardly any later incumbent ever willingly gave up a particle of power once successfully asserted.[3] On the contrary, every fresh advance became, in turn, a point of departure from which

[1] The number of applications for a presidential pardon usually run to about 1,600 a year.

[2] W. B. Munro, *The Government of the United States* (rev. ed.), 130.

[3] Except, of course, special wartime powers of a manifestly temporary character; and even in this domain, most powers acquired have been retained.

still more exalted claims to authority were projected; and under Franklin D. Roosevelt, notwithstanding occasional set-backs, a peak was reached which overtopped all that went before.[1]

Basic factors involved

The reasons for this extraordinary development are not to be found in motivations springing from personal ambition and exaltation. Most of the presidents, being human, have found pleasure in the exercise of authority; but few, if any, have coveted power for its own sake. Presidential preëminence has reached its present proportions for a number of obvious reasons. One is the development of what is to all intents and purposes direct popular election, giving the chief executive a rightful claim to be regarded as no less a spokesman of the national will than is Congress. Another is the vast expansion and progressive centralization of governmental functions characteristic of the past half-century. A third, overtopping even the foregoing, is the oft-demonstrated, ever-growing, and increasingly imperative need for the leadership and direction—in legislation and in general policy-framing—which in a cabinet system are exercised preëminently by the prime minister, but for which our system makes no provision—a need which there is no possible way of meeting except through the president.[2] A fourth, accentuating the foregoing, is the deficiencies of Congress referred to in an earlier chapter, and especially the too frequent failure of that body, over a long period of years, to initiate and proceed boldly and independently with constructive legislation needed and demanded by the country. A contributory factor of tremendous importance, too, has been a succession of great national crises—the Civil War, World War I, the depression of the thirties, the perilous international situation created by the Nazis and the Fascists, and finally World War II—all inevitably making national leadership a topmost concern and forcing executive power to new levels.

Of the three branches into which our national government is divided, the executive has advanced farthest from the point at which it started. The judiciary has considerably more than held its own—mainly because

[1] In the opinion of Professor Edward S. Corwin, about one in three of the thirty-one individuals who have held the presidency have contributed to the development of its powers. Washington, Jefferson, Jackson, Polk, Lincoln, Hayes, Cleveland, Wilson, and the two Roosevelts form his suggested list. *The President: Office and Powers*, 29.

[2] "The nation as a whole," once wrote a scholar who himself later attained the presidency, "has chosen him [the president], and is conscious that it has no other political spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its president is of such insight and caliber. Its instinct is for unified action, and it craves a single leader." W. Wilson, *Constitutional Government in the United States*, 68. "The power and prestige of the presidency comprise the most valuable political asset of the American people; they are, moreover, in a very true sense the creation of the American people." E. S. Corwin, *The President: Office and Powers*, 306.

of its review of legislative and executive acts. The legislative branch has run a poor third; and for this the inexorable expansion of the presidency has been primarily responsible. People who do not like what has happened sometimes hurl at vigorous presidents the charge of dictatorship; and there can be no denying that the balance contemplated by the makers of the constitution has been to a considerable extent upset. Strong and unified government, however, does not necessarily mean arbitrary government, nor a powerful chief executive a dictatorial one. Despite all, the president is still a responsible servant of the people; and such he will remain as long as the popular and congressional controls inherent in our representative system endure.

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CHAPTER XIX

NATIONAL ADMINISTRATION—FUNCTIONS AND AGENCIES

Politics and administration

Government in action entails two major processes: (1) deciding upon policy, and (2) carrying policy into effect—the first essentially a matter of politics, the second a matter of administration. The two, however, are not sharply separated. On the national level, declaring policy is a function primarily of Congress, but shared heavily by the president, and policies are made and remade in the course of administration; administration, in turn, is directed by the president, but controlled also by Congress through the regulation of organization and functions, through control over audits, through investigations, through the power of impeachment, and in other ways.

The importance of administration

Administration, furthermore, is quite as important as policy-making. Congress may deliberate through long months in Washington (likewise a legislature in a state capital), and enact laws by the score, without touching the citizen or his pocket-book unless these laws are applied and enforced by administrative authorities. It is, indeed, the quality of administration that mainly conditions the effectiveness of the democratic process. Good laws are, of course, desirable, and justice through the courts is indispensable. But it is easier to get good laws and impartial court decisions than to secure uniformly economical and efficient administration. The legislature has only to declare its will in an act of broad and general scope, and thereupon its work is finished. The real task remains—to fit the terms of the measure to the existing public situation; to select the officials who are to interpret the law and apply it; to instruct, supervise, and discipline these officials; to settle innumerable questions of detail (many of them highly technical, many involving important matters of principle); to prevent laxity, favoritism, and fraud. It has been an American failing to assume naïvely that all that is necessary in order to achieve a desired end is to "pass a law." As a people, we are only beginning to understand that, even when a law is well conceived and in good form. the vital test comes in the administering of it. Such administration is no mere mechanical process, but on the contrary, a very human affair, coming close to the people, and dependent for its success quite as much upon the people's attitudes and reactions as upon the competence and diligence of the administrators themselves. By its very nature, too, administration must be operative all of the time, day and night, fifty-two weeks a year. Congress sometimes goes several months without a meeting, and the courts are accustomed to lengthy recesses between terms. Administrative management, however, must be kept up ceaselessly;

individual administrators may take vacations, but administration is never adjourned.[1]

Some Fundamental Features of the National Administrative System

1. The national government basically self-sufficing

National and state legislatures and legislative processes are entirely distinct from each other, and so are the systems of national and state courts. In the domain of administration, however, there is a good deal of interlocking and coöperation, involving indeed all three major levels of government, federal, state, and local. Federal elections are managed by state and local officers acting under state law, and state courts naturalize aliens under national law. Offenders against national laws are apprehended by state and local police, as well as by United States marshals and other federal agents. State and local officials were drawn deeply into the enforcement of the Volstead Act when national prohibition was in effect, and are still commissioned to help enforce federal pure food and drug acts, federal wild-life and game laws, the federal plant quarantine law, and federal public health measures. In the area of agriculture, such inter-relationships are particularly abundant; county agricultural agents, for example, although usually appointed locally, are in effect agents of federal, state, and local governments alike, and all contribute to their pay.[2] The recent defense effort and war saw federal selective service legislation carried out largely through state and local agencies, and state and local defense councils used extensively by most of the federal defense and war agencies—for example, by the Office of Price Administration in the rationing program. Some people even consider that the states may end by becoming hardly more than administrative areas and agencies of the government at Washington. Notwithstanding all this, however, the first major fact about the national administrative system is that the national government is still basically self-sufficient in the sense that its laws are, as a matter of principle and to a very great degree in practice, carried out and its other work done by its own separate administrative personnel.

2. The general pattern of administrative organization

The machinery of administration is organized primarily in or under a series of coördinate executive departments[3] created by act of Congress. The constitution does not provide in so many words for departments, nor, of course, say how many there shall be or what they shall be called.

[1] Growing recognition of the importance of administration was reflected in the formation, in 1939, of a national Society for Public Administration, whose journal, the *Public Administration Review*, should be known to all students of the subject.

[2] Federal aid, of course, has contributed to closer inter-governmental relationships in many fields; although in most instances administration of the services federally assisted remains with the states, the federal government retaining only rights of inspection and supervision.

[3] Even in official usage, the terms "executive" and "administrative" are employed very loosely. In the strictest sense, the president and vice-president are the only *executive* officers in the national government; the departments, and even the heads thereof, are *administrative*. As being attached to the executive branch of the government, however, the departments are known as "executive departments," and the civil service as the "executive civil service."

It, however, plainly assumes that departments will exist: it authorizes the president "to require the opinion, in writing, of the principal officer in each of the executive departments"; it also empowers Congress "to vest the appointment of inferior officers in the heads of departments"; and the great burden of administrative work today is carried by the ten departments thus far set up—State, Treasury, War, Navy, Post Office, Interior, Justice, Agriculture, Commerce, and Labor. Outside of the departments, however, is a vast amount of additional administrative machinery. Beginning, in effect, with the creation of the Civil Service Commission in 1883 and of the Interstate Commerce Commission four years later, "independent establishments"[2]—provided for in most instances by act of Congress, but sometimes set up merely by executive order—so multiplied that even before the launching of the Roosevelt Administration's recovery program in 1933 their number had reached a score or more; and the New Deal, the national defense program instituted in 1940, and the later war gave rise to a bewildering array of additional ones, some of which have disappeared because of time limitations or by direct abolition, some by reason of consolidations, and some (*e.g.*, the famous National Recovery Administration[1]) on account of judicial invalidation of the legislation on which they rested—but some of which survive today and, in one form or another, will likely prove permanent. As will be emphasized later, several of the separate boards and commissions encountered are rather more legislative and judicial than administrative. But many of the detached establishments are almost wholly administrative; and upwards of a score of them are grouped under three coördinating "agencies" (Federal Security, National Housing, and Federal Works) hardly, if any, less important than some of the regular departments.[2] Finally, forming the substructure of both the departments and the "establishments" are "the men (and women too) in the trenches," *i.e.*, the host of lesser officials and employees constituting the "executive civil service," operating partly in Washington but in far larger numbers under district and regional offices scattered over the country.

3. Some forms employed

Looking a little more closely at forms of organization employed,[3] one finds all of the departments much alike (a) in being presided over by a single official, known in most instances as a "secretary"; (b) in having (in all but two instances) an under-secretary relieving the pressure upon

[1] See p. 400 below.

[2] In 1946, President Truman announced intention to ask Congress to transform the Federal Security Agency into a department.

The reasons for so often setting up independent agencies to perform given tasks, rather than providing for the work to be done in some one of the regular departments, have been varied. Sometimes a given function did not seem to fit into any department; sometimes its nature seemed to call for a type of agency (*e.g.*, a board with long and overlapping terms) different from types appropriate to a department; sometimes a pressure group would be satisfied with nothing less than a distinct and largely autonomous establishment; sometimes considerations of a personal nature entered in, or even sheer carelessness.

[3] A reorganization of defense agencies was pending in January, 1947.

the secretary and on occasion acting as his substitute; (c) in having usually from one to four assistant secretaries for supervision of major areas of departmental work; (d) in containing a considerable list of operating units (variously known as bureaus, divisions, "offices," and "services"), usually with a single head (variously known as "commissioner," "director," "comptroller," or "chief"), and with functions so grouped as ordinarily to give each unit a reasonably coherent task to perform; and (e) with the units named frequently further subdivided. In other words, departmental organization is on the traditional bureaucratic pattern, with the secretary at the apex of the pyramid and with successive levels of officials beneath him, ramifying downwards to the lowest grades of civil service employees. The more important independent establishments, on the other hand, generally take the form of boards or commissions (of three, five, or often seven members), with all of the members sharing equally in authority and the chairman serving merely as a general manager of operations; although auxiliary to the board itself will be found, in cases like the Interstate Commerce Commission and the Federal Trade Commission, a structure of secretaries, counsellors, bureaus, divisions, and the like, quite comparable to those found in the departments. The tendency is to employ boards and commissions when the work to be done is not wholly, or perhaps even primarily, administrative, but involves also making regulations on legislative lines and reaching decisions of a judicial nature—in other words, when what is needed is not so much instant action as consultation, deliberation, and considered decision shared in by several minds. The members are likely to be so selected as to represent different political parties and varied social and economic interests; long terms make for development of expertness, and arrangements for overlapping prevent a complete change of personnel at any single time. Still another organizational type appears when, for carrying on activities publicly planned and undertaken but closely analogous to private business, Congress sets up a government corporation, owned by the government, presided over commonly by a board of directors with a chairman, and either attached to a department or left independent, but in any case enjoying a freedom of action—in buying, selling, borrowing, loaning, managing—that makes it, as some one has remarked, the most independent of the independent establishments.[1] Best known, perhaps, among the literally scores of such agencies are the Reconstruction Finance Corporation and the Tennessee Valley Authority.[2]

[1] A Government Corporation Control Act of 1945 (59 *U. S. Stat. at Large*, 597), however, imposed a number of new financial and other limitations on such corporations. See C. H. Pritchett, "The Government Corporation Control Act of 1945," *Amer. Polit. Sci Rev.*, XL, 495-509 (June, 1946).

Current information about the organization and activities of all branches of the administrative system will be found in successive issues of the *United States Government Manual* (see p 306 below).

[2] See pp. 373, 430-431 below.

4. Types of functions

So vast and varied are the functions performed by the agencies of these different sorts that one could find a score of ways of classifying them. Obvious enough from what has already been said would be a classification as investigating, administrative, and quasi-legislative and quasi-judicial. Another grouping would throw them into three broad categories, as follows: (1) those that involve, not service to or regulation of the public directly, but rather service to other agencies of the government, such as is rendered by the Treasury Department, the Bureau of the Budget, the Civil Service Commission, and various authorities having to do with purchasing and distributing supplies; (2) those that consist, at least primarily, in rendering services directly to the people, and including the great bulk of the work of such departments as Agriculture, Commerce, Labor, Post Office, and Interior, and of establishments like the Office of Education; and (3) those that are, to be sure, for the ultimate benefit of the people, but which consist immediately in the regulation and restraint of private individuals and corporations, good examples being the work of the Department of Justice, the Interstate Commerce Commission, the Federal Trade Commission, and the Securities and Exchange Commission. Still another, though related, way of viewing the matter would be to think of the functions of a department, for example, as falling into (1) overhead, or staff, functions, having to do with personnel, equipment, funds, and other means by which the department's work is carried on—a matter of departmental housekeeping—and (2) direct service, or line, functions, having to do with the services rendered or regulations imposed in relation to the public. Needless to say, the latter functions constitute an agency's sole reason for existence; all others are only means to an end.

5. Lines of responsibility and control

Heads of departments are directly and fully responsible to the president. Congress can impose duties on them with which the president cannot interfere, and it can remove them by impeachment. But whatever is done by any one of them is considered as done by the president himself, with whom, in the final analysis, complete responsibility rests. Independent establishments sustain somewhat less definite relationships. Some are clearly responsible to the president; others, rather to Congress; still others are more or less answerable to both, and the confusion that sometimes arises at this point furnishes one of the arguments occasionally employed against the multiplication of such bodies.

Department Heads as Administrative and Advisory Officers

Rather than inject a wearisome catalogue of departments and independent establishments here or at any other point in this book, our plan will be to call attention to the organization and functions of the more important ones when later discussing such topics as foreign affairs, finance, defense, commerce, agriculture, and labor. It will be helpful, however, at the present point, to take note of some principal tasks and duties which

heads of departments have in common—apart from their cabinet membership, which has been touched upon in another place.[1]

1. Appointing and removing subordinates

To begin with, the great bulk of subordinate officials and employees in the departments are appointed, directly or indirectly, by the department chiefs—acting, of course, as always, in the president's name. One must hasten to add that by far the larger proportion of the positions filled in this way have now been placed in the classified service,[2] which means that the appointments must be made under the restrictions laid down in the civil service laws and regulations. This, of course, greatly narrows the appointing officer's discretion and leaves him with relatively little "patronage" of a strictly political character. The power is, nevertheless, an important one; and with it goes a power of removal, likewise restricted, to be sure, by civil service rules, yet also decidedly substantial.

2. Directing the work of the department

Subject to the supreme directing power of the president and to varying amounts of control by Congress (and, if the truth be told, by more experienced and often better informed subordinates), each department head guides and supervises the work of all bureaus, divisions, offices, and other agencies in the department under his care. How much he will himself be directed by the president will depend upon circumstances, *e.g.*, how strongly disposed a given president may be to assert himself, how much confidence the president has in the secretary's capacity and judgment, and the degree to which decisions of major importance are required by special conditions existing at a given time. But in any event it falls to the department head to wield a general power of direction and control (including discipline) over the branch of administration intrusted to him, as also to represent the department's interests in procuring appropriations, increases of pay, and better working conditions.

3. Issuing rules and regulations

Another highly important function is that of issuing rules and regulations interpreting a law, filling in its details, applying it to a given type of situation, or even changing it if the necessary power has been conferred by Congress. The far-reaching and ever-expanding ordinance power of the president has been commented on in another connection.[3] In many instances, however, administrative regulations pursuant to this power are prepared in the departments and promulgated in their name, or even in the name of a bureau or division. Good examples include the voluminous regulations under which the postal service is carried on. Indeed, each department head is authorized by statute "to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and prop-

[1] See pp. 274-276 above.

[2] See pp. 310, 316 below.

[3] See pp. 284-286 above. The legislative activities of heads of departments are, of course, by no means confined to the foregoing. As pointed out elsewhere, such officials furnish legislative information, appear before congressional committees, advise with the president on legislative measures and programs, and have much to do with initiating and preparing bills for the consideration of Congress.

erty appertaining to it," and also to make rules appropriate for securing proper examination of accounts. Furthermore, broad regulatory powers covering important matters have been conferred on particular department heads, bureau chiefs, and the like, as well as upon commissions and other agencies outside of the departments. The reasons for the remarkable growth of "subordinate," or "administrative," legislation in the departments and independent establishments are, of course, similar to those accounting for the steady widening of the ordinance power of the president himself—boiling down to the sheer inability of Congress, when legislating, to anticipate and provide for the multiplicity of detailed situations that have to be met when a law is being brought home to the people in terms of day-to-day enforcement.[1]

4. Deciding appeals

Still another important thing that the department head has to do is to decide disputes arising out of the acts of his subordinates. In the administration of the laws governing such matters as immigration, conservation, the postal service, taxation, and social security, great numbers of controversies inevitably develop. Persons affected adversely may feel that an official has exceeded his powers, or that he has reached a decision not warranted by the facts in the case; and fairness demands that opportunity be afforded for a reconsideration of the decision or action. Conceivably, all such questions might be carried to the courts. But the federal Supreme Court itself has explained that, while appeal to the courts is proper enough when the construction of a statute is involved, such appeal, if permitted in the multitude of disputes arising out of the ordinary field operations of the departments, would so swamp the courts as to "entail practically a suspension of some of the most important functions of government."[2] Hence, except when decision hinges upon an interpretation of law, appeal normally lies only to higher administrative officials or boards, including in the later stages the heads of departments; and in many kinds of cases—for example, appeals against closure of the mails to persons and concerns alleged to be engaged in fraudulent transactions —the verdict of the department head is final, although in a limited number there is appeal to the president himself.

5. Supplying information and giving advice

The statutes creating the State, War, and Navy Departments expressly made the heads of those establishments responsible to the president; those creating the Treasury and Interior Departments did not do this, specifying rather that the department head should "report" to Congress. Manifestly, the first-named departments are more immediate organs of the president in carrying out his constitutional functions than are the others. In actual practice, however, all department heads are alike responsible to the chief executive; and all submit reports and recommendations which quickly become common property at both ends of Pennsylvania Avenue. Both president and Congress, furthermore, may at

[1] See pp. 284-286 above.

[2] American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94 (1902).

any time make requests of department heads for information. The president usually asks informally and orally for such data as he desires, although, of course, he also may ask in writing. Congress, or either house, normally makes its requests through the medium of resolutions. Armed with the power of removal, the president is able to enforce compliance. But Congress is in a different position; if a department head refuses to respond to a request, and is upheld in doing so by the president, it is helpless, unless it is willing to resort to the extreme expedient of impeachment.

6. Serving on boards and committees

Finally, all heads of departments, but especially those of such departments as the Treasury, Interior, Agriculture, and Labor, are called upon to serve *ex officiis* as members of various supervising or coördinating boards and committees. In some cases, duties are only nominal, but in others there is important work to be done.

Structural and Functional Reorganization

Growing criticism of earlier conditions

It was, no doubt, inevitable that an administrative system built up over the years largely without plan or design, "like the barns, shacks, silos, toolsheds, and garages of an old farm," should come to have serious defects; and far back in the present century criticism of it began to be heard, not only from taxpayers and officials, but from a rising generation of professional students of public administration as a science and an art. Administration is the costliest part of government, and the taxpayer was stirred by the rapid multiplication of agencies to be supported, each naturally bent upon consolidating its position, expanding its activities, fattening its payrolls, and each tending to become a sort of parent stem from which other newer agencies and services proliferated. Much criticism was motivated also by dislike, in principle, of the extension of government control over business and other aspects of economic and social life—tantamount, we were told, to paternalism, and bordering dangerously on socialism—as well as by hostility to the projection of national regulation into fields traditionally regarded as provinces of the states. In other words, what many critics had in mind primarily was the functions performed rather than the machinery employed. Yet those—especially students of administrative processes—who fixed their attention upon the latter also found plenty of grounds for complaint.

Some basic principles of good administrative organization

Careful consideration of what is involved in efficient and economical administration in city, state, or nation has brought agreement on certain rather definite principles. (1) The multifold tasks to be performed should be grouped according to their nature and each group assigned to one of a series of more or less coördinate departments. (2) The grouping should be on a functional basis, so that each department will have related and unified duties. (3) Functions should not be left diffused among different departments or other separate agencies, with resulting duplication, waste, and divided responsibility. (4) Every agency and every official should

stand in some definite relation to some superior agency or authority, the lines of control running downward, sharply and clearly, and those of responsibility just as sharply and clearly upward. (5) All personnel except policy-making officials at the top should be organized in a civil service, classified according to the nature of the duties to be performed, recruited by a civil service commission (or similar authority) employing suitable tests, and enjoying security of tenure. Other principles, relating for example to budgeting, might be mentioned, but the foregoing are chiefly relevant here.

Violations of these principles formerly found by experts

Tested by standards such as these, the organization of national administration a decade or two ago disclosed at least three major shortcomings. First and most obvious was the lack of coherence and integration inevitably flowing from the circumstances under which the system had been built up. Many offices and bureaus, to be sure, upon being created to meet some definite administrative need, had been fitted into the scheme in a manner entirely appropriate. But in perhaps equally numerous instances a new unit or service had been simply tacked on at any point seeming at the moment convenient, or dictated by political or other extraneous considerations. In many cases, no new unit or service ought to have been created at all; an existing one ought merely to have been enlarged or otherwise reconstructed. As a consequence, not only did independent establishments spring up on all sides, but some of the executive departments (notably the Treasury) became veritable jungles of unrelated units and services. Administrative and regulatory work in great fields like public health and conservation of natural resources was parcelled out among half a dozen different agencies, scattered through three or four departments or in no department at all—a situation from which could result only confusion, duplication, and waste, accentuated by jealousies and disputes among department heads and bureau chiefs as to who should control particular activities.

1. General looseness and planlessness

2. A "headless fourth branch of the government"

A second main defect, closely connected with the foregoing, was the lack of effective responsibility to, and of control by, the chief executive. The fault was not the president's; agencies were so numerous and their relationships so confused that no man could possibly keep an eye on all of them. As a result, however—President Roosevelt's Committee on Administrative Management[1] asserted—there had grown up, without plan or intent, "a headless fourth branch of the government, responsible to no one, and impossible of coördination with the general policies and work of the government as determined by the people through their duly elected representatives." As indicated above, good administration presumes direct and simple lines of authority and responsibility. The lines running between many of the federal agencies and the president were, however, both devious and obscure. Indeed, many boards and commissions were so far removed from presidential control that their perform-

[1] See p. 299 below.

ance of administrative functions constituted a positive invasion of the president's rights and responsibilities as over-all manager of national administration.

3. Boards and commissions ill-adapted to administrative work

And this matter of the performance of administrative functions by boards and commissions entailed a deficiency of still more serious character. As the President's Committee freely conceded, such plural agencies are, for consultation, discussion, advice, and reflection of diverse views and citizen opinion, "extremely useful and necessary." But, as the Committee was equally clear, they are too slow and cumbersome in action to serve acceptably as agencies of administration. Many, nevertheless, had been charged with important administrative duties; and the error, in the Committee's opinion, urgently needed correction.

Obstacles to reorganization

For a long time, the idea of overhauling the national administrative set-up was paid lip-service in government circles, but with action paralyzed. By general admission, any worth-while reorganization would have to be planned by the executive branch itself and put into effect by presidential order. Authority to proceed, however, could come only from Congress; and until within the past few years that body, doubtful about many of the issues involved and hesitant to intrust the necessary discretion to the president, usually shied away from the subject. As would be surmised, commissioners, bureau chiefs, and other officials and agencies, unwilling to be "abolished," or even transferred, were commonly predisposed against the launching of any general reorganization program. The pros and cons of various suggested changes, too, were generally rather technical, and people at large, although certainly standing to profit from increased efficiency and economy, were neither much acquainted with the concrete problems involved nor interested in them. Even among the well-informed, there was honest doubt as to whether some of the changes advocated—especially those looking to the gathering of scattered agencies into existing or new executive departments—would not lead to undesirable extensions of national control, with corresponding weakening of the states. Fear was expressed, too, lest reorganization be found to have had the effect of throwing certain services or agencies into politics.

The Reorganization Act of 1939

Presidents Taft, Wilson, and Harding gave their support to reorganization proposals that eventually came to nothing; and although, under an act signed by President Hoover a few hours before he went out of office, President Franklin D. Roosevelt was able, by executive orders in 1933-34, to introduce a number of changes, the field was still largely untouched when he, in 1936, appointed his Committee on Administrative Management to make a full survey of the situation and submit proposals. Reaching Congress at a time, in 1937, when feeling ran high over the President's project for reorganizing the Supreme Court,[1] bills aimed at carrying out the resulting recommendations encountered rough sail-

[1] See pp. 342-344 below.

ing.[1] At length, however, in the spring of 1939, a Reorganization Act of major importance, giving the president much, although not all, of the authority urged by the Commission, was placed on the statute-book.[2] No change might be made in the number or names of the executive departments; twenty-one specified agencies, including fifteen leading independent establishments, were to be left untouched; and the Commission's suggestions for extending the merit system in the civil service "upward, downward, and outward" found no reflection in the law. Outside of these limitations, however, the president was authorized, until January 20, 1941, to "reduce, coördinate, consolidate, and reorganize" the various agencies of the government, employing for the purpose, not executive orders, but rather proposed "plans," which should become effective sixty days after being transmitted to Congress unless in the meantime disapproved in their entirety—by a sort of veto in reverse—by concurrent resolution of the two houses. The objects of all changes were to be (1) to reduce expenditures, (2) to increase efficiency, (3) to group agencies "according to major purpose," (4) to reduce the number of agencies, and (5) to "eliminate overlapping and duplication of effort."

Resulting changes

Under terms of this legislation, President Roosevelt, at intervals during 1939-40, submitted to Congress five successive "plans" or groups of proposals; and although all evoked opposition, none was blocked; and together they gave the government's administrative organization a widely different appearance from before. Some agencies were abolished outright; several were shifted from one department to another; quite a number of those hitherto unattached were placed within some department; and a lengthy list of scattered ones were grouped under the three new coördinating agencies named above,[3] each headed by an administrator, and constituting a new level in the administrative set-up comparable in importance to that occupied by the departments themselves.[4] The financial saving alone, Congress was assured, would amount to fifteen or twenty million dollars a year.[5]

Wartime developments

There was still more to be done when 1941 arrived and the president's authority expired. For the time being, Congress refused to renew the grant. With the country plunged into war, however, a wholly new situation arose. On the one hand, the effects of the changes already made were blurred and made difficult to appraise by abnormal conditions; on the other, it became imperative that, for purposes of war efficiency, the

[1] The Committee's terse and illuminating report was published under the title of *Administrative Management in the Government of the United States* (Washington, D. C., 1937).

[2] 53 *U. S. Stat. at Large*, 56.

[3] See p. 292.

[4] As indicated earlier, it was in one of these plans also that provision was made for the Executive Office of the President.

[5] There is no reason to suppose that any such saving resulted. Administrative reorganization has usually resulted in improved coördination, planning, and operation, but the assumption that it will yield large and speedy economies financially is not borne out by either experience or logic.

president should continue to have powers (beyond those possessed as general executive, and even as commander-in-chief) to make readjustments. Congress, therefore, in the First War Powers Act, approved less than two weeks after Pearl Harbor, empowered the chief executive, during the continuance of the war and for six months thereafter, to make such redistributions of functions among administrative agencies as he should find desirable, so long as restricted to "matters relating to the conduct of the present war"; and under this authorization a multitude of new administrative agencies arose, accompanied by many transfers, consolidations, redistributions, and other changes, even in branches of the service ordinarily thought of as purely civilian.

A new Reorganization Act (1945)

When Congress wrote into the War Powers Act the time limitation mentioned, it probably had no idea that, officially and legally, the war would last a very long time after the fighting was over; a full year after V-E Day, there still was no definite prospect of the formal proclamation that would end it. Meanwhile, of course, the termination of actual hostilities opened a way for much special wartime administrative machinery to be dismantled; when the president's emergency authority should eventually lapse, agencies transferred or consolidated under it would revert to their former positions; and, in general, a situation loomed in which the administrative structure would stand in need of review and readjustment for the peacetime years ahead. To meet this challenge, President Truman asked necessary authority from Congress; and the upshot was another general Reorganization Act (approved December 20, 1945),[1] bearing resemblance to the pre-war measure of 1939 in again exempting specified regulatory boards and commissions[2] (although the President wanted them included), in giving Congress sixty days in which to veto any proposed plan, and in placing a time limit on the powers delegated (in the present instance, April 1, 1948). Instructing the director of the Bureau of the Budget to consult with the departments and establishments and prepare reorganization plans, the Chief Executive thereupon set forth boldly upon a course not unlike that traversed by his predecessor under the act of 1939. Three plans providing for some twenty-eight transfers, consolidations, and other changes (chiefly in the areas of housing, agriculture, welfare, and public lands), were laid before Congress in May, 1946; and although all met with flat rejection, by large majorities, at the hands of the House of Representatives, two escaped defeat in the Senate, with the result that they automatically became effective after the sixty-day period of suspension. The defeated plan failed principally because of Senate objections—reflecting the views of many groups throughout the country opposed to public housing—to a

[1] 59 *U. S. Stat. at Large*, 613.

[2] Twelve, however, this time, instead of twenty-one. In the present instance, moreover, proposals relating to certain previously wholly exempted agencies, *e.g.*, the Federal Communications Commission, might be made if presented apart from any others.

proposed transfer of functions from other agencies to the National Housing Agency. One of the two which prevailed followed up the establishment of the Federal Security Agency under one of President Roosevelt's plans of 1939, by transferring to that establishment the Employees' Compensation Commission, the child welfare functions of the Children's Bureau, and certain agencies and activities scattered through other parts of the government, thus preparing the way for converting the Agency into a full-fledged executive department whose authorization the President indicated he would presently ask of Congress.[1] The other successful plan embraced a variety of transfers affecting, in one way or another, as many as five departments.

A continuing task

Administrative reorganization may seem a problem and a task that run on and on, without end; and so indeed it is. In a governmental system as vast and complicated as that of the United States, no given pattern can ever be regarded as completely satisfactory, or as in every respect the best conceivable. And even if such perfection could be attained, it would not last; for, administration being essentially a matter of processes and procedures, changing conditions, situations, and needs call continuously for readjustments, in detail and even in the large, in the machinery and techniques by which it meets the day-to-day demands upon it. That is why the President's Committee on Administrative Management urged a conception of administrative reorganization as being, not a task to be performed at a stroke and thereupon considered finished, but rather as an activity requiring continuous attention and effort directed to meeting new situations as they emerge.[2]

The Special Problem of the Regulatory Commissions

Peculiar functions and status

Congress, as we have seen, has habitually refused to allow the Interstate Commerce Commission, the Federal Trade Commission, and about a dozen other agencies of that nature to be tampered with by the president in his reorganization plans. And for this there is a reason, although by some regarded as inadequate. To a degree, these major independent establishments administer and enforce, and accordingly are parts of the administrative system. But they do much more than simply administer and enforce. Far beyond most mere administrative agencies, they interpret broadly-phrased acts of Congress, supplement them, amplify them, and in effect add to them—so that, regardless of the theory that legislative power cannot be delegated, they become to all intents and purposes little legislatures, at all events legislative arms of Congress. At the same time, they also receive complaints, take evidence, hear counsel, study briefs, and make decisions—which, if this does not transform them into

[1] In the process of transfer, the Employee's Compensation Commission was finally abolished.

[2] One branch of the government in which this idea seems to be taken very literally is the Department of State, whose machinery has in later years been reconstructed with almost bewildering rapidity. See p. 466 below.

courts, certainly makes them at times almost indistinguishable from such to the naked eye. The commissions, therefore, stand closer to Congress and to the judiciary than to the president; to protect them against being "packed" by a president on coming to office, their members are given longer terms than his (frequently seven years) and also overlapping terms; and Congress jealously guards them against presidential maneuverings that might eventually land them in departments, where they would come under full executive control. If anything is to be done about them, Congress wants to do it.

Criticisms and proposals

This does not mean that nothing has needed to be done. On the contrary, some of the commissions have been under a heavy fire of criticism for a good many years. Notable among the objections raised have been (1) that, combining administrative, legislative, and judicial powers as they do, they defy the principle of separation on which our personal liberties are supposed to a considerable extent to be dependent, and (2) that they have been allowed to become too literally *independent* establishments, self-contained and operating almost as if in air-tight compartments. But more particular exception has been taken to various procedures which, in the almost total absence of earlier regulation in the statutes, the commissions built up over a long period of years. Rules and regulations vitally affecting the rights of persons and property, it formerly was charged, were often made without the people concerned being allowed opportunity to be heard; findings and decisions of a judicial nature were arrived at and enforced without a chance for injured persons to appeal to the courts. There *was* some public access to the commissions, and there *was*, under certain conditions, appeal to the courts. The complaints mentioned, however, and others like them, once had enough foundation to stir lively discussion; and in 1939 a drastic measure for applying correctives (the Logan-Walter bill) failed to become law only because of a presidential veto.[1] As an alternative to this rather badly conceived proposal, a milder plan was, however, brought forward by an Attorney-General's Committee which worked long and hard on the subject; and, after the matter had been sidetracked for a number of years by the war, Congress finally passed, in 1946, an Administrative Procedure Act[2] based largely on the Committee's recommendations, and promptly approved at the White House.

The Administrative Procedure Act of 1946

The new measure is a complicated piece of legislation, and only a few of its provisions of broadest import can be indicated here. In general, it deals with the procedures to be followed by government agencies in performing quasi-legislative and quasi-judicial functions, and with the

[1] The severer features of this measure (drafted by a committee of the American Bar Association) were inspired by a particular dislike of lawyers for the procedures of the Federal Labor Relations Board and the Federal Securities and Exchange Commission. Some of the old-line commissions were, indeed, expressly exempted from the bill's provisions.

[2] Public Law 404—79th Cong.

relations of such agencies to the courts through the channel of judicial review; and the agencies covered are not simply the regulatory commissions, mainly responsible for the problems involved, but, by definition of the act itself, all "authorities" embraced within the national government except Congress, the courts, and the governments of territories, possessions, and the District of Columbia. Principal requirements imposed on the agencies are: (1) that they shall give full publicity to the machinery and methods by which they work and to the ways in which persons desiring to bring proposals and requests to them may do so; (2) that when they contemplate making a rule they shall give ample notice, personally or through the *Federal Register*, to all individuals or corporations that might be concerned, at the same time indicating the authority by which they plan to act and specifying the terms of the proposed rule, or at least the subjects and issues involved; (3) that officers or employees investigating and presenting cases for adjudication shall be allowed no part in deciding them; (4) that, so far as the orderly conduct of business will permit, any interested person shall be allowed to appear before any agency or its officers or representatives for the presentation and determination of any issue, request, petition, or controversy; (5) that persons compelled to appear (and there is full power to subpoena witnesses) shall be permitted to be accompanied by counsel or other qualified representatives; (6) that any relevant information or testimony, documentary or oral, shall be received, with any interested party entitled to present rebuttal evidence and to cross-examine witnesses; and (7) that after a year every agency shall appoint and employ, under civil service regulations, as many competent "examiners" as may be needed for carrying on investigations, preparing cases, and doing general "spade work" preparatory to agency action.

New provisions for judicial review

Moreover, to clear up the hitherto frequently obscure matter of appeal to the courts against agency actions, it is stipulated that every such action made reviewable by statute, and every other final action for which no other adequate remedy in any court is otherwise provided, shall be subject to judicial review,[1] thus establishing the right of any person adversely affected by an agency action to go into court in quest of redress. And the court so appealed to is required to set aside any agency action, finding, or conclusion discovered to be arbitrary or entailing abuse of discretion, or in excess of statutory or constitutional authority, or arrived at without observance of regular lawful proceedings, or unwarranted by the facts (in so far as the facts are reviewable *de novo* by the reviewing court). Pending court action, also, any agency may, in the interest of substantial justice, postpone the date for any of its actions to take effect.

Although applicable to other federal establishments besides regulatory commissions, the new law is of importance chiefly in connection with

[1] Except where statutes expressly preclude such review, or where an agency is by law given full and final discretionary authority.

them—for the obvious reason that it is principally they that carry on activities of the kinds envisaged. So long as the commissions remain independent establishments, there will be people to criticize them on that score; and others will continue troubled about the fusion in them of administrative, legislative, and judicial functions, although one would be hard put to it to say how this could be wholly avoided. The safeguards, however, set up in the act of 1946 should go far toward remedying procedural defects of which there had been just complaint; and improvements at points where the actions of such bodies impinge upon the rights and liberties of the people are immensely more significant than any mere readjustments of structure or machinery that might be undertaken.

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CHAPTER XX

THE EXECUTIVE CIVIL SERVICE

Numbers and scope

President, heads of departments, under-secretaries and assistant-secretaries, division heads and bureau chiefs—these and other managerial officers at Washington form numerically only an insignificant fraction of the multitude of men and women who, year in and year out, carry on the civilian activities of the national government. Ninety-nine per cent, or more, of the whole number constitute the far-flung force known as the executive civil service—"executive," as being attached to the executive rather than the legislative or judicial branch of the government, and "civil," as differentiated from the Army, the Navy, the Marine Corps, the Coast Guard, and other establishments of a military character. Under our federal system, all of the states, together with their subdivisions, have civil services of their own; and in the aggregate the personnel on these levels, in normal times, heavily outnumbers that on the federal level.[1] Starting with only some three hundred in 1789, the federal service, however, mounted to 208,000 by the close of the nineteenth century; rose to above 900,000 under impact of the first World War; ran along between 500,000 and 600,000 during the ensuing decade and a half; passed the million mark for the first time during the defense effort of 1940-41; stood at 1,545,131 when Pearl Harbor plunged the country into war; reached an all-time peak of 3,375,000 early in 1945; and after tapering off somewhat in the later war period, and more rapidly after hostilities ceased, stood at the still huge figure of 2,118,984 at the end of October, 1946. Expansion of activities and controls in wartime invariably results in a greatly increased government personnel. Nothing like the mushrooming of the federal service in 1941-43, however, was ever experienced in this country; and it is not expected that the figure at which peacetime stabilization will be reached in some indefinite future period will be below 1,500,000.

During the war, at least a million and a quarter of the vast army of civilians on the federal payroll were employed in arsenals, shipyards, and

[1] Thus in 1941, when the federal service numbered 1,150,000, state and municipal services together numbered 3,240,000 (including, of course, teachers in public schools). During the ensuing war years, the federal service was almost tripled, and temporarily passed the state-municipal figure, which actually declined three and one-half per cent on account of loss of employees to the federal government, to the armed forces, and to war industries, and because of curtailment of state and local services. With peace restored, state and municipal services began to be rehabilitated, and already they far outnumber the diminishing federal service. At the beginning of 1945, the federal service stood at 3,375,000, and combined state and local services at 3,135,000, aggregating perhaps one-ninth of the nation's total labor force.

other establishments normally under private control. Contrary to popular impression, however, the federal civil service, even in peacetime, is not made up simply of "government clerks" engaged in dull routine. Instead, it contains a large array of scientists, *e.g.*, chemists, biologists, agriculturists, medical officials, engineers (civil, electrical, hydraulic, mining, sanitary, road, etc.), foresters, geologists, agronomists, live-stock experts, entomologists, hydrographers; an impressive corps of economists, statisticians, and accountants; numerous lawyers; a great body of experienced and responsible administrators. Only a small proportion live and work in the national capital—on June 30, 1940 (to take a date when fairly normal conditions still existed), 133,645 as compared with the 869,175 then constituting the field services, the latter performing duties in all parts of the land, including the dependencies, and, in the case of the diplomatic and consular establishments, in foreign countries as well. For many years before the war, the proportion of women in the service remained fairly constant at around nineteen per cent. Under wartime conditions, however, it rose to thirty-seven per cent, and at the end of October, 1946, was still above twenty-five and one-half per cent.

Earlier Personnel Problems—Spoils versus *Merit*

Some questions concerning personnel

The first major questions that present themselves in connection with any civil service system are those having to do with personnel. How are civil servants recruited? Are they selected and appointed for reasons of demonstrated merit, or on merely personal and political grounds? How are they classified and paid? How is their work evaluated, and under what conditions are they promoted? How are removals made, and why? What arrangements are there for retirement? To what extent does the service offer opportunity for a career?

Generally satisfactory appointments, 1789-1829

For a generation or more after the national government was organized under the constitution, the selection and appointment of administrative officers and employees[1] left little to be desired. Washington placed the matter at the outset upon a high plane by announcing his intention to "nominate such persons alone to offices . . . as shall be the best qualified"; and although the rise of political parties led his successors to give more weight to political considerations when filling posts as they fell vacant or as new ones were created, there were not many removals for partisan reasons—except perhaps during the first two years of Jefferson's first administration.

Jackson and the spoils system

Then came the election of Andrew Jackson, and with it a new theory and practice as to personnel in the national government. Already, a

[1] In discussions of the subject dealt with in this chapter, the terms "officer" and "employee" are often used rather broadly and loosely. There is, however, a distinction—an officer being properly a person *appointed* (or elected) to a public position *created by law*, an employee a person merely *hired* to do certain work. The difference is that between, for example, a collector of internal revenue and a stenographer in his office.

Tenure of Office Act of 1820 had helped set the stage for a spoils system by fixing a four-year term for district attorneys, collectors of customs, and other groups of officials, and thus giving every incoming president a large number of positions to fill without the inconvenience of discovering reasons for removing competent incumbents. Out of Tennessee came Jackson with the conviction, first, that the duties of all public offices were (or could be brought) within the capacity of any man of intelligence, and, second, that "more is lost by the long continuance of men in office than is generally to be gained by their experience." Putting his views into practice, the new chief executive did not indeed make the clean sweep of anti-Jacksonian office-holders for which many of his supporters clamored, but nevertheless filled substantially all posts at his disposal with men who thought as he did, and in addition removed, in his first year alone, officers and employees of all grades to the then unprecedented number of some seven hundred.

The blame for fastening the spoils system upon the country is, however, not to be laid entirely, or even mainly, at Jackson's door. In the first place, partisan removals and appointments were already familiar in many states and cities, the practice now being merely carried over in a large way into the domain of the national government. In the second place, the tightening up of party machinery, and the intensification of party politics following the so-called "era of good feeling," would have led in any case, under conditions then existing, to an increased use of public offices as rewards for party service. Finally, Jackson's views on office-holding, while abhorred by many people, were warmly endorsed by those forces of the new democracy, especially in the West and South, that had been mainly responsible for his election. When, in 1832, Senator William L. Marcy of New York summed up the arguments of Jacksonians in the remark, "To the victors belong the spoils," he coined a phrase that caught the public fancy; removals, as well as appointments, for party reasons became part of the accepted order of things.

Beginnings of reform

People, however, could not wholly close their eyes to the system's unfortunate consequences. On all sides, experienced and worthy public officials were ousted to make room for political henchmen. The public services were thrown into demoralization every time a change of administration took place. The president was harassed almost beyond endurance by place-seekers and their friends. Congressmen tended to become mere solicitors and dispensers of patronage. Administration fell to a generally low level; politics itself grew more mercenary and corrupt. As early as 1853 and 1855, Congress undertook, in a feeble way, to improve conditions by requiring that some thousands of clerkships in Washington be classified on a basis of compensation, and that candidates be appointed to these positions only after examination by the head of the appropriate department. Even on this limited scale, the reform came to nothing; and an act of 1871, under which a civil service commission was

set up and a limited scheme of competitive examinations introduced, proved almost equally barren of results.

The Pendleton Act (1883)

Happily, the cause was not lost. Able men turned their best energies to its support; national and state civil service reform associations were organized;[1] recent reforms in Great Britain were studied and made familiar to American readers. *Harper's Weekly, The Nation,* and other influential journals took up the fight; the assassination of President Garfield by a disappointed office-seeker in 1881 supplied dramatic impetus, and the new president, Arthur, confounded the prophets by vigorously espousing the cause. The upshot was that, early in 1883, Congress passed a well-considered civil service measure[2]—modeled on an English order in council of 1870, and commonly known as the Pendleton Act—which from that day to this has been the fundamental law governing admission to the national civil service.[3]

Progress and Present Status of the Merit System

The classified service and its earlier growth

Two main lines of action were contemplated in this epoch-making measure. One was the progressive classification of clerks and other employees—first in the Treasury and Post-Office Departments, and afterwards, as the president should direct, in other departments as well. The second was the extension to all such classified positions of the plan or principle of recruitment by competitive examination. At the outset, the reform did not extend far. In the first year, the number of positions affected did not exceed 14,000 out of a total of some 110,000. Gradually, however, the number grew, in Washington and by extension also to some of the field services; so that by 1933, on the eve of Franklin D. Roosevelt's assumption of the presidency, it exceeded 450,000, or some eighty per cent of the entire federal service. Much of the increase, of course, was automatic, arising from the expansion of staffs in branches of the service already on the classified basis. Other gains flowed, however, from occasional acts of Congress placing specified groups of positions, whether new or old, in the classified service,[4] *e.g.*, an act of 1902 classifying the employees of the Bureau of the Census; and still others from executive orders issued in pursuance of discretionary authority conferred by the

[1] Notably the National Civil Service Reform League, founded in 1881, renamed in 1945 the National Civil Service League, and today one of the most vigilant and influential agencies for promoting the application of merit principles in national, state, and local civil services.

[2] 22 *U. S. Stat. at Large,* 403-407.

[3] Similar legislation soon followed in Massachusetts and New York, and by this time one could say that the reform movement in American public administration was definitely under way. Three score years, however, have left it somewhat short of complete success in the national domain; while even yet only twenty of the states have enacted service-wide merit laws.

[4] The term "civil service" is often employed loosely, and by people who should know better, as synonymous with "classified service" or "competitive service." The classified service (under the "merit system") forms, of course, only a fraction—though today a very large one—of the civil service viewed correctly as embracing all persons in the public employ.

Pendleton Act or by supplementary statutes—as, for example, when President Cleveland brought into the classified service numerous positions in the internal revenue service and in the Department of Agriculture, or when President Theodore Roosevelt brought in the rural free-delivery employees and all fourth-class postmasters north of the Ohio and east of the Mississippi. Perhaps chiefly because of the burdens which political appointments imposed upon them and upon their heads of departments, the presidents always outran Congress in their desire to see the competitive system extended; Congress, indeed, the Civil Service Reform League bluntly declared as recently as 1937, was always the chief obstacle to progress.

Difficulty of holding ground gained

The assertion is borne out not only by repeated failures of the two houses, when enacting legislation entailing large numbers of appointments, to place the new positions in the classified service, but by actual retrenchments for which Congress, or at all events members hungry for spoils, must be held responsible. Every new presidential administration saw advances on some sectors, but retreats on others—retreats forced on even such sterling friends of the merit principle as Presidents Cleveland, Wilson, and Hoover. Retrogressive pressure was, of course, heaviest at times when a party long out of power suddenly found itself in control, *e.g.*, when the Democrats took over in 1885, 1913, and 1933, the Republicans in 1897 and 1921. And it proved effective, not because presidents and other appointing officers enjoyed the harassing experiences that go with spoils politics, but simply because an apathetic public permitted patronage-mongers in Congress, abetted sometimes by heads of departments who were primarily politicians, to push the merit system back from hard-won positions.

The problem of extension to the higher levels

It goes without saying that despite significant advances to be noted below, the pattern presented by the classified service continued decidedly irregular, being, of course, made still more so by the effects of the recent war. Extensions were rarely in accordance with any fixed plan, and recessions introduced further incongruities. For decades, the most obvious, minimum need was a general levelling up whereby all branches and grades of the service comparable with others to which the merit system had been extended should be brought under it likewise. On top of this, however, was the equally urgent need for extending the merit principle to higher levels of the service than had as yet been reached except at a few scattered points. To be sure, certain higher officials, including many chiefs of bureaus and divisions, had for a good while been selected for their professional standing and retained in office during good behavior. Even these, however, were protected by no legal guarantees against removal at pleasure; and large groups of intermediate and higher offices long remained (as some still do) on a frankly political basis—notably in the postal service, the customs service, the internal revenue service, the mint and assay services, the public lands service, the reclamation service, the

immigration service, and the field services of the Department of Justice Every one concedes that officers having to do in any important way with policy-framing ought to be selected with a view to harmonious representation of public opinion—which normally means on a party basis; and, admittedly, candidates for higher posts as a rule cannot be tested, and would not submit themselves for testing, in the same way that clerks and typists are examined. In our entire federal executive and administrative system, however, there are at most—in peacetime—only a few hundred officials who have to do at all significantly with determining policy; there are well-known and adequate modes of ascertaining the fitness of candidates, no less for places of heavy responsibility in the government service than for positions of trust in great banking and business establishments; and—as has so often been urged by the Civil Service Commission, the National Civil Service League, and other interested and informed people—the whole number, with only the exceptions mentioned, properly belong in the non-political competitive system.[1]

Obstacles

Chief obstacles to reform on these lines were—and to a degree still are: (1) reluctance of politicians, especially in Congress, to see so much valuable patronage cut off, (2) fear that the party in power would be able to "freeze" the existing situation, assuring permanent tenure for its appointees, and (3) the fact that in the case of some 15,500 "presidential offices," appointment was made by the president and Senate, so that they could not be brought under the merit system, on the regular lines, without legislation abrogating the Senate's "advice and consent." More than one president (including Taft in 1912 and Coolidge in 1924) recommended removal of the last-mentioned difficulty by legislation vesting appointment to the offices in question in the president alone, or in heads of departments—along with abrogation of the four-year term (or other fixed term) where such limitation persisted. But politicians, particularly in the Senate, were always pretty solidly against the proposal.

Retrenchment in 1933-38

Franklin D. Roosevelt's accession to the presidency in 1933, followed by the launching of the New Deal, opened the way for the merit system to be dealt some heavy blows. The Democrats were back in power after twelve lean years, and the rank and file were hungry for offices. Swift creation of new agencies of recovery and reform multiplied sharply the number of positions to be filled. And in the great majority of cases Congress exempted from the competitive system the hordes of new and transferred employees, leaving the way open for spoils at a juncture in the national life when nothing could have been less desirable. The president himself issued the first executive order on record withdrawing from the classified service positions (in the Bureau of Foreign and Domestic

[1] There is, however, a point of view, shared even by some reputable students of government, that in the long run the best results will be attained by placing squarely upon appointing authorities full and unfettered responsibility for selecting higher (if not also lower) personnel; also that the party system—indispensable in a democracy—cannot survive without patronage.

Commerce) placed therein by a predecessor. To be sure, a few of the sixty or more new agencies—notably the Tennessee Valley Authority and the Farm Credit Administration—voluntarily decided to operate in accordance with merit principles. But as a result of wholesale exemptions by law, and of spoils raids in a good many of the older establishments as well, the service as a whole so far slipped back that the proportion on a merit basis sank from some eighty per cent early in 1933 to hardly more than sixty-three per cent at the middle of 1937. An atmosphere developed in which the merit system was challenged and endangered as in few earlier periods of its history; indeed, there were efforts to repeal state merit laws outright.

Renewed agitation for reform

Of course, things could not go thus badly without stirring protest. Outside of government circles, the Civil Service Reform League, the Civil Service Assembly of the United States and Canada, the National League of Women Voters, and other organizations—and inside such circles, the National Legislative Council of Federal Employee Organizations and the Civil Service Commission—campaigned not only for a reversal of the current trend, but for an extension of the merit system to include every non-policy-framing group or grade. In 1937, the President's Committee on Administrative Management declared for extension of the competitive system, not only upward and outward, but also downward, so as to include skilled workmen and laborers; and in the same year, the President himself, who all along had assured the reformers that the system was in no danger at his hands and would be "extended and improved" during his administration, urged upon Congress that all except policy-making positions be placed under merit arrangements.

Progress in 1938-40—the Ramspeck Act

At the opening of 1938, one would hardly have guessed that the merit system in the federal service was on the eve of its greatest triumphs; yet so it proved. To begin with, the President himself, in that year, not only modernized the civil service rules, but ordered into the classified service all previously exempt non-policy-determining positions—some one hundred thousand—over which he had the necessary power. More important, Congress, in 1940, made up for a good deal of past dereliction by passing the Ramspeck Act authorizing inclusion in the service, at presidential discretion, of *all* positions remaining exempt except those subject to presidential appointment with Senate confirmation and a few other limited groups; and in the following year, 182,000 were brought in by a single order. Except in so far as Congress might weaken in the case of future groups, or withdraw existing ones, the way was open for throwing the ever-widening boundaries of the merit system around substantially all of the federal service, aside, of course, from that portion of it appointed by the president and Senate, including many officials having to do with making policy.[1]

[1] A word should be added about the special case of postmasters. Early in the century, fourth-class postmasters, postal clerks, letter-carriers, and other minor postal

Wartime experience

One of the gravest problems raised by the defense effort launched in 1940, and in still more aggravated form by our later involvement in World War II, was that of manpower—for the armed services, for industry, for agriculture, and likewise, one hardly need add, for the federal civil service. Even the multiplying activities incident to the defense effort necessitated within a year an increase of federal personnel by upwards of half, and from the outset there was fear (although, if the truth be told, *hope* among some politicians) that the machinery for recruiting, testing, and grading potential employees would not prove equal to the task. The burden thrown upon the Civil Service Commission was, indeed, staggering, the more by reason of heavy losses of existing personnel both to military service and to competitive private industry. Not only, however, —by employing every possible channel of publicity in order to attract capable people, by streamlining its procedures, and by drawing upon state and municipal rosters of eligibles placed at federal disposal—did the Commission contrive, for a time, to meet the demands upon it, but it succeeded reasonably well in maintaining the merit standards of the past, the competitive system proving stronger in the emergency than either friend or foe had dared to anticipate. Even before the end of 1940, however, concessions had to be made in an executive order authorizing the Civil Service Commission to suspend, in relation to any position or class of positions, the competitive provisions of the Civil Service Act, appointments under such suspensions to be without civil service "status" and only for the duration of the emergency. Then came the war, and with it, in time, still another doubling of federal civilian personnel—most largely workers in arsenals, navy yards, and similar establishments of military significance. More and more, it became necessary to subordinate, or entirely suspend, age limits and experience requirements, and, in the more congested sectors of the service, to waive various examination procedures completely. And when such expedients failed to meet the insatiable demands of the employing agencies, a new executive order of February

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employees were placed in the classified service, postmasters of the first, second, and third classes, however, being left outside, partly at least because they could be appointed only with confirmation by the Senate. President Wilson bettered the situation by instructing the Civil Service Commission to hold examinations for all such positions and by undertaking to nominate in every case the candidate receiving the highest rating, regardless of politics. President Harding let down the bars to political appointments by reverting to the earlier practice of nominating one of the *three* standing highest, though in 1936 President Roosevelt restored the procedure of President Wilson. Finally, two years later, in the Ramspeck-O'Mahoney Postmaster Act, Congress gave the examination system a statutory basis by placing the then 14,800 first-, second-, and third-class postmasters in the classified service—on a special footing, to be sure, since incumbents continued to be appointed by the president and Senate, yet with indefinite tenure, and with only candidates examined by the Civil Service Commission, and certified as having one of the three highest ratings, eligible to appointment. Even yet, however, congressmen and senators have a good deal of influence upon selections made from the highest three, and persons without such backing are likely to consider it useless to take the examinations. The Civil Service Commission urges amendment of the Ramspeck-O'Mahoney Act to eliminate the requirement of senatorial confirmation.

16, 1942, opened a way for "war service" appointments to many categories of positions with only "pass" (as distinguished from competitive) examinations, and without reference to classified status at all, yet carrying tenure, at the Commission's discretion, for the duration of the war and for six months thereafter. Keeping its hand on the situation as best it could, the Commission nevertheless was obliged to see some departments and special wartime establishments run wild with selection and use of much of their personnel; and in 1943 an investigation conducted by Congressman Ramspeck brought to light abuses—especially in the form of over-staffing—which an act of Congress required the director of the budget to seek to remedy, even to the extent of fixing personnel ceilings for given establishments. Combined with a restraining influence exerted by the findings and recommendations of a Joint Committee on the Reduction of Non-Essential Federal Expenditures, the Ramspeck investigation contributed to a tapering off in 1943 of the rate at which new federal personnel was being added; and, of course, this enabled the Civil Service Commission to recover some of its lost control.

For the time being, the looser practices made necessary by the emergency undeniably weakened the merit system, and at a juncture when it particularly needed to be strong. The concessions made, however, were designed to be only temporary; and one will hardly doubt that in so critical a situation it was more important to secure indispensable manpower (if not the best, then such as could be got) than to insist uncompromisingly upon standards capable of being realized only under more normal conditions. The saving factor was that, in so far as there was a let-down, it was dictated, not by partisanship, but solely by wartime necessity; and it is significant that this was the first major national emergency during which Congress did not exempt large blocks of positions from merit-system requirements.

Reversion to peacetime operations

With hostilities ended, the task arose of getting the service back on a peacetime basis; and it could not be other than slow and difficult. Even if in future the service were to number the predicted million and a half, fully as many more must in the meantime be discharged and returned to private employment, including the many who had been given tenure for the duration and six months after (the duration being construed as up to, not the end of hostilities, but the official proclamation of peace—still, late in 1946, in the uncertain future). At the same time, the government was pledged to receive back former civilian employees who had been drawn into military service, notwithstanding that their former agencies might have been abolished, absorbed, or their functions redistributed. As pointed out above, the total remaining on the payroll had, in one way or another, by October, 1946, been lowered to 2,118,984, leaving more than half a million yet to be "terminated." The other side of the matter was the reinstatement of regular methods of recruitment; and in February, 1946, President Truman issued an order directing the Civil

Service Commission to "resume operations under the civil service rules," although as yet modified to some degree by special regulations for the period of transition. War-service appointments were to end and normal competitive examinations to be revived "at the earliest possible date," and war service appointees (constituting approximately two-thirds of federal personnel on V-J Day) were to be dropped if they failed to compete, or to qualify, in examinations given for permanent appointment. In both permanent and temporary appointments, disabled war veterans were to be given preference.[1]

An overall advance

Notwithstanding the let-down made inevitable by the war, the merit system, over a period of years, has realized truly remarkable gains. The fight to maintain and extend it, however, has to be unremitting. In 1944, for example, there was a serious threat that some 8,500 legal positions, brought into the classified service by executive order in 1941, would be withdrawn from it by congressional action; in 1943-45, a determined effort was made in the Senate to promote the interests of patronage by subjecting to senatorial confirmation all appointments carrying salaries above a given figure; in 1944, Congress passed a Veteran's Preference Act, which, although from one point of view merely perpetuating a long-established policy on veteran preference,[2] relaxed qualifications standards in a very dubious manner; in 1946, it enacted without a dissenting vote, and the president approved, a measure exempting from civil service regulations all positions in the medical unit of the Veterans' Administration. Such reactionary efforts are to be expected, and some will succeed, at least temporarily. Nevertheless, the greatly enlarged number of regular civil servants now having classified status (including no small portion of the wartime increment, and amounting in all to more than ninety per cent), combined with the authority enjoyed by the president to add still further to the number, marks an achievement of the first order in the fight for good government in this country. Notwithstanding all that had happened, the nation faced the postwar era with the merit system more firmly established in law and practice than at any earlier time in its history.

Recruitment Under the Merit System

Personnel agencies: 1. The Civil Service Commission

The primary object of the Pendleton Act and of the long line of later statutes and executive orders extending its provisions to additional groups of civil servants is, of course, to promote appointment on a basis of demonstrated fitness and to assure appointees security of tenure during good behavior. And to assist appointing authorities in finding persons qualified for places in the classified service, the law provides for a Civil Service Commission of three members, unattached to any executive de-

[1] On the federal service in wartime, see L. V. Howard, "War and the Federal Service," *Amer. Polit. Sci. Rev.*, XXXVI, 916-930 (Oct., 1942), and L. V. Howard and H. A. Bone, *Current American Government* (New York, 1943), Chap. IV.

[2] See pp. 319-320 below.

partment or other agency, and appointed by the president with the advice and consent of the Senate (for no fixed term) under the limitation that not more than two of the members may be "adherents of the same political party." As time passed and conceptions of personnel administration broadened, the Commission's functions grew, until nowadays it is found not only framing and administering competitive examinations and certifying lists of eligibles, but classifying civil servants, making rules and regulations providing for in-service training, investigating charges of political activity, keeping service records reported to it by the establishments, administering the retirement law, and doing numerous other things related to the upbuilding and improvement of the federal service. Within the limits of its powers and resources, the Commission has served the country usefully as a central personnel agency over a long period of years; and with powers and resources considerably increased (although without too much assurance of adequate financial support), it gives promise of still greater service in times ahead. A staff of some 1,775 rose to one of 6,900 during the war; under a wartime reorganization effected in 1942, functions are distributed among divisions such as personnel, personnel classification, examining and personnel utilization, retirement investigations, appeals and review, service records, budget and finance, and information. For purposes of general recruiting, there are, in principal cities throughout the country, fourteen regional offices (each under a regional director) and also twelve branch offices; and the general field organization is completed by more than 5,000 local examining boards, made up of postmasters, collectors of revenue, and other national officers who from time to time are called into special service for this purpose by the Commission, without extra pay, and who hold "assembled," *i.e.*, group, examinations at first- and second-class post-offices—about 150 of the number being rating boards charged with conducting chiefly "unassembled," *i.e.*, individual, examinations designed for skilled and unskilled laborers.[1] For recruiting on more specialized lines, the executive order of 1945 already referred to assigned increased responsibility to the particular departments and agencies, with boards of examiners (both in Washington and throughout the country) composed of especially competent employees and charged with conducting tests, under Civil Service Commission supervision, of applicants for more technical positions in their respective agencies.

2. Other coördinating agencies

For the furtherance of personnel work, various executive departments and establishments began a good while ago to appoint personnel directors and other such officials of their own; and an executive order of 1938 prescribed, among other things, that thenceforth a division of personnel supervision and management, under a director, should be maintained in

[1] During the fiscal year ending June 30, 1940 (the last before an abnormal situation was precipitated by the national defense effort), a total of 839,112 persons were examined; 374,890 of the number received a passing grade; and 102,366 obtained appointment. *Annual Report of the U. S. Civil Service Commission* (1940), 131.

every department and major independent establishment, each director to be appointed, under the merit system, by the department or establishment head. Still further to encourage coördinated attack upon personnel problems, these several agency directors, along with representatives of the Civil Service Commission and the Bureau of the Budget, and such additional persons as the president may name, are linked up in a Federal Council of Personnel Administration which by executive order has become an arm of the Civil Service Commission itself. Finally, with a view to tying the personnel system more directly to the chief executive, another order, in 1939, established a Liaison Office of Personnel Management, thereafter a constituent unit of the Executive Office of the President.

Examinations

With the exception of relatively few posts filled through non-competitive, or "pass" examinations, "classified" appointments are made only on the basis of the showing of candidates in competitive tests. These tests are, in general, arranged by the examining and personnel utilization division of the Civil Service Commission, announced in advance in newspapers and on placards displayed in post-offices and other public places, and administered in various cities throughout the country by the examining boards. They may be either written or unwritten, or both. Candidates for the great bulk of positions of a clerical or other subordinate nature are examined in groups, and exclusively in writing; those seeking positions which call for scientific, technical, or other special attainments are rated, either competitively or otherwise (by the regular Commission boards or by the newer examining agencies above mentioned), in respect to experience, education, training, and fitness, as ascertained usually by interviews and testimony rather than by formal written examination. In the preparation of examination questions, the Commission enlists the aid of experienced persons in the several departments, and occasionally of academic and other outside experts.

Contrast of American and British systems

The law requires examinations to be "practical in their character," and, so far as possible, to "relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed." Herein our American system differs considerably from the British. In Great Britain, the competitive principle operates at higher levels of the official hierarchy than with us; public service is looked upon to a greater extent as a profession, and even a career; and the main object of examinations is to recruit the service (especially that portion of it embraced in the "administrative class") from young men and women who expect to spend their lives in public employment, and whose education and native ability make it probable that they will rise from one grade to another and steadily grow in usefulness as administrators. Hence, British examinations are framed mainly with a view to testing the candidate's attainments and capacity. Mathematics, history, philosophy, the classics,

natural science—these and other branches of higher learning receive much emphasis. Even the examinations for positions of a purely clerical nature are framed on these lines, though naturally confined to more elementary subjects. Under the American plan, the object, in the majority of cases, is not primarily to test general attainments and capacity; rather, it is to ascertain the applicant's technical proficiency and present fitness for the kind of work that he seeks. That we occasionally veer cautiously in the direction of the English system is, however, illustrated by the action of the Civil Service Commission, beginning in 1934, in setting up "registers" for junior professional assistants, with examinations of general rather than specific nature and open only to graduates of colleges and universities.

Making appointments

On the registers of the Civil Service Commission, at Washington and in the offices of the district secretaries, are kept the names of all persons who have passed the various examinations with a grade of seventy or above. Appointment, of course, withdraws a name from the list; and after a year the name of any person not receiving appointment is stricken off (unless the Commission, preferring not to hold a new examination, extends the period), to be restored only if another examination is passed successfully. When a clerk or stenographer or other employee in the classified service is needed by a department, the Commission supplies the appointing officer with the names of three persons who stand highest in the appropriate list of eligibles. The officer normally appoints one of the three, and the other two resume their places on the waiting list.[1] If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names. By way of a check on the judgment of the examiners and the appointing authority, every appointee is placed on probation for a period of six months (a year in the case of certain positions if the Commission and department agree). During this time, he can be removed summarily, with no reason assigned except that his work is unsatisfactory. If retained longer, however, he gains "civil service status," with all the security of tenure for which the law provides.

Veteran preference

The free working of the arrangements described is, however, obstructed by certain special provisions. From as far back as the Civil War, honorably discharged veterans, and wives or widows of such, have, under varying regulations, been eligible for civil service positions on terms easier than those otherwise applying; and even before 1941 more than one-fifth of all new federal appointments went to "preference eligibles" on this veteran basis. In anticipation of employment difficulties for discharged veterans after the recent war, President Roosevelt, early in 1944, reaffirmed the general principle of civil service preference for

[1] The submission of three names, making it possible for the candidate highest on the list to be passed over in favor of the second or third, is characteristic of the American system. In Great Britain, only one name is submitted, and the candidate standing highest can be certain of appointment, barring very unusual circumstances.

ex-servicemen; and at his request, Congress, in the following summer, passed the Scrugham-Starnes (Veterans' Preference) Act,[1] not only giving veterans a monopoly of specified kinds of minor civil service jobs (as guards, messengers, etc.) and empowering the president, for five years after the war, to add to the list, but providing also for (1) arbitrarily adding ten points to the earned examination ratings (conditioned by no minimum educational requirement) of honorably discharged ex-servicemen and women with service-connected disabilities, wives of disabled ex-servicemen, and unmarried widows of ex-servicemen, (2) placing all such persons at the top of the appropriate register ahead of all other eligibles, except in the case of professional and scientific positions with entrance salary of over $3,000 a year, and (3) adding five points to the earned examination ratings of honorably discharged ex-servicemen and women not disabled, and giving such persons preference in appointments over all others rating equally high.[2] The idea that the nation should suitably compensate those who have risked their lives in its defense, and should take care of those who have incurred physical or mental injury in doing so, is sound. From the point of view of good administration, it is, however, unfortunate that we have fallen into the habit of discharging this obligation, not alone by pensions, "bonuses," hospitalization, and the like, but by permitting the civil service to be permeated with persons whose claims are in many instances foreign to the considerations that ought to govern when public employees are being selected. The service promises in future, nevertheless, to be heavily pervaded with veteran-preference appointees, capable and otherwise.

Apportionment according to population

Another restriction arises from a requirement of the Pendleton Act which has always had a particular appeal for members of Congress with a weakness for patronage, namely, that "as nearly as the conditions of good administration warrant," appointments in the departments and independent offices at Washington shall be apportioned among the several states and territories and the District of Columbia on a basis of population. The rule is not applied in the case of veterans, and in any event it can be followed in only a rough sort of way, for the reason that eligibles from many Southern and Western states are not sufficiently numerous. Even so, it is responsible for the appointment of many persons of inferior qualification.

Discipline, Removal, Promotion

No lack of disciplinary control

The merit system was introduced not only to improve the methods by which civil servants are selected, but also to afford a security of tenure never enjoyed under the sway of spoilsmen. Opponents of the reform sought to discredit it by arguing that protected employees, feeling themselves safe, would grow careless and inefficient. There was no intention,

[1] 58 *U. S. Stat. at Large*, 387 (1944).
[2] More or less similar arrangements prevail in many of the states.

of course, that such results should be permitted to follow; and while it is probably true that governments are, on the whole, more lenient with those who serve them in civil capacity than are private businesses with persons on their payrolls, the regulations applying to our national service (both classified and otherwise) contemplate full powers of discipline and removal—so long, in the case of the classified service (says one of the rules), as "like penalties shall be imposed for like offenses, and no discrimination shall be exercised for political or religious reasons." Every member of the service is liable to disciplinary action at the hands of some superior authority; and such action may range all the way from mere reprimand to suspension (not to exceed seventy days), reduction in rank and pay, and, in extremer cases, removal.

Removals

For it must be observed that development of the merit system has in no wise abrogated the judicially established principle that the power to appoint normally carries with it the power to remove. What the rules (statutory or otherwise) do is merely to give merit appointees protection against arbitrary and unreasonable removals, such as officials outside the classified service have no legal ground for claiming. In the main, this protection consists in requiring that removals shall be made only—as an act of 1912 puts it—"for such cause as will promote the efficiency of the service," that refusal to contribute time or money to a political party (or, on the other hand, making a contribution, of money at all events) shall in no case be ground for removal, and that removals shall be made in a manner essentially fair to the employee involved. Fairness is construed to require that the employee be furnished with a written statement of the charges against him and that he be allowed reasonable time in which to make a written reply. Unlike employees under most state and municipal civil service systems, however, he has no right to an oral hearing or trial before dismissal takes effect, although he may be allowed one as a matter of grace; nor can he expect any court to intervene in his behalf. Within the substantive and procedural limitations thus imposed, the appointing authority (the head of a department in the great majority of instances) can sever from that part of the service within his jurisdiction any person whom he judges to be incompetent, dishonest, disloyal, or otherwise a hindrance to good administration. The power, however, is exercised all too sparingly.

Immunity from partisan pressures

Included in the protection thrown around members of the classified service is immunity from pressures of a partisan nature. By terms of the Pendleton Act, no classified officer or employee may be solicited anywhere for political funds by a congressman, senator, or federal office-holder—or indeed by any person whatever within a building used by the federal government. There is nothing to prevent such solicitation by non-office-holders, so long as they do not invade a government building for the purpose; and sometimes officers and employees are in this way practically forced into making contributions. No one, however, may be removed,

demoted, or even threatened, by his superior either for making or for refusing to make a political contribution.

Restraints upon partisan activities

In return, members of the service—although, of course, permitted to vote,[1] and likewise to express privately their opinions on political issues—are required to abstain from activities of a partisan character. From 1907, a rule, based on an executive order, has forbidden members of the classified service to take any "active part in political management or in political campaigns"—a regulation construed by the Civil Service Commission to debar them from membership in party conventions, addressing party gatherings, participating in the preparation of party resolutions or platforms, serving on party committees, assisting in getting out the voters on election day, serving as election officers, distributing campaign literature or emblems, arranging party meetings or demonstrations, publishing anything in the interest of a particular candidate or party, and a long list of other activities having a partisan aspect—although not including mere passive attendance at party meetings or making contributions to party funds through persons not connected with the federal government. And, although the Commission (itself without power to remove any one having "civil service status") long complained that infractions which it looked into and reported were frequently ignored by the authorities having power to remove, partisan abuses at the hands of federal civil servants in times past must, in the main, be laid at the door, not of the classified service, but of that portion of the service remaining on a political basis.

The Hatch Act of 1939

To meet this situation, Congress, in 1939, passed the first Hatch Act,[2] designed to prevent "pernicious political activities" on the part, not only of classified federal employees, but of *all* federal employees except only those occupying policy-determining positions. To be sure, restrictions upon soliciting political contributions from classified civil servants were not carried over to the unclassified. But—aside from persons covered by the exception mentioned—all officers and employees of the United States, classified and unclassified alike, were forbidden to take any active part in political management or political campaigns, or to use their official authority with a view to affecting in any way "the election or nomination of any candidate" for a federal office.[3] Officials in the non-classified service may, to be sure, publicly voice their opinions on political subjects and candidates, provided (the attorney-general has ruled)

[1] Many, however, are non-voters because of having no residence except in the District of Columbia. See pp. 522-523 below.

[2] 53 *U. S. Stat. at Large*, 1197. See p. 144 above, where other purposes of the legislation are explained.

[3] At a stroke, the notoriously heavy participation of federal office-holders in national nominating conventions—always a great advantage to any party in power, and to the "Administration" as against other interests in the party—became a thing of the past. More than fifty per cent of the members of the Democratic national convention which renominated President Roosevelt at Philadelphia in 1936 were postmasters, marshals, revenue collectors, district attorneys, and other federal officials.

they do it not as "part of an organized campaign"; members of the classified service may express such opinions only privately. And the act is construed to forbid every civil servant to whom it applies to become a candidate for any elective state, territorial, or municipal office—at all events, if campaigning is involved.

The Hatch Act of 1940

When approving this legislation, President Roosevelt called attention to the fact that it applied to officers and employees of the federal government only, and recommended that it be extended to cover "state and local government employees participating actively in federal elections." The upshot was a second Hatch Act,[1] in 1940, (1) forbidding employees of state and local governments, if engaged in full-time activities financed wholly or in part by federal funds, to use their official authority in such ways as to interfere with any presidential or congressional nomination or election, and (2) forbidding any persons whose *principal* employment is in a federally aided activity (a) to use their official authority or influence for the purpose of interfering with any nomination or election, (b) to coerce, command, or advise any other such employee to make a political contribution or loan, and (c) to take any active part in political management or a political campaign. Not so long ago, the number of persons affected by legislation on these lines would not have been large. The enormously increased interlocking personnel of federal, state, and local governments originating in New Deal undertakings and in defense and war activities has, however, brought some hundreds of thousands of state and municipal employees into a position to feel the force of the new restrictive measures. The troublesome problem of the office-holder in politics has, of course, not been completely solved; in particular, interpretation of "political activities" under the Hatch legislation (which it falls to the Civil Service Commission to make and enforce) offers plenty of difficulties. Much genuine progress has, however, been made.[2]

Promotion and transfer

In the business and professional world, it is recognized that nothing contributes more to the efficiency and morale of a staff than reasonable assurance of advancement in rank and pay, not according to mere seniority, but under flexible arrangements placing a premium on meritorious service. The same holds true in public administration, even though the fact has not always been so clearly perceived. Few problems of our American civil service (national, state, and local) have proved more baffling. Upon what qualities or attainments of the civil servant should promotion be based? How are these qualities or attainments to be measured? Should promotion be by formal examination or simply on the basis of some one's judgment? Should higher positions in a given branch of the service be filled only by promotion, or also by initial appointment from the outside? In the Pendleton Act we read that no classified officer or

[1] 54 *U. S. Stat. at Large*, 767.

[2] L. V. Howard, "Federal Restrictions Upon the Political Activity of Government Employees," *Amer. Polit. Sci. Rev.*, XXV, 470-489 (June, 1941).

employee shall be promoted "until he has passed an examination," or is shown to be specially exempted from such examination"; and a long-standing rule promulgated by the president enjoins that "competitive tests or examinations shall, as far as practicable and useful, be established to test fitness for promotion in the classified service." Both regulations obviously recognize the possibility of promotions without examination; and until within the past decade, while examinations were more or less irregularly employed, the selection of persons for advancement, in the staffs at Washington as well as throughout the country, was commonly at the discretion of administrative chiefs, guided in so far as they chose by such efficiency ratings as might be available. An executive order of President Roosevelt in 1938, however, tightened up the procedure considerably. The Civil Service Commission was instructed to work out and put into operation a general service-wide promotion system, and since that time the Commission itself has been conducting promotion examinations for positions common to more than one department or establishment, while, under the supervision of the Commission's promotion division, individual departments and establishments have been holding examinations for promotion within their respective jurisdictions; and the Commission's direct examinations open avenues not alone for simple promotions, but also for transfers from one branch of the service to another. Efficiency records, too, are kept more systematically than formerly, with ratings (under terms of the Ramspeck Act) reviewed in every department and establishment by a board of review (composed of one member appointed by the Commission, one by the agency head, and one by the employees) and reported in full to the Commission. Actual promotions are likely to be determined by the results of examinations, checked against candidates' efficiency ratings.

Classification, Pay, Retirement

The slow progress of classification

The only way in which a million or two of federal employees can be brought into orderly arrangement and dealt with according to plan is to group them into classes or categories; and the most obvious basis for such grouping is the nature of the function performed or work done. Different and appropriate examinations can then be devised for each group or sub-group, and likewise compensation fixed on a corresponding graduated scale. Notwithstanding, however, that this seems elementary, Congress long neglected to make the arrangements called for. Different departments or agencies had different classifications, or virtually none at all; examinations were given with little reference to uniformity in nature or difficulty of tests; and compensation was provided with little attention to orderly salary schedules, with persons doing the same kind of work equally well receiving different pay, holders of superior positions in one department or bureau receiving less than inferiors in a different one, and women usually paid less than men for doing the same kind and

amount of work. In 1923, a Salary Classification Act was belatedly passed, under which a classification board inventoried the competitive service in the District of Columbia, grouping into classes all positions involving the same types of work, and assigning appropriate salary ranges (with equal pay for men and women), within limits fixed by the act, to each grade or class. The great bulk of the service—outside of the District—was left untouched (except as classified locally or regionally by office heads, more or less on the pattern of the District classification); and so it remained—except, under special statutes, in the foreign and postal services—until 1940, when the Ramspeck Act authorized the president, operating through the Civil Service Commission, to start the service-wide task afresh. Hardly was the job under way, however, before the defense effort and later war so disrupted the normal situation that any classifications undertaken could be on only a more or less temporary basis; and even yet a large part of the task remains to be carried out.

The classification in effect

So far as it has gone, however, general classification works out somewhat as follows. Some twenty-two hundred different types of positions recognized by the Civil Service Commission are thrown into five classes, or "services," each subdivided into grades. At the top is the "professional and scientific service," consisting of positions requiring professional, scientific, or technical training equivalent to graduation from a college or university. Next comes a "subprofessional service," requiring training of the same sorts but less of it and entailing duties subordinate to those of the first class. Below this is a "clerical, administrative, and fiscal service," bringing together minor positions having to do with office, business, or financial activities. Still farther down the scale is the "custodial service," having duties associated with the care of public buildings, the transportation of persons or property, and the like. And at the bottom is the "clerical-mechanical service," including all positions, outside of recognized trades or crafts, involving skill or experience in machine operation, or merely counting, assorting, and similar duties.

Scales of pay

Traditionally, members of the federal civil service in the lower levels have been paid rather better than corresponding employees in private business, but with compensation in the higher brackets not only uneven from branch to branch but as a rule distinctly below that in private business—in the case of most supervisory and technical posts, far below. In the years of the defense effort and war, the competition with private industry became especially keen, and to meet it (together with rising living costs) Congress was obliged to pass a number of acts more or less temporarily raising pay levels. And nothing was clearer than that, with living costs promising to remain high, more permanent increases would be necessary after peace returned. Almost immediately, indeed, after V-E Day, and following an intensive consideration of the matter by congressional committees and other agencies concerned, a Federal Employees

Pay Act[1] was placed on the statute book, giving substantial permanent advances to a large proportion of the members of the service,[2] and supplemented almost simultaneously by a Postal Field Service Pay Act giving 400,000 postal workers a flat increase of $400 annually (in the case of fourth-class postmasters, a twenty per cent advance). Moreover, in the spring of 1946, additional legislation further raised the pay of a million employees (not including postal workers) by fourteen per cent or $250 a year, whichever was greater—though at the same time stipulating that three-fourths of the increased charge on the national budget otherwise entailed should be averted by reduction of personnel by at least 750,000 by July 1, 1947. The effect of these developments was to remove much uncertainty and discontent and to make federal personnel feel that it was working for a considerate and progressive employer. In 1945, too, the forty-eight-hour work-week instituted during the war was reduced, in most branches of the service, by four hours.

Retirement and pensions

Under any scale of compensation thus far prevailing, or likely to be adopted, the great majority of civil servants cannot be expected to put aside much for a rainy day—still less to provide in any adequate manner for old age; and the only satisfactory way of enabling them to be separated from the service, after they have passed their prime, without becoming dependents or public charges is to make them beneficiaries of a system of retirement pensions. From early in the country's history, Congress was generous, and sometimes prodigal, in pensioning war veterans and their dependents. On the other hand, it did not get around to making provision for civil service pensions until less than thirty years ago. Under a Civil Service Retirement Act of 1920 (amended in 1926, 1930, and 1942), however, we now have a compulsory part-contributory pension system applying originally to members of the classified service only, but later extended to substantially all of the unclassified service as well. Five per cent of the salary or other pay of every person covered is deducted; the government adds contributions as required to keep the "civil service retirement and disability fund" in sound working condition; and from the fund retiring annuities and disability allowances are paid on a scale determined by law. As liberalized in 1930, the system gives all beneficiaries reasonable assurance against dependency in ill-health and old age, and brings the United States abreast of the more advanced countries in making provision for the multitude of men and women who spend their lives doing the government's routine work, many of them with little or no prospect of promotion or other betterment.[3]

[1] 59 *U. S. Stat. at Large*, 295 (1945).

[2] The increase amounted to twenty per cent on base pay up to $1,200; ten per cent on that portion of pay between $1,200 and $4,600; and five per cent on any pay in excess of $4,600. This was the first general increase in base rates since passage of the Classification Act of 1923.

[3] The retirement age for railway postal clerks and certain other groups is sixty-two; for city and rural letter carriers, post-office clerks, and other specified groups, sixty-five; and for other employees, seventy. Special retirement arrangements exist

The Organization of Federal Employees

The right to organize conceded

As the country's largest employer, the national government encounters questions of labor relations and labor policy not unlike those confronting corporations and other private employers; and among these are problems raised by the unionizing of civil servants for purposes of collective action and benefit. Organizations of federal employees started, in the postal service, more than fifty years ago; and after considerable controversy over the tactics of some of the unions in pressing for higher pay, an act of 1912 clarified their status and fixed the government's policy with respect to all parts of the civil establishment from that time to this by unconditionally recognizing the right of federal employees to petition Congress or any member thereof, by guaranteeing that membership in employee organizations designed to improve working conditions should not be made a reason for dismissal or demotion, and by conceding the full right of the organizations to affiliate with labor unions outside of the public service, so long as not entailing any "obligation or duty . . . to engage in any strike or . . . to assist . . . in any strike against the United States."[1]

Existing organizations and their activities

In the last thirty years, the unionizing of federal employees has gone forward fairly rapidly. Nine different groups of postal workers now have nation-wide organizations, enlisting in some instances as much as nine-tenths of their potential strength. A National Federation of Federal Employees, dating from 1917, links up more than six hundred local unions of federal employees, composed of persons engaged in various services outside of the separately organized postal branch; the Federal Workers of America, originating in a secession from the National Federation in 1932 and affiliated with the A. F. of L., has grown rapidly, especially among employees of agencies of New Deal antecedents; the same is true of the United Federal Workers of America (affiliated with the C.I.O.), which came into the picture in 1937; and, notwithstanding the opinion of many people that such relationships should not be permitted, thousands of employees engaged in mechanical trades, *e.g.*, printers, carpenters, and plumbers, belong to the regular unions maintained by their privately employed fellow-craftsmen.

Naturally, the service associations are concerned first of all with salary scales, hours, retirement rights, and other matters relating to the well-being of their own members. Naturally, too, the demands which they make are sometimes not wholly in the general public interest. As a rule, however, they can be counted upon to endorse merit principles and to

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for certain groups, *e.g.*, in the foreign service. Dating from 1916, a workmen's compensation act authorizes compensation for employees killed or injured in the discharge of their duties. For some years, the Civil Service Commission has been urging that federal employees be made eligible also for unemployment compensation benefits.

[1] 37 *U. S. Stat. at Large*, 555.

promote employee morale, and sometimes they show genuine interest in improving the quality of work performed by their members. The things for which they are most criticized are their lobbying activities in Washington, their occasional excursions into politics (chiefly by way of working against unfriendly congressmen seeking reëlection), and their relations with labor organizations outside the service—although it must be added that the no-strike pledge contained in the constitutions of most of the organizations has been kept faithfully, so that our national government has almost wholly escaped defiance of its authority by its own employees such as has at times seriously embarrassed the governments of some European countries.[1]

The civil service as a career

A great deal of water has gone over the dam since genuine civil service reform had its beginning, a little over sixty years ago. The gains have been enormous; yet, as the federal service emerges from the harrowing experiences of the war period, a good deal remains to be done. Perhaps the task for the future can best be generalized as that of surrounding the service with conditions still more favorable for attracting into it talented young men and women aspiring to make it a career. Our experience with spoils politics caused us for half a century to think of civil service reform in hardly more than a negative sort of way, *i.e.*, in terms of frustrating the spoilsman, while the more positive objective of enabling the public services to get their full share of capable recruits was pretty much lost to view. The battle with the spoilsman cannot be relaxed, for he is still with us. But the road to opportunity in the federal and other services must be made smoother and more alluring—by more positive and effective education pointed in that direction, by better examining techniques, by higher pay, by opportunities for extensive and intensive training after entering service, by a system of promotions inviting greater confidence, and in other ways which will readily occur to readers of the foregoing pages. Studies made some years ago indicate that the "prestige value" of the federal service, while still low enough, is higher than that of state and municipal services—in other words, that the public has more respect for and confidence in the national service than in the others. Too long, however, the impression prevailed (and not without reason) that appointment to even the federal service led nowhere and, except as a makeshift, was to be shunned by young people of energy, ambition, and capacity. Today, the situation is changing. Increased opportunities for advancement to higher levels in the service have been opened; the importance of administration as a branch of government was never more fully appreciated; the subject, in all of its aspects, has

[1] In several 1947 appropriation bills, Congress in 1946 laid down a new requirement to the effect that before receiving current pay checks federal employees must execute affidavits that they are not members of any organization of federal employees which "asserts the right to strike against the government of the United States"; and the requirement has since been construed as applicable to all federal civilian employees.

never been studied with equal intensity by officials, investigating commissions, research bureaus, and—quite as significantly—teachers and students in colleges and universities. From an almost uniform attitude of indifference, openly encouraged by vocational advisers, the collegiate youth of the country is being stirred to genuine interest, not only in administration as a subject of academic study, but in public service as a personal challenge and opportunity. And there is no more hopeful sign than this; for it is the young men trained at Oxford, Cambridge, London, and more recently the provincial universities, who have brought the British civil service to its recognized rating as the best that the world has known.[1]

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[1] In the past two decades, a long list of American universities and colleges have developed facilities (courses, programs, fellowships, etc.) for training for public service, on either a pre-entry or an in-service basis—developments which will be found surveyed and interpreted at length in G. A. Graham, *Education for Public Administration* (Chicago, 1941).

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CHAPTER XXI

THE NATIONAL JUDICIARY

A separate system of national courts

The crowning defect of the government under the Articles of Confederation, wrote Alexander Hamilton in *The Federalist,* was the "want of a judicial power"; and in providing for "a more perfect union," the framers of the constitution declared in the preamble their purpose to "establish justice," and made provision for a system of national courts complete in itself, separate from the state courts, and deriving existence and jurisdiction solely from the national constitution and statutes.

If to "establish justice" meant to insure the security of rights under the national constitution, it was essential to have national laws and treaties administered uniformly throughout the country as the "supreme law of the land." And this could be attained only through a series of tribunals established and maintained by the same authority that enacts the laws and makes the treaties. If the interpretation of the national constitution, laws, and treaties had been left to the courts of the several states, we might have had as many different final interpretations as there are states. The supremacy of national law, moreover, has been insured by placing its ultimate interpretation and enforcement in one national court paramount to the other national courts and to the highest state courts.

The judiciary article

For these and other reasons hardly less important, the makers of the constitution decided upon a national judiciary and put into the instrument a separate article—the third—commonly known as the judiciary article. Without going into such matters as the number, composition, and interrelations of the national courts, this article provides simply that the national judicial power "shall be vested in one supreme court and in such inferior courts as Congress may from time to time ordain and establish." With remarkable conciseness and lucidity, it indicates also the limits or range of this national judicial power; and this last-mentioned matter may well engage our attention at the beginning of our study of the subject.

Scope of the Federal Judicial Power

Federal jurisdiction:

In the domain of justice, as in all others, the national government has only limited and delegated powers, which means that the national courts have jurisdiction over only those classes of cases specified in the constitution, or implied in it, while the state courts have jurisdiction over all others. As a glance at the judiciary article will show, the federal judicial power extends to some cases because of the nature of

the matter in controversy, and to others because of the status or residence of the parties concerned. The first of these two classes of cases includes

1. On ground of subject-matter

(1) all cases in law and equity arising under the constitution, laws, and treaties of the United States, and (2) all cases of admiralty and maritime jurisdiction. That is to say, whenever, in any lawsuit, a right is asserted which is based upon some provision of the national constitution, laws, or treaties, or when it is asserted that some right secured by the national constitution, statutes, or treaties has been violated by the enactment of a state law or municipal ordinance, the case may be commenced in, and decided by, the federal courts; or, if commenced in a state court, it may, before final decision, be removed to the federal courts. In other words, whenever it becomes essential to a correct decision of a lawsuit to obtain an interpretation or application of the national constitution, laws, or treaties, the case comes within "the judicial power of the United States." Cases of "admiralty and maritime jurisdiction," also falling in this class, have to do with offenses committed on shipboard, and with contracts which by their nature must be executed partly or wholly on the high seas or "navigable waters of the United States," *e.g.*, contracts for the transportation of passengers and freight, marine insurance policies, contracts for ships' supplies and seamen's wages, and actions to recover damages for torts and other injuries. In time of war, prize cases, too, are included.

2. On ground of the nature of the parties

The second class of cases comes within the scope of the federal judicial power because of the character or residence of the parties, and includes (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between citizens of different states; (4) disputes between citizens of the same state claiming lands under grants from different states; and (5) cases to which a state is a party. From this last class, however, the Eleventh Amendment excepted suits brought against a state by citizens of another state or by citizens of any foreign state. Such cases, if triable at all, fall exclusively within the jurisdiction of the state courts.[1]

Exclusive or concurrent jurisdiction?

The mere fact, however, that certain groups of cases are named in the constitution as falling within the judicial power of the United States does not necessarily mean that they are thereby wholly removed from the jurisdiction of the state courts—because the constitution gives the federal courts no *exclusive* jurisdiction whatever. Congress alone determines by law which of the cases specified in the constitution shall be handled exclusively by the federal courts; all others may be tried in state courts. Under existing national statutes, the federal courts have *exclusive* jurisdiction of all civil actions in which a state is a party, except those between a state and its citizens (or of course any against a state by citizens of another state); also of the following cases arising under

[1] On the Eleventh Amendment, see pp. 31-32 above.

either the constitution or national statutes: crimes, penalties, and seizures, and all admiralty, maritime, patent-right, copyright, and bankruptcy cases; and, further, of all suits and proceedings against ambassadors or other public ministers (or their servants), and against consuls or vice-consuls. Concurrent jurisdiction is enjoyed by the federal and state courts over practically all other cases falling within the judicial power of the United States, which means that the party instituting such a case (*i.e.*, the plaintiff) has the option of commencing his action in a court of his own or the defendant's state, or on the other hand of bringing it in a federal court.

How cases get into the federal courts

The existence at all times of thousands of cases on the dockets of the federal courts may be accounted for in one or another of three different ways. By far the greatest number are cases begun and ended in a federal court because that is the only forum in which they can be tried at all. Other cases have been commenced in a state court, but have been transferred, at the request of the defendant, to a federal court to be finally disposed of there. Such removal is permissible (1) when the parties reside in different states, or (2) when, even though they reside in the same state, some right or immunity is called in question which is based upon the national constitution, laws, or treaties. In either event, the removal must take place before the state courts have rendered final judgment. Such removals are permitted in order to place the defendant on an equal footing with the plaintiff (who had the choice between the federal and state courts when he brought his suit), and especially to protect the defendant against the effects of local prejudice. Lastly, cases get into the federal courts as a result of appeals from the decision of the highest court of the state where the action started. If, in deciding such cases, the state court finds it necessary to uphold or deny any right claimed under the national constitution, laws, or treaties, the defeated party may take an appeal directly to the federal Supreme Court, which is thus given the last word in passing upon national rights.

Kinds of Cases Tried

1. Criminal law and cases under it

The cases appearing in the federal courts in one or another of the ways just explained fall into two great divisions, criminal and civil. The only criminal jurisdiction belonging to the federal courts is such as has been conferred by act of Congress; and Congress, of course, has no authority to define crimes and fix penalties except as it is derived, directly or indirectly, from the constitution. In only five kinds of cases has that instrument directly conferred this authority, namely, (1) piracies and felonies committed on the high seas; (2) offenses against the law of nations, or international law; (3) counterfeiting the securities and current coin of the United States; (4) treason against the United States; and (5) offenses committed in the District of Columbia, in any other place wholly under national control (such as a fort or an arsenal),

or in the territories and dependencies, where Congress has ample authority to define crimes and determine their punishment.

Statutory crimes

If, however, the criminal dockets of the federal courts contained only cases falling within these five classes, the criminal jurisdiction of these tribunals would be quite unimpressive. Actually, the power of Congress to define crimes and provide for their punishment is very much broader than the above enumeration would indicate; for whenever Congress has authority under the constitution to enact a law upon a given subject, it has the implied, or resulting, power to make that law effective by providing that infractions thereof shall be treated and punished as crimes. The power to establish post-offices, for example, carries with it the implied power to punish the crime of robbing the mails. Invoking its power to regulate and protect interstate commerce, Congress in 1934 passed a series of laws materially enlarging federal jurisdiction over acts that are originally state criminal offenses, but which often assume an interstate character because of the flight of the perpetrator.[1]

Criminal procedure

Procedure in federal criminal cases is regulated in a large measure by those provisions of the early amendments designed to protect the rights of persons accused of crime by surrounding them with the safeguards against arbitrary and irregular prosecutions that were inherited from the English common law and embodied in the English Bill of Rights of 1689.[2] No civilian, for example, may be put on trial for a federal offense (except a misdemeanor) unless he has been indicted by a grand jury, nor be compelled to testify against himself in any criminal case, nor be deprived of life, liberty, or property without due process of law. Persons accused of crimes are entitled to a speedy and public trial by an impartial jury;[3] to a trial in the vicinity where the crime was committed, in order to facilitate the obtaining of witnesses; to be furnished with an exact copy of the indictment; to have witnesses subjected to cross-examination in their presence; to have compulsory process for obtaining witnesses; to have the assistance of counsel for their defense; and to be admitted to bail in a reasonable sum, pending their trial. Furthermore, no person may again be subjected to trial in a federal court for the same offense if he has once been acquitted on the charge. But the same offense may be punishable by state authorities in the state courts and by federal authorities in the federal courts. This is true, for example, in cases of fraud when use has been made of the mails, and of theft from freight-cars moving in interstate commerce. And the

[1] With jurisdiction restricted to their respective states, state authorities have often been handicapped by lack of any right to cross state lines in pursuit of persons accused or suspected of crime. Federal penal legislation of the sort mentioned above has aided in bringing about a closer coördination and coöperation of state and federal criminal authorities.

[2] The only provision in the constitution's "bill of rights" relating to *civil* procedure is Art. VII, which guarantees trial by jury in all civil cases in which the amount in controversy exceeds twenty dollars.

[3] The right to trial by jury does not extend to petty offenses, and may be waived, under certain circumstances, even in felony cases. See p. 104 above.

fact that a person has been successfully prosecuted for such an offense in a state court is no bar to prosecuting and convicting him in a federal court; for in such cases the defendant is being tried in different jurisdictions for offenses against different sovereignties.

Criminal prosecutions are instituted and trials conducted, on behalf of the government, by district attorneys appointed by the president, on recommendation of the attorney-general, for each of the eighty-four districts into which the states are now divided; and the territories have their district attorneys serving in a similar capacity. In exceptionally important and complicated cases, a special district attorney may be appointed to represent the government.

2. Civil cases:

Civil cases constitute the second great category of actions tried in the federal courts. On the basis of the law administered, three distinct sorts of civil cases must be distinguished—cases at law, cases in equity, and admiralty cases.

(a) Cases at law

Cases at law comprise mainly actions arising out of civil wrongs, called torts, and actions based upon contracts, either express or implied. They rest upon some principle of the old common law carried over from England, or upon some state or federal statute; and they are tried in accordance with the rules of the English common law, or modifications thereof provided for by state or federal statutes. In most actions at law, the redress sought is money damages, and the remedy is granted only after the wrong has been committed or the contract has been broken. There are many cases, however, in which the granting of money damages to the injured party is an inadequate remedy, for the very good reason that the defendant may refuse to pay the judgment obtained against him and has no property which can be seized and sold to satisfy the judgment. Or it may be impossible to estimate the amount of damages that would result from the non-fulfillment of an agreement. In still other cases, a contract may be involved—for example, a deed conveying title to real estate—which is perfectly regular and legal on its face and is executed with due formality, although the circumstances surrounding its execution may have been tainted by fraud, intimidation, or undue influence.

(b) Cases in equity

In order to do "equity," or "substantial justice," in such cases as these, the "equity jurisdiction" of English and American courts has been built up through the centuries as a supplement to the usual law remedies. Industrial strikes often result in injury or destruction of property for which no adequate money damages can be collected. In equity proceedings, a federal court may, by issuing a writ of injunction, command strikers and their sympathizers to refrain from injuring or destroying property belonging to an employer.[1] Any violation of the terms of the injunction constitutes an offense known as contempt of

[1] An injunction is a writ issued by a court (federal or state) commanding an individual, a group of persons, or a corporation, to do, or to refrain from doing, certain acts described in the document. The Norris-LaGuardia Act of 1932 greatly restricted the use of injunctions in industrial disputes. See p. 448 below.

court, which may be punished severely and summarily by the court whose jurisdiction has been disregarded, in most cases without benefit of jury trial for the offending parties. Again, when it is impossible to estimate the amount of damages that might result from a breach of contract, as when the owner of a valuable race-horse has agreed to sell that horse—the only one the purchaser wants—a court, in equity proceedings, will, by a decree of "specific performance," order the owner to carry out the agreement. In the third type of cases, a court, in equity proceedings, may entirely set aside a deed for the transfer of property on the ground of fraudulent or other improper circumstances surrounding the execution of the instrument.

(c) Admiralty cases

Lastly, the same federal judges that administer common law and equity also administer admiralty and maritime law in cases of tort and contract connected with shipping and water-borne commerce on the high seas or "navigable waters of the United States." Such cases are tried and determined in accordance with the highly technical and peculiar rules of the admiralty code inherited from England and modified by acts of Congress. In prize and piracy cases, the judges sitting in admiralty courts also administer international law.

The courts as business managers

In their handling of cases at law and in equity, the federal courts in recent decades have increasingly become the managers of important businesses, through their right to appoint receivers to take charge of and manage property, pending litigation, for the benefit of the owners, stockholders, or creditors. As a result, the courts have found themselves indirectly engaged in the operation of railways, municipal transportation systems, mines, factories, and various other business enterprises; and in so doing they are required to pass upon questions of business administration, service, and personnel, supervise accounts, authorize bond issues and sales of property, and intervene in controversies with employers and labor unions over wages and working conditions.[1] In this capacity, "they are as truly the business managers of the properties or enterprises which they are judicially guarding as if the judges bore the title of president or superintendent."[2]

Structure of the Federal Judicial System

From the nature and scope of the national judicial power, we turn to the system of courts in which this power is exercised, finding as we do so three major facts: first, that the "federal judicial system," in the proper sense, comprises three grades or levels of tribunals; second, that (as already indicated) only the Supreme Court at the top is directly provided for in the constitution; and third, that all courts on the lower levels have been established and their jurisdictions defined by Congress in statutes starting with the Judiciary Act of 1789, which is still the

[1] Sometimes also they have custody of property of persons held incompetent to manage it.

[2] W. MacDonald, *A New Constitution for a New America*, 192.

statutory basis of the present organization.[1] We find also that no federal judges are elected, but rather that all are appointed by the president with the advice and consent of the Senate, and that all hold office during good behavior and are removable only by impeachment.[2]

1. District Courts

The hierarchy starts at the bottom with district courts, of which eighty-four are distributed over the country (with several also in the overseas territories[3]), in order to bring them within reasonably easy reach of litigants. A less populous state is likely to form a single district, but a more populous one to be divided into two or three. And the number of judges attached varies from one to as high as thirteen, according to the volume of business to be taken care of. Cases triable in a district court are of many different sorts. All federal crimes are prosecuted there, and all proceedings instituted under the anti-trust laws. Admiralty cases, suits arising under the internal revenue, postal, copyright, patent, and bankruptcy laws, or under any law regulating commerce, as well as cases removed from a state court before final judgment, are included also. In some instances, appeals may be taken directly to the Supreme Court; but as a rule they go first to a circuit court of appeals. The district court itself has no appellate jurisdiction (except in a qualified sense on rulings by United States commissioners appointed by a district judge to assist in enforcing the criminal laws).

2. Circuit courts of appeals

Next in order come the circuit courts of appeals, of which one is found in each of ten great judicial circuits into which the country has been divided, with an additional one in the District of Columbia.[4] District judges may be called in to serve, but usually a court of appeals is composed of circuit judges, varying in number from three to seven, according to the amount of litigation to be anticipated. The purpose of the courts of this grade is, of course, to relieve the Supreme Court of a vast amount of appellate jurisdiction which it would not have time to handle; and,

[1] There are, however, scattered federal courts apart from those constituting the "federal judicial system." The latter, provided for in the judiciary article, are often called "constitutional" courts; those outside—being created and regulated by Congress under powers derived mainly from other parts of the constitution—are, by distinction, known as "legislative" courts. Examples include all of the federal courts in the territories and the District of Columbia, a Customs Court, a Court of Customs and Patent Appeals, a Court of Claims, a Tax Court created by the Revenue Act of 1942, and, for the time being, an Emergency Court of Appeals set up in 1942 to hear appeals arising under orders or regulations of the Office of Price Administration. In creating such courts, providing for the appointment of judges, fixing judicial terms and compensation, and prescribing jurisdiction and procedure, Congress has an almost completely free hand.

[2] Nine federal judges have been impeached; of the number, four were convicted and removed, while the proceedings against a fifth were dismissed when he resigned on the eve of his trial. A few judges have resigned, and so escaped, when impeachment proceedings seemed imminent. Partisan considerations, which might conceivably enter into impeachments, have not been conspicuous except in the cases of Judges Pickering and Chase, impeached during the presidency of Jefferson.

[3] One each in Alaska, Hawaii, Puerto Rico, the Virgin Islands, and the Panama Canal Zone.

[4] District courts started under the Judiciary Act of 1789; the circuit courts of appeals were introduced in 1891.

with exceptions as indicated, all appeals from district courts must go to the appropriate circuit court, whose decisions are normally final, although under defined conditions important cases may be farther appealed to the Supreme Court. In order, however, to maintain the Supreme Court's ultimate jurisdiction in matters of great economic or constitutional moment, cases involving the anti-trust laws, the enforcement of orders issued by the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board, the constitutionality of state legislation, and a few other major matters, may by-pass the circuit courts completely, going at once from a district court to the supreme tribunal.[1] A circuit court of appeals has no original jurisdiction.

3. The Supreme Court:

At the top of the system—in a sense, at the head of the entire judicial organization of the United States—stands the Supreme Court, first organized under the Judiciary Act of 1789 with a chief justice and five associate justices, but now consisting of a chief justice and eight associates. Although receiving slightly higher compensation,[2] the chief justice has, in reality, no more legal weight or influence in deciding cases than any of the associate justices. He is simply the presiding judge at sessions of the Court, acting further as a sort of chairman in assigning to his associates the task of writing the Court's decisions in cases that have been heard and discussed. His position in this respect does not, however, exempt him from performing his share of this kind of work. In all, thirteen chief justices have presided over our highest judicial tribunal since its foundation.[3] The outstanding figure in the list is John Marshall, who headed the Court for more than thirty years (1801-34), and who, because of his forceful and winsome personality, his firm and clear convictions in favor of a liberal construction of the powers of the national government, and the masterful logic and lucidity of style with which those convictions were expressed in many a notable decision during the formative period of our national institutions, is justly regarded as "the second father of the constitution"—even though some of the constitutional interpretations for which he is famous are not in favor with the Court as it stands today. There have been associate justices also whose personality and influence upon our constitutional history entitle them to mention, notably Joseph Story (1811-45) and Oliver Wendell Holmes (1902-32).

(a) Composition—chief justice and associates

(b) Sessions and quorum

Regular and public sessions of the Supreme Court are held annually in the new and impressive Supreme Court building adjacent to the Capitol, starting the first Monday of October and lasting through May. Six

[1] The need for unifying and equalizing the work of the lower federal courts was met in part by the creation, in 1922, of a Federal Judicial Conference, and farther in 1939 by the establishment of an Administrative Office of United States Courts. See *Annual Report of the Attorney-General* (1940), 3-4, 19-23.

[2] $25,500 as compared with $25,000.

[3] The present incumbent is Fred M. Vinson, succeeding Harlan F. Stone, deceased, in June, 1946.

justices must be present at the argument of a case, and any decision arrived at, to be effective, must be concurred in by a majority of that quorum—in other words, by a minimum of four justices. If, in a given case, the requisite majority cannot be obtained for a decision, or the justices are evenly divided, a rehearing may be ordered; although an even division on a question of reversing a lower court has the effect of upholding the earlier finding.

(c) Decisions and "opinions"

Supporting every decision is a more or less extensive "opinion," prepared (after the case has been heard and discussed) by whatever member of the Court may have received the assignment, and setting forth, with pertinent citations, the line of reasoning pursued; and any justices who concur in the result, but have arrived at it by a different approach, are permitted to contribute single or joint "concurring" opinions, while any one or more unable to concur may submit single or joint "dissenting" opinions. All decisions and opinions, moreover, are regularly published by the government for the benefit of the legal profession and general public, in a series of volumes, known as *United States Reports*,[1] prepared under the editorial supervision of a reporter of decisions appointed by the Court. Decisions are handed down by the Supreme Court only in cases coming before it in one of the ways about to be indicated. Early in its history, the Court took the position, which it has ever since maintained, that it would under no circumstances render "advisory opinions" on general questions or hypothetical cases submitted to it by either Congress or the president.

(d) Jurisdiction

Cases come before the Supreme Court in one of two ways. A few, *i.e.*, "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," may be commenced there, and over these the Court is said to have "original" jurisdiction. And since this is by specification of the constitution itself, the list may not be extended by Congress, which would be tantamount to amending the constitution in an unconstitutional manner. The great majority of cases, however, come to the Court rather on appeal, either from a lower federal court or from a highest state court when some federal question is involved.[2] Within the limits of various congressional regulations, the Court has wide discretion in determining what appealed cases it will actually receive and hear, as also what cases it will, on its own initiative,

[1] Reports of decisions handed down before 1882 are usually cited by the name of the reporter who prepared them for publication, as follows: Dallas, 4 vols., 1790-1800; Cranch, 9 vols., 1801-15; Wheaton, 12 vols., 1816-27; Peters, 16 vols., 1828-42; Howard, 24 vols., 1843-60; Black, 2 vols., 1861-62; Wallace, 23 vols., 1863-74; and Otto, 17 vols., 1875-82. Since 1882, the *Reports* have been designated by serial number only, beginning with Volume 107, and are cited as 107 U. S., etc.

[2] In December, 1946—on petition of the federal government and with the assent of the defendants—the Supreme Court agreed to take jurisdiction at once over an appeal by the United Mine Workers and its president, John L. Lewis, against a decision of the federal district court for the District of Columbia finding the defendants guilty of contempt of court. Normally, the case would have gone first to a federal court of appeals; but it was considered that, in the critical situation existing, this would involve undesirable delay.

call up for review by writ of *certiorari* from a lower court; and in the exercise of this discretion lies no small part of its power.

The Supreme Court and the Constitutionality of Statutes and Executive Acts

The Court as defender of the constitutional system

In deciding cases, all courts have to consider whether rights, powers, and interests in controversy are claimed under laws that are themselves consistent with constitutional provisions; and it becomes the most important and distinctive function of the federal Supreme Court to pass in the last instance upon the constitutionality of state laws and of acts of Congress. In performing this function, it serves as the ultimate defender, on the one hand, of the reserved powers of the states and, on the other, of the supremacy of national law—the supreme guardian, indeed, of the federal constitutional system itself. How and why judicial review arose, especially as practiced by the Supreme Court, and the significance of its development for the building of a strong national government, have been touched upon at an earlier point in this book.[1] The fact was noted that the constitution nowhere expressly confers the powers involved, and that there have always been people who looked upon the exercise of them by the courts as sheer usurpation. But it was observed, also, that no less authorities than Alexander Hamilton and John Marshall believed that, in hearing and deciding cases, the courts must necessarily have an eye to the constitutional validity of any state or federal laws involved; and the opinion was asserted, not only that under a divided system of government such as ours, court review of legislation was historically inevitable, but that it is entirely consistent with the spirit of the constitution and indeed, in our situation, indispensable.

Review of state statutes and actions

The truth is that the great majority of appealed cases finally reaching the Supreme Court turn upon, or at least involve, the constitutional validity of some state statute or executive action or of some federal statute, treaty, or executive act. State statutes or executive actions come in for review normally when a highest state court, in a case before it, has held that a given statute or action is consistent with the constitution and laws of the United States as the "supreme law of the land," but the defeated litigant believes otherwise and causes the issue to be carried on appeal to Washington. Even a provision of a state constitution itself may be challenged. And what happens is that the federal Supreme Court, if it takes jurisdiction of the case, scrutinizes the constitutional issue at stake and either sustains the state court's finding or reverses it, in which latter case the offending statute (or specified section thereof), or executive action, becomes of no further effect. In earlier days, this was the form which federal judicial review most commonly took; and to the consternation of states' rights people—and later of people interested in

[1] See pp. 41-42 above. On earlier developments, see E. S. Corwin, "The Establishment of Judicial Review." *Mich. Law Rev.*, IX, 102-125, 283-316 (Dec., 1910, Feb., 1911).

advanced labor and other social legislation by the states—long lists of acts of state legislatures were given the *coup de grâce.*

Review of federal laws and actions

But judicial review operates also, within the confines of the federal government itself, when some dissatisfied person, corporation, or group considers itself injured by a measure of Congress, an executive act, or even a treaty provision, and goes into a federal court to prove that a right or immunity supposed to be protected by the constitution has been ignored. The question is likely to come down, of course, to that of whether Congress or the executive had proper power, under the constitution, to pass the law or perform the act prompting the protest; and here again, if, after hearing a case brought up on appeal from a federal district court or court of appeals, the Supreme Court concludes that the plaintiff's contention is sound, it decides accordingly, reversing any lower decision to the contrary and making the disputed legislation or executive action as if it had never existed. Needless to say, a Supreme Court ruling on the constitutionality of either a state or a federal statute or executive action remains the authoritative law on the matter as long as the Court does not itself reverse or modify its position, as sometimes happens.

Resulting criticism

Of course the Supreme Court has been responsible for invalidating only a very small percentage of the thousands of measures passed by Congress and the state legislatures since 1789—in the case of congressional acts, a total of fewer than seventy. In a good many instances, however, the laws stricken down have been of major importance, as for example when a five-to-four decision denying the power of the national government to tax incomes[1] rendered such taxation impossible until after the adoption of a constitutional amendment (the Sixteenth), or when the National Industrial Recovery Act of 1933 and other significant New Deal legislation[2] was invalidated. Frequently, too, as in the instances cited, the measures involved have arisen out of, or been surrounded by, bitter political controversy. It is no longer worth any one's breath to argue against the power and right of the Supreme Court to exercise the functions of review which it has developed. But it remains open to people who do not like the consequences to criticize the manner in which the Court performs these functions, to attack the point of view and philosophy animating various groups of justices, and even to cast aspersions upon the motives and discernment of the president in selecting the justices in the first place.

Influence of the predilections of justices

For it must be remembered that what the Court says and does at any given time depends very largely upon who the justices are, upon their temperaments, and upon their characteristic attitudes and views. To be sure, they are supposed to be above personal animus, partisan or otherwise; and to the end that they may enjoy all possible independence and

[1] Pollock *v.* Farmers' Loan and Trust Co., 158 U. S. 601 (1895). See p. 32 above.
[2] See pp. 400, 417 below.

security, they are guaranteed tenure during good behavior, paid liberal salaries which may not be reduced during their period of service, and accorded deference befitting members of what Americans have been pleased to regard as "the most august tribunal on earth." But they remain human beings, and bring to their posts strong political, social, and economic predilections—to which they, indeed, sometimes owe their appointment. And in interpreting and applying words and phrases—"regulate," "commerce," "due process of law"—which have come down in some instances from the eighteenth century, they can hardly fail to be swayed, consciously or unconsciously, by their social philosophies and general outlook on affairs.

The Court as a maker of policy

It must be remembered, too, that when interpreting and applying the language and spirit of the constitution, the justices are acting not merely as a judicial body settling lawsuits; often as not, they are also deciding questions of public policy—even though matters of that sort are supposedly for the political branches of the government, *i.e.*, Congress and the executive, to decide. Thus when, after Congress has passed an act and the president has approved it, the Court intervenes in a case brought under the measure and overthrows it, it in effect is ruling that the policy embodied in the act shall not, after all, be the policy of the country—at least not until a perhaps differently constituted Court sometime later takes a different view; and the ground for such intervention is that, in the Court's opinion, the constitution does not mean what Congress and the president thought it did. "We are under a constitution," remarked former Chief Justice Hughes many years ago, "but the constitution [and therefore what can lawfully be done under it] is what the judges say it is."[1] Mr. Justice Frankfurter has put the matter even more tersely by saying: "The Supreme Court is the constitution."

The Court controversy of 1937

In many periods of the country's history, when the Court's constitutional interpretations had the effect of denying to the national government (or to state governments) power to deal with public problems on which action was desired and attempted, the tribunal has seemed to a good many people to be exalting its own views of some policy above those of the constitutionally ordained policy-determining organs of government, and in so doing to be exercising a veto, or "negative dictatorship," of wholly unwarranted character; and especially was such feeling likely to run high, when, as occasionally happened, the Court's adverse conclusions were reached by a five-to-four vote of the justices, yielding what have sometimes been referred to disparagingly as "one-man" decisions—though decisions just as binding as unanimous ones.[2]

[1] Mr. Hughes was not a member of the Court when he said this.

[2] Although reversals by such close decisions have, in all, not exceeded a score, they have been relatively more numerous in later years, and some have had the effect of overthrowing laws in which large numbers of people were interested. It has sometimes been proposed that they be obviated by requiring more than a bare majority (say two-thirds) of the justices to concur before overruling a statute or any part thereof; and in pursuance of this objective, constitutional amendments have repeatedly been

Such a period was the early portion of Franklin D. Roosevelt's second administration, marked by one of the most heated controversies in our national history with respect to the judiciary more or less in general, but with the Supreme Court as the principal focus. A Court consisting largely of elderly members carrying over from a period of Republican domination in national politics had invalidated one basic New Deal recovery measure after another, to say nothing of a New York minimum wage act; and in circles of more liberal persuasion strong demand arose that something be done to reverse the situation and clear the path for the newer legislative programs. Various possibilities were open. The Court might be stripped of its power to declare acts of Congress unconstitutional, and this was advocated by some. But President Roosevelt, who felt as strongly as any one that the Court, as constituted, was badly out of touch with social and economic realities ("living in horse and buggy days") and had become an impediment to the solution of pressing national problems, approached the issue from a different angle, looking rather to Court rejuvenation and liberalization through the infusion of new blood—making, as he said in a startling message to Congress in February, 1937, "the judiciary as a whole (and the Supreme Court in particular) less static by the constant and systematic addition of new blood to its personnel." There were at the time in the entire federal judiciary thirty judges who were over seventy years of age, and in the Supreme Court six. Congress, it was proposed, should authorize the appointment of an additional judge for every federal judge who, having reached the age at which such judges may retire on full pay, *i.e.*, seventy, should fail to retire within six months—the new judges to serve concurrently with the old. Should no Supreme Court justices retire, the total number on the bench would become fifteen, which in any case was to be the maximum.

Charges and counter-charges

The proposal entailed no constitutional difficulties; the power of Congress to regulate the number of judges in all federal courts, and of the president and Senate to appoint them, is incontestable. Its wisdom and expediency, however, as well as the motives behind it, became subjects of stormy discussion in press, on platform, over the radio, and especially in Congress. The President was sharply charged with planning to "pack" the Supreme Court with new members of his own way of thinking, and thereby in future to control its decisions, which, in turn, it was alleged, would lead to the reversal of earlier decisions restricting national and state powers and, in effect, to amending the constitution and reconstructing the system of government in an unconstitutional manner, with the states deprived of any opportunity to express themselves on the changes involved. To the contention that the Supreme Court had overturned the intended balance in our scheme of government by developing its power-

introduced in Congress making it necessary for six, or even seven, of the nine justices to agree in order to declare a law unconstitutional.

ful, and some said arbitrary, veto on acts of Congress and the executive, it was retorted that the President's plan would destroy whatever was left of the system of "checks and balances" by making the Supreme Court completely subservient to the president, or at any rate to the president and Congress.

Legislative failure but actual Court transformation

After exciting days, a bill embodying the main features of the presidential plan failed to pass; and no new and younger judges were authorized. There was, however, remedial legislation relating to the procedures of the lower federal courts. And concurrently the Supreme Court itself came in for significant changes, even if not by the method advocated. In the first place, whatever the reason, the Court, even while the controversy was going on, showed a profound change of heart, not only by handing down a series of decisions upholding certain New Deal measures such as the Railway Labor Act (1934), the Labor Relations [Wagner] Act (1935), and notably the Social Security Act (1935),[1] but also by completely reversing the position it had taken in the New York case (Adkins *v.* Children's Hospital) on the constitutionality of minimum-wage legislation.[2] Moreover, within the space of hardly more than a year, three "conservative" justices retired or died, opening the way for appointment of "liberals" in their places. In 1941, the most stalwart anti-New-Dealer of all (Justice McReynolds) retired; by 1943, all but two of the nine justices were Roosevelt appointees; and between 1936 and 1946, not only was only one act of Congress declared unconstitutional (and it not an important one), but a dozen or more earlier restrictive decisions were overruled or modified.

The "New Deal" Court

For now the better part of a decade, the country has had a "New Deal" Supreme Court. To some people, this is a source of gratification, to others quite the reverse. The period has not been one of great jurists on the Court; few of the newer appointees had ever attracted attention for their legal learning; few even brought to their task significant judicial experience.[3] The period has been notable for divided opinions and the registering of sometimes sharply-worded dissents. And in 1946 bickering among the members—although no novelty, as historians are aware—attained the proportions of a national scandal. Nevertheless, the Court in this period (perhaps for the very reason that it was so devoid of profound jurists) significantly modernized its methods of constitutional interpretation, and by the same token the constitution itself; and this modernization consisted essentially in replacing a traditional legalistic and almost mechanistic method of deducing decisions from the facts in a case, with little or no consideration of social and economic factors, by an approach

[1] See pp. 444, 459 below.

[2] West Coast Hotel Co. *v.* Parrish, 300 U. S. 379 (1937).

[3] Chief Justice Stone (who died in 1946) and Mr. Justice Frankfurter had legal learning, but no previous judicial experience. Mr. Justice Rutledge had important earlier judicial experience, and Chief Justice Vinson (appointed in 1946) had served for six years on the Circuit Court of Appeals for the District of Columbia.

based on the idea that the constitutionality of a law may properly depend, not solely upon the words and phrases of the constitution as meticulously weighed and dissected by the justices, but at least equally upon perception and understanding of the social or economic conditions that led the legislature to pass the law in the first place. An occasional earlier justice of the Court had this less legalistic, more practical, approach; Oliver Wendell Holmes and Louis D. Brandeis, famed as dissenters, did so. But its adoption by substantially the full Court has come only in the last few years; and the resulting freshness and flexibility in attitudes and actions will make the decade a notable one in Court history after most of the relatively obscure justices have personally been forgotten. After all, a main responsibility of the Court is to keep the law abreast of the times.[1]

The Judiciary's Executive Aspect—The Department of Justice

Thus far, we have dealt only with the courts as agencies through which cases are tried and decisions handed down; and these tribunals certainly constitute the heart of the judiciary. The cases decided, however, have as their object the enforcement of law, and they arise only when somebody thinks that law, or a right under it, is being disregarded.[2] They do not create themselves, but rather have to be instigated, or "brought," commonly in the federal domain by officers concerned with law enforcement; furthermore, if court decisions are to mean anything, they have to be carried out or enforced—again usually by officers of the law. The courts, in other words, are enmeshed with a system of law enforcement; there is an executive side to the judiciary, as well as a strictly judicial side.

Agencies of law enforcement

As chief executive, the president, it will be recalled, is charged by the constitution with "taking care" that "the laws be faithfully executed";[3] and all federal law enforcement is to be regarded as stemming ultimately from him. For the tremendous task, he has many agencies; in some branches of the government, hardly an existing agency is without duties and responsibilities of the kind. Through a staff of inspectors, the Post Office tries to bring to justice offenders against the postal laws and regulations. The Treasury Department has a secret service engaged principally in ferreting out counterfeiting of the currency and securities of the United States. In its Bureau of Internal Revenue, the same Depart-

[1] See R. E. Cushman, "What's Happening to Our Constitution," *Public Affairs Pamphlets* No. 70 (New York, 1942).

[2] In the domain of *civil* law, the function of government consists principally in laying down the rules which are to guide individuals and corporations in their relations and dealings, and in providing tribunals in which controversies may be adjudicated, although government officials may have to do in various ways with seeing that the results of adjudications are carried out. In the field of *criminal* law, government lays down prohibitions, prescribes penalties, ferrets out infractions, provides courts for trying accused persons, and in addition bears sole responsibility for executing judicial findings.

[3] Art. II, § 2.

ment has also machinery for running down violations of the tax laws, and in its Bureau of Customs, machinery for detecting and preventing smuggling. And the list might be extended indefinitely.

The Department of Justice

There is, however, one great agency of government which, under the president's direction, has law enforcement for its main, rather than more or less incidental, function, namely, the Department of Justice; other agencies operate in particular spheres; it has general responsibility for the job as a whole. Curiously, there was no such department until 1870, when the pressure of legal work incident to the Civil War and Reconstruction forced a concentration and systematization of the functions involved. But, although still one of the smaller executive establishments in terms of personnel, the Justice Department is now one of the most vigorous and important. No department except perhaps the Treasury is so interlocked with the others. To be sure, the head of the Department, the attorney-general, devotes his time largely to studying and rendering opinions on legal questions submitted to him by the president or department heads. But he also appears before the Supreme Court in important cases, bears responsibility for the work of the Department as a whole, starts prosecutions at the president's direction or on his own initiative, and, in general, serves as the chief law officer of the country. In the Department offices at Washington will be found also an assistant to the attorney-general, a solicitor-general (who regularly represents the government before federal courts), a battery of six assistant attorneys-general in charge of anti-trust, tax, criminal, and other divisions, and, among other agencies, a Bureau of Investigation (the famous F.B.I.), whose activities parallel and supplement those of the secret service in the Treasury, and embrace the crime-detection work of the highly efficient "G-Men." [1]

Field force

For the detection and prosecution of offenses against the federal laws, the Department must, however, rely heavily on the field force which it maintains for the purpose, consisting principally of a district attorney and a marshal in each of the more than ninety judicial districts into which the country (including the dependencies) is divided. Aided by one or more subordinates, a district attorney presents to a grand jury all violations of national laws coming to his attention within his area; and if that body brings an indictment, it falls to him to conduct the case of the government against the accused person; on a different level, his work, therefore, bears general resemblance to that of a county prosecuting attorney. Assisted by deputies, the district marshal arrests and holds in custody persons accused of crime, summons jurymen, serves legal processes, executes the judgments of federal courts, and if need be protects federal judges from personal violence when engaged in the performance of their official duties. In each district, too, the district judge appoints

[1] In view of the urgency at the time of preventing illegal entry of aliens, watching over the activities of aliens already in the country, and preventing sabotage and other misconduct, the Immigration and Naturalization Service was transferred to this department from the Department of Labor in 1940.

one or more United States commissioners empowered to administer oaths, issue warrants of arrest, subpoena witnesses, conduct preliminary hearings of accused persons, discharge such persons or admit them to bail, and in other ways to assist in expediting the enforcement of the federal criminal laws. Needless to say, the effectiveness of the courts and the respect entertained by the people for them and for the law depend heavily upon the vigor, intelligence, and fidelity with which law-enforcement authorities of all grades apprehend offenders and carry out the findings of the courts against them—findings which the courts themselves can declare but have no means of executing.

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2. FUNCTIONS AND SERVICES

CHAPTER XXII

NATIONAL FINANCE

Many activities of the national government have now been brought to view, but others of major importance still claim our attention; and to some of these we now turn. Basic to everything else is the raising and spending of money; for, as the struggling government under the Articles of Confederation quickly found out, little can be done without adequate access to funds. A prudent individual first calculates his resources and then trims his outlays so as to keep within them. A government, too, cannot be indifferent to its flow of income. But since it can accelerate the flow indefinitely, chiefly by increasing taxes and by borrowing, it can, and often must, decide upon expenditures first, and shape its plans afterwards for obtaining the necessary funds. Taking our cue from this fact, we, in the present chapter, consider first some aspects of national expenditure, and then look into the matter of revenue.

The Spending Power

Constitutional basis

The constitution has rather more to say about raising revenue than about spending it: authority to tax, as well as to borrow, is expressly conferred; and various limitations upon the taxing power are carefully prescribed. A government, however, that could not spend money would be no government at all; and ample federal spending power is found in the constitution, not only in the authorization of Congress to "pay the debts and provide for the common defense and general welfare of the United States,"[1] but in various other provisions conferring authority to do things that cannot possibly be done without spending money, *e.g.*, raise and support armies, provide and maintain a navy, establish postoffices and postroads, and maintain a system of courts. Only three specific restrictions are imposed: (1) that appropriations for the support of the Army shall not be "for a longer term than two years"; (2) that "no money shall be drawn from the Treasury but in consequence of appropriations made by law"; and (3) that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."[2]

[1] Art. I, § 8, cl. 1. In the case of Charles C. Steward Machine Co. *v.* Davis (301 U. S. 548), turning on the constitutionality of provisions of the Social Security Act of 1935, the Supreme Court, in 1937, held that Congress has full and independent power to appropriate public funds to promote the public welfare. Manifestly, this opens the way for exercise of very wide discretion.

[2] Art. I, § 8, cl. 12, and § 9, cl. 7.

How Appropriations Are Made—The Budget System

Loose methods of appropriation formerly prevailing

Not a dollar of federal money can be expended legally except in pursuance of authorization, direct or indirect, by Congress; and passing the great appropriation bills becomes one of the most important tasks of that body at every regular session. For many years before the adoption of the present budget system in 1921, such bills were drafted and introduced by no fewer than nine separate House committees—the bills themselves regularly numbering fourteen—and in the Senate were handled by as many as fifteen different committees. Based upon more or less inflated requests made by the various spending agencies, and merely swept together and transmitted to Congress in an undigested mass by the secretary of the treasury, these bills were not only framed, but considered and reported by the several committees, in little or no relation to one another—and, what was worse, in little or no relation to the condition of the Treasury or to the outlook for revenue. With no single guiding hand to exercise restraint, they were likely to emerge even more generous in their grants than when they first made their appearance; and although the president might warn and admonish, he as a rule could do nothing in the end except affix his signature, because to do otherwise would mean to halt essential government activities. Under such division of responsibility, log-rolling became a fine art, the "pork-barrel" an inexhaustible resource.

The Budget and Accounting Act of 1921

In days when expenditures were relatively modest and revenues adequate to meet them, criticism of such haphazard procedures had little or no effect. The startling upswing of the national outlay during the first World War, however,—together with the many fiscal problems and difficulties entailed—lent new force to a growing demand for reform; and in 1921 a national budget system, such as had long been talked about, became a reality. The essence of a sound budget system consists in careful planning of the expenditures of a given period in relation to anticipated income, by a single authority, which not only will achieve the necessary correlation but shoulder definite responsibility for results; and while the plan introduced by the Budget and Accounting Act of 1921 [1] left, and still leaves, a good deal to be desired, it, in general, meets these basic prerequisites.

The Bureau of the Budget

The planning and coördinating agency set up by the act is the Bureau of the Budget, originally attached loosely to the Treasury Department, although in effect an independent establishment. As supreme director of national administration, the president is, however, the logical authority to bear primary responsibility for preparing integrated programs of spending and revenue-raising; and after Franklin D. Roosevelt became chief executive, the Bureau was drawn into closer relations with the White House, until eventually, under authority conferred in the Reor-

[1] 42 *U. S. Stat. at Large*, 20.

ganization Act of 1939, it was absorbed outright into the Executive Office of the President, thereupon becoming definitely the arm of the chief executive for all contacts and dealings with the financial side of the government. More adequate financial support was thenceforth received, and under the direction of an able "career man," Harold D. Smith, the Bureau quickly became one of the most vigorous and effective establishments in Washington.[1]

The Bureau's expanded rôle

There has been, also, a remarkable expansion of functions. From an agency concerned with little more than coördinating requests for funds in relation to expected revenues and putting them into coherent shape for transmission to Congress, the Bureau has developed into the principal aid to the president in planning and guiding the operations of the entire executive branch of the government. Conceptions of the budgetary process itself have been broadened to include not only the formulation of well-defined financial programs for the various departments and establishments, but also supervision of and control over the execution of such programs, including continuous study of problems of administrative organization and business methods. Resulting in part from the enlargement of governmental activities in fighting the depression of the thirties, the Bureau's new rôle arose to an even greater extent from situations created by the more recent defense effort and war, when greater responsibilities than ever before were thrust upon the president, and when, in passing them along, as he must, to departments and other agencies, he found the Bureau the readiest and most dependable medium for maintaining the supervision and responsibility incumbent upon him. To a division having to do with receiving, reviewing, and preparing estimates, are added others charged with coördinating departmental proposals for legislation with the established policies of the president, studying fiscal programs in relation to the state of the national economy, supervising the statistical work of government agencies, and advising and assisting on problems of administrative organization, procedure, and management. It was perfectly natural that when in 1945 Congress gave President Truman authority to reorganize the national administration on a permanent peacetime basis, his first step should have been to call on the Budget Bureau for the formulation of plans.[2]

Preparing the budget

Although of doubtful advantage, the government's fiscal year opens on July 1, rather than January 1; and a given year is hardly entered upon before work on the financial arrangements for the succeeding year is started. First of all, every spending agency is asked by the Budget Bureau to make out detailed estimates of the funds that it will need in the next fiscal year and to submit such estimates not later than September 15. In larger agencies, this is done by special budget officers, in lesser

[1] The director is appointed by the president alone, and for an indefinite term. Since 1946, the post has been occupied by James E. Webb.

[2] F. M. Marx, "The Bureau of the Budget; Its Evolution and Present Rôle," *Amer. Polit. Sci. Rev.*, XXXIX, 653-684, 869-898 (Aug., Oct., 1945).

ones by members of the staff detailed for the purpose; and for many weeks conferences go on between these or other agency representatives, on the one hand, and Budget Bureau officials, on the other—the former commonly pressing for as generous allotments as they can hope to get, the latter raising questions, offering objections, and seeking to whittle down the frequently somewhat extravagant requests. On larger matters, the budget director is brought into the discussions; and, subject only to overruling by the president, his word is law for every department, bureau, board, and commission as to what expenditures (and in what amounts) shall be recommended to Congress and what ones shall not. Meanwhile, the Treasury Department, on its part, has been asked not only for data concerning interest charges on the national debt, but also for detailed estimates of the revenues that may be expected in the period, together with proposals for increasing such revenues in case they promise to be insufficient. With all of the estimates and other information finally in hand (ordinarily by December 1), Bureau officials total up the amounts, arrange data in logical order, and work the whole into a volume of several hundred pages—*i.e.*, the "budget"—which, by the close of the calendar year, is placed on the desk of the president. At this last moment, that official can revise or strike out items. But usually he has already assented to most of them; and, with Congress coming into regular session normally on January 3, he, commonly within a few days after his regular message, submits a special message transmitting the budget as a balanced fiscal plan for which he assumes full responsibility, and covering not only appropriations but revenue proposals and, if necessary, proposals for deficit financing.[1]

The budget before Congress

In 1920, with the adoption of a budget system imminent, the House of Representatives prepared for the new order of things by enlarging its general appropriations committee to thirty-five (now forty-three) members, giving it jurisdiction over all appropriation proposals, and authorizing it to employ as many as fifteen sub-committees (in later years twenty-one) for handling proposals relating to particular departments or agencies.[2] Received in the House, a budget's revenue proposals are turned over at once to the committee on ways and means, and its far bulkier proposals for expenditure to the appropriations committee; and formerly the two committees and their sub-committees worked independently from this point, with the Senate commonly not sharing in the operation until after bills had been passed in the House. With a view, however, to more coördination, the Legislative Reorganization Act of 1946 interposed a new procedural stage by requiring that, upon the presi-

[1] As noted elsewhere, President Truman, on January 21, 1946, varied the usual procedure by transmitting the "state of the Union" message and the budget for the ensuing year as a single document.

[2] The corresponding Senate committee now has twenty-one members. In 1940, the Brookings Institution recommended that the separate House and Senate appropriations committees be replaced by a single joint appropriation committee of the two houses, equipped with a permanent staff of budget and fiscal experts.

dent's proposals being received, the House committees on ways and means and appropriations and the corresponding Senate committees (on finance and appropriations), or duly authorized sub-committees thereof, meet jointly and, with the president's recommendations before them, work out a "legislative budget" to be reported to the two houses—such report to contain figures for the maximum amounts to be appropriated and to be reserved for deficiencies, with recommendations for debt reduction or increase, according as a surplus or a deficit should be in prospect, and the whole accompanied by a concurrent resolution of adoption.

Under the new plan, the two houses thereupon have before them not only an integrated budget submitted by the president, but a more or less different one agreed upon by the four congressional committees principally concerned, and therefore enjoying a presumption in its favor before general debate begins.[1] In the old days, appropriations sub-committees in the House evolved bills covering appropriations in their several fields of jurisdiction; these were reported to the general appropriations committee, and by it to the House; as separate measures, they were transmitted to the Senate, where again they were considered by sub-committees, by the main committee, and finally on the legislative floor; and, as individually emerging (usually after conference committees had been called into play), they eventually were sent, still as separate measures, to the White House, where almost invariably they were signed.[2] The new procedural requirements laid down in the legislation of 1946 had not become fully operative when these lines were written, but there was no reason to anticipate any significant departures from previous practice, except that the budget offered for final approval by the two houses would technically be, not the president's, but that of Congress itself as agreed upon by its four coöperating committees after considering the president's recommendations.

A useful reform—but incomplete

During the quarter-century since the federal budget system went into effect, it has abundantly proved its worth. Under the relatively normal conditions prevailing in the earlier part of the period, it enabled the president to hold the spending agencies in leash and to effect substantial economies; and even in the years of extraordinarily lavish expenditure associated with the New Deal and with the defense and war effort, when the executive rather than Congress was taking the lead in planning huge outlays, it imparted unity and responsibility which otherwise would have been lacking. The collaboration, too, provided for in 1946 represents a distinct gain. There still, however, is room for improvement. It would be advantageous, for example, if department heads and the director of

[1] Early in 1947, a sub-committee of twenty members of the 102-man joint committee agreed on a ceiling of 31.5 billions on appropriations for fiscal 1948—six billions less than the president's budget proposed.

[2] Appropriation measures, like others, are, of course, subject to veto. Seldom, however can they be disapproved without risk of disrupting some phase of the government's work, even when including provisions to which the chief executive objects.

the budget were given the privilege of the floor in Congress, so that they might explain budgetary proposals (or omissions) to the general membership of each house, as they now explain them to individual leaders, committees, and sub-committees. Appropriation measures of general character are no longer introduced except by the appropriations committees. But representatives and senators freely exercise the privilege of introducing bills calling for the appropriation of money for particular projects—building a post-office, constructing a dam, dredging a harbor, or "improving" a river—in which they (at all events the voters back home) are interested. And although the Legislative Reorganization Act of 1946 amended the rules of the Senate so as to forbid any increase by that body of amounts stipulated in reported appropriation bills, or the insertion of any new items, unless to carry out provisions of some existing law, or unless moved on authority of some standing or select committee, even this far from air-tight restriction was not applied to the House. It would save taxpayers millions of dollars a year if Congress were to emulate the example of the British Parliament, and, as a matter of regular practice, refrain from voting money for any purposes, or in any amounts, not specified in the carefully considered plans of the executive. At the least, if present usage is to continue, it would be helpful if, by constitutional amendment, the president were given power to veto separate items of appropriation bills, as governors in all but ten states have been authorized to do.

Executing the budget—the General Accounting Office

In its report of 1937, the President's Committee on Administrative Management criticized the Budget Bureau for concentrating too much upon the preparation of budgets and not giving enough attention to "supervision over the execution of the budget by the spending agencies." As the committee was frank to recognize, the Bureau had never up to that time been given sufficient staff or money to enable it to perform this added task. The situation has now been largely corrected; and much is done by way of checking up on the use actually made of funds voted, and supervising the transfer of funds from one agency to another. There is need for such work, notwithstanding the existence of another agency—the General Accounting Office—created, in point of fact, by the same act of 1921 which brought the Budget Bureau into existence. In addition to auditing the accounts of spending agencies, this independent establishment—independent because its head, the comptroller-general, is appointed by the president and Senate for a fifteen-year term and is removable only by impeachment or, for cause, by joint resolution of Congress—has as a main function the validating of payments for services, supplies, etc., as a means of seeing that all such outlays fall within the purposes and limits of appropriations as made by Congress; without the comptroller-general's approval, money for such purposes cannot be drawn from the Treasury, or, if drawn and paid over, must be refunded. After 1933, the General Accounting Office became

a focus of vigorous controversy, partly because the then comptroller-general, John R. McCarl, personally hostile to the New Deal, held up numerous payments in connection with New Deal enterprises as lacking proper authorization in congressional appropriations; and in 1937 the President's Committee made recommendations, eagerly accepted by the President himself, looking to abolition of the Office, transfer of "pre-audits" to the Treasury Department, and retention of post-audits in a new agency to be headed by an auditor-general. Sharply clashing views developed, however, in various responsible quarters; and the suggested changes have not been made. Meanwhile, President Roosevelt's opportunity to select a comptroller-general of more sympathetic disposition eased the situation, though without ending the problem.

The Growth of National Expenditures

Some astonishing totals

In the first decade of the present century, the national government rarely spent as much as half a billion dollars a year; indeed, the Fifty-first Congress (1889-91) not so long before had achieved notoriety as the first to appropriate over a billion during its biennium. From that modest level, national expenditures have vaulted to proportions staggering the imagination. By the beginning of the Roosevelt period (1933), they had risen to nearly four billions a year; and three years of New Deal effort to overcome the depression pushed them up to above nine billions. Some improvement in the national situation permitted a drop to about eight billions in 1937. But an economic recession in that year, combined with growing outlays for national defense, carried the figure for the fiscal year ending June 30, 1941, to $12,710,000,000, exclusive of debt-retirement payments. Within the first six months of the following fiscal year, the fast expanding defense effort merged into war effort on the most gigantic scale ever known to the country; and the total outlay for that year (1942) reached the astonishing figure of $32,396,000,000. Even this, however, was merely a prelude to greater outlays later on; in fiscal 1943, they rose to seventy-eight billions (almost double the total national income in the depression year 1932), and in 1944 to almost ninety-four billions; while in fiscal 1945, the last year of the war, expenditures exceeded a hundred billions—or almost exactly half of the "gross national product" (total production of goods and services) for that year. Nothing like this could have been envisaged by any one a generation ago. With the cessation of hostilities, expenditures for fiscal 1946 dropped to slightly less than sixty-five billions; while for fiscal 1947, the President's estimate in his budget message of January, 1946, was a little under thirty-six billions—"about a third of the budgets for the global war, although nearly four times the prewar budgets."[1]

[1] Items in this estimate exceeding one billion dollars were: national defense, sixteen billions; interest on the public debt, five billions; veterans pensions and benefits, 4.2 billions; international finance, 1.75 billions; civil departments, 1.5

Six months later, however, as the year was starting, this figure was raised by five and one-half billions.[1] Competent economists have estimated the cost of operating the government in future more or less normal times at somewhat over twenty-two billions—three times as much as in 1938. But, of course, this is only a guess.

The depression and the war as contributing factors

After World War I, the country settled down to a more or less normal peacetime expenditure pattern, with outlays devoted principally to interest on and retirement of the national debt, veterans' pensions, maintenance of the executive, legislative, and judicial establishments, support of the Army and Navy, and the carrying on of relatively modest enterprises in such domains as reclamation, river and harbor improvement, and highway construction. After 1933, however, this pattern was warped almost beyond recognition—first, by new types of expenditure (on work relief, aid to agriculture, assistance to youth, social security, and what not), introduced in an effort to get the country out of depression and to inaugurate a permanently improved social and economic order, and afterwards, in far greater degree, by outlays incident to the national defense program launched in 1940, and especially to the ensuing war. In the year ending June 30, 1941, for example, nearly a billion dollars went for aid to agriculture and more than two and one-half billions for work relief; and although during the war such items as the latter largely disappeared, the over-all and permanent growth of ordinary peacetime expenditure is indicated by the fact that in 1942 President Roosevelt expected the national outlay after the war—even with the most careful economy while the staggering national debt was in process of liquidation—to amount to not less than ten billions. But of course it was the defense effort and the war that most of all led to expenditures in the fantastic amounts mentioned. During the year ending June 30, 1940, eighteen per cent of the total national outlay went for defense; in the following year, about forty-nine per cent; in the next one, eighty per cent; and in 1943, ninety-two per cent. In asking Congress, in June, 1942, for a 1943 war grant of $39,400,000,000, the President made by far the largest single appropriation request on record to that time—the sum being greater than the entire cost of our participation in World War I, and more than ten times the total outlay of the national government in 1929. Yet even this figure was dwarfed by a request seven months later for an even hundred billions for war-spending during the ensuing fiscal period. What the total cost of the defense and war effort will finally prove to have been, in terms simply of actual current expenditure, no man can say. But it is significant that appropriations, contract

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billions; refunds, 1.75 billions; and expenditures based on proposed legislation, 1.5 billions.

[1] As indicated above, the presidential budget submitted in January, 1947, placed expenditures for the ensuing fiscal year at thirty-seven and one-half billions—with, however, the new joint committee's sub-committee of twenty agreeing (in February) on a ceiling of thirty-one and one-half billions.

authorizations, and government-corporation commitments from June, 1940, merely through December, 1943, aggregated 334 billions—more than all the money spent by the national government from the inauguration of George Washington to the attack on Pearl Harbor.

National Revenues—The Taxing Power

The taxing clause of the constitution

Although the national government receives no small amount of revenue from other sources, *e.g.*, operation of the postal system and the mints, fees from patents and copyrights, fees and fines imposed in the courts, and sales of property, the money with which to make such stupendous outlays as those mentioned—and indeed to cover ordinary expenditures as well—can be obtained in only two main ways, *i.e.*, by taxation and borrowing; and to these fiscal operations we now turn. A major difference between the government under the Articles of Confederation and that under our present constitution is that, whereas the former could raise money only by making requisitions upon more or less uncoöperative states, the latter can reach down past the state governments to the individual citizen, levy on his property or business or income, and enforce payment, if necessary, by seizing and selling his possessions in case of delinquency. Very appropriately, the long list of powers given Congress in the eighth section of the first article of the constitution starts off with the power "to lay and collect taxes, duties, imposts, and excises."

Restrictions on the taxing power:

1. Purposes

Comprehensive, however, as is the taxing power thus conferred, it can be exercised only in accordance with certain express or implied restrictions. To begin with, Congress is not free to lay and collect taxes for any and all purposes, but only (as the constitution plainly says) "to pay the debts and provide for the common defense and general welfare of the United States." The first two purposes indicated are definite enough. The term "general welfare," however, is so broad that there have always been differences of opinion as to what activities and objectives may be read into it. In practice—especially of late—it has not imposed much actual restriction. Any taxation (or appropriation) for a purpose regarded by the Supreme Court as falling within the boundaries marked out by the constitution for the federal government can be justified under it; and the Court as at present constituted is rather easily satisfied on the point.

2. Uniformity of indirect taxes

Down to World War I, the greatest part of the national revenue always came from indirect taxes; and, as we shall see, a very large share is still derived from this source. In laying taxes of this kind, Congress is bound by the constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States."[1] The requirement does not prevent tobacco excises, for example, from falling more heavily upon sections where tobacco products are manufactured extensively than upon others where there is little industry of the kind; it means merely that all cigars or cigarettes of a given kind or condition

[1] Art. I, § 8, cl. 1.

shall be taxed at the same rate in all parts of the country. Formerly, the clause meant also that duties on imports must be uniform at all ports of entry. Under Supreme Court decisions since 1901, however, rates on commodities coming from the insular dependencies may differ from those on imports from other areas; and under the trade agreement system instituted in later years,[1] there is much additional variation, according to the foreign country from which the commodities come.

3. Other express restrictions

The taxing power is further limited (1) by a constitutional provision forbidding the laying of duties on exports, although Congress is authorized to regulate export trade in every way other than by taxation; and (2) by the requirement that direct taxes shall be apportioned among the several states according to population. As interpreted in earlier days—to include only poll or capitation taxes and taxes on real estate (and at one time slaves)—direct taxes have been laid by Congress only four times in our history, most recently in 1861. Taxes on incomes laid in 1862 were held by the Supreme Court not to be direct taxes. When, however, the validity of a new income-tax law was challenged in the last decade of the century, the Court ruled differently; and ultimately, as we have seen, the obvious impossibility of taxing incomes in accordance with any apportionment among the states led in 1913 to adoption of the Sixteenth Amendment, brushing aside the entire question of whether income taxes are or are not direct taxes and simply authorizing Congress to "lay and collect taxes on incomes, from whatever source derived," without apportionment.[2]

4. Implied restrictions

Finally may be mentioned (1) the implied restraint of Congress, (arising from the nature of the federal union) from taxing the property or essential functions of state governments or of subordinate governments created by them, and (2) the similarly implied restraint from taxing securities issued by such jurisdictions or incomes derived therefrom.[3]

Wide sweep of the taxing power

Except as restricted in the foregoing ways, Congress is free to tax any and all objects and persons within the national jurisdiction, and to raise any amounts of revenue desired or deemed feasible; if the people think themselves taxed excessively or unfairly, they will find remedy, not in the courts, but in electing a Congress pledged, or predisposed, to a different tax policy. Most laws imposing taxation can readily be classed as revenue laws, *i.e.*, laws in which the primary, if not sole, purpose is to produce income for the government. There are, however, measures which —although tax laws in form—aim only incidentally at bringing in revenue. Thus, tariff schedules designed to protect American industries against foreign competition have often carried rates too high to be productive. Indeed, Congress has at times gone so far as to impose taxes with the

[1] See p. 363 below.
[2] See pp. 32-33 above.
[3] But see p. 63 above, concerning the taxation of salaries.

avowed purpose of destroying a business activity, such as the issuing of bank notes by state banks; and measures of this nature have been sustained on the ground that Congress has full right to impose taxes as a means of regulating commerce or coinage, or rendering effective some other expressly granted power.

The taxing power and social reform

Is a tax constitutional, however, when it is not clearly either a revenue measure or a device for rendering effective some other delegated power, but rather is aimed solely, or principally, at promoting the "general welfare" of which we have spoken? This question was raised pointedly by a law of 1902 laying a prohibitive tax upon oleomargarine, by an act of 1912 placing a similar tax upon the manufacture of poisonous phosphorus matches, by narcotic-drug laws of 1914 and 1919 imposing a tax on registered dealers, and by an act of 1919 laying a special tax on the incomes of concerns employing children under the age of sixteen, the sole purpose being to discourage the use of child labor. In cases coming before it at different times, the Supreme Court upheld both the oleomargarine and the narcotics law as revenue measures, refusing to inquire into the legislative intent. The constitutionality of the phosphorus match law has never been judicially tested. But when the child labor law was challenged, the Court fixed attention on the motive animating Congress, and held the measure not a valid exercise of the taxing power. For similar reasons, it invalidated the processing taxes levied under the first Agricultural Adjustment Act (1933) and a tax on producers of bituminous coal (1935), on the ground that the former were for the purpose of regulating agricultural production and the latter only a penalty for noncompliance with regulations affecting the business of coal-mining, neither of which fields was then regarded by the Court as within the bounds of congressional control. As previously indicated, however, a Court now oriented to more liberal viewpoints has shown greater tolerance in such matters; and the presumption is that to the many occasions on which the federal taxing power has already been used with impunity in advancing social and economic ends, with considerations of revenue wholly secondary, will in future be added still others of major significance. In much of our income and inheritance taxation during recent decades, the purpose to curb "swollen fortunes" can be discerned almost as clearly as that of obtaining revenue; and in messages to Congress in 1935 and on other occasions, President Franklin D. Roosevelt, pushing farther ideas advanced by Theodore Roosevelt, Wilson, and even Hoover, warmly advocated such a policy, with a view to more equitable distribution of wealth and economic power.

The problem of multiple taxation

With the federal government and the states taxing the same persons, incomes, and occasionally property at the same time, there are plenty of chances for double, or even triple, taxation; and in the past thirty-five years—beginning with the federal corporation tax of 1909, the income tax of 1913, and the estate and inheritance tax of 1916—the amount of

such multiple taxation has increased enormously. Although the federal government relies for the major part of its tax revenue upon personal and corporation income taxes, estate and inheritance taxes, stock transfer taxes, tobacco and liquor taxes, and gasoline taxes, all of these objects are taxed by some or all of the states as well. Indeed, apart from the general property tax, there are few major forms of taxation to which the national and state governments do not both lay claim, each without much regard to the other or to the taxpayer; and often the sums collected by the national government within a state from a given tax exceed the amounts collected from that tax by the state itself. The resulting handicaps to business and industry—to say nothing of the burden for individuals—have stirred endless discussion and protest. In a period, however, when most taxing authorities are of necessity bent upon getting as much as they can, the problem remains largely unsolved.

The Pattern of Federal Taxation

Direct and indirect taxes

As illustrated by the long controversy over the nature of income taxes, the distinction between direct and indirect taxes is not always clear. In general, however, direct taxes are assessed upon and paid by those liable to them in a direct manner, and as such; while indirect taxes are collected commonly at some stage of production or distribution, *e.g.*, from the manufacturer or importer and, being merely passed on to the consumer in the form of higher prices for commodities, are paid by the latter without much realization that they are being paid at all. The federal government early began relying principally upon indirect taxation, chiefly duties on imports; and so completely were the country's tax needs met from this source that until the Civil War direct taxes were brought into play only four times and excise taxes only in the two periods 1791-1802 and 1813-18. The exigencies of the conflict between the states, however, not only forced a temporary reversion to direct taxation, but brought excise taxes again into use; and from that time onwards the latter always formed part of the federal tax picture—although with tariff duties (designed to protect the country's industries as well as to yield revenue) continuing dominant. Sometimes the argument was heard that people would be more tax-conscious, and therefore more concerned about economy and efficiency in government, if taxation were less disguised. But politicians found it convenient to keep tax burdens more or less hidden, and the indirect pattern was consistently adhered to. Only toward the close of the century did new currents of social and economic opinion bring to the surface concepts of a radically altered tax pattern—one in which, while older taxes were not to be discarded, increasing importance should be assigned to a tax based upon ability to pay as measured in terms of individual and corporate incomes; and, constitutionally validated by the Sixteenth Amendment (1913), the new form of levy established itself firmly before we became involved in World War I.

Trends since early times

From that period until 1933, more federal revenue came from this source than from any other; and, although during the depression years customs duties and excises proved more productive, the income tax stream began rising again in 1937, and during the later war period it became a veritable torrent. In the years since 1941, unprecedented expenditures have been provided for by unprecedented borrowing, with the result of a national debt rising at its peak to over 279 billions. Probably a larger share of the enormous war cost should have been met from current income. There was, however, extremely heavy wartime taxation (an eightfold increase between 1940 and 1945); and while substantial reductions took place in 1945, *e.g.*, repeal of the excess profits tax on corporations and some lowering of personal income taxes, and while, too, early in 1947 a Republican Congress was promising further reductions, there is no prospect of anything other than high taxation for a very long time to come. The total tax yield in the year ending June 30, 1946, was somewhat over forty and one-half billions, leaving a deficit of upwards of twenty-five billions; the President's estimate for the year ending June 30, 1947, presented in his budget submitted in January, 1946, was about thirty-one and one-half billions, compared with estimated expenditures for the same year of some thirty-six billions—although six months later the figure was moved eight billions higher (with estimated expenditures also, as has been indicated, raised by five and one-half billions).[1]

Principal federal taxes today

Far and away the most important federal tax in our time, in terms of yield, is that on personal and corporate incomes—the former, in 1945, producing almost twenty billions and the latter more than sixteen billions, or, altogether, close to four-fifths of the total tax receipts.[2] Next come general excise, or commodity, taxes on tobacco, liquors, motor-fuel, admissions, cosmetics, and scores of other objects, many of them luxuries, to be sure, but many also necessities for at least some people. In 1944, the yield of these aggregated three billions. Farther down the list come payroll taxes levied upon employers for the maintenance of unemployment compensation under the federal security program.[3] These in the year mentioned yielded a billion and a half. Next are sharply progressive taxes on the estates of deceased persons or on inheritances of portions thereof, and also on gifts—imposts aggregating in 1944 half a billion. And finally (disregarding various minor items) come customs duties, which as late as 1910 topped all other federal taxes in productiveness, but nowadays run at the low level of only 350 to 450 millions. The principal new tax of general scope proposed in wartime was a sales tax, such as many states maintain; but no serious effort was made to introduce one.

[1] The deficit for the year would thus be 1.9 billions instead of the 4.5 billions earlier contemplated.

[2] Because of high exemptions, there were only between three and four million payers of personal income taxes in the twenties. Wartime extensions brought the number to forty-three and one-half millions in 1944, of whom, however, some twelve millions in the lowest brackets were taken off the tax-rolls in 1945.

[3] See p. 457 below.

The Enactment of Tax Measures—Tariff Legislation

The handling of revenue bills

All measures for raising national revenue are required to originate in the House of Representatives. When the president's budget message is received by that body in early January, all portions of it relating to revenue are forthwith referred to the ways and means committee; and to this group it then falls to whip into shape a tax bill, sometimes following closely, sometimes less so, the plans and recommendations of the chief executive and his budget director, and back of them, the Treasury Department.[1] Working for many weeks, through sub-committees when necessary, and with the aid of repeated conferences with the president, budget director, Treasury officials, bankers, business men, and others, the committee finally emerges with a measure which for further weeks absorbs much of the time and energy of the House. Passed by that body, the bill goes to the Senate, where, notwithstanding that the House was originally intended to enjoy substantial primacy in controlling the national purse, most revenue measures are more or less drastically altered, either in the finance committee or on the floor. There is, indeed, nothing to prevent the Senate from amending a House revenue bill by striking out all parts after the enacting clause and inserting an entirely new bill; and something of the sort has happened on several occasions. It is even possible for a bill which in effect, and almost in technical form, is a bill to raise revenue to be passed in the Senate before the House has taken any action at all. In any event, a major tax bill, after passing the Senate, will most certainly have to "go to conference"; and it is commonly in the form in which it comes from conference that the two houses finally enact it and the president signs it. Throughout the entire procedure, the country—especially the business element—watches with interest, and even anxiety, to see what new taxes will be decided upon and what increases or other changes will be made in existing ones.

The special case of tariff legislation

From time to time, Congress turns its attention to the enactment of a revenue measure of a type raising special problems and difficulties, *i.e.*, a general tariff law prescribing the duties to be paid on articles imported from foreign countries and also, under varying conditions, from some of our insular dependencies. A generation ago, tariff-making solely by act of Congress—never very satisfactory—was found no longer tolerable. Responsibility for decisions was too much diffused between the two houses; special interests and their lobbyists exerted too great influence; general tariff bills had become such labyrinths of facts and figures that even the most conscientious congressman could not inform himself on more than a minor fraction of the provisions on which he was expected to vote. Furthermore, regardless of how well-considered any set of schedules might be when first adopted, fluctuations of prices in the world market

[1] See, however, pp. 352-353 above for additional steps introduced by the Legislative Reorganization Act of 1946.

might render it inadequate almost before the ink was dry on the statute. Obviously, the need was not only for tariffs that would be more flexible—capable of quicker adaptation to changing situations—but for tariffs based on more comprehensive, exact, and up-to-date information; and in 1916 a good start toward reform was made when a United States Tariff Commission was set up, composed of six members representing both leading parties and charged with continuous investigation of all economic matters bearing upon tariff policy, and with reporting in full to both the president and Congress.

Flexible tariff arrangements

By itself, the Commission has never had power to make changes in tariff laws or in their administration; and originally it had no authority to accompany the information it imparted with recommendations except of the most general sort. Tariff acts of 1922 and 1930, however, not only charged it with investigating differences in the cost of production of any domestic article and any like or similar foreign article, but required it to recommend to the president, on the basis of its findings, *specific* increases or decreases in tariff rates; in turn, the president was authorized to change rates, either up or down, within a range of fifty per cent. In this way arose our "flexible tariff" arrangements, constituting, until 1934, our sole means of counterbalancing (without action by Congress) the effects of differentials between costs of production here and abroad.

The trade agreement system

More, however, was to come. Tariff revision by the procedure described was still cumbersome: the president could act only on recommendation of the Commission, which, like most such bodies, was prone to move slowly; besides, the recommendations made could apply only to specific articles, without embodying any general program. Impressed with the urgency of seizing every possible opportunity to promote revival of our then languishing foreign trade, Congress, in 1934, met a request from President Roosevelt by passing a Trade Agreement Act (renewed in 1937, 1940, 1943, and most recently in 1945) giving the chief executive large latitude in negotiating reciprocal or "bargaining" tariff agreements with other countries, with no intervention by the Tariff Commission or any other authority.[1] Articles on the dutiable list may not be transferred to the free list, or *vice versa;* no rates may be lowered by more than fifty per cent of the existing rates; and the "most-favored-nation" principle must be preserved. Otherwise, the president may act freely; and by March, 1945, agreements of the kind were entered into with twenty-eight different nations, bringing the effective general level of our tariffs down almost to that prevailing under the low-tariff Underwood Act of 1913. Under wartime conditions, the operation of the system was seriously disrupted. Nevertheless, the opinion seems justified that the principle underlying it is indispensable to trade revival and prosperity in the post-

[1] The act in its latest form will expire June 12, 1948. Early in 1947, a Republican Congress was critical toward the system, but no early change was expected.

war era; and it is safe to assume that, in one form or another, it will be adhered to.[1]

Borrowing Money—The National Debt

Methods of borrowing

When expenditures and revenues are approximately equal, the government is said to have a "balanced" budget. If, on the other hand, expenditures exceed receipts, there is a deficit, and the budget is said to be out of balance. In ordinary times, and for ordinary undertakings, the income derived from taxation, supplemented by receipts from other sources, has usually been sufficient to meet the government's needs. In time of war, however, or other unusual strain, such as a period of economic depression, or to meet the cost of some great public undertaking like the Panama Canal, the government is obliged to resort to borrowing; and the accumulated obligations thus incurred give rise to the national debt. Congress, operating through the Treasury Department, may borrow from any lenders, for any purposes, in any amounts, on any terms, and with or without provision for repayment of the loans, with or without interest.[2] The method of borrowing is commonly that of selling securities—usually in the form of interest-bearing long-term bonds or short-term treasury notes or certificates—to banks, corporations, and individuals as voluntary purchasers; and such securities rate high in the money markets, not only because, when issued in times of stress, they usually pay attractive interest, but because the national government (unlike some of the states) has never repudiated a debt. If, however, the investment motive, reënforced by patriotic appeals and high-pressure salesmanship, fails, in time of emergency, to bring about voluntary purchases in sufficient amounts, the government may compel purchases by "deferred-saving" devices of one kind or another.

The national debt since 1916

In the past decade and a half, the United States has been added to the long list of countries laboring under the burden of a huge national debt. As recently as 1916, on the eve of our involvement in World War I, we were paying interest, as a nation, on less than a billion dollars.[3] Three years of war financing—in the course of which upwards of twenty billion dollars' worth of Liberty and Victory bonds were disposed of to literally millions of purchasers—raised the figure to above twenty-five billions. Peace restored, extensive borrowing ceased; and, in a period of what was looked upon as unparalleled prosperity, national revenues, notwith-

[1] The Tariff Commission continues to exercise its functions under the earlier flexible tariff legislation with respect to all rates not made the subject of agreements with foreign countries.

[2] The power to borrow is expressly granted in the constitution, being indeed one of the very few conferred absolutely without restriction (Art. I, § 8, cl. 2). The United States operates under no *constitutional* debt limit, such as is fixed for many of the states by provisions in their fundamental laws. For some time, however, a debt limit has been maintained by act of Congress, the figure being raised by stages during recent critical years until in March, 1945, it reached 300 billions. In June, 1946, an act of Congress reduced it to 275 billions.

[3] This, of course, takes no account of the debts of states and their subdivisions.

standing lowered tax rates, exceeded national expenditures, year after year, permitting substantial debt retirement. By the end of 1930, we owed only a trifle over sixteen billions. With a little more sacrifice during lush days, the whole of this might have been liquidated; and, as we are situated now, it is a pity that we did not put forth the effort.

Already, however, at the date mentioned, the effects of the great depression were being felt widely, both by governments and by private persons and corporations. Revenues fell off sharply; outlays for relief and related purposes mounted to new heights; under a policy of "borrowing itself into prosperity," the country went on from a national debt of twenty-nine billions in 1935 to one of forty-two billions on June 30, 1940, when for the twelfth successive time the government closed a fiscal year with a formidable deficit.

But worse was yet to come. In the autumn of 1939, a major war broke out in Europe, accompanied by grave developments in the Far East; and for two years each succeeding month brought the conflict nearer to our own shores—until, finally, in December, 1941, we found ourselves actually at war with the three principal totalitarian states. Regardless of deficits, therefore, the country was compelled to tighten its belt and undertake, first, a *defense* program (on land and sea and in the air) which alone would have removed all possibility of a balanced national budget for many years to come, and afterwards a *war* effort whose cost and resulting liabilities mounted, as we have seen, to fantastic heights. Notwithstanding heavily increased taxation, the national deficit for the year ending June 30, 1941, soared to $5,103,000,000, and the gross national debt to $48,961,000,000—an increase of nearly six billions in a single year.[1] And that was while we were still at peace. Within two months after Pearl Harbor, the sixty-billion mark was passed; on December, 1942,—with the country at war only a year—the figure was close to a hundred billions; by June 30, 1943, it topped 140 billions; in December, 1944, it stood at 231 billions; and at the end of February, 1946 (though half a year after the surrender of our last totalitarian foe), it reached a peak of 279.5 billions. On the other hand, the President's budget message of January, 1946, conveyed the cheering information not only that there would be no debt increase in fiscal 1947, but that the debt would in that year be trimmed through retirement to approximately 271 billions[2] (six months later, he said 261 billions), involving the first significant reduction since 1930. Even with the tide thus turned, the burden to be borne by the present generation, and probably in large part passed on to generations yet unborn, is appalling. Aside from the excellent credit which the government still enjoys, the situation's main redeeming feature lies in the fact that the debt—while none the less a burden and a prob-

[1] The national deficit reached its peak of 55.5 billions in fiscal 1943, dropping the next year to 49.5 billions, and to 20.7 billions in fiscal 1946.

[2] Entailing interest charges (even at the low rates at which the government was able, in the World War II period, to borrow) estimated at five billions.

lem—is owed entirely to our own people,[1] millions of whom, as buyers of war savings bonds and other securities, have acquired a new stake in national policy and in the national economy. There is, however, no valid basis for rationalizing our immense debt, as some people have sought to do (on rather abstruse fiscal grounds) as a beneficent influence in our economic life. It need not be, and probably never will be, paid in full; nevertheless, in liquidating even any considerable portion of it, vast amounts of money must be collected from some people and paid to others, and the redistribution can easily entail unpleasant, if not disastrous, consequences. The annual interest charge alone will long cut deeply into funds available for budgeting.

The Treasury Department

Financial functions: The vast volume of fiscal business destined to arise out of the financial powers (especially the power to tax) conferred upon the new government in 1789 was not, of course, foreseen. Nevertheless, one of the first necessities was machinery for the collection of taxes, the custody of funds, and the keeping of accounts; and the resulting Treasury Department has developed into a huge administrative establishment, employing more people than the majority of other departments and performing tasks, great and small, of highly varied character. Foremost among its activities is the collection of the national revenue, chiefly (except for postal receipts) through the Bureau of Customs and the Bureau of Internal Revenue. The former collects the duties on imports provided for by the tariff laws and trade agreements, the work being performed at some three hundred main or subsidiary "ports of entry," located on the Pacific and Atlantic coasts, on or near the Canadian and Mexican borders, or in Alaska, Hawaii, Puerto Rico, and the Virgin Islands, and grouped in fifty-one customs collection districts. The Bureau of Internal Revenue collects the personal and corporation income taxes, estate and inheritance taxes, capital stock taxes, liquor, tobacco, and amusement taxes, and a wide variety of other imposts; and for this purpose, the country, including Alaska and Hawaii, is divided into sixty-six districts, each in charge of a collector, with the requisite staff of deputy collectors, revenue agents, and other assistants.

1. Collection of revenue

Formerly, the collection of the national revenues was to a large extent automatic. That is to say, foreign goods could not be imported, and domestic goods subject to taxation could not be manufactured or sold, until the importer, manufacturer, or dealer had paid whatever taxes were due. In the case of importations, cash payments prevailed; in that of excises, the method was mainly that of selling stamps and licenses. Beginning with the corporation tax law of 1909, however, other and sometimes more complicated methods have been introduced, although the

[1] Therefore, in essence, a claim of the bond-holders upon the future productive capacity of the country.

customs and ordinary internal taxes continue to be gathered as before. Personal and corporation income taxes, and likewise inheritance taxes, are based upon sworn statements of the tax-paying individual or corporation, and are payable directly and in cash. Manifestly, the statements called for may be evaded or falsified; and with a view to minimizing such abuses, revenue authorities busy themselves the year round with checking up on the returns made. Any statement may be challenged and inquired into if an examiner finds reason to doubt its accuracy or completeness.

2. Custody of funds

A second main function of the Treasury Department is that of keeping the government's money and paying its bills in accordance with appropriations duly made. In the Treasury Building in Washington is a treasury (in the physical sense), in whose vaults large sums are held; and until 1921 there were sub-treasuries in nine other principal cities. Government money has also long been placed in banks; and since the discontinuance of the sub-treasuries most of it is so deposited, principally in the federal reserve banks located in twelve cities carefully chosen with reference to the needs of business.[1] The custodian of the government's monies, and also of large stocks of gold kept in vaults in Kentucky and Colorado and of silver stored at West Point, is an official known as the treasurer of the United States.

3. Control of the currency

A third important function of the Department is the control of the currency. The Bureau of Engraving and Printing prepares all of the paper money, as well as the bonds and other securities, of the national government; the Bureau of the Mint supervises the mints, where the coined money is manufactured, and the assay offices, where precious metals are received, tested, evaluated, and paid for; the United States Secret Service guards the currency against counterfeiting; and the Bureau of the Comptroller of the Currency supervises the national banks, directs periodic examinations of them, and receives their reports. This latter official also is responsible for the issuance and redemption of federal reserve notes and federal reserve bank notes.

4. Management of the national debt

One further financial function of the Department is the management of the national debt, concentrated since 1940 in a Bureau of the Public Debt, located in a division known as the Fiscal Service. Once it has been decided by the proper authorities to make a new offering of public debt securities, *e.g.*, savings bonds, the Bureau prepares the necessary documents, directs the handling of subscriptions and allotments, and plans and issues the securities themselves. It also attends to the retiring of securities, and is responsible for all public-debt accounting and auditing.

Non-financial functions

Early in its history, the Department began to be assigned functions which had little or nothing to do with finance, and until after World War I it served as a dumping ground for offices and activities that Congress did not know how to dispose of otherwise. In recent years, however,

[1] See p. 371 below.

such non-financial functions have been gradually reduced by transfers to other departments or agencies, until today the only important units of the kind still included are the Bureau of Narcotics, charged with enforcement of the anti-narcotic laws; a Procurement Division, which purchases and distributes supplies for government agencies; and the United States Coast Guard, which, after operating as a service under the Navy from late in 1941, was transferred back to the Treasury Department on January 1, 1946.

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CHAPTER XXIII

MONEY, BANKING, AND CREDIT

The National Currency System

Constitutional provisions

In view of the chaotic monetary conditions prevailing during the Revolution and under the Articles of Confederation, it is not surprising that the framers of the constitution put into that instrument provisions calculated to insure a uniform national currency. On the one hand, Congress was granted authority to "coin money [and] regulate the value thereof";[1] on the other, the states were forbidden to coin money, to emit bills of credit, *i.e.*, paper money, or to make anything but gold and silver coin legal tender in the payment of debts.[2]

A national currency established

Dating from legislation of 1792, our first uniform national currency was based on the now familiar decimal system, with the dollar as a unit, and consisting of coins manufactured from the two precious metals, gold and silver, with fifteen ounces of the latter reckoned as equivalent in value to one ounce of the former. In later days, fluctuation of the two metals in the world market produced difficulties; and in 1873—the ratio between the two in our currency system having in the meantime been changed to sixteen to one—Congress "demonetized" silver by wholly stopping the coinage of silver dollars. With the Democrats, led by William Jennings Bryan, demanding remonetization at sixteen to one, the presidential campaign of 1896 was waged almost exclusively on the currency issue. Not only, however, was the fight lost, but a Republican Congress and president in 1900 placed on the statute-book a "gold standard" act making the gold dollar the standard of value and requiring that the value of all other money be maintained on a parity with gold, so that a silver dollar or a paper dollar might be taken to the Treasury at any time and redeemed at face value in the yellow metal.

Changes resulting from the depression

The average person may hardly have realized it, but the depression of the thirties became responsible for a number of important changes affecting the monetary use of the two metals: (1) in 1933, the gold standard, under which since 1900 all money had been maintained on a parity with gold, was abandoned; (2) in the same year, the "gold clause" theretofore commonly written into long-term bonds and contracts, both public and private, and calling for the payment of principal and interest in gold coin, was likewise given up; (3) in 1934, the gold content

[1] Art. I, § 8, cl. 5.
[2] Art. I, § 10, cl. 1.

of the gold dollar was reduced by somewhat over forty per cent, in effect giving the country a "fifty-nine cent dollar"[1]; and (4) in the same year gold was "nationalized," *i.e.*, the federal government took over the country's entire stock with a view to coining no more, but merely holding bullion as a permanent metallic base for paper currency. The avowed object of all these and other changes was a "managed" currency which, with increase of the volume of money and decrease of its value, would raise the price level of commodities.

Paper money introduced

The constitution says nothing about paper money—except to forbid the states to issue it. When, however, during the Civil War, the national government ran into difficulty in its efforts to float loans adequate to carry on the conflict, Congress took the bold step of not only authorizing the issuance of legal tender paper currency ("greenbacks"), but also creating a system of national banks and authorizing them to issue notes up to ninety per cent of their holdings of United States bonds; and although "greenbackism" became a major issue in the politics of later years, the right of Congress to make paper money legal tender for private as well as public debts was fully upheld in an important series of actions usually referred to as the Legal Tender cases.[2]

Present forms of currency

Today, our government seems to maintain one of the most complicated currency systems in the world. In law, there are no fewer than ten varieties, namely: (1) United States notes, or "greenbacks"; (2) gold coins and bullion; (3) gold certificates backed by gold held by the Treasury; (4) treasury notes of 1890; (5) standard silver dollars and bullion; (6) silver certificates backed by silver dollars held by the Treasury; (7) national bank notes; (8) federal reserve notes, largest by far in quantity and issued by the federal reserve banks on a backing of commercial paper; (9) federal reserve bank notes, differing only in being based on federal bonds; and (10) minor coins of nickel, copper, and silver. Actually however, the currency has been greatly simplified by recent developments. Gold coin and gold certificates are no longer in circulation; all national bank notes are being withdrawn from circulation and replaced with an equal amount of federal reserve notes; federal reserve bank notes were never issued in any large amount and are now practically out of circulation; and the less than two million dollars outstanding in treasury notes of 1890 are likewise being retired. The consequence is that practically (in addition to subsidiary and minor coins) only United States notes, silver certificates, and federal reserve notes are at present in circulation, the last-mentioned being obligations of the twelve federal reserve banks and of the government, and by far the most important kind of money now in use. All coins and currency of the United States are legal tender for the payment of all debts, public and private.

[1] The president's power further to devalue the dollar expired in 1943.
[2] Notably Juilliard *v.* Greenman, 110 U. S. 421 (1884).

Development of the National Banking System

How national banks came into being

From the constitution's silence on the subject of banking, strict constructionists of early days deduced that the matter was one for regulation solely by the states. Under Federalist leadership, however, a national bank, known as the Bank of the United States, was established in 1791. Its charter expired in 1811, but a second institution of the kind was set up in 1816; and when its constitutionality was challenged, in the celebrated case of McCulloch *v.* Maryland (1819), the Supreme Court availed itself of the doctrine of implied powers to put practically beyond question the authority of Congress to create banking corporations. To be sure, from the time when the second Bank of the United States closed its doors in 1836 until the Civil War, the field was left entirely to banking institutions chartered under widely varying state laws. But the need for a currency of uniform value throughout the country, together with the desire to facilitate the sale of government bonds on favorable terms during the war, led Congress in 1863 and 1864, as indicated above, to make provision for a long-delayed national banking system, comprising banks chartered, regulated, and inspected by national authorities, and empowered to issue notes designed to circulate as money. A ten per cent tax on the notes of state banks had the effect, indeed, of giving the new national banks a monopoly of the right to issue notes, a privilege which they enjoyed uninterruptedly until the creation of the federal reserve system in 1913. State banks, however, continued to exist and to carry on a great deal of business, side by side with national banks; and so they do today.

The federal reserve system (1913)

Originally, national banks were so many entirely separate institutions, with no more means of coming to one another's relief in time of stress than railroads or merchandising establishments; and from the ups and downs of business during recurring cycles of prosperity and depression flowed embarrassments and failures which often might have been prevented. To remedy this situation, by linking up the whole number of national banks in an integrated series and imparting greater elasticity to their operations, Congress, in 1913, enacted a law creating what is known as the federal reserve system.[1] Under this centralizing measure, the country is divided into twelve great districts, in each of which is a federal reserve bank, located as a rule in the district's principal city, and doing business, not, as in the case of national and state banks, with the general public, but only as a rule with the government and with "member banks," comprising all of the national banks of the district and such state banks as choose to identify themselves with the system. Capital stock is subscribed principally by the member banks; and supervision of the general system is vested (since 1935) in a board of seven governors appointed by the president for fourteen-year terms,

[1] 38 *U. S. Stat. at Large*, 251.

with the bank of each reserve district controlled by a board of nine directors.

Corrective Banking Legislation of 1933-35

With important powers over the reserves, discount rates, note issues, and general operations of both reserve banks and local member banks, the federal reserve machinery introduced by the act of 1913 served useful purposes, and in normal times appeared to provide a reasonable remedy for our more serious banking ills. The stock market crash of 1929 and the financial chaos that followed showed plainly, however, that something was still wrong; at all events, our banks proved unable to weather the storm in any such fashion as did those of Great Britain, Canada, and some other countries, and many collapsed. All sorts of drastic changes in an admittedly defective system were proposed—the elimination of state banks in favor of a single set of national banks, the establishment of a great central Bank of the United States (on the model of the Bank of England), and what not.

Reforms introduced

In the end, and after much troubled discussion in Congress and the country, reforms were introduced on three main lines. (1) Banking practices were overhauled and toned up, especially under terms of a banking act of 1933. (2) In the belief that if depositors have some assurance that their money is safe in banks, they will be willing to leave it there, thus averting bank "runs" and resulting bank closings, a plan of guaranty of bank deposits was introduced temporarily in the act of 1933 and two years later made permanent. Under this arrangement, deposits in banks belonging to the federal reserve system, and also in non-member banks meeting certain conditions, are insured up to a maximum of $5,000. (3) Finally, in 1935, the federal reserve system was overhauled rigorously. Not only was the preëxisting administrative machinery reconstructed (with a view to lessening the danger of politics entering in), but the presumably ameliorative and corrective functions of the board of governors were materially strengthened, especially in the direction of greater flexibility in the reserves which banks are required to maintain, greater freedom in raising and lowering rediscount rates and thereby controlling lending activities, and more power to check inflation or deflation by the sale or purchase of government securities by reserve banks.[1]

Some New Credit Agencies

Why needed

Along with the foregoing developments directly affecting the country's system of commercial banks arose also numerous new credit or

[1] In 1945, the United States became a subscriber to an International Monetary Fund with initial assets of over eight billion dollars, and a leading participant in an International Bank of Reconstruction and Development, both set up in pursuance of agreements reached at a United Nations Monetary and Financial Conference held at Bretton Woods, N. H., in 1944, and designed to advance the interests of international credit and business.

lending agencies, originally created and supervised by the national government with a view to helping overcome the effects of the long-continuing depression. Like commercial banks, thrift institutions—such as savings banks, insurance companies, and building and loan associations—found themselves heavily encumbered with "frozen" assets. Railroads, too, suffered in the general decline of security values, and found it impossible to carry on their usual financial operations. Thousands of farmers and home-owners, unable to meet payments on mortgages, faced foreclosure and dispossession proceedings. From harassed individuals and corporations in all sections of the country appeals poured in upon the national government for assistance that might enable them to tide over the period of stress.

The Reconstruction Finance Corporation

Responding to the demand, and upon recommendation of President Hoover, Congress early in 1932 created the Reconstruction Finance Corporation, patterned after the War Finance Corporation of 1918, and placed under the management of a board of seven directors, three *ex officio* and four appointed by the president and Senate.[1] The new agency was endowed with a capital of $500,000,000, all subscribed by the government, and eventually (being continued and utilized on even a larger scale during the Roosevelt administrations) with far greater sums, with the result that it became a vast super-credit institution, holding a key position in every phase of the government's recovery program. Authorized from the first to make properly insured loans to banks, to trust and insurance companies, to building and loan associations, to agricultural and live-stock credit associations, and to railroads, it in time was permitted to extend its ministrations to ordinary private industry, and within a period of less than three years (1932-35) it disbursed the stupendous sum of nearly seven billion dollars. Some of this money went for purposes of relief, but the bulk of it was allocated to institutions and businesses for assistance in reviving commercial, industrial, agricultural, and transportation activities the country over—a procedure sometimes described as "priming the pump" of national prosperity. On the whole, the results were excellent, and many of the loans were repaid in a surprisingly short time. By 1937, the R.F.C. was widely thought to have served its purpose; and at that date Congress passed an act to facilitate its gradual withdrawal from lending activities by authorizing the president to suspend or terminate its operations in any field of lending whenever he should find that credit for borrowers in that field was "sufficiently available from private sources to meet legitimate demands."

Before the Corporation could wind up its activities, however, Congress gave it a fresh lease on life by authorizing it, in 1938, to make further private loans to combat a renewed recession in business; and, with the

[1] The present form of organization calls for a board of five directors, all appointed by the president and Senate. The Corporation functions principally through loan agencies located in thirty-one cities.

defense effort and later war presently ensuing, the agency, far from being liquidated, entered upon a new and even more vigorous period of activity. In the critical years 1940-41, it not only played an extremely important rôle in financing defense industry by making loans and investments that private capital could not take the risk of making, but it brought into existence various subsidiary government corporations, such as the Rubber Reserve Company, the Mineral Reserve Corporation, the Defense Plant Corporation, the Defense Supplies Corporation, and the Defense Homes Corporation, thereby assisting in the accumulation of reserve supplies of rubber, tin, manganese, and other raw materials indispensable in wartime; and it also aided industrial plant expansion and helped to provide housing facilities for defense workers. Continuing its activities on many lines throughout the war, and in the ensuing period of reconversion, the Corporation (with life most recently extended to June 30, 1947) was, in 1942, placed in the Department of Commerce —only, however, to revert to its status as an independent establishment when, early in 1945, the Senate manifested unwillingness to confirm Henry A. Wallace as secretary of commerce unless the R.F.C. were exempted from his jurisdiction.[1]

Other national credit agencies

Following the precedent set by creation of the Reconstruction Finance Corporation, Congress established other credit agencies during 1932-34, most of them dependent for at least part of their funds upon the backing or assistance of the R.F.C., and most of them still functioning. One group, designed primarily to afford better borrowing facilities for farmers, will be dealt with in a later chapter.[2] A second—comprising a system of home loan banks (1932), presided over by a Federal Home Loan Bank Administration, and empowered to provide credit for institutions engaged in home-financing, and a Home Owners' Loan Corporation (1933) authorized to make direct loans to distressed home-owners not able to borrow through other channels—was designed to relieve home-owners facing the loss of their homes through foreclosure.[3] A new chapter, too, in the history of federal assistance to home-ownership was opened in 1944, when the Servicemen's Readjustment Act (popularly known as the "G. I. Bill of Rights") opened opportunity for honorably discharged veterans to obtain government loans for twenty years to buy or build homes or to acquire farms or business property.[4] Through these and other lending agencies, not only has the national government become a creditor on a large scale and thus entered into competition with private banking establishments, but the government and the private

[1] In opposing the confirmation of Mr. Wallace, Senator Byrd of Virginia termed the R.F.C., with its numerous subsidiaries, "the most colossal banking institution the world has ever known, either public or private . . . [and] virtually immune from the control of Congress . . . actually, as it now operates, a fourth branch of the government," *New York Times*, Jan. 23, 24, 25, 1945.

[2] See Chap. xxvi below.

[3] See pp. 361-362 above.

[4] See pp. 459-460 below.

banks of the country have at the same time been drawn into closer and more helpful relations.[1]

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[1] In a survey of government lending activities published in 1946 by the National Tax Equality Association, and entitled "The High Road to Socialized Credit," the total of outstanding loans on June 30, 1945, for which the federal government was in one way or another responsible was estimated at nineteen billion dollars. Many of the policies involved were criticized severely—although, it must be remembered, by an organization instinctively hostile to "socialized credit."

CHAPTER XXIV

FOREIGN AND INTERSTATE COMMERCE

Government and economic affairs

As illustrated by preceding chapters dealing with taxation, spending, banking, currency, and credit, there is a very close connection in this country between government and economic life; itself influenced in a multitude of ways by economic interests and forces, government in turn is occupied mainly with tasks and problems relating in one way or another to the national economy. From the field of finance, we turn to other broad areas of governmental economic operation—first of all, that of commerce, embracing not merely trade in the ordinary sense but the avenues of transportation and communication through which trade and intercourse are carried on. In the chapter to follow, the relations of government with general business will be considered; here, however, we take up commerce in particular, because (although, of course, most commerce *is* business) our national government's control over business flows, to a large extent, from its power to regulate commerce.

The commerce clause of the constitution

Lack of power to control the conditions under which commerce was carried on with foreign countries and among the several states was a main defect of the Articles of Confederation; and, as we have seen, it was a controversy between certain of the states over this matter that set in motion the train of events leading to the Philadelphia convention of 1787. Unimpeded development of trade, both domestic and foreign, being recognized as a prime requisite of national stability and growth, the new constitution was so drawn as to give Congress general power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[1] Indeed, this power stands second in the list of those conferred; and it is doubtful whether any other of the constitution's provisions, except only the taxing clause, has contributed so much to the vigor of the national government as we know it today. Certainly none has had so much to do with developing the close relation long existing between government and business—a relation steadily growing closer and more significant as the commercial enterprises of our people increasingly transcend state and national boundaries.

Expansion by judicial interpretation

Commerce carried on wholly within the bounds of a state is left to be regulated exclusively by the state concerned. Federal power over all other commerce is, however, granted in broad and general terms; of four express limitations imposed, only one—that forbidding Congress to lay a tax or duty on exports from any state—has proved of much impor-

[1] Art. I, § 8, cl. 2.

tance.[1] To be sure, until rather recently the Supreme Court construed the power as extending only to commerce as such and quite directly. The conditions, for example, under which commodities handled in foreign and interstate trade were produced (including perchance the employment of child labor in manufacturing) were not supposed to fall within its scope; and even the "due process" clause of the Fifth Amendment and the reservation of powers to the states in the Tenth Amendment were regarded as imposing limitations. Even this narrow construction permitted expanding applications of regulating authority, as inventions developed new forms of commerce, *e.g.*, motor transportation and radio-broadcasting. Within the past decade, however, a reconstituted and "liberalized" Court has adopted a far broader view of what may be regulated as aspects of commerce. Thus in upholding the National Labor Relations Act of 1935 and the Fair Labor Standards ("Wages and Hours") Act of 1938 [2]—in 1937 and 1941, respectively—it held manufacturing, mining, and lumbering in which raw materials and finished products are carried in interstate commerce to be inseparable from such commerce and therefore within the scope of congressional regulative power. In 1944, too, it held private insurance business, previously construed not to be included within the scope of the term, to be commerce, and accordingly subject to regulation by Congress, in its interstate aspects, equally with any other form of commercial intercourse between states.[3]

Present meaning of "commerce" and "regulate"

Constitutionally, "commerce" today therefore includes not only the exchange of commodities, but the transportation of them, and of persons and animals, by land, water, or air; the construction and maintenance of toll-bridges and ferries; the writing of insurance policies; the transmission of intelligence by telegraph, telephone, and wireless (including radio); and even agriculture, mining, fishing, logging, and manufacturing —and all are subject to congressional regulation in so far as carried on by or involving interstate or international operations. The term "regulate" has likewise undergone judicial interpretation and expansion. From having denoted power merely to permit and control commerce under certain conditions, it has come to include authority to protect and safeguard it and, on the other hand, to prohibit it altogether when deemed in the national interest.[4] Furthermore, Congress not only may regulate all in-

[1] Art. I, § 9, cl. 5. The other three limitations (contained in the same article and section) are: (1) the foreign slave-trade might not be prohibited before 1808; (2) no preference may be given by any regulation of commerce or revenue to the ports of one state over those of another; and (3) vessels bound to or from one state may not be obliged to clear, enter, or pay duties in another state. The first of the three was only temporary, and the second and third have operated merely to prevent discrimination against the commerce of any state or group of states.

[2] See pp. 443-446 below.

[3] United States *v.* Southeastern Underwriters Association, 322 U. S. 533. Congress, however, granted the insurance business exemption from actual federal regulation for three years in order that it might put its own house in order.

[4] Examples of legislation aimed at restricting or prohibiting commerce in the interstate domain include the Pure Food and Drugs Act of 1906, the Mann White

strumentalities of interstate and foreign commerce, but it may itself create corporations to serve as such instrumentalities.[1] In short, as a result of the commerce clause and of judicial decisions based upon it, Congress has authority to enact all legislation appropriate for the protection and advancement of commerce in its interstate and foreign aspects—"to adopt measures to promote its growth and insure its safety, to foster, protect, control and restrain." [2] Hardly any other provision of the constitution has contributed so much to building up the power of the national government, especially in the past fifty years; apart from the taxing clause, no grant of authority, as observed above, has had so much to do with developing the close relation long existing between government and business—a relation growing ever more intimate as the commercial enterprises of our people have increasingly transcended state and national boundaries.

The Regulation of Foreign Commerce

Scope

In its provision for congressional regulation, the constitution brackets foreign commerce and interstate commerce in the same phrase.[3] Authority over foreign commerce is, however, really the broader, for the reason that the national government has exclusive, and practically unrestricted, jurisdiction over our relations abroad, this having the effect of reënforcing and supplementing the authority specially conferred in the commerce clause; foreign commerce, too, may be regulated by treaty as well as by congressional act. The authority to regulate foreign commerce, furthermore, extends to every act of transportation or communication cutting across our national boundaries, no matter how deep in the country's interior may be the point of beginning or of termination. A cablegram to England sent from Chicago is foreign commerce from the time it is first placed on the wires; a consignment of ladies' gowns from Paris to Cleveland is foreign commerce not simply until it is unloaded from a ship or airplane at New York, nor even simply until it reaches Cleveland, but until the importer has sold the original package or at least broken it for the purpose of selling its contents. Only (ruled the Supreme Court more than a hundred years ago) when imports—the original package

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Slave Act of 1910, the Webb-Kenyon Act of 1913 prohibiting shipments of intoxicating liquor into "dry" states (a prohibition written into the constitution in 1933 in the Twenty-first Amendment), and the "Lindbergh Law" of 1932 making kidnapping, when the victim is taken across state lines, a federal offense. In 1929, too, Congress passed an act divesting convict-made goods of their interstate character when shipped in interstate commerce and making their admission into a state a matter of state determination. On embargoes upon foreign commerce, see p. 381 below.

[1] Thus the Inland Waterways Corporation was set up in 1924 to carry on the operations of the government-owned inland canal and coastwise waterway system.

[2] Chief Justice Hughes, in Texas and N. O. R. *v.* Brotherhood of Railway and Steamship Clerks, 281 U. S. 548 (1930).

[3] The constitution gives Congress power to regulate (1) foreign commerce, (2) interstate commerce, and (3) commerce with the Indian tribes. The last-mentioned form of commerce had some importance in early days, but is of little or no present significance.

or its contents—have "come to rest," and are commingled with the general property of the people of a state, does the controlling authority of Congress end and that of the state begin.[1]

Regulations of foreign commerce which Congress has enacted (or may enact) may be divided into (1) those aimed at promoting trade, or at all events American shipping, (2) those aimed at restricting or preventing trade, and (3) general rules looking to safety and convenience.

The promotion of trade and shipping

It would be difficult to name any national policy which the government of the United States has pursued longer and more consistently than that of protecting and promoting the foreign trade of our people. The very first Congress passed acts with this in view; and to a considerable extent the legislative and diplomatic history of the country from that day onwards could be told in terms of efforts to open new markets for American goods abroad, to secure and maintain equal opportunity for American traders, and to build up relations and agencies calculated to promote these ends. The diplomatic and consular services have been, and are, used to assemble and transmit needed information; with active congressional support, the Department of Commerce—especially through its Bureau of Domestic and Foreign Commerce—built up, in the later twenties, a world-wide corps of special commercial agents, though later in part withdrawn; the entire international policy of President Franklin D. Roosevelt, although far transcending the interests of commerce, was designed, along with other and even greater objectives, to make the United States more of a trading nation than ever in the past.

The rôle of Congress

As even this brief enumeration suggests, the encouragement of foreign trade is the business of no single branch or agency of the government; the president, several of the executive departments, many bureaus and services, and of course Congress, are heavily involved. Thinking here, however, primarily of the rôle of Congress, we note promotional and regulatory activities including the following: (1) legislation and appropriations supporting trade-promotion personnel and efforts of the executive branch; (2) exemption, by the Webb Act of 1918, of American export companies from the restrictions of the anti-trust laws, so long as certain conditions are met; (3) authorization of national banks having a capital and surplus amounting to a million dollars to establish branches in foreign countries to facilitate business relations, together with assent to an executive order of 1934 establishing a special bank in Washington —the Export-Import Bank—"to facilitate exports and imports and the exchange of commodities between the United States and other nations"; and (4) enactment of a reciprocal trade agreement law in 1934 (four times renewed since) conferring on the president wide latitude in stimulating trade by reducing tariff duties.[2] Important legislation, too, has been aimed not only at increasing exports and imports, but at encouraging the

[1] Brown *v.* Maryland, 12 Wheaton 419 (1827).

[2] See pp. 363-364 above.

transportation of them in American ships; and this effort has taken two main forms: (1) tonnage duties or taxes based on the cubical capacity of vessels arriving in American ports from foreign countries and graduated so as to fall more heavily on ships built or owned abroad than on American vessels (or, in lieu of such, discriminatory duties on foreign goods imported in any but American vessels); and (2) laws for the encouragement of an American merchant marine. Under impetus supplied by World War I, Congress in 1916 created a United States Shipping Board for the purpose of developing a greatly needed naval auxiliary and merchant marine; and in 1920 and 1928, the Board's powers were expanded along lines more directly related to the promotion of peacetime commerce. Direct subsidies to private steamship lines—such as have been common enough in foreign lands—have generally been strongly opposed in this country. Nevertheless, between 1928 and 1936, substantial subsidies, in disguise, were provided, chiefly in the form of lucrative contracts for carrying the mails overseas; and in the last-mentioned year direct and heavy subsidization was introduced under terms of a Merchant Marine Act in which the government engaged to bear up to half of the cost of constructing merchant ships and to make up to ship owners and operators the full difference between the cost of operating American and foreign vessels competing for the same business.[1] World War II left the country with a merchant marine out of all proportion to any foreseeable need, and the question of what to do with the larger part of it has not been settled.

Restriction or prohibition of trade

Of congressional regulations restricting or prohibiting foreign trade, three types need only be briefly mentioned. One is general tariff laws which, when having as their principal object, not the production of revenue, but the protection and stimulation of home industries, find their constitutional justification at least as much in the power of Congress to regulate foreign commerce as in the taxing power. Notwithstanding the trade agreement system, designed to promote trade by lowering tariffs, the policy of the country, subscribed to by both leading political parties, is still that of protecting American industry and agriculture by a system of duties on imports from abroad; and, of course, this means that a protective tariff law is by intention a measure for restricting foreign trade—imports directly and exports indirectly, since foreign people cannot buy in the American market unless they can also sell. A second type of restrictive regulation takes the form of limiting (or in the case of people not eligible for naturalization, forbidding outright) the immigration of aliens into the United States. Immigration is commerce and could be controlled by Congress on that basis even if the regulation of it were not also an incident of the power of a sovereign government to manage its

[1] This act of 1936 also replaced the United States Shipping Board with a United States Maritime Commission, under which ship construction was pushed to new heights during the recent war, chiefly in government-owned plants operated by private concerns.

own foreign relations. Finally, and of more drastic nature, are embargoes such as have been laid several times in our history, suspending commerce completely with all or specified countries or (under some exports-licensing plan) in specified commodities. Sometimes the object has been to lessen the likelihood of the United States being drawn into a foreign war, or to serve as a weapon in a war actually going on; sometimes, to prevent aid being given to revolution or aggression in a foreign country; sometimes—as amidst the defense effort preceding the recent war—to conserve materials and products urgently needed for this country's own security;[1] sometimes—as during the period of industrial reconversion since 1945—to prevent undue drain upon the domestic supply of given commodities. But in any case the power to impose the ban resides in Congress—although the president may be permitted to exercise it (as in 1940) under delegated congressional authority.

Regulations in the interest of safety or convenience

Perhaps the largest and most varied class of congressional regulations relating to foreign trade is that consisting of navigation or inspection laws, enacted by the first Congress and on numerous occasions since. Objects in mind have been the protection of American shipping, the stimulation of shipbuilding, safeguarding the health and safety of passengers, and promoting the well-being of seamen. Notable among measures having the last-mentioned purpose was the LaFollette Seamen's Act of 1915.

The Regulation of Interstate Commerce

What is interstate commerce?

Subject to slight qualifications to be mentioned presently, the regulation of commercial transactions begun, wholly carried on, and completed within a single state falls exclusively to the authorities of that state. The moment, however, such a transaction crosses a state boundary it ceases to be intrastate, and becomes interstate, commerce. Not only does the interstate character attach to a shipment of goods, under such circumstances, as soon as it is delivered by the shipper at the freight-office, warehouse, or depot of a common carrier, *i.e.*, a railroad, steamship, or express company, but, by judicial interpretation, it continues to adhere to the transaction throughout the entire journey and until the goods have been delivered to the consignee. Only then do the authorities of the state in which they have arrived have a right to tax them or otherwise to regulate their sale or use. It is substantially correct to say that Congress enjoys *exclusive* authority to regulate interstate commerce, and that this authority extends to water-borne commerce as well as to commerce carried on by land, partly by land and partly by water, by air, or

Scope of national control

[1] The Neutrality Act of 1937, under which the president would have had power to cut off shipments of munitions to Japan and China during their war starting in that year, was never invoked; but the National Defense Act of 1940, authorizing a scheme of exports-licensing, became the basis for drastic restrictions on the export of war materials of nearly every character to not only Japan but other countries aside from Great Britain.

in any other manner. Indeed, wherever navigable waters form, either in their natural condition or by artificial union with other waters, a continuous highway over which commerce is carried on between two or more states, or with a foreign country, they become "navigable waters of the United States," whose use Congress may control as an incident of the power to regulate foreign and interstate commerce. Moreover, even in the immediate field of transportation, congressional power over interstate commerce does not stop with the mere movement of articles, animals, persons, or intelligence from state to state; it includes also the relations of those engaged in such transportation with their employees. Thus Congress may legally require railway companies to equip their trains with safety appliances, to reduce the number of hours a day which their employees work, to grant employees compensation when injured in the course of their employment, to bargain collectively with employees' representatives, and to provide retirement or pension systems; and all of these things it has actually done.

Relation of state and national control

Of a vast number of commercial transactions, it is easy to say that they are wholly subject to state control, and of others it is equally easy to say that they are clearly of an interstate nature, which removes them wholly from such control; and if all could be classified so readily, few, if any, causes of friction would arise between state and national authorities over matters of commercial regulation.[1] Much difficulty of this kind, however, has been experienced, because many transactions unfortunately cannot be made to fit into either of two such mutually exclusive categories. In practice, state regulations many times affect interstate commerce, as for example when debarring color-blind engineers—not to mention the taxation of interstate carriers and their business. On the other hand, if cars employed only in local transportation are hauled as part of a train along with cars used in interstate transportation, they must be equipped with safety appliances required by the federal Safety Appliance Act; and in order to save carriers the trouble of simultaneously administering two or more sets of rates, and to protect them also against low intrastate rates that might throw an undue burden on interstate traffic, state-made railroad rates lower than interstate rates are invariably invalidated by the federal courts.[2] So long as judicially regarded as constitutional, national regulations take priority over state regulations; and the result is to place all instrumentalities of interstate commerce, even though engaged in intrastate business as well, under almost complete federal regulation. As for state regulations (apart from rates) impinging on interstate commerce, the most that can be said is that if

[1] For the enforcement of its own regulations relating to commerce, practically every state has some administrative board or commission, variously called a railway commission, a public utilities commission, or a commerce commission.

[2] After interstate rates were raised in pursuance of a Transportation Act of 1920, several states sought to preserve a lower level of rates within their boundaries. In Wisconsin R. R. Commission *v.* C. B. & Q. R. R. Co., 257 U. S. 563, the Supreme Court ruled that this could not lawfully be done.

they are challenged, and the Supreme Court considers their main purpose to be the protection of the health or safety, or promotion of the convenience, of the state's own inhabitants, or that they are primarily of only local application (such as laws regulating pilotage), they are likely to be upheld as not amounting to an invasion of the authority of Congress; but if they are viewed otherwise, they will almost certainly be overruled.

The Interstate Commerce Act (1887)

Aside from appropriations for the improvement of rivers and harbors, little national legislation affecting interstate commerce was enacted until some sixty years ago. Railroads naturally took on an interstate character at an early stage of their development; but while federal lands and subsidies were lavished upon them, regulation of their operations was long left entirely to the states. Only after the Civil War, when railway-building set in on a greatly increased scale and the inadequacy of state regulation became increasingly manifest, was a movement started for control over them by national authority. The upshot was the passage by Congress, in 1887, of the Act to Regulate Commerce,[1] first of a long series of national statutes regulating railways and other public service corporations with a view to preventing excessive charges, discriminations, and other unfair practices. And not only did the measure lay down principles and rules which such corporations must observe, but it created a special agency—the Interstate Commerce Commission—to administer and enforce them.

Present scope of regulation under it

With numerous amendments and interpretations greatly enlarging its original scope, the act of 1887 now applies to all interstate commerce carried on by railroads, by common carriers by water (both inland and coastal), by express companies, by sleeping-car and other private-car companies, by motor-bus companies, and by pipe-lines except those for the transportation of gas and water; likewise, bridges, ferries, car-floats, and lighters, and indeed terminal and other facilities of whatsoever character when used in the interstate transportation of persons or goods.[2]

Restrictions imposed

Upon all corporations operating any of these instrumentalities of public service are imposed numerous restrictions, each prompted by some earlier abuse. Thus, (1) dispatchers and trainmen must not be employed, in interstate commerce, longer than nine and sixteen hours, respectively, within any period of twenty-four hours; (2) rates for the transportation of persons and freight and for the transmission of messages must be just and reasonable; (3) rebating, directly or indirectly, and undue discrimination or preference between persons or localities are prohibited under severe penalties; (4) charging a higher rate for a short haul than for a long one over the same line in the same direction is forbidden, except in certain special instances when authorized by the Interstate Commerce

[1] 27 *U. S. Stat. at Large*, 379.

[2] Until 1934, the act applied also to all instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless systems. These are now provided for in the Communications Act of the year mentioned. See p. 386 below.

Commission; (5) free transportation may be granted by carriers only to narrowly restricted classes of persons; (6) common carriers are prohibited, except in a few special cases, from operating, owning, or controlling, or having any interest in, any competing carrier by water; and (7) carriers may not issue stocks, bonds, or other securities without previous consent of the Interstate Commerce Commission.[1]

Duties imposed

In addition to these restraints, numerous positive duties have been imposed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes in them may be made only after permission has been granted by the Interstate Commerce Commission; (2) full and complete annual reports must be made to the Commission, covering such matters, and arranged in such form, as the Commission prescribes; (3) all accounts must be kept according to a uniform system authorized by the Commission; (4) in case of injury to any of its employees, a carrier must grant pecuniary compensation, unless the accident was caused by the wilful act or negligence of the injured party; (5) the standard or basic work-day for railway employees engaged in the operation of trains is eight hours, and carriers must conform their wage schedules to this standard, and grant overtime pay; (6) all trains engaged in interstate commerce must be equipped with automatic safety appliances; and (7) all railway companies so engaged must maintain compulsory retirement and pension systems for their superannuated employees.

The Interstate Commerce Commission

The Interstate Commerce Commission—the administrative board charged with enforcing the regulations indicated, and innumerable minor ones as well—consists of eleven members appointed by the president and Senate for seven-year terms, and has a staff of some 2,300 clerks, attorneys, examiners, statisticians, investigators, and technical experts, organized in sixteen major bureaus, each under a director or chief who reports directly to a commissioner or to the full Commission. The commissioners work largely in divisions, or panels, of not fewer than three members each; and a decision of a division has the same force and effect as a decision of the Commission itself—subject to the entire Commission granting a rehearing, and finally to court appeal. Divisional hearings are sometimes held in cities in distant parts of the country.

Power over rates

Under the original law, the Commission did not have power to make rates, either upon its own initiative or upon complaint of shippers that existing rates were unreasonable. Ultimately, however, although only after a vigorous campaign of popular education, and in the face of persistent opposition from the carriers—the necessity of conferring extensive

[1] Rate-making and other proceedings by the Commission assume substantially the character of proceedings in a court of justice: the various parties are represented by their attorneys, witnesses are examined, and documentary and other evidence is submitted. Decisions are embodied in rulings and orders enforceable in the federal courts in proper proceedings, and to these courts appeals may be taken by parties affected adversely.

rate-making power was brought home to the national mind; and under laws passed in 1906 and 1920, the Commission is authorized, on complaint and after hearing, not only to fix "just and reasonable" rates, regulations, and practices, but also to prescribe definite maximum or minimum, or both maximum and minimum, charges.

Some Newer Areas of Regulation

1. Inland and coastwise water transportation

Historically, the regulation of interstate commerce has, until later years, been largely a matter of regulating railroads. A good deal of commerce, however, has always been water-borne—in vessels plying the coastal waters of the country or its rivers and lakes. Notwithstanding that the power of Congress to control such water-borne commerce was perfectly clear, for a long time such regulation as was undertaken took the form almost entirely of federal planning and expenditure for the improvement of rivers and harbors; and over the years billions of dollars have been spent for this purpose, sometimes legitimately and wisely, but often from motives that had more to do with politics than with navigation—river and harbor bills having traditionally been a favorite source of congressional "pork." Only in the Transportation Act of 1940[1] did Congress get around to instituting a genuine system of regulation of rates, services, and management for trade carried on by water (or partly by water and partly by rail), on lines broadly similar to those long applying to railroads. Already aptly termed "the economic supreme court of the American transportation world," the Interstate Commerce Commission now found itself with a considerably widened jurisdiction.[2]

2. Motor transportation

Meanwhile, however, that jurisdiction had been enormously extended also in another direction. The automobile had been introduced, and trucks and buses had come into use. For a good while, distances covered were usually limited and no regulation was deemed necessary beyond state or local provisions concerning licensing and safety. As truck and bus business developed, however, on something approaching its present huge scale, serious difficulties and abuses arose—cut-throat competition between companies and between them and the railroads, under-payment of employees, laxity about accident insurance, dubious financing; and although remedial measures were instituted by some states, it became apparent that the business had so largely assumed an interstate character that, as the Interstate Commerce Commission long urged, the problem was fundamentally one for the national government. In 1935, therefore, Congress passed a Motor Carrier Act[3] bringing all interstate truck and bus lines within the pale of federal law and making the I.C.C. the

[1] 54 *U. S. Stat. at Large,* 898.

[2] All commerce on inland waters, as well as all coastwise trade, is, by act of Congress, restricted to American vessels, and a considerable share of it in the central portions of the country is in the hands of a self-supporting government establishment, the Inland Waterways Corporation, in the Department of Commerce.

[3] 49 *U. S. Stat. at Large,* 543-547.

regulating authority. If intending to operate across state boundaries, a truck or bus company must initially secure a certificate of convenience and necessity from the Commission; and thereupon its financing, rates, hours of labor, safety appliances, and general level of service become subject to that body's supervision very much as in the case of railroads.

3. Electrical communications

As illustrated by motor transport (and indeed, if one goes back far enough, by the railroad and the steamship), science and technology are responsible for many new modes of transportation, progressively expanding the scope of "commerce," and adding by so much to the problem of regulating it. In the field of communications (which no less than transportation is embraced in "commerce"), they have added, if possible, even more. In most European countries, the telegraph, the telephone, and radio are government-owned and operated, directly or through auxiliary corporations. Apart from some limited ownership and operation of facilities for its own use by the national government, all of these instrumentalities in the United States have been developed and are owned and operated privately; and since all more important ones are necessarily interstate in scope, all come within the range of federal control over commerce. Originally, telegraph and telephone regulation fell to the Interstate Commerce Commission; although when, in 1927, it was belatedly recognized as necessary to institute similar regulation of radio-broadcasting, the function was assigned rather to a separate Federal Radio Commission, charged with issuing licenses, assigning wave-lengths, and exercising some supervision over advertising. This latter arrangement did not work well; and in 1934 the desirability of a new set-up for radio control, combined with a conviction that the Interstate Commerce Commission was expending its time and energies on transportation matters to the neglect of problems connected with interstate electrical communications, Congress passed a comprehensive Communications Act[1] (a) abolishing the Radio Commission and transferring its work to a new Federal Communications Commission, and (b) withdrawing telegraph and telephone regulation from the I.C.C.[2] and vesting it in the new agency, which therefore now has for its province the entire field of interstate (and to a more limited extent foreign) communications by both wire and radio.[3] Speaking generally, the powers, functions, and procedures of the Communications Commission are similar to those of the I.C.C., with, in the case of radio, the allotment and control of use of the air lanes in accordance with "public interest, convenience, and necessity" one of its most formidable tasks. The new arrangement for telegraph, telephone, and cable regulation in 1934 marked the only instance in over sixty years of the jurisdiction of the I.C.C. being narrowed.

[1] 48 *U. S. Stat. at Large,* 1064.

[2] Regulation of cable lines to foreign countries also, although control over these has always been to a considerable extent in the president.

[3] The states, however, retain some control over telephone companies, especially their local rates.

4. Aviation

Shortly after World War I (which imparted a considerable impetus to aviation), a standing interstate conference having as its object the promotion of uniformity in state legislation[1] brought forward a Uniform State Law for Aëronautics; and numerous states adopted it. As time went on, however, much, if not most, flying became interstate; and in 1926 Congress passed an Air Commerce Act applying to all interstate aviation and giving a Bureau of Air Commerce in the Department of Commerce power to fix standards of safety, to test and license aviators, and to make rules governing air traffic. This agency has since been superseded, and (after a somewhat bewildering succession of changes) there have come to be, since a Civil Aëronautics Act[2] was passed in 1938, two main interrelated federal agencies with functions of the kind: (1) a Civil Aëronautics Administration and (2) a Civil Aëronautics Board—the former concerning itself principally with mapping, lighting, and marking interstate airways, providing regular and emergency landing fields, licensing planes and pilots, and fostering aviation research; the latter, principally with the quasi-legislative and quasi-judicial functions of controlling rates for the transportation of passengers, mail, and goods, promulgating safety regulations, investigating aircraft accidents, and suspending or revoking licenses. Although placed in the Department of Commerce for "housekeeping" purposes, both are more truly independent establishments—in form, branches of a Civil Aëronautics Authority. In a domain in which strict uniformity of rules and practices is peculiarly desirable, the states have in most instances risen to the need by incorporating all federal-made regulations into their own aviation codes.[3]

The Department of Commerce

Origins

Impressed with the growing urgency of problems of commerce and industry, Congress in 1903 added to the then list of eight executive departments a Department of Commerce and Labor. Ten years later, Labor was set off as a separate department. Commerce, however, remains an establishment of major interest and importance; any review of the functions and activities of its upwards of twenty principal offices and services would take one over an enormous area of government enterprise, and cannot be undertaken here. A few divisions, indeed, *e.g.*, the Inland Waterways Corporation and the agencies having to do with aviation, have already been touched upon.

Some divisions

Central to the Department is the thirty-four-year-old Bureau of Foreign and Domestic Commerce, sometimes described as "the business man's representative in government," and reorganized in 1945 with

[1] See pp. 564-565 below.

[2] 52 *U. S. Stat. at Large*, 973.

[3] Another form of federal regulation of interstate commerce which might be spoken of here is that applying to the transmission of electric energy across state lines. The subject of water-power will, however, be touched upon later in connection with the conservation of resources. (See pp. 429-430 below.)

increased segregation of its international and domestic functions. Included also are (1) a Coast and Geodetic Survey, which assists mariners by charting the coastlines of the United States and its dependencies, as well as lake and river beds and ocean currents, and by making seismological observations with a view to reducing earthquake hazards; (2) a Weather Bureau (transferred from the Department of Agriculture in 1940), operating the basic national system of meteorological observations, analyzing the resulting data, and preparing and distributing weather forecasts and warnings; (3) a Patent Office (about which something will be said in the next chapter) administering the patent laws enacted by Congress; (4) a Bureau of Standards—one of the outstanding scientific institutions of the country—carrying on research in fields in which precise measurements are required, and comparing and testing measurement standards employed in scientific investigation, commerce, and educational institutions with the standards adopted or recognized by the government; and (5) a Bureau of the Census [1]—the "greatest fact-finding and figure-counting agency in the world"—responsible not only for taking the decennial census required by the constitution, but for various supplementary enumerations provided for by statute, and publishing reports which, although at first glance dry and forbidding, yield the student who refuses to be discouraged comprehensive and illuminating surveys of the country's population, occupations, wealth, and significant trends.[2]

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[1] In 1946, the Census Bureau's functions relating to vital statistics were transferred to the Federal Security Agency. Its business reports and other activities, however, remain in the Department of Commerce.

[2] As in the case of all of the executive departments, an up-to-date outline of departmental machinery and activities will be found in the latest issue of the *United States Government Manual.*

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CHAPTER XXV

GOVERNMENT AND BUSINESS

Earlier attitudes

For a good while after our national government was founded, the view was commonly held that private business enterprise should not be interfered with by public authority. Government, to be sure, might and should remove obstacles to the free flow of such enterprise; and it is not to be forgotten that in the first decade under the constitution the federal government laid business under heavy obligation by putting the national credit on a secure basis, establishing a sound monetary system, chartering a United States Bank, and creating other favorable conditions so notoriously lacking under the Articles of Confederation. Even the measures required for these purposes, however, encountered sturdy opposition, on constitutional or other grounds; and that government should embark upon positive regulation or control of business interests, operations, and practices would to most people have seemed totally undesirable. The welfare of society, it was believed, would be best furthered by free competitive activity among the individuals composing it.

Great changes later

A century and half, however, has brought a remarkable change. Not only does government nowadays encourage and promote business in a multitude of ways undreamt of in the time of Hamilton and Jefferson, but it has swept a mighty regulating arm over virtually the entire field of commercial, industrial, and financial activity, fixing conditions of competition, forbidding practices held objectionable, and, under copious legislation associated particularly with the New Deal, controlling production, prescribing minimum wages and maximum hours, requiring collective bargaining, and prohibiting false or misleading advertising of commodities and securities. In the recent war period, a peak was reached when industrial establishments were, in effect, told what they might manufacture, access to necessary materials was scaled according to priorities, and the prices at which products might be sold were placed under ceilings prescribed from Washington; and even though such wartime controls have already been, and will be farther, relaxed, in the final outcome business will undoubtedly be left subject to a greater amount of regulation, all told, than in any earlier period of our history. Government itself, indeed, engages in business, not only in such older and necessary forms as conducting the postal service, but in newer forms (such as loaning money to farmers and home-builders) in which it competes directly with private capital.

In the previous chapter, we examined the commerce clause of the

constitution (which, as pointed out, supplies the constitutional basis for most regulation of business in general) and looked into the ways in which commerce as such is regulated under it. Here we are concerned with (1) some ways, not already touched upon, in which the federal government assists business; (2) the development of business regulation in general from the later nineteenth century; (3) some newer forms of regulation introduced during the fight for recovery from the depression of the thirties; (4) some more or less temporary forms of regulation accompanying our participation in World War II; and (5) a few aspects of the government's own direct participation in business.

Some Government Aids to Business

In point of fact, there is not much that the national government undertakes that does not actually or potentially, directly or indirectly, serve the interests of business. The maintenance of friendly intercourse abroad, the stationing of consuls in foreign cities, the upkeep of the Army and Navy for national defense, the preservation of domestic law and order, the regulation of commerce, the provision of a currency system, the control of banking, the operation of a postal service, and what not—all make for conditions obviously indispensable if the business interests of the country are to thrive. Protective tariffs in some ways restrict business, and certainly are not to be considered indispensable to it, yet are presumed also to have fostered business, at least in the domain of manufacturing. Three activities, however,—validated by express grants of power in the constitution—may be singled out for mention here: (1) the maintenance of a system of weights and measures, insuring the definiteness and stability of standards which business relations require, (2) the granting of copyrights and patents, and (3) the regulation of bankruptcy.

1. Weights and measures

The authority given Congress to "fix the standard of weights and measures"[1] is so unrestricted that it can be, and has been, exercised in respect to all manner of measurements—length, weight, volume, temperature, strength, quality, and others; and to aid in determining such standards, the Bureau of Standards, mentioned above, is maintained in the Department of Commerce. Along with the familiar units taken over from old English usage—the pound, yard, gallon, bushel, etc. (with their derivatives), the metric system employed in Continental countries, and having some decided advantages, has been given official status, even though as yet but little actual use is made of it outside of scientific circles. So far as developed to the present time, the function of the national government is merely to "fix" standards, keep models in the Bureau of Standards, and furnish models or copies to the states, leaving it almost entirely to state and local governments to require conformity to the appropriate standards in business and other transactions in so far as they choose to do so. Congress may not only *fix* standards, but set up

[1] Art. I, § 8, cl. 5.

machinery for enforcing them nationally. This, however, it has not done, with the result that in day-to-day practice there is not entire uniformity the country over.

2. Copyrights and patents: The constitutional basis of our laws and regulations relating to copyrights and patents is a grant of authority to Congress "to promote the progress of science and the useful arts" by securing to authors and inventors, for limited periods, "the exclusive right to their respective writings and discoveries."[1] The exclusive right conferred is by way of exception to the common law rule against monopolies, with the purpose, of course, of rewarding talent and encouraging creative effort. The privilege of copyright extends not only to books, but to periodicals, paintings, charts, maps, dramatic and musical compositions, cartoons, lectures, sermons, motion pictures, and photographs; and the period covered is twenty-eight years, with in most cases option of one renewal for an equal length of time. Included is the exclusive privilege of translating, dramatizing, and presenting a work; and in the case of a musical composition, the right also to perform it publicly for profit and to exact a royalty for any reproduction of it by mechanical instruments. A grant of copyright is made to everyone seeking it and depositing one or more copies of his work, with payment of a two-dollar fee; copyright, too, is property and transferable as such. On the other hand, the Copyright Office in the Library of Congress, which administers the law, makes no effort to ascertain whether any infringement of a previously copyrighted publication or production is involved; if such is alleged, the party considering himself injured can seek redress only through a suit for damages, or injunction proceedings, in a federal court.

a. Copyrights

b. Patents Through a Patent Office in the Department of Commerce, a patent may be granted to any person who has invented or discovered "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, not known or used by others in this country ... and not patented or described in any printed publication in this or any foreign country ... and not in public use or on sale in this country for more than one year" prior to the filing of the application. As suggested by this phraseology, patents, unlike copyrights, are not granted to every one who applies; on the contrary, the Patent Office is supposed to do its best to find out whether the machine, device, or process for which a patent is sought is actually new and whether a patent for it would infringe upon rights under some patent previously granted; and the period for which a patent runs is only seventeen years, with, in general, no right of renewal. Appeals against decisions of the patent examiners in the Patent Office may be taken to a board of patent appeals in the Office, and thence to the Court of Customs and Patents Appeals or to a federal district court. Moreover, while in general the monopolistic rights carried by a patent are not challengeable, the uses made of patents,

[1] Art. I, § 8, cl. 8.

especially by big industries, singly or in combination, sometimes bring the holders into conflict with the laws prohibiting contracts in restraint of trade. Slightly over a hundred years ago, a commissioner of patents soberly recommended to Congress that his office be abolished because "everything had been invented." How far wrong he was is indicated by the fact that upwards of fifty thousand patents are in our times granted every year, the 2,415,374th in the country's history being, in fact, recorded in February, 1947.[1]

3. Bankruptcy

Bankruptcy is one of a number of matters over which the national and state governments have concurrent legislative power; and for more than a hundred years (except for three brief intervals) it was left entirely to state control. In 1898, however, Congress passed a general bankruptcy act;[2] and thereupon former state laws on the subject either were repealed or fell into a condition of suspended animation. It is still permissible for a state to legislate on bankruptcy. But in all cases of conflict the national law takes precedence; and this law is so comprehensive that little need or room for state action survives. Proceedings in bankruptcy cases come under the jurisdiction of the federal district court of the district in which the bankrupt resides; and after a bankrupt's assets have been inventoried and equitably distributed among his creditors, the judge enters a decree discharging him from all further legal liability for debts incurred prior to the commencement of proceedings.

The extraordinary number of bankruptcies occurring during the depression decade of the thirties led to much new legislation supplementary to existing bankruptcy law, notably (1) an act of 1933 opening the courts to persons (especially farmers) and railroads with assets exceeding liabilities yet unable to pay their debts as they matured, and facilitating settlements between such "debtors" (not "bankrupts") and their creditors without the stigma of bankruptcy; (2) an act of 1934 permitting corporations in general to reorganize as "debtors" (not bankrupts) with the consent of a majority of their creditors; (3) a Municipal Bankruptcy Act of 1934 (held unconstitutional in 1937, but forthwith replaced with a law excluding counties[3]), extending to counties, cities, and other local "taxing districts" privileges similar to those conferred on individuals and railroads in 1933; and (4) an Emergency Farm Mortgage Act of 1935. Taken together, these measures (which are still operating in the liquidation of old debt situations) proved of substantial importance in speeding up business and agricultural recovery, especially by permitting prompt

[1] Charging each applicant a fee of forty dollars, the Patent Office actually makes money for the government.

In addition to granting patents, the Patent Office registers trade-marks and labels for use on goods distributed through channels of interstate and foreign commerce. Registration is for twenty years, is indefinitely renewable, and can be protected through appeal to the courts.

[2] 30 *U. S. Stat. at Large*, 544.

[3] Nevertheless with counties and special assessment districts brought back under the legislation in 1940.

readjustment, on a sound basis, of debts owed by railroads and other corporations. At the same time, the opprobrium of bankruptcy was entirely obviated in the case of any company whose affairs were sufficiently sound to be susceptible of reorganization. Finally, in 1938 and 1946, Congress enacted general revisions of the bankruptcy laws calculated to coördinate and unify the expanded system.[1]

Federal Regulation of Business Combinations and Practices

Corporations and "trusts" —the problem of monopoly

Business in this country grew to its present immense proportions largely through the agency of combinations or associations known as corporations and "trusts," a corporation being a group of people pooling capital for a business purpose and endowed by law with a single, corporate personality; a trust, a combination or merger of corporations into a super-corporation controlling the constituent corporations by holding major shares of their stocks or other assets. Another, and nowadays more familiar, name for trusts is holding companies—a term employed especially in connection with great combinations in the field of gas, electric, and other public utilities. Corporations may be given their legal status as business entities by act of Congress—both private corporations, such as railroads and banks, and government-owned and operated corporations, like the Reconstruction Finance Corporation and the T.V.A. As a rule, however, they receive their charters from a state (Delaware being a favorite because of the easy terms permitted), with legal rights ostensibly restricted to the state of incorporation, but in practice extending to other states as well by virtue of some simple formality of registration. As long ago as 1933, our two hundred largest industrial corporations, with assets aggregating almost a hundred billion dollars, controlled not only nearly half of the country's industrial wealth, but a fifth of the national wealth all told.[2]

Such concentration of economic power raises many problems, and among them that of monopoly, involving exclusive operation of some economic function or group of functions, or at all events such a degree of dominance as to give independent control of services and prices. In certain areas, monopoly is hardly to be avoided. Speaking generally, it is not practicable for two or three gas and electric companies to operate in the same city; and in such cases monopolistic abuse has to be prevented by direct public regulation, as for example of rates. From England, however, America inherited a deep-seated antipathy to monopoly in general, and the common law as brought across the Atlantic (and still basic to our legal system) made unlawful any monopolistic powers and practices unreasonably obstructing trade—in other words, interfering with the freedom of competing businesses, large and small, to organize and operate

[1] 52 *U. S. Stat. at Large*, 840.

[2] National Resources Committee, *The Structure of the American Economy* (Washington, D. C., 1939), 105.

on equal terms. And this free scope for individual initiative and enterprise, leaving the way open for failure and disaster, but also for opportunity and success, and insuring the consuming public the benefits of quality and prices flowing from a competitive quest for markets and profits, has remained the most treasured feature of our American economic system. By the same token, the protection of this national heritage —in other words, the curbing of monopolistic abuses—has been, increasingly in these later days of big business, a major public concern and a topmost task of government.

State regulation inadequate

For upwards of a hundred years—while the Supreme Court continued to regard Congress as having no power to regulate interstate commerce except as to matters involved *directly* in commerce—the states were left to deal alone with monopolistic and other practices interfering with the free flow of trade; and whatever correctives they brought to bear rested either simply upon the old common-law principle that all combinations operating to restrain trade *unreasonably* are illegal or upon statutes defining or modifying that principle's applications.

The Sherman Act (1890)

In earlier and simpler days, no great amount of difficulty was experienced. But with the rise of manufacturing and other business establishments of large proportions, and operating over wide interstate areas, state regulation proved increasingly inadequate; and in 1890, Congress, taking a broader view of its commerce powers than did the judges, risked judicial disapproval by passing a notable measure—the Sherman Anti-Trust Act—aimed at protecting trade and commerce against restraints and monopolies, and to that end, declaring, in sweeping terms, every contract, combination, or conspiracy in restraint of trade or commerce among the several states or with foreign nations to be illegal, and providing heavy penalties for violations.[1] No special agency, however, was created to administer the law; the Department of Justice showed little zeal for enforcing it; a Supreme Court decision in the Sugar Trust case of 1895 [2], severely narrowed its scope by ruling that although the defendant produced all but two per cent of the sugar used in the United States, its business was primarily *manufacturing*, rather than *commerce*, and therefore subject to regulation only by the states; and for a decade thereafter virtually nothing happened.

The "rule of reason"

"Trust-busting" was one of President Theodore Roosevelt's prime interests, and successful prosecution of the Northern Securities case by the government in 1904 gave him fresh impetus. Notwithstanding government victories in other cases, however, the Supreme Court again weakened the law by setting up a distinction between combinations which, in the Court's opinion, involved only a "reasonable," and those which amounted to an "unreasonable," restraint of interstate or foreign trade. In cases in 1911 against the American Tobacco Company and the Stand-

[1] 26 *U. S. Stat. at Large* 209
[2] United States *v.* E. C. Knight Co., 156 U. S. 1.

ard Oil Company, for example, the Court applied this "rule of reason" and in effect read into the law declaring illegal "every" combination, etc., in restraint of trade, the word "unreasonable," after the word "every." The effect was practically to reverse or overrule certain earlier decisions in which the Court had held that *all* such combinations in restraint of trade came within the inhibition of the statute.

Further legislation required

Experience of this sort naturally suggested that if the law applied only to "unreasonable" combinations and contracts, some means should be provided whereby well-intentioned combinations might know definitely whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine their status. Demand arose, too, for clarification as to the kinds of contracts that the government would look upon as unreasonable restraints upon trade, and as to the trade practices that it would regard as constituting unfair competitive methods. The upshot was (1) the passage, in 1914, of the Clayton Anti-Trust Act [1] to reënforce and supplement the Sherman Act of 1890, and (2) the simultaneous creation of the Federal Trade Commission as an agency to carry on investigations and coöperate with the Department of Justice in the enforcement of "anti-trust" laws, new and old.

The Clayton Anti-Trust Act (1914)

Vigorously sponsored by President Wilson as a "new law" to meet "conditions that menace our civilization," though opposed with equal energy by business interests, the Clayton Act (1) forbade price-cutting to drive out competitors, granting rebates, making false assertions about competitors, limiting the freedom of purchasers to deal in the products of competing manufacturers, and a long list of other abuses, discriminations, and restraints of trade; (2) forbade corporations to acquire stock in competing concerns if the effect would be to lessen competition, and outlawed interlocking directorates in the case of larger banks, industrial corporations, and common carriers; (3) made officers of corporations personally liable for violations of the act; and (4) made it easier for injured parties in cases arising under either this act or the original anti-trust law to prosecute their suits.

A quarter-century of irregular enforcement

The object of the new legislation of 1914 was to close the gaps in the Sherman Act, and President Wilson hailed it as supplying "clear and sufficient law to check and destroy the noxious growth [of monopoly] in its infancy." Notoriously, however, it proved less effective than had been hoped. In interpreting "unfair methods of competition," the courts grew increasingly tolerant; to a dead-weight of opposition from large business interests was added honest doubt of disinterested students, including some federal officials, as to whether the entire program was practicable, or even desirable, and especially as to whether ameliorative regulation of trusts and other combinations was not preferable to attempts to break them up completely; efforts to make directors personally

[1] 38 *U. S. Stat. at Large*, 730.

liable for the acts of corporations almost completely broke down. During World War I, the entire body of legislation was, to all intents and purposes, suspended; under succeeding Republican administrations, it was seldom invoked; and when the National Recovery Act of 1933 was passed, in an effort to rescue the country from a great depression which the anti-trust laws had manifestly not availed to prevent, those laws were expressly suspended for so long as the Recovery Act should remain in force. This period of suspension proved, however, of only two years' duration, and thereupon the laws came back into at least nominal operation. Presently, too, they acquired some actual vigor. In 1938, a former professor of law at Yale University, Thurman W. Arnold was placed in charge of the anti-trust division of the Department of Justice, and forthwith became the most assiduous "trust-buster" that the country had known since Theodore Roosevelt, instituting in five years forty-four per cent of all proceedings started under the anti-trust laws between 1890 and his retirement in 1943.[1] There was, however, some shift from the old idea of trust-busting as an object in itself to that of simply defending a free market in the necessities of modern life; and with this more broadly social end in view, prosecutions were directed primarily against private groups that had established themselves in strategic positions of control—against "bottlenecks of business" that blocked the distribution of products anywhere along the line from the raw-material stage to purchase by the ultimate consumer. In 1938, also, under President Roosevelt's initiative, Congress provided for a Temporary National Economic Committee charged with looking deeply into the entire problem of concentration of wealth and economic control, and the effects of it on American life.

The situation during World War II

While, however, the new enforcement campaign was in progress, the country was plunged into World War II. The Committee had reported voluminously in 1941, piling up impressive evidence of the tremendous concentration of wealth and economic power that had taken place, but offering only divided recommendations for remedial action—even if the times had been favorable for any action at all. And in wartime, proceedings under existing laws had to be slowed down, the President announcing in 1942 that, while every effort would be made to protect the public interest, with no violation of law escaping ultimate punishment, prosecutions would be postponed whenever it could be shown that such a course would tend to promote the production of materials for war use; in the same year, indeed, Congress expressly exempted from prosecution at any time any acts or omissions "deemed in the public interest" and approved by the chairman of the War Production Board after consultation with the attorney-general. There was not complete cessation of anti-trust activity: in 1943, fifty-two suits were instituted, forty-three were concluded, and 152 investigations were started; and in 1944 the "largest anti-trust suit

[1] In the fiscal year 1940 alone, 345 suits were instituted and 280 terminated; and of the latter, the government won 265.

in history" was filed against the Association of American Railroads and various individual railroad companies and investment banking houses, aimed at breaking an alleged rate-making monopoly in the transportation field. In general, however, the war years were a period of slackened effort.

A continuing dilemma

The war ended with large numbers of suits pending or postponed, and with others needing to be instituted; and the Department of Justice soon gave evidence of renewed activity. On the other hand, President Roosevelt's aggressive concern was no longer in the picture, and the overshadowing problem of reconversion of industry to a peacetime basis served as an unsettling and deterring factor. In any event, it was clear that, by and large, the story of anti-monopolistic regulation in this country had not been one of highly impressive achievement. A limited number of great concerns—chiefly the Standard Oil Company and the American Tobacco Company, as earlier constituted—had been broken up; others had been brought to book and penalized; many minor punishments had been inflicted along the way. Basic obstacles, however, remained, and probably will always remain. Among these, one was, and is, the dependence of the laws for vigorous enforcement upon the economic predispositions and personal inclinations of successive presidents; another, more serious, was the lingering uncertainties, despite all the legislation, as to what constituted "unfair competition," "unreasonable" restraint of trade, and the like; still another was the wavering support which the Federal Trade Commission could expect from the courts; and weightiest of all was the inescapable economic fact that large-scale production, calling for large-scale organization, makes for economies, and therefore for more and cheaper goods and services for the consuming public. Under these circumstances (and others that might be mentioned), the effort to maintain equity and opportunity for business of *all* sorts, small as well as large, clearly dare not be abandoned, yet could be expected, at best, to yield only somewhat modest results.

The Federal Trade Commission

Like its prototype, the Interstate Commerce Commission, the Federal Trade Commission (consisting of five members appointed by the president and Senate for seven-year terms) has throughout its history been one of the major independent establishments, with a staff now numbering more than six hundred. Charged with the general function of preventing unfair methods of competition and unfair trade practices, in the interest of the public,[1] the Commission (1) requires reports from, and conducts investigations of, corporations engaged in interstate commerce (except

[1] The Commission now enforces not only the Sherman Act and the original Clayton Act, but (1) an amendment of 1936 to the latter known as the Robinson-Patman Anti-Discrimination Act, and designed to prevent sellers from arbitrarily giving advantages to some buyers, as against others, through disguises such as advertising allowances and brokerage fees; (2) a Wheeler-Lea Truth-in-Advertising Act of 1938; and (3) a Wool Products Labeling Act of 1939, which seeks to protect producers, manufacturers, and consumers against the presence of unrevealed substitutes and mixtures in wool products.

banks and common carriers); (2) advises with corporations on organization and other matters with a view to helping them keep from running afoul of the law; (3) issues "cease and desist" orders when violations or threatened violations of law are discovered; (4) checks on compliance by corporations with not only the Commission's own orders, but antitrust decrees handed down by the courts; (5) guards against unlawful acquisitions of stock by corporations and against prohibited interlocking directorates; (6) holds conferences in which representatives of industry are encouraged to agree upon wholesome trade practices (although the line between lawful and unlawful agreements is not always easy to maintain); (7) investigates trade conditions in and with foreign countries where combinations or practices may affect the foreign commerce of the United States; and (8) does many other things as well. In all this it may act on its own initiative, on direction of the president or of Congress, or at the suggestion or request of the attorney-general; and disregard of its cease and desist orders, issued after formal hearings, subjects the violator to suit brought by the attorney-general, unless in the meantime an appeal has been taken to a federal circuit court of appeals.

Some Special Fields of Business Regulation

Supplementary to the regulation of general business under such basic statutes as the Sherman Act and the Clayton Act, with their amendments, are many restrictive arrangements applying to particular branches or areas of business. An older illustration is the system of regulations imposed by a Packers and Stockyards Act of 1921 on packers, commission men, and stockyard operators for the protection of farmers and stock-raisers against arbitrary price manipulations, discriminatory charges, and other unfair practices from which they long had suffered. Administered by the Bureau of Animal Industry in the Department of Agriculture, in conjunction with state departments of agriculture or live-stock commissions, this measure was upheld by the Supreme Court as a legitimate exercise of the federal commerce power.[1]

Fields occupied during the depression

Many of the special fields of regulation, however, were first occupied by the federal government in connection with its efforts during the thirties to overcome the depression of that period and to prevent its recurrence. Those efforts, to be sure, went far beyond the mere regulation of particular types of business. In the National Industrial Recovery Act of 1933,[2] based on the assumption that the federal commerce power involves full authority to remove burdens from commerce and obstructions to its flow, attempt was made virtually to revolutionize the pattern of industry and of industrial relations with a view to increasing production, spreading work among the unemployed, raising wages, stimulating purchasing power, abolishing child labor, promoting collective

[1] Stafford *v.* Wallace, 258 U. S. 495 (1922).
[2] 48 *U. S. Stat. at Large*, 195.

bargaining, and curbing wasteful competition.[1] On the ground, however, that Congress had stretched the commerce power unjustifiably to include manufacturing, and had been too free in delegating powers of an essentially legislative nature to the president, the Supreme Court invalidated the act after two years of operation;[2] and, except for being preserved, as the so-called "Little N.R.A.," in the limited field of supplies furnished to the government under contract, the entire structure collapsed.[3] Other remedial measures of the period, however, proved more acceptable to the Court and became the basis for business regulation that has survived and expanded to this day. Three particular areas so covered may here be mentioned: the issue and sale of securities, public utility holding companies, and the sale of commodities.

State control over sales of securities

Millions of Americans own shares of stock in medium-sized or larger businesses; many others hope to do so; millions also have, in effect, loaned money to such businesses by purchasing and holding their bonds or debentures. Only in this way could our gigantic industrial machine be financed; only in this way, too, could great numbers of thrifty people find profitable outlets for the bulk of their savings. Such distribution of stocks, bonds, and other securities, however, opens a very wide field for fraudulent practice. The average investor is in no position to know the actual financial condition, the prospects, or even the reliability and integrity, of businesses to which he is solicited to intrust his money; and if he is at all gullible, he stands large chance of being "taken in" by the high-powered salesmanship of dishonest, or at least unscrupulous, promoters and agents. To be sure, the common law can be invoked against persons perpetrating fraud. But against slippery vendors of securities, it is not likely to prove of much avail. To be sure, too, the national government stands ready to prosecute persons using the mails for fraudulent purposes. But most sales of securities are not made by mail. And so notorious did abuses become, with people swindled out of millions every year, that Kansas, in 1911, led off in a belated effort of the states to make life uncomfortable for sellers of "blue sky" by placing all traffic in stocks and bonds within the state under public regulation. Other states followed suit, with the result that nowadays virtually all of the forty-

[1] Almost equally important parallel legislation aimed at agricultural recovery will be described in the next chapter. See pp. 415-419 below.

The essence of the new industrial scheme was a system of "codes of fair competition," covering hours, wages, and other matters—codes which, after being drawn up for different industries and trades by representatives of their own choosing and approved by the president, were to be binding on all persons engaged in the given industry or trade, with heavy fines for violation. General direction was vested, under the president, in a National Recovery Administration; and at the end of the first year some five hundred codes were in operation, with two hundred more in process of adoption. The plan was intended only for the period of national recovery, although hope was entertained that some of its more ameliorative features would survive afterwards on a voluntary basis.

[2] Schechter *v.* United States, 295 U. S. 495 (1935).

[3] The National Labor Relations [Wagner] Act of 1935, however, salvaged practically the whole of one section of the Recovery Act guaranteeing the right of collective bargaining. See p. 443 below.

eight have "blue-sky" laws, commonly requiring securities offered in the state to be registered and purveyors of them to be licensed, and enforced by a securities commissioner or similar official, usually with authority to prohibit the sale of a given security issue in the state unless investigation (in case of doubt) reveals that there is nothing fraudulent about it.

Federal control introduced:

Here again, however, state regulation, however beneficial, could not fully meet the need. Machinery was inadequate for the complicated investigations required; more serious, promotors and salesmen freely operated across state lines, in a business that to a large extent was interstate in character. When the depression came on in the thirties, it was considered that a main contributing cause had been the unloading upon the public of worthless or dubious securities through misrepresentation and other fraud—"a traffic," as President Roosevelt characterized it, "in the social and economic welfare of our people"; and the experience brought home forcibly the need for stricter and more uniform regulation by national authority. The upshot was the enactment by Congress of two carefully drawn statutes—in 1933, a Federal Securities Act, and in 1934, a Securities Exchange Act.[1]

The Federal Securities Act of 1933

The basic purpose of these two interlocked pieces of legislation is to protect investors against every sort of fraudulent practice in the issuing and handling of securities offered for sale in interstate commerce. To this end, the act of 1933 begins by requiring all issues of stocks, bonds, or other securities, if to be offered in interstate commerce or by mail, to be registered with originally the Federal Trade Commission but since 1934 the Securities and Exchange Commission set up in that year.[2] Every such registration must be accompanied by a "registration statement" containing full financial and other information, and also by the "prospectus" intended to be used in soliciting purchases by the public, and containing all information which an investor ought to have when making a decision; and selling or offering to sell to the public in interstate commerce or through the mails any security not properly registered with the Commission is made a penal offense. Not only so, but heavy civil liability is laid upon any corporation, including its directors and principal financial officers, for any untrue or only partly true declaration of a material fact in a registration statement or prospectus. To the ancient rule, therefore, of *caveat emptor*—"let the buyer beware"—is added the complementary injunction, "let the seller also beware." It is not the business of the Commission, any more than that of a state securities commissioner, to pass upon the inherent value of securities issued or upon the outlook for prosperity of the corporation issuing them; and no action by the Commission is to be construed as a recommendation of any secur-

[1] 48 *U. S. Stat. at Large*, 74, and 48 *U. S. Stat. at Large*, 881.

[2] This Commission consists of five members appointed by the president and Senate for staggered five-year terms.

ity to potential purchasers. The agency's only function, up to this point, is to see that complete information concerning a security is made available to the public, that this information is accurate, and that no fraud is practiced in connection with sales.

The Securities Exchange Act of 1934

To aid in promoting this general end, the Securities and Exchange Act of 1934 went an important step farther. A large proportion—perhaps the major part—of the securities registered with the Commission are bought and sold on stock exchanges found in twenty or more of our principal cities, the largest and best known being that in New York. Formerly, however, transactions in securities in these markets were subject to little regulation beyond the few restrictions which the exchanges themselves saw fit to impose upon their members; and these provided little protection for the investing public. All manner of unsavory and dishonest practices grew up—"wash sales," matched orders, "rigging the market," "jiggles," pools, and other manipulations—by which prices were pushed up or forced down for the benefit of insiders, while innocent investors were led like lambs to the slaughter. Speculation "on margin," too,—*i.e.*, paying only a certain percentage in cash for what is bought—reached scandalous proportions, notably in the frenzied market operations shortly preceding the crash of 1929, and threatened to precipitate the entire national credit structure into chaos.

To remedy this situation, the transactions of all exchanges engaged in interstate commerce are declared by the act of 1934 to be "affected with a national public interest" which makes it necessary to provide for their regulation and control "in order to protect interstate commerce, the national credit, the federal taxing power, to make more effective the national banking system and the Federal Reserve system, and to insure the maintenance of fair and honest markets in such transactions." Annual and other reports are required to be filed with the exchanges and the Commission by all corporations or companies having securities listed, and any deviations from material fact constitute grounds for suspending or withdrawing the security from trading. Various provisions outlaw sundry objectionable practices of the past, and, all in all, the measure seeks to make the exchanges fair and open market-places for investors rather than mere rendezvous for conspiring speculators. One will not be so naïve as to suppose that all stock market operations have since been, or will in future be, beyond reproach. Exceedingly timely and useful safeguards have, however, been supplied.[1]

[1] In June, 1946, the Securities and Exchange Commission asked for extension of its jurisdiction so as to cover the securities of all corporations having assets of over three million dollars, and with more than three hundred security-holders. The effect would be to add about a thousand to the two thousand already included; and among them would be such large enterprises as the Aluminum Company of America and the Great Atlantic and Pacific Tea Company. The total number of corporations and companies filing federal tax returns is 475,000. But the great majority are very small, and a good many are in the hands only of particular families or of employee groups. To January, 1947, the Commission's request had not been granted.

Public utility holding companies

A problem of growing importance in later years has been that of the public utility "holding company"—a corporation chartered in some particular state, holding the majority stock in operating companies scattered over the country, and able, as matters formerly stood, to evade any great amount of regulation, and therefore to indulge in shady practices of many descriptions. Some of the abuses, indeed, which the Securities Act and the Securities Exchange Act were designed to remedy attained their greatest seriousness in connection with the marketing and distribution, through stock exchanges, of the securities of such holding companies. To deal with the matter, Congress, in 1935, passed a momentous measure under two "titles," one a Public Utility Holding Company Act and the other a Federal Power Act.[1] In the first portion of the statute, the Securities and Exchange Commission is given jurisdiction over holding companies engaged in the production of gas and electricity and either participating in interstate commerce or making use of the United States mails—which, manifestly, means virtually all of them. All holding companies have been forced to register with the Commission, and to file with it a registration statement giving full information concerning the company itself and its subsidiaries; securities can be issued and properly acquired only with the Commission's consent; other sorts of transactions, too, must have similar sanction.[2] In these and other ways too numerous to mention, the national government has been given substantially the same control over public utility holding companies that state authorities have for years been exercising over operating companies. If President Roosevelt could have had his way, all such holding companies would have been doomed to extinction. Conviction, however, that a holding company may be both legitimate and socially useful, reënforced by large-scale lobbying by the interests concerned, influenced Congress to reject the drastic "death sentence" clauses of the original bill and to go no farther than to stipulate that after the beginning of 1938, the operations of a holding company should be confined to a single integrated utility system, so as to be easier to inspect and control. In pursuance of this provision, and under the vigilant supervision of the Federal Power Commission, a number of large holding companies have in recent years been divesting themselves of operating companies and connections held not to be appropriate elements in an integrated system.

Regulation of the sale of commodities

Based also upon the commerce power is the Commodities Exchange Act of 1936,[3] which seeks to prevent and remove obstructions upon interstate commerce arising from market manipulation and excessive speculation upon exchanges dealing in agricultural commodities. After various administrative shifts, a Commodity Exchange Branch of an

[1] 49 *U. S. Stat. at Large*, 803.

[2] The regulation of rates, facilities, and business practices of electric and gas companies doing an interstate business has been vested in the Federal Power Commission, dating from 1930. See p. 430 below.

[3] 49 *U. S. Stat. at Large*, 1941.

Agricultural Marketing Administration in the Department of Agriculture is now in charge of enforcement, with wide discretionary authority over exchanges trading in wheat, rice, corn, and other grains, cotton, butter, eggs, and other commodities; and the agency is empowered to fix the limits to "futures" trading and to speculative trading done by any one person upon exchanges, to curb excessive speculation and market manipulation, and, in general, to fix trading rules and fair trade practices.

The Government, Business, and World War II

Wartime mobilization

The new system of increased control by government over business as outlined in the preceding pages was hardly in full operation before the country turned to the stupendous defense and war effort of 1940 and after; and hardly a business establishment or operation failed to be affected, if not indeed transformed, by subsequent developments. The great objective throughout was "economic mobilization," with the prevention, or at all events the curbing, of inflation coming in, by 1942, as an objective of hardly secondary importance; and the means employed ranged all the way from encouragement of voluntary effort to the imposition of the most rigid and far-reaching controls. At the outset, the problem was chiefly one of stimulating the production of materials needed by the Army and Navy. Even this soon entailed a scheme of priorities compelling producers to give right of way to Army and Navy orders as against orders from private dealers or consumers; also arrangements for allocation, under presidential order, of goods and materials, so as to avert shortages and keep all essential industries going at top speed. Before long, prices began going up; and an Office of Price Stabilization and Civilian Supply (renamed in August, 1941, Office of Price Administration [1]) was set the task of preventing price spiraling and checking inflation, with power to determine fair and reasonable maximum prices, *i.e.*, price "ceilings." [2] An executive order of August, 1941, introduced a system of control over the huge instalment credit business carried on through the nation's banks, stores, and personal finance companies. As early as June, 1940, the Navy Department was authorized to take over and operate private plants when unable to come to agreement with the managers on defense contracts; and the power to requisition (with compensation, of course) both plants and materials was extended by stages until by October, 1941, the president had authority to take over any military or naval equipment or the machinery, tools, or materials necessary for the manufacture or operation of such equipment, provided such articles were needed for the country's defense and could not be obtained otherwise. On the basis of authority somewhat indirect, but effective, the entire automobile industry was asked in January, 1942, to turn all of its re-

[1] See pp. 496-497 below.

[2] In May, 1942, a general "price-freezing" plan went into operation, with the highest prices of the preceding March serving as ceilings.

sources to the production of war materials; a month later, the radio manufacturing industry was given three months in which to do the same thing; and by rapid stages practically all other consumers' durable-goods industries were similarly put in process of "conversion." From this, it was but a step to rationing of retail sales to consumers. Even in 1941, gasoline was rationed to dealers; and in 1942 it was rationed to consumers (first in seventeen Eastern states, and later throughout the entire country), while new cars, new tires, and sugar, and eventually numerous other commodities, were rationed the country over. Shortage of plant capacity became a problem also, and gradually the government was drawn into financing plant expansion, with a total authorized expenditure of more than eight and one-half billion dollars by the summer of 1942.[1]

Postwar "reconversion"

These are merely a few of the many ways in which government and business were rapidly brought into new or altered relations by the national emergency. Others included the slowing up of enforcement of anti-trust regulations, as already mentioned. As the end of war approached, the staggering problem loomed of "reconversion," *i.e.*, getting industry back into its normal channels and loosening the iron grip of wartime government upon the country's business; and—carried forward for more than a year, after peace returned, under general supervision of a Civilian Production Administration, successor to the War Production Board of previous years[2]—the task was to a large degree accomplished.[3] The government curtailed its own business operations; priorities largely disappeared; price control was relaxed, though not entirely abandoned; and in general something like the traditional scope for free enterprise was restored, subject, of course, to surviving and reinvigorated prewar regulation through agencies dealt with earlier in this chapter. No one was so naïve as to suppose that everything could be put back where it was in 1940. But—again speaking generally—the relations of government and business promised, after the entire experience was over, to look, in their broader outlines, a good deal as described in foregoing pages.

The Federal Government's Direct Participation in Business—The Postal Service

Various lines of activity

So strong has been the tradition of private initiative and management in American business that governments, whether national, state, or local, have in peacetime invaded the field far less than in a number of other countries. More or less incidental to its strictly governmental functions, however, every one of the states not only buys supplies but sells products; a state university, for example, marketing live-stock and foodstuffs produced on the experimental farms of its agricultural college is as truly engaged in business as is any private purveyor of such commodities.

[1] Cf. pp. 495-497 below.
[2] See pp. 495-496 below.
[3] The Civilian Production Administration was abolished in December, 1946.

Numerous municipalities, too, own and operate waterworks, electric light plants, gas works, street railways, airports, bridges, tunnels, and other utilities. From the earliest days, the national government also has been in business; indeed, the postal system which it took over from the old Confederation in time developed into one of the largest business enterprises in the world. Nowadays the United States buys and sells real estate; manufactures munitions, ordnance, currency, and many other things; builds ships; constructs buildings, highways, and other public works; loans money through a multitude of channels; operates the largest printing establishment in the world; carries on, through the wholly-owned Inland Waterways Corporation, an extensive transportation business on the Mississippi and other inland waterways; owns various other operating corporations and directly operates the Alaska Railroad and the Panama Canal. During World War I, the national government took over temporarily the management of all railroads and telegraph and telephone systems, and during World War II, coal mines and even certain mercantile establishments. Since the end of hostilities in 1945, it has been engaged in marketing numerous industrial plants and great quantities of supplies representing surplus property left over from the war. In nearly all of these undertakings, it competes directly with private business.

The postal service:

Constitutional basis

One national enterprise which, in the main, is not thus competitive is the postal service;[1] and in view of its high importance, a word in conclusion may be said concerning it. So intimate is the connection between the postal service and commerce that, had the constitution been entirely silent on postal matters, Congress might easily have established a postal system under powers implied in the commerce clause. One finds, however, in the list of powers expressly conferred that of establishing "post-offices and post-roads";[2] and the only serious constitutional issue which has ever arisen in connection with the subject has been that of whether, as strict constructionists for a good while contended, the power conferred extended only to designating which of existing routes should be used for transmission of the mails, or whether, as broad constructionists argued, it included the right to build and operate roads especially designed for the purpose. As has usually happened, the more liberal interpretation prevailed, and in later decades the improvement of the postal service has repeatedly been employed as a justification for federal aid to highway construction and development of airlines even within individual states. The postal power belongs exclusively to Congress, and the postal service that has arisen under it is, in the strictest sense, a government monopoly.

Growth and functions

Although nation-wide postal establishments operated by government authorities do not go back very far historically, the services rendered by

[1] Even here, however, the parcel-post system competes with express companies and the money-order system to some extent with the operations of banks.

[2] Art I, § 8, cl. 7.

such agencies are nowadays considered prime necessities; and the postal system of the United States has become, not only the most extensive in the world, but probably the largest single peacetime business enterprise in which any government has ever been directly concerned.[1] Indeed, a person desiring to portray the amazing development of the United States in the past hundred and fifty years could hardly do so more effectively than in terms of the growth of the postal system. He could cite the 41,792 post-offices and 32,112 rural delivery routes in operation on June 30, 1945, the latter serving over twenty-nine million people; the receipts of $1,314,240,000 in the same year, compared with $280,000 in 1800; the million and more letters mailed every hour of the day from one end of the year to the other; the nearly thirty-five billion pieces of mail handled in a year; the 491,640 regular and temporary employees, a number equal, not so many years ago, to two-thirds of the executive civil service. But even more striking would be the facts relating to the expansion of functions and activities which has made the Post Office the department whose operations come closest home to the great mass of the people. High points in the recital would be the introduction of the registration system in 1855, the beginning of urban free delivery in 1863, the establishment of the money order system in 1864, the starting of rural free delivery service in 1896, the introduction of the postal-savings system in 1911, the starting of the parcel-post system in 1913, and the launching of air-mail service, now operated on a large scale under contracts with private airways companies, in 1918.

The financial aspect

It is not in the nature of public services to make money, and hardly any of them do so. Conducted, however, essentially as a business enterprise, with the people paying for the service they get, the postal establishment has commonly been looked upon as one that ought at least to pay its own way. Rarely, however, in the past hundred years has it been able to do this; when, in certain recent years, enormously increased wartime business enabled it to report a sizeable profit, the showing stood out

[1] Benjamin Franklin laid the foundations of our postal system when deputy postmaster-general of the colonies during the twenty years before the Revolution, and also postmaster-general in 1775-76. The Post Office Department, by which the present system is administered, came into existence in a roundabout way. It was not recognized by statute as a coördinate executive department until 1874. But to all intents and purposes it enjoyed that status from 1825, when the term "post office department" was first used in the title of an act of Congress; and even more definitely from 1829, when, on the initiative of President Jackson, the postmaster-general became a member of the cabinet. The Department is headed by a postmaster-general, who, for obvious reasons, is often selected with a view to his experience in managing a great business, *e.g.*, John Wanamaker, or, at all events, in conducting large enterprises, not excluding (as in the case of Will H. Hays, James A. Farley, and others who could be mentioned), national political campaigns. Each of four assistant postmasters-general has charge of a bureau of the Department, which in turn is organized in divisions under superintendents or chiefs; and there are other general departmental officers, including special assistants to the postmaster-general. The bulk of the Department's work is done, of course, throughout the country, in collecting, assorting, transporting, and delivering mail (including parcels of merchandise), receiving and caring for savings, transferring money under the money-order system, and enforcing the laws against lottery schemes and swindlers.

in bold relief against an almost unbroken succession of annual deficits. And the reasons for deficits are not difficult to discover. One is the heavy cost of handling and transporting vast quantities of printed matter for the entire federal establishment—all going, of course, postage free. Another is the necessity of maintaining service over large rural areas where the outlays entailed are bound to be out of all proportion to the returns. A third is the over-payment—from a purely business point of view—of air carriers. A fourth is the especially low rates allowed on educational, scientific, religious, and fraternal publications, the free distribution of country newspapers within the county of publication, and free carriage of books, pamphlets, and other reading matter in raised characters for the use of the blind. Finally comes also substantial increases of pay and reduction of hours for postal employees, over against the practical impossibility of pushing postal rates much above their present levels.

Some of the policies referred to are aimed at promoting the public well-being, and on that ground, may be, and probably are, defensible. A business run on such lines is not, however, likely to make ends meet; and in the case of a business of a public-service nature like the postal establishment, operating in a country of continental proportions, it probably ought not to be expected to do so. The Post Office could reasonably be expected to pay its way only if free to cut off—as a private business undoubtedly would do—any branch or operation demonstrating its inability to be self-sustaining. A postal service ministering to a twentieth-century civilization cannot, however, be conducted on the simple dollars-and-cents basis of a chain store or a motor plant.

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CHAPTER XXVI

AGRICULTURE AND CONSERVATION

Agriculture in the American economy

The United States started as an almost purely agricultural country, and long remained such. Ninety-five per cent of its population was rural in 1790, and as late as the Civil War the proportion was still above eighty per cent. Growth of industry and trade in later decades, however, completely changed the picture; by 1920, the rural-urban balance had been tipped in favor of the urban, and since then the urban has risen to seventy per cent and the rural fallen to thirty. Upon this diminished proportion of our people, however, rests the major responsibility for feeding the country (and of late no small part of a hungry postwar world) and supplying its fibers and other raw materials; and this it does from a total of some five and one-half million farms, of which hardly more than half produce anything over and above what is consumed by their occupants. Even so, over-production, with accompanying low prices, has been a source of much difficulty in the past, notably preceding and during the depression of the thirties, and easily may become such again. The explanation of the capacity thus developed lies to some extent in improved crops and breeds (for example, hybrid corn), but mainly in the revolutionizing of farming in later years—never more rapidly than during the recent war—by mechanization, enabling fewer workers to produce more with less effort; between 1940 and 1944, food output, aided by good weather, was pushed upwards by thirty-five per cent, with farm laborers reduced by two and one-half millions and, altogether, no more people engaged in farming than in 1875. The country's farms, too, are mostly of moderate size; in 1940, there were but slightly over one hundred thousand containing a thousand acres or more, and the national average was 174 acres. Nor does this stand in the way of mechanization; tractors, combines, and other power-driven machinery adapted to modest acreage are enabling the operator of a small farm for the first time to compete commercially with agriculture on a larger scale. The Industrial Revolution has caught up with farming, but without putting such a premium on bigness as in the case of industry. And this means that, although mechanization will doubtless lead to more large farms (as indeed has been demonstrated since 1930), the moderate-sized family farm will continue, at least for a long time, to be the backbone of the country's agriculture, if not indeed, as Thomas Jefferson so ardently believed, of its democratic institutions and general well-being.

There is, to be sure, a darker side to the picture. In 1940, two-fifths

of all farms in the country were operated, not by owners, but by tenants—"share-croppers" in the South, and also large numbers of renters in even such favored areas as the Middle West. There are the hazards of weather, of pests and scourges, of competition of foreign products, of marketing costs, of heavy taxes, and what not. The proportion of agricultural income to total national income is surprisingly low—in 1940, only about eight per cent. Periods of prosperity, too, such as prevailed during and shortly after the late war seem inevitably to be followed by periods of over-production and depression; and, despite prolonged and prodigious efforts of the federal government to bring the industry to a stabilized parity with the other great economic interests of our people, it still is not at all points satisfactorily meshed with the general national economy.[1]

Government and agriculture

Although by nature and tradition the most highly individualistic form of enterprise in which our people have engaged, agriculture, like both industry and labor, long ago turned to the halls of government for encouragement and assistance. Nor has the quest been in vain. From early days, local governments contributed by providing roads, enforcing fencing regulations, exterminating pests, supporting fairs and exhibitions, maintaining schools, and in other ways promoting rural welfare; and nowadays county boards have agricultural functions, and the interests of the farmer are in numerous ways served by an official known as the county agent (with also often a female home-demonstration agent), sometimes appointed by the board and in any event—although responsible to both state and federal authorities—acting as a principal promoter of agricultural improvement within his county. A hundred years ago and more, state legislatures, too, were passing laws and making appropriations for the farmer's benefit; and this they continue to do, not usually by virtue of express constitutional provisions, but in pursuance rather of reserved powers liberally construed by the courts. Nearly every state also has a department or board of agriculture endowed with inspectorial, licensing, certification, and other administrative authority, as well as with general advisory and educational functions.

Responsibility of the federal government

The nature of agriculture and its problems is, however, such that neither local nor state action can fully meet the farmer's needs. Basic to all such needs is that of being able to market grain, tobacco, cotton, livestock, and other products at prices yielding a fair return on property

[1] Factors in the growing tendency to over-production—in addition to those already mentioned—include the decline of export markets, the reduced need for feed-stuffs resulting from the replacement of millions of horses and mules by motor machinery on the farms, the increased use of commercial fertilizers, the changing food habits of the people, especially in the cities (cereals declining in demand, with orchard and garden products more in demand), the turning of Western grass-lands to tillage (notably in the period of World War I), and the opening of new lands to cultivation by reclamation projects making water available. Altogether, agricultural productivity is increasing at a rate several times faster than the rate of population growth—although if the standard of living of large masses of the population could be brought up to desirable levels, the problem of surpluses would largely, if not wholly, disappear.

employed and labor expended. Yet prices are determined largely or entirely by competitive conditions quite transcending the control of any single state. Products must be transported, too, through channels of commerce cutting across state, and even national, lines. And although even the national government is in no position to do all that the farmer's interests might seem to require, manifestly it can reach farther, and with more effect, than can any state. To be sure, the federal constitution makes no mention of agriculture. But no more does it speak specifically of industry or labor. And Congress has many powers, *e.g.*, appropriating money, regulating interstate and foreign commerce, and providing post-roads, from which broad federal authority for regulating and assisting agriculture can be, and has been, deduced. Beginning with proposals heard as early as Washington's first administration, and gaining momentum as agricultural interests and problems took on more of a national, and eventually international, aspect, the conviction grew that primary responsibility for ministering to the needs of agriculture in a large and coherent way rests with the federal government; and a systematic account of the activities flowing from this conception in the past three-quarters of a century—and particularly since 1933—would run to great length indeed. Nor could the story be brought to a conclusion; for in the face of constantly changing agricultural conditions and needs, the federal government's task steadily grows more complicated and exacting, with problems of adjustment of production to consumption, of stabilization of farm income, of land use, of soil erosion, of farm tenancy, of resettlement of handicapped rural populations, of rural electrification, and the like, still largely awaiting solution—even though the prosperous state of the farmer in the recent war period has, for a time at least, rendered some of the challenges less pressing.[1]

Production and Marketing

Encouragement of production

As a factor in an increasingly complex national economy, agriculture has developed in such a manner that the farmer normally finds himself confronted with three main sets of problems, pertaining respectively to

[1] If problems such as those mentioned have not been solved, it is not for lack of an impressive executive department at Washington to give attention to them; for the Department of Agriculture is not only one of the largest government establishments in the world, but one of the best organized and conducted. It was not by chance that the same year (1862) which saw the Morrill Act and the Homestead Act placed on the federal statute-book yielded also a third statute creating a "department of agriculture"; and although for a time the new agency was only a unit within the Department of the Interior and presided over merely by a commissioner, pressure from increasingly vocal agricultural interests finally, in 1889, influenced Congress to raise it to coördinate rank with the seven executive departments then existing—agriculture thus becoming the first great occupational interest to win a seat in the cabinet. The story of the Department in these last fifty or sixty years has been not simply one of swiftly multiplying functions and activities and rapidly growing personnel; it has been a record also of systematic, persistent, and fruitful research, making the Department today an outstanding example of useful association of science and government. For a detailed description of the Department's organization and activities, see any recent edition of the *United States Government Manual.*

(1) production, (2) marketing, and (3) credit. On the production side, government has sometimes intervened to curb surpluses and sustain prices by curtailing output, as notably under the New Deal program for national recovery in the earlier thirties. As a rule, however, the objective has rather been increased and better-assured production; and to this end a number of policies have more or less consistently been pursued: (1) making arable land available, in earlier days by liberal parcelling out of public land, and more recently by stimulating the removal of farmers from exhausted or otherwise substandard land to areas of greater productiveness; (2) imposing tariffs on farm products from abroad, with a view to larger outlets for American products and at better prices—a policy, however, never too effective for the reason that in the case of most staple crops, such as cotton and grain, the American farmer himself normally produces an exportable surplus; (3) scientific research aimed at introducing new crops, improving varieties and breeds, increasing soil productiveness, combatting pests and diseases, and applying sound principles of economics to all stages and forms of the agricultural process; and (4) disseminating the results of research and otherwise promoting popular education on agricultural subjects. A word may be said about each of the last two policies mentioned.

Scientific research

The medium through which research of direct significance to agriculture is carried on is mainly a series of bureaus and services in the Department of Agriculture. The earliest function of the Department was, indeed, scientific investigation and dissemination of the information gained therefrom; and notwithstanding later multiplication of activities in other directions, the Department is still by all odds the greatest research establishment of its kind in the world.[1] Of bureaus devoted particularly to investigation (and coördinated under an Agricultural Research Administration), seven of principal importance have to do with (1) agricultural and industrial chemistry, (2) animal industry, (3) dairy industry, (4) entomology and plant quarantine, (5) plant industry, soils, and agricultural engineering, (6) human nutrition and home economics, and (7) agricultural economics. From these terms, one can easily infer the general nature of the inquiries and experiments conducted by the various agencies, even though only an expert can completely understand and appreciate the technical procedures and objectives frequently involved. Still other units devoted not quite so exclusively to research, yet continually carrying on studies of significance, include (1) a Forest Service, which not only investigates forestry problems, but takes care of as many as 154 national forests (comprising over 178,000,000 acres) in thirty-three states and territories, and shares responsibility with the Land Office and the Reclamation Service in the Department of the Interior for carrying out and extending the national conservation program

[1] Its staff contains more persons of scholarly attainment, and fewer appointed for political reasons, than that of any other of the departments.

gradually developed since 1900; and (2) a Soil Conservation Service, dating from 1935 and concerned with bringing about physical adjustments in land use with a view to protection of resources and development of a better balance in agriculture. Agricultural research, however, is carried on not only by federal agencies, but also by state and territorial experiment stations; and federal assistance to these is provided from funds pledged by various acts of Congress and administered by an Office of Experiment Stations in the Department of Agriculture, which, in a supervisory capacity, lends unity and consistency to the programs undertaken.[1]

Agricultural education

The object of the investigative activities of the foregoing agencies is practical assistance to farmers; and this necessitates facilities for popularizing the results obtained. Much information, of course, is conveyed directly through the medium of widely distributed bulletins, reports, and other printed documents. In these days of radio-broadcasting, a good deal—notably such things of immediate concern as market reports and weather predictions—is put on the air. But the federal government (in common with the state governments) has also committed itself to an ever-widening program of agricultural education in the stricter sense of the term, and the country is now dotted with federally-aided state agricultural colleges (organized for the most part under provisions of the Morrill Act of 1862), and with the also federally-aided experiment stations mentioned, providing information relating especially to the climate, soil, and markets of the region adjacent to each station. Various forms of federally-aided extension work are carried on also, with a view to bringing information directly to the farmer and his wife in their home; indeed, every one of the agricultural colleges now maintains a distinct division for the conduct of such work in both agriculture and home economics. Federal supervision is supplied by an Extension Service existing since 1924 in the Department of Agriculture.[2]

The problem of marketing

Having shown the farmer how to "make two blades of grass grow where one grew before" and how to raise live-stock more efficiently, the government found that it had created for itself a new and even greater problem. More farmers now had produce to sell; more had come to be dependent upon receipts from "cash crops"; any obstruction to the transportation of commodities to distant markets, or to the handling of such commodities in the increasingly intricate processes by which they reached the consumer—any piling up of surpluses and depression of prices—was of deep concern. And when, after an over-extension of agricultural production incident to World War I, difficulties at these points began to

[1] An act of Congress in 1946 placed new stress on agricultural research and authorized increased appropriations over a five-year period for support of it. Public Law 733—79th Cong.

[2] All in all, in no field of government activity is there more federal-state-local interlocking and coöperation than in that of agriculture.

multiply, the farmer turned to his government for aid, especially in developing markets, sustaining prices, and minimizing the effects of market manipulations engaged in by speculators and others for their own advantage. Down to 1929, such assistance took the form, chiefly, of (1) furnishing full, exact, and up-to-the-minute information concerning crop and marketing conditions and prospects, both at home and abroad; (2) establishing and maintaining uniform grades and standards for commodities handled through the channels of interstate and foreign commerce; (3) regulating bonded warehouses and stockyards, licensing commission merchants, brokers, and others who handled or dealt in perishable farm products, and in other ways protecting the producer against discrimination and fraud; and (4) protecting him against the operations of speculators dealing in "futures," *i.e.*, engaging to deliver stipulated quantities of a given commodity on a given date at a given price, and depending for profit upon forcing down the buying price—the price received by the farmer—in the meantime. All measures taken on these lines, however, failed to yield farmers as a class a proportionate share of the prosperity which the country considered itself to be enjoying in the period 1921-29; and a comprehensive Agricultural Marketing Act of the last-mentioned year, designed to reënforce and extend the earlier measures through the instrumentality of a Federal Farm Board authorized to encourage the formation of farmers' marketing coöperatives and in other ways to assist in promoting effective marketing, brought no better results—principally because there was no power to do the thing that the situation most obviously required, *i.e.*, curb over-production. Accordingly, the problem of outlets and prices was no new one when the Roosevelt Administration took it over, in a period of dire distress for not only industry and business but agriculture as well.

The first Agricultural Adjustment Act (1933)

The National Recovery Act of 1933, touched upon in the preceding chapter, was designed primarily to stimulate revival of trade and industry. Not only, however, did agriculture stand in at least equal need of assistance, but without improvement of its status, commercial and industrial revival could not go far. Accordingly, under impetus supplied by the newly installed Administration, Congress—invited by the President to enter "a new and untrod path"—boldly bracketed with the Recovery Act a novel Agricultural Adjustment Act designed to benefit the farmer through a program of crop curtailment and drastic marketing controls.

General purport

The new legislation had various objectives, but its basic aim was clear and simple, *i.e.*, to increase the farmer's purchasing power by raising the prices which he received for his products—prices which at the time were so depressed by accumulated surpluses that frequently they did not even cover the cost of production. More specifically, the goal was "parity," that is, a price level at which farm products would have the same purchasing power as in the arbitrarily selected but favorable base

period, 1909-14.[1] To achieve this, the farmer was to be helped plan his production to fit the demands of existing markets, thereby avoiding unsalable surpluses;[2] and it seemed necessary likewise to extend control over people engaged in "processing" agricultural commodities, *i.e.*, preparing them for use, and over traders in such commodities as well. Asserting that the depressed condition of agriculture had "burdened and obstructed the normal currents of commerce" in farm products, the authors of the act sought to give their handiwork a valid constitutional foundation by putting it forth as a measure by which such burdens and obstructions were to be removed. And the task of carrying out the measure's provisions was assigned to the appropriate executive department—more specifically, to the secretary of agriculture,[3] to whom was given unprecedented authority to reduce the market supply of basic agricultural commodities and to regulate the marketing of them. Basic to the plan was the effort to restrict production—an end to be attained chiefly through voluntary agreements by farmers to reduce acreage planted, to plow under a percentage of crops already growing, to kill surplus pigs, and otherwise to curtail their output of marketable commodities. Compensation was provided in the form of cash bounties or subsidies paid to farmers in varying stipulated proportions; and funds for the purpose were to be secured largely from "processing taxes" levied upon manufacturers of cotton goods, millers, meat-packers, and other processors of agricultural products to which the terms of the act applied[4] —the taxes, in turn, being passed along in the form of higher prices to consumers. In June, 1934, when the act had been in operation a year, the administrator testified that three million farmers, having concluded that they at least had nothing to lose, had signed production-control contracts for curtailing output, thereby withdrawing from surplus production about forty million acres; that the farmer's cash income, including benefit payments, had risen by thirty-nine per cent; and that the buying power of farm commodities had improved by twenty per cent.

Crop reduction features

Marketing arrangements

Along with production, the act dealt also with marketing; and here, too, the secretary of agriculture was endowed with new and far-reaching authority to enter into marketing agreements with processors and others engaged in handling *any* agricultural commodity "in the current of in-

[1] In the case of tobacco, the base period was August, 1919, to July, 1929. Cf. J. D. Black, *Parity, Parity, Parity* (Cambridge, Mass., 1942).

[2] Unlike industrial establishments, farms cannot simply close down when markets are glutted, or change in a few months to some other form of production. Once in operation, a farm must be kept going, and when prices fall, the tendency of the farmer—unless relief is afforded in some other way—is simply to increase his production in order to maintain his income, thus contributing to a further decline in prices.

[3] To administer the law, an Agricultural Adjustment Administration was organized in the Department, although on a largely autonomous basis.

[4] Originally seven, *i.e.*, wheat, cotton, field corn, rice, tobacco, hogs, and milk and its products. Later additions were beef, dairy cattle, peanuts, barley, flax, grain sorghums, sugar beets, sugar cane, and potatoes. See p. 418 below.

terstate or foreign commerce"; and the making of such agreements was declared to be not a violation of the anti-trust laws. Of even greater importance was the power conferred to issue, or to refuse, revocable licenses (and to fix their terms) permitting processors and others to handle, in the currents of interstate or foreign commerce, *any* agricultural commodity or "any competing commodity." The object, of course, was to enable the secretary to prevent—or eliminate—unfair prices and practices.[1]

The A.A.A. declared unconstitutional (1936)

Almost from the day of enactment, the constitutionality of the Agricultural Adjustment Act was questioned, attacks centering chiefly upon the processing taxes—"the heart of the law." Hundreds of cases appeared in the federal courts challenging the right of the government thus to employ the taxing power as a means of bringing about national regulation of agricultural production, and in a six-to-three decision rendered early in 1936,[2] the Supreme Court pronounced the taxes unconstitutional, asserting that they were not taxes in the true sense (that is, levies for the support of the government), but rather exactions from one group to provide benefits for another—a device, too, by which Congress had presumed to invade a field reserved to the states under the Tenth Amendment, and therefore outside the sphere of the national government.[3]

A New Approach to "Parity"

The quest for a substitute plan

Although the plan described had cost taxpayers and consumers nearly twice as much as the processing taxes had brought in, it had contributed heavily to increasing farm income, and invalidation of the taxes was a blow to farmers, who could no longer hope to receive the benefits, or bounties, which the taxes had provided. Manifestly, farm income would drop sharply unless some substitute could be devised; manifestly, too, such a substitute would have to be based upon some constitutional authority other than the taxing power. With little delay, a new starting point was found in the long-recognized right of Congress to provide for conservation of the country's natural resources; indeed, in a Soil Erosion Act[4] passed in 1935, following widespread devastation and distress caused by floods and sand-storms, Congress had unwittingly provided a foundation upon which a new farm-aid and crop-control program could be projected.

[1] By fixing prices, establishing quotas for producers, providing rules of fair competition, and setting up boards of control, marketing agreements under the act brought into existence a far greater amount of coöperative marketing than previously existed. Closely related to the Agricultural Adjustment Act were the Bankhead Cotton Control Act of 1934, the Kerr-Smith Tobacco Control Act of 1934, and the Warren Potato Act of 1935

[2] United States *v.* Butler, 297 U. S. 1 (often referred to as the Hoosac Mills case). The case arose out of the refusal of a New Hampshire textile establishment to pay the tax for processing cotton.

[3] The marketing provisions of the law were reënacted after the decision.

[4] 49 *U. S. Stat. at Large*, 163. This act is administered by the Soil Conservation Service in the Department of Agriculture.

The Soil Conservation and Domestic Allotment Act (1936)

Believing that an indirect production-control plan, if tied in with this soil conservation measure, would pass the test of constitutionality, Congress, in February, 1936, passed a Soil Conservation and Domestic Allotment Act erecting a new edifice of farm relief, but making production control *incidental* to soil conservation. As in the A.A.A., restoration of the prewar purchasing power of the farmer was the end sought; but the goal was now to be reached by a new route. Instead of direct bounties for curtailed production, benefit payments were to be made to farmers voluntarily coöperating with the government in the work of soil conservation, especially by shifting land from soil-depleting crops such as corn, cotton, tobacco, and wheat to soil-conserving or soil-building crops such as alfalfa and clover, with soil-building payments due also for planting specified acreages of legumes or turning cultivated land into pasturage.[1] In protecting the productiveness of their soil, farmers, it was hoped, would so reduce their output of staple crops that surpluses would disappear.

The Agricultural Adjustment Act of 1938

Perhaps this expectation was too optimistic; at all events, 1937 proved an especially good crop year, and price-depressing surpluses continued as embarrassing as before. Accordingly, in 1938, Congress passed a new Agricultural Adjustment Act, scrupulously avoiding processing taxes and any other devices likely to encounter judicial disapproval, but nevertheless contemplating, like the ill-fated measure of 1933, direct control of agricultural production. Continuing the conservation program of 1936 for what it was worth, the measure sought to achieve the desired control by additional arrangements briefly as follows: (1) if in any year the production of wheat, corn, cotton, rice, or tobacco threatened to create a surplus that would break the price, the new A.A.A. provided for was to take a referendum among the producers of a given crop on the desirability of imposing limitations; (2) if two-thirds voted favorably, the A.A.A. was to allot to each producing county, on the basis of the average acreage seeded during the preceding ten years, the number of acres that might be planted to the given crop; (3) within each county, and with the coöperation of local committees, an allotment was to be made, in turn, to each producing farmer, of a maximum acreage from which he might market his product without restriction; (4) the producer might raise more acres of the crop if he insisted, but if he marketed products from such excess acreage during a period of surplus, he was to be subject to fine; (5) on surplus crops so produced, a farmer might receive loans from a Commodity Credit Corporation in amounts calculated according to "parity" prices (based on the average price of the given commodity during the years 1909 to 1914); (6) such surplus crops should be stored, under government seal, until such time as a scarcity might arise, when the farmer might sell them at the parity price and repay his loans—such

[1] No special taxes were introduced for meeting soil-conservation payments. Appropriations made from the government's general funds were justified on the basis of the power to tax and appropriate money for promoting the general welfare.

sales operating to prevent the market price from ever rising far above parity; and (7) when the price of a given commodity should fall below parity, the producer should be entitled to receive from the government payments sufficient to make up the deficiency. In short, surplus crops were to be stored in years of superabundance, without the farmer being left short of cash, and then would be available to throw on the market in years of shortage from drouth or other cause—with prices held always close to parity levels, and with in any event the farmer guaranteed a return (price plus subsidy if necessary) not below such levels. To this system of an "ever-normal granary" was added, too, a provision for wheat-crop insurance (extended in 1941 to cotton), undertaking to protect producers against depleted yields due to drouth, flood, insect infestation, and plant diseases—insurance costs (*i.e.*, premiums) being payable by the insured to the government either in cash or in surplus wheat, and the latter becoming an additional reserve of the ever-normal granary.[1] Completing the structure of the New Deal farm program, and fully sustained as constitutional by the Supreme Court,[2] the legislation of 1938 proved both successful and popular during the brief period that elapsed before conditions were sharply altered by World War II; and, except as rendered inapplicable, or at points deliberately waived, under wartime conditions, it has continued in operation to the present day.

Some Wartime Developments

New emphasis on production

Little did the authors of the various crop-restriction and surplus-reduction programs dream that the day was near when the country's top problems in agriculture would be those of increasing production and building up surpluses. But so it turned out. Even before the United States entered the war, the expanding need for American foodstuffs in the war-torn democracies, the augmented assistance to them authorized by the "lend-lease" legislation, and the growth of consumer demand in our own country arising from our defense effort, impelled the Department of Agriculture to announce a farm program for 1942 calling for "the largest production in the history of American agriculture." The increases mainly contemplated were in what had previously been considered non-basic commodities—chiefly such foodstuffs as poultry, eggs, milk and other dairy products, meat, vegetables, and sugar. Basic crops with a long record of surpluses—wheat, cotton, tobacco, and rice—continued under somewhat restricted production and marketing until 1943; although corn

[1] A Federal Crop Insurance Corporation was set up in the Department of Agriculture to administer the insurance system.

Independent of the new A.A.A., but designed to reënforce its provisions for reducing surpluses, were three other expedients: (1) export subsidies for wheat, cotton, and cotton goods; (2) provisions of free lunches for several million undernourished school children; and (3) the distribution of food stamps among eligible low-income families, to be used in exchange for specified surplus commodities (including cotton) at local stores—a device, however, terminated, under wartime conditions, in 1943.

[2] Chiefly in Mulford *v.* Smith, 307 U. S. 38 (1939), and Wickard *v.* Filburn, 317 U. S. 111 (1942).

acreage (corn being a feed grain) was allowed to be considerably increased, and the 1943 crop proved the largest in a decade. As a result of heavy feeding of wheat also to livestock, and of its use in the production of alcohol, that grain was, by 1943, fast moving from a surplus to a deficit situation; and early in the year the War Food Production Administration removed all wheat-acreage and marketing restrictions, with the result that the 1943 crop became the second largest on record. Not only so, but in midsummer the same authority asked wheat-growers to step up their 1944 acreage to sixty-eight million, as compared with somewhat over fifty-four million seeded the previous year. Finally, in 1944, all effort to control food production, save by voluntary means, was for the time being abandoned, although restrictions were retained upon the production and marketing of tobacco.

Curbing farm prices

Within a year after Pearl Harbor, the well-being of the people and the prosecution of the war itself were menaced by rising prices and by a growing danger of runaway inflation; and agriculture was deeply involved. Early in 1942, a powerful farm *bloc* in Congress contrived to write into a basic Emergency Price Control Act [1] a provision prohibiting ceilings on food products until farm prices had gone, on the average, sixteen per cent beyond "parity prices"—parity, it will be recalled, being a level of prices at which farm products would have the same purchasing power as during the five-year period preceding the first World War. Thus shielded, farm prices mounted steadily; and in September President Roosevelt informed Congress that with a view to keeping the cost of living within bounds, the recent prohibiting clause would have to be repealed, and, further, that if it were not repealed by October 1, he, acting under his authority as commander-in-chief, would disregard its restrictions and proceed independently to carry out an anti-inflationary program entailing both wage stabilization and fixing of farm prices considerably below "parity." Amid loudly voiced protests against this threatened suspension of national law by independent executive action, Congress went to work on bills ostensibly aimed at accomplishing the desired purpose; and shortly an act was passed authorizing the chief executive to stabilize not only farm prices, but wages and salaries. In the case of farm prices, however, the measure went only half-way; because ceilings might not be fixed below either parity or the highest market levels between January 1 and September 15, 1942, whichever was higher. Thenceforth, the consumer had better protection against skyrocketing food costs, yet with the farmer enjoying a prosperity limited only by an inadequate labor supply.[2]

[1] 56 *U. S. Stat. at Large*, 23.

[2] On June 30, 1946, the Emergency Price Control Act of 1942 expired and agricultural prices began rising. A month later, however, new legislation reimposed controls in part for a period of one year.

It would be tedious to describe the frequent reorganizations of administrative machinery in the Department of Agriculture incident to the war. Suffice it to say simply that in 1946 nearly all of the numerous agencies and units having to do with

Credit Facilities

In concentrating to this point upon the basic matters of production and marketing, we have by-passed another very important activity, and one to which we now must turn, *i.e.*, assistance to the farmer in the form of credit facilities.

Prior to 1933

Farmers desiring to acquire land, make improvements, or carry over crops in the hope of a better market, frequently have to borrow money. Long ago it became apparent that they had less easy access to funds than did industrial interests, and were required to pay higher interest rates; and after a commission appointed by President Wilson looked into the matter, Congress in 1916 passed an act creating a nation-wide farm loan system, operating under a Federal Farm Loan Board. In a leading city of each of twelve districts into which the country was divided for the purpose was established a federal land bank, with capital subscribed mainly by the United States, and endowed with power to issue tax-exempt bonds to raise money with which to make loans secured by mortgages on landed property. The banks lent money, however, not directly to individual farmers, but to groups of ten or more organized voluntarily in what were known as national farm loan associations. An association received applications from its members, approved or rejected them, took and endorsed mortgages on the applicants' property, and, on the basis of these, secured from the banks the funds which it passed out in the form of loans to its members. The same act of 1916 also authorized the formation of joint-stock land banks, with capital stock subscribed wholly by private individuals, and enjoying about the same privileges and performing the same functions as the federal land banks. And to complete the structure, an act of 1923 instituted a series of twelve intermediate credit banks designed especially to serve the farmer who wanted, not long-term credit, but loans for a few months or a year, and loans secured, not on land, but on live-stock, corn, wheat, or other commodities.

In later times

By 1933, it was plain that larger facilities for agricultural credit would have to be provided; in the preceding five years, a tenth of the country's farms had been sold at public auction to satisfy creditors, and the number of such sales was steadily increasing. Already, the act which created the Reconstruction Finance Corporation in 1932 had empowered that agency to organize regional agricultural-credit corporations in the twelve federal land-bank districts, with a capital in each case of not less than two million dollars subscribed by the Corporation. Loans made by these institutions to farmers and stock-men had helped, but not enough; and a Farm Credit Act of 1933 authorized the Corporation to allocate to the farm loan commissioner (later known as the land-bank commissioner)

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agricultural production and marketing were consolidated into an omnibus Production and Marketing Administration, with distinct branches in charge of affairs relating to nine principal commodities.

the sum of two hundred millions, to be used in making loans to farmers, secured by first and second mortgages. The act likewise provided working capital for farm operations and made possible the redemption or repurchase of farm property lost under foreclosure proceedings between July 1, 1931, and May 12, 1933. In time, other steps were taken. A central bank for coöperatives, with a regional bank in each of the twelve farm credit districts, was established to serve twelve thousand or more coöperative buying and selling associations among farmers of the country; twelve production credit corporations were set up, one in each city having a federal land bank, to provide short-term credit for all types of farm and ranch operations; the Commodity Credit Corporation mentioned above was brought into existence by executive order of October, 1933, with power to buy, hold, sell, lend upon, or otherwise deal in such agricultural commodities as might be designated from time to time by the president; and a Federal Farm Mortgage Corporation, created by Congress in June, 1934, was empowered to issue tax-exempt bonds (guaranteed by the government) to the extent of two billions—bonds which might be exchanged for others held or issued by federal land banks, thereby increasing the resources of the land banks available for the refinancing of farm mortgages.

The credit set-up summarized

The upshot of these and other measures is that in each of the twelve farm credit districts there is now a federal land bank, a federal intermediate credit bank, a bank for coöperatives, and a production credit corporation—the four forming a coördinated administrative unit, and the whole comprising a truly gigantic framework of agricultural credit institutions.[1] The management of the entire system, excluding the Commodity Credit Corporation, furthermore, has been gathered into the hands of a single coördinating authority, the Farm Credit Administration, originally created by executive order of 1933, incorporated into the Department of Agriculture in 1939, and permanently superseding the Federal Farm Board and a long list of cognate agencies.

Rural Betterment

From activities directed to the scientific and economic aspects of farming, the Department of Agriculture has moved on in later years, especially since 1933, to what may be termed broadly the human, or social, aspects of the occupation. Impelled to do this by rural backwardness and distress brought sharply to view by the economic depression of the thirties, it now regards as part of its regular task the systematic promotion of better living conditions in rural communities.[2] Only a few

[1] On June 30, 1945, the various lending agencies involved had outstanding loans aggregating nearly six billion dollars.

[2] This function it shares, of course, with establishments such as the Department of Labor, the Public Health Service, and the Office of Education; and all have drawn inspiration and guidance from private agencies such as the Country Life Commission appointed by President Theodore Roosevelt nearly forty years ago.

of the more significant services of this nature can, however, be mentioned here.

1. Relief for farm tenants

The agricultural credit institutions described above are designed primarily to benefit farmers who own, or have an ownership interest in, the land they cultivate. There is another great agricultural class that cannot avail itself of these credit agencies, for the reason that those who belong to it own no land and little, if any, other property that might serve as a credit basis for loans. These less fortunate people are the tenant farmers, share-croppers, and farm laborers, who since 1880 have been steadily increasing in proportion to the number of farm-owners. They are the people who give rise to what is called the farm tenancy problem; and the areas where large numbers of them live, notably the Southern and Southwestern states, form our "rural slums." Following a penetrating, and fairly startling, report in 1937 on the conditions and outlook of these submerged elements, submitted by a committee on farm tenancy appointed by President Franklin D. Roosevelt, Congress in the same year passed the Bankhead-Jones Farm Tenant Act,[1] under which the government, operating through state and local machinery terminating in county committees of farmers, not only makes outright grants to meet emerging situations, but offers forty-year loans on easy terms to farm tenants, farm laborers, and share-croppers to enable them to acquire homes and lands of their own, and likewise "rehabilitation loans" for the purchase of live-stock and farm equipment, for refinancing indebtedness, and for family subsistence.

2. Improved land use

The depression of the thirties focused attention upon three or four million "economic refugees," many of whom dwelt in the hard-hit mining and manufacturing regions of the East and Middle West, although the majority were extracting a meager living from dying cotton lands in the South, from the dry and exhausted arable and grazing lands of the West and Southwest, and from the cut-over timber areas of the North and Northwest. To remove these people from public relief rolls, and keep them off, the national government launched in 1935 (1) a "land-use program," aimed at taking some ten million acres of substandard or submarginal land out of crop production and turning it to more suitable uses, *e.g.*, forest or pasture; (2) a "resettlement program," looking to the removal of toilers on substandard land to land of better quality; (3) a "rehabilitation program," emphasizing reëstablishment of credit for indigent farmers living on reasonably satisfactory land; and (4) a "suburban program," contemplating the development of "model" communities on the outskirts of urban areas, for the benefit of low-income city workers and suburban farmers.[2] Management of these various enterprises was at first (1935) intrusted to an independent Resettlement Administration;

[1] 50 *U. S. Stat. at Large*, 522. The measure was considerably amended in 1946.

[2] Greenbelt, Maryland, seven miles from Washington, became in October, 1937, the first of these communities to be opened for occupation. Not many others were actually developed.

in 1937, it was transferred to a Farm Security Administration in the Department of Agriculture; and in 1946, with the Farm Security Administration abolished, it was placed under a Farmers' Home Administration, in the same department, with instructions that liquidation of all resettlement and rehabilitation projects be completed as soon as possible.

3. Rural electrification

Until a decade ago, the United States lagged behind several other countries in bringing electrical energy within the reach of rural populations, and even today barely half of the nation's farms have access to electric power. In 1936, however, Congress passed a Rural Electrification Act launching a long-term program under which considerable progress has been made toward providing farms with cheap light and power, relieving the drudgery of the farmer and his wife, and adding to the farm's income-producing equipment. Management of the undertaking is vested in a Rural Electrification Administration, at first independent but since 1939 a unit within the Department of Agriculture, and it consists principally in making self-liquidating loans (1) to associations (often coöperatives organized for the purpose), corporations, states, or local-government bodies, to enable them to build transmission lines and buy generators for furnishing electrical energy to people in rural areas for whom central station services are not available, and (2) to individuals or firms engaged in wiring farm buildings and installing electrical and plumbing appliances and equipment—no loans being extended directly to consumers. Up to June, 1945, loan funds made available by Congress aggregated $525,400,000; and for the single fiscal year 1946, $200,000,000 additional was authorized, providing for an estimated 135,000 miles of line serving some 500,000 farms and rural dwellings. Progress during the war was limited only by shortages of labor and materials; and although in many places private utility companies have been extending their lines to discourage government-financed enterprises from being started, the field for further development remains large.[1]

4. Medical care

On the theory that a family in good health is a better credit risk than one not so favored, the Farm Security Administration began developing in 1938, a medical-care program for its clients; and thus while Congress and the general public have been debating the prickly issue of "state medicine," one federal agency "has jumped the legislative gun and instituted its own program of socialized medicine." The Security Administration for a time fostered group-health plans, worked out in cooperation with physicians, in more than a third of the three thousand counties in the United States, and under them in 1943 more than 110,000 farm families, or about 572,000 persons, were obtaining medical care by payment of annual fees within their means. Besides general physicians'

[1] In September, 1946, the Rural Electrification Administration estimated that through its operations, combined with those of private power companies, 3,106,775 of the nation's farms (some 56 per cent of the total) had been connected up with central station electric service. During 1946, REA-financed power systems brought electric service to more than 21,000 farmers a month.

care, services often covered emergency surgery, limited hospitalization, and prescribed drugs, and, in many cases dental care.[1]

The Conservation of Natural Resources

Perhaps it is inevitable that an energetic and expanding people eagerly possessing itself of a virgin country richly endowed by nature should be guilty of spoliation and waste. So, at all events, it has been in the United States. Toward the close of the nineteenth century, however, warnings began to be sounded, not only that the supply of available public land was fast diminishing, but that continued heedless exploitation of forests, minerals, and other natural wealth would some day leave the country impoverished; and at the present time conservation activities have come to be so numerous and varied that half of the major bureaus and services in the Department of the Interior have to do with one or another of them. In fact, it has sometimes been proposed that the name of the Department be changed to "Department of Conservation."[2]

Bases of federal action

Like so many others of our problems, that of protecting natural resources—of adjusting the natural environment to human requirements and maintaining a suitable balance between the present and future needs of our people—is greatly complicated by our federal system of government. Up to a point, to be sure, the national government has free scope. There are still large areas (more than a fifth of the country, indeed) which belong to the nation as distinguished from states, cities, and private individuals or corporations; and on this federally owned public domain, the government at Washington has full power to restrict the exploitation of minerals, to control the use of waterpower, to preserve forests and plant new ones, to protect wild-life, and what not. And, naturally, here is where the work of conservation has been pursued most vigorously and effectively. The greater part of the country's resources, however, are in areas over which the national government has no control as owner. Here the problem is primarily one for the states and their subdivisions; and, in varying degrees, it is receiving attention from them, particularly in the matter of forestry. But many states are lax; nearly half have not even a conservation department; no single, nation-wide program of state action can be expected; and if satisfactory results are to be attained, federal encouragement, guidance, and assistance are almost as essential as on the national public domain itself. Nor are means

[1] A further phase of rural betterment in which, if growing demand for federal aid eventually prevails, the national government will in future share more actively than at present is the improvement of rural schools, attended by more than half of the country's children. Cf. p. 78 above.

[2] The Interior Department dates from 1849, and the principal branches of it now are: (1) the Bureau of Land Management (formed in 1946 by merging a long-existing General Land Office and a Grazing Service), (2) the Bureau of Reclamation, (3) the Geological Survey, (4) the Bureau of Mines, (5) the Office of Indian Affairs, (6) the National Parks Service, (7) the Fish and Wild-Life Service, (8) the Petroleum Conservation Division, (9) the Division of Power, and (10) the Division of Territories and Island Possessions. For a full outline, see any recent edition of the *U. S. Government Manual.*

wholly lacking by which the national government can exert itself in this direction. Through discussion and published information, it can educate the people on the subject; through grants-in-aid, it can join with the states in financing and controlling conservation activities; its commerce power can be invoked in regulating the development and use of navigable streams and the sale of commodities and services, *e.g.*, hydroelectric energy, and its treaty-making power in protecting migratory wild-life. All of these things not only can be, but are being, done; and it is reasonable to expect that in the future conservation will be increasingly nationalized.

Public lands

Federal conservation activities have to do, first of all, with the most basic of natural resources, *i.e.*, land. At one time or another, three-quarters of the entire continental United States, or nearly one and one-half billion acres, have been "public" land, *i.e.*, land nationally owned. Vast quantities were in earlier days granted to states in aid of education and internal improvements; later on, much was bestowed upon transcontinental railroads; a great deal was allotted to soldiers and sailors; large tracts were sold to speculating land companies; and under terms of a Homestead Act of 1862—offering 160 acres to any person who would pay a registration fee of ten dollars and perform a limited amount of work on his holding during a period of five years—millions upon millions of acres were parceled out among pioneering home-seekers. Prodigality and fraud often went hand in hand; yet vast areas were occupied by thrifty populations which have helped greatly to make the country what it is today. For a decade after 1935, allotments of public land to private individuals was largely suspended, but early in 1946 an executive order of President Truman reopened all such lands to private entry except any containing deposits of thorium, uranium, or any other "fissionable materials for the release of atomic energy." Of some 430,000,000 acres still held, constituting more than one-fifth of the country's area—178,000,000 acres are included in national forests (with additional tracts acquired from time to time by purchase or in other ways); while 55,000,000 acres are contained in more or less permanent Indian reservations and more than 11,000,000 are accounted for by national parks, wild-life refuges, reclamation projects, and military and naval reservations. Gradual accessions from private and state owners will in future probably more than offset any further allotments.

Reclamation

Large stretches of the earlier public domain, located chiefly in the Western states, were arid or semi-arid—much of the land fertile enough, but unproductive unless supplied with water; and since 1902 a Reclamation Bureau in the Interior Department has been charged with conservation of the limited water resources of seventeen Western states for irrigation, power development, and domestic and industrial uses. In 1946, fifty-seven reclamation projects or parts of projects were in operation, and, backed by a huge appropriation, and with construction work on thirty

new projects scheduled, the Bureau was launching the most ambitious program in its history to meet the peacetime needs of the country for agricultural and industrial expansion. Many completed projects, notably Boulder Dam and Grand Coulee Dam, not only supply water for municipal consumption, for irrigation, and for the development of electric power for the use of industries, but afford sorely needed flood protection as well. In recent years, crops valued at four hundred million dollars have been produced on lands watered by reclamation systems.

Forests

Until late years, the policy of conservation, in the stricter sense of the term, has been applied mainly to three major resources—forests, minerals, and petroleum. Although of inestimable value not merely for timber, but for their effects upon the distribution of moisture, and in other obvious ways, the wooded areas of the country have long stood in danger of utter depletion at the hands of private owners; and it has fallen not only to the states, but to the national government as well, both to stay the process by admonition and education and to establish and maintain extensive forest preserves on publicly-owned land. At the present time, there are 154 national forests, located in thirty-three different states and territories, and with an aggregate area (178,000,000 acres) two-thirds that of the state of Texas.[1] To be sure, these forest areas are not simply walled off as reserves for the future. Timber is cut and marketed in them by private companies, under federal supervision; some tracts are leased for grazing purposes; all are open to campers and other recreation-seekers, under regulations permitting no damage to the wooded growth. But the first consideration is the preservation of them as *forests;* and to that end they are given all possible protection against fire, insects, disease, soil erosion, flood, and damage from indiscriminate grazing, as well as from destructive cutting.

Minerals

Mineral resources on the public domain are conserved, too, by a policy developed since 1910 under which the government expressly reserves for itself any mineral wealth that may be found to exist, and merely leases mineral lands for exploitation by private interests operating under government supervision and paying royalties into the national treasury, a portion being turned over to the states concerned. Mineral resources are studied and reported upon by the Geological Survey in the Department of the Interior; and mining methods, prevention of mine accidents, and treatment and utilization of ores, the country over, are dealt with similarly by a Bureau of Mines in the same department. So far as mineral resources are in private hands (and most of them are so), the main problem presenting itself to governments, both state and national, is that of relieving the long-depressed bituminous coal industry. Except temporarily during war emergency, too much soft coal is mined; the high-

[1] Administration is in the hands of a Forest Service in the Department, not of the Interior, but of Agriculture. Four-fifths of our commercial forest lands are, however, in private hands.

grade deposits are showing signs of depletion; the business was operated at a huge loss for many years, and the condition of the workers, although now improved, has often been deplorable. The states, however, cannot—in any event, do not—act sufficiently in concert to make any headway with the problem. And when the national government sought in some degree to solve it, first through an N.R.A. coal code in 1933, and later through a "little N.R.A." set up by the Bituminous Coal Conservation [Guffey] Act of 1935, the effort was frustrated by Supreme Court decisions.[1] A new Bituminous Coal [Guffey] Act, omitting all features of the earlier measure to which the Court had objected, was passed in 1937 and later upheld.[2] Expiring, however, in 1943, the measure was not renewed; and in later days the industry has gone along much as before, except in so far as new terms and conditions for the miners have been wrested from the operators by strikes like that occurring in the spring of 1946.[3] The coal problem—still unsolved, and likely to grow more acute as substitute sources of heat and energy are increasingly employed—has many aspects besides that of conservation; but protection of diminishing high-grade deposits is still involved in it.

Petroleum

Until recently, little progress was made toward effective protection of the country's oil resources. To be sure, the National Industrial Recovery Act of 1933 authorized the president to prohibit the transportation in interstate and foreign commerce of petroleum or its products produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn by any state law or regulation; and a code for the oil industry, with the secretary of the interior as administrator, was duly put into operation. Tested in the courts, however, the whole arrangement collapsed; in the "Hot Oil" cases of 1935, the highest federal tribunal ruled that Congress had exceeded its constitutional authority by delegating to the chief executive power which by its nature was tantamount to making laws.[4] Unwilling to abandon the effort, Congress then passed the Connally Act *directly* forbidding the shipment in interstate commerce of oil produced in excess of quotas fixed by state laws, with no authority in the president except to suspend the restriction if he found a disparity between supply and demand; and, supplemented by a production-quota compact among a number of principal oil-producing states, authorized in advance by Congress, this is the chief peacetime guarantee of oil conservation that the nation now has.[5]

[1] The 1935 act was declared unconstitutional (Carter *v.* Carter Coal Co., 298 U. S. 238, 1936) by a Supreme Court that had not yet recognized manufacturing and mining as partaking of the character of interstate commerce.

[2] Sunshine Anthracite Coal Co. *v.* Adkins, 310 U. S. 381 (1940).

[3] As a consequence of this strike, the federal government took over management of the mines, which it retained up to and beyond another strike late in the same year. See p. 448 n. below.

[4] Panama Refining Co. *v.* Ryan, 293 U. S. 388 (1935).

[5] In 1946, sharp controversy arose over whether rich "tidelands" oil deposits, located between low-water mark and the three-mile limit of American jurisdiction (chiefly along the coast of California) belonged to the federal government or to

Soil conservation

Of fundamental importance, too, are the arable-land and fresh-water resources of the country; and in later years attention has been turned likewise to conserving them. Floods and sand-storms have driven home in a tragic manner the need for adopting special measures for soil preservation, especially in large areas of the Middle West and Southwest; and devastating droughts have imparted a similar significance to measures for water conservation. In 1935, Congress set aside funds for the prevention of soil erosion and for flood control; and a Soil Erosion Act[1] passed shortly afterwards declared it to be the national government's policy to provide permanently for the control and prevention of erosion on farm, grazing, and forest lands. Administration of the measure falls to the Soil Conservation Service in the Department of Agriculture, cooperating with more than 1,400 soil conservation districts organized by farmers and ranchers under laws enacted in most of the states. As we have seen, too, soil conservation was the heart of the Soil Conservation and Domestic Allotment Act of 1936.

Water conservation

No less indispensable are our fresh-water resources, and numerous agencies of the national government are, in various degrees and ways, concerned with them. The public has long been aware of the importance of government aid in flood prevention in the basins of the Mississippi, Ohio, Missouri, and Colorado rivers, and more recently in New England; and since the great Mississippi Valley flood of 1927 the national government has spent more than a billion dollars on flood-control works in various parts of the country, with further liberal outlays authorized. Scarcity of water, on the other hand, has, until of late, presented no problem sufficiently serious to evoke wide public concern, apart from irrigation needs in the remoter West. Devastating sand-storms and destructive droughts occurring in the summers of 1934 and 1936, however, dramatically stressed the need for conserving and enlarging the water resources of a vast area—the "dust bowl"—lying in the Great Plains region; and, beginning in 1934, state and federal governments have been cooperating in formulating measures to alleviate, and ultimately to prevent, the recurrence of drought conditions.

Hydroelectric power

The great river systems with which the United States is favored afford almost limitless opportunities for the harnessing and utilization of waterpower; and so long as their policies do not conflict with federal rights, the states may control hydroelectric power generation and transmission as they like. In a number of ways, however, the national government has been drawn into this same field of activity. To begin with, the War Department has supervision over dams and other structures affecting the navigability of inland waters. In the second place, there is full national

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the coastal states. A bill giving the states clear title was vetoed by President Truman on the ground that the question was one for the Supreme Court to decide; and in the House of Representatives the veto was sustained, leaving the matter still undetermined.

[1] 49 *U. S. Stat. at Large*, 163.

authority to control the construction and use of hydroelectric plants on streams flowing—as many do—through the public domain. A third national right is that of regulating the transmission of electricity across state boundaries. And a fourth form of activity is government building of dams in key locations on great rivers with a view not only to production of power, but also to flood control, irrigation, and improvement of navigation, notably in the basins of the Tennessee, Colorado, and Columbia rivers. A Federal Power Commission of five members has been clothed with authority to license water-power projects undertaken on the public domain or on navigable waters elsewhere, and also to regulate rates, services, and the issuance of securities by the licensees, provided the states affected do not act individually or are unable to agree. A Natural Gas Act of 1938 [1] extended the Commission's jurisdiction to include interstate transportation and sale of another important energy source—natural gas. And a Flood Control Act [2] two years before further enlarged the Commission's jurisdiction to include multiple-purpose river-basin planning, and likewise development of hydroelectric power in flood-control dams constructed by the War Department.

The Tennessee Valley Authority

Our review of federal conservation policies and measures may, perhaps, be most fittingly concluded with some special mention of a group of enterprises—the "keystone of the New Deal arch"—undertaken during the past fifteen years in the valley of the Tennessee River. Developments at Muscle Shoals (on the middle Tennessee) during World War I, and designed for the extraction of nitrogen from the air for use in manufacturing explosives, left the national government the owner of 2,300 acres of land, two nitrate plants, a power house, and Wilson Dam. Later years saw much controversy over the use, if any, to be made of this property; and little progress toward a solution was attained until, at the request of President Roosevelt, Congress in 1933 passed a Tennessee Valley Authority Act [3] aimed at improving the navigability and promoting flood control of the Tennessee, providing for reforestation and proper use of marginal lands in the Tennessee Valley, encouraging the Valley's agricultural and industrial development, assisting national defense by operating government-owned nitrate plants, and indeed pointed toward other, though not fully specified, objectives. Over an area of 41,000 square miles (four-fifths the size of England), embracing portions of seven states,[4] and having a population of nearly three millions, agriculture and industry were to be reconstructed, forests restored, soil erosion checked, mineral resources developed, cheap power and chemical fertilizers produced, and the inhabitants generally assured the benefits of a "more abundant life"; and to carry out the plan, the Tennessee Valley Authority

[1] 52 *U. S. Stat. at Large,* 821.
[2] 50 *U. S. Stat at Large,* 1215.
[3] 48 *U. S. Stat. at Large,* 58
[4] Tennessee, Virginia, North Carolina, Georgia, Alabama, Mississippi, and Kentucky.

was incorporated, under a board of three directors appointed by the president, and with a capitalization of fifty million dollars provided at once by Congress, with authority to issue bonds on the credit of the United States up to a like amount.

The Authority's power development

Although by no means neglecting conservation and development of the region's soil, forest, and mineral resources or promotion of the health, industry, and general well-being of the residents, the Authority has quite naturally focused its efforts thus far mainly upon taming the unruly Tennessee river, thereby promoting navigability, reducing flood hazards, and, in particular, providing great quantities of electric power. Twenty-one huge dams have been built or acquired; others may be added; and arrangements have been set up for selling surplus power to states, counties, cities, corporations, and individual consumers, with a view not only to recovering some portion of the huge expenses incurred, but also to providing the much-discussed "yardstick" for measuring the fairness of rates charged consumers by private utility companies. Agreements entered into with leading private power companies, too, have enabled the Authority to extend its market considerably beyond its own immediate area, and several private utility properties have been purchased outright. In meeting the urgent need for increased electric power to vitalize our defense and war industries after 1940, the Authority proved an asset of the first importance, particularly helpful being the production of chemicals and fertilizers at Muscle Shoals and the stepping up of power production at the various dams; and, while the object of no small amount of criticism and attack, partisan and otherwise, the experiment is to be regarded as having justified itself, for purposes of peace as well as of war.[1]

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[1] In cases decided in 1936 and 1939 (Ashwander *v.* T.V.A., 297 U. S. 288, and Tennessee Electric Power Co. *v.* T.V.A., 306 U. S. 118), the Supreme Court sustained all essential features of the underlying legislation.

Convinced of the high value, both local and national, of the Tennessee Valley development, President Roosevelt, in 1944, recommended the creation of a Missouri Valley Authority along the lines of the T.V.A., to develop the water and other resources of nine Western states, and at the same time renewed pleas made as early as 1937 for setting up similar development organizations for the Arkansas and Columbia river basins. In 1946, no fewer than ten bills were before Congress proposing "valley authorities" for different areas of the country, although none became law. See W. C. Clark, "Proposed 'Valley Authority' Legislation," *Amer. Polit. Sci. Rev.*, XL, 62-70 (Feb., 1946).

Of somewhat similar nature is the St. Lawrence deep waterway and power project, for which President Roosevelt repeatedly sought authorization. A treaty on the subject with Canada was rejected by the Senate in 1934; an executive agreement on similar lines was refused approval in 1941; and the latest repulse of the project came in December, 1944, when, after the proposal had been offered as an amendment to a pending rivers and harbors bill, the Senate defeated it by a vote of 56 to 25. The project, of course, could not be carried out without congressional appropriations.

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CHAPTER XXVII

GOVERNMENT AND LABOR

Labor becomes an organized force in American society

Under the common law as carried over from England into America, supplemented by a vast growth of newer statutory law, labor involves a relationship between a worker who performs a stipulated service and an employer who compensates him for it in money or goods. The relationship is of a contractual nature, and traditionally one of the precious heritages of every individual has been his freedom to enter, whether as worker or as employer, into such relationship if and when he chooses—in other words, his "freedom of contract." To be sure, in these later times of highly developed labor organization this freedom has, in various ways, been sharply curtailed. Even yet, however, it is in principle basic to the American labor system.

In early times, when most people worked only for themselves, such hired laborers as there were bargained individually with employers and obtained such terms on wages, hours, and the like as they could. Even before 1789, however, mechanics and artisans in a few of the larger cities began drawing together in unions, and as industry expanded and workers multiplied, especially after the Civil War, consciousness of a weak bargaining position without organization, combined with growing desire for improvement of labor conditions in a multitude of directions, led to unionization on an ever-increasing scale. Employers naturally objected; public opinion was skeptical; and following early English precedents, American courts long looked askance at unions as constituting, or threatening, criminal conspiracy. The movement, however, went steadily forward, and in time the courts, the public, and even practical-minded employers, accepted unions as not only inevitable, but—so long as they kept within the laws as gradually being liberalized—a legitimate means of enabling a vast segment of the working population to press in an articulate way for higher wages, shorter hours, and other ameliorations. In time, too, unions began drawing together in regional, or even nationwide, federations. In 1886, the American Federation of Labor became the common spokesman of organized labor the country over; and after it had served in this capacity for half a century, seceding labor forces set up (in 1938) its lusty and more militant rival of today, the Congress of Industrial Organizations, carrying the labor movement more vigorously into the great mass-production industries.

Not all of labor, of course, is as yet organized—indeed considerably less than half of it: in a total national labor force of between fifty and

sixty millions (men and women), the A. F. of L. claims only 7,151,808 members, the C.I.O. 6,000,000, and other major organizations, chiefly the four separate railway brotherhoods, approximately 2,000,000, or a total of something like 15 millions. But no one needs to be reminded of the economic power which the organizations possess, freshly illustrated by the paralyzing effects of great strikes of coal-miners, railroad employees, and other groups during the period of reconversion following the recent war. Political power is immeasurable, too; for although there has not arisen (nor is likely to), as in Britain, a labor party contesting elections and presenting a united front on legislative floors, tremendous political influence is channeled through the two major parties, or sometimes through *blocs* cutting across them, expressing itself by supporting or opposing presidential, congressional, and other candidates, contributing to campaign funds (even though unions *as such* may not lawfully make such contributions), planning and urging legislation, lobbying on a grand scale in Washington and in state capitals, and, in general, employing whatsoever means and devices give promise of advancing the interests that wage-earners, or at all events their leaders, have at heart. Of the power of labor's political voice in later years—even if not always a united voice—the pages that follow will give abundant evidence.[1]

Government's concern with labor:

1. State and local

Labor influences, and sometimes controls, government; government, in turn, regulates and otherwise concerns itself with labor—if possible, even more than with agriculture. Purely local governments, to be sure, have not much to do directly with the matter, at any rate beyond regulating working conditions among their own employees; and even here they are subject to the superior authority of the state. But, as in the case of agriculture, the states can, and do, draw from their wealth of reserved powers wide latitude for regulative action. To begin with, the employer-employee relation is, as has been said, a contractual one, and the states have power of enforcement as in the case of contracts of other kinds. There is nothing, too, to prevent a state from enacting and administering a wide variety of laws controlling the conditions under which work is carried on, so long, of course, as not conflicting with the national constitution and laws; and from fairly far back, most of the number have built up more or less extensive codes of labor laws, covering such matters as hours, wages, safety devices, compensation for injury, collective bargaining, and the settlement of disputes. Beginning with Massachusetts in 1869, all likewise have set up a state labor bureau or department charged with compiling statistics, promoting arbitration and conciliation, and enforcing labor regulations generally.[2]

[1] It is generally considered, however, that, notwithstanding occasional boasts and threats of labor leaders, the country's "labor vote" (itself a somewhat nebulous quantity) cannot be swung at all solidly in any given direction in an electoral contest—although in many cities, notably New York, it undoubtedly holds a balance of power.

[2] See pp. 580-581 below.

2. Federal

Except in its clauses relating to slavery, the federal constitution makes no allusion to labor; and, speaking broadly, in earlier days, whatever was done with reference to the matter—outside of regulating labor by the national government's own employees and, in time, by the employees of contractors doing work for the government—was supposed to be done by the states. As industry grew, however, and labor problems multiplied, ample constitutional grounds were readily found for steadily expanding action by the federal government with reference to the whole broad domain of labor interests and relations: (1) the power to tax and appropriate money for promoting the general welfare opens a way for the maintenance of a federal department of labor, for investigation of labor conditions and dissemination of information on the subject, and for providing systems of social insurance benefiting chiefly the laboring man and his family; (2) the power to regulate interstate and foreign commerce makes possible the protection of the labor market by restriction of immigration and by tariffs curbing the competition of foreign-made goods, and, even more important, the control of conditions under which goods carried in both foreign and interstate commerce are produced; (3) jurisdiction over the territories and the District of Columbia carries with it a control over labor in those areas at least as extensive as that of the states within their own boundaries; and (4) even the ordinarily free scope of the states is many times restricted by judicial construction of "due process" and other principles embodied in the federal constitution. As itself the largest employer of labor in the country, the federal government, of course, has full authority to regulate the labor of its own workers, by inherent right and without need for constitutional authorization, express or implied.

Earlier Federal Protective Measures

The upshot is that for more than sixty years the national government has increasingly supplemented state control with protective and other regulatory activities affecting the nation's wage-earners. As early as 1882, Congress enacted a Chinese exclusion law [1] (later renewed in various forms) as a restriction upon the inflow of competitive labor; three years afterwards, another measure debarred alien laborers, of whatever nationality, if under contract to individuals or corporations; and a long line of immigration restrictions in later times, culminating in the quota system instituted in 1921, have had as at least one of their major purposes the safeguarding of American employment against swamping by foreign-born workers. Creation of a Department of Commerce and Labor in 1903 further reflected federal concern; and ten years later the influence of labor was strong enough to bring about the establishment of a separate Department of Labor designed "to foster, promote, and develop the welfare of wage-earners of the United States, to improve their working conditions,

[1] *22 U. S. Stat. at Large, 58.*

and to advance their opportunities for profitable employment."[1]

Protective laws based on the commerce power

Meanwhile, taking advantage of its commerce power, Congress entered the broad field of legislative action aimed at protecting labor groups against harmful exploitation. As far back as 1840, the government had become "an example to righteousness," when President Van Buren, by executive order, prescribed a ten-hour day for federal employees on public works; and in 1868 Congress had followed by fixing eight hours as a day's work for all "laborers, workmen, and mechanics" federally employed in any way.[2] Regulations of the kind for labor outside of government employment (and employment by government contractors) was not undertaken federally until early in the present century. But in 1907 an Hours of Service Act limited to sixteen the hours of consecutive work of persons having to do with the interstate movement of railway trains, and in 1916 the Adamson Act, passed at the behest of the railway brotherhoods, reduced the working day for all such persons to eight hours. An Employers' Liability Act of 1908, applying to all employees engaged in interstate commerce, drastically amended and liberalized the common-law rules which, under the old doctrines of "contributory negligence" and "assumption of risk," had until then enabled carriers largely to escape liability for injury or death suffered by their workmen in performance of duty. A LaFollette Seamen's Act of 1915 extended to a large class of employees previously subjected to almost incredible hardships and deprivations important safeguards such as suitable diet and regular payment of wages; and in 1920 the benefits of the Employers' Liability Act were extended to these workers also. Significant, too, were certain clauses of the Clayton Anti-Trust Act of 1914 declaring human labor to be not "a commodity or article of commerce," exempting labor organizations from the operation of the anti-trust laws, and restricting the use of injunctions in labor disputes[3]—although to labor itself this legislation proved disappointing when the courts insisted on whittling away most of the benefits expected to accrue from it. Finally, in 1932, a Norris-LaGuardia Anti-Injunction Act made "yellow dog" contracts, *i.e.*, contracts by which employees bind themselves not to join a trade union,

[1] The principal branches of the Department of Labor today are (1) the Bureau of Labor Statistics, (2) the Division of Labor Standards, (3) Shipbuilding Stabilization Committee, (4) the United States Conciliation Service, (5) the United States Employment Service, (6) the Wage Adjustment Board, (7) Division of Labor Standards and Public Contracts Division (under a single administrator), and (8) the Women's Bureau. A Children's Bureau formerly included was transferred in 1946 to the Federal Security Agency, except that functions relating to child labor under the Fair Labor Standards Act remain in the Labor Department, in the Wages and Hours Division. There are also an Apprentice-Training Service and a Ship-building Stabilization Committee. For full descripton, see the most recent edition of the *United States Government Manual.*

[2] In time, this eight-hour day (seven hours for clerical employees) became standard throughout the government service, and in 1936 the Walsh-Healey Act imposed it also upon contractors with respect to any of their employees engaged in work for the government.

[3] See p. 396 above.

unenforceable in the federal courts; and expressly forbade the courts to issue injunctions against laborers for striking, for using union funds in aid of a strike, or for inciting others to strike, unless the employer could show that he had made "every reasonable effort" to arrive at a settlement or that unlawful acts had been committed or threatened by the strikers.

Failure of measures for women and children

In one direction, the protective efforts characteristic of this first quarter of the twentieth century proved less successful, and because of difficulty with the courts. When, in 1916, Congress undertook to restrict child labor in factories by excluding the products of such labor from interstate commerce, the Supreme Court held the measure void as regulating manufacturing rather than commerce;[1] when, in 1919, another attempt was made, on the basis of the taxing power, the result was similar, although of course on different grounds;[2] and when, in 1918, a minimum-wage law for women and children in the District of Columbia was placed on the statute-book, it, too, fell before a judicial ruling that adult women were being deprived of freedom of contract guaranteed them by the constitution.[3] As indicated elsewhere, the object of the earlier ill-fated child labor legislation has since been at least partially attained through the Fair Labor Standards Act of 1938, upheld unanimously by a differently constituted and differently minded Court.[4]

The new era starting in 1933

All in all, the federal government had, by 1933, concerned itself with labor conditions and problems in quite a variety of ways, and with considerable effect. All that had gone before proved, however, merely a modest prologue to what was to come after, in an era marked by the great depression, the defense effort starting in 1940, four years of global war, and a year and a half of unsettled conditions attending the effort to get the country back on the broad highway of peacetime development. Not even in agriculture was the epoch of the New Deal more prolific in experiments, innovations, and readjustments, or more productive of new and basic government activities and controls. And from this point the present chapter must be devoted mainly to reviewing some of the things that happened in this extraordinary period. Three aspects, chiefly, may be touched upon: (1) efforts for promoting and controlling employment; (2) the improvement of labor standards through collective bargaining and a system of maximum wages and minimum hours; and (3) the expansion of machinery for promoting industrial peace. Two other and simultaneous developments of concern chiefly to the laboring population—the introduction of a nation-wide system of social insurance and efforts in behalf of better and low-cost housing—will be touched upon in the chapter to follow.

[1] Hammer *v.* Dagenhart, 247 U. S. 251 (1918).
[2] Bailey *v.* Drexel Furniture Co., 259 U. S. 20 (1922).
[3] Adkins *v.* Children's Hospital, 261 U. S. 525 (1923).
[4] See pp. 445-446 below. It will be recalled in this connection that in 1924 Congress submitted to the states a constitutional amendment on the subject, but that the proposal (still pending) has never been ratified by the requisite number of states. See p. 36 above.

Promotion of Employment

Unemployment a perennial problem

In enumerating the famous "four freedoms" to which he believed people everywhere to be entitled, President Franklin D. Roosevelt placed high in the list "freedom from want"—the best guarantee of which is, of course, remunerative employment; and it has always been axiomatic, under our American system of free competitive enterprise, that any person needing to support himself or a family ought to have a chance to do so by honest toil. The ideal is, however, difficult to realize in practice. Even in periods of comparative prosperity, the lagging or collapse of some industries, the shifting of others from one part of the country to another, changes in popular tastes and demands, introduction of new techniques of production, and other unsettling developments constantly going on in the national economy throw people out of work, and at best—even in a time of stepped-up production like the recent war years—there is always a substantial margin of unemployment; while in periods of economic decline and stagnation, the proportion may mount to appalling levels. At the nadir of the depression of the thirties, the number of unemployed in the country rose to thirteen millions or more; and notwithstanding considerable recovery in the meantime, it was still approximately ten millions in 1940 when the defense effort began rapidly to take up the slack. The problem, if not of averting it entirely, at least of keeping unemployment at a minimum, is, therefore, always with us.

Ways of dealing with it:

State and national governments have long concerned themselves with the matter, approaching it on three principal lines: (1) regulations calculated to reserve the labor market for adult American citizens; (2) maintenance of employment agencies and other devices for bringing the worker and the job together; and (3) in times of special stress, programs of public works designed to furnish a livelihood to large numbers of workers otherwise unemployed.

1. Efforts to promote employment of American citizens

Efforts to protect the American worker against competition from workers abroad, or alien workers resident in the United States, have taken the form principally of (1) protective tariffs laid partly or wholly with a view to keeping out of the American market commodities produced by cheap labor abroad, and thereby supposedly guaranteeing more work for American laborers and at higher wages; (2) restrictive immigration laws, as indicated above, keeping for American workmen jobs that, under a looser immigration policy, would go in large numbers to foreigners; and (3) laws confining labor on public works to persons of citizen status.[1] In private industry, it has been found impracticable to deny aliens the same right to employment as citizens, because in the view of the courts such denial is tantamount to refusing equal protection of the laws. State laws providing for such discrimination in public undertakings have, how-

[1] Of course, this third expedient does not of itself reduce unemployment; it may mean simply fewer unemployed *citizens*.

ever, been upheld; and for nearly a decade the federal government has also successfully maintained a policy of permitting no aliens to be employed on any federally-aided work project. Two additional restrictions in the interest of a maximum number of jobs for adult workers dependent upon the general labor market, although not coming under the heading of foreign or alien competition, are (1) the curbing of child labor under the Fair Labor Standards Act, to be touched upon below, and (2) limitations upon the sale of prison-made goods in competition with other goods, by laws enacted in most of the states not only restricting the marketing of such goods manufactured in the state's own prisons, but imposing—under authority conferred by Congress in the Hawes-Cooper Act of 1929—the same limiting conditions upon the distribution of goods produced in prisons of other states.

2. Public employment agencies

Even when jobs are abundant, there is the problem of bringing job and worker together; and over so vast a country, with industries so diversified, and with costs and difficulties of seeking work except in one's immediate locality so prohibitive, the problem is indeed a serious one. For meeting it, a bewildering variety of employment agencies have made their appearance—agencies not creating work, of course, but only directing people to it. Some are conducted by individual employers or employer associations; some are maintained by labor organizations; many are private profit-seeking enterprises. Even under regulation, however, private agencies long ago showed serious defects, and as early as 1890 public agencies began to appear in the field. For a time, these took the form chiefly of employment offices set up and operated by states. During World War I, however, an acute labor shortage led to the creation of a U. S. Employment Service (with offices scattered over the country) in the federal Department of Labor; and although after 1919 the agency was poorly supported and did not prove very effective, a New Deal measure of 1933—the Wagner-Peyser Act—gave it a new lease on life, while at the same time introducing federal grants-in-aid to state employment offices. In 1939—the Social Security Act of 1935 having introduced a nation-wide system of unemployment compensation [1]—the U. S. Service was incorporated in a Bureau of Employment Security under the Social Security Board; and under this arrangement the agency was charged afresh with developing a national system of employment offices while at the same time assisting in establishing and maintaining systems of state public employment offices, with the aid of federal funds matching the expenditures of states and localities. With a view to more effective mobilization of manpower for war, all state employment services were, on January 1, 1942, transferred to full national control. Further, in the following April, the President created a nine-man War Manpower Commission to "bring about the most effective mobilization and maximum use of the nation's manpower"; and thereupon the Employment Service and all

[1] See p. 457 below.

other machinery and functions of the then existing Social Security Board having to do with employment were transferred to this Commission, where they became parts of a Bureau of Placement concerned with recruiting workers and placing them in both industry and agriculture. In 1945, however, the Manpower Commission was terminated, and the U. S. Employment Service, still embodying the state services, was reassigned to the Department of Labor. After the war, strong sentiment developed in Congress and among the states for a restoration of their employment services to the states; and although President Truman (recommending that the consolidation under federal control be maintained at least until June 30, 1947) tartly vetoed an appropriation measure providing for the proposed restoration within a hundred days, the bill as it finally became law [1] fixed November 15, 1946, as the date, and in that form it was reluctantly accepted at the White House. The U. S. Employment Service survives, with its own system of employment offices in some nine states which as yet have no such offices of their own, and it is expected to continue indefinitely as a coördinating authority. The federal government, moreover, contributes to the restored state services nearly $43,000,000 a year.

3. Programs of public works

In periods of heavy unemployment, state and federal governments alike may come to the assistance of the working population by instituting programs of public works calculated to provide large numbers of jobs—as well as, of course, by direct grants for relief. The most striking illustrations of this "pump-priming" method of dealing with a slump in industry were afforded by the programs embarked upon by states, and especially by the federal government, in combating the depression of the thirties, when the government at Washington set up (1) a Public Works Administration, with large funds for initiating public construction and financing self-liquidating semi-public building, and (2) a Civil Works Administration (succeeded by a Works Progress Administration, subsequently renamed Work Projects Administration), with further billions at its disposal, together with (3) two employment undertakings designed especially for the benefit of the country's youth—a Civilian Conservation Corps assembling, over a period of ten years, three hundred thousand young men in upwards of two thousand camps for work on forestry, park, flood-control, and other conservation projects, and a National Youth Administration, organized in 1935 as a branch of the Works Progress Administration and, over a similar period, financing additional hundreds of thousands of youth, some attending educational institutions and others not. With the general employment situation sharply reversed after we entered World War II, all of these agencies were soon liquidated.

"Full employment" legislation

One other line of effort, in the federal field, calls for mention. Fearful of unemployment on a disastrous scale after the war, and hopeful that such a calamity could be staved off, both then and later on, President

[1] Public Law 549—79th Cong. (1946).

Truman and various members of Congress, a group of economists, and other people feeling deep concern, threw their support, in 1945, to a Full Employment Bill predicated not only on the federal government's responsibility for preventing depression and unemployment, but on the conviction that, by assuring an "expanding economy," the government actually could permanently assure useful jobs for all who were willing and able to work. The plan was much too complicated to be explained in full here,[1] but the essence of it was (1) that every year the president should transmit to Congress not only his regular fiscal budget, but also a "national production and employment budget," or economic budget, setting forth the policies which in his judgment must be pursued in order to maintain high-level production and full employment; (2) that if storm signals showed, this budget should propose measures necessary to keep the economy on an even keel (*e.g.*, tax reduction as an incentive to business expansion; public works undertaken by state and local governments; if necessary, public works and other employment-making undertakings by the federal government as well); and (3) that Congress should be placed under no less obligation to implement the economic budget than the fiscal budget. The heart of the scheme was the close study, forecasting, and planning designed to lie behind the president's recommendations, together with the statutory compulsion upon Congress to act on what was submitted to it. Many people considered the plan well-meant, but naïve; and, despite much urging from the White House, Congress eventually adopted it, in the Employment Act of 1946,[2] only after whittling it down somewhat so as to provide merely for (1) an "economic report" by the president each year to Congress, covering levels of employment, production, and purchasing power, current and forseeable trends, the government's "economic program," and recommendations for legislation; (2) a council of three economic advisers to the president to advise and assist in preparing such reports; and (3) a joint committee on the economic report, composed of seven members from each house, charged with planning ways and means of implementing the recommendations made and reporting them for action. Dissatisfied though he was with the weakened form in which the measure passed, the President signed it.[3]

[1] For a detailed explanation by one of the authors of the bill, see J. E. Murray, "A Practical Approach [to Maintenance of High-Level Production and Full Employment]," *Amer. Polit. Sci. Rev.*, XXXIX, 1119-1126 (Dec., 1945).

[2] Public Law 304—79th Cong.

[3] After months of study, the council of economic advisers submitted its first report to President Truman on December 16, 1946, as a basis for the first "economic budget," presented to Congress a few weeks later. The report discussed the goals for 1947 and said that the purposes of the Employment Act would be substantially achieved if, employment should be maintained at about the 1946 level, or slightly higher, with an over-all increase in total production of five per cent.

The only country in which something approaching full employment is attained is Russia, but there, of course, only by virtue of a rigorous collectivism wholly alien to the American mind and way of life.

Improvement of Labor Standards—Collective Bargaining

Provisions of the National Recovery Act (1933)

Even before the remarkable outburst of labor legislation in the earlier years of the New Deal, Congress had availed itself of its commerce power to enact many laws aimed at improving working conditions in industry generally or in particular industries—laws fixing maximum hours, prescribing measures for protection of life and limb, requiring compensation for injuries, and even, in the case of seamen, stipulating adequate food, clothing, and living quarters. With improvement of labor standards as one of its many objectives, the National Recovery Act of 1933,[1] however, went farther than any previous measures, requiring (in its famous Section 7 (a), all codes of fair competition adopted by the various industries (1) to set minimum wage levels, fix maximum hours, eliminate child labor, and otherwise improve working conditions, (2) to recognize the right of employees "to organize and bargain collectively through representatives of their own choosing," and (3) to protect every employee or other person seeking employment against being required, as a condition of employment, "to join any company union or to refrain from joining." In laying down these regulations, the government not only evidenced a new concern with wages and hours for industry as a whole, but unequivocally endorsed labor unions as instrumentalities through which workers might collectively compel employers to abide by adequate wage and hour standards and maintain proper working conditions.

The National Labor Relations Act (1935)

Many of the gains expected to be realized were placed in jeopardy when, in 1935, large portions of the Recovery Act were voided by the Supreme Court. Promptly in the same year, however, Congress, in response to urgent labor demand, and again invoking its commerce power, passed a National Labor Relations [Wagner] Act salvaging practically the whole of Section 7(a) with its guarantee of collective bargaining. To make such bargaining more free and effective, "company" unions (ordinarily including all employees in a given establishment, and more or less dominated by the company officials) were outlawed, so that thenceforth all unions might be fully independent employee organizations; and, although one of the objects was to avert strikes, the act forbade its clauses ever to be construed as interfering in any way with the right to resort to such weapons.

The National Labor Relations Board

For the enforcement of this measure, a National Labor Relations Board of three members (appointed by the president and Senate for five-year terms) was set up as an independent quasi-judicial agency, and given two important functions: first, to ascertain and declare who, in any particular plant, are bona fide representatives entitled to speak for the employees in collective bargaining;[2] and second, to pass upon com-

[1] See p. 400 above.

[2] After the federal measure became law, several states enacted "baby Wagner Acts," guaranteeing collective bargaining in purely intrastate industry.

plaints against employers for denying or abridging employees' rights to organize, for refusing to bargain collectively, or for engaging in other specified unfair practices. Both forms of action are, of course, initiated, not by the Board, but by employees (or, in certain cases, by employers)—the first, by filing a petition for an election to choose representatives or agents, the second, by filing complaints. If after local investigation by an examiner (with perhaps a hearing in Washington), a complaint is sustained, the Board may issue "cease and desist" orders enforceable in the courts like similar orders issued by the Federal Trade Commission.

The act's constitutionality upheld (1937)

A measure as far-reaching as the National Labor Relations Act could not fail to be challenged in the courts; and since, down to this time, the Supreme Court had always held manufacturing, mining, and the like not to be commerce, and therefore not subject to federal regulation under the commerce power, it was widely expected that when the test came the Court would hold the new legislation to be a regulation, not of commerce, but only of labor conditions in manufacturing and other industries, and therefore void. The outcome, however, was far otherwise. Even though the changes of personnel which were about to transform and liberalize the Court had barely begun, three decisions handed down in 1937 [1] took the ground that, although the manufacturing operations of the defendant corporations were, to be sure, carried on locally, the finished products were objects of interstate commerce, which had the effect of investing even the manufacturing of them with the character of commerce, and therefore of bringing it within reach of the commerce power—wherefore (1) Congress had a right to require collective bargaining and otherwise regulate labor conditions in manufacturing plants so situated; (2) the Labor Relations Act was constitutional; and (3) employers had no alternative but to comply with the statute's provisions. In these crucial decisions, the Court took a long step toward so modernizing its interpretation of the commerce power as to enable the national government to deal freely with the realities of American business today.

Criticisms of the measure

Ever since placed on the statute-book, the Labor Relations Act and its administration by the Labor Relations Board have stirred much criticism, not only among industrialists, but in the press and among people generally who have been irked by the legislation's failure to avert, or perhaps even to diminish, strikes and other labor disorders. Some of the complaints have been based on misconception of the act's true purport; some have been merely partisan; some have been directed against faulty administration rather than against the legislation itself. Taking into account the strength that organized labor has acquired, and the entire atmosphere of present-day American industrial life, the results have not

[1] National Labor Relations Board *v.* Jones & Laughlin Steel Corp., 301 U. S. 1 (1937); National Labor Relations Board *v.* Fruehauf Trailer Co., 301 U. S. 49 (1937); and National Labor Relations Board *v.* Friedman-Harry Marks Clothing Co., 301 U. S. 58 (1937). All three decisions were reached by five-to-four votes of the justices.

been wholly negative. One ground for valid criticism is, however, to be found in the frankly one-sided nature of the employer-employee relationship which the act envisages. Many actions or practices are enumerated in the law as "unfair." But every one is declared to be such only if indulged in by employers. Nothing is made "unfair" if done by labor organizations; and in conjunction with various immunities long enjoyed by labor unions and leaders, this has contributed to a lack of balance and reciprocity making for irresponsibility and sometimes injustice. If Congress may protect the flow of commerce by compelling employers to accept collective bargaining with their employees, it would seem logical to protect it also by either requiring unions to become incorporated, so that they might more effectively be held responsible for breaches of agreements made through such bargaining, or by requiring compulsory arbitration of labor disputes arising in establishments engaged in or producing for interstate commerce. To both such proposals, however, labor has been strongly opposed; and, with its political power both reflected in and enhanced by the Wagner legislation, its voice has thus far prevailed.[1]

The Improvement of Labor Standards—Wages, Hours, Child Labor

The Fair Labor Standards Act (1938)

With the Labor Relations Act (and also the Social Security Act of the same year) safely validated judicially, the Roosevelt Administration was ready to engineer the next major step in its program for the amelioration of labor conditions. To this time, federal regulation of wages and hours had been confined substantially to government workers and employees of government contractors, and of common carriers; and while approximately half of the states had wage and hour regulations, the restrictions usually applied to certain industries only, and in nearly every instance were confined to women, or women and children. A stumbling block to state wage and hour legislation of general scope had been the view of the courts that such legislation violated freedom of contract;[2] and although in a case in 1937 involving a Washington minimum wage law the federal Supreme Court reversed its earlier position on the point, there was little prospect of adequate state legislation the country over for men as well as women. Accordingly, in this same year, President Roosevelt called upon Congress for federal measures that would pick up where the defunct National Recovery Act left off by putting a "floor" under wages (a minimum wage law) and a "ceiling" over hours (a maximum hours law), and also by abolishing child labor; and the upshot was a Fair Labor Standards ("Wages and Hours") Act of 1938, representing the government's most ambitious attempt as yet to regulate working

[1] The House of Representatives did pass, in 1940, a bill applying some correctives, but the Senate failed to act. Sentiment aroused by a bituminous-coal strike late in 1946, combined with the capture of both branches of Congress by the Republicans in the November elections, seemed certain to lead in 1947 to new, and perhaps somewhat drastic, legislation on the subject.

[2] In 1905, the federal Supreme Court so ruled in Lochner *v.* New York (198 U. S. 45).

conditions in industry. Applying in general to workers engaged in manufacturing, mining, processing, or transporting commodities moving in interstate commerce (although not to agricultural laborers, to employees of common carriers provided for in other statutes, or to a few other groups), the act laid down regulations on all of the subjects specified by the President—wages, hours, and child labor.

1. Wages

A minimum wage of twenty-five cents an hour was prescribed for the first year following October 24, 1938, thirty cents an hour for the next six years; and after seven years (in 1945), unless sooner brought into operation under specified circumstances, the figure was to be forty cents an hour, except in special cases; and in point of fact, the forty-cent level was actually arrived at in July, 1944. By 1941, with the law in force only three years, more than 800,000 workers had obtained wage increases.

2. Hours

Forty-four hours a week were set as the maximum during the first year of the law's operation, forty-two hours the second year, and forty hours after October 24, 1941—with in all cases overtime pay at one and one-half times the regular rate. Within limits, however, the work-week might be extended by collective bargaining agreements, especially in industries requiring speeding up in certain seasons.

3. Child labor

Finally, child labor was placed under drastic restriction by provisions prohibiting goods produced under conditions of "oppressive child labor" to be handled in interstate commerce—such child labor being later defined as including the employment of any children under sixteen in manufacturing or mining, or under eighteen in occupations declared by the Children's Bureau (then in the Department of Labor) to be "particularly hazardous ... or detrimental to their health or well-being." In occupations covered by the law, other than manufacturing and mining, children might be employed in periods not interfering with their schooling and under conditions not injurious to their health and general welfare.

Constitutionality and administration

Although the new legislation encountered much hostility in some quarters, responsible employers, on the whole, fell into line with it promptly and carried out its provisions faithfully; and when challenged constitutionally, it was sustained unanimously by a Supreme Court [1] that already had broken with its own precedents and accepted the regulation of manufacturing having an interstate aspect as within the bounds of the commerce power. During World War II, the strain upon the country's productive capacity led (in 1943) to authorization of a forty-eight-hour week in war industries, but the deviation was only for the period of emergency. Including its child-labor provisions, enforced by a Child Labor and Youth Employment Branch, administration is vested in a Division of Labor Standards in the Department of Labor, with which has been consolidated a Public Contracts Division having to do with enforcing similar wage and hour provisions of the Walsh-Healey Act of 1936 applying to labor on government contracts exceeding ten thousand dollars.

[1] United States *v. Darby Lumber Co.*, 312 U. S. 100 (1941).

The Promotion of Industrial Peace

The rôle of government

Throughout all the years while labor was achieving the great gains that have been mentioned (and others as well), losses were suffered also—and by industry and the general public too—from lockouts, slowdowns, strikes, and other interruptions and disorders incident to labor-management disputes. In general, there are four ways of settling such disputes: direct negotiation, mediation, arbitration, and litigation. The first usually proceeds without intervention by government; in the second and third, government may or may not have a part; in the fourth, government necessarily participates, through the courts. Government may concern itself, however, not only with settling disputes, but with trying to prevent them; and when they occur, its activities may take many forms.

Declining activity of the states

Until comparatively recent times, governmental promotion of industrial peace was a concern almost exclusively of the states, under their reserved powers; and by the close of the last century most states had legislation on the subject, backed in a dozen or more of the number by standing boards of conciliation or arbitration. As, however, industry took on more of a national aspect, and its problems grew in scope and complexity, the federal government was inevitably brought upon the scene; and in the past twenty or thirty years it has so preëmpted the field that nowadays state agencies for handling labor controversies have relatively little importance except in Kansas, Colorado, and perhaps one or two other jurisdictions.

Some constitutional grounds for federal action

The powers of the federal government in this domain have certain clear constitutional foundations: (1) a dispute arising in the conduct of interstate or foreign commerce, *e.g.*, involving railway or shipping employees, falls manifestly within the scope of the commerce power; (2) if the enforcement of any federal law or the discharge of any federal function, *e.g.*, operating the postal service, is involved, there is equally self-evident authority to intervene; (3) if a dispute localized within a particular state leads to disorders of such magnitude that the state authorities call for assistance, the president is constitutionally required at least to consider whether to respond with federal troops.

Special aspects:

1. Anti-trust laws

This, however, is but part of a picture, the remainder of which is supplied largely by judicial interpretation of the general commerce power and of due process of law. When the Sherman Anti-Trust Act of 1890 made illegal every contract and combination in restraint of interstate trade, there was no mention of labor unions. Nevertheless, one of the earliest applications of the law came in connection with the Pullman strike in 1894 at Chicago; and in the famous Debs case growing out of it,[1] the Supreme Court took a position which it has ever since maintained, namely, that the Sherman Act applies to activities of labor unions no less than to those of corporate combinations. To be sure, at the behest

[1] *In re* Debs, Petitioner, 15 Sup. Ct. 900 (1895).

of labor, the Clayton Anti-Trust Act of 1914 declared unions not to be illegal combinations or conspiracies in restraint of trade. But, as judicially interpreted, this did not imply that such organizations could not, especially in connection with strikes, commit acts in restraint of trade for which they could be held responsible; and as recently as 1940 the Supreme Court, pointing out that no act had ever been passed exempting unions from the anti-trust laws, unqualifiedly reaffirmed its traditional position.[1] By interpretation, therefore, the federal government is competent to proceed at law against labor unions whenever it can show that strikes, boycotts, slow-downs, or other activities interfering with the production of goods, have the effect of obstructing the flow of trade.

2. Injunctions

A second line of restrictive or punitive interpretation stems from the complementary guarantees of the Fifth and Fourteenth Amendments that no person (and for this purpose, among others, a corporation is a person) shall be deprived of life, liberty, or property without due process of law. By strikes, lockouts, and the like, labor organizations do undoubted damage to employers and investors (to say nothing of the general public), stopping production, reducing income, and in such ways depriving the injured of property; and with a view to lessening such losses as far as possible—losses for which it rarely was possible to get reparation through civil suits—employers long ago, through their lawyers, began applying to courts for writs of injunction issued in anticipation of irreparable injury being done (*e.g.*, by violence that might arise from picketing) and forbidding the acts that would cause it. The sting to an injunction lies in the fact that if the forbidden acts are persisted in, those responsible become guilty of contempt of court, for which they can be summarily tried (formerly without a jury) and punished by fine or imprisonment; and it goes without saying that labor has always been bitterly hostile to injunction procedures, especially to the earlier denial of jury trial in cases of contempt. Various efforts to bring about restrictions had little effect until 1932, when the Norris-LaGuardia Anti-Injunction Act, passed largely in response to pressure from the American Federation of Labor, sharply curtailed the previously almost wide-open list of actions to which injunctions might be directed, and also assured to persons tried for contempt for ignoring injunction decrees the benefit of a jury. Injunctions in labor disputes are still issued, by both federal and state courts, and they remain potential weapons. Their actual rôle, however, has been considerably diminished.[2]

[1] Apex Hosiery Co. *v.* Leader, 310 U. S. 469 (1940).

[2] The power of the injunction, nevertheless, was brought into fresh prominence by the case of John L. Lewis and the United Mine Workers of America near the end of 1946. Liquidating a strike of the previous May, the federal government had taken over the bituminous coal mines, granting the miners' union terms which the operators had refused to concede, and which were understood to be fixed for the duration of government control. In defiance of an order of the district court of the District of Columbia, Mr. Lewis, in the following November, declared the union contract with the Department of the Interior cancelled and ordered some 400,000

Federal activities and agencies for promoting industrial peace:

1. The special case of railway labor

The most obvious place for the federal government to start dealing with the problem of industrial peace was in relation to railways, not only because of the disastrous consequences of breakdowns in the country's transportation services, but because, under the commerce clause, there could be no doubt about constitutional authority to act. As early as 1886, Congress began legislating on the subject, and in time several agencies arose for averting or adjusting railway labor troubles—with carriers by air eventually brought also under the same arrangements. Of these instrumentalities, three are chiefly important: (1) a National Railroad Adjustment Board, operating in four divisions or panels for different branches of employment, with employers and employees represented equally on each, and concerned with minor grievances of individuals and with interpreting and enforcing agreements concerning wages, hours, and working conditions; (2) a National Mediation Board, which may be appealed to by either party to a controversy, or may volunteer its services, with a view to effecting a settlement directly, or in lieu of that, getting the dispute referred to an impartial board of arbitration; and (3) "emergency boards" designated from a National Railway Labor Panel and, once a group of employees has voted to strike, set to work investigating the merits of the situation and making recommendations which, although of no legal effect, have in the past usually received so much public approval that the contending parties have been willing to accept them. Railway disputes have been by no means uncommon in recent years, but except in the case of a strike by trainmen and engineers in the late spring of 1946 which for a brief time paralyzed the movement of trains, making it necessary for the government to take over the roads, the machinery described has usually availed to avert actual stoppages of transportation. Concessions made by the government in the situation mentioned, however, are considered to have weakened the legal and moral force of the Railway Labor Act of 1926 (with 1934 amendments) previously held up as a model statute for settling disputes without actual resort to strike.

2. The labor field in general

The U. S. Conciliation Service and supplementary agencies

The federal government's efforts to maintain industrial peace have not, however, been confined to the field of transportation. A Conciliation Service, dating from 1913, endeavors, through commissioners of conciliation, to promote peaceful settlement of any and all labor disputes arising in other fields; and after the national defense effort was started in 1940, the Service's activities were sharply stepped up, with a high percentage of settlements without work stoppage. Its inability, however, to prevent or end strikes in certain vital industries led President Roosevelt, in 1941,

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miners out on strike. For disregard of the restraining order, a fine of $3,500,000 was imposed by the court on the miners' union and one of $10,000 on its president. The miners returned to the pits, and the federal Supreme Court agreed to hear the case on appeal, rather than wait for it to follow the regular channel through a court of appeals; and the district court was upheld, with the union fine cut to $700,000. On the one side, it was argued that the Norris-LaGuardia Act exempted labor unions from the injunction process; on the other, it was contended that the act was not applicable to situations in which the federal government was a party.

to set up, by executive order, an eleven-man National Defense Mediation Board to take jurisdiction (though with no enforcing powers) over any dispute certified to it by the secretary of labor as being beyond the capacity of the Conciliation Service to settle.

In January, 1942, this Mediation Board, having in turn demonstrated its own inability to prevent recurring labor disorders, was, by executive order, replaced by a National War Labor Board of twelve members, endowed with authority, among other things, to take jurisdiction of disputes on its own initiative as soon as other procedures for adjustment had failed, and "finally" (*i.e.*, without appeal to the courts) to settle any dispute, employing for the purpose mediation, voluntary arbitration, or arbitration under rules formulated by the Board itself. Working through twelve regional labor boards, each with power to make decisions subject only to appeal to the parent board, this agency, under wartime conditions, became a sort of supreme court for labor disputes; and on various occasions when its findings and orders were disregarded, the president, as commander-in-chief, instructed federal armed forces to take over and operate plants or services until compliance or settlement could be achieved. At the end of 1945, with peacetime conditions reviving, the Board was, in its turn, succeeded by a National Wage Stabilization Board in the Department of Labor, charged primarily with approving or disapproving applications for wage or salary increases or decreases, but also with some responsibility for helping settle labor disputes not successfully dealt with by the Conciliation Service, the National Labor Relations Board, or special fact-finding boards set up for particular situations. Finally, in February, 1947, this Wage Stabilization Board was abolished and its functions distributed between other agencies in the Labor and Treasury Departments.

The War Labor Disputes Act (1943)

Although presumably to be liquidated at some early date, one other major wartime development calls for mention as being basic to the numerous and costly labor troubles of the country in the early postwar period. Agreements of labor leaders not to cripple the war effort by encouraging strikes were sometimes violated, at least by the leaders' followers, and recurrent stoppages in the coal industry early in 1943 spurred Congress to pass, in June of that year—over strong labor protest and a forceful presidential veto, but nevertheless by heavy majorities—a War Labor Disputes [Smith-Connally] Act,[1] often referred to as the "Anti-Strike" Act, since its declared central purpose was to prevent strikes in wartime. Under terms of this highly controversial measure, the secretary of labor, the National Labor Relations Board, and the National War Labor Board were required to be given notice of any dispute likely to result in a strike; if, during a "cooling off" period of thirty days after such notice, no settlement was arrived at, the Labor Relations Board was to take a secret ballot among the employees concerned on the direct

[1] 57 *U. S. Stat. at Large*, 163.

question of whether they approved the threatened "interruption of war production"; and the results of the vote were required be given to the public. If the outcome indicated willingness of the workers to fly in the face of public opinion and go ahead with a strike, there was nothing that the government could do to prevent them; once they had gone through the motions required of them, a strike was legal, war or no war; and not only did wartime strikes actually continue, but the government seemed to many people to have been put in the position of actually facilitating them by itself offering a procedure by which they could be decided upon.[1] So objectionable, indeed, did this latter aspect prove that in December, 1945, Congress definitely forbade the Labor Relations Board to make any further use of its funds in taking strike votes; and in 1946 President Truman officially declared that function extinct. To minimize damage from wartime strikes actually occurring, the legislation of 1943 went on to empower the president to take possession of and operate any plant, mine, or facility whenever a strike or other labor disturbance affecting it threatened the production of articles or materials needed for the war effort; and so long as government operation continued, any interference with production by strike, lockout, slow-down, or other disturbance, or any form of encouragement or assistance to such interruption, was made illegal. Under these provisions, various strike-bound industrial, and even mercantile, establishments were seized and operated for longer or shorter periods during the later war years. Unless sooner repealed, the Smith-Connally Act was to expire six months after the close of the war, or at any earlier date fixed by Congress by concurrent resolution. Whereas, however, the fighting had long since ceased, official termination of the war had not yet been proclaimed when these lines were written (1946), and an act already obsolete in several of its features, and under increasingly heavy fire, was still on the statute-book—though considered not likely to survive the wave of labor legislation expected from the Republican Congress organized in January, 1947.[2]

Postwar strikes and anti-strike legislation

Late in 1945, with hostilities ended and the country confronted with the huge task of reconversion to a peacetime economy, the wave of industrial disputes and disorders which had been feared became a reality, and by the late spring of 1946 the nation was in the grip of the most formidable labor troubles in its history. Automobile manufacturing, the oil industry, the lumbering business, coal mining, meat-packing, and in time the railroads—all were affected on a ruinous scale, with countless smaller industries and businesses also involved. For a federal government whose foremost interest and obligation lay in the direction of helping and guid-

[1] It was on this account principally that President Roosevelt had sought to kill the measure by veto. Far from discouraging strikes, he said, the bill, if made law, would "stimulate labor unrest and give government sanction to strike agitations."

[2] It will be recalled that the Smith-Connally Act was the legislation which somewhat irrelevantly forbade labor organizations to contribute to campaign funds in connection with the election of president and members of Congress. See p. 143 above.

ing the country toward an orderly transition from war to peace, the resulting situation naturally raised tremendous problems. The ordinary machinery of conciliation and mediation was quite overwhelmed, and to reënforce it President Truman adopted the policy of appointing "fact-finding" boards to inquire into the merits of particular controversies. The upshot of this was, however, that boards not only explored facts but made recommendations; and when such recommendations developed a sort of pattern supporting wage increases of eighteen and one-half cents an hour, the inevitable tendency developed for labor unions not previously affected to consider that their members, too, were entitled to such increases, and accordingly to threaten or launch strikes to obtain them. A well-meant effort largely defeated itself; and by the late spring of 1946 other and more heroic measures seemed essential.

In the climactic months of May and June—which saw the entire coal industry (bituminous and later anthracite) tied up, industry paralyzed, the railroads' trainmen and engineers (although comprising only two of the twenty railway unions) stopping the operation of trains, and a general strike of maritime workers also impending—the President came forward with a drafted emergency anti-strike bill authorizing the chief executive (1) to seize (even though in peacetime) any industry interrupted by a strike, actual or threatened, and declared to be "vitally necessary to the maintenance of the national economy," (2) to establish in such seized industries "fair and just wages and other conditions and terms of employment"; and (3) to draft striking employees into the Army and force them to work. The measure purported to be nothing more than an expedient for overcoming the existing emergency. But the stiffness of some of its provisions came as a shock not only to labor but to many other people; before the two houses passed it (in somewhat differing forms), its harsher features were softened down, the proposed draft into military service being eliminated; and in the end it was left to languish on the speaker's table in the House and did not become law.

The Case bill 1946

Meanwhile Congress had developed a plan of its own, embodied in what came to be known as the Case Labor Disputes bill, and aimed not so much at meeting the immediate crisis as at amending the Wagner and Norris-LaGuardia Acts and laying a long-term basis for more stable and equitable labor relations. Among other things, the measure (1) made all collective bargaining contracts binding and enforceable against either party, with unions liable to damage suits for breach of contract; (2) provided for a new Labor Management Mediation Board with authority to intervene in labor disputes (not subject to the Railway Labor Act) having interstate implications, and to enforce a thirty-day "cooling off" period to permit of efforts at peaceful settlement; (3) amended the Norris-LaGuardia Act by giving the federal courts authority to enjoin violence, intimidation, obstructional picketing, or threats thereof, in labor disputes; (4) excluded foremen from the category of "employees" under

the National Labor Relations Act; and (5) forbade exclusive union control of welfare funds, such as the five-cents-a-ton levy demanded and obtained in the current coal strike. Opposing the measure on various grounds, President Truman insisted that it be laid aside as grist to the mill in a suggested six-month study of proposals for permanent legislation. Both houses, however, passed it—only to see it stricken down by a veto which the lower house failed by five votes to override.

An unsolved problem

In the outcome, therefore, the country was left with merely a peacetime law perpetuating a wartime solution of labor difficulties, and limited —like the Smith-Connally Act—to six months after formal proclamation of the end of hostilities; while the complicated and baffling problem of the long-term handling of labor controversies went over to an uncertain future. Confronted, however, with the largest, the most aggressive, and the most powerful labor movement that the world has ever seen, the country will increasingly stand in need of a well-considered basic labor policy favorable to the operation of a free economic system in the framework of a democratic society.[1]

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[1] Other labor legislation actually enacted in 1946 might be mentioned if space permitted, notably a Hobbs Anti-Racketeering Act (Public Law 486—79th Cong.), approved by the president July 3, 1946, and strengthening earlier legislation (1934) for the protection of interstate commerce against interference by intimidation, threats, or coercion. Making it unlawful to interfere with such commerce by extortion or robbery, this amending measure was aimed particularly at high-handed practices by which the trucking of commodities had been beset in many parts of the country. A comprehensive Federal Industrial Relations bill, introduced by Senators Hatch, Burton, and Ball in June, 1945, was not enacted, but early in 1947 something on the order of it seemed likely to become law. For an analysis of the 1945 bill, see *Polit. Sci. Quar.*, LXI, 189-215 (June, 1946).

By executive order in 1941, President Roosevelt set up a Fair Employment Practice Committee (succeeded by another of the same name in the Office for Emergency Management in 1943) designed principally to prevent companies doing business with the government from practicing discrimination in employment on grounds of race, creed, color, or national origin. Always stoutly opposed by Southern congressmen, the agency lapsed on June 30, 1946, and bills to revive it and broaden its scope so as to cover all business languished on the calendars.

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CHAPTER XXVIII

SOCIAL SECURITY—HOUSING

The ideal society would be one in which every individual had enough to eat and wear, satisfactory shelter against the elements, protection for health, a chance for a good education, and in the case of adults an opportunity to earn a living by honest toil, with safeguards against worry and want in old age. Such a society never actually existed. But it has come nearer to realization in the United States than in most other parts of the world; and significant advances toward fuller attainment of it have been made in the past fifteen or twenty years.

The growth of governmental welfare activities

In early times, to be sure, the individual American was left largely to shift for himself, except as he might be helped by his family, or by a church or other local group. Even in colonial days, however, parishes and counties developed responsibilities for poor relief, and after 1789 activities of the kind broadened, still mainly on a local basis, yet with the states entering the field with grants-in-aid, hospitals and asylums for different classes of unfortunates, and welfare boards and departments administering these institutions, supervising local services, and to some extent promoting wider coverage and higher standards. In time, the federal government also (fully endowed constitutionally with power to "provide for the . . . general welfare of the United States") [1] began making some contributions—abolishing slavery, humanizing conditions attending immigration, using the commerce power to curb the transmission of diseases and the distribution of impure food and drugs, building a supervisory federal public health service, enacting safety laws for rail, water, and air transportation and for mining, taxing out of existence injurious forms of manufacture (*e.g.*, making matches from white phosphorous), prohibiting the circulation of immoral matter through the mails, and doing a multitude of other things for the protection and betterment of large numbers of people.

Conditions revealed by the depression

Despite all this, however, when the great depression of the thirties threw nine or ten million people out of employment, created acute social distress, and forced a general stock-taking of the country's situation, thinking people were shocked at the general picture revealed. Unemployment, on some scale, was no new thing, but not much had been done about it; millions lived on so narrow an economic margin that, once out of work, they were almost immediately in want; only one state, *i.e.*, Wisconsin, had set up any system of unemployment insurance; over half of

[1] Art. I, § 8, cl. 1.

the states had introduced some plan of old age assistance, but usually inadequate, and elsewhere the dependent aged were left to be cared for by their relatives or, in default of that, to become public charges in county or other institutions; a federal Sheppard-Towner Act of 1921 had given state health departments limited funds for assistance to expectant mothers, but had been allowed to lapse; large numbers of dependent and helpless children were receiving only such more or less casual care as local agencies provided. The longer-term outlook, moreover, was disturbing. Studies by competent authorities showed that, with population growing, the number of available industrial jobs had been declining even before the depression; that, while technological discoveries and inventions opened new avenues of opportunity, they also closed many; that the shifting of once self-sufficient country people to the cities tended to leave them dependent upon industrial ups and downs and in a generally insecure position; that with life expectancy rising and the birth-rate declining, persons over sixty years of age would in future constitute a greatly increased proportion of the country's population—one in every eight, it was predicted, by 1980. Unemployment on a considerable scale, it appeared, would be permanent; the burden of caring for the needy aged would steadily grow; unless strong measures were taken, the multiplying under-privileged of poorer parts of the country and of congested cities would continue keeping the boasted national standard of living from being fully realized in practice. In short, the problem before the nation was vastly more than merely one of tiding the people over the existing period of calamity.

The Social Security System

The act of 1935

For combating the depression itself and getting a baffled and discouraged nation back on its feet, the Roosevelt Administration, confronted by inability or disinclination of the states to go far, resorted to drastic measures, most of which have been touched upon at various points in preceding chapters. Huge federal outlays for relief and vast loans and gifts to states and localities for public works could not, however, go on forever, even though the conditions now requiring them very well might recur. Moreover, there ought to be ways not only of cushioning the impact of "hard times" when encountered, but of giving large masses of people a new sense of security against hazards having to be faced in both bad times and good. And after much study had gone into the matter, Congress, in 1935, passed a comprehensive Social Security Act, characterized by President Roosevelt, its principal author and sponsor, as, to be sure, not providing complete protection against "the hazards and vicissitudes of life," but nevertheless constituting "the most useful and fundamental single piece of federal legislation ever enacted in the interest of American wage-earners." Amended several times in the past decade, the nation-wide system of security introduced is still incomplete, and

hardly a session of Congress fails to call forth proposals for expanding and strengthening it. Certain salient features of it as they now stand may, however, be briefly indicated.

1. Unemployment compensation

Towering above all other aspects of the legislation are the provisions made for unemployment compensation and for protection of the aged. With a view to safeguarding the great mass of wage-earners against the hazards of unemployment, the states are encouraged, by federal grants designed to cover administrative expenses in full, to set up insurance or compensation systems. Under these, workers involuntarily unemployed receive benefits paid through public employment offices or other approved agencies and derived from an excise tax (which may not be deducted from wages) on employers of some specified number of persons—in twenty-five states, eight—at a rate rising from one per cent of the annual payroll in 1936 to three per cent in 1938 and thereafter. Speaking strictly, there is no *federal* system of unemployment compensation. Congress has merely utilized its taxing and appropriating powers to stimulate the states to devise and set up compensation systems of their own;[1] and while various prescribed conditions must be met if federal grants to cover costs of administration are to be forthcoming, each state is left free to adopt any general type or plan of compensation preferred, and, in so doing, to determine the classes of unemployed and the conditions under which such classes may participate, as well as the scale of benefits. Nowhere has it been found feasible to make an unemployment compensation scheme cover all of the gainfully employed, and the system here described does not extend to agricultural workers, domestic servants, public employees, casual laborers, employees of religious, charitable, educational, scientific, and literary institutions or organizations, or to employees of common carriers in interstate commerce (these last, however, being covered somewhat similarly by a separate federal scheme instituted in 1938[2]). As the system stands, every state has been participating in it since 1937. There has, however, been considerable demand for converting the entire system into a purely federal one, and for the greater uniformity and wider coverage to which that change would probably lead.

2. Old age assistance and insurance

The problem of the aged presents itself in two different although related aspects—that of relieving aged persons who already are dependent and that of preventing dependency later on. As being the more immediately pressing, the first of these matters was taken up by the states (beginning with Pennsylvania, Montana, and Nevada in 1923) a good while before the federal Social Security Act was passed; by the close of 1934, twenty-eight states, indeed, had enacted legislation on the subject, al-

[1] The tax on employers is levied by the federal government; but although, upon collecting it, the states turn over the proceeds to that government, they requisition them back for the payment of benefits. And employers under approved state systems get a credit on their federal taxes equal to ninety per cent of the payroll taxes they pay.

[2] 52 *U. S. Stat. at Large*, 1094.

though in three it was not operative and in only ten was it state-wide. To stimulate and nationalize old age *assistance*, the Social Security Act introduced a plan of federal responsibility and coöperation under which federal aid is extended to the states on the familiar fifty-fifty principle, although in no case to involve a federal allowance of more than fifteen (changed in 1939 to twenty and in 1946 to twenty-five) dollars a month per person.[1] Within three years, every state qualified to receive the federal funds. A minimum of federal control was provided for, and administration in some of the states has been lax.

More ambitious are the provisions made for old age *insurance*. Applying to substantially the same workers who are reached by unemployment compensation (the principal groups excluded are indicated above), the act of 1935 set up a nation-wide compulsory retirement system under which annuities or pensions, graduated in amount on the basis of earnings and length of service, are payable at the age of sixty-five from a fund built up from contributions made equally by employers and employees,[2] the national government making no direct money contribution, but bearing undivided responsibility for operating the system and playing the combined rôles of collector, bookkeeper, and administrator. In essence, the plan is one for compulsory savings—in other words, for spreading wages over the lifetime of the worker rather than over merely his wage-earning years; and on the theory that the employer is both concerned and obligated, he is required to help make the plan workable by sharing in creating and maintaining the fund. Contributions made by employers and employees alike started at one per cent of the wages paid or received in 1937, and under the original law would have reached a maximum of three per cent in 1949. Because, however, this promised to build up huge reserves long before they would be needed, Congress, from year to year, and usually over presidential objection, "froze" the tax at one per cent, doing this most recently in July, 1946, for the year 1947, when otherwise the rate would automatically have become two and one-half per cent. The amount received by a beneficiary depends to some extent upon the sum that he has paid in, but may in no case exceed eighty-five dollars a month.

Amendments of 1939

In 1939, the name of this phase of social security was changed to "old age and survivors' insurance," and the scope was broadened to include protection of the family, rather than merely the wage-earner, through the establishment of monthly benefits for certain dependents and survivors of retired workers, and for certain survivors of insured workers who die before retirement. The date for the first payment of monthly benefits was advanced from January 1, 1942, to January 1, 1940; and a few minor groups previously excluded were brought under the terms of the law.

[1] Matching, of course, a similar amount paid by the state. Naturally, the beneficiary makes no contribution to the funds from which payments are made.

[2] The contributions of employees are collected by employers, being simply deducted from wages—as the employers' own contributions may not be.

Additional aspects of the security program adopted in 1935 can merely be mentioned. (1) Federal aid on a fifty-fifty basis is provided for the care of dependent children under sixteen years of age (eighteen, if they remain in school). (2) Following up provisions of the Vocational Rehabilitation Act of 1920, federal aid, in increased amounts, is extended to vocational rehabilitation, which is now placed upon a permanent basis. (3) On lines similar to those followed in relation to old age assistance, federal aid is provided (to a limit of twenty dollars per person per month) to enable the states to pay pensions to the blind. (4) While no federal program of general health insurance has as yet been adopted, the legislation of 1935 extends aid to the states (increased in 1939 to eleven millions a year) for strengthening and expanding state and local public health services.

8 Other forms of security and amelioration

Before federal money for any of the joint undertakings becomes available, a state's plans for the use of the combined funds must receive the approval of some designated agency of the national government. To the states, therefore, it falls to take the initiative in getting the various arrangements under way. To them also it falls to determine who are entitled to receive benefits or assistance, as well as the amounts to be allowed. In some fields, the federal grant equals the state appropriation; in others, it is based upon population or financial need, or both.

The system sustained by the Supreme Court

Within a short time after enactment of the legislation of 1935, all of the states took (with respect to certain of the programs, or all of them) whatever action was necessary to qualify for the various forms of aid and coöperation contemplated; and a federal Social Security Board of three members—originally an independent establishment, later a unit within the Federal Security Agency, and in 1946 abolished when its functions were placed directly under the head of that Agency—entered upon its huge task of supervising a system estimated to entail in future an outlay of not less than three billion dollars a year. Inevitably, the legislation was attacked at many points on constitutional grounds, and amidst confusing decisions of lower courts a good deal of doubt arose as to how much of it would ultimately be sustained. In a series of notable decisions handed down on May 24, 1937,[1] however, the federal Supreme Court, though closely divided, took a far broader and more liberal view than in earlier decisions such as those involving the N.R.A. and the first A.A.A., and upheld every really vital feature of the basic act, discovering at last, as someone has remarked, "a method for implementing nationalism."

Social security in the "G.I. Bill of Rights"

The United States had not long been involved in the recent war before it became apparent that the aids and services provided by the legislation of 1935 and 1939 would need to be considerably broadened in order to meet the situation created by the return of millions of servicemen and

[1] Carmichael *et al. v.* Southern Coal and Coke Co., 301 U. S. 495; Charles C. Steward Machine Co. *v.* Davis, 301 U. S. 548; Helvering *et al. v.* Davis, 301 U. S. 619.

women to civilian life; and realization of this led in 1944 to the enactment of a more or less specialized social security measure entitled the Servicemen's Readjustment Act, popularly known as the "G.I. Bill of Rights." [1] For honorably discharged veterans of the late war, the law provides unemployment compensation up to fifty-two weeks of unemployment, federal guarantee of loans up to four thousand dollars for the purchase or construction of homes or the purchase of farms or business property, loans or even subsidies for purposes of education or professional training, hospitalization and medical care, and other kinds of benefits.

The question of further expansion

In its first decade, the security system outlined established itself as a permanent and praiseworthy feature of the American social order. The huge task of administering it was performed well, and in the process the standards and techniques of state and local welfare management were generally toned up. Throughout the period, leaders of thought on the subject have, however, contended—as President Roosevelt himself believed—that only by a great deal of revision and expansion could the system be made truly adequate; and, as has been indicated, in the past few years hardly any subject has stirred more proposals in Congress and outside. With ardent backing from both President Roosevelt and his successor, the Social Security Board (while still in existence) called repeatedly for a new and greater program, extending the plan of unemployment compensation to fifteen or twenty million workers not yet covered, plugging another large gap by introducing a nation-wide scheme of disability and sickness insurance, and making numerous other readjustments and extensions in the interest of a balanced and logical system compatible with the American way of life, yet within limits of what the nation could afford; and from as far back as 1943 a bill of majestic proportions (the Wagner-Murray-Dingell bill), "covering the major economic hazards from the cradle to the grave," and warmly supported by Presidents Roosevelt and Truman, has been kept alive in Congress by determined advocates, although such legislation on the subject as has actually been enacted during the period has dealt only with changes, important in themselves, but not extending to the greater additions envisaged. The vast difficulties involved in working out acceptable plans, the sectional jealousies and rivalries sometimes stirred, hesitation over greater expenditures in a period of national deficits and staggering debt, and some lingering prejudice against enterprises of New Deal origin, combine to paralyze action on the broader lines advocated. There is much, however, to indicate that the situation is gradually shaping toward a general revision and expansion—to which, indeed, early in 1947, it seemed not unlikely that, under urging from the White House, Congress might address itself after other major matters, *e.g.*, labor legislation, tax revision, and liquidation of war powers, should have received due attention.

[1] 58 *U. S. Stat. at Large*, 284.

Public Housing

Slow development of state and local control

The acute housing shortage experienced by the country during and after World War II, causing untold inconvenience and hardship for great numbers of people, focussed attention upon a problem really as old as our present industrial society. Rural housing is often far from what it should be, but when our population dwelt almost entirely on farms or in villages and small towns, people commonly had access to reasonably good houses and there was not much for public authorities to do about the matter. With the rise of great industrial centers, however, the situation changed, and decidedly for the worse. Detached houses gave way to drab tenements; high land values caused crowding and congestion; high rents forced families into pitifully inadequate quarters; immigrant workers congregated in teeming "Little Italy's" and the like; the "slum" —dreary, crowded, and dangerous alike to health and morals—became a blot upon an otherwise fair social economy. Aside from some control over fire hazards and construction methods, the first serious attention given to housing by public authorities was directed to ameliorating the condition of low-income groups in slum areas; and while even in the third quarter of the nineteenth century a few cities bestirred themselves to some extent about the matter, enacting local codes prescribing building regulations and sanitary standards, the effects were slight, and in time reformers turned with more hope to the legislatures of the states. From legislation in certain of the more highly industrialized states did indeed come measures fixing standards with somewhat beneficial effect. At best, however, it merely imposed regulations on private owners of existing housing or upon private construction, without directly bringing new and better housing into existence. New York, to be sure, went farther by taking measures calculated to encourage private enterprise to undertake a good grade of building for people of low incomes, and even by setting up a state housing board charged with slum clearance in the metropolis and with supervising the construction of "model tenements." But no other state emulated the example thus set.

The federal government enters the field

Aside from some provision for the housing of war-workers during World War I, the federal government stayed almost completely out of the field until the depression of the thirties. From that time, however, it has been continuously involved, in many different ways and through the medium of legislation and administrative machinery so complicated, and so frequently changed, as to baffle almost any one except a professional student of the subject. As pointed out in an earlier chapter,[1] the first form of federal effort, undertaken at a time when great numbers of people were losing their homes through mortgage foreclosures, was aimed, not particularly at increasing or improving housing, but at enabling hard-pressed home-owners to avoid being dispossessed; and the method con-

[1] See p. 374 above.

sisted in setting up (in 1932) a series of home loan banks (under a Federal Home Loan Bank Administration) to provide credit for local institutions engaged in home-financing, with, in addition, a Home Owners' Loan Corporation (in 1933) to make direct long-term mortgage loans, out of federal funds and at low interest rates, to distressed home-owners who for one reason or another could not borrow through other channels. Almost simultaneously, however, encouragement of new low-cost building and of renovation of residential properties was undertaken through a Federal Housing Administration created under a National Housing Act of 1934 and authorized not only to insure lending institutions against possible losses on loans made for the purposes indicated, but itself to make federal loans to these institutions, to be employed in promoting low-rent dwellings. To this point, the objectives had been primarily to enable people to save their homes and to stimulate employment in home building and modernization. Growing concern with the social values of good housing, however, was reflected in a National Housing [Wagner-Steagall] Act of 1937 setting up a United States Housing Authority charged with making long-term loans (up to eighty per cent of the costs involved) to state or local housing authorities for the construction of low-rent housing and for slum-clearance; and it is principally under this agency that federally-aided projects of low-rent housing (apart from some war housing) and slum clearance have subsequently been carried on. The federal government does not directly engage in the work of construction or demolition, but merely makes loans; the municipal or other local authorities directly concerned plan the projects, furnish such additional funds as may be needed (normally twenty per cent), and execute the different enterprises. Within six years after the legislation of 1937 was enacted, all but ten of the states qualified for the federal aid by setting up the requisite authorities—sometimes with jurisdiction confined to one or two cities, but often extending to all cities and towns and even rural areas.

Housing and World War II

The plan outlined had only limited opportunity for operation before the national defense effort launched in 1940, and the ensuing war, gave the housing problem a new slant and emphasis. With the rapid expansion of shipyards and of plants for manufacturing airplanes, powder, and other war materials, the building of new plants for such purposes, and the construction of military camps and training quarters, hundreds of thousands of workers and their families flocked to localities not equipped to house them; and partly in order to meet this situation, partly because of scarcity of labor and materials, and partly because Congress virtually cut off supporting appropriations, the general program of civilian construction and slum clearance came almost to a stop. Indeed, under legislation of 1940 federal housing activities were substantially restricted to such as had to do with taking care of the armed forces and of war-plant workers; and between 1940 and the close of 1944, a total of 1,479,502

war-housing units were constructed or reconstructed, about half of the number publicly and about half privately. Amending legislation of 1940 broadened the powers of the United States Housing Authority in this direction and liberalized the access of state and local authorities to federal funds. With a view, also, to more integration of the many different federal agencies which by this time had come to have something to do with housing, President Roosevelt, in 1942, consolidated seventeen of the number into a National Housing Agency, of which today the Federal Housing Administration (essentially a mortgage-insurance organization) and a Federal Public Housing Authority are principal units—the first bearing revised general responsibilities for civilian housing, the second concerning itself with managing war housing during the period of reconversion.

Housing since the war

The housing situation confronting the country after the war is a familiar, and for many people, a painful subject. Almost complete cessation of civilian building for five or six years, on top of heavily reduced building during the preceding depression years; an appreciable increase of population in the meantime; return from overseas of millions of servicemen looking for homes—these and other factors easily explain the severe shortage by which every part of the nation was beset. For governments on all levels, difficult problems were posed; and in Washington two principal programs of action emerged. Under one, enacted into law in May, 1946, emergency housing for veterans was provided for under a program ambitiously conceived to eventuate in more than two and one half million new homes, through federally aided private construction, within a period of two years.[1] Under the other, a maximum of $135,000,000 a year for ten years (providing 125,000 new units annually) was to be turned to the erection of twelve million and a half private dwellings—the great majority by private enterprise so assisted that rents could be at least twenty per cent lower than for good-grade private housing not subsidized. Although, however, pressed by the President and otherwise widely supported, the General Housing [Wagner-Ellender-Taft] bill in which this second ambitious proposal was embodied failed of passage as the Seventy-ninth Congress drew to a close (in August, 1946); and any new federal assistance for housing—apart from that for veterans—went over for later decision.

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CHAPTER XXIX

FOREIGN RELATIONS

Constitutional basis

The government of any independent state manifestly must have power to carry on official dealings with the governments of other states; and we have the word of our federal Supreme Court for it that, even if no grant of such authority could be found in the constitution, nor indeed any clauses from which the authority could be deduced, the conduct of foreign relations would still be a proper and necessary function of our national government as "a necessary concomitant of nationality." [1] There is, however, no lack of expressly granted power. To be sure, there is nowhere a single blanket grant, nor even any mention of "foreign relations" as such. But the president is authorized to "appoint ambassadors, other public ministers and consuls," to make treaties, and to "receive ambassadors and other public ministers"; the Senate is allotted a share in treaty-making, as well as in appointments; and Congress is given power to regulate foreign commerce and to declare war. Furthermore, federal control in this domain is made exclusive by clauses forbidding the states to "enter into any treaty, alliance, or confederation"—or into *any* agreement or compact with . . . a foreign power"—except with the consent of Congress. By discriminating against alien residents in the matter of property-holding, by failing to do justice when aliens suffer at the hands of mobs, and in other ways, the states may raise difficult international problems for the national government. But that government has the sole right and power to handle such matters internationally. If we are to believe the Supreme Court, it has *all* power (not actually prohibited) to act for us in the international field, with or without constitutional authorization, express or implied.

Diffused responsibility.

By nature, the conduct of foreign relations is an executive function; and in many countries it is almost exclusively such in actual practice. In the United States, too, it is such a function primarily, yet one also shared heavily with other branches of the government. As chief executive, the president unquestionably is the supreme director of our official international intercourse. Nowhere in the constitution, however, is he expressly assigned such primacy; on the contrary, he is merely given certain powers, the Senate is given others, and Congress as a whole still others. And while, in outlining here the pattern of control over foreign relations, the president will have to be assigned the center of the stage, the emphasis will be misleading unless it is at the same time made per-

[1] United States *v.* Curtiss-Wright Export Corporation, 299 U. S. 304 (1936).

fectly clear that what we have in this area of our government is a responsibility shared by the executive and legislative (and at some points even the judicial) branches—a responsibility far more diffused than that prevailing in the conduct of foreign relations in any other important country. The arrangement may be justifiable, but we often pay a price for it in terms of unpredictability, delay, confusion, and frustration.

With these basic facts in mind, we turn to the ways in which our foreign relations are managed, starting with the president as supreme director; although, the president's functions being exercised largely through the Department of State and its far-flung auxiliary, the Foreign Service, something may well be said about these agencies before the chief executive is brought directly into the picture.

The Department of State and the Foreign Service

The secretary of state

Although among the smaller departments in personnel, the Department of State, including the Foreign Service, is, in the geographical sweep of its activities (in peacetime at least), the most extensive of all, being indeed the long arm by which the government reaches out to and deals with matters in the remotest lands beyond seas. So completely and uniquely, too, is it an agency of the White House that requests made of it by Congress are regarded as being made of the president himself. At the Department's helm is, of course, the secretary of state, commonly the most conspicuous cabinet officer, and in any event endowed with a certain primacy by statutory recognition as next after the vice-president in the line of succession to the presidency. His is the oldest department, with functions of a more delicate nature than those of any other; and usually he sustains more intimate relations with his chief in the White House than does any other department head. Not all secretaries of state have been great men or able administrators, and comparatively few, such as Jefferson and Hay, have brought to the office actual experience in diplomacy. The roster of incumbents since 1789 has, however, been adorned with enough honored names—Jefferson, Marshall, Madison, John Quincy Adams, Clay, Webster, Calhoun, Seward, Blaine, Hay, Root, Hughes, Stimson, Hull, Byrnes—to have invested the secretaryship, like the presidency itself, with a lofty tradition.

General departmental organization

Many circumstances combine to make the internal organization of the Department exceptionally subject to change, and no description is likely to hold true in every detail over a very lengthy period. Since two extensive overhaulings in 1944, major features have, however, included the following: (1) an under-secretary of state, serving as acting secretary when his chief is absent or incapacitated, and at other times aiding in the formulation and execution of policy; (2) a battery of six assistant secretaries, in certain cases with responsibilities associated with given geographical areas; (3) a number of specialized officials such as the counsellor and the legal adviser; and (4) no fewer than seventeen more

or less coördinate "offices," each headed by a director charged with supervising and integrating usually from three to seven or eight divisions (under chiefs) among which the functions to be performed are distributed. One such office is that of Far Eastern Affairs; another, that of Near Eastern and African Affairs; a third, that of American Republic Affairs; a fourth is in charge of the Foreign Service; while additional ones have to do with broad functional areas such as international trade policy, economic security policy, transport and communications policy, international information and cultural affairs, research and intelligence, "controls" (passports, visas, etc.), and budget and finance. One will not be surprised to learn that, amid the turmoil of the past decade, State Department activity has been carried to new heights, and machinery expanded beyond anything previously known.

The Foreign Service:

The first thing that one discovers on turning to the Foreign Service is that what is now a single establishment was formerly two, *i.e.*, diplomatic and consular. Each had not only its own functions but its own personnel, its own system of recruiting and promotion, its own classification, and its own salary scale; and, however much aptitude a member of one service might show for work of the kind performed by the other, it was almost impossible for him to be transferred. For many years the feeling grew that the wall separating the two services ought to be broken down, and after numerous proposals had fallen by the wayside, the Rogers Act of 1924 accomplished the desired reform.[1] Diplomatic and consular services were consolidated in a common field force known as the "Foreign Service of the United States"; the diplomatic and consular branches of this service were put on an interchangeable basis, so that transfers might be made from one to the other whenever found advantageous; and provision was made for assignment of new recruits to either branch of the service in which they happened at the time to be needed. A comprehensive Foreign Service Act of 1946[2] regulates the present organization of the service in great detail, with a director-general in charge of administration, and with an advisory board bringing together representatives of four departments—State, Agriculture, Commerce, and Labor.

1. Organization

2. Personnel

In earlier days, appointments to diplomatic and consular positions, as to places of other kinds, were made by the president and Senate with no necessary regard for fitness. Men of ability and experience were sometimes appointed, but too often the determining factors were personal favoritism and party service. In 1895, President Cleveland introduced the rudiments of a merit system in the consular service, and in 1906 President Theodore Roosevelt instituted a plan of competitive examinations and efficiency ratings for the appointment and promotion of consuls of all grades, including consuls-general. In 1909, President Taft started a scheme of competitive examinations in the lower grades of the diplomatic

[1] 43 *U. S. Stat. at Large*, 140.
[2] Public Law 724—79th Cong

service, with provision for efficiency records as a basis of promotion. This, however, did not affect the members of the service above the rank of secretary, who, accordingly, seldom long outlived the Administrations that appointed them and rarely or never survived a change of the party in power. Furthermore, in both services the reforms rested until 1915 only on executive orders, not on statute. Here again the legislation of 1924 made notable advances. By its terms, all persons in the Foreign Service below the grade of minister are appointed only on the basis of written and oral competitive examinations of such comprehensiveness and difficulty that only well-trained college graduates can hope to pass them.[1] As needed, and in the order of their ratings, successful candidates are given preliminary or preparatory terms of a few months as salaried junior vice-consuls in near-by posts, after which they receive several months of further instruction in a foreign service officers' training school —reconstructed in 1946 as a Foreign Service Institute—in the State Department at Washington. Only then are they ready to be appointed as foreign service officers (of the lowest grade)—in whichever branch of the service there are vacancies, and with some regard to their personal aptitudes. Supplemented by later legislation—notably the Moses-Linthicum Act of 1931 [2]—the Rogers Act also fixed salaries of "foreign officers" (as distinguished from "staff officers and employees") on a uniform scale rising from $2,500 to $10,000 (with moderate annual increases, and with certain travel and other allowances), made suitable provision for promotions, and established a retirement and disability fund to which members of the service contribute five per cent of their salaries. Indeed, the Moses-Linthicum Act rounded out the reform by classifying clerical employees as well and bringing them within the merit system. Under a new scale introduced by the Foreign Service Act of 1946, compensation now runs from $3,300 to $13,500 for foreign service officers and from nominal amounts like $1,720 to $10,000 for staff employees.

Status of ministers and ambassadors

Although forming parts of the Foreign Service in the broader sense, ministers and ambassadors [3] are outside the scope of much of the legislation just described, and are still appointed by the president and Senate on grounds in which political and personal considerations, *e.g.*, reward for party service and for contributing generously to campaign funds, may

[1] As a rule, the written examinations are held in September, are taken by from six to eight hundred young men and women, and are successfully passed by from sixty to one hundred Of the latter number, the rigorous oral examinations, held the following January, usually eliminate all but twenty-five or thirty; and of these, by no means all actually receive appointments. Candidates must be between the ages of twenty-one and thirty-five, and must be designated for examination by the president. *The American Foreign Service,* a pamphlet issued from time to time by the Department of State, gives full information. But students should very carefully weigh the hazards before deciding, as many do ill-advisedly, to go in for "a foreign-service career."

[2] 46 *U. S. Stat. at Large,* 1207.

[3] An ambassador outranks a minister, but is not otherwise different. Since 1893, it has been the practice of the United States to send an ambassador to any country that sends one to us.

weigh heavily. Tenure, too, is uncertain, and sometimes brief, especially if the party to which the incumbent belongs soon goes out of power. To be sure, the Rogers Act and the more recent Foreign Service Act of 1946 have as one of their objectives the encouragement of young men of ambition and talent to make the foreign service a career, and to that end both statutes require the secretary of state to give the president from time to time the names of members of the service who have demonstrated their fitness for promotion to the grade of minister; and in recent years a gratifying number of such promotions have been made. Until of late, an obstacle of considerable seriousness arose from restriction of salaries to a range between $10,000 and $17,500, with the result of numerous posts being practically beyond the reach of persons not of independent means. Under the Foreign Service Act of 1946, however, the range is $15,000 to $25,000; and although the increase by no means enables all chiefs of mission to live within their stipends, the situation is better than formerly. There is advantage in a system flexible enough to permit the president to choose our highest diplomatic officers from men of standing and achievement in all professions and fields, and some of our ablest and most successful representatives abroad have been persons without previous diplomatic training or experience. But, also, it is pleasing to know that the rank and file of the service is now so improved that he cannot find excuse for failing to draw from the "career men" in it for the higher posts with increasing frequency. By and large, our consular establishment has long been as efficient as any in the world. Notwithstanding shining exceptions, our diplomatic service has, in times past, ranked rather low. In so far, however, as our presidents, resisting personal and party pressures, henceforth succeed in filling ministerial and ambassadorial positions, not with political appointees, but with men who either have come up with distinction through the secretaryships, counselorships, and similar offices or have attained equally desirable qualifications by experience in other fields, an ancient ground of reproach will have been removed; and it is gratifying to be able to record that of the two score ambassadorial posts which we maintained in 1941, ten were held by career men, and of the thirty ministerial posts, fifteen.[1] The commanding position that our nation has gained since 1917 and the ever-growing complexity of our relations abroad, both in peacetime and in wartime, demand not only an extensive but a strong foreign service—strong at the top no less than at the bottom. Appropriately enough, the Foreign Service has been termed our first line of defense.

Diplomatic functions

Asked to indicate the functions of an American diplomatic representative in a foreign country, one might list the more important of them somewhat as follows: (1) to convey messages and inquiries from the

[1] In seven cases, these diplomats were commissioned to governments then operating in exile—six in England and one in Canada. The later war years brought considerable changes in the number and distribution of diplomatic posts.

home to the foreign government, and to transmit information and replies in return; (2) to cultivate friendly relations with the authorities of the foreign state and keep the way open for prompt and amicable adjustment of controversies; (3) to negotiate agreements and treaties, alone or in collaboration with specially appointed commissioners, and under instructions from the secretary of state; (4) to keep the secretary of state, and through him the president, informed on political conditions and trends abroad, and especially on international developments; (5) to watch legislation and other governmental actions in the foreign state, and make inquiry or lodge complaint if American treaty rights are threatened; and (6) to be of assistance to resident or traveling fellow-citizens, in ways that often tax both ingenuity and patience. Naturally, the burden of responsibility will be heavier in some capitals than in others, and at times of international tension than in days of peaceful routine. But it is never light; and no mere cataloguing of duties, in the foregoing fashion, can give a complete measure of it.

Consular functions

The primary function of the American consular officer, at least historically, is to promote the interests of American trade abroad; and to this end he observes and reports on economic conditions in his territory, watches for new and larger openings for American goods, sends back information on the most advantageous forms of advertising and the best methods of packing and shipping commodities, and puts himself at the service of the American manufacturer, shipper, or commercial traveler engaged in studying the foreign market on the spot. This, however, is only part of the story. In addition, (1) he certifies the invoices of goods intended for shipment to the United States, and otherwise assists in the administration of our tariff laws; (2) he acts as paymaster (for civilian purposes) of the American government abroad, and also as tax-collector, *e.g.*, in connection with the federal income tax; (3) under certain conditions, he cares for the estates of Americans who die abroad; (4) he witnesses marriage ceremonies when one of the parties is an American citizen; (5) he decides disputes between masters, officers, and men on American ships, provides for stranded seamen, and may discharge seamen from their contracts; (6) he inspects and approves the passports of aliens intending to come to the United States, thus helping enforce our immigration laws; (7) he serves as peacetime business agent in securing fuel and stores for American ships; and, in general, (8) he acts as "guide, philosopher, and friend" to traveling fellow-countrymen. Far less in the public eye than the minister or ambassador, the consular official penetrates corners of the earth where diplomacy rarely or never reaches and is easily the most valuable sort of general utility man that modern government and business have developed.[1]

[1] It is hardly necessary to add that under international conditions existing both during the war and since, the normal functioning of both diplomatic and consular officers has been warped at many points from the customary pattern.

The President and Foreign Relations

The Department of State, as described, is the president's lawful agency for carrying on our official dealings with foreign governments. Whatever it does is done in the president's name; and it is now time to review a few of the principal activities for which the chief executive, as thus assisted, is responsible.

1. Carrying on foreign intercourse

In the first place, the president is the official channel of intercourse between our government and governments abroad. On the one hand, subject to the Senate's right of confirmation, he appoints all ambassadors and ministers to foreign countries, and all consuls stationed therein, with, of course, the full power of direction and removal which the appointing power entails. Indeed, for purposes of convenience he may employ "special," "secret," or "personal" agents abroad, who, not being technically public officers, require no senatorial confirmation, and who commonly receive their pay, if any, out of a presidential "contingent fund." [1] Conversely, he receives, on his own responsibility, all foreign ambassadors and other public ministers, with power also, if occasion requires, to break off dealings with them and in effect send them home. Through the State Department, he carries on correspondence abroad, obtaining information, declaring policy, pressing claims, offering settlements, and replying to all manner of inquiries and proposals. Congress, on its part, may not address any foreign power or receive any communication from one; and any private citizen or corporation undertaking to engage in discussion or negotiation with a foreign government on a matter of political significance becomes liable to penalty. While, however, normally using the State Department as a channel, to such a degree that even foreign governments must ordinarily address the White House not directly but only through the Department, the president may nevertheless go as far as he likes in handling matters directly and personally—even to the extent of managing the country's foreign relations practically from his own desk, as did President Wilson during World War I, or going abroad to lead in the negotiation of a great international settlement, as did the same chief executive when peace was to be made in 1919, or meeting and conferring with representatives of foreign governments at any places selected for the purpose, as President Franklin D. Roosevelt repeatedly met and conferred with Prime Minister Churchill and Marshal Stalin (and on one occasion with Chiang Kai-shek) during World War II.

[1] The diplomatic or semi-diplomatic activities of such agents may on occasion be quite as important as those of regular ministers and ambassadors, as, for example, were those of Nicholas Trist in negotiating peace with Mexico in 1848, of Commodore Perry in getting our first treaty with Japan in 1854, and of Colonel E. M. House as a roving special emissary of President Wilson in Europe during World War I. From 1940 onwards, Myron C. Taylor appeared intermittently at the Vatican (with which the United States does not maintain regular diplomatic relations) as special representative of the president charged with promoting the interests of peace, and in 1946 some controversy was stirred by pressure upon President Truman from Protestant sources for termination of the arrangement.

2. Recognition

Out of this presidential function of representing the nation in its dealings abroad grows a second important power, namely, that of recognition—by which is meant the authority to determine what the official American attitude shall be toward an unsettled or changed political situation in a foreign land. The constitution has nothing to say on the subject, and at various times it has been argued that Congress possesses the power concurrently with the president. International usage, however, makes it strictly an executive function; the power to appoint and receive envoys would certainly make it such in the United States; and precedent, backed by judicial opinion, places it wholly in the president's hands, subject only to the power of the Senate to confirm diplomatic appointments, and to the power of both houses to vote foreign service appropriations. Recognition may take the form of welcoming into the family of nations (so far as we can do it by our own action) a state that has lately asserted its independence, as did President Monroe, after 1817, in recognizing a number of newly risen Latin American republics, or as did President Theodore Roosevelt in 1903 in recognizing the republic of Panama and thereby paving the way for the construction of the Panama Canal. The usual method in such cases is the sending and receiving of diplomatic representatives. Or recognition may take the form of instituting official relations with a new political régime that has taken over in a given country, as when President Franklin D. Roosevelt, in 1933, recognized the government of the U.S.S.R. by concluding a treaty with the Kremlin.[1] It may also, of course, be withheld or definitely denied, as when Presidents Hoover and Roosevelt steadfastly refused to recognize the new "state" of Manchukuo established under Japanese auspices on Chinese soil in 1932. In all matters of recognition, the principle is that the president may go as far as he likes in recognizing international *facts*; recognition before facts exist is premature, and may become a source of threatened war.

3. Protection of citizens abroad and of alien residents

"Under our system of government," the courts have declared, "the citizen abroad is as much entitled to protection as the citizen at home";[2] and it falls to the president, as chief executive and director of our foreign relations, to see that such protection is duly extended, whether on the basis of treaty stipulations usually covering such matters or otherwise. If an American sojourning in a foreign land or traveling on the high seas is mistreated and cannot obtain justice, the president, acting through the State Department, may make demands in his behalf, and may go to any length short of a declaration of war to obtain redress for him. Similarly, it is the president's duty—up to the limits of national authority—to see

[1] Still another form presents itself when, an insurrection having arisen in a country, the president formally recognizes the insurgency, or even the belligerency, of the insurrectionists by giving them (so far as the United States is concerned) certain rights which they would not have as mere rebels. President Cleveland thus recognized a state of insurgency in Cuba in 1895.

[2] Durand *v.* Hollins, Fed. Cas. No. 4186 (1860).

that protection is extended to aliens legally domiciled in the United States. He must execute all provisions of the constitution, the national laws, and treaties bearing on their rights; and while he has no way of compelling state authorities to extend protection in matters, like property-holding, outside the scope of national jurisdiction, he may admonish them to be mindful of alien rights and may instruct district attorneys to lend aliens needed legal aid. In time of war abroad, he may be of assistance to both aliens and citizens by issuing a proclamation of neutrality calling attention to rules of international law and to statutes forbidding various unneutral acts. When the United States is itself at war, however, the rights of aliens of enemy nationality become only such as international law recognizes in situations of the kind; and the president is not obligated beyond that point.[1]

Treaties and Executive Agreements

The functions thus far reviewed belong to the president quite independently, or at all events are subject to only indirect and limited control by the legislative branch. We come now to two others, of major importance, which again are primarily presidential, yet are also shared to a considerably greater extent by the Senate or by Congress as a whole—(1) treaty-making and (2) shaping foreign policy.

Treaty-making

A main instrumentality for regulating and stabilizing international relations is treaties; and the constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."[2] Under the Articles of Confederation, Congress made treaties; and the framers of the constitution at first thought of giving the power to the Senate. As, however, the concept of the presidency grew in their minds, the opinion developed that it would be better to assign treaty-making, along with the general management of the country's foreign relations, to the chief executive, associating with him the Senate as an advising and restraining council. The House of Representatives was deliberately omitted from the plan in the interest of "secrecy and despatch"; and the assent of two-thirds, rather than a simple majority, in the Senate was provided for in order to prevent treaties from being made too lightly, and also to give sectional interests like the New England fisheries added protection against being "sold out."

Presidential initiative

The language of the constitution clearly associates the Senate with the president throughout the entire process of making a treaty; and not only do passages in *The Federalist* indicate that this is what the framers had in mind, but President Washington actually began his treaty-making (with the Southern Indians in 1789) on that basis. A few years of experience demonstrated, however, that it was more practical and expeditious

[1] See p. 88 above.
[2] Art. II, § 2, cl. 2.

for the president to "make" the treaty and only afterwards to seek the Senate's "advice and consent"—such consent being simply to a final act of ratification to be performed by the president and making the instrument effective so far as our own government is concerned. To be sure, either branch of Congress, or the two concurrently, may, by resolution, advise or request that a given treaty, or series of treaties, be negotiated; and the president may, in advance or during the course of a negotiation, consult with individual senators, or even the Senate as a whole.[1] But unless the chief executive chooses to set the necessary machinery in motion, no negotiation can be started; he can begin a negotiation regardless of the desire (and even without the knowledge) of either branch of Congress; and rarely indeed is the Senate as a body given any chance to express itself on a proposed treaty until the completed instrument is transmitted to it. Short of flatly withholding assent to ratification, the most that the Senate can do is to assent on certain conditions, or to attach reservations which will make it necessary for the president to renew negotiations with a view to securing the foreign government's acceptance of the proposed qualifications or other changes. In exercising his powers of initiative and direction, the president may work through the regular diplomatic representative accredited to the foreign government concerned; or he may appoint a special plenipotentiary or commission to go abroad for the purpose; again, he may cause the negotiation to be carried on in Washington through the secretary of state; or, finally, he may undertake, or at least participate in, the negotiation himself, as did President Wilson in connection with the Treaty of Versailles in 1919. When the treaty is completed, he, furthermore, has full freedom to submit it to the Senate, return it to the negotiators for revision, or drop it altogether. He may hold it back because he considers it unsatisfactory, or because he recognizes that submission of it to the Senate would be useless.

The Senate's share in treaty-making

"A treaty entering the Senate," wrote John Hay after six years of experience as secretary of state, "is like a bull going into the arena; no one can say just how or when the final blow will fall—but one thing is certain—it will never leave the arena alive." [2] This statement is much

[1] There are only about a dozen instances in which the opinion of the Senate as a whole has thus been sought. As a matter of expediency, the president and secretary of state usually keep in close touch with the members of the Senate committee on foreign relations when an important negotiation is in progress. The president may, indeed, make one or more senators members of a negotiating commission, as in the case of the conclusion of peace with Spain in 1898, the Washington Conference of 1921-22, and the London Naval Conference of 1930. President Wilson has been criticized for not including one or two senators in the commission which represented the United States in negotiating the Treaty of Versailles in 1919. And one will recall the prominent rôle of two members of the Senate committee on foreign relations, Senators Connally and Vandenberg, not only in framing the Charter of the United Nations at San Francisco in 1945, but in subsequent meetings associated with that organization, as well as in conferences in which the American secretary of state met in Paris and elsewhere with the foreign ministers of the United Nations.

[2] W. R. Thayer, *Life and Letters of John Hay* (Boston, 1920), II, 393. A treaty submitted to the Senate is referred to the committee on foreign relations, and debate

too strong, as is evidenced by two or three major facts: (1) no treaty was rejected outright by the Senate until 1824; (2) the total number so rejected throughout the history of the country to 1935 is only sixty-two; and (3) while the Senate either failed to act upon, or insisted on amendments or reservations to, 152 treaties (to the date mentioned), it unconditionally approved some nine hundred, or more than four-fifths of the entire number presented to it. Quite a number of treaties slip through with no opposition at all. Those that stir controversy, however, encounter a genuine hurdle in the two-thirds rule; and it must be admitted that of the treaties that have come to grief a large proportion have been of first-rate importance, *e.g.*, the treaty for the annexation of Texas in 1844, the Taft-Knox arbitration treaties of 1911-12, the Treaty of Versailles in 1920, the St. Lawrence Waterway Treaty in 1934, and the protocol for adherence to the Permanent Court of International Justice in 1926 and 1935; and, further, that many which finally emerge triumphant do so only after a great parliamentary battle, calling into play every sort of pressure from the White House.

At any time while a treaty is pending in the Senate, the president may recall it, either because circumstances have so changed that he no longer favors it or because he perceives that it is doomed to defeat or becoming hopelessly encumbered with reservations and amendments. Even after the Senate has given its consent, a treaty may be held up. It remains for the president to ratify it—and, upon being apprised of ratification by the other government (or governments), to promulgate it; and he has the option of refusing to take these final necessary steps, although naturally he will do so only under very unusual circumstances.

Dissatisfaction with the existing system

For a hundred years or more, the treaty procedure outlined served, on the whole, acceptably. In later days, however, it has given rise to a great deal of dissatisfaction. To begin with, the two-thirds rule, although conceded to have been perhaps desirable under eighteenth-century conditions, is alleged to be out of harmony with our present-day democracy, grounded as it is upon the principle of government by ordinary simple majority. A second objection often voiced is that the rule makes it too easy for special interests, by mustering merely a minority vote, to hold up or defeat a treaty which may be in the general public interest. Inasmuch, too, as a very large proportion of senators are elected by predominantly rural populations in thinly peopled agricultural states, the great weight assigned to the Senate in treaty-making gives, in the opinion of some, too much power in this particular domain to populations remote from the coasts and more or less provincial in their outlook. Yet another complaint is that the House of Representatives is placed in the awkward position of being practically obliged to vote appropriations, and some-

and action (if any) follow in executive session after the committee has reported. As indicated earlier (see p. 235 above), treaties formerly were nearly always considered only behind closed doors, but since 1929 have been dealt with in "open" executive session unless in a given case the Senate decides upon secrecy.

times enact legislation, for putting treaties into effect, although powerless over the making and ratifying of them.[1] Finally may be mentioned the ground-swell of criticism traceable since 1920 to the conviction of many people that, but for the obstructionist attitude of a Senate minority, the United States would, as a member of the League of Nations and adherent of the contemporary World Court, have contributed to international coöperation a force and vigor that might possibly have changed the entire course of world events in the past unhappy decade.

Proposed changes

There are, of course, those who would leave matters as they are; and undoubtedly they include a substantial majority of the senators themselves. But a heavy proportion of people who have thought seriously about the subject favor one or the other of two principal proposed changes, *i.e.*, (1) to empower the Senate to assent to the ratification of treaties by simple majority (either of those present or of the total membership) instead of two-thirds, and (2) to make ratification contingent on such majorities (again either of those present or of the total membership) in both houses. Notwithstanding that the latter plan might prove responsible for a good deal of deadlock and delay, it probably is preferable; although neither could be adopted without a constitutional amendment, which, requiring as it would a self-abnegating two-thirds vote in the Senate, would be exceedingly difficult to obtain.[2]

Execution and termination of treaties

Once promulgated, a treaty becomes, from the international point of view, a contract between the United States and the nation or nations constituting the other parties, and from the domestic point of view, an addition to the law of the land, supreme and enforceable like any other portion of that law. The courts of the states must give it full effect; and if their construction of its provisions proves objectionable to any litigant, appeal can be taken to the federal Supreme Court. Of course, not all treaties are, or are intended to be, permanent. Some expressly provide for their own expiration; some are terminated by war; some are replaced

[1] On this ground, the House early set up a claim to a share in the treaty-making power. In his message on the Jay Treaty in 1796, Washington, however, urged that after a treaty has been duly ratified, Congress is morally, if not legally, obligated to take any action required for enabling the commitments under it to be lived up to; and although the issue was revived in connection with the Treaty of Ghent in 1814 and the treaty for the purchase of Alaska in 1867, the principle as thus laid down has consistently prevailed.

[2] Many proposals for such an amendment have been introduced, and in 1945 one of the number, motivated especially at that time by desire to ease the way for American adherence to the contemplated United Nations organization, and, as amended, providing for assent to treaty ratifications by majority vote of the total membership in each house, passed the House of Representatives by the requisite two-thirds, without, however, receiving approval of the Senate. A method already frequently employed roughly approximates the proposed plan in that large matters which very well might have been cast in treaty form are handled instead as ordinary legislation (bill or joint resolution), requiring only the normal majorities in the two houses. It was thus that the president was authorized to take the United States into the International Labor Organization, and that the United Nations Relief and Rehabilitation Administration agreement, the Bretton Woods financial proposals, and the British loan of 1946 were authorized for implementation through executive agreements.

by new agreements; some are abrogated by being "denounced" by one or more of the parties. When it is desired in this country to dispense with a treaty, or some portion thereof, our government is likely to seek an agreement to that end with any nation, or nations, concerned. In default of such agreement, however, the president may, on his own authority, simply proclaim the treaty at an end; or he may take such action with the support of a joint resolution of Congress; or Congress itself may make any of the treaty's provisions of no legal effect by enacting legislation inconsistent with them. Although treaties are "law of the land," the Supreme Court has said that they are no more truly so than are acts passed by Congress. Invariably, the Court has been reluctant to construe a statute as in violation of a treaty; but when there is manifest conflict, the later in date prevails.[1] Neither a court decision nor a statute can, however, abrogate a treaty as an international contract. Although rendered unenforceable domestically by such means, a treaty preserves its international status until revoked by executive action; and in the meantime the foreign power may construe an adverse judicial decision or statute as a breach of contract entitling it to reparation through an international proceeding.

Can treaties confer legislative powers?

Often enough, a treaty is of such a nature as to require legislation to make its provisions effective. Can a treaty be made a means of conferring on Congress legislative power not otherwise possessed? Not if one accepts the view of Thomas Jefferson, who contended that the constitutional provision on treaty-making merely sets forth a procedure for exercising granted powers and is not itself a substantive grant. The Supreme Court, however, has ruled differently. In a case decided in 1920, it held that the treaty-making power is a distinct grant of authority to the national government, and broad enough to be applicable to all subjects of national concern and capable of being handled only by international negotiation;[2] from which it follows that federal legislation in pursuance of treaty provisions may properly extend to matters otherwise exceeding congressional competence, even to such as fall clearly within the reserved (including police) powers of the states. In point of fact, legislation of this character has many times been enacted and enforced.

Executive agreements

Treaties can be ratified and become operative only with the advice and consent of the Senate. But not every agreement entered into with a foreign government takes the form of a treaty. Increasing numbers, instead, are "executive agreements," for which—notwithstanding that there is no mention of them in the constitution, and that as a rule they are to all intents and purposes treaties—consent of a two-thirds senatorial majority is neither sought nor obtained.[3] In some cases, *e.g.*, postal conventions

[1] Chinese Exclusion Cases 130 U. S. 581 (1889).

[2] State of Missouri *v.* Holland, 252 U. S. 416.

[3] In his *International Executive Agreements*, W. McClure computes that the total of executive agreements entered into by our government between 1789 and February, 1941, was "well over 1,250—a third more than the number of treaties." From

and trade agreements, such agreements rest upon authority conferred in advance by blanket act of Congress.[1] The majority of them, however, are concluded by the president (directly or through agents) without such authorization—sometimes in pursuance of a treaty, sometimes as commander-in-chief of the armed forces, and occasionally simply as chief executive and the country's supreme representative for direct official dealings with foreign states. And not only are they upheld by the courts as "supreme law of the land," [2] but the limits to which the president may carry them are nowhere defined. Many agreements deal with minor matters which, on their face, do not call for a treaty—for example, petty pecuniary claims of American citizens against foreign governments. But others relate to affairs of prime importance. Indeed, an executive agreement may become frankly a means of evading—temporarily, at all events—the necessity of going to the Senate with a treaty. In 1905, President Theodore Roosevelt worked out a treaty with Santo Domingo stipulating that the United States should guarantee the integrity of that republic and take over the administration of the customs with a view to settling foreign claims and warding off European intervention. The Senate refused to consent to the treaty; whereupon the President entered into a *modus vivendi* with the Dominican government on precisely the lines desired; and for two years the protectorate was maintained on this basis alone. In 1907, a treaty regularizing the arrangement was at last assented to and ratified. President Taft, in 1911, entered into a similar agreement with Nicaragua, which was not superseded by a treaty until 1916.

Congress and executive agreements

So far, indeed, was the power of executive agreement carried that in 1941 a responsible State Department official could seriously argue, not only that the two-thirds rule in the Senate was "a peril to the national welfare," but that anything that can be done by treaty can also be done (and the implication was *should* be) by executive agreement. The war years then dawning, however, saw an uprising on the matter in a quarter where it was most to be expected—the Senate. Executive agreements of 1940 under which the United States secured from Great Britain long-term leases of sites in the Atlantic for naval development, and from Denmark the right to take various precautionary measures in Greenland and Iceland, were so obviously germane to the president's function as commander-in-chief that they stirred little protest. When, however, in pursuance of power conferred in the Lend-Lease Act of 1941,[3] the State Department, under presidential direction, began concluding agreements with

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1929, the texts of such agreements were published in the State Department's *Executive Agreement Series*, until 1946, when this Series was merged with a similar *Treaty Series* in the present *Treaties and Other International Acts Series*.

[1] On trade agreements, see pp. 363-364 above.

[2] As in United States *v.* Belmont, 301 U. S. 324 (1937). The federal Supreme Court has never held an international act unconstitutional. An executive agreement, however, binds only the signing executive; his successors are free to continue it or not as they choose.

[3] 55 *U. S. Stat. at Large*, 31.

Great Britain, the U.S.S.R., China, and other nations involving a network of long-term commitments running into billions of dollars, dissatisfaction manifested itself. And when, in 1943, it was learned that a United Nations Relief and Rehabilitation Convention was to be treated as an executive agreement and not referred to the Senate, notwithstanding that it entailed "practically illimitable obligations for the United States practically in perpetuity," the State Department was vigorously challenged. Controversy ensued in which the secretary of state was threatened with an official investigation, and in the end a compromise was forced under which, while UNRRA itself was entered into as a matter of executive-legislative action only and without a treaty, the executive branch promised in future to be more circumspect about observing "constitutional processes." In anticipation, too, of efforts already started to build up a world organization for the preservation of peace, both houses of Congress, in the year mentioned, passed resolutions asserting that American participation must be by such "constitutional processes," which, in the Senate phraseology, were expressly defined as involving Senate approval by regular two-thirds majority; and in 1945 the Charter of the United Nations was duly submitted to and approved by that body.

Plenty of room for executive agreements remains; and there still is, and can be, no exact definition of their proper limits. Wartime experience has, however, at least vindicated and reëstablished the principle that significant financial commitments may not be made except by treaty, or at all events legislative action of the two houses; that, in general, agreements profoundly affecting the country's foreign interests and policies shall be only by treaty; and, finally, that the dividing line between treaty procedure and some alternative procedure is one to be drawn, in the final instance, not by the executive, but by the Senate or by Congress as a whole. The chief problem remaining is the tendency to short-circuit the Senate as a treaty-making authority, even on important matters like the Bretton Woods Agreement and the loan to Great Britain, by simple legislation of the two houses either authorizing executive agreements in advance or validating them afterwards.[1]

The President, Congress, and Foreign Policy

More than once, persons dissatisfied with the handling of our relations abroad have been heard to exclaim that the United States has no foreign policy; and it is true that our physical isolation in times past, our traditional aloofness from the affairs of Europe, and our preference for avoiding long-term international commitments seemed for many decades to denote at least a rather negative attitude on many matters of concern to other nations. But even aloofness is a policy; and besides we were not always aloof. The truth is that we have always had quite clearly defined,

[1] E. M. Borchard, "Treaties and Executive Agreements," *Amer. Polit. Sci. Rev.*, XL, 729-739 (Aug., 1946).

and sometimes very cogently stated, foreign policies—certainly we have such now—even if not always entirely consistent, nor always meeting the approval of the entire body of the people.

The rôle of the president

The shaping of such policies, under our system, is not the function of any one branch or department of government, nor even exclusively of government at all, since public sentiment, with the press, the radio, and other agencies playing their parts, has much to do with it. The supreme maker of policy is nevertheless the president (in close conjunction with the State Department); even when not strictly the author of a given policy, he commonly becomes such to all intents and purposes by declaring it to the world and taking the necessary steps to carry it into effect. When Washington proclaimed American neutrality in 1793, and in his Farewell Address warned his countrymen against political entanglements with Europe, he started the country on a course of "isolation" from which in later times only the most extraordinary emergencies ever availed to swerve it completely. Monroe, in 1823, voiced in a message to Congress certain principles concerning foreign political activities in the Western Hemisphere which, under the name of the Monroe Doctrine, developed into one of the most enduring and important of all our foreign policies. When, in 1844, President Tyler's secretary of state, Daniel Webster, instructed Caleb Cushing as our first emissary to China to see to it that the United States received assurance of equal opportunity in that country, he inaugurated a line of policy which, under the more familiar name of "open door," became, and remains, the cornerstone of all American dealings with the Far East. Theodore Roosevelt, Taft, and Wilson brought a number of Caribbean republics under United States supervision and, for better or worse, left us a policy of maintaining Latin American financial protectorates which only a decade or so ago gave way to President Franklin D. Roosevelt's newer "good neighbor" policy. Wilson in 1915 and Hoover in 1932, through their respective secretaries of state, Bryan and Stimson, made it American policy to withhold recognition from international agreements or arrangements in the Far East interfering with the territorial or administrative integrity of China or the equal opportunity for trade and other enterprise in that country. During the earlier stages of World War II, President Franklin D. Roosevelt led in formulating and carrying out the national policy under which the United States first severely strained and later frankly abandoned its neutral position in order to give aid to Great Britain and other fighting nations which, in the Chief Executive's opinion, must at all costs be kept from going down. Similarly, he bore full responsibility for the government's unyielding opposition to Japan's proposed "new order" in Eastern Asia, bringing the two countries to the brink of war by 1941, and precipitating them into actual combat before the year ended, with Germany and Italy almost simultaneously declaring war upon us as part of a concerted Axis attack. In the Atlantic Charter of 1941, he joined with Prime Minister

Churchill in proclaiming broad postwar international policies to which the United States was solemnly committed on his sole responsibility; and policies were further determined and declared throughout the war, frequently as a sequel of conferences with spokesmen of allied states. When a foreign complication arises, or a new international problem presents itself, it is the president who has the first opportunity to say what the attitude of the nation shall be; and by the stand that he takes he can so put the country on record that it will be next to impossible for Congress, or even a later president, to assume a different position. As we shall see, he may even lead the nation into war; for although he cannot declare war, he can adopt an attitude or create a situation, *e.g.*, by refusing to yield in a controversy with a foreign government, that may make war unavoidable.

Congressional limitations and controls

Nevertheless, the president does not long play a lone hand, or always have his own way. A zealous Congress forced upon a reluctant chief executive the War of 1812, and likewise the intervention in Cuba in 1898 which led to the war with Spain, the annexation of the Philippines, and a long train of other fateful consequences. An unconvinced Senate balked President John Quincy Adams in his Pan-American policy, Pierce in his Cuban policy, Grant in his Dominican policy, Cleveland in his Hawaiian policy, and Wilson in his endeavor to put the United States into the League of Nations. One of the most vigorous and important standing committees in each of the two branches is the committee on foreign relations,[1] in which, in connection with proposed legislation (and, in the Senate committee, with treaties) problems of foreign policy receive extended discussion, sometimes supplemented by lively public hearings.[2] Special committees, too, may be set up to investigate areas of presidential action on policy in this field. Whatever funds are required for carrying on our relations abroad (including those needed for executing the provisions of treaties) are, of course, obtainable only through appropriations voted by Congress. The national government's exclusive control over foreign relations gives Congress plenary *legislative*, even as it gives the president plenary *executive*, power in this domain; and once Congress has legislated—on immigration, merchant marine, foreign commerce, "lend-lease" arrangements, and what not—the president is quite as much obligated to execute the resulting statutes as if they related to domestic affairs. The upshot, therefore, is that, while in foreign relations the president appears to have a singularly free hand, and while he actually does enjoy much liberty of action, our dealings abroad are, after all, controlled by no single branch of the government, but rather are shaped, even if somewhat unequally, at the two ends of Pennsylvania Avenue.

[1] "Foreign affairs," in the case of the House of Representatives.

[2] A joint foreign relations committee of the two houses has sometimes been proposed; also some sort of a council on foreign relations composed of cabinet members, senators, and representatives chiefly concerned with foreign affairs.

The rôle of public opinion

Back of both president and Congress, however, stand the people; and, in the final analysis, no significant program of foreign policy can be carried out that lacks the support of the voters, evidenced through elections, the press, and in other ways. "No matter," ex-Secretary of State Hull has remarked, "how brilliant and desirable any course may seem, it is wholly impracticable and impossible unless it is a course which finds basic acceptance ... by the people of this country." Here, as in other areas of planning and action, the chief executive must ascertain, scrutinize, and weigh public opinion; failing to do so, he may easily be betrayed into embarking upon a line of policy leading straight to humiliating frustration at the hands of the people or their elected representatives. Not infrequently, cross-currents of opinion make it difficult to discern what the nation really thinks and wants with respect to a given situation or problem; considerations of self-interest and altruism are often bewilderingly intermingled, and economic, ethnic, or other pressure groups may pull in diametrically opposite directions. But there are ways —in which the president, the State Department, and Congress alike are usually versed—of forming reasonably sure judgments as to how far the country as a whole is prepared to go in supporting a given line of policy or its opposite; and most of the time, planning and action are kept within the limits disclosed.

Participation in International Organization

Some forms taken

The foreign relations of the United States are by no means confined to direct and separate dealings with nations individually. To begin with, they are operated within a framework of international law, which, originating in ways too complicated to be described here, is at all events a matter of more or less general international agreement or acceptance, and certainly not a creation of the United States or of any two or three nations alone. In the second place, many treaties which we enter into are not bilateral, but multilateral, *i.e.*, shared in by a considerable number of states, as for example the Versailles Treaty at the close of World War I (which we failed to ratify) or the treaties of 1922 and 1930 on the limitation of naval armaments. Such treaties or conventions are likely to be concluded at diplomatic meetings or conferences in which the United States is represented along with varying numbers of other states; and as world affairs have grown more complex in later decades, their number and importance have tended to increase. Then there is the matter of international associations and organizations to which the United States has become a party—even before, or at any rate quite apart from, the rise of the problem of world organization posed by the League of Nations and the present United Nations. A recent issue of the *United States Manual* lists no fewer than seventy-three bodies of the kind with which the United States is identified, established in nearly every instance by multilateral treaty, convention, or agreement, and ranging from a Pan-

American Union linking up the twenty-one republics of the Western Hemisphere for closer coöperation and the recently active United Nations Relief and Rehabilitation Administration to a Universal Postal Union, an International Institute of Agriculture, and a long list of other agencies for investigative, consultative, regulative, and technical purposes. When the League of Nations came into being after World War I, the United States, by Senate decision, refused to become a member. Throughout the ensuing quarter-century it could not, however, hold completely aloof from the organization's activities; and it not only from time to time employed observers at Geneva, but participated in many conferences held under League auspices, ratified various conventions of League origin, took part in the work of several technical and other commissions carrying on League activities, and eventually joined the International Labor Organization closely associated with the League, although persistently refusing to adhere to the World Court which the League set up. All of these relationships have added to our personnel occupied with international matters and have given the State Department increased responsibilities for guidance and control; many, too, have entailed legislative work for Congress.

The United States and the United Nations

But the most significant participation of the United States in coöperative international activity has come as a result of the challenging experiences of the recent war decade; and the country now finds itself a leading member of the most ambitious and potentially most important international league or union known to history—the United Nations, born of World War II, projected on its broader lines at the Dumbarton Oaks Conference of 1944 in Washington, provided with its basic charter or constitution at a later international gathering in San Francisco representing fifty states and dominions, and operating from an American location in the heart of New York City. Not only in the General Assembly and the smaller but pivotal Security Council of this organization is our government represented, but also in a growing list of subsidiary bodies—an Economic and Social Council, a Trusteeship Council (not yet fully organized in 1946), a United Nations Educational and Scientific Organization, an International Court of Justice, and others;[1] and in future (if the new coöperative machinery fulfills the hopes of those who devised it) an increasing proportion of the matters which our State Department and Foreign Service heretofore have handled on the traditional nation-by-nation basis will be dealt with, at least in part, through the United Nations as an over-all medium of world discussion, decision, and action. Diplomatic and consular relations with individual nations will continue, together with probably a good many independent international commissions, unions, and other such agencies. Nevertheless, if the new plan for

[1] By a vote of 89 to 2, and after only six days of debate, the Senate approved the United Nations Charter, and therefore American membership in the organization, on July 28, 1945. On August 2, 1946, it similarly accepted (60 to 2) for the United States compulsory jurisdiction by the International Court of Justice.

collective international action succeeds, the pattern and workings of our American foreign-relations machinery may in time undergo considerable change.

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CHAPTER XXX

NATIONAL DEFENSE

Defense becomes a major concern

Until within the past generation, geography assured our country a singularly sheltered position internationally. Even so, modest provisions for defense were always necessary. In little over a century, we engaged in three international wars; and in 1917 we were drawn into the greatest armed conflict that the world had known to that time. Hardly more than a decade ago, however, we still had a comfortable sense of isolation and security. Our Army was small; our Navy, more impressive, yet not preeminent; and the national temper was so far removed from militarism as to make it difficult, indeed, to maintain any respectable defenses at all. Then dawned a period of great change. International turmoil gripped the world; technological advances largely robbed us of the protection afforded by broad oceans; war advanced relentlessly in our direction and at length overtook us. By rapid stages, defense, long a matter of only rather casual interest, became our paramount national concern—and defense no longer confined to mere preparedness, but actualized in deadly combat on land and sea and in the air, in every quarter of the globe. In time, the enemy was defeated and new international machinery set up for keeping the peace. No one supposed, however, that future security was guaranteed any nation; on the contrary, the "absolute weapon" of atomic power raised new and greater fears; and, all in all, defense remained and doubtless will long continue, for us as for other peoples, a problem and challenge of unsurpassed importance.

Some constitutional principles:

1. Defense a responsibility of the national government

During the Revolution and the ensuing "critical period," the lack of power of Congress to mobilize the fighting strength and material resources of the country, and to deal promptly and decisively with domestic disorders, gravely imperiled the birth of the nation; and the experience put the makers of the constitution in a frame of mind to endow the new government with adequate powers both to make war and to repress insurrection. Into the new fundamental law they therefore wrote upwards of a dozen provisions which, taken together, conferred upon the national government every power at that time deemed requisite for defending the country, whether against Indian depredations, foreign attack, or domestic uprising. Almost equally with the conduct of foreign relations, defense was made, as it today remains, a national function. To be sure, the states may maintain militia for use in enforcing their own proper authority. But unless Congress gives permission, they may not "keep troops or ships of war in time of peace" or engage in war

unless actually invaded or in such imminent danger as will not admit of delay.[1] Even the state militia may be called into the service of the United States, thereupon passing under the supreme command of the president; and, as is well known, the military establishments of the states have in later times become an integral part of the war machine of the nation.[2] In time of defense emergency, and especially of war, states, counties, cities, and other jurisdictions collaborate with the national government in a multitude of ways. Their efforts, however, are merely phases of an over-all national effort; and full responsibility for planning, encouraging, and directing that effort rests with the government at Washington.

2. Civil authority supreme over military

A second matter is equally fundamental. While solicitous about providing for defense, the framers of the constitution had no desire to open a way for an overshadowing, and perhaps overweening, military establishment, or for the rise of military dictatorship. To be sure, they did not expressly enjoin in the document—as is done in all of the state constitutions except that of New York—that the military establishment shall in all matters be subject to civil control. But they accomplished the purpose adequately enough by so defining the defense and war powers of Congress and the president (civil branches of the government) as to leave no room for military domination. Congress alone can raise and support armies, make rules for governing them, and declare war; the president is commander-in-chief of all armed forces, whether in peace or in war.[3] As any one conversant with Washington knows, Army and Navy officers, even in time of peace, exert a good deal of influence upon policies relating to national defense, upon military and naval appropriations, and at times even upon the conduct of foreign relations. But in all such matters the power of final decision rests with civilians.

Defense Powers and Functions of Congress

1. Providing for the Army and Navy

As just indicated, the supreme civil agencies sharing control over national defense are Congress and the president. To begin with, Congress has sole power to "raise and support armies" and to "provide and maintain a navy."[4] These things it does by stipulating the number and kinds of troops to be enlisted, prescribing the method of recruitment, authorizing the building and manning of war craft, providing for auxiliary equipment such as forts, arsenals, dockyards, and air services, and of course by raising and appropriating money for the maintenance of military, naval, and air establishments, subject to the constitutional restriction that no appropriation for raising and supporting armies may be made

[1] Art. I, § 10, cl. 3.

[2] See pp. 487-488 below.

[3] Outside of the constitution, civilian supremacy is further assured by congressional definition of the functions and powers of the courts, and by the almost unbroken custom of appointing only civilians, not generals or admirals, as heads of the War and Navy Departments.

[4] Art. I, § 8, cls. 12, 13.

for a longer period than two years.[1] There is no lack of power to take whatever steps are deemed necessary—even to the extent of conscription, as in World Wars I and II—to safeguard the nation in time of peace, and to insure vigorous prosecution of hostilities in time of war.

2. Enacting military and naval regulations

In the second place, Congress has full authority to prescribe "rules for the government and regulation of the land and naval forces," [2] and "rules concerning captures on land and water." [3] The resulting regulations for the Army are called the "Articles of War"; those for the Navy, the "Articles for the Government of the Navy"; together, the two are known as the "Military Laws of the United States." Within their proper spheres, both Army and Navy have "governments" of their own, with the military regulations prescribed by Congress as in effect codes of law, with hierarchies of military and naval officers to administer such law, with military police and courts-martial to aid in the enforcement of it, and with legal branches under judge advocates general, and likewise legal staffs attached to divisions and corps areas, to exercise functions of a judicial nature. The regulations imposed by Congress set forth the powers and duties of officers and men in the military and naval services, define offenses against discipline, provide means and procedures for trying persons accused of such offenses, fix penalties, and otherwise regulate military activities and conduct.[4]

3. Exercising control over the National Guard

Congress may provide for as large a standing army as it sees fit; and it is generally agreed that the world situation will in future require a considerably larger one than in the past. Our earlier traditions, however, in common with the traditions of English-speaking peoples everywhere, were opposed to any formidable army in time of peace, inclining rather to the maintenance in each state of a volunteer citizen militia with only such modest training and equipment as would enable it to cope with domestic disorder or to meet other relatively minor needs; [5] and all states continue to have such militia, even though nowadays linked up with the national defense establishment and bearing the significant name of "National Guard." [6] State contingents of the National Guard are still primarily state agencies, with (so long as not drawn into federal service) appointment of their officers and provision for their training expressly reserved to state authorities. Congress, nevertheless, is authorized to

[1] Art. I, § 8, cl. 12.
[2] Art. I, § 8, cl. 14.
[3] Art. I, § 8, cl. 11.
[4] For a good brief discussion of military law and justice, see E. W. Puttkammer [ed.], *War and the Law* (Chicago, 1944).
[5] The constitution, indeed, speaks, in the Second Amendment, of such a militia as being "necessary to the security of a free state."
[6] Speaking strictly, the militia includes, under terms of a statute of April 2, 1898, all able-bodied male citizens (and aliens who have declared their intention to be naturalized) between the ages of eighteen and forty-five; and all such are "liable to perform military duty in the service of the United States" (30 *U. S. Stat. at Large*, 361). In ordinary usage, however, the term denotes only the armed establishments maintained by the states, *i.e.*, the organized and trained portion of the militia embraced in the National Guard.

"provide for arming and disciplining the militia," to provide for calling into federal service any and all units needed for executing the federal laws, suppressing insurrections, or repelling invasions, and to make rules for governing such units when "employed in the service of the United States." And in pursuance of these broad powers, Congress not only has at various times made use of portions of the National Guard for federal purposes (in 1940, indeed, mobilizing the entire force for assistance in national defense), but has enacted numerous regulations aimed at increasing the establishment's effectiveness and coördinating its organization, training, and equipment with that of the Regular Army. As we have seen, Congress also contributes to the National Guard's financial support.[1]

4. Declaring war

Congress alone can declare war.[2] Hostilities may, of course, begin without a formal declaration, as in the instance of the Spanish-American War of 1898; indeed, as in the case of the war with Japan, Germany, and Italy beginning in December, 1941, they may be forced upon us by aggressive action of a foreign power, leaving us no alternative. But even in such cases a declaration will promptly be adopted by the two houses, as a means (if for no other purpose) of fixing, for the benefit of neutrals, an exact date from which the rights and liabilities incident to war are to be reckoned. The usual method is a joint resolution, requested and afterwards signed by the president. Many times it has been proposed by people anxious to keep the United States out of war that, except when the nation is attacked, the question of going to war should in all cases be put to a country-wide popular vote. Unless the constitution were amended, however, the decision must finally rest with Congress; and it is not clear that a great deal would be gained from the procedure suggested. There would always be the question of the proper stage at which to resort to a referendum, and the people as a whole could not in all situations become sufficiently informed upon the complicated, and often technical, issues at stake to be able to act wisely. In any case, too, war can come to us without any declaration at all.

5. Mobilizing the nation for war effort

There was a time when, except in case of invasion, war was of no great moment to the general mass of the people. Armies were volunteer, taxes indirect, supplies bought in the open market, sacrifice and morale demanded chiefly of the forces in the field. The huge scale on which the mechanized wars of today are waged, however, makes them hardly less of civilian than of military concern. When war comes—and even when merely a threatened war is being prepared for—it is, as President Wilson remarked in 1917, "not an army that we must shape and train; it is a nation." And experience gained both during World War I and in connection with the stupendous defense effort launched in 1940 and merging into the war effort of later days, revealed in startling manner the lengths to which Congress may go in reorganizing and regimenting the national

[1] See p. 76 above.
[2] Art. I, § 8, cl 11

life for purposes of successful prosecution of, or even simply preparation for, war under twentieth-century conditions. As commander-in-chief of the armed forces, the president independently enjoys war powers of impressive magnitude. To Congress, however, it falls, not only to provide the necessary men and money—by conscription acts, revenue acts, and appropriation acts—but to endow the chief executive with all the broad authority required for turning industry, commerce, transportation, and even science and education, into channels likely to contribute most adequately to successful national effort.[1]

6. Regulating wartime civil liberties

Although the general rule in the United States is that civil rights remain intact and the ordinary laws continue to operate in wartime, actual or alleged military necessity is almost certain to dictate restrictions that would not be thought of or tolerated in time of peace. When the normal processes of justice prove inadequate, martial law may be proclaimed by Congress, or indeed by the president if Congress is not in a position to act.[2] Further, the privilege of the writ of *habeas corpus* may be suspended "when in cases of rebellion or invasion the public safety may require it."[3] During the Civil War, President Lincoln took the ground that the right of suspension belongs to the chief executive, and on a number of occasions he exercised it by his own authority. Congress, however, claimed the power for itself, and not only exercised it, but backed up its position by passing acts of indemnity presumably validating the presidential suspensions. From the fact that the power to suspend is included in an article of the constitution relating especially to congressional powers, it is nowadays deduced that the view of Congress on the matter is the correct one. Congress may likewise go to undefined lengths in restricting freedom of speech and press in wartime. To be sure, the constitution recognizes no difference in status for personal rights in time of peace and in time of war. War, however, brings not only an intensity of military activity, but a tenseness of the public mind, that both condones and demands vigorous suppression of comment or criticism injurious to morale or likely to give information or comfort to the enemy. Too often, resulting legislation is couched in language so sweeping as to open the way for, if not actually to encourage, serious invasions of civil liberty by enforcing officers, and even by the courts, although the record in World War II was distinctly better than on some earlier occasions.

[1] See pp. 492-494 below.

[2] Martial law should not be confused with military law, which consists of rules and regulations applying only to persons in the military or naval service. Martial law (more often invoked by the states than by the national government) has the effect of subordinating civil to military authority in the area specified, and consists of no fixed body of principles and rules, but rather of whatever regulations those in command may see fit to impose. It applies to all civilians within the area, and sometimes to military personnel as well. See C. Fairman, *The Law of Martial Rule* (Chicago, 1930), and "The Law of Martial Rule and the National Emergency," *Harvard Law Rev.*, LV, 1253-1302 (June, 1942).

[3] Art. I, § 9, cl. 2.

7. Caring for veterans

Inheriting the practice from English and colonial usage, Congress not only has provided regular pay for soldiers and sailors, but has bestowed land, money pensions, or other special benefits upon the demobilized forces after every war in which the United States has engaged, from the Revolution onwards. The particularly hazardous nature of the service rendered the country by those who bear arms in its defense has seemed to merit such recognition; persons actually incapacitated, together with their dependents, have been conceded to have an irrefutable claim to the nation's care; powerful political pressure brought to bear upon congressmen by veterans' organizations has often led to grants where the obligation was considerably less clear. So generous, indeed, has been Congress when veterans have been involved that from 1792 to 1930 national outlays on money pensions alone reached a total of fifteen billion dollars, with no account taken of allotments of land to veterans in earlier days, or the heavy cost in later decades of hospitalization and medical treatment for veterans incapacitated by injuries or illness incurred in active duty. Benefits bestowed on veterans of World War II, in addition to the operation of regular pension and hospitalization systems, have included government aid in carrying protection originating in in-service war-risk insurance; advantages in the acquisition of war property disposed of by the United States; increased preferential eligibility for employment in the federal civil service; continued monthly payments for a period after honorable discharge; and, in 1946, terminal leave pay for all wartime furlough periods not actually used—not to mention also the generous provisions of the "G.I. Bill of Rights" of 1944 for grants to veterans in aid of education or training, and for government guarantee of loans procured for the purchase of homes, farms, or businesses.[1]

The Defense Powers and Functions of the President

The president and the beginning of war

Congress alone can declare war. The force of the statement is lessened, however, by the well-known fact that in managing the country's foreign relations the president may create a situation making war virtually inevitable. As commander-in-chief, President Polk, in 1846, ordered American

[1] For purposes of more unified and effective administration, a Bureau of Pensions long maintained in the Department of the Interior was in 1930 consolidated by executive order with other scattered agencies having to do with military pensions and veterans' relief to form an independent establishment known as the Veterans' Administration, which forthwith became one of the most heavily manned branches of the government and also one of those requiring the largest yearly appropriations. A personnel of 215,700 in 1946 was expected to reach 250,000 in 1947; and during the 1946 session of Congress alone, seven and one-third billion dollars were appropriated by Congress for Veteran Administration use. In 1946, the total number of surviving veterans of all wars was over seventeen millions—more than twelve per cent of the country's entire population; and the greater part of these (or their relatives or descendants) were government beneficiaries in one form or another. It was not until 1911, when the last child of a soldier in one of Washington's armies died, that pensions for veterans of the Revolutionary War became a closed chapter, and the last pension claim for the War of 1812 was liquidated only in 1946—which goes to show how the enormous pension liabilities incurred in the last two world wars will perpetuate themselves, in some degree, through coming generations.

troops to advance into territory then in dispute with Mexico. The Mexican authorities had made it plain that such a step would be regarded as an act of war, and the soldiers were promptly fired upon. Polk then said that war existed by act of Mexico, and Congress proceeded to a formal declaration. President McKinley ordered the battleship *Maine* to Havana harbor in 1898, notwithstanding that the Spaniards were certain to regard the act as unfriendly. The vessel was blown up, and the Spanish-American War followed. By his handling of relations with Berlin after the sinking of the *Lusitania* in 1915, President Wilson brought the country into a position where the only alternative to a declaration of war upon Germany would have been national stultification. And, more recently, the whole course of policy and action which, over a period of years, led the United States straight to involvement in World War II, while sustained by increasing evidences of broad national support, was projected and carried forward under the sole ultimate responsibility of President Franklin D. Roosevelt.[1]

The president as commander-in-chief

The central figure in all that pertains to national defense, including the conduct of war, is, of course, the president; and the powers and functions that make him such come from three main sources: (1) his basic status as chief executive; (2) delegations of authority by Congress; and (3) the constitutional rôle of commander-in-chief.[2] As chief executive, he undoubtedly would have, in any case, the power to appoint (with senatorial confirmation) all regular and reserve officers of the armed establishments, to supervise and direct the War and Navy Departments, and to enforce military and naval regulations enacted by Congress, together with others issued on his own account under valid authority. How much more is involved in being commander-in-chief is not so clear. The constitution does not specify; no definition has been supplied by either Congress or the courts; and the function is not only so intertwined with that of chief executive as to defy disentanglement, but also restricted and conditioned by the exclusive authority of Congress to declare war, to control the raising of troops, and to appropriate funds. Taken in conjunction, however, with the powers possessed as chief executive, and viewed in the light of what has actually happened in our major wars, his status as commander-in-chief undoubtedly raises the president to a lofty pinnacle. In time of peace, to be sure, the chief executive's supreme command (although no less existent than in time of war) is more or less latent; the country may hardly be aware of it. In discharging his duty to see that the laws are faithfully executed, the president may find it necessary to employ force; and the armed establishment is always available for the purpose, as for protecting the states (on call from the

[1] Over against the president's capacity for "rushing" Congress and the country into war must, however, be set his power to veto a declaration of war—although no veto of the kind is on record. On a few occasions, too, *e.g.*, in the period leading up to the War of 1812, Congress has been more inclined to war than the president.

[2] Art. II, § 2, cl. 1.

legislature or governor) from domestic violence. Even though, however, the use of troops be regarded as bringing into play the function of supreme command, such activity, within domestic limits, derives primarily from the president's status merely as chief executive.

Extraordinary powers during war

It is, rather, when war comes that being commander-in-chief brings the president into his fullness of power, with authority accruing that would never be tolerated, or even asserted, except in national emergency. In war or peace, and limited only by funds at his disposal, the commander-in-chief can send land, sea, or air forces anywhere that he chooses, in this country or abroad.[1] With war in progress, he can take as much part as he likes in mapping out strategy and directing campaigns; indeed there is nothing to prevent him from taking the field in person if he so desires, except, of course, that as a civilian, he would be an amateur —even if he were not pressed to the limit with tasks more properly within his province.[2] Like any other supreme commander, he can terminate hostilities by agreeing to an armistice. He can set up military governments in conquered territory, and, directly or through his appointed agents, exercise all executive powers there, and all legislative powers as well until Congress makes different arrangements.[3] Meanwhile—exercising authority likely to be delegated to him as commander in-chief by Congress—he can take over plants in which labor stoppages are interfering with war production, or the railroads if transportation difficulties are impeding the war effort. Indeed, the object in war being to mobilize and make effective the national strength as speedily as possible, and at the same time to break down the enemy's power of resistance, control over the disposition of the armed forces inevitably broadens into the general duty of taking whatever measures may be found necessary to those ends. As a former secretary of war put it, the commander-in-chief's function is nothing less than to prosecute a war "to the fullest extent." [4] In all this, the president, of course, must not violate the constitution or the laws; and, to a degree, he must work in coöperation with Congress, which delegates to him as commander-in-chief many powers not clearly

[1] Under the defense program instituted in 1940, the National Guard, together with troops raised under the Selective Training and Service Act (see p. 500 below), might be used only in the Western Hemisphere and in United States territories and possessions, including the Philippines. Upon the outbreak of war with the Axis Powers in December, 1941, however, the restriction was removed and the way opened for sending any of the country's armed forces to any part of the globe.

[2] More than most presidents in wartime, President Franklin D. Roosevelt shared in the planning of military and naval strategy and operations during the recent global war. By the summer of 1942, indeed, there was complaint that he and the British prime minister, Winston Churchill, were trying to exercise too much personal direction. In a "fireside chat" of October 12, however, he freely conceded the wisdom of leaving military decisions to military men.

[3] Military government as set up in Germany, Japan, and elsewhere after the defeat of the Axis in World War II was necessarily under the joint auspices of the allied nations which had won the victory. The American participation in it, however, was under the direction of the president; and in Japan proper, which, unlike Germany, was dealt with as a unit, American control was almost complete.

[4] Newton D. Baker, quoted in E. S. Corwin, *The President: Office and Powers*, 395.

to be considered as inherent in him in that capacity.[1] Outside of these limitations, however, he and his advisers, civil and military, have, and must have, practically a free hand. After all, running a war is, by its very nature, an executive job; it cannot be intrusted to a debating society.

Illustrations from World War II

Aside from powers possessed, by constitutional right, as chief executive and as commander-in-chief (and now pushed to what might seem their limits), President Roosevelt's war powers during World War II came, of course, from grants, or delegations, by Congress, and included (1) many delegated to President Wilson during World War I and never taken away, such as power to increase the enlisted strength of the Army and Navy (up to authorized limits) and to take over power-houses, dams, conduits, and reservoirs needed in manufacturing munitions, and (2) many even greater powers conferred in statutes passed either during the preliminary defense effort of 1940-41 or during the ensuing year. Outstanding among such newer statutes were (1) the Selective Service and Training Act of 1940, conferring power to select and induct into service as many eligible men as in the president's judgment the national interest required; (2) the Lend-Lease Act of 1941 authorizing the chief executive to sell, transfer, exchange, lend, or lease ships, aircraft, implements of war, or other materials to the government of any country whose defense was deemed vital to the defense of the United States; (3) acts conferring power to prohibit the export of military equipment, to establish priorities on materials used in naval construction, to acquire stocks of strategic and critical materials needed by defense industries, to requisition property required for defense, and to arm merchant ships; (4) a War Powers Act,[2] passed eleven days after Pearl Harbor and reviving or broadening various powers earlier granted to President Wilson, including power (a) to establish a censorship over all communications by mail, cable, radio, or other means passing between the United States and any country the president should specify, (b) to transfer functions—if related to the conduct of war—from one government agency to another, (c) to modify defense contracts and permit them to be entered into without competitive bidding, and (d) to control alien financial transactions and to utilize in the national interest approximately seven billion dollars' worth of alien property in the United States; and (5) an amending Second War Powers Act,[3] following in three months and (among other provisions) conferring broad rationing and allocating authority. Other

[1] One will not be surprised to learn that difference of opinion often arises as to whether a proposed line of presidential action requires authorization by law. The president is likely to be guided by opinions received from his attorney-general, who, being a member of the Administration, can usually be depended upon to give the executive the benefit of the doubt. But there is always a fringe of uncertainty as to what new reaches of authority might be read into the title of commander-in-chief by the president himself or written into it by legislative action. Some congressional grants have been viewed as superfluous, and even as actually harmful because of restrictive specifications included.

[2] 55 *U. S. Stat. at Large*, 838.

[3] 56 *U. S. Stat. at Large*, 176.

special powers of equal moment, too, were conferred in later acts meeting needs as they arose; and, all in all, the war powers possessed and exercised by President Roosevelt overtopped those known to any of his predecessors.[1]

Government in Action During World War II

The defense effort launched in 1940, and the war that followed, subjected government on all levels to stresses and strains which, especially in the case of the national government, exceeded anything experienced to that time, at all events since the Civil War; and to the foregoing outline of war powers may be added a word of comment on some of the ways in which the situation was met.

Regular and special agencies

From the point of view of machinery, the first fact to be observed is that a very large part of the extra work entailed was at all stages performed by the regular agencies of the national government, vastly enlarged in personnel, and of course assisted and supplemented by the governments of states and localities. Congress remained in session most of the time; the president, with vastly increased powers, worked with a new intensity; the War and Navy Departments enormously expanded their activities; the Treasury Department shaped fiscal policy, collected the swollen revenues, and borrowed money from banks and individuals; the Department of Agriculture stimulated and controlled the output of farm products needed in this country and by the allied nations; the Department of the Interior contributed, among other ways, by handling the difficult problem of oil and gasoline supply; the Federal Works Agency supervised defense building; the U. S. Maritime Commission promoted shipbuilding; the Federal Power Commission helped see to it that power was available for munitions plants; the T.V.A. stepped up the production of both power and chemicals; and so on and on. But of course as new activities developed, and earlier ones expanded beyond all previous conceptions, much new machinery became essential; and before long there arose a maze of freshly created federal agencies, so frequently renamed, reconstructed, and replaced as often to bewilder even the near-to-hand observer in Washington. Nearly all such agencies were called into being by executive order, in some cases with, in others without, express congressional authorization; and while some were placed in one executive department or another, many of the more important ones became independent establishments. Anticipating such multiplication,

[1] In most instances, powers were conferred for specified periods only. Thus the First War Powers Act was limited to the duration of the war and six months after; the Second was originally to have terminated on December 31, 1944, but was later extended to March 31, 1947—with President Truman asking in February for further extension of only very limited portions. With a view to being able to recall any of the powers delegated irrespective of presidential wishes, Congress incorporated in both of these measures (and in certain others, including the Lend-Lease Act) a provision for withdrawal or cancellation by simple *concurrent resolution*—the point being that, while bills and joint resolutions must be submitted to the chief executive, concurrent resolutions have not been so submitted since the earliest days of the nation.

and at the same time the need for tying in the new establishments with the chief executive and commander-in-chief, an executive order as early as May, 1940, set up in the Executive Office of the President a framework known as the Office of Emergency Management, under whose broad roof were later gathered some fifteen major establishments concerned with different basic fields of wartime control, administration, and research. Some of these (and other) emergency creations have now been abolished or absorbed; others still have functions to perform; a few may prove permanent.

The task to be performed

The task of getting the nation of 1940 into a state of defense commensurate with the dangers confronting it, and later of tightening and maintaining the mobilization of men, resources, and effort for actual and prolonged war, was stupendous. Nevertheless, by the summer of 1941 industrial production was showing the greatest upsurge ever witnessed in the country; and with war bursting upon us before the year was out, the pace was redoubled. Thenceforth, armed forces, in mounting numbers, were to be equipped and transported to the four corners of the earth; supplies, in staggering quantities, were to be furnished to Britain, Russia, and China, even while our own needs were catapulting to new heights; indispensable materials no longer obtainable from the customary sources were somehow to be provided through other channels; civilian manpower and womanpower were to be turned to their most effective uses; labor was to be kept ceaselessly on the job; prices were to be held in control as a safeguard against run-away inflation; the channels of transportation were to be kept open for maximum war use; public morale was to be bolstered in a multitude of ways; in short, a wartime economy was to be developed, managed, and made to meet the exigencies of a situation in many respects unprecedented. To follow up in detail even a few of the activities involved would require more space than is available here. But half a dozen may be mentioned.

Some major fields of activity

1. Production

Aside from recruiting and training men for the armed forces, the topmost wartime necessity is the provision—speedily and nowadays in almost incredible amounts—of munitions and supplies; and with a view to assuring itself of ample production of these, some people thought, when the war came, that the government ought to take over any and all private industry whose products were likely to be seriously needed. This idea, however, did not prevail. To be sure, the government did establish numerous munitions plants (usually operated under contract by private corporations) and finance the expansion of old plants of various kinds or the establishment of new ones; and for longer or shorter periods it took over plants here and there to keep operation from being interfered with by labor difficulties. But it did not waver from the policy of relying principally upon mobilizing the products of industry privately operated. The agency most directly concerned with stimulating and guiding such production was a War Production Board, dating in its later form from

1942; and it was under such direction not only that the manufacture of many consumer goods was checked or stopped and the turning out of war supplies pushed from peak to peak, but that stockpiles of essential raw materials were built up and priorities established for funneling materials to war industries most in need of them.[1]

2. Manpower

It has already been intimated that the national government could, if it chose, register all people outside of the armed forces for civilian war work and assign them to jobs. Despite many proposals in Congress that something like this be done, no policy so far-reaching was adopted.[2] After 1942, however, a War Manpower Commission was concerned with promoting the most effective mobilization and maximum utilization of the country's civilian manpower (and to a less extent womanpower as well); and in conjunction with numerous other agencies, such as the Selective Service System, the Department of Labor, and the labor boards functioning in relation to industrial disputes, it served a useful purpose in keeping our people at work, and in places and jobs where they were most needed, not only in industry but in transportation and agriculture as well.

3. Price control and rationing

As early as 1941, dislocations incident to the emphasis upon defense industry began to be reflected in rising prices; when Pearl Harbor was attacked, the general cost of living had already gone up eleven per cent. Nothing was more certain than that, unless rigorous checks were applied, prices would continue upward as spending power increased and consumer goods grew scarcer, with the effect of augmenting the cost of war supplies, stirring discontent in the ranks of labor, pressing hard upon people with fixed incomes, and quite possibly leading to disastrous inflation. Restrictive efforts through an Office of Price Administration established in 1941 proved of slight avail, because of lack of power actually to fix and enforce price-ceilings. An Emergency Price Control Act of 1942, however (presently amended to cover rents), provided for an O.P.A. of greater effectiveness; and from that date until the law expired on June 30, 1946, price levels were kept reasonably well in hand for commodities likely to be affected by prevailing scarcities.[3] After a month's interval of no regulation, furthermore, the O.P.A. was called back to life for a year, although under a measure leaving wide latitude for its controls to be progressively curtailed.[4] From early in 1942, broad powers (conferred in the second War Powers Act) to ration commodities among consumers fell also to the O.P.A., being employed, as every one knows, in connection

[1] In October, 1945, the War Production Board was superseded by a Civilian Production Administration, whose surviving functions were, in December, 1946, transferred to a new Office of Temporary Controls.

[2] Although, as we shall see, there was, in 1942, a registration of all *men* up to sixty-four years of age, with *liability* to call to some kind of duty. See p. 501, note 2, below.

[3] In Yakus *v.* United States, 321 U. S. 414 (1944), the federal Supreme Court held the act's delegation of power to be within constitutional bounds.

[4] Public Law 548—79th Cong. By February, 1947, controls remained only over rents, sugar, syrup, and rice; and at that time the agency's survival even to the end of its year of grace was seriously threatened.

with not only automobiles, tires, gasoline, fuel oil, farm machinery, coffee, sugar, meats, canned goods, and shoes, but numerous other articles for which demand was out of proportion to supply. Of the list, however, only sugar was still rationed when these lines were written.

4. Transportation

Almost as vital as the production of war materials is the moving of them (and also of troops) to the places where they are needed; and it is not surprising to find that in wartime government exercises special controls over nearly every form of transportation. Less than two weeks after the Pearl Harbor disaster, an executive order set up an Office of Defense Transportation, with jurisdiction (within the general framework of existing transportation controls wielded by the Interstate Commerce Commission and allied agencies) over railroads, inland waterways, air transport, motor transport, coastwise shipping, and pipe lines; and from that time onwards the O.D.T. not only controlled railroad traffic so as to get the utmost out of existing trackage and equipment, assure priority for troop movements and for shipments of war materials, and avert terminal congestion at ports, but encouraged greater utilization and conservation of motor trucks and commercial passenger vehicles (under a ration system), and likewise devices such as group-riding for relieving carriers while also conserving tires and gasoline. Important services, too, were rendered in connection with the transportation of petroleum and its products, and with coastwise shipping. Early in 1946, the O.D.T. was liquidated.

5. Information and censorship

War is waged also in the realm of ideas and their dissemination; and any government in wartime will concern itself not only with getting to its people the information it wants them to have and with cultivating a public opinion favorable to the war effort, but also with keeping from the enemy information that would be useful to him, and with preventing the enemy and enemy sympathizers from damaging the national morale through open or secret propaganda. The story of our government's efforts after 1940 to keep the nation discreetly informed on the problems, progress, and goals of the defense and war effort would reveal a good deal of fumbling with a difficult problem, leading eventually, however, to a fairly successful integration of responsibility in an Office of War Information established in the summer of 1942. The reverse of the picture took the form of organized effort to prevent dissemination of information or opinion which might prove of value to the enemy or damaging to the war effort or morale of our own people; and to undertake this responsibility an Office of Censorship was set up almost as soon as we were in the war. In the case of all mail, cablegrams, long-distance telephone calls, radio messages, and other communications going out of (or in the case of mail, coming into) the United States, there was literal censorship in the sense of advance inspection, with decision whether to delete passages or refuse to permit any part to go through. In the case, however, of domestic publications and radio-broadcasting, the method was rather that of

securing voluntary compliance with "codes of wartime practices" telling the press and broadcasting companies what they must not print or broadcast—although, of course, with no lack of power to compel compliance where not forthcoming voluntarily.[1]

6. Civilian defense

The conduct of war is definitely a national function, but collaboration by state and local governments, and by voluntary citizen groups as well, is essential to solidarity of effort. During World War II, state and local machinery was employed in operating the selective service system, the rationing system, and to some extent the system of price control; and civilian defense—aimed chiefly, so long as there remained any danger of enemy assault upon our home front, at protecting people and property against the hazards of air raids, but later principally at promoting morale and encouraging productiveness—was organized also largely on a state and local basis. Every state eventually set up a defense council; several thousand cities and counties did likewise; and, in all, millions of men and women volunteered their services. Federal encouragement and supervision were supplied by an Office of Civilian Defense established in 1941, with, however, no final powers of compulsion; and the intelligence, fidelity, and effectiveness with which the state and local agencies functioned naturally showed a good deal of variation the country over.[2]

The Armed Services

War Department and Army

Although, as we shall see, it has been proposed that a separate air service in a distinct executive department be created, and on the other hand that the military and naval establishments be merged in a single department of national defense, the armed service of the United States is as yet organized in two coördinate branches, the Army and the Navy, each associated with a separate department. The status of the Army in relation to the War Department is difficult to define. In a sense, the Army is a service within the Department, like the Foreign Service in the Department of State, with the Department serving as the mechanism through which the Army is managed on behalf of the commander-in-chief. At the same time, the Army top command forms so large and vital a part of the Department that in reality Department and Army come close to being one and the same thing. To be sure, the Department, dating from 1789, has functions not directly related to the Army (although sometimes of military significance), such as supervising river and harbor improvements through a corps of engineers, developing inland waterway transportation through the Inland Waterways Corporation, and exercising direct control over the Panama Canal. The Army, however, is the Department's prime concern and indeed sole reason for existence; be-

[1] The system of voluntary censorship was terminated and the Office of Censorship liquidated in August, 1945.

[2] The Office of Civilian Defense ceased operating on June 30, 1945.

The costs of the war effort in terms of expenditures, taxes, and debt have been touched upon in an earlier chapter. See pp. 355-356 above.

cause of the Army, the Department, during World War II, overtopped all other government agencies in money spent, in number of civilian employees, and, of course, in number of uniformed personnel.

Army High Command and Subordinate "commands"

Army organization as headed up in the War Department is a complicated and technical matter about which little can be said here. But as it existed at the close of World War II, it comprised, first of all, (1) a War Department General Staff, dating from 1920, sharply reduced in numbers in 1942, and charged particularly with planning and coördinating policy; and (2) a Chief of Staff (at present General of the Army Dwight D. Eisenhower), ranking professional soldier in the Army, adviser to the secretary of war in everything relating to planning and executing Army programs (in effect, the military head of the Department), and responsible to the president on all Army matters affecting strategy, tactics, and operations. The secretary of war, General Staff, and Chief of Staff comprised the "Army High Command" from which went the official instructions to be carried out by all subordinate commands both in the United States and overseas.

But there were other important agencies. Hardly was the country in a war of obviously unprecedented proportions before military leaders perceived the need for replacing an old form of organization based on infantry, cavalry, field artillery, coast artillery, and air units with a new one more in keeping with the superior systems employed abroad and with the tasks now to be undertaken; and early in 1942 the vast military machine then taking shape was reconstructed, by executive order, in three major branches, or "commands"—the Army Ground Forces (infantry, artillery, cavalry, etc.), the Army Air Forces, and the Services of Supply (later renamed Army Service Forces), the first two concerned with combat, the third with "supply, procurement, and general housekeeping duties," and each provided with an elaborate staff of officials starting at the top with a commanding general.[1] On the whole, the new and simplified pattern served its purposes acceptably during the remainder of the conflict. Revealing, however, certain defects, and being in any case limited to the duration of the war and six months thereafter, it, in 1946, came in for a good deal of overhauling before being made permanent, the principal changes being (1) an enlargement once more of the General Staff, with a broadening of operations as well as planning functions;[2] (2) a reduction of the three commands to two, by abolition of the Army Service Forces and transfer of its functions to the General Staff; (3) provision of greater autonomy for the Army Air Forces; and

[1] In addition, a number of overseas commands were created as the war progressed—European Theater of Operations, Mediterranean Theater of Operations, Southwest Pacific Command, etc. See J. D. Millett, "The War Department in World War II," *Amer. Polit. Sci. Rev.*, XL, 863-897 (Oct. 1946).

[2] Even under the wartime set-up, however, basic decisions on the division of manpower and supply among the various overseas areas of operation were made by an Operations Division under the General Staff.

(4) a change of designation of the Army Ground Forces to "Army Group."[1]

The Army during World War II

Under terms of the National Defense Act of 1920, the Army of the United States consists of (1) the Regular Army, (2) the National Guard, and (3) the Reserve Forces. Defined as the "permanent military establishment" in both peace and war, the Regular Army consists of (1) full-time officers and (2) enlisted men and non-commissioned officers, in such numbers as Congress may determine, and ordinarily recruited in peacetime from volunteers serving from one to three years, with optional reenlistments for three-year periods. As indicated at various points above, the National Guard consists of the organized militia of the several states and territories, liable to call at any time into federal service, and in 1940 actually so called. The Reserve Forces consists of former Army officers, National Guard officers, and especially men who have had training in the Reserve Officers Training Corps ("R.O.T.C.") units in colleges and universities, and constitutes a reservoir of officer material on which to draw when need arises, as in 1940.[2] Except for vast temporary enlargement on a conscription basis during World War I, the Regular Army was always relatively small until 1940; on June 30, 1939, its effective strength stood at 13,819 officers and 174,079 enlisted men—a total of 187,898. Preparation of the country to meet the dangers looming by 1940 brought, however, a totally different situation. The first moves made were to increase the authorized enlisted strength of the Regular Army and National Guard, to launch intensive campaigns for recruiting volunteers, and eventually to call the National Guard and Organized Reserves in all of the states (by that time totalling 408,000 officers and men) into federal service. All this, however, was only preliminary to a far more drastic step, *i.e.*, the first peacetime resort to selective compulsory military service in the country's history. On September 13, 1940, the president approved a Selective Training and Service Act[3] (effective until May 15, 1945), under which all male citizens and resident male aliens between the ages of twenty-one and thirty-five were required to register, thereupon becoming (except as otherwise provided) liable, as soon as called, to training and service in the land or naval forces of the nation; and from

[1] The new organization is set forth in War Department Circular 138, May 14, 1946; and the entire subject is covered in detail in J. D. Millett, "The War Department in World War II," *Amer. Polit. Sci. Rev.*, XL, 863-897 (Oct., 1946).

[2] Under normal conditions, the Regular Army is officered principally by men trained in the United States Military Academy at West Point, and the Navy similarly by men trained in the United States Naval Academy at Annapolis, with some having received, in addition, training of more specialized or advanced nature at an Army War College at Washington, a Naval War College at Newport, Rhode Island, or some one of three or four other auxiliary training centers. Persons to receive such training are selected in part on a preferential basis—with, for example, special consideration for honor graduates of colleges and universities affording military training under the surveillance of Army officers. In the main, however, they are nominees of senators, representatives, and territorial delegates, under a system designed to assure wide geographical, social, and racial distribution and discourage the rise of a military caste.

[3] 54 *U. S. Stat. at Large*, 885

this initial legislation, modified and extended at various points during the next five or six years,[1] resulted the unprecedented force of almost twelve million men which the nation had under arms (in all services) when the Axis Powers collapsed, operating (at one time or another) in more than thirty distinct areas, in nearly all quarters of the globe.[2]

The Army of today and tomorrow

With hostilities terminated, demobilization began. Even between V-E Day (May, 1945) and V-J Day (three months later), a top Army strength of 8,300,000 officers and men was cut somewhat, and in ensuing months discharges continued at a pace as rapid as the task of bringing back millions of men from overseas would permit. By January 1, 1946, the number left in service was approximately half of the earlier total; five months later, this figure had, in turn, been halved; and by the end of summer, 1946, the number was down to approximately 1,550,000, with a goal of 1,070,000 announced (and in fact prescribed by act of Congress) for July 1, 1947. With responsibility for occupying and policing foreign conquered territory ended (at some uncertain but as yet distant time),[3] farther reduction is to be expected. In July, 1946, however, General Eisenhower, Chief of Staff, gave it as his considered opinion that for at least fifteen or twenty more years an effective Army strength of 800,000 would be essential, backed by a National Guard of 680,000 (double its prewar size) and trained officer reserve forces numbering from 100,000 to 150,000; and something like this program seems likely to prevail, unless the uncertain international situation prevailing since the war continues indefinitely.[4] Meanwhile, after a two-months' suspension, selective service, on a modified basis and for the period to March 31, 1947, was resumed on August 1, 1946, under new legislation making men from nineteen to forty-four years of age (the Army said it wanted none over thirty) liable to induction, but exempting fathers, certain categories of ex-servicemen, and essential agricultural workers, and raising the scale of pay.

The Navy Department

A second great defense arm is the Navy, operated through a Navy Department set off from the War Department in 1798, when a conflict

[1] Thus in May, 1945, the original act was extended to May 15, 1946, unless sooner terminated.

[2] Originally, only the Army drew upon the selective service lists. Under executive order of December 5, 1942, however, the Navy, Marine Corps, and Coast Guard, previously relying on volunteers, were authorized to recruit from the same source; and the total mentioned above includes all of these services.

Two weeks after the Japanese attack at Pearl Harbor, the draft was broadened by an act of Congress requiring all men between the ages of eighteen and sixty-four inclusive (except those already registered) to register for conscription in the armed forces or for non-combatant war activities. This, however, involved merely an established *liability* to call, and most of the registrants beyond military age never received actual assignments.

[3] In September, 1946, there were 400,000 American troops in Europe (chiefly Germany, Austria, and Italy) and 150,000 in Japan, besides some 25,000 in Korea and China.

[4] In July, 1946, the War Department disclosed orders for a National Guard totaling 682,114 officers and men, and reported that all states and territories except Hawaii had agreed to the quotas assigned them.

with France seemed in the offing. Sustaining the same general relations with the president as the War Department, the Navy Department has also a top organization broadly similar, with a General Board corresponding roughly to the War Department General Staff and a Chief of Naval Operations (at present Fleet Admiral Chester W. Nimitz) serving as principal adviser and in effect naval head of the Department, very much as the Chief of Staff on the military side. Both departments, of course, have not only "staff" agencies of these sorts for planning and supervision, but long lists of "line" agencies—offices, divisions, bureaus, and the like—concerned with putting into execution plans and decisions made at the top.

The Navy—ships and men

From Revolutionary times, the United States maintained a navy of lofty traditions, but of no great size until the close of World War I, when, with an imposing fleet afloat and a still more powerful one under construction, the country found itself with the scepter of sea supremacy within its grasp. At the Washington Conference on the Limitation of Armaments, in 1921-22, agreements were entered into among the leading naval powers under which thirty-one of our capital ships were due to be sunk, scrapped, or demilitarized; the London Naval Conference of 1930 envisaged still further reductions; and for a time, notwithstanding a certain amount of new building, our naval strength actually declined. Partly as a means of relieving unemployment, a more vigorous building program was, however, entered upon in 1933; and after it became clear not only that other nations (particularly Japan) were rapidly increasing their naval strength by building all types of fighting craft not covered by ratio agreements, but that the Washington and London treaties would not be continued after 1936, effort was redoubled, bringing the country once more into a world-wide armament race. Mounting naval appropriations made possible a good deal of building during the later thirties; and with war breaking out in Europe in 1939 and threatening the destruction of even the British Navy (on which we long had depended heavily), a building program was launched in 1940 aimed at making the United States fleet by 1946 the most powerful that had ever ploughed the seas. The objective now was also a "two-ocean" navy (*i.e.*, a navy capable of being divided between the Atlantic and the Pacific, yet with "command of the sea" in both areas); and since a navy consists not merely of ships, aircraft, shore fortifications, and men, but also of bases, sites for eight well-located bases in or adjacent to the Atlantic were leased from Great Britain for immediate development.

After our own involvement in the war in 1941, the building and launching of naval, as well as merchant, ships was stepped up almost incredibly, proceeding for five years on a scale never before approached in this or any other country, and leaving us at the end with far and away the largest and strongest naval establishment in the world. In July, 1946—five years after the launching of the two-ocean program—the Navy Depart-

ment announced that in eight government-owned navy yards and twenty-eight privately owned yards, 1,322 fighting ships had been turned out in the five-year period, and that the United States had a current total of 1,500 combatant ships (with 100,000 auxiliary vessels of all kinds), with 223 additional ones building and to be completed within a year.[1] Corresponding increases took place, of course, in naval personnel, bringing a force of 420,500 officers and men when Pearl Harbor was attacked to the stupendous total of 3,717,000 at the end of 1944.[2] From this top level, demobilization proceeded after 1945 as in the Army, with Navy plans contemplating a peacetime "ceiling" of 500,000, in addition to a Marine Corps of 100,000; and in 1946 these figures were given definite statutory authorization. For the long pull ahead, the temper of Congress and the country was favorable to a naval establishment surpassing the combined naval strength of the rest of the world—at all events until developments of the Atomic Age should incontrovertibly show surface craft and operations to be obsolete.

Some Defense Questions of Today

The impact of atomic power

Our American system of national defense has been outlined at considerable length, and space remains for only the barest mention of pressing problems, new and old, relating to it, even on the morrow of its greatest tests and victories. The major new problem—and quite completely new—is one that, of course, dwarfs all others, *i.e.*, the bearings upon all national defense, our own included, of the release of atomic energy, with all its potentialities for harm as well as help. The dramatic tests conducted at Bikini atoll in the south Pacific in 1946 were designed to reveal, among other things, what the atomic bomb, if employed by an enemy, would do to an American fleet. But it was already manifest that the "absolute weapon" had hurled a challenge at all means and methods of defense employed through the centuries, on land and sea, and that unless its use could somehow in future be kept under rigorous restraint, the nations might as well begin all over again to think through and make provision for the protection of their peoples and possessions in this age of technological revolution. Our first great defense question today is, therefore, whether we really have any defense at all, or indeed can have, in the new and terrifying situation that has arisen.[3]

[1] More than 5,000 merchant and cargo ships were built during the same period.

[2] These figures include (1) the Marine Corps, a naval auxiliary organized on Army lines originally to provide the Navy with trained infantry for land fighting or other duty whether ashore or afloat, and (2) the Coast Guard, in peacetime attached to the Treasury Department as a sort of maritime police, but during the war absorbed temporarily into the Navy Department.

[3] On August 1, 1946, President Truman signed a bill creating an Atomic Energy Commission of five civilian members charged with almost unlimited powers to develop and control atomic energy in the United States. Participation by the armed services is restricted to representation in one of four technical divisions set up to cooperate with the Commission.

The outlook for international peace

Deeply involved with this is, of course, the question of whether, even though there may turn out to be no really effective defense against the bomb, the new machinery of international peace laboriously built up during and since the recent war will prove so efficacious that defense will become only a more or less academic matter. If there are to be no more aggressions, no more attacks, no more wars, there will be nothing of importance to defend ourselves against, and defense powers, plans, machinery, and expenditures may be allowed to lapse into the limbo of forgotten things. No sensible person, however, can be so naïve or unrealistic as to imagine that any such beatific state of affairs is in store for us. On the contrary, every indication is that, while the United Nations and its auxiliary creations may, as we trust, contribute powerfully to promoting a condition of universal peace in the world, human nature will still be human nature, peoples will still cherish grudges, hatreds, and ambitions, nations will keep on crossing each other's purposes, and governments will continue to fumble opportunities for averting strife and disaster—all of which means that defense unquestionably will remain a problem not to be ignored or side-stepped by the United States any more than by any other nation, large or small.

What kind of defense system?

This being true, the question comes home to us of what kind of a defense system we want, or need, to maintain in coming years—apart from defense against atomic power, certainly not to be ignored, but as yet involved in deep obscurity. And here the main issues are (1) assuming that the Navy will be kept strong, *how* strong? (2) the same for the air forces; and (3) in the case of the Army, shall we fly in the face of tradition and keep permanently a large professional standing army, *or* shall we keep a smaller standing army, but supported by a large reservoir of trained citizen-reserves, *or* shall we revert to our prewar situation, with a small standing army reinforced only by the National Guard and by limited numbers of young men trained, mainly in colleges and universities, for officer duty? On the navy and air-force question, a stand (at least for the time being) has clearly been taken by the services themselves, backed by the President and Congress, in favor of continued superiority to any single or combined force that could conceivably be thrown against us. On the army question, Army authorities, warmly supported by Presidents Roosevelt and Truman and by many other prominent civilians, have strongly favored the second of the alternatives indicated, which, however, would almost inevitably entail a system of universal and compulsory military training strongly opposed by many elements of our people; and, with plausible arguments possible in all directions, the matter remains one on which the mind of the country is as yet to be made up.[1]

[1] Extensive hearings on the subject of compulsory training were conducted in Congress in 1944-45; in the latter year, a House postwar military policy committee reported favorably; and in the same year bills made their appearance in Congress.

Consolidation of War and Navy Departments

One other very important question which of late has absorbed a great deal of attention, at least in government, military, and naval circles, is that of consolidating the War and Navy Departments into a single Department of Defense or of Armed Forces, with a view to bringing the nation's fighting strength under more closely coördinated control. Actively revived during the recent war, this oft-heard proposal was at that time put aside as contemplating a reorganization too extensive to be undertaken in the midst of combat. In 1946, however, a bill ardently supported by President Truman stirred heated discussion, with, in general, Army people favoring it and Navy people opposed; and though Congress adjourned leaving the measure on the calendars, the proposal was brought to the fore again in 1947 and seemed not unlikely to prevail. Advocates stressed the benefits to arise from integration of command and from doing away with duplication; opponents professed to fear the "inertia of size," a probable subordination of naval interests, and loss of the healthy competition, as they viewed it, now existing between the two services.[1]

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No action, however, resulted, and, for one reason or another, the matter, although certainly not abandoned, has of late been less actively agitated.

[1] Still a further question of organization is whether, if the War and Navy merger does not materialize, there should not be a consolidation of Army and Navy air forces (perhaps postal aviation also) in a single and separate executive department similar to air ministries in European countries. In general, the idea has been opposed by both of the departments concerned, each preferring to retain control over an air force of its own.

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CHAPTER XXXI

TERRITORIES, DEPENDENCIES, AND SPECIAL JURISDICTIONS

The territorial growth of the United States

In the period of the American Revolution, thirteen English colonies along the Atlantic seaboard set themselves up as self-governing states; and from these states the original United States was created. People of the time considered the country large; and since, viewed as a whole, it included not only the thirteen states but all of the territory between the Great Lakes and Florida and westward to the Mississippi, it really was so, especially under conditions of communication and transportation then prevailing. Every student of our history knows, however, that this was only a beginning, and that by 1900 the American flag was flying over considerably more than three million square miles of continental, and more than 700,000 square miles of insular, territory. In the history of territorial expansion in modern times, only that of Great Britain, France, and Russia is comparable.

Beginnings of territorial government

Furthermore, all of the areas acquired either contained substantial populations when annexed or gained such populations as people poured into them in quest of land, profits, and subsistence; and this meant that arrangements had to be made for control of affairs. From having themselves been colonies governed (to a considerable degree) from beyond the Atlantic, the thirteen original states saw the nation which they had founded become itself possessor of far-flung colonies or dependencies requiring government. And the task of instituting territorial government had to be taken up forthwith, because the new nation in 1789 found itself with dependent territory already on its hands. Indeed, the pregnant clause authorizing Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" [1] was inserted in the constitution primarily in order to enable the new government to take over an important function assumed and exercised by its predecessor under the Articles of Confederation. With a view to terminating disputes and promoting national unity, four states—Massachusetts, Connecticut, New York, and Virginia—had ceded to the United States large areas claimed by them west of the Alleghenies; and, for the government of the region north of the Ohio and east of the Mississippi, the old Congress had adopted, in 1787, a fundamental law known as the Northwest Ordinance—easily the most significant single measure enacted during the entire period of the Confederation. Hardly was the Ordinance in effect, however, before the new constitution was framed;

[1] Art. IV, § 3, cl. 2.

and not only was the above-mentioned empowering clause placed therein, but the Ordinance itself was reënacted, substantially unchanged, by the first Congress under the new régime.

Significance of the Northwest Ordinance

The significance of the Northwest Ordinance lies not only in its liberal provisions for local self-government, for representation in Congress, and for fundamental civil and political rights, but also in the fact that the plan of government provided for set a standard closely adhered to in practically every law thereafter enacted by Congress for the government of our continental possessions; indeed, many of the more essential provisions found in later territorial organic acts were copied almost verbatim from the earlier Ordinance.[1] Of equal, or even greater, import is the express indication in the Ordinance that the people of the Territory were not to be kept in perpetual subjection to congressional authority, but that, on the contrary, the territorial government was to serve simply as a temporary arrangement until the growth of population should warrant the Territory's admission to the Union as a state, or group of states, upon a footing of equality with the older states. In other words, territorial status was to be merely preparatory to statehood—a principle ever after adhered to in the case of our continental territories, and setting up a certain presumption even in the case of island possessions like Hawaii and Puerto Rico. From the Northwest Territory, five states were subsequently created, *i.e.*, Ohio, Indiana, Illinois, Michigan, and Wisconsin. In similar manner, from the Southwest Territory came the states of Kentucky, Tennessee, Alabama, and Mississippi.

The Constitutional Basis of Territorial Government

Power to acquire territory

The territorial governments mentioned were created in a region inherited by our present national government from the government of the Confederation; and, of course, it was this Western expanse that the framers of the constitution had in mind when they expressly authorized Congress to make all needful rules and regulations for the government of territories. It is not clear that the framers had any intention of authorizing the new national government to acquire other regions (even though contiguous) such as those later annexed and provided with territorial governments; and Jefferson, in 1803, would have preferred to purchase the Louisiana territory only in pursuance of an empowering constitutional amendment. Nevertheless, repeated decisions of the Supreme Court have settled beyond all question that the right of the national government to acquire territory, although not expressly granted, may be implied from the power to admit new states into the Union, from the power to make treaties, and likewise from the power to carry on war

[1] In 1790, for example, Congress authorized for the region south of the Ohio, known as the Southwest Territory, a government very similar to that provided for in the Northwest Ordinance. In territories organized after 1836, however, the appointed council forming the upper branch of the earlier territorial legislature was replaced by a popularly elected senate.

and make peace.[1] By virtue of power implied from one or another of these express grants, Louisiana was acquired in 1803, Florida in 1819, Texas in 1845, Oregon in 1846, California in 1848, Alaska in 1867, Hawaii, Puerto Rico, Guam, and the Philippines in 1898, and the Virgin Islands in 1917.

Power to govern territory

In the case of territory acquired by peaceful means, congressional authority to legislate for its government begins the moment the title of the United States is established. During time of war, the president, in his capacity as commander-in-chief, governs, through the Army and Navy, any territory acquired by conquest, whether or not eventually retained. After the establishment of peace, however, his power to govern must be based (a) upon authority granted by the constitution to see that the laws are faithfully executed, or (b) upon some act of Congress for the government of the conquered territory, or (c) in the absence of any act of this nature, upon the implied consent of Congress that the government set up under his military authority be continued. At different times, Congress has temporarily clothed the president with practically absolute authority over an annexed territory. But sooner or later it established, in nearly all of the areas acquired before the Civil War, governments similar to those created in the old Northwest and Southwest Territories; and ultimately all such territories were admitted as states. The only exceptions to the usual procedure were in the cases of Texas and California, which were admitted as states without having passed through the territorial stage.[2]

The organization of territorial governments in those portions of the national domain not covered by the Northwest and Southwest Ordinances, and also the admission of certain states so covered, furnished occasions, prior to 1860, for many exciting sectional controversies over slavery. At no time, however, has the full power of Congress to fix the form of territorial governments been successfully challenged; and the principle has become firmly established that such governments exist merely as the instrumentalities by which Congress exercises its authority over the territories.

New situation after the Spanish-American War

With the exception of Alaska, all territories acquired by the United States before the Spanish-American War were contiguous, and had been settled and developed by natives of this country and by European immigrants whose civilization and traditions were not fundamentally different from our own. Consequently, Congress had little or no hesitation about extending to them a large measure of self-government and all of the civil

[1] As a sovereign state, the United States has also, under international law, the power to acquire territory by discovery and occupation, or by other methods recognized as proper by international usage. This is the basis of our claim to the Guano Islands acquired in 1856, to Canton and Enderbury Islands, and to lands in Antarctica.

[2] A few other states—Maine, Vermont, Kentucky, and West Virginia—were so admitted too; but of course they were formed from original territory of the United States.

rights guaranteed by the national constitution. The annexation of Hawaii in 1898, however, and in particular the Spanish-American War, brought under the control of the United States non-contiguous territory lying in the tropics and inhabited by relatively backward peoples of different race and language, almost totally inexperienced in self-government, and enjoying none of the civil and political rights which long have been the cherished heritage of our own citizens. Admittedly, the power to govern these new possessions resided in Congress; and at first glance it seemed necessary, in view of earlier Supreme Court decisions, to extend to their inhabitants all of the rights and privileges enumerated in the constitution, including freedom of speech and press, the right to bear arms, and trial by jury. Embarrassing results, however, that might flow from such adherence to legislative and judicial precedents made it desirable to draw some distinction between the legal status of these new acquisitions and that of the older territories on the continent; and in a series of decisions, beginning about 1900, the Supreme Court developed such a distinction, thereby releasing Congress from some of the restrictions under which it had previously dealt with territorial problems.

"Incorporated" and "unincorporated" territories

The distinction evolved was one as between territory "incorporated" in the United States and territory "not incorporated." In the former category were included Alaska, Oklahoma, New Mexico, and Arizona, none of which, at the time the decisions were handed down, had been admitted to statehood. In legislating for the incorporated territories, said the Court, Congress was bound by all constitutional limitations not clearly inapplicable. Hawaii, Puerto Rico, and the Philippines, on the other hand, were held to be "unincorporated" territories. To be sure, they belonged to the United States rather than to any foreign power; they were appurtenant to, and dependencies of, the United States. But they were not *parts* of the United States in the sense in which the incorporated territories were. Consequently, Congress, in legislating for them, was not bound by all restrictions in the constitution regarded as applicable to the incorporated territories, but only by the "fundamental" parts of the instrument. *These* parts, we were told, automatically extend to all territories of the United States as soon as they cease to be foreign territory; the "formal" parts, on the other hand, apply to unincorporated territories only when Congress expressly so directs.

Illustrations

The Court has never attempted to make an exhaustive enumeration of the fundamental and the formal parts of the constitution, but has reserved the right to determine from time to time what parts are fundamental and what ones are formal. In cases decided since 1900, it has held that Congress is not bound by the requirement that taxes shall be uniform throughout the United States, but may impose duties on articles coming from unincorporated dependencies either higher or lower than those collected upon similar articles coming from a foreign country. Similarly, it has held that the requirement of grand and trial juries for the prose-

cution of crimes is not binding upon Congress when providing for the government of unincorporated territories like Hawaii (before 1900), Puerto Rico, and the Philippines (before 1935). Moreover, it has held that the mere act of annexation does not make the inhabitants of such areas citizens of the United States, but that such citizenship arises only from express grants thereof by Congress. The result has been to give Congress a fairly free hand in solving the special problems arising out of our possession of tropical dependencies inhabited by politically inexperienced peoples—even though most of the rights guaranteed by the constitution have, in point of fact, been extended sooner or later to the inhabitants of such dependencies.

An exact classification of existing territories and dependencies is difficult to make, but in general they fall into three categories, as follows: (1) incorporated or fully organized territories, of which there are now two, *i.e.*, Alaska and Hawaii; (2) territories unincorporated but with some aspects of "incorporated" status, *i.e.*, Puerto Rico and the Virgin Islands; and (3) dependencies wholly unincorporated, or "unorganized," *e.g.*, the Panama Canal Zone, Guam, Samoa, Wake, and a number of other mid-Pacific islands. There are also certain areas—chiefly Cuba, Haiti, and Santo Domingo—in which the United States has assumed limited protective responsibilities, although the countries involved, remaining sovereign states, are in no sense "dependencies." Certain air and naval bases or stations, too, in the nearer Atlantic and in the Pacific, were gained during the recent war, by international agreement or by conquest. In most instances, however, the future of these remains to be determined, and in any event they (usually involving no political jurisdiction) hardly fall in the category of dependencies as here defined.

The Government of Incorporated Territories—Alaska and Hawaii

Executive and legislative machinery

In most essential respects, the status of these top-level territories (defined in organic acts which only Congress can amend) is identical with that enjoyed by our newer states when they were passing through the territorial stage. The inhabitants are citizens of the United States; and the constitution and all laws of the United States not locally inapplicable are expressly declared to be in effect as elsewhere in the country. In each territory, the present government consists of distinct executive, legislative, and judicial branches. There is a governor, appointed by the president and Senate at Washington for a four-year term, and paid out of the national treasury, and a legislature consisting of a senate and a house of representatives; and legislative sessions are held biennially. The election of senators and representatives (also of the delegate which the territory sends to Congress) may be participated in by bona fide residents for a year, twenty-one years of age, of citizen status, and able to read and write English (or in Hawaii, Hawaiian). Legislative measures, or items

therein, may be vetoed by the governor, and can also be (though very rarely are) disallowed by Congress.

Judicial organization

Judicial power in Alaska is exercised by a federal district court, organized in four divisions. In Hawaii, there are two sets of courts, territorial and federal. The territorial courts correspond rather closely to our state courts, and include a supreme court, circuit courts, and such inferior courts as the legislature may from time to time create. The supreme court consists of a chief justice and two associate justices, all of whom must be citizens of Hawaii. They, and the judges of the circuit courts also, are appointed by the president and Senate for four-year terms, unless sooner removed by the president. Besides these territorial courts, there is a federal district court consisting of two judges, a district attorney, and a marshal—all appointed by the president and Senate for six-year terms and subject to presidential removal.

The question of statehood

Both Alaska and Hawaii are potential new states. With a population of 72,524 in 1940, and with steady growth assured—especially as a result of the building of the Alaska-Canada highway for war purposes in 1942—the former will soon be at least as populous as Nevada; and the fact that nearly all of the inhabitants are former residents of the United States or descendants of such will lend force to any concerted demand for statehood that may presently be made. In Hawaii, indeed, there was, before the recent war, a vigorous demand of the kind; and a congressional committee studying the question on the spot in 1938 reported favorably. Moreover, a local referendum two years later brought out a vote of two to one for statehood. Before the war, a main obstacle was the fact that, with the Islands constituting our primary fortress of defense in the Pacific, more than one-third of their population (423,530 in 1940) was nevertheless Japanese. The demonstrated loyalty of a very large part of the Japanese population to the United States during the trying period of the war has, however, largely removed the difficulty, and statehood in the rather early future seems a probability. Both the Republican and Democratic national platforms of 1944 endorsed eventual statehood for Hawaii and Alaska alike.[1]

The Government of Unincorporated Territories—Puerto Rico and the Virgin Islands

1. Puerto Rico:

(a) Citizenship and civil rights

The most important of our unincorporated territories today is Puerto Rico, whose government is based on organic acts passed by Congress in 1900 and 1917—the second measure extending United States citizenship to the residents of the Island, and also including a bill of rights covering

[1] In January, 1946, a sub-committee of the House committee on territories, returning from observation and hearings in Hawaii, reported that the territory is ready for statehood, and President Truman, in his message of the same month, recommended it. On the other hand, congressmen visiting Alaska reported that territory to be not yet prepared; although an advisory territorial referendum on the question in October, 1946, gave a substantial majority for statehood.

almost all of the points in the first eight amendments to the federal constitution, with the omission of trial by jury and indictment by grand jury. Most statutory laws of the United States not locally inapplicable have the same force and effect as in the United States proper.

(b) The executive

"Supreme executive power" is vested in a governor, appointed by the president and Senate at Washington and (unlike the governor in an incorporated territory) for no definite term. Seven executive departments were created in 1931, each with a commissioner at its head. The attorney-general and the commissioner of education are appointed by the president and Senate for four years, unless sooner removed by the president; the heads of the other departments are appointed by the governor and senate of Puerto Rico for four years, unless sooner removed by the governor; and the seven department heads collectively form an executive council.[1]

(c) The legislature

The Puerto Rican legislature is much like the Hawaiian. The senate consists of nineteen members elected by popular vote for a four-year term; each of seven districts elects two senators, and five others are chosen at large. The house of representatives consists of thirty-nine members elected every four years, thirty-five of them chosen from single-member districts and four at large. In electing the senators and representatives chosen at large, each voter is permitted to vote for only one candidate for the senate and house, respectively. Voting qualifications are, for the most part, left by the organic acts to be prescribed by the local legislature, subject to the provision that "no property qualification shall ever be imposed upon or required of any voter." Citizens of the United States who have resided in the Island at least one year, and are twenty-one years of age, are voters; and since 1932, women have been included in the electorate. Legislative sessions are held annually; and special sessions of the senate, or of both houses, may be called by the governor.

General legislative powers were conferred on the Puerto Rican legislature in 1917 in substantially the same language as in the organic laws of Alaska and Hawaii, but at the same time with a good deal less freedom of action. Legislative organization and procedure are regulated in greater detail than in either of the incorporated territories mentioned, and there is the significant difference with respect to the veto that, whereas in Alaska and Hawaii a vetoed measure repassed by a two-thirds vote in both houses automatically becomes law, in Puerto Rico a vetoed measure so repassed may be referred by the governor to the president at Washington, finally becoming law only if that official approves it or fails to act. As in the incorporated territories also, any legislative act may be disallowed by Congress.

(d) The judiciary

As in Hawaii, there are two kinds of courts, territorial and federal. At the head of the former stands the supreme court, composed of five

[1] Until 1917, the council, somewhat differently constituted, formed the upper branch of the territorial legislature.

justices appointed by the president and Senate for life or good behavior. Below it are seven district courts, each presided over by a single judge appointed by the governor and senate for four years. Finally, there are thirty-four "municipal" courts, in as many judicial districts, with limited jurisdiction in civil and criminal cases. Besides these territorial courts, there is a federal district court with one judge, a district attorney, and a marshal, all of whom are appointed by the president and Senate for four years, unless sooner removed.[1]

2. The Virgin Islands

Acquired from Denmark by purchase in 1917 as a move to forestall possible annexation by Germany, the Virgin Islands (in the Lesser Antilles, and with an area of only 140 square miles) remained under immediate control of the president until 1936, when an organic act passed by Congress extended to their 22,000 inhabitants (now about 25,000) a liberal measure of home rule.[2] The insular legislature consists of the popularly elected municipal councils of (a) St. Croix and (b) St. Thomas and St. John, sitting as a single house; executive power is vested in a governor appointed by the president and Senate for an indefinite term, and reporting to the secretary of the interior at Washington; and the judiciary consists of a district court, together with such inferior courts as may be established by law. Measures may be enacted by the legislature only by two-thirds vote, and any which the governor refuses to approve must be transmitted to the president, who has three months in which to take action on them; all measures, too, enacted by either a municipal council or the legislative assembly are required to be reported to, and are subject to disallowance by, Congress.

The Management of Wholly "Unorganized" Dependencies

Arrangements for wholly unorganized dependencies vary considerably, but in no case is there any provision for local self-government. All are merely "possessions," subject to whatever controls may be instituted from Washington; and a brief word concerning them must suffice.

The Panama Canal Zone

The Panama Canal Zone comprises a strip of territory five miles wide on each side of the Canal, leased in perpetuity from the republic of Panama in 1902, and with a population in 1940 of 51,827. During construction of the waterway, the Zone was governed by the president

[1] As in Hawaii, a movement for statehood has developed; and not only has the legislature since 1934 repeatedly petitioned Congress on the subject, but in both 1940 and 1944 the platforms of Republican and Democratic parties (in the United States) alike declared for such statehood eventually. There has been strong demand in the island also, pending statehood, for popular election of the governor; and after 1942 President Roosevelt encouraged expectation that this would be introduced. When Governor Rexford G. Tugwell resigned in 1946, no opportunity to fill the post by election was given, but President Truman appointed as successor Jesus T. Pinero, resident commissioner of Puerto Rico in Washington, who thus became the first native Puerto Rican to occupy the position. A bill supported by President Truman and providing for a plebiscite in which the people of the island should indicate whether they want independence, statehood, or the status of a self-governing dominion has long been pending in Congress, but without action taken.

[2] Somewhat earlier (1927), they were give United States citizenship.

through a commission. When, however, the work neared completion, Congress, in 1913, authorized the president to discontinue the commission and thenceforth to govern the Zone through a governor and such other officials as he might find necessary. In consequence, a "governor of the Panama Canal," appointed by the president and Senate for four years, now administers the affairs of the Zone, under supervision of the secretary of war. In the absence of a local legislature, such laws as operate within the area either are made by Congress or take the form of presidential orders. Provision has been made by law also for the establishment of organized towns, and for a system of courts beginning with magistrates' courts corresponding to justices of the peace elsewhere.

The mid-Pacific islands

Until brought into the limelight by the war in the Pacific beginning in 1941, most of our minor island possessions—Guam, the American portion of Samoa, Wake, Midway, Jarvis, Baker, Howland (all located in the mid-Pacific)—were, for the average American, hardly more than names on the map, if even that. In none has civil government as yet been introduced; in fact, until rather recently, only Guam and Samoa have been inhabited. Guam, in the Marianas, was ceded to the United States by Spain in 1898. Its status has never been fixed by Congress, and the president has governed the island through an officer of the Navy, assisted by American and native officials. American Samoa became a protectorate of the United States by virtue of an Anglo-German-American agreement in 1899 In 1900 and 1904, it was ceded to the United States by native chieftains, but not until 1929 did the cession receive congressional acceptance and ratification. During that long period, Congress failed to make any provision for the government of the islands, leaving the president to administer them through an officer of the Navy, who has ruled under laws based on the customs of the people, the laws of the United States, and the common law of England. The inhabitants of Samoa, like those of Guam, are not citizens of the United States.

With the development of trans-Pacific aviation, the other islands mentioned (often called the Guano Islands) acquired, even before the recent war, a new value apart from their guano supplies. Midway and Wake, as well as Guam, are on the direct air route from Honolulu to Manila; Howland and Baker, on the route from Hawaii to Australia; and Jarvis, Samoa, Canton, and Enderbury, on the way to New Zealand. In recognition of their resulting importance, the Department of Commerce, and later the Department of the Interior, established small colonizing groups on several of the islands, and Congress voted modest appropriations for maintaining and improving them as landing ports for American aviators.

When the war came, everything west of Midway was lost to the Oriental conqueror. Except for remote points in the Aleutian archipelago, Alaska, however, was never invaded. Much damage was wrought at Pearl Harbor in the attack which touched off the war; but Hawaii was

never taken and served throughout the war as a major base for our operations in the Central Pacific. The Philippines, of course, were lost, but were regained in 1944-45; Guam and Baker Island were recovered in 1944; and in the end not a square foot of the American empire in the Pacific was permanently lost. Not only so, but the question thrust itself forward of whether, with peace restored, that empire should not be extended to include part or all of the far-flung archipelagoes (the Marianas, Marshalls, and Carolines) formerly held by Japan under mandate from the League of Nations, but later subdued by American arms—as well as possibly certain other strategically situated islands. Early in 1947, the matter still awaited final determination; but the United States had formally requested the United Nations that an area including most of the former mandated islands be placed under U. N. trusteeship with the United States as administrator.[1]

The Independence of the Philippines

In all earlier editions of this book, a large portion of the chapter on territories was devoted to the Philippine Islands, as being the largest and in many respects the most important of our colonial dependencies. In strict logic, the Islands might here go almost unmentioned; for on July 4, 1946, they gained their long-sought independence and entered the family of sovereign nations as the Philippine Republic. Our voluntary relinquishment of them was unprecedented in the history, not only of our own "imperial" policy, but in that of the entire world. For forty-eight years, however, our possession of the Islands was a matter of cardinal importance for us; and we are still near enough to the days in which the Philippine problem transcended all other American questions of territorial policy to justify, and even require, bringing the present chapter toward a close with some review of the conditions under which the Islands, after their deliverance from Japanese subjugation, achieved their present separate status.

The development of self-government

The Philippines were acquired by the United States in 1898 as a wholly unexpected result of the war with Spain; and their acquisition gave the United States a new importance in the Far East, where of late

[1] In most European countries, the supervision of colonial affairs is concentrated in a colonial ministry or other single executive department. In the United States, however, it is parcelled out among three departments having to do primarily with other things. The Interior Department's Division of Territories and Island Possessions has oversight of the incorporated and partly incorporated areas—Alaska, Hawaii, Puerto Rico, the Virgin Islands—and some other places; the Navy Department looks after Guam, Samoa, Wake, Midway, and a few other possessions; and the War Department supervises the Canal Zone. As pointed out earlier, Alaska and Hawaii are represented, too, in the House of Representatives at Washington by a popularly elected territorial delegate and Puerto Rico by a popularly chosen resident commissioner—in all cases with the right to serve on committees and to speak on the floor, but not to vote.

In August, 1946, the United States submitted to the United Nations a voluntary report on the administration of its dependencies and expressed a hope that all major powers would do likewise. An ambitious "trusteeship" plan provided for in the UN system has not yet (early 1947) been organized.

its influence had been at a low ebb. Retention of them as an American possession was bitterly opposed by "anti-imperialists," and in assenting to ratification of the peace treaty providing for their transfer, the Senate failed by a margin of only a single vote to declare it the intention of the United States not to annex the Islands permanently, but rather "in due time to dispose of them as dictated by the best interests of the Islands and of the United States." In contrast with British, French, Dutch, and other colonial policy in that quarter of the earth, American policy relating to the Philippines had from the first the two major objectives of (1) systematically preparing the Islands for self-government and (2) keeping open the question of their eventual independence. For nearly three years after the annexation, the Islands had only a military government under direction of the president. In 1901, however, Congress authorized the establishment of a temporary civil government; and in the following year an organic law gave the new dependency a modest start on the road to managing its own affairs. Finally, in 1916, a Philippine Government Act [1]—commonly known as the Jones Act—broadened the suffrage, introduced a legislature of two elective houses, and otherwise provided for a system of insular government which lasted until 1935, and under which self-government was so far attained that by the date mentioned less than three per cent of the public officials, of all grades, were other than Filipinos.

The movement for independence

In its preamble, the Jones Act, moreover, announced the country's intention of giving the Islands their freedom as soon as "a stable government" could be established therein; and at once the matter became a political issue. The act was the work of a Democratic president and Congress, and in its platform of the same year the party endorsed the principle of "ultimate independence." On their part, the Republicans criticized the Democratic attitude, asserting that the American task in the Islands was but "half done" and talk of independence premature; and the positions thus taken were reiterated in 1920 and 1924, even though without stirring a great deal of interest among the voters. Encouraged by the promise of the Jones Act and by the repeated Democratic declarations, the insular legislature sent delegation after delegation to Washington in quest of a grant of "immediate, absolute, and complete independence"; and in March, 1934, the demand was partially met in the McDuffie-Tydings bill which became the Philippine Independence Act of the same year.[2] On May 1 following—the anniversary of Admiral Dewey's victory at Manila Bay—the insular legislature unanimously accepted the arrangements offered.

[1] 39 *U. S. Stat. at Large,* 545.

[2] 48 *U. S. Stat. at Large,* 456. The drive in Congress which finally made this legislation possible was engineered primarily by American agricultural interests desiring Philippine sugar, tobacco, cocoanut oil, cordage, and other products subjected to tariff duties, instead of admitted duty free as theretofore, and by labor interests which wanted Filipino immigration checked or stopped

The Philippine Commonwealth established (1935)

This done, the legislature arranged for an early election of delegates to a convention to draft a constitution for the Islands. The assembly completed its labors in February, 1935, and a month later the new fundamental law received President Roosevelt's approval; whereupon May 14 was designated by the Philippine legislature for a popular vote upon the new form of government. With women participating, the decision was for ratification, by the heavy margin of 438,000 to 11,000. The American governor-general thereupon issued a proclamation setting a date for the election of officers; subsequently, the president issued a proclamation announcing the results; and on November 15, 1935, the new government of the Philippine Commonwealth began exercising its powers and functions.

The ten-year transitional period:

With the launching of the Commonwealth, the Islands entered upon a ten-year period of political and economic readjustment, preparatory to full independence. During this transitional interval, they were to enjoy

1. Political status

far greater autonomy than before, yet with plenty of strings attached. They were to remain part of the United States, even though no longer termed an "insular possession"; their citizens owed allegiance as previously; they could change their constitution only with the consent of the president of the United States—now represented in the Islands by a high commissioner in lieu of the former governor-general.[1] Moreover, all measures passed by the Commonwealth legislature must be reported to Congress, and certain of them were subject to the president's absolute veto; the president, under certain circumstances, might suspend the operation of any Commonwealth law, contract, or executive order; the United States Supreme Court continued to review cases carried to it from the Philippine supreme court; Philippine foreign relations remained under the "direct supervision and control" of the United States; the United States continued to garrison military posts in the Islands, with authority to call into service all military forces organized by the Commonwealth government;[2] and, finally, the United States might at any time intervene in the Commonwealth's affairs with a view to preserving the system of government, protecting life, property, and individual liberty, or insuring the discharge of the Commonwealth's obligations.

2. Economic relations

In its economic aspect, the status assigned the Commonwealth during the transitional period clearly reflected the motivations, on the American side, chiefly inspiring the Independence Act. In line with the demands of labor, Filipino immigration into the United States was limited to fifty persons a year; while, instead of being admitted duty-free in unlimited quantities, specified Philippine commodities—chiefly sugar, tobacco, cocoanut oil, and hempen products—were admitted free only within

[1] Under the Jones Act, the Islands were represented in the United States House of Representatives by two resident commissioners, chosen by the insular legislature. The Commonwealth had but one such commissioner, appointed by the Commonwealth president.

[2] This, of course, was done when the Japanese invaded the Islands in 1941-42.

specified quotas, all excesses being subject to the same duties as if coming from a foreign country. Subject to revision annually, the quotas agreed upon were, down to 1941, generally large enough to include substantially all of the respective products imported from the Islands. If, however, with the transitional period ended, the quota system were in future to be terminated, the pinch would come; for the entire Philippine economy had for forty years been based upon preferential treatment in the American market. In the spring of 1938, a Joint Preparatory Commission, composed of equal numbers of Americans and Filipinos, recommended that, instead of being terminated abruptly in 1946, trade preferences then existing be tapered off gradually over a period extending to 1960. But a "cushioning" bill to this effect, warmly supported by President Roosevelt, failed to become law.

Status if and when independence was attained

Under terms of the Independence Act, the Islands were automatically to become independent in 1946, the Commonwealth thereupon emerging as "a separate and self-governing nation." The United States was to be entitled to negotiate with the government of the new Philippine Republic for the retention of 'naval reservations and fueling stations" in the Islands; but all military forces were to be withdrawn and all governmental connections severed—one final obligation on our part being to negotiate with foreign powers for the Islands' perpetual neutralization. And, of course, unless some different agreement were arrived at in the meantime, Philippine products entering the United States would become subject to the same tariff rates as any other imports from abroad.

Independence becomes a reality (1946)

In 1941-42—midway through the contemplated transitional decade—the Islands suffered the shock of Japanese conquest; despite heroic defense, with such American guidance and aid as difficult circumstances permitted, they passed completely under the heel of the invader, with the regular government displaced by a puppet régime and every effort made to persuade the inhabitants that their future, and even their hope for independence, lay with Japan. Prior to the conquest, the rather dismal economic prospect, together with growing threat from Japan's projected Far Eastern "new order," had raised considerable doubt as to whether the program laid down in the Independence Act would really be carried out in full, and even as to whether, under existing circumstances, the Filipinos themselves would want it to be. But the war removed all such uncertainty. Three weeks after Pearl Harbor, President Roosevelt solemnly promised the Islands that their freedom would be redeemed and their independence established and protected; in 1944, Congress voted him authority to proclaim independence even before 1946 if deemed expedient; expulsion of the conqueror in 1945 left the Islands insistent upon independence at the earliest possible date; and by general consensus July 4, 1946, was fixed as the time for it to become effective—which curiously meant that, despite all that had happened, independence would

be achieved at precisely the time originally contemplated in the legislation of 1934.

Arrangements for trade and rehabilitation

According to schedule, independence became a reality, by presidential proclamation, on the date indicated; the transitional Philippine Commonwealth became, and now is, the Philippine Republic. In general, the terms of independence were as contemplated in the act of 1934, including the right of the American government to negotiate for the retention of military reservations and fueling stations; and it is to be assumed that the American naval base at Manila will continue. Before independence took effect, however, three important measures were adopted by a Congress fully prepared to recognize that the United States could not simply proclaim the Islands' freedom and walk out. One of these solved the problem of trade relations by guaranteeing Philippine products a preferential American market for twenty-eight years, the existing duty-free system on a quota basis being prolonged for eight years and for the next twenty years such commodities becoming subject to graduated tariff rates rising by five per cent annually until finally in 1974 all preferential features would disappear.[1] Inspired by the unhappy condition in which the Islands and their people were left by three and one-half years of Japanese domination, a second of the measures mentioned allocated $400,000,000 to compensate Filipinos for war damage to private property, and another $120,000,000 to aid in restoring and improving public property and essential public services.[2] And a third measure provided for military assistance to the Islands in establishing and maintaining national security.[3] So much, at least, the United States has done to assist the young republic in getting on its feet economically and providing for its own protection. Still further aid may prove necessary, in addition, of course, to all possible support for the Islands in attaining a dignified and useful international position. After all, the Islands have gained their independence at a very critical time in their history.

Philippine government

From the Commonwealth, the new Philippine Republic inherited a system of government which, as reëstablished after the interlude of Japanese control, required almost no alterations to fit it for the new period in the Islands' history. As has been indicated, the national constitution, dating from 1935, and containing full guarantees of civil liberty, was framed by a democratically chosen convention and ratified by heavy popular vote. The Congress for which it provides consists of a senate and house of representatives, elected directly by universal suffrage for two- and four-year terms, respectively; and the powers conferred upon it (in many respects ampler than the powers of the Congress of the United States) give it an almost unique position among contemporary legislatures outside of the British Parliament. The chief executive is a president

[1] Public Law 371—79th Cong. (1946).
[2] Public Law 370—79th Cong. (1946).
[3] Public Law 454—79th Cong. (1946).

elected by the people for a four-year term; and his cabinet consists, as in the United States, of heads of the various executive departments. Interesting variations from our American system are, however, seen in (1) limitation of the president to eight consecutive years of service; (2) lack of authority of the Congress to increase appropriations asked for in the presidential budget, except those for support of the legislative and judicial branches of the government; (3) possession of the item veto by the president; (4) action on presidential nominations to public office, not by the senate, but by a commission of twenty-four members named in equal numbers by the two branches of the Congress; and (5) definite authorization for heads of departments to appear and be heard in either legislative house. Consisting of a supreme court and such inferior courts as may be established by law, the judiciary has as its most notable feature for Americans the express authority of the supreme court to declare statutes and treaties unconstitutional, provided seven of the justices concur. For purposes of local government, there are thirty-nine provinces with an elective governor, and four others with governors designated by a bureau of non-Christian tribes.[1]

In anticipation of early independence, and in order that the new republic might come into being with a government holding "a fresh mandate from the people," the Philippine Congress, in December, 1945, passed an act calling a special election on April 23, 1946 (the first since 1941), and empowered the newly chosen officers and members of Congress, who otherwise, under existing law, would not have taken over until the following December 30, to assume their posts forthwith. In the ensuing contest, the presidential incumbent, Sergio Osmeña,[2] was defeated by the incumbent vice-president, Manuel Roxas, who accordingly was inaugurated on May 28, 1946, as the first president of the independent Philippine nation.

Some Special Jurisdictions

1. Miscellaneous federal areas or establishments

In addition to the widespread territories and dependencies dealt with in earlier portions of this chapter, our national government has exclusive jurisdiction over further areas not forming mere ordinary parts of the states in which they are situated. To begin with, literally hundreds of federal military or naval stations, forts, arsenals, dockyards, parks, forest preserves, prisons, hospitals, asylums, post offices, power sites, and other establishments dot the country; and over all such, by constitutional provision, Congress has exclusive legislative control,[3] with managerial functions also, of course, in federal hands. If the states exercise any functions whatever in these areas or places, *e.g.*, by serving legal processes or

[1] These tribes consist chiefly of the Moros in Mindanao and the Sulu archipelago.
[2] Osmeña had succeeded to the then nominal presidency in 1944, on the death of President Manuel L. Quezon in Washington.
[3] Art. I, § 8, cl. 17.

taxing private property, they do so only with express congressional assent.

2. Indian reservations

A second and different category of special jurisdictions consists of some two hundred Indian reservations, situated in upwards of twenty states, and with an aggregate population of over 350,000. The gradual establishment of these reservations marked a relatively late stage in the long and troubled relations between white man and red in this country; and the reservations themselves are not necessarily permanent, since sometimes, the inhabitants having become capable of owning their own land and managing their own affairs, a reservation is discontinued and wholly absorbed into the state in which it is located. The constitution merely gives Congress power to "regulate commerce . . . with the Indian tribes." But on one basis or another authority has been found not only for gathering most surviving Indians into reservations, but for full federal control over all such areas, however far it may be found desirable to go in particular cases in permitting the inhabitants, under federal supervision, to adopt tribal constitutions and exercise rights of local self-government. An Office of Indian Affairs, in the Department of the Interior, is in general charge, and the necessary field work is carried on by a force of several thousand persons (including many Indians) under regional supervision of five district superintendents. The general theory underlying the system is that the Indians are "wards" of the nation—although the implications of this somewhat nebulous status have not prevented them from also being made citizens.

3. The District of Columbia

Finally, in this brief summary, we come to the area in which the national capital is situated, *i.e.*, the District of Columbia, formed originally from lands on both sides of the Potomac river ceded for the purpose by Virgina and Maryland, but, since the retrocession of Virginia's portion in 1846, consisting of some seventy square miles on the Maryland side of the stream. Over this area, the constitution gives Congress power of exclusive legislation,[1] as over any other place transferred to the national government; and while the District has some of the aspects of a state, others of a county, and certainly many aspects of a city, it is legally no one of the three, but simply an area completely and directly controlled by the national government. Devoid of any local legislature or council, it receives its laws and ordinances exclusively from Congress. For an executive, it has three commissioners, of whom two are appointed by the president and Senate from among the residents of the District for three-year terms and a third is detailed by the president from the engineer corps of the Army for an indefinite term. As a body, these three commissioners have extensive powers: they appoint to numerous important municipal positions; they have charge of police and fire protection, and make regulations for the safeguarding of life, health, and property; they supervise the local public utilities, including gas, electricity, telephones,

[1] Art. I, § 8, cl. 17.

transportation, and water-supply. Schools are under a board of education appointed by the judges of the supreme court of the District, and a board of charities and the judges of a municipal court are appointed by the president. For more than forty years prior to 1920, the cost of the District government was divided equally between the national treasury and the taxpayers of the District. In the year mentioned, however, the District's quota was moved up to sixty per cent; and in more recent years, the federal government's share (six million dollars of late) has been further reduced until now it amounts to hardly more than one-fifth of the total municipal budget. Many of the District's 700,000 inhabitants retain a legal residence in some one of the states and may vote there, usually by mail. In the District itself, however, not even taxpayers are voters; there are no locally elected officers, and the District as such has no part in choosing the president or any member of Congress. That, in general, it is desirable for the national capital to be situated in an area under exclusive national jurisdiction is commonly conceded. In later years, however, opinion—warmly supported in the District—has been developing that the inhabitants might well be intrusted with more control of their own affairs (which, indeed, they possessed before 1878), and the burden of Congress correspondingly lightened; and recurring agitation of the matter may in time bear fruit, although at present there is no definite prospect of its doing so.

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PART III

STATE GOVERNMENT

CHAPTER XXXII

STATE CONSTITUTIONS

Importance of the states

The power, importance, and prestige of our national government must not be allowed to obscure the fact that practically every citizen of the United States is at the same time a citizen of some state and an inhabitant of a subdivision of a state called a county, and of some fraction of a county known as a town, township, village, borough, or city. It was from a union of *states* that the national government originally arose; and notwithstanding the vast powers gathered to itself by that government in later years, the states are still the focal points of impressive authority and action. Without some acquaintance with the states and their governments, one cannot entirely understand either our federal system or the national government itself.

Interconnections with the national government

For, in addition to operating governmental systems with very wide functions within their respective areas, the states perform services without which the national government, on its present constitutional basis, could not operate. All proposed amendments to the national constitution require ratification by state action in order to become effective. The states largely determine who may vote for representatives and senators in Congress, and for presidential electors. They mark out the congressional districts from which representatives are sent to Congress, and also prescribe by law most of the regulations governing the nomination and election of senators, representatives, and presidential electors. If it were ever again to become necessary for the House of Representatives to choose a president, the representatives would vote by states, each state having one vote. Employed as agents of the national government for a great variety of purposes, the states serve that government conspicuously in the expenditure of appropriations in aid of road-building, forest protection, unemployment relief, maternal and child welfare, agricultural and vocational education, industrial rehabilitation, and defense. In quite a different field, they form the framework upon which national political parties are organized.

Despite all this, surprisingly few people know as much about state and local government and politics as about the national government and national politics; and this notwithstanding that there is scarcely a period or an activity in the life of the average person which is not in some measure, either directly or indirectly, touched, influenced, regulated, or controlled by state laws, or by local ordinances deriving their authority from such laws.

Features Common to All of the States

One very well might approach a study of forty-eight separate governments with a sense of futility, expecting to become lost in a wildnerness of differing authorities, functions, and procedures. And truly enough our state and local governments display variations sufficient to keep a student of them occupied for years, if bent upon following them out to their last detail. After all, however, except at very few points (*e.g.*, Nebraska's one-house legislature), all of the state governments are organized on the same broad pattern, and have functions and problems generally similar. Our task, accordingly, will be simplified if at the outset we call to mind several fundamental features which the states as a group have in common.

1. Legal equality The United States is a union of states which are on a footing of legal equality one with another; and so far as their representation in the Senate is concerned, they are on a footing of political equality as well. In other words, no rights or privileges are enjoyed by one state which do not at the same time belong to all of the others. This equality of the states is basic to our constitutional system.

2. Native or inherent powers Although much circumscribed by the express and implied limitations contained in the national constitution, the sphere of state activity is still more extensive than that of the national government, and in that sphere each state is supreme; its powers are native and inherent, not derived or delegated as are the powers of the national government.

3. A written constitution Every state has a written constitution which provides for the organs of state and local government, defines their respective powers and functions, guarantees the civil rights of its citizens, and serves as the fundamental organic law to which all state legislation and local ordinances or regulations must conform. A state is at liberty to put almost anything it sees fit into its constitution, except, of course, that any provision conflicting with the national constitution, or with acts of Congress or treaties of the United States, will, upon being challenged in the courts, be held null and void.

4. A single chief executive Every state has a single chief executive called the governor, who in all states except one is elected by direct popular vote; in Mississippi, he is chosen by popular vote supplemented by action of the legislature. The state governorship has descended directly from the office of governor as existing in colonial days.

5. A representative legislature

Every state has a representative lawmaking body composed of persons chosen by direct vote of the electorate, and usually called the "general assembly"; although in New Hampshire and Massachusetts the name employed is "general court," a term inherited from the time when the general membership of the Massachusetts Bay Company, known as the general court, was the only lawmaking body in the Massachusetts colony.

6. A bicameral legislature

The legislature in every state except Nebraska is a bicameral, or two-chamber, body, consisting of what are commonly called a house of representatives and a senate.[1] In the case of the original thirteen states, the bicameral legislature developed naturally out of circumstances peculiar to the colonial period. The assembly, or popular branch of the colonial legislature, became the prototype of our present house of representatives; the governor and council, acting in a legislative capacity, became the prototype of the modern state senate. Without giving much, if any, actual consideration to the relative merits of one-house and two-house legislative bodies, practically all of the states formed since 1789 have from their beginning employed the bicameral plan.

7. Civil and criminal courts

In every state there is an elaborate system of courts for the administration of justice in civil and criminal cases, and for administering the estates of deceased persons. Everywhere, the highest of these state courts, usually called the supreme court, exercises the right to declare null and void any act passed by the legislature of the state, or any ordinance passed by a city council, inconsistent with the letter or spirit of the state constitution, the national constitution, an act of Congress, or a treaty of the United States.

8. Separation of powers

Like the national government, all of our state governments are organized upon the theory that the powers of government fall into three great classes—executive, legislative, and judicial; that each of these groups of powers should be assigned to, and exercised by, a distinct branch or department of government; and that no such branch or department should exercise powers which have been assigned to either of the others. The idea is, in other words, that executive, legislative, and judicial functions should, in general, be grouped in mutually exclusive compartments —even though in practice it has nowhere been found feasible (any more than in the federal government) to adhere to this principle with absolute fidelity.

9 Checks and balances

Intimately associated with the principle of separation of powers is the system of checks and balances found in every state government, each of the three branches being provided with means of defense against encroachments upon its proper sphere by either of the other two. Thus the executive branch may check legislative encroachment through use of the governor's veto; the judiciary has a check upon the legislature through its power to declare the acts of that body unconstitutional; and in turn the legislature, through its power to impeach and remove both adminis-

[1] Nebraska's one-house legislature dates from 1937. See p. 544 below.

trative and judicial officers, and in some instances to abolish courts, has a check upon the executive and judicial departments. The right of the senate to confirm many of the governor's appointments is a further check upon the executive; and the latter has a certain check upon the courts through his power of pardon and reprieve. In addition, each branch of the legislature is balanced against the other, each having a veto upon the legislative acts of the other.

10. Local governments

Lastly, every state is divided into local-government areas called counties, except in Louisiana, where the name "parish" is used instead. These counties or parishes, in turn, contain towns or townships, villages, boroughs, cities, and a great variety of special districts. And so it comes about that the great majority of people live under at least four different layers of government—the national government, a state government, a county government, and the government of one or more subdivisions of a county, such as a city, township, village, or borough; and it is with one or another of these varied subdivisions of a county that the native-born American, consciously or unconsciously, first comes into contact.[1]

State Constitutions—Some General Aspects

How made

Every state has a written constitution, providing the legal basis for its government precisely as the instrument framed at Philadelphia in 1787 supplies a legal basis for the national government; and any legislative or administrative act found contrary to this fundamental law may be invalidated by the courts, on lines familiar in the federal sphere. Most of the forty-eight documents—even those in operation in the older states—date from comparatively recent times; but some have lasted through two or three generations, and a few are, to all intents and purposes of Revolutionary origin. Among the earliest constitutions, only that of Massachusetts was framed by a convention of delegates chosen expressly for the purpose; and it alone was submitted to a vote of the people before taking effect. During the nineteenth century, however, it became customary for constitutions to be made and ratified in this manner; and every one of those in operation at the present time so originated, except that in a limited number of instances, *e.g.*, the Louisiana constitution of 1921, there has been no submission to a popular vote.

Limits to a state's control over its constitution

Every state has, of course, a right to make its own constitution and to change or replace it whenever desired. In exercising this broad prerogative, nevertheless, it must keep within limits fixed by the general character of the national constitutional system as a whole. Under this system, a state has wide reserved and undefined powers, but not *unlimited* powers; and in making and amending its constitution it may no more transcend the restrictions placed upon it by the national constitution than in performing any other of its functions. For example, it may not authorize *ex post facto* legislation or bills of attainder or the issuance of

[1] The government of these local areas will be dealt with in Part IV below.

paper money or laws impairing the obligation of contracts, or any form of government other than "republican," because in the federal constitution all states are expressly forbidden to do any of these things. Indeed, an incoming state is subject to even more restrictions, because when Congress scrutinizes the constitution under which the new state proposes to operate, objection may be raised to any feature of it whatsoever, even if not involving any alleged infraction of national constitutional law. As we have seen, a provision eliminated to meet congressional objection may, once the state is admitted, be restored if the matter involved is by nature political rather than contractual.[1] In order to get into the Union at all, however, an incoming state must, at least for the time being, content itself with a constitution which Congress will in every respect approve.

A constitution's contents:

It would not be expected that forty-eight different constitutions for states in some cases very large and in others very small, in some instances populous and highly industrialized and in others thinly peopled and almost entirely agricultural, would be in all respects alike—even if some of the documents were not brief and general and others ten times as lengthy and crowded with detail. Viewed in the large, however, the constitutional arrangements required by the very fact of statehood, and flowing from political ideas and objectives more or less common to our entire people, inevitably must follow a somewhat uniform pattern;[2] and any one contemplating the documents as a group will find their contents running substantially as follows: (1) a preamble setting forth, sometimes rather rhetorically, the instrument's motivations and objectives; (2) an outline of the general framework of government, state and local, with provision for the three familiar branches (with usually a separate article devoted to each), definition of functions and powers, and specification of principal organs or agencies through which powers are to be exercised; (3) in conjunction with this, one or more articles fixing the qualifications for voting and regulating to some extent the procedures to be followed in elections; (4) provisions relating to taxation and other aspects of finance, usually imposing limitations upon the legislature, as, for example, in incurring state indebtedness; (5) provisions (in some of the newer constitutions running to several pages) laying down the principles to be followed in chartering corporations and regulating corporation practices and procedures; (6) articles, of increasingly ample scope in many later constitutions, dealing with the organization and rôle of state and local authorities having to do with education, health, social insurance, conservation, and other activities falling within the wide confines of "public welfare"; and invariably (7) specification of the way or ways in which the constitution may be amended.

1. Governmental structure and functions

[1] See p. 57 above.

[2] This they do, too, not only because of similarity of basic needs and ideas, but because of lack of originality on the part of constitution-framers, resulting in much actual copying.

2. Bill of rights

Finally (although usually placed near the beginning of the document), there is, in every constitution (8) a series of articles or clauses comprising a bill, or "declaration," of rights—rights regarded, however, not as *conferred* by the constitution, but rather as preëxisting and merely confirmed and guaranteed. In the older documents, this is likely to include a broad assertion of political theories in vogue in the late eighteenth and early nineteenth centuries—theories which in some instances are still generally adhered to, but which in other cases have been relegated to the lumber-room of discarded doctrines. The newer constitutions either omit these theories altogether, as being more or less unrealistic and affording little actual protection against misuse of governmental power, or present them in a revised, modernized form. More important, in any event, are the provisions relating to certain concrete fundamental rights of the citizen, such as religious freedom and freedom of speech and the press, the right to keep and bear arms and to be exempt from unlawful searches and seizures, the privilege of the writ of *habeas corpus*, and the right to bail and to trial by jury; also clauses prohibiting *ex post facto* laws, laws impairing the obligation of contracts, cruel and unusual punishments, and the deprivation of life, liberty, or property without due process of law. Many of these stipulations merely duplicate, of course, the limitations imposed upon the national government by the first eight amendments to the national constitution, and likewise those imposed upon the states in Article I, Section 10, of that instrument. Some, *e.g.*, requiring use of grand juries and unanimous verdicts by trial juries, present serious obstacles to the prosecution of crimes under modern conditions.

Methods of Amending or Revising Constitutions

Three principal sources of proposals

Every state constitution provides some method for its own amendment (or more general revision), and in every case, too, a more roundabout and difficult procedure than is required for merely altering or repealing a statute.[1] Three principal methods are found in operation, distinguished mainly by the way in which changes are originated and brought before the people: (1) by legislative proposal; (2) by popular initiative; and (3) by action of a constitutional convention. The first two operate chiefly in connection with *amendments* in the stricter sense, *i.e.*, specific changes, or a limited number of such; the third, chiefly in connection with *revisions*, involving more general overhauling, and perhaps complete rewriting, of the fundamental law. Amendments proposed in either of the first two ways must, in every state except Delaware, be submitted to a popular vote before becoming effective; and the same is almost universally true of revisions (or amendments) originating in constitutional

[1] The present discussion relates to changes in constitutional texts only. But of course it must not be overlooked that, just as in the case of the national constitution, the actual operation of state constitutions is often modified by executive, legislative, or judicial interpretation, and by custom or usage.

conventions, although in a few instances popular ratification is not required, *e.g.*, by the Virginia constitution of 1902 and the Louisiana constitutions of 1913 and 1921.

1. Legislative proposal

In every state except New Hampshire, amendments may be proposed by the legislature;[1] and this is the method more commonly employed even where the popular initiative is also in use. In thirty-three states, an amendment is ready to be submitted to the people as soon as a single legislature has acted upon it favorably. With a view to more considered action (including opportunity for the voters to express themselves on pertinent issues at an intervening election), fourteen states (including New York and Pennsylvania), however, require approval by two successive legislatures; and in Delaware, as previously indicated, this completes the amending process.[2] In eighteen states, only a simple majority of the members of the two houses is required for submission, but in twenty-five, either two-thirds or three-fifths must be obtained; and this, of course, raises somewhat of an additional hurdle. As a rule, legislatures may propose any number of amendments at any time. In Illinois, however, no given legislature may propose amendments to more than a single article of the fundamental law; in Kansas, Kentucky, and a few other states, the number that may be submitted to the people at any one election is restricted to two, three, or some other small quota; and New Jersey, Tennessee, and Vermont permit submission of amendments only once in five, six, and ten years, respectively. Occasionally a legislature has made bold to propose not mere specific, isolated amendments, but a more general revision which it has itself formulated. In New Jersey, however, such a revision was rejected by the voters in 1944; and when the Indiana legislature tried the plan in 1911, the courts held that it had gone beyond its proper function. A different approach, taking the form of authorization by the legislature of a commission to prepare a general revision, has sometimes proved more successful; and it was in this manner that Georgia's new constitution of 1945 originated. Indeed, it seems not unsafe to predict that this newer procedure will increasingly commend itself as having advantages over revision either by the legislature on the one hand or by a large constitutional convention on the other.[3]

2. Popular initiative

Under the popular initiative, any individual or group of voters may draft a proposed amendment and, by securing the signatures of a minimum number of qualified voters to a petition, bring about submission of it to a popular vote. If the proposal receives the number of votes required by the constitution, it is adopted and becomes as binding as if it had

[1] In New Hampshire, by constitutional convention only.

[2] In South Carolina, an amendment proposed by a single legislature is voted on directly by the people, but the power to take final action is vested in the next succeeding legislature.

[3] The commission is likely to be a mixed group containing various state officials serving *ex officiis*, members of the legislature designated by the presiding officers of the two branches, representatives of the judiciary, and some members at large appointed by the governor.

formed a part of the original instrument. The use of the popular initiative in connection with constitutional amendments began in Oregon in 1902 and is now authorized in twelve other states, the latest adoption being in Massachusetts in 1918.[1] To bring a popularly initiated proposal to a vote, there must be either a definite number of signatures, as 20,000 in North Dakota and 25,000 in Massachusetts, or a number equal to a certain percentage (usually from eight to fifteen) of the total vote cast for some specified state office at the preceding election. In Massachusetts, the proposed amendment must first be submitted to the state legislature; the approval of at least one-fourth of all the members of two successively elected legislatures, in joint session of the two houses, must precede a referendum; and the legislature may submit to the voters a competing or substitute measure. In most states where the initiative is authorized for constitutional amendments, proposals may relate to any provisions found in the constitution, without restriction; in Massachusetts, however, several constitutional provisions are protected against change by this procedure, *e.g.*, those relating to the courts and to civil liberties.

Requirements for ratification

In most states, an amendment, however originated, can be ratified by simple majority of all popular votes cast *on the amendment*. In twelve (including Illinois and Minnesota), however, the requirement is higher, *i.e.*, (in most instances) a majority of all votes cast *in the election;* and the difference is significant, because invariably a good many people voting on candidates fail to vote at the same time on amendments submitted. With abstention having the same effect as voting in the negative, ratifications become difficult or impossible to secure; and many a useful amendment, though with more votes cast for it than against it, has gone down to defeat because of the rule.

Numbers of amendments

From Tennessee, whose constitution of 1870 has never been amended, the number of amendments adopted in the various states ranges upwards well into the hundreds; although dating only from 1921, Louisiana's fundamental law has been subjected to 229 amendments (to 1945) and California's constitution of 1879, to 201. In general, the constitutions amended less frequently are the older and briefer ones, and, of course, those specifying more difficult amending procedures; while those most freely amended are the ones specifying easier procedures, and especially those (as in the two states last mentioned) running to great length and crowded with detail—for of course details require more frequent change than fundamentals. Adding to legislative proposal the method of proposal by popular initiative has tended to multiply amendments in certain states, but not greatly; between 1904 and 1938, the total of popularly-initiated amendments, the country over, was only 109 (twenty-four of them in Oregon).[2] Altogether, it appears that between 1900 and

[1] The twelve states are Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Missouri, Nebraska, Nevada, North Dakota, Ohio, and Oklahoma.

[2] A prolific source of amendments in a few states, *e.g.*, South Carolina (also Georgia before 1945) is the unfortunate practice of writing into the constitution detailed pro-

1935 approximately 2,500 amendments were submitted to the voters, of which about sixty per cent were adopted.[1]

3. Constitutional conventions

When only a few specific amendments are to be considered and quick results are desired, the methods of popular initiative and legislative proposal are to be preferred. But when a thoroughgoing revision is contemplated, they are hardly adequate. This can best be undertaken by a constitutional convention, consisting of delegates chosen by the voters expressly for the purpose—even though a convention is, at best, a cumbersome and expensive device, and in some states impossible to authorize, elect, and assemble (with its work also submitted to the voters) in much less than three or four years. In New Hampshire, the constitutional convention is the only authorized method of proposing constitutional changes, and the question of holding one must be submitted to a popular vote periodically; in all other states except Rhode Island, however, it is an alternative method. The constitutions of three-fourths of the states expressly or impliedly provide for such conventions; and in the remaining twelve it is the generally accepted view that the legislature may legally provide for them, notwithstanding that the constitution is silent on the subject. As a matter of fact, conventions have been held in all of these states with the exception of Rhode Island.

Organization and Work of Constitutional Conventions

Call

In a great majority of states, the question of whether a constitutional convention shall be called is first of all submitted by the legislature to a popular vote, even though the constitution may not expressly require it; and in any event, if the voters so ordain, the call is issued by the legislature in the form of a statutory enactment. Periodical submission is required in eight states, namely, New Hampshire, every seven years; Iowa, every ten years; Michigan, every sixteen years; and Maryland, New York, Ohio, Missouri, and Oklahoma, every twenty years—though in all of these states except Maryland and New Hampshire, the question may be submitted also at other times. In most states, it may be submitted simply whenever the legislature sees fit.[2]

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visions on local government, making it necessary to amend the fundamental law every time (for example) the debt limit of a particular municipality is to be increased.

[1] The numbers seem impressive, but the great majority adopted have had to do with matters of only minor importance. In point of fact, the last fifteen or twenty years have been a period of constitutional stagnation in the states. Sponsors of the 1941 edition of the "model state constitution" (see p. 536, note 1, below), representing some of the best thought in America on problems of state government, expressed the hope that publication of the new document would prove a stimulus to state constitutional reform. Of course, the ensuing war period was hardly a favorable time for such ventures.

[2] In all, some two hundred constitutional conventions have been held, the most recent being those in Ohio (1912), Massachusetts (1917-19), Arkansas (1918), Nebraska, New Hampshire, and Illinois (1920), Louisiana (1921), Missouri (1922, 1943-44), New York (1915, 1938), and New Hampshire (1940).

Size

When a constitutional convention has been called, detailed provisions usually have to be made by the legislature for the nomination, election, convening, and compensation of the members, and for submission of their work to the voters. Constitutional conventions sometimes contain as few as eighty members, and sometimes more than four hundred; in most instances, they do not exceed two hundred. The delegates are nominated and elected in accordance with the general primary and election laws, although some states (for example, Massachusetts) have made special provision for non-partisan nomination and election. Usually they are chosen from the legislative or senatorial districts employed in electing members of the legislature, and not infrequently a few are elected from the state at large.[1]

Organization

The convention assembles at the state capital on the day designated by law, and organizes by electing one of its members president, providing for a staff of clerks, secretaries, and stenographers, and adopting a set of rules to govern its proceedings. A large body is ill-adapted to detailed consideration of the great variety of subjects invariably coming before a constitutional convention, and therefore a somewhat elaborate committee system is employed. As a rule, the committees (ten, fifteen, twenty, or more) are appointed by the president of the convention, although in a few instances committee assignments have been made by a committee especially created for the purpose.

Procedure

In general, the proceedings of a constitutional convention follow the same pattern as those of a state legislature (except as procedure in the latter is affected by the existence of two houses); and this is particularly true of the functioning of committees. To each committee is customarily assigned one or more sections or articles of the constitution, and all proposed changes (numbering 377 in the Missouri convention of 1943-44), originating either with members of the convention or with people outside, are referred to the appropriate committee for preliminary consideration. Committee sessions are often thrown open to the public, and an opportunity is almost always given the advocates and opponents of various changes to present their respective arguments. If a committee approves a given proposal, it is reported to the convention, perhaps in somewhat amended form, and then placed on the calendar for consideration in committee of the whole. Political partisanship has at times been conspicuous in a convention's organization and proceedings—strikingly so in the New York convention of 1938.

The authority of a convention

Constitutional conventions are, indeed, legislative bodies, with the primary, if not sole, function of drafting new fundamental laws or for-

[1] The over-representation of rural districts as compared with urban communities, found in a number of state legislatures (see Chap. xxxiii below), is likely to appear also in constitutional conventions. Consequently, the representatives of rural sections may exert a greater proportional influence for or against proposed amendments when they originate in the legislature or in a constitutional convention than when originating under the popular initiative. In the latter situation, the vote of a citizen counts for as much in one section of the state as in another.

mulating amendments to existing ones. Some conventions, like that in Illinois in 1862, have gone farther and have assumed more or less actual management of the state government, displacing existing officers, substituting others chosen by the convention, and attempting to supersede the legislature in various matters. At other times, the legislature, in making provision for the meeting of a convention, has attempted to impose limitations upon its work which the convention has wholly or in part disregarded. Naturally, conflicts have resulted as to the proper scope of authority; and out of them three theories have developed. According to the first, the legislature is supreme, and in the act of calling the convention may limit the powers of that body by excluding from its consideration amendments to certain sections of the constitution, by requiring it to submit amendments to certain other sections, by prescribing the manner in which its work shall be submitted to popular vote, and in various other ways. Those who take this view hold that the convention has no right to disregard or to deviate from any of these statutory restrictions. According to a second theory, the convention has all the sovereign powers of the people, and is the supreme body in the state during its existence. Therefore, being superior to the legislature and to all other branches of the state government, it may disregard any or all limitations which the legislature has sought to impose upon it, and may, indeed, legally exercise whatever governmental functions it cares to assume—as the Illinois convention tried to do in 1862.

Each of these two theories has some support in convention precedents and judicial opinion. But the view now most generally held is that a convention is neither sovereign nor wholly subject to the legislature—that, on the contrary, the two are coördinate bodies, each supreme within its proper sphere and bound by the provisions of the existing constitution and statutes. If the constitution authorizes the legislature to impose restrictions on the convention, the latter is bound to respect such limitations; on the other hand, if such authorization is lacking, the legislature cannot bind the convention as to what shall be placed in the revised constitution, or lay other restrictions upon it. The convention, furthermore, may neither supersede any existing organs or agents of state government nor exercise any of the powers assigned to them; its functions are limited to proposing a new constitution or amendments to the existing one.

Submission of a convention's work

Almost invariably, the results of a convention's deliberations have to be submitted to the voters for their approval before taking effect; although in a dozen or more instances in the past hundred years constitutions have gone into operation without popular ratification, the latest being the Virginia constitution of 1902 and the Louisiana constitutions of 1913 and 1921. The vote required for the ratification of the work of a convention is the same as that required for the adoption of amendments proposed by the legislature.

A convention may submit its work to the voters in one of three different forms. It may, for example, present it as a series of specific amendments, to be voted on separately, as was done in New York in 1938; although this is hardly practicable except when only a comparatively small number of amendments are proposed. Or, it may submit a complete new or revised constitution, to be accepted or rejected as a whole, as occurred in Michigan in 1908, in Arkansas in 1918, in Illinois in 1922, and in Missouri in 1945. This method has the serious disadvantage of compelling changes not widely opposed to suffer the same fate as articles relating to controversial matters. Opposition to the initiative and referendum, or to changes in the system of taxation, for example, may be so strong that, rather than see a proposal of the kind adopted, its opponents will vote against the entire document, although everything else in it may be quite satisfactory; and the sum total of such fragmentary opposition may involve the constitution's defeat. In this cumulative fashion, the proposed new constitution for Illinois was wrecked in 1922.

The third method is a compromise between the two just described. A substantially complete revision of the constitution may be submitted as a single document to be rejected or approved as a whole, and at the same time one or more especially controversial sections be submitted separately. This enables the electorate to approve the greater part of the convention's work and yet to disapprove certain specific features. Such a plan was followed in Illinois in 1870, when eight separate articles were submitted along with a new and substantially complete constitution.[1]

The Tendency to Excessive Length

The long constitutions of recent decades

Naturally, state constitutions vary considerably in contents, and therefore in length. But all of them are long documents; even the briefest ones run well beyond the national constitution in number of words, if not also in multiplicity of provisions. The original constitutions were comparatively brief; with only two exceptions, the ten shortest ones in operation today were adopted before the Civil War.[2] On the other hand,

[1] A "model state constitution" promulgated by the National Municipal League in 1921, and issued in revised editions in 1928, 1935, and 1941, provides three methods of constitutional amendment, as follows: (1) proposal by majority vote in each house of the legislature at two regular sessions, and adoption by majority vote of the electorate; (2) initiative by some stipulated proportion of the electorate and adoption similarly by popular majority, provided the total vote on the proposal amounts to at least fifty per cent of the total vote for governor at the last preceding election; and (3) proposal by a constitutional convention, with adoption by popular majority, under the same limitation. At any regular session, the legislature may submit to the electorate the question: "Shall there be a convention to amend or revise the constitution?" If a majority of those voting on the question register approval, the legislature must, at its next session, provide for a convention, meeting within four months; and, quite independently of this procedure, the secretary of the legislature must submit the question of a convention to the people every twenty years.

[2] These ten are those of New Hampshire (1792), Vermont (1793), Connecticut (1818), Rhode Island (1842), New Jersey (1844), Indiana (1851), Iowa (1857), Kansas (1859), Tennessee (1870), and North Carolina (1876).

all of the nine or ten longest ones have been adopted since the Civil War, and four of them since 1900.[1] From the fourteen closely printed pages of New Jersey's constitution of 1844, constitutions now run all the way to upwards of three hundred pages in the cases of California and Louisiana.

As these facts indicate, state constitutions have steadily grown lengthier the country over, in recent decades, and especially in the past forty years; new ones have been lengthy from the outset, and older ones have been lengthened by incorporating in them elaborate provisions dealing with subjects formerly either ignored or left to be dealt with by the legislature at its discretion.[2] Sometimes additions have been made with a view to overcoming, or anticipating, obstacles interposed by judicial constructions of "due process" in the realm of social and industrial regulation; at other times, the object has been to authorize the legislature or the state executive department to do certain things for which there seemed to be no clear basis in the existing constitution; and groups of legislative regulations which have been in successful operation have sometimes been "frozen" into a constitution. When a constitutional convention first assembles, most of its members may be favorable to a short constitution dealing only with fundamentals. But it is soon discovered that each is in favor of detailed provisions upon matters in which he is especially interested, or which he feels to be of fundamental importance; and as a result, the convention usually ends with a new constitution longer than the old one. Furthermore, the more elaborate and detailed a constitution grows, the more frequently do new amendments become necessary; every new condition or unforeseen contingency that arises tends to require a change, not simply statutory, but also constitutional.

Distrust of legislatures as a reason

But the main explanation for our lengthy constitutions is the widespread distrust of state legislatures growing out of the abuses of legislative power, accompanied by much corruption, which marked the middle portion of the last century. With a view to averting these evils, later constitution-makers have drawn up long lists of specific restrictions upon the action of the legislature, and, by the detailed treatment of

[1] These longest constitutions (most of them running to forty or fifty pages of print) include those of Maryland (1867), Colorado (1876), California (1879), South Dakota (1889), Alabama (1901), Virginia (1902), Oklahoma (1907), Louisiana (1921), and Georgia (1945). The Missouri constitution of 1875 would formerly have been in the list, but the framers of a revised constitution adopted in 1945 managed to come off with a document 11,000 words shorter than the old one. The example thus furnished should be emulated; but, as has been truly remarked, most of the states are constitutionally antiquated and contented!

[2] For example, provision for the control of railways, banks, and other corporations; sections authorizing the enactment of laws for the benefit of the wage-earning classes; provisions prompted by the changed position of women in modern society; paragraphs dealing with the special problems created by the rise of great cities; and articles making detailed provision for popular education—the Oklahoma constitution (1907) going so far as to require the legislature to provide for "a uniform system of textbooks in the common schools," and for teaching "the elements of agriculture, stock-feeding, and domestic science."

many subjects in the constitution itself, have placed these matters beyond the reach of tinkering legislators. Confronted with the very practical problems of checking and preventing legislative abuses and corruption, constitution-framers have shown scant regard for the theoretical distinction between legislative and constitutional subjects and functions; and they will probably continue to do so until they develop the courage to undertake a reconstruction of legislatures on lines calculated to render constitutional restrictions less essential. Legislative reorganization and improvement, in other words, is a prerequisite in most states to a shorter constitution dealing only with fundamentals.

The desirability of shorter documents

Simplifying the state constitution by eliminating all but fundamental provisions relating to the organization and powers of government and the rights of citizens is not a matter of mere academic interest; it is a reform of great practical importance, for at least four reasons. In the first place, constitutions encumbered with wearisome and often unimportant detail become so unwieldy and bewildering that almost no one except lawyers understands, or even tries to understand, them. In the second place, inserting legislative matters in the constitution is a good deal like locking up one's last will and testament in a safe-deposit box and throwing away the key; it is an effective means of preventing reconsideration, change, and reform. To the ordinary delays and difficulties of obtaining legislative action is added the necessity of securing a constitutional amendment—never an easy thing to do. In the third place, the increased number of subjects placed beyond the reach of the legislature has been responsible for much of the widespread popular criticism of the courts for declaring acts of the legislature unconstitutional. With shorter constitutions, fewer occasions would arise for the courts to overturn legislative enactments. Finally, from the expanded state constitutions some courts have developed the doctrine of implied or resulting limitations, which still further ties the hands of legislatures on many occasions when action is desired. According to this judicial doctrine, the mere fact that a subject has been placed in the constitution indicates an intention on the part of the constitution-makers to take that subject entirely out of the hands of the legislature, and therefore is an implied denial of the right of the legislature to deal with any phases of the subject unless there is some express authorization in the constitution itself. It should be added, however, that this doctrine does not obtain everywhere; in some states, the courts have held that the legislature has all power not denied to it by the state (or the national) constitution.

The future of state constitutions

The future seems to promise two possible lines of development. If the present tendency to incorporate in the constitution matters not of fundamental importance but primarily of a legislative character, and to deal with these matters in detail, continues unabated, more and more frequently will amendments become necessary in order to meet changing conditions. This, in turn, might be expected to lead to the adoption of

easier amending processes, *i.e.*, processes increasingly resembling those now employed in the enactment of ordinary statutes either by the legislature or by direct popular action through the initiative and referendum; and in this way, the historic dividing line between constitutional and statutory laws might become more and more hazy, if not quite indistinct, until ultimately substantially the same procedure for the enactment of both would be arrived at. On the other hand, we may see a reaction against the comprehensive and bulky constitutions of the past few decades in favor of shorter instruments dealing only with matters of a fundamental and truly constitutional nature. Should this come about—the indications that it will do so are not impressive—there obviously will be less need for frequent amendment, and the present sharp distinction between the modes of enacting constitutional provisions and ordinary statutes may be expected to continue to be reflected in more difficult amending procedures.

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CHAPTER XXXIII

THE LEGISLATURE—STRUCTURE AND POWERS

A cursory examination of the constitutions of the forty-eight states will show that with only three exceptions the article relating to the structure and composition of the legislative branch precedes the articles devoted to the executive and the judiciary; and—the legislature being the major policy-determining organ of the state—the arrangement is a logical one, just as it is, and for the same reason, in the case of the national constitution. Our forthcoming discussion of state government may therefore properly follow the same sequence.

The legislature as the central power-house

In the state legislature, as in a great power-station, is generated the energy which sets in motion and drives most of the machinery, not only of the state government, but of county, municipal, and other local governments as well. The state constitution creates numerous executive and administrative offices, and to some extent prescribes their functions; it establishes courts, and to some extent defines their jurisdictions; it provides for certain organs of county and other local government, and to some extent outlines their powers and duties. But the articles relating to these several phases of state and local government are seldom self-executing; usually they require supplementary legislation. Administrative officials, for example, have little to do until the legislature enacts laws for them to administer; the courts cannot adjudicate the rights of individuals (save as these rights may be specified in the constitution, or based upon the common law) until the legislature defines them; county, city, and other local-government units are intimately dependent upon the legislature, and often cannot function until that body has enacted necessary laws.

Within the framework erected by the constitution, the legislature fills out the executive, judicial, and local organization of the state; regulates, wholly or in part, the jurisdiction and procedure of the various state and local courts; defines crimes and their punishment; defines the civil rights of citizens and aliens; regulates the ownership, use, and disposition of property, the making and enforcement of contracts, the conduct of professions and of many business and industrial enterprises, especially those carried on by corporations; enacts laws having to do with the relations of husband and wife, and other domestic relations; provides for a system of free public schools, and for charitable and penal institutions; regulates primaries, elections, and the organization and operations of political parties; passes acts restricting rights of liberty and property in the inter-

est of public health, morals, safety, and the general welfare; authorizes taxation for the support of state and local governments; appropriates money to be expended by each department or activity of the state government; and authorizes the incurring of indebtedness by both state and local governments.[1]

Essentials of a good lawmaking body

Any legislature under a democratic system of government has large potentialities for benefit and for harm, and a first requisite is that its outward structure, as well as its internal organization and procedures, be such as to make it an effective and responsible agency of the public will. It should not be of such size as to be unwieldy; nor should its form be such as needlessly to complicate the process of lawmaking, or to facilitate evading responsibility for what it enacts or fails to enact. Its internal organization and the rules governing its proceedings should be free from unnecessary complications, should seek to expedite work while yet giving each proposal a fair opportunity to be considered, and should insure full publicity for discussions, committee reports, and decisions. In the handling of financial legislation, there should be close coöperation between those agencies of the government charged with raising the state's revenue and those authorized to appropriate and expend it. Endowed with extensive powers to control, for weal or woe, most of the business and social relationships of citizens, as well as to regulate their civil rights and duties, the lawmaking body should manifestly be composed of persons who are at least reasonably representative of the principal geographical sections and of the main social and economic groups within the state. Although highly desirable, it is not essential that they be experts in either the technique or the subject-matter of legislation. It is indispensable, however, that they have the assistance of expert draftsmen; that they be in a position to avail themselves of competent advice concerning the complicated problems that come before them; and that they be able to draw freely upon the experience of other states, and of all officials charged with the administration of the laws which they enact.

A main reason for present deficiencies

Any one at all familiar with the organization and workings of our state legislatures knows that no one of the forty-eight fulfills all of the foregoing requirements, and that many meet only a small fraction of

[1] The legislature is, of course, in no sense the author of all law operating in a state. There is federal law as well as state law; and underlying both is a great body of common law, inherited largely from England.

On the other hand, in addition to strictly legislative functions, some of a non-legislative character are assigned to the legislature in every state. For example, the consent of the senate is required for the appointment of certain officers named by the governor, and sometimes for their removal as well; the judges of the highest state court, and some of inferior courts, are chosen by the legislature in Vermont, Rhode Island, Virginia, and South Carolina; in about one-third of the states, judges of the state courts may be removed by a vote of the two houses of the legislature; impeachment proceedings originate in one branch of the legislature and are generally tried by the other, although judges of some of the highest courts may be added, as in New York; in some states, the legislature also appoints certain of the county and town officers, and takes part in the appropriation of town and county funds; and in a number of states the legislature serves as a canvassing board in connection with the election of certain state officers.

them. Many reasons can be assigned. For the present, it will suffice to mention only the most fundamental one, *i.e.*, the fact that hitherto the ingenuity of constitution-makers has been expended chiefly upon defining and restricting the legislature's powers, on the manifest assumption that the public well-being requires the legislative branch to be carefully circumscribed—with the result that little has been done toward working out plans by which the legislature can be made a really responsible lawmaking body, capable of promoting the general welfare by wise, carefully drawn, and well-considered laws.

The Bicameral System

Origin and development

Every state legislature, except that of Nebraska, is organized in two houses, both elective,[1] and both endowed with substantially the same powers. In the original thirteen states, the bicameral plan developed naturally out of the conflict between aristocratic and democratic elements in the colonial period; and by the close of the Revolution it had been adopted in all of them except Pennsylvania and Georgia.[2] In the states later admitted to the Union, the plan was followed as a result of more or less deliberate imitation of the older states, or of the national Congress, but with little of the justification which existed in the earlier instances; in part, it has been perpetuated through almost automatic adherence to the ancient formula of divided powers and checks and balances. Under the earliest state constitutions, there were higher property qualifications for membership in the state senate, and for the privilege of voting for senators, than in the case of the other branch of the legislature; so that the two houses were elected by different constituencies and represented somewhat different social and economic groups or interests. This distinction, however, long ago disappeared; and practically the only differences today between the two houses are the longer term for which senators are usually chosen,[3] the slightly higher age or residence qualifications for membership in the senate, and the fact that the terms of senators usually do not all expire at the same time, as do the terms of members of the lower house. So far as determined by suffrage qualifications, the electorates for both houses are identical. "Each chamber is, in short, a mere duplication of the other; neither is more conservative or radical than the other, and each is subject to the same influences. Thus it has come about that the state employs two substantially identical organs to perform the same

[1] Candidates for election to the legislature are nominated in some states, mainly in the South, by convention, but in most states by direct primary. Election is by printed ballot (except where voting machines are employed); and the polling often occurs on the same date as presidential and congressional elections.

[2] Four of the oldest states have, at one time or another, had a unicameral legislature: Delaware, until 1776; Pennsylvania, until 1790; Georgia, 1777-1789; and Vermont, until 1836.

[3] In thirty-one states, the term of senators is four years; in sixteen others, two years; and in one state (New Jersey) three years. The term of members of the lower house is one year in New Jersey, four years in Alabama, Louisiana, Maryland, and Mississippi, and two years in all other cases.

functions."[1] Retention of the bicameral system under these changed conditions has to be justified, if at all, mainly on the ground that it provides representation for distinct territorial areas in one branch and for units of population in the other; or that it is effective as a means of preventing undesirable legislation by presumably insuring double consideration for all laws prior to their enactment.

Should the system be retained?

Undoubtedly, the system does facilitate a balance of power between city and country districts, and on that account it finds support as a mode of protecting the rights of rural minorities against possible infringement by urban majorities, or *vice versa*. Those who defend it are more likely, however, to lay stress upon the checking, or revising, function which the two-house plan supposedly insures. For entirely satisfactory conclusions on this point, there is need for a thorough study, in a number of typical states, of the actual rejections and amendments by each house of measures originating in the other house. Unfortunately, such studies have been made in only very few states.[2] The statistics of bills rejected or amended by the respective houses which emerge from these studies, however, constitute no very impressive argument for the retention of the bicameral system on the ground that one chamber exercises a wholesome check upon the legislative output of the other. If, in this connection, one recalls the fact that everywhere, except in North Carolina, the governor is endowed with the veto power, and that the courts have long been freely wielding the power to declare laws unconstitutional, it is not easy to avoid the conclusion that the value of the bicameral system, as a means of setting up an additional hurdle over which legislative measures must pass before becoming laws, is—in view of the positive evils which accompany, and in some instances are inseparable from, that system—hardly sufficient to warrant its retention, especially in states where there is no sharp differentiation between urban and rural elements of the population.[3]

Advantages of the unicameral plan

The advantages of the unicameral, or one-house, system are unmistakable. In the first place, it enables public attention to focus promptly upon a narrow and well-defined area, and therefore permits of a genuine scrutiny of legislative proceedings while laws are being made—a thing practically impossible in the case of our present large two-chamber legislatures with their multitude of committees. In the second place, when there is but one chamber, responsibility cannot be bandied back and forth between two houses, members of one house working with members of the other to defeat legislation, and putting it beyond the power of the

[1] J. W. Garner, quoted in J. M. Mathews and C. A. Berdahl, *Readings in American Government*, 658.

[2] Notably in New York, Illinois, Wisconsin, Iowa, California, and New Mexico.

[3] The "model state constitution" proposed by the National Municipal League provides for a unicameral legislature, with its members chosen under a plan of proportional representation. For a defense of the two-house system, see F. E. Horack, "Bicameral Legislatures Are Effective," *State Government*, XIV, 79-80, 96 (Apr., 1941).

public to know exactly what has happened. The duplication of committees furnishes abundant opportunities for shifty deals between two sets of committees and two sets of political leaders, still further serving to delay action, becloud issues, and dissipate responsibility. Many bills—good as well as bad—after passing in one house, fail to become law merely by reason of the inaction of the other house, and not because of any negative vote. Deadlocks and friction constantly arising between the two houses would cease when two houses no longer existed; and the cost of supporting the legislature would, or could, be reduced.

Nebraska's experiment with the plan

For reasons such as these, many American cities have changed over to the single-chamber plan for the city council, and in the last decade one state has done so for its legislature. In Nebraska, in 1934, a popularly initiated constitutional amendment providing for a legislature (officially known as a senate) of but one house, to consist of from thirty to fifty members (finally fixed at forty-three) chosen for two years on non-partisan ballots, was submitted to the voters, and, after a stirring campaign, was adopted by a majority of upwards of 100,000. The plan—under which that state became the first in more than a hundred years to employ the unicameral principle—went into operation in 1937. Most observers agree that it has worked well, with the quality of members improved, the number of proposed measures reduced, and definiteness of responsibility increased; and interest stirred by the experiment may in time lead to a similar reform in other states.[1]

Representation in Legislatures

Size of the two houses

Changes in the size, as well as in the structure, of most of our state legislatures would likewise contribute to their increased effectiveness, and would reduce the ease with which responsibility for legislative action or inaction may now be evaded. For purposes of deliberation, the senates are, in most of the states, more nearly of ideal size than are the lower houses. Senates range in membership from seventeen in Delaware and Nevada and nineteen in Arizona up to fifty-one in New York and Illinois and sixty-seven in Minnesota, the last-mentioned numbers being rather larger than is desirable. The lower houses, on the other hand, are generally so large as to be ill-adapted for purposes of deliberation, with the result that great power in determining both the form and the substance of legislation has perforce to be lodged in irresponsible committees. Delaware and Nevada have lower houses of suitable size for deliberation, *i.e.*, thirty-five and forty members, respectively. At the other extreme

[1] Proposals on this line, however, failed when new constitutions were being framed somewhat recently in Missouri and Georgia. In Missouri, defeat was by a narrow margin, and a movement for adoption by amendment is at present in progress. On the Nebraska experiment, see H. B. Summers, *Unicameralism in Practice; The Nebraska Legislative System* (New York, 1937); H. T. Dobbins, "Nebraska's One-House Legislature After Six Years," *Nat. Mun. Rev.*, XXX, 511-514 (Sept., 1941). It may be noted that the single-chamber system is employed in all of the Canadian provinces except Quebec and in most of the cantons of Switzerland.

stand Vermont, Connecticut, and New Hampshire, with lower houses consisting of 246, 267, and 399 members, respectively.[1] More than half of the states have lower houses of over one hundred members.

The size of the two houses is determined in different ways in different states. The constitution usually lays down some general rule or principle to guide the legislature in apportioning representatives and senators among the various political subdivisions. But in most states the actual size of the two houses is left to be determined, within broad limits, by the legislature itself.

Bases of representation

In establishing areas for representation in the legislature, state constitutions and statutes follow no uniform rule. When the oldest states were formed, representation was based upon territorial units; towns and counties were usually given a substantially equal number of representatives; and no grave injustice resulted so long as marked differences of population did not arise. As some towns or counties outstripped others, however, glaring inequalities of representation developed, some of which still exist; and to remedy this situation, many states have adopted equal units of population as the basis of representation in one or both houses, or in other ways have given increased recognition to populous communities. As a result, we frequently find an intermingling of territorial and population units in the same state.

In the lower house, the chief units of representation are towns in New England and counties in most of the other states; and when differences in population are not recognized in the apportionment, gross inequalities in representation and a series of "rotten boroughs" result. This is especially true in Vermont, Connecticut, and Rhode Island. In state senates, the unit of representation most generally employed is the county; and most states give some recognition to differences in county population, although restrictions are frequently placed upon the number of senators permitted to the most populous counties. In a number of states, counties are grouped or subdivided into senatorial districts of substantially equal population, each electing the same number of senators. In a few states, there is but one series of districts for the election of members of the two branches of the legislature; but as a rule the senatorial districts are different from, and larger than, the lower-house districts. Whatever the basis of representation, the districts are almost always laid out by the legislature; and where population is the sole basis, the state constitution usually makes it the legislature's duty to redistrict the state after each decennial federal census, or oftener, in order to keep the districts substantially equal in population and give a vote as much weight in one part of the state as in another.

A further feature of legislative representation is the frequent discrimination in one or both branches in favor of rural counties and against

[1] The number of members of the lower house in New Hampshire varies slightly from session to session. The figure given above is for the 1945 session.

large urban communities, especially in California, Illinois, Maryland, Missouri, Michigan, New Jersey, New York, Pennsylvania, and Rhode Island. Cook county (Chicago), for example, with more than half of the population of Illinois, has only about thirty-seven per cent of the members of either house; and Wayne county (Detroit), with nearly forty per cent of the population of Michigan, has only seven out of thirty-two senators and twenty-seven out of one hundred members of the lower house.[1] Nor is this sort of discrimination always directed against a single populous city. Often it happens that urban districts, taken as a whole, are greatly under-represented in comparison with rural sections, especially when every county (or town), irrespective of size, is granted at least one member—as is the case in the lower house in Vermont and in the New Jersey senate.

Representation of social and economic groups

Nevertheless, despite oft-expressed opinions to the contrary, our state legislatures are probably fairly representative of the different social and economic groups existing in the states. Every degree of education is found, and in some legislatures the proportion of members who have had a high school, college, or university education is at times considerably larger than that prevailing among the people generally. Almost every profession is represented, and almost every conceivable business activity, although lawyers and farmers usually outnumber the members of other vocations. The majority are men in the prime of life, between forty and sixty years of age; although now and then a young man barely a voter, or an octogenarian, appears. Every phase and degree of political experience is represented also: "those who have been only voters, those who make politics a business; those who are ardent partisans, and those who are politically torpid; the conservative and the demagogue—all are intermingled in these representative bodies." Even foreign-born citizens have hitherto been well represented. And since the adoption of national woman suffrage, women legislators have appeared in increasing numbers.[2]

Suggestions for proportional representation

No one can successfully contend, however, that all shades of *political opinion* at present find representation in our legislative bodies. With few exceptions, senators and members of lower houses are chosen in small, single-member districts, with the candidate who secures a simple plurality of the popular vote winning the seat. In any district there is likely to be a large minority—even a majority when the votes are divided among the candidates of three or more parties—that has no spokesman of its point of view in the legislature; and in the aggregate such "unrepresented" elements in a state may be both numerous and important. A remedy often suggested is the adoption of proportional representation,

[1] Under a 1943 apportionment, New York City has less than forty-five per cent of the state's total legislative membership, although numbering 54.5 per cent of the total population and 53.4 per cent of citizen population—the primary basis of apportionment.

[2] On the personnel of state legislatures, see C. S Hyneman, "Who Makes Our Laws?," *Polit. Sci. Quar.*, LV, 556-581 (Dec., 1940), and W. B. Graves [ed.], reference cited on p. 554 below.

under which members of the two houses would be chosen from districts returning three, five, or even more, and seats would be allotted in accordance with the strength shown by the various parties at the polls, thus giving minorities a chance to win at least a few of the number. A Proportional Representation League has long urged adoption of such a plan for both state and local purposes; the successive groups of political scientists that have formulated and periodically revised the National Municipal League's "model state constitution" have consistently advocated the same thing; and some popular sentiment favorable to the scheme has been created. Its actual use in this country, however, has as yet been confined to a very limited number of municipalities.[1]

The Legislature's Powers

Earlier in this chapter, some hint was given of the scope, variety, and importance of state legislative activities. Nevertheless, one may pore over one's state constitution from beginning to end without discovering any list of the kind. For, in every state the legislature has all legislative power not granted elsewhere, not prohibited to states by the national constitution, and not expressly or impliedly withheld by the state constitution; and no comprehensive enumeration of its powers is ever attempted. To be sure, one will come across clauses in almost every constitution which expressly confer certain specific powers. But these direct grants are exceptional, and have been deemed necessary because of special circumstances—in some instances, in order to offset the effect of court decisions in interpreting general phrases in the constitution, such as "due process of law"; at other times, as a precaution against a possible future judicial denial of power. Outside of instances of this kind, however, the powers of the legislature are seldom specified; as a part of the general powers of the state, they are inherent, residual, and unenumerated.

The police power

One of these residual and inherent powers, however, deserves special emphasis, namely, the police power—"that vital power of the American state to legislate for the public welfare." More specifically, "it is the power of the state to restrict the individual's freedom of action, or free use of his property, in order to protect the health, safety, morals, good order, convenience, or general welfare of the state." In exercising this important power, the legislature may restrict the ordinary rights of liberty and property enjoyed by the individual in almost any manner and to almost any degree, so long as the federal Supreme Court is satisfied that such restrictions do not amount to a deprivation of life, liberty, or property without due process of law; and statutes based upon the

[1] For the election of members of her lower house, Illinois employs a scheme of "cumulative" voting, under which, with each district returning three members, a voter may concentrate all his three votes on a single candidate. The theory is that this will enable minorities to mass their strength on candidates they favor and so secure their election. The plan, however, has proved of doubtful value.

police power have multiplied in recent decades until they have become almost legion, with no end in sight.

Constitutional Restrictions Upon Legislatures

A distrustful attitude and its effects

Despite the fact that the legislature is an exceedingly useful organ in every state government, it is looked upon by many people as more or less of a necessary evil, which ought to be systematically curbed and checked; and constitution-makers have commonly taken the same view. Practically every state constitution adopted since the early nineteenth century has testified, in the number and variety of restrictions imposed upon the legislature's activities, to the unfortunate experiences of the past when legislatures had substantially a free hand. For the sins of past generations of lawmakers, many unoffending legislatures are today so hobbled and shackled as not only to prevent them from doing serious harm, but also to make it impossible for them to achieve the good which otherwise might result from their work.[1]

Indirect restrictions

In the earliest state constitutions, framed in a period of sharp reaction against strong executive power, practically no direct limitations were placed upon legislative activity. In later ones, however, especially in the West and South, one finds, in addition to provisions of the bill of rights guaranteeing fundamental personal and property rights against legislative impairment, a formidable array of specific restrictions—often freely incorporated, too, into the earlier constitutions by eventual amendment. Not only so, but, with fear of the executive subsiding and distrust of legislatures increasing, the governor has been given a veto on legislation in every state except North Carolina. In thirty-nine states, indeed, this extends to a veto of a part as well as of the whole of any appropriation measure, and in two states to a similar "item" veto upon all legislation whatsoever.

We have commented, moreover, on the growing tendency to withdraw specific matters, partially or completely, from legislative discretion by incorporating provisions concerning them into the lengthy constitutions of later days. And even where the withdrawal does not appear, on its face, to be complete, it may in fact become such through application of a doctrine of implied or resulting limitations which many courts have developed, and according to which every provision of a state constitution is to be construed as limiting legislative power *to the greatest possible extent.* In probably a majority of states, the upshot of this remarkable interpretation is that, whereas in theory the legislature has all legislative power not denied to it by terms of the national and state constitutions,

[1] Most of the express restrictions upon the states found in the national constitution (Art. I, § 10, and the Fourteenth Amendment), together with the implied limitations on the power of the states over foreign and interstate commerce, taxation, and bankruptcy, are, in practical operation, primarily restrictions upon the state legislatures. See Chap. v above.

It is not to be inferred that *all* of the restrictions about to be reviewed are undesirable. Some are both necessary and wholesome.

in practice it has tended to become a body having only strictly delegated powers, much like the municipal council described in a later chapter.[1]

Direct restrictions:

More direct restrictions about which a word can be said here have to do particularly with (1) financial matters, (2) the enactment of special, local, or private laws, (3) legislative procedure and the form in which bills must be enacted, (4) the frequency and length of legislative sessions, and (5) the use of the initiative and referendum.

1. Finance

Among financial limitations laid down in constitutions, one finds sections requiring all taxation to be uniform upon all kinds of real and personal property according to valuation, or else permitting classification of different kinds of property but requiring that the rate of taxation be uniform within each class; clauses forbidding the legislature to exempt counties, or other local governments, from their share of the state taxes, or to exempt persons or corporations from taxation; clauses prohibiting the appropriation of money to private or sectarian schools, or to religious institutions; and sections limiting the period for which appropriations may be made, and prohibiting extra compensation to any public officer, agent, or contractor, or the payment of any claim against the state not expressly authorized by law. All but three constitutions (those of Connecticut, New Hampshire, and Vermont) prohibit the loan or pledge of state credit to private enterprises or to local governments, or to both; and also forbid the state to subscribe to the stock of private corporations, or to assume the liabilities of individuals, associations, or corporations.

(a) General

(b) Indebtedness

Especially important are the constitutional limitations on the power of the legislature to incur indebtedness. Most states permit legislatures to authorize loans in only comparatively small amounts, and only in order to meet casual deficits or temporary emergencies, the usual amount permitted being $500,000 or less. Counties, cities, and other local governments in more than half of the states are similarly subject to constitutional debt limitations, with the legislature therefore incapable of extending their borrowing powers. Lastly, in all but nine of the states the governor has been given the right to veto, or to reduce, separate items in appropriation bills, as a further means of checking legislative extravagance; and inasmuch as the legislature is seldom able to overcome an executive veto or reduction, the device proves very effective.

2. Special legislation

Another group of restrictions has to do with "class legislation" and with local, special, or private laws, *i.e.*, laws which apply to, or are for the benefit of, some particular person, corporation, or locality, or which are not of general and uniform application throughout the state, or which do not apply to all persons or corporations included in some authorized classification. As a result of the evils arising in many states from lack of restraints at this point, most constitutions now contain provisions designed to prevent special legislation, or at all events to restrict the number and variety of special or local laws that may be enacted.

[1] See Chap. XLI below.

The most common ways of dealing with the problem of special legislation are: (1) to prohibit special, local, or private laws on any matters and in all cases which can be covered by a general law;[1] (2) to require that all general laws, or laws of a public nature, be uniform in their operation throughout the state; and (3) to list, in the constitution itself, subjects which may not be dealt with in special or local laws. Thus we find legislatures expressly forbidden to pass special laws granting divorces; locating or changing county seats; regulating county and township affairs; granting or amending corporate charters; and granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise. In many instances, these restrictions have had a salutary effect. Nevertheless, a great amount of special legislation continues to be enacted; for legislatures have found ingenious ways of evading the supposed restraints.

3. Legislative procedure

The constitutional limitations relating to legislative procedure and to the form in which bills must be passed are designed, for the most part, to guard against surprise, to secure reasonable deliberation and publicity, and to insure, in some degree, a sense of responsibility on the part of the lawmakers. Among restrictions belonging to this general class are clauses requiring (1) that all bills and their amendments be printed a certain number of days before final action is taken, although very often the rule is not observed in practice; (2) that every bill be read "at large," or at length, on three different days, although where all bills have to be printed this serves no useful purpose, consumes a large amount of time, and in actual practice is commonly disregarded; (3) that a yea and nay vote be taken on the passage of all measures, a rule which also is frequently disregarded;[2] (4) that no act embrace more than one subject, which shall be clearly indicated in the title; and (5) that statutes be not amended or revived by reference merely, but rather that all portions amended or revived be included in full.

4. Frequency and duration of sessions

In early days, it was customary to provide for annual elections and for annual sessions of the legislature; at present, however, legislators are elected every year only in New Jersey;[3] and only six states (Rhode Island, Massachusetts, New Jersey, New York, South Carolina and California[4]) have annual legislative sessions. In forty-two states, sessions

[1] Where the state courts hold that the legislature is the sole judge of whether a given situation can be covered in a general law, this kind of restriction naturally has proved ineffective.

[2] To save much of the time otherwise consumed in roll-calls for yea and nay votes, Alabama, California, Iowa, Louisiana, Michigan, Minnesota, Nebraska, Texas, Virginia, and Wisconsin have installed a system of electrical voting in one house or both.

[3] New York had annual election of members of the lower house until a constitutional amendment of November, 1937, lengthened the term to two years. In Massachusetts, biennial sessions were substituted for annual sessions by a constitutional amendment adopted in 1938; although in November, 1944, the voters decided upon a return to annual sessions. Alabama, in 1939, adopted an amendment providing for biennial sessions (beginning in 1943), in place of the former quadrennial sessions.

[4] Beginning in 1947.

are biennial, with the provision that special sessions may be called at any time. Furthermore, exactly half of the states (twenty-four) now limit, in one way or another, the period during which the legislature may sit. With variation from forty days in Wyoming to five months in Connecticut, the most common limit is sixty days or thereabouts, which is the rule in some twenty states. In a few other states, there is no absolute limitation; but after the expiration of a certain period the legislators receive no pay, or their compensation is at a reduced daily rate. In general, these latter restrictions, it is hardly necessary to add, arise from a desire to compel legislators to perform their work with dispatch, and from a hope, too, of reducing the quantity of poor legislation, and of saving the state from the evils of over-legislation generally. Extended experience, however, has clearly and repeatedly demonstrated their futility; and at some points, *e.g.*, the sixty-day limitation upon sessions, they are inherently undesirable.

The Statutory Initiative and Referendum

Two "guns behind the door"

To the foregoing may be added one other form of restriction upon legislatures which, because of its significance, may be given somewhat fuller attention, namely, constitutional provisions under which legislative functions are to some extent taken out of the hands of the legislature and vested directly in the people. Two devices (usually but not invariably going together) are employed for the purpose—(1) the referendum, under which the voters can veto measures passed by the legislature if they find them objectionable, and (2) the initiative, under which they can instigate and bring to decision measures which the legislature appears unwilling or unable to enact. Both, of course, are expressions of a lack of complete confidence in legislative bodies. Both are designed, not for purposes of legislation generally, but as "guns behind the door," presumably to be used only when the legislature fails to satisfy public demand.[1]

South Dakota, in 1898, became the first state to adopt the initiative and referendum for ordinary legislation; and since that time nineteen other states have taken a similar step, the last one to do so being Massachusetts in 1918. In addition, Maryland and New Mexico have the referendum only. In Mississippi, however, the amendment authorizing direct legislation was declared invalid in 1922 by the state supreme court, and accordingly today (1947) the system (either referendum only or both) is actually in operation in a total of twenty-one states.[2]

[1] Between 1900 and 1929, inclusive, a total of 272 statutory proposals were submitted to the voters under the popular initiative. Of this number, about one-third (91) were approved. During the same period, the statutory referendum was invoked 199 times, resulting in popular rejection of 129 measures, or about sixty-five per cent. For these figures, we are indebted to Mr. Judson King, director of the National Popular Government League. It should be emphasized that the initiative and referendum here referred to relate to *statutes* only, not to constitutional amendments and revisions.

[2] The list, in chronological sequence, is as follows: South Dakota (1898), Utah (1900, 1917), Oregon (1902), Nevada (1904), Montana (1906), Oklahoma (1907),

Forms of the referendum

Initiative and referendum arrangements vary considerably, yet a general characterization of them is not difficult. In the first place, referenda may be either optional or obligatory. An optional referendum takes place when the legislature, desiring an expression of popular sentiment upon an act that it has passed, stipulates that the measure shall not go into effect until it shall have been approved by the voters at an election; or the legislature may leave districts or counties to determine, each for itself, whether a certain law shall apply to them. This use of the referendum, not uncommon before 1898, may occur anywhere. The referendum which we here have in mind, however, is rather of the obligatory or mandatory type, and independent of the legislature. Where it prevails, provision is usually made for suspending all ordinary legislative enactments for a certain period (usually ninety days),[1] in order to give the people of the state an opportunity to scrutinize the work of their lawmakers. If during the interval a prescribed number or percentage of voters (most commonly five per cent) decide that a given measure is undesirable, they can, by filing a petition, prevent it from taking effect until it has been submitted to the voters and endorsed by some stipulated number or percentage thereof.

Procedure under the initiative

The initiative may be invoked whenever any considerable number of people believe that the legislature has failed to enact necessary or desirable laws. A citizen or group of citizens may, with or without the assistance of lawyers, draw up a bill designed to meet an alleged need. This done, the next step is to obtain the signature of a specified number of voters (usually five or ten per cent of the total) to a petition requesting that the bill be enacted into law. The petition is filed with the proper authority, and then either one of two courses is taken, according as the law of the state prescribes. One is called the direct initiative; the other, the indirect initiative. Under the direct initiative, the proposed measure is submitted to the people at the next regular election or at a special election, without being previously presented to the legislature. Under the indirect initiative, the bill must be submitted to the legislature at its next session; and if that body acts favorably upon it, it becomes law without the necessity of a referendum.[2] If the legislature fails to act favorably, the bill is referred to the people and becomes law if approved by the required vote. In most states, the legislature is not permitted to amend a bill originating under the popular initiative, but in some it may put before the people a rival or substitute measure; and the governor has no

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Maine (1908), Missouri (1908), Michigan (1908), Arkansas (1910), Colorado (1910), California (1911), New Mexico (1911), Arizona (1911), Idaho (1912, 1933), Ohio (1912), Nebraska (1912), Washington (1912), North Dakota (1914), Maryland (1915), and Massachusetts (1918).

[1] Except that certain measures, designated as emergency acts, are likely to be exempted.

[2] Voters who disapprove of an act passed by the legislature under the initiative may invoke a referendum upon it, by compliance with the rules applicable to bills originating in the legislature.

power to veto any measure passed by use of the initiative and referendum.[1]

Arguments for direct legislation

The arguments for and against the initiative and referendum have been set forth fully in many places. In summary, the chief advantages alleged are: (1) the system gives the electorate an affirmative and negative check upon the legislature, the need for which has long been felt in many states, especially in those in which political "machines" or special interests have dominated the legislature; (2) it tends to stimulate popular interest in the work of the legislature, for the electorate is directly responsible if laws are unsatisfactory;[2] (3) it tends to reduce legislative corruption, because the legislature's decision on proposed laws is no longer final—only the finality of that decision having made it worth while to resort to corrupt methods to influence legislative action; (4) inasmuch as the people are given the final word as to what shall be law, many existing constitutional limitations on the legislature may safely be relaxed or repealed altogether; (5) constitutions in many instances may also be considerably shortened by the omission of articles dealing in detail with subjects which were purposely placed beyond reach of the legislature at a time when there was no opportunity, such as the initiative and referendum afford, to reverse or to supplement unsatisfactory legislative action.

Objections to it

Of the numerous objections to the two devices which have been advanced, the more weighty are the following: (1) the average voter is incapable of voting intelligently upon matters of legislation; (2) the system is, at best, "a calling for the yeas and nays, not for a full expression of opinion," and it assumes that voters are ready and able to give an unqualified "yes" or "no" to any question of public policy referred to them; (3) by failing to arouse interest among numerous citizens, the system often results in the enactment of laws by a minority of the voters; (4) the electorate is often put to the needless trouble and expense of passing upon questions which, although unimportant, may be forced upon the attention of the public through the activities of small organized groups; (5) efforts to obtain petition signatures for legislative measures are sometimes attended by irregularities and fraud; (6) where the initiative and referendum may be used both for constitutional amendments and for ordinary legislation, the system places the fundamental civil and political rights of minorities at the mercy of temporary majorities at the ballot-box; (7) the system tends to break down the quality of legislatures by weakening the sense of responsibility on the part of the individual member for what is enacted or fails of enactment, since, with

[1] In some states, *e.g.*, Massachusetts, additional signatures to the initiative petition are required in order to bring the measure to a popular vote after it has failed to pass the legislature.

[2] In some of the states having the initiative and referendum, "publicity pamphlets" are provided for, containing exact copies of all measures referred to the voters, together with such arguments pro and con as interested persons may care to advance. Copies are mailed by some state official to all of the voters before each election.

the initiative and referendum, the electorate may correct any misinterpretation of its wishes; (8) the system tends to aggravate the burdensome and confusing task already imposed upon the voters by requiring them, in addition to selecting large quotas of public officials, to pass upon any number whatsoever of legislative proposals that may be submitted on the same ballot; (9) the scheme may be misused by a minority party in the legislature to prevent the principal laws enacted by the majority party from taking effect, as happened in Missouri in 1921-22.

A useful device, but not a panacea

Space does not permit pointing out in detail how some of these objections might apply with equal force to the submission of constitutions and constitutional amendments to popular vote; or how others also apply to laws enacted in the usual way by the legislature acting alone; or how still other grounds of objection might be removed by improving the details of initiative and referendum procedure, or by withdrawing certain subjects from the operation of the initiative and referendum altogether, as has been done in Massachusetts. It must be remembered that the system of direct legislation, as now employed in connection with state lawmaking, is designed primarily to weaken the influence of bosses, machines, and special interests, such as have dominated many a state legislature at one time or another, and often for long periods. As a remedy for such situations, the plan is not infallible, any more than is the Australian ballot or the direct primary. Nevertheless, to many people it seems the best expedient available at the present time for vetoing or supplementing the acts of a legislature which proves to be, not a representative, but a misrepresentative, lawmaking body.

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CHAPTER XXXIV

THE LEGISLATURE—ORGANIZATION AND WORK

Machinery and Procedure

Every state legislature is, in general, free to organize itself in whatever manner it chooses and to carry on its work under rules of its own making. Naturally, there is variation from state to state; yet in their larger aspects organization and procedure are everywhere much the same, mainly because of the inevitable tendency to follow the example of Congress. The presiding officers of the two houses, the committee system, the handling of bills and resolutions, the rules of debate—all show the profound influence of the federal example. In the lower house, the presiding officer is, as in the House of Representatives at Washington, a speaker; and, like his national prototype, he is elected by the entire house after being first agreed upon by the majority caucus. In most upper houses, the lieutenant-governor presides, after the manner of the vice-president in the United States Senate; elsewhere, a president of the senate is elected by the members of that body from among their own number. These presiding officers exercise substantially the same influence and authority over the proceedings of their respective houses that are exercised by the speaker and vice-president in Congress; and the other members of the legislature enjoy about the same privileges and immunities as members of Congress. Each house also chooses a clerk, a chaplain, a sergeant-at-arms, and other officers and attendants,[1] and is required to keep and publish a record or journal of its proceedings.

Committee systems

In every legislature, each house is subdivided into standing committees for the more effective consideration of the large number of measures introduced;[2] and the power to assign members to such committees is

[1] Not infrequently, spoils considerations lead to "padding the payroll," *i.e.*, increasing the number of legislative employees out of proportion to actual requirements.

[2] Bills are assigned to appropriate committees by the presiding officer in each house, although his action may be overruled by the house and the bill sent to another committee. A different procedure, however, is followed in Ohio. See R. Baker, "The Reference Committee of the Ohio House of Representatives," *Amer. Polit. Sci. Rev.*, XXXIV, 306-310 (Apr., 1940).

The following are the usual steps in the enactment of a bill, although slight variations are found in different states:

(1) Introduction by any member or by a committee. A member either rises in his place and asks permission to introduce a bill (permission is never withheld) or merely files the bill at the clerk's desk;

(2) First reading, generally by title only, followed by an order for printing copies for the use of members, and by reference to a committee;

exceedingly important, as affecting both the fortunes of legislators and the fate of bills. Appointment to senate committees is made by the lieutenant-governor in fifteen states, by the president or president *pro tempore* in nineteen states, by the senate as a whole in nine states, and by a committee on committees in five states—California, Montana, Nebraska, North Dakota, and Vermont. In the lower house, the power of committee assignment rests with the speaker, except in Oklahoma, where a committee on committees is utilized, and in Nebraska, where in the single house existing this same plan prevails. Whatever method of appointment is employed, the dominant party almost invariably has a majority on each committee. Senate committees vary in number from less than twenty in seven states to more than forty in twelve states—South Dakota, with fifty-six, having the largest number. House committees number fewer than twenty in five states, and more than fifty in ten states, Oklahoma and Kentucky leading, with sixty-seven and seventy-five respectively. Where the number runs beyond twenty or thirty, some are certain to be useless.

Joint committee plan

In Massachusetts, Connecticut, and Maine, the bulk of legislation is handled by a system of joint committees made up of members of both houses; and this arrangement has several distinct advantages over the dual system. In particular, it avoids the duplication and delay more or less inevitable when the same measures are handled by two committees, and it reduces the tendency to shift responsibility from one house to the other.[1]

Defects of committee systems:

1. Excessive number

In most states, the number of committees is considerably larger than the efficient handling of legislative business requires, having as a rule been determined more by petty personal and political considerations than by the necessities of good procedure. The disadvantages of too many committees are obvious. In the first place, each member is required to serve on more committees than he can actually give time to; in the Illinois senate of 1931, each member belonged, on an average, to eighteen committees, and in the Georgia house, to thirty-five. Furthermore, too many committees means reference to different committees of inter-

(3) Consideration in committee, followed by a favorable or adverse report to the house;
(4) Second reading at length, with opportunity for debate and amendment;
(5) Third reading, with some further opportunity for debate and amendment, followed by the final vote on the perfected bill;
(6) Transmission to the other house, where practically the same routine is followed;
(7) Appointment of a conference committee to adjust differences between the two houses;
(8) Adoption of the report of the conference committee in each house;
(9) Submission of the bill as enacted to the governor for his approval or veto;
(10) Return of the bill, if vetoed, to the house in which it originated; if passed by the requisite majority, it goes to the other house for similar action.

[1] In 1945, some joint committees were found in Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Rhode Island, and Virginia. In these states, however, they are employed on a far smaller scale than in the three other states named above.

related matters which could more satisfactorily be handled by a single committee.

2. Excessive size

Further defects of existing committee systems can be mentioned only briefly. Committees are often so large as to make them unwieldy, thus throwing undue power into the hands of the chairmen or of sub-committees. In recent years, the largest have been found in the lower house in Georgia (seventy-five members), Illinois (fifty-eight), Iowa (fifty-four), and Pennsylvania (fifty-two), and in the Illinois senate (fifty-one).

3. Other faults

Another serious shortcoming in most states is the secrecy—at all events, lack of publicity—and the irresponsibility surrounding committee sessions. Few states require committees to publish notices of the times and places of their meetings; or to maintain public calendars of all committee meetings and hearings; or to keep and publish minutes of all proceedings; or to open all sessions to the public. In the great majority of states, furthermore, the two houses have insufficient control over their committees, one of the results being the frequency with which committees indefinitely retain, and thus smother, measures referred to them—a situation at its worst in certain states where "graveyard" committees are deliberately maintained with a view to pigeon-holing and killing measures that the legislative machine does not want to see passed. There are features, too, of the operation of the committee on rules, the "steering" committee, and the conference committees[1] which enable these agencies to become autocratic and irresponsible masters of legislative proceedings, especially in the last crowded days of a session. And finally, the committee system in many legislatures needs reorganization to bring about closer and more harmonious relations among all committees which in any way, directly or indirectly, have to do with financial legislation. Almost all legislatures have several committees simultaneously dealing with such matters, each house having its separate set of such committees, and each such committee and set of committees working more or less independently of, and even in rivalry with, the others. As a result, our legislatures have long had a reputation for wastefulness and extravagance.

Rules of procedure

Most of the older states more or less deliberately copied the congressional procedure in operation at the time of their admission into the Union; and the newer states have commonly adopted *en bloc* the body of rules in operation in some near-by state, rarely venturing upon any experiments of their own. Once adopted, the rules are seldom changed.

[1] As in the federal Congress, conference committees are appointed by the respective presiding officers of the two houses when a bill originating in one house has been changed during its passage through the other. It is customary, too, to appoint on such committees, in addition to other members, the chairmen of the house and senate committees which have had the bill in charge. Conference committees endeavor to reach a compromise on the points of difference between the two houses, and if they are successful, the measure as reported almost invariably passes both houses without further debate.

Legislators who would not hesitate a moment to propose drastic changes in statute laws, or in the organization of the administrative branches of the government, commonly display little or no originality, courage, intelligence, or perseverance in introducing and insisting upon changes in the rules governing the proceedings of their own body. These rules should be such as to expedite business, to insure adequate consideration of measures both in committees and on the floor of the two houses, to give a fair opportunity for all elements to be heard in debate, and to secure publicity and responsibility at every stage of the lawmaking process. In few states, however, have rules been adopted with these ends primarily in mind.

Congestion of business at end of a session

Almost everywhere, a great deal of time is wasted in the early part of a session, or at best is consumed in organizing, in making committee assignments, and in gaining familiarity with the complicated rules. Moreover, the legislature is rarely in session more than four days a week. During this time, most of the work is being done by the various committees; and comparatively few states have rules compelling committees to report within any specified period on bills assigned to them. The result is a most unseemly crowding of business into the last two weeks or ten days of a session, during which the houses work overtime, and often amid the most demoralizing confusion.[1] That such congestion may be reduced to a minimum is proved by the experience of Massachusetts, where the rules have been carefully devised with a view to obtaining prompt consideration of measures, and where a joint committee system has contributed greatly toward the achievement of that result.

Aids to Legislation

Most legislators not experts

None of our state legislatures can by any stretch of the phrase be called a body of experts on either the form or the substance of legislation. Members come from all walks of life and ordinarily give only a few months once in two years to the business of lawmaking. Apart from the lawyers, who generally form the largest single group, few have had training or experience which in any degree especially qualifies them to frame laws. Most of the members at any given time, too, have had no previous legislative experience. Rarely does it happen, as in California in 1937 and 1939, that a majority in each house have served in former legislatures; far more commonly, only a third or a fourth of the members have ever been in the legislature before.

Bills commonly drafted outside of the legislature

This lack of special qualifications for the more technical side of lawmaking is, however, not so serious as might be supposed; for, contrary to popular assumption, comparatively few measures are drafted by the legislators themselves. The great majority are prepared rather by lawyers

[1] One legislature which was in session four months, and in that time passed over 800 bills and resolutions, enacted half of this number in the last fifteen days, at an average rate of almost thirty a day, an even hundred being passed on the last day.

on the outside, employed for the purpose by private individuals, associations, committees, or corporations, or by county, municipal, or other local-government bodies; or they are put in shape by some principal state executive officer or his subordinates. Bills drawn by one or another of these agencies may be formally introduced in the legislature by any member; and a member who renders this service may assume responsibility for a measure which he presents, or he may expressly disclaim all responsibility for it by saying that he merely introduces it "by request." Unfortunately, no effective limit is placed upon the number of measures which individual members may introduce, and no satisfactory way has yet been devised of checking the avalanche of proposals which descends biennially in practically every state.

Bill-drafting bureaus

To meet the ordinary legislator's need for assistance on the technical side of lawmaking, a considerable number of legislatures have created a bill-drafting bureau, often in connection with a legislative reference library, although in other instances entirely distinct; and where this has been done, every member is privileged to avail himself as much as he likes of the assistance which this bureau, through its experts in bill-drafting, can render in putting his ideas into proper form for enactment into law.

Sources of information:

Far the greater portion of the legislator's working time is spent in studying, and making up his mind upon the merits of, bills prepared in one or another of the ways mentioned. If he is industrious and conscientious, he may acquire the information requisite for intelligent action in one or more of several different ways. First, he may turn to the legislative reference library or bureau, where he will find that a trained staff has collected and carefully indexed for ready reference a large amount of useful material pertaining to almost any subject likely to come up during a session. The extent to which members avail themselves of this resource naturally varies widely from state to state, and from legislature to legislature in the same state, and some members probably make no use of it whatever. Nevertheless, there is great advantage in having such an institution at hand for the use of those who care to resort to it.

1. Legislative reference libraries

2. Reports of special commissions

Special *ad interim* commissions are not infrequently authorized by the legislature to investigate difficult and complicated problems and report their recommendations at a later session; and reports of such commissions—dealing with taxation, the reorganization of the administrative agencies of the state government, revision of the election laws (to mention only a few possible subjects)—have in recent years proved important aids to intelligent legislative action in more than one state.

3. Committee hearings

Still another channel through which legislators may acquire useful information concerning pending measures is public hearings at which arguments for and against a bill are presented to the committee having the measure in charge by private individuals, either in person or by attorney, and by private and public corporations through their officers or other representatives.

4. Executive and administrative officials

The great bulk of state legislation has to do with work carried on by the state and local governments, and in the last analysis most of the information which members need in order to act intelligently on matters relating to such work must come from the officers, boards, and commissions actually performing it. On the other hand, the administrative authorities depend upon the legislature for power and for funds. And this interdependence points forcefully to not only the desirability, but the necessity, of close coöperation between the legislative and administrative branches if either is to do its work effectively. Unfortunately, whatever connection and coöperation exist today between them has usually to be achieved in roundabout ways; and the situation is likely to continue until legislatures adopt rules permitting the governor and other executive officers of the state to prepare and introduce measures relating to their respective offices or departments, and giving such measures a favored place on the legislative calendars—and until legislatures adopt rules permitting and requiring the governor and other state executive officers to appear on the floor of either house to explain and defend their requests for appropriations or for other legislation.[1]

Legislative Leadership

Various sources

In bodies as large and unwieldy as are most of our state legislatures, leadership not only is needed, but is bound to arise in one form or another. Inasmuch as legislative bodies nearly everywhere are elected and organized along party lines,[2] a varying degree of leadership is likely to appear in the party legislative caucus, usually dominated by a small group of older and seasoned members familiar with the rules and skillful in influencing their fellow-members. In this group, the speaker of the house and the president *pro tempore* of the senate are almost certain to be included, because of the strategic position which they hold in the legislative organization. Sometimes leadership is assumed mainly by the committee on rules, or by the steering committee, especially in the last crowded days of a session; or, less frequently, by the chairman of the appropriations committee and the chairmen of a few other committees. But in not a few instances the actual leadership has been found entirely outside of the legally chosen lawmaking body, being wielded by unofficial and irresponsible party chiefs; and when this happens, the legislature is commonly said to be "boss-ridden" or "machine-controlled."[3]

[1] Under a constitutional amendment adopted in New York in 1927, the governor has a right to appear before either house of the legislature or before a committee when the budget is under consideration; and, on the other hand, either house or a committee may at any time request the governor or a department head to appear before it.

[2] Exceptions are to be noted in the cases of Minnesota and Nebraska, where the members are elected on a non-partisan ticket.

[3] An admirable picture in fiction of a boss-controlled legislature (in New Hampshire) is to be found in Winston Churchill's *Coniston*. Essentially the same picture might have been drawn for the Pennsylvania legislature in the time of Quay and during the early years of the Penrose domination.

Executive leadership

There is, of course, a possibility of legislative leadership being supplied by the governor, as it often is by the president in the national government; and many governors have proved effective at this point, especially in connection with legislation to which they committed themselves at the time of their election, and with legislation having to do with finance.[1] Much depends, however, upon the energy, skill, and aptitudes of the individual chief executive, as well as upon the general party situation; and such leadership as comes from this source does not, except in rare instances, completely meet the need. As a result, systematic and comprehensive programs of legislation are seldom framed in advance, and measures for the most part are considered piecemeal and not in any logical sequence or relationship.

Legislative councils

One thing preëminently required by the situation is a greater amount of deliberate and intelligent legislative planning, not only during a session but before a session begins; and to furnish such planning, a dozen states, beginning with Kansas and Michigan in 1933, have adopted the device of a legislative council (or a comparable agency), consisting usually of from five to ten senators and from ten to fifteen members of the lower house. Canvassing the legislative needs of the state, preparing the way for and recommending important bills, employing experts for special studies and publishing their reports, such an agency may serve the legislature and the state with great effectiveness, and without encroaching unduly on the regular committees. Results have varied, but in most states that have adopted the plan (notably in Kansas) a high degree of usefulness has been attained.[2]

Some Conditions Under Which the Legislature Works

The volume of business

The need for leadership, whether from within or without legislative halls, becomes the more obvious when one takes into account the deluge of bills and other proposals biennially bursting upon most of our state legislatures. The total of projects for forty-two legislatures meeting in 1939 was 57,925. The number is not always so large; yet it is rather an exceptional session in any state that does not call forth at least a thousand. Of course, the vast majority of these measures never receive consideration on the floor of either house, but die in committee, unwept and unsung. Notwithstanding this high mortality, however, the number of bills of all sorts that finally pass both houses and become laws is enormous (15,867 in 1943); and in the volume of "session laws" that appears

[1] The governor also sometimes exerts much influence upon the selection of presiding officers in the legislature, and upon the assignment of members to the more important committees.

[2] The "model state constitution" sponsored by the National Municipal League provides for a legislative council of from seven to fifteen members charged with (1) collecting information concerning the government and general welfare of the state and reporting the same to the legislature; (2) considering, and reporting to the legislature on, proposed legislation submitted to it; (3) recommending legislation on its own account; and (4) performing such other functions as the legislature may assign to it. Members of the council are to receive additional compensation.

shortly after a legislature adjourns one is certain to find a curious intermixture of crudely drawn measures of only ephemeral importance, and often of little more than local significance, and, on the other hand, carefully drawn enactments of permanent value to the state as a whole, and to the nation; for in many instances state legislation has had an important influence upon national laws.

Lobbying

In an earlier chapter, attention was called to the regrettable absence, much of the time, of deep and sustained popular interest in the work of Congress. Popular indifference is perhaps even more noticeable in the case of our state legislatures; and essentially the same reasons may be offered in explanation. Special interests with selfish ends to serve, and, on the other hand, well-meaning and public-spirited hobby-riders, maintain no end of interest in legislative work. Often they descend upon the state capital like a cloud of locusts, and exert an influence upon the legislative output quite as important and far-reaching as that of the congressional lobby. At all events, the lobby is probably everywhere the most powerful of all influences shaping state legislation. The term need not imply the corrupt use of money, or indeed any improper motive or conduct. On the contrary, it often happens that where the lobby is most industrious, numerous, and successful, corruption is wholly absent; lobbying is often of great educational value to legislators personally unacquainted with the merits or defects of pending bills. There are, in fact, two well-defined classes of lobbyists. The first consists of perfectly honorable men and women who adopt open-and-above-board methods of influencing members. The other is composed of the "harpies and vultures of politics," consisting usually of paid attorneys of corporations and including many former members of the legislature who understand the inner workings of the legislative machinery. It is this second class, very largely representing special interests and employing means more or less corrupt, that gives the lobby a bad name; it is perhaps the chief cause of undesirable legislation and of the defeat of measures framed to promote the public well-being. Some attempts have been made to regulate lobbying activities by legislation in New York, Massachusetts, Wisconsin, and certain other states. Comparatively little, however, has been accomplished; and the problem remains one of the most baffling in the field of American government.[1]

[1] Evidently influenced by the self-improvement efforts that have manifested themselves in Congress (see Chap. XVII above), twenty-odd states have of late given some attention to the need and possibility of improving state legislative organization and methods, although no far-reaching reforms have as yet been adopted. See J. A. Perkins, "State Legislative Reorganization," *Amer. Polit. Sci. Rev.*, XL, 510-521 (June, 1946), and J. W. Lederle, "New York's Legislature Under the Microscope," *ibid.*, XL, 521-527 (June, 1946). For the study and encouragement of state legislative improvement, the Council of State Governments maintains a Committee on Legislative Processes and Procedures, and the American Political Science Association, a Committee on American Legislatures. Late in 1946, the former presented (in pamphlet form) a significant report making recommendations on sessions, terms, committees, hearings, legislative aids, rules, local and special legislation, and other matters.

The Need for Uniform State Laws

With forty-eight legislatures operating as so many separate laboratories or experiment stations, it is not surprising to find the same subjects, even those of first-rate importance, sometimes dealt with in forty-eight different ways. In many instances, this diversity is not a bad thing, and in some cases it seems unavoidable. Whenever, for example, new problems arise suddenly and demand immediate legislative solution, each legislature is obliged to blaze its own way. Experience finally may show that one state has been peculiarly successful in dealing, for example, with workmen's compensation, or the sale of fire-arms, or get-rich-quick concerns; whereupon its laws on those subjects are likely to be extensively copied by sister states. But while in many instances the absence of uniform laws is a fact not to be deplored, there are numerous matters upon which a high measure of uniformity is not only desirable but of really great importance. For there is a broad legislative field of common interest to the people of all of the states, yet over which the federal government has no control, despite the remarkable expansion of its power over interstate commerce and other matters as described in earlier chapters. The regulation of social and commercial relationships, for example, falls mainly to the separate states; and the absence of substantial uniformity would quickly lead—indeed has already led in repeated instances—to confusion, and perhaps chaos. Laws governing the making and enforcement of ordinary business and insurance contracts obviously call for uniformity throughout the nation. Uniform laws are needed also to prevent the legal tangles that arise in determining the status of individuals and of property as affected by divorces and subsequent remarriages. When the same act is treated as a felony in one state, as a misdemeanor in another, and is not punishable at all in other states, uniformity in the definition of crimes would hardly be amiss. Highly advantageous, too, would be uniformity in motor-vehicle laws, in laws governing the licensing of legal and medical practitioners, and in laws regulating the production of oil. In many fields, furthermore, it is desirable to have substantial uniformity not only as between state, but also as between state and national, laws—for example, in air-traffic regulation.

To a rapidly increasing extent, state and federal laws are being brought into line, especially under operation of the grant-in-aid system. To an appreciable extent, also, uniformity of state laws is being promoted by interstate compacts dealing with matters of concern to two or more states. The most effective agency serving the cause in a direct way is, however, a National Conference of Commissioners on Uniform State Laws, composed of commissioners (usually three) from each of the states, the District of Columbia, and each of the territories and major dependencies, and comprising lawyers of standing and experience, together with mem-

Commissioners on uniform state laws

bers of law-school faculties, all serving without pay. Since the Conference began its work, about 1890, it has drafted and recommended to the states approximately one hundred "uniform acts," although many have become obsolete, so that at present the commissioners are recommending sixty-two. Progress toward uniformity through separate state action is necessarily slow; nevertheless, much has been achieved.[1] Even the adoption of numerous uniform statutes by every state in the Union would not, however, insure complete uniformity; because, in the first place, laws on many subjects would, and should, continue to be formulated by states independently, and, in the second place, even the "uniform" laws would be subject to perhaps widely differing judicial construction from state to state, and also to differing interpretations by administrative officials charged with enforcing them. The most that can be hoped for, therefore, is a gradual approach to over-all uniformity in those particular (but numerous) fields of legislation in which diversity gives rise to interstate difficulties or embarrassments, for either governments or people.[2]

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[1] Only one proposed act—a Uniform Negotiable Instruments Act—has been adopted by all forty-eight states, but a Warehouse Receipts Act has been adopted by all except South Carolina, a Narcotic Drug Act by forty states, a Stock Transfer Act by thirty-nine, and a Veterans' Guardianship Act by thirty-five. Only thirteen of the acts proposed have been adopted by as many as half of the states.

[2] National defense and war programs emphasized anew the need for uniformity in many fields of state legislation, as well as for coördination with national laws and regulations. Since 1941, a drafting committee of the Council of State Governments and a federal-state relations section of the federal Department of Justice have actively coöperated in drafting numerous proposals for state wartime and postwar legislation for presentation to state legislatures for enactment. *State Government*, XVIII, 10-12 (Jan., 1945).

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CHAPTER XXXV

THE STATE EXECUTIVE

Executive and administrative offices and agencies

To carry into effect public policy which has been enacted into law, and to perform other duties prescribed by the constitution and the statutes, two main types of state agencies are everywhere provided. The first is found in the offices of governor, lieutenant-governor, secretary of state, auditor or comptroller, treasurer, attorney-general, and superintendent of public instruction—offices created as a rule by the constitution, and commonly referred to as the "state executive offices." The second type takes the form of newer boards, commissions, and offices, established ordinarily by statute, and usually known as the state administrative organs or agencies. Functionally, there is no sharp distinction between the two groups; and often enough the entire round of activities carried on by the non-legislative and non-judicial parts of the state government are referred to broadly as "state administration." Nevertheless, it will make for clearness if we first take account of those offices that are essentially executive, and reserve the administrative services proper for treatment in a later chapter.

The Governor

Colonial origins

No one needs to be told that the most important executive officer of a state is the governor. Every colony in the days before the Revolution had a governor; and, notwithstanding popular dislike of the power which that official wielded, every one of the new state constitutions provided for a continuance of the office, albeit with authority considerably curtailed. The organized territories of later times had governors, and all carried over the office into their state organization as a matter of course. In only two of the colonies (Connecticut and Rhode Island) was the governor elected, even indirectly, by the people; and in a majority of the original thirteen states he was chosen by the legislature. The plan of popular election, however, gradually won its way, and nowadays it prevails in every one of the forty-eight states.[1] Candidates are nominated either in state-wide direct primaries in which every properly registered voter of each party is entitled to participate, or by state conventions made up of delegates selected by the members of each party in such subdivisions as counties and congressional or legislative districts. Ordinarily, a plurality elects, although in a few states, *e.g.*, Vermont and

Election

[1] Except with some qualification in Mississippi, where popular election is combined with legislative action.

Georgia, a majority is required; and in these two states, provision is made for choice by the legislature if no candidate wins a majority of the popular vote.

Qualifications, salary, and term

All state constitutions require the governor to have certain qualifications. He must in any case be a citizen of the United States; and in all but a few states he must be at least thirty years of age (the actual average is about fifty-one). Usually he must have resided in the state for a period of five years. His compensation is either fixed in the constitution or left to the discretion of the legislature, the present range being from $3,000 a year in South Dakota to $25,000 in New York, with an average of about $8,000. In twenty-six states, the term is fixed in the constitution at four years; in twenty-one others, at two years; while New Jersey elects every three years. In the newer constitutions, the tendency is to shift from the two-year to the four-year term, as was done in New York in 1937, in Georgia and Alabama in 1941, and in Idaho in 1944. As a rule, the governor is eligible for immediate reëlection, and for reëlection any number of times; but in Indiana, Pennsylvania, and a few other states he may not serve two consecutive terms.

Removal

The governor and other principal state officers may be removed by impeachment. The power, however, is seldom exercised; in point of fact, only thirteen governors have ever been impeached. Five impeachments occurred in the South during the Reconstruction period: one governor was removed from office, one resigned to avoid removal, and in the other cases the charges were dropped. In the North, two governors were impeached during the same period, one being acquitted and the other removed from office for embezzlement of state funds. More recent instances include the impeachment of Governor Sulzer of New York in 1913, of Governor Ferguson of Texas in 1917, and of Governors Walton and Johnson of Oklahoma in 1923 and 1929, respectively—all of whom were removed from office. In 1929, Governor Huey Long of Louisiana was impeached. Before the trial had progressed far, however, the case was dropped. In 1935, Governor Moodie of North Dakota was impeached, but before the trial began, the supreme court of the state decided that he was ineligible for the governorship by reason of insufficient residence in the state; whereupon he was succeeded in office by the lieutenant-governor, and the impeachment proceedings ended. In twelve states, a more expeditious method of removing state officers is supplied by the popular recall. To 1947, however, this device was brought to bear against only one governor.[1]

In case of the governor's death, resignation, removal, or protracted absence from the state, the lieutenant-governor, in two-thirds of the states, succeeds to the office—except that when the governor has been recalled, his successor naturally is the rival candidate who polled the highest popular vote at the recall election. When the lieutenant-

[1] Governor Frazier of North Dakota, recalled in 1921.

governorship is vacant, or where that office does not exist, the succession follows some order laid down in the constitution or in a statute, with the president of the senate usually succeeding.

The Governor as an Executive

Contrast with the president

Like the president of the United States, the governor of a state is first of all an executive. Whereas, however, the federal constitution bestows on the president *the* executive power, *i.e., all* such power,[1] state constitutions invariably assign to the governor only *supreme* or *chief* executive powers, implying that there is other executive power besides that which he possesses. And the difference is fundamentally significant; because whereas the president can wield all power that can legitimately and constitutionally be read into the term "executive," the governor has little or no executive power except that with which he is expressly endowed, enjoying little or no inherent authority derived from the fact that he is the *chief* executive of the state. State constitutions, indeed, frequently say, in so many words, that the executive branch of the government shall consist of the governor, lieutenant-governor, and various other officers mentioned by title, with the governor assigned only a certain primacy within the group of officials with which he is bracketed. And the upshot is—with the courts commonly construing grants of power in state constitutions rather literally and narrowly—that the governor's position is decidedly weaker than that of the president, and his control over the administration of affairs correspondingly less impressive. From this, too, flows a lack of integration and coöperation which is perhaps the most conspicuous and unfortunate feature of state government in our times.

Lack of adequate control over his subordinates

To be sure, the governor is commonly charged with seeing that the laws are faithfully executed. But the set-up is such that in carrying out this mandate he must rely largely upon subordinates—chiefly the other state executive officers (generally chosen by popular vote), the locally-elected sheriffs, prosecuting attorneys, and city officials, and the also locally elected judges of the various state courts—over whom he has little direct and effective control. Properly to live up to the constitutional injunction, he should (1) be given a free hand in selecting at least some of these subordinates, (2) be able to supervise and direct them in the performance of their duties; and (3) be empowered to suspend or remove an official proving incompetent or unfaithful. Unfortunately, in no state is the governor given any such full and effective means of control over these law-enforcing agencies. Chosen independently of the governor and for fixed terms, the principal executive officers may fail completely to cooperate with their nominal chief, causing embarrassment for him and discord and friction in the administration of the state's affairs. Especially

[1] Even in confirming appointments and assenting to treaties, the Senate does not really exercise executive power, but merely approves or disapproves the exercise of such power by the president in particular situations. See pp. 473-474 above.

is this likely to happen when one (or more) of these officers belongs to a different political party, or to a different faction in the same party, from that of the governor. Nowhere do these state officials occupy the same relation of subordination to the governor that the heads of the national executive departments occupy with respect to their chief; nor do they constitute a body of legal and political advisers to the governor corresponding to the president's cabinet.[1] The governor's control over the great majority of administrative officials, including the statutory boards and commissions, is further lessened not only by restrictions often surrounding the manner of their selection and appointment,[2] but also by his inability to direct them in their official work and his lack of power—so fully possessed by the president in the federal field—to suspend or remove them from office for dishonesty or incompetence. The principal elective state officials can, as a rule, be removed only by the cumbersome process of impeachment. Even when the governor is authorized to remove or suspend them, an effective check upon the exercise of the power is imposed in a number of states through the requirement that removals shall have the approval of the senate. In New York, for example, the principal elective state officials can be removed only by a two-thirds vote of all the members elected to the senate—a requirement which more than once has resulted in serious embarrassment for the governor. Over local officers, the governor has, in most states, even less control; although in New York, Michigan, Minnesota, Ohio, and Wisconsin he can remove certain of them.[3]

The Governor and Legislation

Although the legislature is the chief organ for the enactment of state laws, it is not the only part of the government that partakes of that function. Some lawmaking authority is exercised in every state by what are called quasi-legislative boards or commissions, upon which has been conferred the right to issue ordinances or regulations having the force of law and applying to the operation of public utilities and other corporations, to the protection of the public health, and to a large variety of other matters. But a far more important subsidiary agency in law-

[1] In half a dozen states, to be sure, there is a "governor's council" or "executive council." But in most instances where the group consists of executive officials serving *ex officiis* it does not contain all of the number and does not exercise significant advisory functions About the only genuine executive cabinets in existence are in (1) New York, where, however, the cabinet does not include all department heads and exists on a purely voluntary basis, and (2) Kentucky, where the membership is partly appointive and partly elective.

[2] As new boards, commissions, and offices have been created in later times, there has been more tendency to vest appointment in the governor—yet often under hampering restrictions.

[3] In the past thirty years, a few states—chiefly Illinois, New York, Virginia, Minnesota, Pennsylvania, and Vermont—have contrived, by constitutional amendment or by statute, to go fairly far toward integrating their executive and administrative machinery and concentrating responsibility in the governor. But the general picture remains as indicated above, partly because of fear of "one-man rule," partly because of the influence of vested interests, and partly because of sheer inertia.

making is the governor. Indeed, as a factor in legislation he is scarcely second to the legislature itself; for although his legal authority in this field is largely of a negative character, he is often able in various ways to exert much positive influence in determining both the form and the substance of the laws that are passed. This, indeed, is the chief point at which his power is at present growing.

1. Special sessions of the legislature

For the positive or affirmative influence of the governor upon legislation, the starting point is his right to call special sessions of the legislature and to send formal messages to the two houses whenever they are in session. In more than half of the states, the legislature, when convened in special session, may consider only the subjects which have been included in the governor's call. Hence, by specifying certain topics in his summons, the governor may practically compel the legislature to consider these matters and to put itself more or less fully on record concerning them.

2. Messages

Every state constitution, likewise, contains a clause requiring the governor to inform the legislature from time to time, by messages and addresses, upon the condition of state affairs. Like similar communications of the president to Congress, these messages not infrequently are addressed over the heads of the legislators to the people at large, in the hope of creating public sentiment that will compel the legislature to adopt some part of the chief executive's program. Frequently, too, the governor's messages are accompanied by bills incorporating his recommendations. Whether such recommendations and bills receive favorable consideration depends largely upon the governor's tactfulness, his persuasiveness in winning over members and party leaders, the extent of the popular support back of his measures, and, not infrequently, the vigor with which he wields the veto and uses the patronage at his disposal as clubs to compel the reluctant support of certain members. Naturally, his power will go farther, too, if his own party has a harmonious majority in the two houses.

3. Budget-making

The rapid spread of the movement for state budgetary reform has considerably enhanced the governor's legislative influence.[1] Indeed, a large majority of the states which have adopted improved budgetary methods have recognized both the appropriateness and the importance of assigning to him the leading part in the preparation of the state budget. No other official or group of officials can perform this task so satisfactorily; none is in a position to know more intimately the needs of the various administrative branches and state institutions. And it is the governor primarily who will be held responsible for economical and efficient conduct of the state government.

4. The veto power

The desirability of giving the governor some official share in the translation of the public will into law is practically everywhere recognized by granting him the veto power. Originally, the states bestowed this power

[1] Budgetary reform will be considered further in Chap. xxxviii below.

grudgingly, or not at all; nowadays, it appears in every state except North Carolina; and it enables the governor to exert a direct influence in legislation equivalent to not less than that of one-half of the legislature, with the single limitation that it can be employed only in the negative.

Period allowed for executive consideration of bills

Before any bill passed by the legislature becomes law, it has to be submitted to the governor, and if he vetoes it, it fails unless the legislature passes it a second time by the requisite majorities in the two houses. The time allowed the governor for consideration of bills varies from state to state: during the legislative session, in nine states he has only three days; in twenty-two states, he has five days; in four states, six days; and in eleven states, ten days. If he fails either to approve or veto a bill within this period, it becomes law automatically. If, however, the legislature adjourns within this time, the bill, in twenty-one states, fails to become law unless the governor subsequently approves it. In these states, therefore, the governor has a "pocket veto," or veto by inaction, corresponding to that possessed by the president of the United States. On the other hand, in Maine and five other states,[1] if the legislature adjourns within the period allowed for considering them, bills become law unless the governor returns them with his objections at the beginning of the next session.

Of more importance is the length of time allowed for the consideration of bills after the legislature adjourns; for the bulk of legislation is passed shortly before adjournment. In thirty-four states, the governor is given a definite time following adjournment, ranging from six to thirty days, in which to approve or disapprove measures that have been passed. In twenty-three of these states, bills become law unless the governor records his disapproval within a specified period. In the other states, including California and New York, no pending bill becomes law unless approved by the governor within the period.

Bills passed over the veto

The size of the vote required in the legislature to overcome the governor's veto also varies: in Connecticut, a mere majority of a quorum in each house suffices, and in seven other states a majority of the full membership is adequate;[2] in five states, a three-fifths vote is required;[3] elsewhere, a two-thirds vote is necessary, based, in twelve states, on the number present, and in the remaining twenty-two, on the total membership. Everywhere the records show, however, comparatively few vetoes overridden.

Extent of the veto power

The scope of the veto power, likewise, differs. In nine states, every bill must be approved or rejected as a whole, even though some parts of it may be deemed good and others bad. In the case of appropriation bills, this has often resulted in forcing the governor to accept an entire measure,

[1] Florida, Indiana, Mississippi, Nevada, and South Carolina.

[2] Alabama, Arkansas, Indiana, Kentucky, New Jersey, Tennessee, and West Virginia.

[3] Delaware, Maryland, Nebraska, Ohio, and Rhode Island.

including items unnecessarily large or for unworthy projects, or else to veto the entire bill and thus perhaps delay indefinitely the voting of necessary funds for carrying on the state government. In such a situation, most governors have preferred to accept the former alternative. To enable the governor to restrain the common legislative tendency toward wastefulness, extravagance, and expenditures for purely local objects, all but nine of the states [1] have now conferred upon him the right to veto separate items in appropriation bills. Two states, Washington and South Carolina, have gone so far as to permit a veto of any section or sections of *any* bill passing the legislature; elsewhere, non-appropriation bills must be accepted or rejected as a whole.[2]

Effects of the veto power

The extent to which the veto power is used depends upon the political and personal relations existing between the governor and the legislature, and especially upon the nature of the veto power itself. Vetoes are naturally most numerous in those states in which it is possible to disallow separate items in appropriation bills. Moreover, the full effectiveness of the veto is greater than is indicated by the large number of bills vetoed and the small number passed a second time. A mere hint from the executive office that a veto may be expected if a certain bill passes is often sufficient to kill it; and frequently something more than a hint to this effect is forthcoming. The possibility of a veto often impels members of the legislature to ascertain what the governor's attitude is likely to be before they even introduce a measure. Furthermore, in informal conferences with members of the legislature, or in more formal committee hearings, the governor may indicate amendments that will have to be adopted if a bill is to receive his approval. Not infrequently, also, a veto message points out specific objections to certain parts of a bill, and new bills are introduced and passed with the objectionable features omitted or amended. In such ways, the governor's power in legislation—which in law is of a purely negative character—may be transformed, without changing a letter of the state constitution, into a positive, affirmative influence.

Obstacles to the governor's leadership

Notwithstanding the theory of separation of powers on which our state governments are based, the public has, in the past twenty or thirty years, come to look more and more upon the governor as a legislative leader and to hold him responsible for having, and for putting through, a definite program of legislation, very much as the country at large has come to hold the president responsible for getting legislation through Congress. The governor, however, is always handicapped in his legislative leadership, as is the president, by the practical restriction of his direct contact with the legislature to personal interviews, and by being obliged to intrust the explanation and defense of his measures in each

[1] Indiana, Iowa, Maine, New Hampshire, Nevada, North Carolina, Rhode Island, Tennessee, and Vermont.

[2] On the question of the item veto in the federal government, see p. 246 above.

house to some member thereof. Manifestly, his influence as a leader in lawmaking would be increased, and a greater degree of harmony and co-operation between the executive and legislative branches result if the governor and the heads of executive departments were given the right to introduce bills on their own responsibility and to sit in the legislature, although without a vote. This arrangement would carry with it the privilege of explaining and defending their recommendations and bills, and would afford them opportunity to impart first-hand information and to answer questions arising in the course of debate. Thus far, the only important step taken in this direction has been the inclusion in a budget amendment to the New York constitution, adopted in 1927, of a provision authorizing the governor and heads of departments to appear before the legislature and be heard on any matter pertaining to the budget. If, however, we continue to hold the governor responsible for putting through a legislative program—as we probably shall—we cannot fairly deny him direct and public access to the lawmaking body; although this innovation may have to await, in most states, the action of a constitutional convention or the adoption of a popularly initiated amendment.[1]

Proposed remedy

Miscellaneous powers

In addition to the executive and legislative powers outlined, the governor is clothed with certain miscellaneous powers, such as control of the state militia (including the use of it for repressing disorder and for other purposes), granting pardons and reprieves, and calling special elections to fill vacancies. He is also an *ex officio* member of a large number of state boards and commissions, and is the medium through which official communication is carried on with other states and with the national government. Unfortunately, most of the governor's time is consumed in the performance of comparatively trifling ministerial duties, instead of being devoted to an intensive study of the big problems in the fields of legislation and administration. One will not be surprised to learn that the recent war thrust upon state governors a new burden of responsibility, especially in connection with the operation of the selective service, the appointment and supervision of state defense councils, and the mobilization of civilian resources of every sort. In many states, they found themselves already armed with extensive emergency powers, dating from legislative grants made during World War I or from more recent grants. But in any case, new or enlarged authority was conferred by most legislatures—authority ranging all the way from general supervision of defense councils to direct seizure of property for military use by condemnation or purchase.[2]

[1] The "model state constitution" proposed by the National Municipal League authorizes the governor to order a referendum on *any* bill failing to pass the legislature. Likewise, it authorizes a majority in the legislature to submit to a referendum any bill vetoed by the governor and, on the question of repassage, receiving a majority, but not a two-thirds, vote.

[2] Council of State Governments, *Emergency War Powers of the Governors* (Chicago, 1942). Cf. "War Powers of Governors," in *State Government*, XV, 39-40, 46-47 (Feb., 1942).

Other Executive Officers

Lieutenant-governor

A lieutenant-governor is provided for in thirty-seven state constitutions.[1] In general, his functions are (1) to succeed the governor in the event of the latter's death, removal, absence, disability, or impeachment; and (2) to preside over the deliberations of the senate (except in Massachusetts), and incidentally to have a casting vote in case of a tie (except in Michigan). In some states, he has the right to participate in senate debates, to vote when the senate is in committee of the whole, and to serve *ex officio* as a member of the governor's council. On the whole, the office, when not useless, is at least unimportant; and the eleven states that have no lieutenant-governor have not experienced any resulting inconvenience.[2]

Secretary of state

Space permits only the briefest summary of the duties of the other principal executive officers. There is always a secretary of state, or secretary of the commonwealth, who is the custodian of the state archives and the state seal. He also has charge of the publication of the laws, countersigns the proclamations and commissions issued by the governor, issues certificates of incorporation to corporate bodies of various kinds, has important functions in connection with primaries and elections, and performs a great variety of miscellaneous duties. The secretary is elected by popular vote except in Delaware, Maryland, New Jersey, Pennsylvania, Texas, New York, and Virginia, where he is appointed by the governor; and in Maine, New Hampshire, and Tennessee, where he is chosen by the legislature.

Treasurer

The state treasurer is merely the custodian of the revenues and trust funds of the state, which he pays out, on order of the auditor or comptroller, for purposes authorized by law. Treasurers are chosen by the legislatures in Maine, Maryland, New Hampshire, New Jersey, and Tennessee, and appointed by the governor in New York and Virginia; elsewhere they are elected by popular vote.

Auditor or comptroller

The auditor or comptroller (found in all but three states) has much greater power than the treasurer, for he not only audits the accounts of all state officers charged with the collection or disbursement of state funds, but passes in the first instance upon the legality of all expenditures. No money may be drawn from the public treasury without warrant previously issued by him. In New Jersey, Tennessee, and Virginia, he is chosen by the legislature; elsewhere he is elected by the people. In Oregon and Wisconsin, the secretary of state is *ex officio* auditor; and in New Hampshire, warrants on the treasury are drawn by the governor, who

[1] The states that have no such office are Arizona, Florida, Maine, Maryland, New Hampshire, New Jersey, Oregon, Tennessee, Utah, West Virginia, and Wyoming. In four of these (Arizona, Oregon, Utah, and Wyoming), the secretary of state succeeds to the governorship in case of a vacancy between elections; elsewhere the succession passes to the president of the senate.

[2] The office is omitted in the "model state constitution."

annually appoints a committee of the executive council to audit the accounts of the state treasurer.

Superintendent of public instruction

The superintendent, or commissioner, of public instruction has charge of the general educational interests of the state, and in this capacity supervises the administration of the school laws, apportions the school funds among cities, townships, or school districts, conducts investigations, and makes reports to the governor and legislature concerning the public school system. Superintendents are elected by popular vote in thirty-two states, but appointed by the governor in seven,[1] and by state boards of education in nine.[2]

Attorney-general

The attorney-general—the principal law officer of the state—prosecutes and defends all actions in which the state has a direct interest, gives legal advice to the governor and other principal state officers, and in some instances exercises supervision over the work of the county prosecuting attorneys. In five states, he is appointed by the governor;[3] in Maine, by the legislature; in Tennessee, by the supreme court; elsewhere he is elected by the people.

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[1] Maine, Massachusetts, New Jersey, Ohio, Pennsylvania, Tennessee, and Virginia.

[2] Connecticut, Delaware, Maryland, Minnesota, Missouri, New Hampshire, New York, Rhode Island, and Vermont.

[3] Indiana, New Jersey, New Hampshire, Pennsylvania, and Wyoming.

CHAPTER XXXVI

STATE GOVERNMENTAL ACTIVITIES

Earlier chapters of this book should have made it clear that the rôle of government in modern society goes far beyond the primary function of protecting life and property. A modern government must not only engage directly in numerous activities, but also regulate multifold and complex economic and social relationships; and this is even more true of our state and local governments than of the national government. What activities shall be undertaken, which relationships shall be regulated, to what distance regulation shall go, and what agencies shall be employed for carrying on activities and for performing regulatory functions, are matters sometimes covered in the state constitution, although more commonly left to legislative determination. From state legislatures has flowed, in fact, for seventy-five years, a stream of measures empowering or requiring state governments to undertake functions or services which, if previously undertaken at all, were left either to private enterprise or to local-government units—functions and services often having no direct relation to the original purposes of government. Indeed, despite an expansion of federal functions regarded by some people as having precipitated the states into decline, state governments never more actively provided services for their people than they do today;[1] and a few of the number may be called to mind before we turn to the agencies of administration through which they are carried on.

Education

Trend toward centralization

In any such résumé, the educational work of the state government deserves to come first, not only because of its intrinsic importance in a democracy, but by reason of the vast number of persons directly affected by it, and also the large sums annually appropriated for it.[2]

Until near the middle of the nineteenth century, education received little or no aid from the states as such, responsibility for supporting such schools as existed being left either to private organizations or to the authorities of school districts or of towns and townships. The small units mentioned still have a considerable voice in school affairs in many states, although appearing largely to have outlived their earlier usefulness; and in recent years there has been a steady, even though slow and uneven,

[1] In 1936, no fewer than 420 state activities in California were listed by J. M. Peirce in *The Tax Digest*, XIV, 260-261, 281-286 (Aug., 1936).

[2] Slightly more than a billion dollars in 1943.

shifting of control from local to higher authorities—from school districts to towns and townships, from the latter to counties, and from counties to the state. Indeed, the transition in some states appears to be well on the way to a uniform state-managed public school system.

To remove the inequalities in educational opportunity that have been largely responsible for this centralization, and also to set higher and more uniform standards, state legislatures have brought under state supervision or control, wholly or in part, many matters pertaining to school administration that were formerly left to local school authorities—such as the training, examination, and licensing of teachers, compulsory school attendance, textbooks, libraries, school-house construction, medical inspection of school children, and numerous other things. Besides supporting and regulating the public school system, most states maintain state schools for the blind, the deaf and dumb, and the feeble-minded; and nearly every state has a state agricultural college and a state-supported university.[1]

At the head of their educational activities, all states have an official called the state superintendent (or commissioner) of public instruction, whose term, salary, power, and influence vary greatly from state to state; and in addition nearly all states have a state board of education, with from three to thirteen members, organized in different ways and having widely varying powers.

Charities and Corrections

Rise of state institutions

Not essentially different has been the story of the way in which state governments have come to carry on a wide range of charitable or welfare services, and to maintain a series of correctional or penal institutions. In early state history, there was practically nothing that would be described today as *public* administration of charities and corrections. The former were looked after mainly by private individuals and groups; and such public administration as existed was carried on entirely by towns and counties, consisting of little more than unsystematic efforts by the town or county overseer of the poor to relieve paupers in their homes, or to place them in local almshouses. Correctional institutions consisted only of town and county jails and lockups. By the middle of the past century, the unprogressiveness of local agencies in dealing with welfare and correctional problems was rapidly becoming apparent, as was the financial inability of local governments and private agencies to maintain adequate and efficient institutions. And as a result, legislatures gradually set up state institutions to supplement—in some cases to supplant—local welfare agencies, until today we find in every state an array of state-managed welfare or charitable institutions, most of them carrying on educational as well as charitable activities. By 1934, many states had also

[1] On proposals for federal aid to the states for general school purposes, see p. 78 above.

set up machinery for paying pensions to indigent persons over sixty-five or seventy years of age, and to indigent mothers of dependent children; and in 1935 the development received fresh stimulus from the federal Social Security Act, under which the national government has come to the financial assistance of the states for the benefit of numerous handicapped classes.[1] Fairly numerous, also, are state institutions established for punishing or reforming delinquents—prisons, houses of correction or workhouses, and reformatories.

Methods of state supervision

Over these miscellaneous institutions, the states exercise a supervision that varies greatly both in extent and in methods. Some states have a single board of control, with members appointed by the governor and senate, receiving salaries, and devoting most of their time to the work of the board. Such boards have usually superseded the local board of trustees, and have assumed practically complete management and control of state institutions. Other boards of control have jurisdiction over charitable institutions only, in which case they may be called departments of welfare; still others supervise and control correctional institutions as well.[2] The more common method of state supervision, however, is to place the various institutions in more or less homogeneous groups, each group being supervised by an appointive state board.[3]

Results

Better care and treatment of the inmates of our charitable and correctional institutions, improved construction and arrangement of institutional buildings, more effective collection of statistical information concerning dependency and delinquency, as well as greater efficiency and economy in management, are generally conceded to be among the beneficial results of centralized state administration. And the extension of state control to cover county jails and almshouses would no doubt result in incalculable improvement in many states where such control is now lacking.[4]

Public Health Activities

Beginnings of state activity

Not unrelated to the states' educational, charitable, and correctional services are their activities in protecting the public health; and no activity contributes more to the physical safety and well-being of the people. In our early national history, no special agencies, state or local, for public health protection existed. After the Civil War, however, the need for regular and continuous state-wide supervision over public health by special state officials was recognized by the legislatures, as was also the need for systematic coöperation between central and local health authorities.

[1] See Chap. XXVIII above.

[2] About one-fourth of the states have a welfare department or department of charities and corrections under a single top official.

[3] Whatever type of central administration is employed, in only a few states does state supervision extend to local charitable institutions and methods of welfare work, or to local jails.

[4] See p. 642 below.

Health departments

Most state health departments today are in charge of a board of health, consisting of from three to fifteen members, serving without pay in about half of the states and paid by the day in the remainder.[1] The board members are usually appointed by the governor without senate approval, and as a rule hold office for from four to six years. With the board meeting only three or four times a year in most states, the need for an executive in continuous charge of health administration has been met by the appointment, either by the governor or by the board of health, of a full-time, salaried executive known variously as health commissioner, director of public health, or secretary of the board of health. However organized, state health departments have important powers and perform a wide variety of functions. They make and enforce rules and regulations for the prevention and eradication of communicable diseases, especially by establishing quarantines and by suppressing insanitary conditions within the state. They wield extensive powers of investigation, especially with a view to ascertaining the causes and prevalence of diseases, abating nuisances, and keeping trustworthy vital statistics. Their inspectors or sanitary engineers examine the sources of milk, water, and ice supplies, as well as places in which food is sold, and seek to protect lakes, streams, and harbors from pollution. The health department may be empowered also to pass upon plans for local sewerage systems, and to appoint, supervise, control, and remove local health officials. In these ways, and others too numerous to mention, the centralization of health administration, the broadened activities of state departments, and their coöperation with national health authorities[2] have been of inestimable value to the general public.

Labor Laws and Their Administration

Central administration of labor laws

More recently developed than most of the services thus far described are the numerous activities which state legislatures have authorized in behalf of wage-earners. Under their power to restrict the freedom of employers and employees in the interest of the general welfare, more than three-fourths of the legislatures have conferred wide regulatory powers either upon a unified department of labor or upon scattered and independent boards or commissions. Where a labor department exists, it is usually headed by an industrial commission or similar body, or (in about a fourth of the states) by a single labor commissioner or director; and to render the authority of these agencies more effective, they are empowered to conduct investigations, to make rules and regulations having the force of law, and to prosecute violations thereof in the courts.

Health and safety laws

The regulations administered by these state agencies are known collectively as labor laws; and, springing in part from pressures exerted

[1] A few states have a health department under a single head.

[2] Especially the Public Health Service and certain bureaus of the Department of Agriculture.

by organized labor, in part from recognition by legislatures themselves of their obligation to promote the general welfare, they not only seek to improve the workers' economic status, but also supplement the measures for public health protection already noted. Aimed at the latter objective are, for example, child labor laws, and laws limiting the hours of continuous work for women in industries, stores, and hotels, and entirely prohibiting the employment of women in mines. Closely related are laws seeking to avert or mitigate the effects of industrial accidents and industrial diseases by requiring safeguards against dangerous machinery, and laws providing for state inspection of factories, workshops, and mines. Most states also have workmen's compensation laws, some applying to all industrial accidents, others to the more hazardous occupations only; and about one-third grant compensation for occupational diseases.

Unemployment insurance

Apart from accidents and sickness, the most serious problem confronting workers is involuntary unemployment. Until, however, Wisconsin passed an unemployment insurance or compensation law in 1932, no state had taken action on the subject. The situation is now completely changed; for, spurred by the federal Social Security Act of 1935, every state has in the last decade set up an insurance plan of one type or another. State employment offices, supplementing the U. S. Employment Service, also became increasingly useful. To the end that such services throughout the country might be geared more effectively for war production, all were transferred to federal control in 1942. Under date of November 15, 1946, however, all were restored to the states, though with some continuing federal supervision.[1]

Employment offices

Postwar planning

To avert a period of widespread unemployment following the demobilization of millions of war veterans, some thirty states took measures to aid in providing postwar employment. Under one name or another, state planning commissions were set up to draft plans or "blue-prints" for postwar construction and development of projects (notably in California, Illinois, Pennsylvania, and New York) or to coöperate with and advise counties and cities engaged in similar planning. Millions of dollars, too, were appropriated by state legislatures or voted by cities to aid in developing projects and for the purchase of project sites.

Agriculture and Conservation

More numerous, more varied, and in certain respects more important, than state activities for the welfare of industrial wage-earners are the services which legislatures have authorized for the benefit of agriculture and the conservation of natural resources. This is not surprising when one recalls the preponderance in nearly all state legislatures of members from rural districts, as well as the fundamental importance of agriculture and natural resources in our national economy.

[1] See pp. 440-441 above. Nine states as yet have no services of their own.

Agricultural services

Among the states' activities in the interest of their rural population, some have a clear relation to the public health, *e.g.*, the inspection of dairy herds and meat products. Many others are designed to promote improved farming methods and to raise the farmer's income. These include analysis of soils and fertilizers, inspection of plants, trees, shrubs, fruit, and seeds, study of scientific poultry-raising and stock-breeding, and suppression of animal and plant diseases and pests. Every state also maintains an agricultural experiment station, whose bulletins are circulated widely among farmers and stock-men. Besides imparting scientific training to students in classrooms and laboratories, the state agricultural colleges conduct extension courses bringing to people on the farm new ideas concerning crop cultivation and the care and feeding of live-stock; at the same time, "home demonstration" agents help raise the standard of rural home life.

Conservation

Related activities in the field of conservation include the preservation and propagation of fish and game, draining swamps and irrigating arid lands, preventing and extinguishing forest fires, developing state-owned forests and protecting those privately owned, and enforcing measures for soil conservation and the conservation of oil and gas resources. Such an enumeration, however, merely hints at the extremely varied and interesting ways in which state governments, often in close coöperation with the national Department of Agriculture, endeavor to advance the all-important agricultural interests of the nation.

Administrative machinery

Of these manifold services, not a few are rendered by separate and independent boards or commissions. In recent years, however, there has been a tendency to correlate all such activities in a state department of agriculture, headed either by a single commissioner of agriculture or, in most states, by a board of agriculture employing a full-time executive and a staff of experts. Separate departments of conservation, also, are frequently found exercising functions which, in other states, fall to the department of agriculture. Starting with only advisory powers, many of these agencies have later gained control in specified fields.

Public Works

Different types

Public works carried on by state governments include the construction and operation of canals in a few states, notably New York; the erection of dams and reservoirs for flood prevention and control; the maintenance of state parks or forest preserves, mainly for recreational uses; and the erection of public buildings, highway bridges, and monuments. By all odds the most important public works, however, are highways; and in no other activity has the tendency toward centralized state administration progressed more rapidly. First, state legislatures began giving financial aid to local authorities, such grants to be expended under state supervision and with the advice and assistance of state officials. Then they started authorizing the construction of highways at state expense

Highways

and in accordance with standards prescribed by state administrative agencies. And today the principal highways in all states represent undertakings of state governments, heavily subsidized by federal grants-in-aid and acting in close coöperation with, and under supervision of, the Public Roads Administration in the Federal Works Agency at Washington.[1]

State administrative agencies

To administer the states' varied public works, legislatures have created a corresponding variety of administrative bodies. A few states have departments of public works exercising jurisdiction over works of different kinds, but it is more common to find departments in charge of only some one type of undertaking. All states, in any case, have a distinct highway department. In about a third of the number, the head of this department is a highway commissioner or director of highways, appointed by the governor, and often solely responsible to him. More often, however, the department is headed by a part-time highway commission of from three to seven members, in which case the active head is a full-time, salaried executive, often a highway engineer, who directs major highway construction and supervises local highway work.

Regulation of Business

Basis of state control

A state has the right to control all business activities within its borders except such as have been instituted by the national government or involve aspects of foreign or interstate commerce. In varying degrees, this power has been exercised by every legislature in passing regulatory laws and in setting up administrative agencies to enforce them. Most such regulations have been enacted under the state's police power, and apply to businesses manifestly affecting public health, morals, or safety, or in other ways having a direct bearing upon the public welfare.[2] The courts, however, have upheld still other regulations, on the broad ground that they apply to businesses "affected with a public interest"—a phrase not easily defined, but covering such miscellaneous matters as grain elevators, warehouses, hotels, financial institutions, telephone, light, power, and transportation companies, and retail milk prices.

Some miscellaneous regulations

It should be borne in mind also that many labor and health laws mentioned in preceding sections of this chapter are likewise regulations of business. So, too, are laws regulating admission to the practice of certain professions or trades, as well as usury laws, prohibiting the taking of interest in excess of legal rates. Still other laws are designed to protect the public from fraud in connection with advertisements and contracts; and misbranding and adulteration of foods and drugs are commonly prohibited. In fact, there are few lines of business, whether carried on by individuals, by partnerships, or by corporations, that are not subject

[1] See p. 77 above.

[2] Under the Fourteenth Amendment, such regulations must not amount to a deprivation of life, liberty, or property without due process of law, nor deprive any person within the state of the equal protection of the laws. See pp. 105-107 above.

to some form of control through state legislation and state administrative agencies.

Regulation of corporations

Especially numerous and important are measures regulating business corporations of one kind or another. High in the list are anti-trust laws (some antedating the Sherman Anti-Trust Act of 1890[1]) laying down sweeping prohibitions of all kinds of trusts, monopolies, or combinations in restraint of trade, or aimed at preventing monopolies in special fields, particularly in the production and sale of foodstuffs, with unfair trade practices, tending toward monopoly, commonly specified and forbidden. "Blue sky" laws also appear in almost every state, regulating the issuance and sale of securities by both interstate corporations and others outside, in order to protect the public against fraud. Among the most important measures affecting corporations are those relating to banks, building and loan associations, insurance companies, and public utilities. In the case of banks, such laws fix the minimum amounts of capital stock, the method of stock subscription, the maximum or minimum amounts and the nature of a bank's loans, assets, reserves, and investments, and the liabilities of its stockholders and directors. Building and loan associations are regulated in much the same fashion; and insurance companies, of all types, similarly operate under detailed regulations. Finally, large numbers of laws have to do with the regulation of public utilities—businesses which, although owned and operated by private persons, are essentially public in character, which enjoy special privileges (such as the use of streets and highways and the right of eminent domain), and which tend to become monopolies. Here are included transportation companies—including railways, airlines, urban railways, and bus and cab lines—and of course telephone, gas, electric, and water companies. Regulation in this field takes the form principally of controlling financing, fixing rates or laying down rules governing them, and prescribing standards for services rendered.

Administrative agencies

To enforce in specific cases the general standards as to rates and services which the legislature has set up, administrative bodies under one name or another—railroad commissions, warehouse commissions, public service or commerce commissions—have been created; and the work of these agencies, although of by no means uniform excellence or effectiveness, is second in importance to no other state activity.[2] Aside from the public service commissions, no uniform type of organization to administer the various laws relating to business exists in the several states. Most states have special machinery to deal with special classes of corporations, *e.g.*, banking and insurance commissions; while others

[1] See p. 395 above.

[2] Certain phases of utility regulation that cannot be reached by state laws and regulations are dealt with in the federal Public Utility Holding Company Act of 1935. See pp. 403-404. And, of course, in the case of all transportation and communication agencies, state regulations must be compatible with the federal laws applying to interstate commerce.

confer regulatory powers upon the state auditor, the state treasurer, or the secretary of state.

Police Activities

Scope and basis

Underlying all of these regulatory activities of the states are those having to do with police, or law-enforcement, activities embracing the entire system of internal regulation by which the states preserve public order, protect life and property, prosecute and punish criminals, and restrict the business and professional activities of their citizens in the interest of the general welfare. Such activities include the enforcement, not only of all provisions of the state constitution and of all pertinent statutes, but also of all ordinances, rules, regulations, and decisions issued by state and local officials, including the courts.

Decentralized law enforcement

Decentralization is the most distinguishing characteristic of state law enforcement today, as indeed it has been since colonial times. That is to say, instead of centralizing police activities in a single state department of justice, with representatives operating throughout the state, each state has an aggregation of separate officers and agents charged with duties connected with one phase or another of the work, and operating on different levels of government. Foremost among the state (as distinguished from local) law-enforcing agencies stand the chief executive officers, especially the governor, the secretary of state, and the attorney-general. The courts, too, although seldom in a position to take the initiative, play an indispensable part in law enforcement in connection with the administration of criminal justice and the imposition of civil penalties. In addition, there is a large and steadily growing number of administrative boards, commissions, and departments, some of which have been mentioned in preceding pages. Inspectors or other representatives of these agencies often travel about the state, and ordinarily they are able, in quite inconspicuous ways, to obtain observance of the laws with which they are concerned. Upon county sheriffs and prosecuting attorneys, upon mayors and city police forces, and even upon rural township constables, the states not only impose important civil duties, but rely chiefly for the maintenance of law and order, and for the prevention, detection, and prosecution of crimes and misdemeanors. Seldom coördinated by any central controlling or guiding hand, such local officers (at least outside the larger cities) are, however, usually without any special training for their official duties; and their effectiveness is further impaired by the fact that they are chosen, for the most part, by popular election, independently of one another, and in various political subdivisions of the state. As a result, laws supposed to reflect the will of the entire state—especially those fixing moral standards or regulating moral conduct of citizens—are frequently enforced only to the extent to which local public opinion appears to support them; and the natural desire of local officials for reëlection may contribute heavily to lax enforcement.

State police and highway patrols

To overcome in some degree the weaknesses inherent in this decentralization of the law-enforcing system, all states have gone at least so far as to institute an agency known as a highway patrol, designed to unify and strengthen enforcement in a domain of major importance in this motor age; and twenty[1] have gone farther by creating a state police, superimposed upon the police establishments of counties, cities, and other local areas, coöperating with them and supplementing their activities. With a trained personnel organized and officered along military lines, the state police exercises general police powers throughout the state, performs the function of highway patrol which in other states is taken care of by a force having patrol duties only, assists local police officers in apprehending offenders, and, in time of flood or other disaster, helps prevent destruction of property and loss of life.

The National Guard

Unfortunately, situations sometimes arise, especially in connection with strikes or other industrial disorders, where obstructions to law-enforcement are offered by combinations too powerful for the local police or the courts to handle, yet without state police being available; and in such emergencies the sheriff of the county or the mayor of the city most concerned may appeal to the governor, who, as commander-in-chief of the state militia, is empowered by the state constitution to call out National Guard units to do police duty in protecting life and property.[2] For effective police work, however, the National Guard is in many ways ill fitted; and in states that maintain them, state police forces are commonly found more satisfactory. Speaking broadly, the National Guard is important not so much for its services to the state itself as for its close integration with the armed forces of the nation.

State Guards

When, as in 1940, war or a threat of war makes it necessary to call all or most of the National Guard into federal service, the states would be left without militia to handle possible emergencies unless special provision of some kind were made; and on the occasion mentioned, the entire National Guard having been placed in federal cantonments for intensive training, Congress amended the National Defense Act to permit any state desiring to do so to organize special militia units for the duration of the emergency, with assistance from the national government in providing the necessary equipment. Nearly all states took advantage of the authority conferred; and throughout the war period the resulting State Guard contingents not only stood ready to be employed by the governor in the event of domestic disorder or disaster, but more or less continuously furnished protection against sabotage or attack for power-plants, waterworks, docks, airports, and other defense properties and interests. Once

[1] Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and West Virginia.

[2] National Guard units may be called out also to maintain order, protect life and property, and aid in the relief of distress following a flood, fire, or earthquake of unusual proportions.

it became apparent that the country stood in no actual danger of air-raids or other invasion, interest in keeping up the units declined; and, with the National Guard restored to the states, State Guards are rapidly becoming a thing of the past.

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CHAPTER XXXVII

ADMINISTRATIVE AGENCIES AND PROBLEMS

The preceding chapter has brought to view some of the main governmental activities nowadays authorized by state constitutions and statutes. What of the steadily expanding administrative machinery required for carrying out the duties entailed?

Multiplication of boards and commissions

In earlier days, state government was a comparatively simple affair; a half-dozen principal officers, with small staffs of deputies or other assistants, met all executive and administrative needs. As virgin fields of investigation and control were occupied, however, especially after 1900, new machinery was provided—sometimes by constitutional amendment, but in most cases by statute—until the multiplication of boards and commissions became easily the most conspicuous feature of state (as likewise of federal) administrative development. From 1900 to 1909, the number of such agencies created, the country over, averaged between one and two hundred a year; and although the pace later slackened, hardly a legislative session terminates in any state today without at least one new administrative body being authorized. Until very recently, nearly all states had at least two score such establishments, while in several the number exceeded a hundred.

Some reasons

The reasons for this development are not difficult to discover. Some of the new agencies were created originally for the purpose of collecting and digesting information for the legislature as a basis for intelligent lawmaking on some complicated subject. Others originated in a disposition of the legislature to devolve regulative activities which it could not itself well perform upon separate and continuing commissions or other agencies specializing in the given field. Not a few boards and offices have been created mainly or solely with a view to increasing the "spoils" to be distributed as rewards for party services. Again, persons interested in some project of reform urge the undertaking of new work by the state government; and, instead of studying the existing machinery in order to determine whether the new function might not properly be handled by an existing agency, they draw up a statute creating a new one, and the legislature obligingly passes it. Popular demand for more industrial and social-welfare legislation, and for more activity by state governments in promoting agriculture, has been especially prolific at this point. A number of new boards and offices, too, spring from the increasing tendency of the states in recent years to assume functions originally left to county, city, or town authorities. Lastly, the growth of insurance, banking, and

other financial corporations, and of railways and other public service companies, together with the breakdown of the numerous attempts to regulate them by detailed legislative enactments, has resulted in the creation of boards or commissions in almost every state for the administration of laws designed to regulate such business enterprises. Establishment of these newer administrative agencies, although sometimes unwarranted, has in many instances had the very beneficial effect of securing the advantages of specialization in public affairs and the application of technical knowledge;[1] at the same time, it has complicated governmental machinery to a point where the ordinary citizen finds it almost unintelligible.

Varying types

In the form taken by administrative agencies, there is great diversity; not a single state has followed a wholly consistent plan. In some instances, functions have been assigned to one or another of the principal executive officers already existing. At other times, an entirely new official has been introduced, *e.g.*, a highway commissioner, or a superintendent of banking, or a director of conservation. More frequently, however, the tasks to be performed—especially newer ones—have been intrusted to some sort of a board or commission. Where a board is employed, the chances are that it will consist of persons serving in merely an advisory, or supervisory, capacity, and devoting only a small part of their time to the activity, while the actual administrative work is carried on by subordinates. Often part or all of the members, perhaps including the governor or comptroller or attorney-general, are serving *ex officiis;* and they are usually not experts, or at any rate technicians, in the field of work they supervise. Familiar examples are found in boards of health, boards of education, boards of agriculture, and pardon boards. Commissions may be distinguished from boards by the fact that as a rule the officials who compose them are expected to perform the actual work of administration, to be experts in it, and to give all of their time to it. When, also, an administrative agency is clothed with quasi-legislative or quasi-judicial powers, it is generally called a commission rather than a board; although the distinction does not always hold, even in the same state—the two terms often being used loosely and interchangeably. Important examples of commissions, as distinguished from boards, are railway or public utility commissions, tax commissions, and civil service commissions. The extent of the power wielded by these different officers, boards, and commissions varies widely, of course, from state to state. At one extreme, they are found exercising merely the power to investigate and recommend; at the other, they are observed issuing orders and regulations having the force of law, notably in the case of boards of health

[1] Some of the newer state functions partake more of the nature of business enterprises than of government, notably as they have been developed in North Dakota. Not a few states, regarded as business concerns, own more property, employ more persons, and pay out more for labor and materials than any other enterprise operating wholly within their boundaries.

and public utility commissions. In the matter of internal organization, however,—with reference to such things as size of staff, classification of employees, and salary ranges—they have comparatively little freedom, such matters being usually regulated by the legislature as a phase of its general control over practically the entire administrative system.

Defects in Existing Administrative Arrangements

Long before depression overtook the country in 1929, the rising cost of state government had prompted searching investigations and illuminating reports by commissions on economy and efficiency in about a third of the states. In its turn, the depression, with the resulting decline in public revenues, aroused fresh interest in governmental economy and led to a new series of surveys of the administrative side of state governments. The main purpose of all such inquiries was, of course, to ascertain which, if any, of the numerous administrative agencies were unnecessary; which, if any, might profitably be combined; and in what other ways economy and efficiency could be promoted In almost every instance, the resulting report amounted to a severe indictment of the existing state administration as unscientific, uneconomical, and inefficient; and in several cases important remedial action ensued. The most damaging specific defects brought to public attention in this way may be summarized as follows—defects formerly almost universal, and still prevalent in the two-thirds of the states that either have not overhauled their administrative machinery at all or have made only a very imperfect job of it.

1. Lack of uniformity in organization:

There has commonly been an almost total lack of uniformity in the methods by which the members of the various administrative agencies are selected, in the length of their terms, in the ways provided for their removal from office, and in standards of compensation. In New York,

(a) Elective or appointive boards

for example, just prior to the reorganization of 1927, seven of the 187 principal state administrative agencies were filled by popular election, seven by the legislature, and fifteen by appointment by the governor; while fourteen bodies were *ex officio,* seventeen were partly *ex officio* and partly appointed by the governor, sixty-eight were appointed by the governor and senate, and the remainder were constituted in a bewildering variety of ways.

(b) Bi-partisan arrangements

Many state boards and commissions are called non-partisan when in reality they are bi-partisan, *i.e.,* divided in their membership between the two major political parties. Representation of the principal minority party was originally intended to serve as a check upon the majority party and to mitigate the evils of partisanship in administration. In practice, however, the arrangement often results in bi-partisan agreements concerning the distribution of patronage attached to a given office or board, in a division of responsibility for the character of the work performed, and in frustrating or warding off investigations that might prove equally damaging to the two parties represented.

(c) Term

The term of some of the administrative officers is definitely fixed by law and coincides with that of the governor; in the case of others, there is a fixed term which does not coincide with the governor's; while in still other instances the term is left more or less indefinite.

(d) Removals

There is likewise no uniformity in the methods provided for the removal of administrative officials. Impeachment by the lower branch of the legislature, followed by trial and conviction before the senate, is authorized in most states for the chief state officers; but this is a cumbersome procedure, seldom made use of. In New York, despite a wholesome reorganization of administration a score of years ago, there are still, besides the process of impeachment, no fewer than seven distinct ways of removing department heads and other principal officials; less than one-half can be removed by the governor upon his individual responsibility. In other states, the situation is not essentially different.

(e) Compensation

Some of the administrative officers of the state are paid a fixed salary; others receive no salary, but are paid by the day or by fees; while still others are allowed only their actual expenses while performing their official duties.

(f) Spoils system

Subordinate positions attached to the various administrative departments and public institutions, aggregating more than ten thousand in several states and over fifty thousand in New York, are generally distributed among the political and personal friends of the officers or members of the several boards and commissions in accordance with the well-known practices of the spoils system; and this goes far toward explaining the inefficiency with which many state functions are performed when judged by the standards prevailing in private business enterprises.

2. Improper functional division and inadequate correlation

Numerous faults appear also in the distribution of functions among administrative agencies, and in the relations of the agencies with one another. In general, there has been little effort to correlate them; and, instead of finding similar or clearly related functions combined in a single administrative office, the commissions on economy and efficiency have almost uniformly reported a most unfortunate division of related duties and activities among two or more boards, commissions, or officers, often doing their work quite independently of each other and of any central directing and controlling officer. Harmonious coöperation—in other words, the teamwork essential to efficient administration—is rare and more or less accidental; officers and activities are needlessly duplicated, resulting in both inefficiency and added expense.

3. Inadequate unifying and directing authority

Over the scores of administrative agents, boards, and commissions there is, as a rule, no unifying or coördinating authority and only very slight directing or supervisory control. Generally lacking, therefore, is any proper responsibility to the governor, to the legislature, or to the people. Elective officers are practically independent of one another, and of the chief executive of the state as well; and almost equally slight is

the governor's control over the more numerous appointive agencies, selected in diverse ways, serving for varying terms, and rarely removable by his independent action. Whatever unifying and harmonizing force there is comes, in many states, from the outside, being exerted by the "invisible government" of political organizations.

4. Excessive cost

Speaking broadly, state administration is uneconomical. To be sure, large gains have flowed, in forty-odd states, from substitution of centralized purchasing for former arrangements under which each department and institution, subject only to certain statutory regulations, bought its own materials and supplies. Waste, however, still commonly arises from the unscientific manner in which administration is organized, from lack of a modern and uniform system of accounting, and especially from want of a central agency or authority charged with studying the financial needs of the various administrative departments and state institutions, collecting and revising the estimates which they submit, and preparing and presenting for legislative consideration a comprehensive and itemized schedule of appropriations actually needed for maintaining the state's institutions and services on a satisfactory level. All too frequent, too, has been the absence of effective supervision over the expenditure of moneys appropriated.

Administrative Reorganization

Some elements in an effective reorganization

For correcting defects such as the foregoing, suggestions and recommendations began to be heard more than a generation ago; and in that time a movement for administrative consolidation has spread, in varying degree, to about three-fourths of the states. Included in such consolidation are chiefly: (1) reorganization of the numerous administrative offices into a few coördinated departments, with definite heads; (2) authorization of the governor to appoint these department heads, who become directly responsible to him and may serve as his cabinet; and (3) careful adjustment of the terms of department heads with reference to the term of the governor. The object, manifestly, is to concentrate in the governor a real, not merely a nominal, responsibility for the state administration [1] —such as the president bears in relation to national administration— and to introduce long-needed unity, efficiency, and economy. Such administrative reorganization naturally demands (1) a careful grouping of related functions under the same departmental management, based upon a thorough survey of all the administrative activities of the state; (2) a proper internal organization of every department, *i.e.*, the subdivision of each into divisions or bureaus, each with a chief responsible to the head of the department, and a logical division of departmental work among the several subdivisions; and (3) the abolition

[1] A few states have attempted to coördinate administrative activities, without increasing the power of the governor, by using a board of public affairs (Wisconsin, after 1911), a state administrative board (Michigan, 1921-1927), or a group of commissions (New Jersey since 1915).

of unnecessary offices and the unification of duplicated activities. Administrative consolidation does not necessarily include reform in accounting, purchasing, and budgetary methods; but it is a prerequisite for the successful introduction of these reforms, and in the plans of administrative consolidation adopted in Illinois, Idaho, Nebraska, California, and New York they have been practically concurrent. Furthermore, the requirement of senatorial confirmation for the governor's appointments might well be relaxed, if not abandoned altogether, thus ending the friction and "trading" which often impair the governor's responsibility when he and the senate are out of harmony politically.

The Illinois civil administrative code

After some unsuccessful efforts to bring about administrative reorganization in Oregon in 1909 and 1911, in Minnesota in 1913, and in Iowa and New York in 1915, the first comprehensive plan was adopted by the Illinois legislature in 1917, following a careful preliminary survey of all the state's administrative agencies. The civil administrative code, embodying the reform, abolished over one hundred statutory offices, boards, and commissions and consolidated their functions in nine departments, namely, finance, agriculture, labor, mines and minerals, public works, public welfare, public health, trade and commerce, and registration and education—to which were added in 1925 a department of conservation and a department of purchases and construction. At the head of each of the present eleven departments is a director appointed by the governor and senate for a term of four years, coinciding with the governor's term; and under each director are an assistant director and heads of bureaus, also appointed by the governor and senate, although under the immediate control of the head of the department. In the original code, provision was made likewise for a centralized purchasing system, a uniform accounting system, and an improved executive budget system. Indeed, administrative consolidation was carried almost as far as the Illinois legislature could go without amendments to the constitution.

Reorganization in other states

The example thus set has helped stimulate thirty-odd states to give more or less serious consideration to plans of reorganization and consolidation—though in a good many cases without significant results, and in no case with an outcome to be regarded as entirely satisfactory. Of special interest and importance is the reorganization carried out in New York between 1925 and 1927. A constitutional amendment was there adopted in 1925 providing for a complete overhauling of the state's administrative "system"; and shortly thereafter the necessary legislation was enacted to make the amendment effective, with the result that some 180 administrative agencies were consolidated into eighteen departments, the heads of which, with four exceptions, are appointed by the governor and senate.[1] The new scheme went into effect on January 1,

[1] The attorney-general, at the head of the law department, and the comptroller, at the head of the department of audit and control, are elective officials. The nominal

1927, and as a corollary, the governor, acting solely upon his own initiative and authority, organized a cabinet consisting of the heads of all but five of the new departments.[1]

Reorganization and democratic government

"Changes in the form of governmental organization are not an end in themselves. They can be justified only in so far as they produce better results. Their primary purpose has been to systematize a control already vested in the governor but so disorganized as to be ineffective."[2] If, with properly constructed machinery, state administration is not more efficient and more economical than under the former system with its endless incongruities, absurdities, and lack of coördination, the fault lies chiefly with the governor and the character of his appointees; and the public can assign the blame intelligently, since the system becomes far more understandable by the average citizen than in the past. "Democracy," as the New York Reconstruction Commission of 1919 truly said, "does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account, they must have a government that they can understand."

The State Civil Service

Essential features of the merit system

To produce the most satisfactory results, however, the structural changes described must be accompanied by a drastic overhauling of the method of filling the thousands of subordinate positions connected with state institutions and administrative services.[3] Personal favoritism and partisan considerations, still too commonly the controlling factors, have to be eliminated and the merit system substituted. The merit system is founded on the principle that public office is a public trust, and should be bestowed only upon persons of proved fitness. It assumes that the public is entitled to reasonable qualifications on the part of its servants, and that such qualifications can, in a vast majority of cases, be ascertained by a properly devised and fairly administered system of competitive examinations, open to all applicants. It also aims to prevent promotion or dismissal, for merely personal or political reasons, of public employees selected in this manner, and to establish the rule that removals shall be made only for legitimate causes, such as dishonesty, negligence,

head of the department of agriculture is the council of farms and markets, which, however, chooses a commissioner of agriculture, who is the active head. The board of regents of the University of the State of New York was left at the head of the department of education, with power to appoint a state commissioner of education. Several departments are headed by commissions of three or five members; but in each case a departmental chairman is provided, with the other members restricted to quasi-judicial functions.

[1] In Kentucky, a governor's cabinet, consisting of seven elective and six appointive officials, meeting once a month, was provided for by the reorganization statute of 1934. California also has a governor's cabinet (called a council, and authorized by law), which functioned most effectively between 1927 and 1931.

[2] W. F. Dodd, *State Government* (2nd ed., 1928), 265.

[3] On July 31, 1944, such positions numbered approximately 28,000 in California, 42,000 in Pennsylvania, 51,000 in New York, and 471,000 in the country as a whole.

and inefficiency. The system ought, therefore, to be made to apply, not only to the appointment, but also to the promotion and removal, of practically all non-policy-determining subordinate positions connected with the state administration; and adoption of it not only tends to bring about the selection of better qualified persons for positions in the service of the state, and to secure for them and for the state the advantages that should accompany permanence of tenure, but helps protect the governor and other appointing officers from the time-consuming importunities of office-seekers, who sometimes invade state capitals much as frogs covered the land of Egypt.

State civil service laws

The most effective means of uprooting the deeply entrenched spoils system is the enactment and honest enforcement of a carefully drawn civil service law. Until very recent years, fewer than a dozen of the states (starting with New York in 1883) had merit systems based upon such laws and applying to the great bulk of their administrative employees. At the present time (1947), however, the number is twenty-two.[1] Moreover, following the adoption of amendments to the federal Social Security Act in 1939, all states operating under that law (now all forty-eight), and not having adequate civil service systems, have been required to establish a merit system in at least this field, to be administered by a "merit system council"; in every state, indeed, without exception, the merit system has been introduced for employees in certain specified departments or agencies. In the main, service-wide civil service laws, where existing, are modeled upon the national civil service act of 1883; and invariably they include provisions for the classification of state employees, competitive examinations for their appointment and promotion (with often some provision for veteran preference), and clauses prohibiting appointments and removals for political reasons. The laws are usually administered by a small bi-partisan civil service commission, appointed by the governor and senate. However wisely and skillfully a civil service law may be drawn, the success or failure of the merit system depends very largely upon the character, ideals, and efficiency of the members of this commission. In the hands of an indifferent or hostile commission, the

Civil service commissions

[1] The states having comprehensive civil service laws in 1947 were as follows: New York (1883), Massachusetts (1884), Illinois and Wisconsin (1905), Colorado and New Jersey (1907), California and Ohio (1913), Connecticut (1913, 1937), Kansas (1915, 1941), Maryland (1920), Virginia (1922), Maine, Tennessee, and Michigan (1937), Alabama, Minnesota, Rhode Island (1939), Louisiana (1940), Indiana (1941), Oregon and Georgia (1945). The Connecticut law of 1913 was repealed in 1921. An Arkansas law of 1937 and a New Mexico law of 1939 were repealed in 1939 and 1941, respectively. The Kansas law of 1915 had been inoperative since 1922 because of failure of the legislature to make necessary appropriations, but in 1941 a new law became effective. A Kentucky government reorganization act of 1936 provided for a division of personnel efficiency under the direction of the commissioner of finance, and including a system of competitive examinations. The Michigan act of 1937, one of the best, was seriously weakened by amendments in 1939. Nebraska, in 1945, enacted a civil service law of restricted application.

In New York, Colorado, Ohio, California, Michigan, Louisiana, and Georgia, the constitution requires the enactment of a civil service law; elsewhere the merit system rests entirely upon the insecure foundation of statutes.

best law of the kind can be made a farce in practical operation. And this has sometimes happened when the commissioners have been purely political appointees, closely identified with the spoils system which they were supposed to eliminate or check, and merely reflecting a partisan governor's own attitude toward the merit system.

Newer functions

Until very recently, civil service commissions—national, state, and municipal—have practically everywhere confined their activities to the preparation and conduct of competitive examinations. They, and the general public, have assumed that the main, if not the sole, function of such commissions is to keep spoilsmen out of the public service. That function is of the first importance, and will always remain so; there should be no let-up in that work. Nevertheless, it is becoming more and more apparent that the commissions should not stop with this negative function. In numerous direct and positive ways—by assuming new, or comparatively undeveloped, functions as the personnel or employment division of the state corporation—civil service commissions, if composed of men of vision, energy, and practical experience as employers, can enhance the general efficiency of state administration. By devising and putting into operation methods of measuring and increasing the efficiency of state employees, by stimulating in them ambition for promotion, by enlarging their opportunities for self-improvement, and by establishing uniform standards of compensation, civil service commissions have it in their power to make far greater contributions to the general efficiency of state government than most of them have made in the past.[1]

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[1] On the broadened range of activities of the federal Civil Service Commission, see p. 317 above.

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CHAPTER XXXVIII

STATE FINANCE

How to obtain the money necessary for carrying on the numerous and varied activities mentioned in the preceding chapters, how to apportion the state's revenues among the different spending agencies, how to fix and maintain effective safeguards against waste and corruption, what limitations (if any) to place upon the state's borrowing power, and how to link up state finances, in the narrower sense, with the finances of counties, towns, and other local-government areas—these are problems which, in ordinary times, are second in importance and difficulty to none that we have thus far encountered in the field of state government; in a period of economic depression or of war, they are no less important and decidedly more difficult.

Sources of State Revenue

It is natural that among forty-eight states differing widely in area, population, and resources, some should be in far better financial condition than others. All, however, have experienced rapidly rising cost of government in recent decades, and nearly all have been obliged to search diligently, not only for ways of increasing the yield of older sources of revenue, but for new reservoirs to be tapped.

Non-tax revenues

As in the case of the national government, income is derived not only from taxation, but from other sources as well; indeed, in most states these other sources yield a considerably larger proportion of the total revenue than is drawn from comparable sources by the national government. Chief among state revenues not coming from state taxation are:

(1) Earnings of public service enterprises established and maintained by the state, such as docks, wharves, warehouses, ferries, toll-bridges, canals, mills and elevators, coal mines, publishing houses, and irrigation projects.

(2) Fees, or highway-privilege dues, collected from individuals or corporations enjoying special rights to use the streets and roads of the state in providing public services, such as those furnished by electric railway, lighting, telephone, and water companies.

(3) Receipts from the rental of real estate held principally or wholly for investment purposes, such as the income from school lands, especially in the Western states.

(4) Interest received on sinking funds, public trust funds, and current deposits of state money in banks.

(5) Fees, charges, and earnings accruing to the general departments of the government, *i.e.*, the various administrative agencies, state institutions, and the courts. Included here are license fees, fees for inspections, charges for filing, copying, or recording legal documents, tuition and other fees charged in state educational institutions, fees for the care of inmates of asylums and the like, and sometimes also the earnings of industries carried on in penal or charitable institutions.

(6) Receipts from fines imposed in criminal cases, from forfeiture of bonds, and from escheats, *i.e.*, property whose owners cannot be ascertained or located.

(7) Subventions, or grants-in-aid, by the federal government for education, highway construction, social security administration, and numerous other activities;[1] also donations or gifts from private persons or corporations, the principal or income of which can be expended for designated state uses; and contributions by state employees toward pension or retirement funds.

(8) Special assessments and charges to defray the cost of specific public improvements or public services undertaken primarily in the interest of all or some portion of the public, such as for the cost of highway construction and repair, for forest-fire patrol, for the maintenance of drainage districts, and for other improvements and services assessed against the benefited properties or persons.

Different kinds of taxes

Large, however, as are the sums obtained in many states from these varied sources, by far the greatest amount of revenue in all states—rarely less than four-fifths of the total—is derived from taxation; and it is this phase of state revenue alone that will be considered here. In general, a state has a right to tax all persons and corporations residing or doing business within its bounds, and all forms of property located therein—save only as restricted by the federal constitution[2] and by self-imposed restraint laid down in the constitution of the state itself; and a list of the principal categories of taxes employed today (not all of them, of course, in any one state) would run somewhat as follows.

(1) The general property tax, together with special forms of property taxes, such as those imposed on public utilities.

(2) Corporation and other business taxes, which may assume a variety of forms, such as taxes on capital stock, gross receipts, deposits held by banks, or even the value of insurance policies.

(3) License and privilege taxes and permits, in connection principally with motor vehicles and their operators, alcoholic beverages, chain stores, and hunting and fishing.

(4) Income taxes, usually applying (as in the practice of the national government) to both personal and corporation incomes.

[1] See Chap. VI above; and cf. *The Book of the States, 1945-1946,* pp. 37-46, 299-301, 329-330.

[2] With respect, for instance, to imports, transactions in interstate commerce, and certain instrumentalities of the federal government.

(5) Death taxes, *i.e.*, inheritance and estate taxes, usually taking the form of graduated or progressive taxes applied to both direct and collateral inheritances, although in some instances to only the latter.

(6) Sales taxes, either on a general scale or applying to particular commodities, as gasoline, alcoholic beverages, and tobacco products.

(7) Poll taxes, including all per capita taxes, uniform or graded.

(8) Documentary, stock transfer, and miscellaneous taxes.[1]

The changed emphasis in state taxation

From taxes of all kinds, the forty-eight state governments realized in 1945 a total of five and one-half billion dollars—a new record. The striking thing about the recent tax picture is, however, not so much the impressive aggregate yield as the great change that has taken place in the relative importance of certain of the principal imposts; and the outstanding fact here is that while the historic general property tax continues to be the backbone of our revenue system for purposes of local government, it has receded far into the background as a support for state government as such. While in 1945 sales taxes of various kinds (including motor fuel taxes) were yielding the states the huge sum of $2,272,000,000, or 53.4 per cent of all state tax-revenue, the general property tax was yielding for purely state purposes no more than $229,000,000, or only 5.4 per cent of such revenue. Indeed, upwards of a dozen states, including New York and California, now make slight, if any, use of the general property tax for *state* purposes.

Because, nevertheless, of its historical importance, its continued use widely for state and everywhere for local purposes,[2] the prevalent dissatisfaction with it in many quarters, and its central position in the entire problem of tax reform, our summary of the existing tax system may well start with some comment on the property tax.

The General Property Tax

Nature and basis

In its broadest meaning, the general property tax is a tax on the estimated exchange value of all property, levied at a common rate for all property in the same taxing area. It is thus universal and uniform; it is imposed on the property where it is located; and it is paid by the owner. Taking, of course, a multitude of forms, property nevertheless exists in the two chief forms of (1) real estate, consisting of land and improvements (mainly buildings) and (2) personal property—the one immovable, the other movable. Personal property, in turn, may be either tangible, *e.g.*, livestock, grain, merchandise, household furniture, machinery, and automobiles, or intangible, as stocks, bonds, mortgages, and

[1] To this list may be added unemployment compensation taxes on payrolls, often called "payroll taxes," and yielding in 1945 a total of $1,254,000,000—more than any other tax. Since, however, the proceeds of these taxes are for a special purpose not connected with general operation of the state government, they may be omitted from the present discussion.

[2] In view of the constitutional provision that "direct taxes shall be apportioned among the several states... according to their respective numbers," the property tax, being a direct tax, is not practicable for federal use, and is not so employed.

bank deposits. Where the general property tax is really general, these distinctions are, at least in theory, of no great consequence; all property is supposed to pay the same tax regardless of designation. In the majority of states, however, some classes of property are set apart for special (usually lower) rates of taxation, or indeed are exempted altogether; so that the term "general property tax" must often be taken in an approximate rather than a strictly literal sense. In all states, the tax is employed primarily for county, city, and other local purposes, being, indeed, by far the greatest resource of local governments; and, as indicated above, several states now make little or no use of it for strictly state purposes. In all cases, however, it rests upon taxing authority conferred by the state—in the constitution, in statutes, or in both—and throughout most of the country the states themselves share in the proceeds.

The "tax calendar"

Although numerous, complicated, and varying somewhat from state to state, the stages or steps involved in administering the property tax—the "tax calendar" of which the experts speak—lend themselves to brief review. (1) First comes the tax levy, the competent authority (usually the legislative body) of each unit of government, including the state itself, determining the amount of revenue that must be raised from this source and then imposing it as the year's tax burden, so to speak, on the property concerned.[1] (2) The property is valued by local assessors in order to determine the valuation on which the owners' tax obligations shall be computed. Personal property is assessed annually, real estate also annually in about half of the states, but in other states at longer intervals ranging from two to ten years; and all assessments are supposed to indicate value on a certain day. (3) Valuations determined by local assessors are far from uniform, and property-owners often raise objections. Hence a third step involves inspection of the assessments, with adjustment of inequalities and injustices, by a county, city, or township board of review.

(4) A fourth step is "central assessment or equalization." Along with the locality, the county, and in most instances the state, makes a property-tax levy. Each taxing jurisdiction might, of course, set up its own separate assessment machinery. But this would involve expensive duplication, and what happens is that each takes the locally-made assessments as a starting point and on the basis of them makes such equalizations and other adjustments as boards of equalization employed for the purpose may decide upon. Sometimes the work is performed on the state level by a board of equalization consisting of certain elective state officers serving *ex officiis*, but often it is in the hands of a specially appointed body known as the tax commission, which in any event is likely to have the important functions of (a) issuing instructions to assessors and other tax officials regarding the proper performance of

[1] Chronologically, the levy often comes later, but this is immaterial to the essential process.

their duties, including methods of procedure, accounting, and recording; and (b) making the original assessments of certain kinds of property which are difficult to assess locally, especially railroads, telegraph and telephone systems, express and sleeping-car services, and other public utilities. Incidentally, it would, of course, be perfectly possible to let the state do *all* of the assessing; and this would make for considerably greater uniformity than even the best-intentioned equalization authorities can hope to achieve. Local assessors, however, are supposed to have the advantage of familiarity with local property; and, although overborne with respect to many other forms of centralization, local jealousy of state authority would at this point be difficult to break down. (5) Once the results of assessment and equalization, the state over, are known, taxes can be apportioned and rates determined. In the city, township, or other local assessment district, the clerk or other proper official has only to figure out how many cents on the dollar, or dollars on the hundred, will be necessary to produce the revenue required locally. From the county will come similar information for purposes of county revenue, and finally also from the state, for its purposes, except, of course, where the state no longer shares in the proceeds of the tax. Adding to the local rate the rates certified to him by the overlying units, the local official arrives at the total tax rate; and tax bills are made out and sent to property-owners accordingly.

Completing the tax calendar are three further stages which for present purposes require only to be mentioned: (6) collection of the taxes as levied, commonly by a local collector or treasurer, who forwards the county and state shares to the proper officials; (7) special procedures for collecting, or at least trying to collect, taxes that become delinquent; and (8) appeals from dissatisfied taxpayers or tax districts, first to the state tax commission, and afterwards, if desired, to the courts.

Advantages of the tax

For a hundred years, the general property tax has been a cardinal feature of the American fiscal system; and notwithstanding its many and serious faults, there are points in its favor. Property receives protection from government, and may logically be asked to contribute to government's support. Lending itself particularly well to local use, the tax is in keeping with the perhaps weakening, but still persisting, spirit of home rule. Its easy elasticity—the facility with which its yield can be moved up or down by simple manipulation of the tax rate—fits it to meet varying needs after other sources of income have been exhausted.

Disadvantages:

1. Concealment of personal property

Nevertheless, the tax has some serious defects. First may be mentioned the unfairness arising from widespread concealment of intangible personal property, resulting in complete escape from taxation. In early times, nearly all property was in the form of real estate or of tangibles such as livestock, furniture, merchandise, farm implements, and grain. Nearly everything could be located and its value determined by the tax assessor, and little, if any, taxable property failed to pay its just share.

From this relatively simple situation, we have shifted to one in which the value of stocks, bonds, mortgages, bank deposits, and other intangibles often exceeds that of real estate and tangibles. Furthermore, it has become practically impossible for tax assessors actually to see and evaluate all tangible personal property, to say nothing of intangibles; so that the common practice is to require the taxpayers themselves to make out sworn statements of their personal property and simply hand them to the assessors—a method that, of course, virtually amounts to self-assessment. Still further, while real estate and personal tangibles are usually immune from federal taxation, intangibles (or at all events the income derived from them) are taxed so heavily from Washington that when federal taxes and state taxes are added together, they amount —at least in the estimation of many people—to virtual confiscation.[1] Under these circumstances, vast amounts of property which the tax assessor has no chance to see are never reported to him—such portion as is reported depending almost entirely upon the personal honesty of the taxpayer in the given case.

2. Defective assessments

A second main defect of the general property tax arises from faulty assessment of property actually reached. The reasons for such deficiency are numerous, but no doubt the chief one is that ninety per cent or more of the hundred thousand assessors functioning in some 29,000 assessment districts throughout the country are part-time elective officials, with hardly ever any training qualifying them to weigh the many factors entering into the determination of property values; "much of what they do is mere guesswork." There are architects' tables, land-value maps, and other equipment which would be of assistance; but only rarely are they used. Directions from the state tax commission and corrections made by equalization boards contribute something, but not enough to guarantee satisfactory results. In consequence, what purports to be a uniform general property tax is in many states neither uniform, nor general, nor equitable. Real property usually bears more than its fair share; and often there is glaring inequality in the valuations placed upon real estate located in different parts of the same state, and even within the same county. Personal property, on the other hand, either is shockingly undervalued, or, because of being easily concealed, escapes taxation altogether.

Improvement through classification

Problems connected with these and other defects of the property tax have received a great deal of study, and to a limited extent improvements are being introduced. One of these takes the form of classifying property so that different tax rates may be imposed on the different classes, so long as the rate is uniform for all property falling within a given class. This makes it possible for lower rates to be applied to intangibles, thereby removing or lessening the incentive to conceal them.

[1] The burden is the more onerous because the state-local tax rate on intangibles is commonly one which has been determined primarily with reference to real estate and tangibles.

In about half of the states, intangibles are now taxed under especially low rates or valuations, and nine or ten have exempted them altogether. New York, indeed, has exempted *all* personal property, and Wisconsin the greater part of it. After all, such abandonment of the *general* property tax represents merely a reversion in the direction of the property tax of the earliest days, when the tax was imposed separately, and at different rates, on land and other forms of property.

Other possible improvements

Two or three other lines of improvement suggest themselves. One relates to the quality of assessments; and here the need is to get away from the use of untrained popularly-elected local assessors, and substitute a plan under which assessors would become state civil servants, appointed on a merit basis by the tax commission or other central authority—a proposal which, however, would as yet be looked upon with little favor in most local communities.[1] A second improvement might well have to do with county and other boards of review or equalization, now composed commonly of members serving *ex officiis* and, for obvious reasons, hardly better equipped than the assessors themselves. If there would be virtue in having assessors appointed by the state tax commission, the same arrangement might well be applied to members of equalization boards; and any plan tending to eliminate politics from such boards and to obviate the tug-of-war between members representing rural and urban taxing districts would be a clear gain. One other step in advance would be to bring on the tax-rolls a great deal of real estate now exempted—approximately one-eighth throughout the country as a whole. Real estate used for religious, educational, and philanthropic purposes has long been immune, on the ground that the institutions holding it are not run for profit, but are performing essential community services. Perhaps this is justifiable. But some states go farther than this, for example, by partly or entirely exempting manufacturing plants, farm implements, growing crops, and homesteads, *i.e.*, urban or rural dwellings occupied by the owner, with the sites on which they stand. All such exemptions narrow the tax base and increase the tax rates on remaining taxable property; and, with heavy pressure for augmented public revenues promising to continue through the years, we may not unlikely see determined and finally successful effort to bring much property now exempted on the tax-rolls, even though perhaps at reduced rates or valuations.[2]

[1] After studying the subject four years, a committee of the National Association of Assessing Officers presented a significant report in 1941, recommending (among other things) that the number of assessment districts be greatly reduced, that all assessors be appointed rather than elected (and on a merit basis), and that terms be lengthened and salaries increased.

[2] For a rather recent descriptive and statistical survey of the general property tax in the United States, see C. E. Rightor and I. A. Applebee, *Property Taxation: 1941*, U. S. Dept. of Commerce, Bureau of the Census, State and Local Government Special Study No. 22 (Washington, 1942). On tax-exempt property, see *State Government*, XIX, 108-114 (Apr., 1946).

A relatively new problem for the states has arisen from the loss of tax revenues resulting from acquisition by the federal government of land for flood control, soil

Newer Forms of State Taxation

There are those who consider that the best way to avoid the ills incident to the general property tax is to substitute other taxes for it. Such a generalization, however, is hardly valid, because, with improvements of the kinds suggested, the tax can be at least partially redeemed from its most serious defects; for strictly local purposes, it is still to be regarded as a natural form of tax and probably indispensable. In the scale of revenue-producing sources for strictly state purposes, however, it has dropped far toward the bottom; and we may next note some forms of taxation that in many states have largely or wholly superseded it.

1. Income taxation

The first serious chapter in the history of income taxation in this country was written in the federal domain, and culminated in the Sixteenth Amendment and the income tax law of 1913. In the states, there were a few earlier unsatisfactory experiments, but the first permanent and effective law was passed in Wisconsin in 1911. In 1913, Massachusetts, Delaware, Missouri, and Mississippi enacted similar legislation; in 1915, New York and North Dakota joined the growing list; and thereafter the movement spread until at present (1947), more than three-fourths of the states have income taxes applicable to either individuals or corporations, and usually to both. In the fiscal year 1945 (ending at various dates in different states), the aggregate yield of state taxes on individual incomes was $350,000,000, and on corporate incomes $460,000,000—constituting together about nineteen per cent of the total state tax yield (although, of course, a much higher per cent in states having the income tax).[1] Though differing in details from state to state, the principal features of the tax are: (1) taxation of net income only,[2] (2) exemption of stipulated amounts for single persons and of larger amounts for married persons, with allowances for dependents; (3) a scale of rates rising from commonly one per cent on the first thousand dollars of taxable personal income to as much as fifteen per cent (in one or two states) in the highest bracket; (4) a "normal" rate sometimes supplemented with surtaxes after a certain point is reached; (5) usually lower rates on corporate than on personal incomes; and frequently (6) assessment and collection, not by local officials, but—as started in Wisconsin in 1911—through the state tax commission and a force of civil service employees.[3]

conservation, and especially for power development. In certain instances, the federal government has, however, adopted a policy of replacing such lost revenues. See A. Edelman, "Public Ownership and Tax Replacement by the T.V.A.," *Amer. Polit. Sci. Rev.*, XXXV, 727-737 (Aug., 1941), and "Power Projects Pay Tax Losses," *Nat. Mun. Rev.*, XXX, 478-481 (Aug., 1941).

[1] All figures for tax yields here cited are from U. S. Dept. of Commerce, Bureau of the Census, *State Tax Collections in 1945* (Preliminary) (Washington, 1945).

[2] There are gross-income taxes also, *e.g.*, in Indiana, but they are properly a species of business tax.

[3] A few states tax income from one or two stipulated sources only, *e.g.*, New Hampshire from intangibles, and Ohio from intangibles and rents.

Motor fuel and vehicle taxes

Until comparatively recent times, highways and streets were financed almost entirely from general taxation, mainly the general property tax. The advent of the motor vehicle to almost universal use led, however, to demand for more and better roads, and naturally prompted the idea that the highways, rural and urban, used by the ubiquitous motorist should be paid for and kept up by him. The result has been, not only the development of the country's present remarkable network of hard-surfaced thoroughfares, but the rise to great prominence of a newer group of tax levies, sometimes referred to as the "motor vehicle tax family." Chief among the members of this family are (1) the motor vehicle license, which in essence is an annual payment for the privilege of using a motor vehicle on the highways, and whose yield of $456,000,000 in 1946 exceeded the yield of state income taxes paid by either individuals or corporations; and (2) the gasoline tax, started in Oregon in 1919, now used in every state, and in 1946 yielding (at rates averaging about four cents a gallon) a total of $900,000,000—more than any other single source of state tax revenue, and over a sixth of the total revenue raised by the states throughout the country. Over the protest of rural and road-building interests, not to mention automobile associations, varying portions of motor vehicle (including gasoline) proceeds have, in later years of financial stress, been used, in a number of states, for miscellaneous state purposes; on the other hand, not even the huge total of such proceeds has ever sufficed (except during wartime suspension of construction) to meet the full outlay of the states on roads and streets.[1]

General sales taxes

Gasoline taxes are, of course, a form of sales taxes; and for a good while there have been scattered taxes, both federal and state, on sales of other specified commodities. The principle of the sales tax has, however, of late been carried much farther. The story starts with the economic depression of the thirties, characterized by two or three significant developments affecting state finances. One, of course, was the sharp shrinkage of revenues, leading to the introduction of many economies such as cutting down the number of employees and reducing salaries. Another was the uprising of hard-pressed taxpayers against the burden of taxation, expressing itself in protests voiced by hundreds of taxpayers' associations springing up over the country, and even in sporadic taxpayers' strikes. A third was the easing of tax-collection regulations, in view of the enormous proportions attained by tax-delinquency—for example, by reducing penalties for non-payment of taxes, by permitting payment of property taxes in instalments, by remitting penalties if delinquent taxes were paid before a fixed date, and by postponing tax sales and extending the period of redemption of property after being sold for overdue taxes. Still another such development was the revelation with

[1] F. G. Crawford, *Motor Fuel Taxation in the United States* (Syracuse, N. Y., 1939). Restricted use of motor cars during the recent war cut down receipts from vehicle and fuel taxes; on the other hand, road-building was largely suspended.

new vividness of the defects of the general property tax, leading nearly a score of states to enact laws setting limits of one kind or another to the taxing powers of state and local governments.[1]

Easily the most arresting development of the period affecting state revenues was, however, the rapid spread of sales taxes. Beginning with West Virginia somewhat before the depression era (1921), a total of thirty-one states introduced such levies, in one form or another, most of them between 1933 and 1936. In some instances, the action was inspired, at least partly, by fear of inability, in the lack of such a tax, to meet the obligations imposed by the new social security system, at a time when state revenues were sagging. In most cases, indeed, the tax was adopted as an avowedly temporary or emergency measure; and in view of its unpopularity because of its inherent troublesomeness, and because also of the opinion that it bears unjustly on people of very limited means, it is not surprising that no state has adopted such a tax since 1937, or that eight have abandoned it. Twenty-five states, located in all sections of the country, retain it, however; and in sixteen of the number there is a supplementary "use" tax, laid on the use, storage, or consumption of commodities that would have been subject to the sales tax if bought in the state instead of brought in from outside. In most of the twenty-five states, the sales tax applies only to retail sales; but in five [2] it is a *general* tax in the fullest sense, applying to the sale of all commodities, including real estate and personal services, and to purchases at wholesale as well as retail. Wherever tried, the tax has been highly productive, and it is difficult to see how some states could have avoided bankruptcy without it. Even with only half of the states employing it, and with the rates (now most commonly two per cent) lowered in several states, the tax (together with the minor "use" levy) yielded in 1945 the sum of $775,000,000—more than was derived from any other source except gasoline taxes (themselves sales taxes) and contributions to unemployment compensation. More than eighteen per cent of the total state tax revenue in the year mentioned came from general sales taxes; about thirty-five per cent, from such taxes plus gasoline taxes.[3]

Tax Administration—The Collection and Custody of Funds

Tax collection

In the days when nearly all state revenue was derived from the general property tax, the state treasurer had little to do except receive

[1] In seven of these states, including Michigan, Indiana, Ohio, and West Virginia, such provisions were embedded in the state constitution. Cf. G. Leet and R. M. Paige, *Property Tax Limitation Laws* (rev. ed., Chicago, 1936).

[2] Indiana, Mississippi, New Mexico, Washington, and West Virginia.

[3] Other important state taxes, which cannot be discussed here, include—aside from the payroll taxes mentioned on p. 600 above—(1) a wide variety of often rather complicated business taxes (including gross receipts taxes), (2) estate and inheritance taxes (known together as death taxes), and (3) poll taxes, either provided for or permitted in all but six states, and employed mainly in the South.

the moneys passed along to him after being locally collected. Nowadays, the situation is different, because the taxes on which the state depends have become highly diversified, and many are collected by officers or other representatives of the state itself. To be sure, the general property tax is in nearly all instances still gathered by local collectors or treasurers, county or city, with the proceeds apportioned among the various taxing units (including the state) according to the relative rates that have been imposed. In some states, however, this tax is no longer used for state purposes; and in nearly all of the others its yield to the state, as we have seen, is far over-topped by other forms of tax revenue. In the case of the property tax, the main difficulty arising is tax delinquency, which, as observed above, grew serious indeed during the depression, with often as high as thirty, forty, or even fifty to sixty per cent of the amounts due in individual taxing districts going unpaid. With considerable uniformity, the states provide for (1) a regular payment period (on the basis of payment either at a single time or, in about half of the states, in instalments), and (2) an additional period during which, if payment is made, accrued interest must be included, with often the amount of the tax somewhat increased also by way of further penalty. Procedures in cases of persistent delinquency vary, but in most states there are "tax sales" enabling the taxing authorities to get their money, and giving the private purchasers ownership of, or at least an interest in, the properties involved.

Local *vs.* central collection

Except as it normally proceeds almost automatically in the case of the general property tax, local collection of state revenue is not economical, the expense entailed often consuming a large share of the sums gathered. Centralized collection has therefore grown in favor, especially in connection with income, estate, inheritance, motor vehicle, and business taxes. In Wisconsin, taxes on incomes of individuals, trusts, and estates are collected by income-tax assessors, selected according to merit principles and each functioning in one of four districts, where their duties are performed under the supervision and direction of the state tax commission—reversing the procedure in the case of the property tax, in that a large share of the proceeds of the income tax, after being centrally collected, is turned over to counties and other local areas. All other states employing income taxes have substantially similar arrangements, at least for collection. Tax revenues gathered by state agencies and retained for the state do not always, however, go into the general state treasury; fees collected by the secretary of state or the insurance commissioner, for example, frequently are used to pay the expenses of the office collecting them, only the surplus, if any, being turned over to the treasury. Even the moneys paid directly into the treasury are in some cases earmarked for particular purposes, *e.g.*, education, making it necessary for the treasurer to maintain an accounting system permitting of separate accounts for various funds.

It may be added that there is growing sentiment among experienced persons in favor of concentrating all state tax administration in the state tax commission or some other single department.[1]

The care of funds

In about a dozen states, all state funds are kept in the state's vaults, with, of course, no interest received. Elsewhere the practice is to deposit such money in banks located in different sections and designated as depositories. To be sure, the latter arrangement opens a way for favoritism and collusion in selecting the banks, and for losses arising from bank failures. After unhappy experiences at these points, most states, however, have at least protected themselves against loss by requiring depository banks to furnish adequate guarantees of security; and some profit to the state usually accrues from a low rate of interest paid on the deposits made.[2]

The Pattern of State Expenditures

The rising cost of government

The past thirty years have witnessed an extraordinary increase of public expenditures in the United States, on all levels of government—federal, state, and local. Growth of population, developing urbanization, mounting prices (except temporarily during the depression of the thirties), and especially the steady expansion of governmental functions and services, would have produced a trend toward higher outlays in any case. But two world wars and the prolonged intervening economic crisis quickened a mere trend to a torrential flow; and although the cessation of hostilities in 1945 started a sharp recession, especially in the federal domain, nothing is surer than that, even with peacetime conditions fully restored, governments will still be found spending as they never spent before except in days of dire emergency. As recently as 1930, the total outlay of state governments was but slightly over two and one-half billion dollars; in 1944, the figure mounted to $5,959,000,000; and—with great service undertakings like education, public welfare, and highways stretching, on ever-expanding lines, into the indefinite future—no outlay much if any smaller is to be anticipated in any year to come. Some idea of how the 1944 total was allocated, including the portions spent directly by the states and the far larger portions turned over by state treasuries to be expended by counties, cities, and other local units, may be obtained from the following tabulation: [3]

[1] Every state except Florida now has a tax commission or similar agency. About twenty states have a commission of from three to seven members (usually three), and some thirteen others concentrate the functions in a single tax commissioner, sometimes with the assistance of a board of tax appeals. Under either plan, tax commissioners are commonly appointed by the governor, and usually for six years.

[2] M. L. Faust, *The Security of Public Deposits* (Chicago, 1936). A further safeguard—in this instance against the misuse of funds—takes the form of pre-audits by a state auditor or comptroller to determine, before payment is made, whether a claim on the treasury is valid, supplemented, too, by post-audits ranging over the accounts of all spending agencies throughout a year or other substantial period.

[3] The figures that follow are taken from Bureau of the Census, "State Expenditures in 1944" (May, 1946).

The objects of state expenditure in 1944

1. Debt retirement and interest, $318,000,000. A few states have little debt, but many owe sizeable amounts, and the total is nearly three billion dollars.

2. Administrative, legislative, and judicial establishments, $2,104,000,000. The general machinery of state government costs a good deal, although perhaps less than commonly supposed. With this over-all item accounted for, the remainder of the list consists of *service* functions, as follows:

3. Schools, $1,181,000,000. Rather less than one-third of the sum was spent directly by the states (on state universities, teacher-training institutions, state departments of education, etc.); the remainder represents grants to local governments, chiefly for the maintenance of systems of elementary and secondary schools.

4. Old age insurance and unemployment compensation, approximately $1,404,000,000. For completeness of the record, unemployment insurance may be included here; for although, under the terms of the federal Social Security Act of 1935, the money comes from an excise levied on employers (of eight or more persons) by the federal government and does not go into the state treasuries, it is requisitioned from the federal government by the states and paid out by them. It is included in the total expenditures indicated above.

5. Public welfare, $947,056,000. Included in this item are old age and other forms of public assistance, largely but not entirely embraced within the federal-state social security program launched in 1935. More than half of the sum mentioned took the form of grants to local units.

6. Highways, $853,600,000. As in the case of certain other expenditures to be mentioned, this sum includes not only outlays by the states directly, but also highway funds allocated to local units and highway debt service.

7. Hospitals and institutions for the handicapped, $263,604,000.

8. Agriculture and conservation of natural resources, $131,701,000.

9. Public safety or protection of person and property, $130,906,000. This reflects the recent development of state police and of other protective agencies in a domain formerly left almost entirely to local governments.

10. Corrections, $77,929,000.

11. Health and sanitation, $69,613,000.

12. Recreation, $7,501,000.

13. Libraries, $2,827,000.

Methods of Appropriation—Budgetary Reform

Having seen the diverse ways in which state funds are obtained, and the principal objects of state expenditure, we turn to the methods by which money is allocated to the offices, departments, boards, commissions, and other spending agencies.

Earlier appropriation methods

Under conditions prevailing in practically every state prior to about 1913 (and even yet not wholly overcome), it was impossible either to make comprehensive plans for the distribution of public revenues among the several administrative activities or to control, in any strict and effective way, the use of state money or property. With almost unlimited demands pouring in from a hundred or more agencies and institutions, and with no method of balancing claims upon the treasury one against another, and of distributing appropriations on the basis of a full consideration of the requirements of the state, unseemly scrambles for funds invariably took place whenever the legislature came into session. The departmental and institutional estimates were either merely "compiled" by some state officer, such as the treasurer or auditor, and transmitted by him to the legislature, or presented directly and independently to the appropriation committees by heads of the state departments or institutions. No administrative officer acquainted with the entire business of the state reviewed such estimates, compared them, cut them down to agreed necessities, measured them against estimated revenues, and laid before the legislature a carefully prepared financial program. Furthermore, every member of the legislature was at liberty to introduce as many bills as he chose carrying charges upon the state treasury; and when the legislature adjourned, no one pretended to know, even approximately, how much money had been appropriated.[1]

Resulting extravagance and waste

In most states, the governor could veto separate items; wherefore, with a view to shielding them against a veto, it became common practice to place doubtful expenditures in the same item with essential ones. Meanwhile, without any knowledge of what the total of authorized expenditures for its next fiscal period would be when the governor had finished vetoing bills and items, the legislature would pass revenue bills prepared by separate committees with little or no relation to the work of the committees in charge of appropriations. Naturally, neither the governor nor the legislature could be held to a proper degree of accountability by the citizens of the state who had to foot the bills; and executive departments were often granted more money for the performance of their functions than the nominal head of the state government considered necessary.

Adoption of budget systems

Relief from these conditions became imperative as the cost of government mounted; and it has been found, in greater or lesser degree, in plans of budgetary procedure introduced in all of the states since Wisconsin and California set the example in 1911—ten years before a budget system was adopted for the federal government. Hardly any two of these state plans are alike in detail, and there are some differences in fundamentals. Most important among points of variation is the budget-making agency—in other words, the location of responsibility for formulating the budget or program of expenditures. On this basis, the systems fall into

[1] On somewhat comparable earlier conditions in the federal government, see p. 350 above.

three fairly distinct classes. (1) In one state, Arkansas, the budget is prepared and submitted to the legislature by the finance committees of the two houses. (2) Nine states have laws providing for budgetary boards or commissions, consisting usually of the governor and one or two other executive officers and a few members of the legislature, or made up solely of the principal executive officers. (3) The remaining thirty-eight states have what is called the executive type of budget: [1] in five of these (Arizona, Nevada, New Mexico, Vermont, and Wyoming), the governor is made directly responsible for formulating and presenting the program of state expenditures; in the others, budget-making is in the hands of a comptroller, a budget director, a budget bureau, or some other official or agency whose work is performed, at least nominally, under the governor's supervision.

Still much room for improvement

Some states have budget systems which at certain points are superior to that of the national government.[2] In New York, Maryland, West Virginia, and Nevada, for example, the legislature may reduce or strike out any item in the budget, but may not (with slight exceptions) increase any amounts requested, or insert new items. Elsewhere, however, amounts may be increased and new items inserted; indeed, in not a few states procedure is still loose and budgetary restraints rather a matter of theory than of practice.

If one were to attempt to enumerate the main requisites of a sound budget system for a state—many of them still lacking in a majority of states—the list might run somewhat as follows. (1) Each department, office, or institution should be required to submit to a central budget-making agency, two or three months before the legislature meets, an estimate of its financial needs for the ensuing fiscal period, upon uniform sheets having items arranged in accordance with some uniform system of classification. (2) The central budget-making agency should then make a careful review, revision, and compilation of the estimates submitted; and to aid it in this work, it should be given a staff to conduct investigations and make reports. (3) At some time within the first few days of the legislative session, this budget-making agency should submit to the legislature a complete budget, *i.e.*, a comprehensive program of recommended expenditures and estimated revenues, and accompanied by a balance sheet, a debt statement, and a statement of the financial condition of the state for each year covered by the budget. (4) All appropriations should be consolidated in a single appropriation bill, unless, as in a number of states, the constitution requires that appropriation bills for salaries of state officers shall not include other items of expenditure. (5) The legislative committees should forthwith proceed to a consideration of the budget proposals, and should report their appropriation bills

[1] New Hampshire and Rhode Island are included in this third group, although their budgetary systems contain important variations from the true type of executive budget.

[2] See pp. 351-354 above.

in ample time to allow full debate, criticism, and amendment, so that the bills may be passed well before the close of the session. (6) No supplementary or special appropriation bills should be enacted until after the final passage of the budget bills; and in all such cases a two-thirds or three-fourths vote might well be required. Even if made effective on all of these lines, a state budget system would not serve all of its purposes unless accompanied by such ancillary reforms as (1) reconstruction of state administrative machinery (where not already carried out) so as to unify and integrate executive responsibility for the entire system; (2) concentration of the handling of all appropriation measures in a single committee of each house, or, better still, in a joint committee of the two houses; and (3) grant to the governor (where he does not already have it) of the power to veto items.

State Control Over Local Finances

As must have become apparent from preceding comments, the finances of a state and of its political subdivisions are so intermingled that neither can be understood in isolation from the other. For the ordinary taxpayer, the finances of his local governments (there are almost always more than one) are, indeed, considerably more important than those of his state; such governments, in the aggregate, spend three or four times as much as do the forty-eight state governments combined.[1] These local governments, however, raise by no means all of this money by their own efforts; and this leads, first of all, to a word about the sources from which local revenues are derived.

Sources of local revenue

(1) The first of these (mentioning only the most important) is locally imposed taxes, supplemented by many kinds of license and other fees.[2] On this score, we need say little; for the one universally used and supremely important local tax is the general property tax, already described. The great bulk of the proceeds of this tax (in certain states the whole amount) goes invariably for local needs; and it is difficult to see how the tax, with all its faults, could be replaced with any other. (2) Next may be mentioned the proceeds of "shared taxes." These are taxes (like several we have mentioned) which, although imposed, and usually collected, by the state, are by law so administered that some agreed proportion of the yield is automatically turned over to counties and other

[1] Leaving out of account the tremendous depression and wartime expenditures of the federal government, the high cost of government is not chargeable mainly to state government, but to local government, where the increase of expenditures has been caused chiefly, as in the case of state government, by the assumption of new activities by governing bodies and by public improvements of one kind or another—all in response to the demands of taxpayers, many of whom were a few years ago found leading taxpayers' strikes!

[2] Local taxing units (including units empowered to raise money by special assessment or other devices) are exceedingly numerous—155,099 in 1942. In hundreds of instances, tax or debt limits upon counties or cities have been evaded by creating, for some special purpose, a new type of district and endowing it with the right, on its own part, to impose taxes and incur debts. The result is the veritable labyrinth of special districts and overlapping taxing jurisdictions described in Chapter XLIII.

local units. Technically, the general property tax is not such a tax, because although the taxpayer gets a single tax bill, he is really paying, by a single transaction, two or more property taxes—county, city, state—included in one bill for purposes of convenience; a taxing unit on any taxing level can put into the composite bill whatever proportion it desires.[1] The truly "shared" tax is *one* tax, state levied, and with the locality having no part in it except to receive such percentage of the yield as has been allocated to it by law. Good examples are motor vehicle license taxes, gasoline taxes, and in a dozen states, income taxes, liquor taxes, and sales taxes.

(3) Finally, there are grants-in-aid—extended even more generously by state governments to localities than by the national government to the states.[2] These differ, obviously, from shared taxes, in that, whereas under the shared tax the state automatically hands over to the localities from year to year such proportion of the proceeds of a given tax as has been fixed by law, under the grant-in-aid system the state, *out of its own funds*, bestows on the localities such amounts, for such purposes, and on such conditions, as it may choose. In the one case, the amount distributed is dependent on the yield of a particular tax; and usually the distribution is such, at least approximately, as to return the money to the communities where it was collected. In the other case, a fixed amount for a given year, from general funds, is distributed, by appropriation, and usually on some basis of demonstrated need. State grants-in-aid are particularly important in the domains of education, welfare activities, and highways. Funds received by localities from shared taxes may usually be expended for any purposes whatsoever, but those from grants-in-aid only for purposes expressly stipulated in the grant. Both shared taxes and grants-in-aid have attained their present proportions fundamentally because of (1) the greatly superior taxing powers and opportunities (as well as borrowing facilities) of the state governments as compared with local governments, and (2) the general trend in later times toward centralization, expressing itself in fiscal relationships as well as in other fields.[3]

Forms of state control

Even in imposing their own taxes (including the property tax), local units are likely to be subject to constitutional or statutory restrictions, *e.g.*, as to the maximum tax rate that they may employ; and in any case, local assessments, as we have seen, are likely to come under the scrutiny of the state tax commission or other equalization agency, which may readjust them or even (usually on appeal from taxpayers) cause reassessments to be made. In spending their funds, too, local governments

[1] Except as restricted by general constitutional or statutory limitations.

[2] It is not to be forgotten that the national government also makes some grants directly to local units, although the aggregate is relatively small.

[3] L. W. Lancaster, *Government in Rural America* (New York, 1937), Chaps. VI-VII; R. J. Hinckley, "State Grants in Aid," *Special Report No. 9*, [New York] *State Tax Commission* (Albany, 1935).

are under state controls. (1) Grants-in-aid are received on condition that the services for which they are earmarked are kept on a satisfactory level of efficiency; and the states have a good deal to do with establishing such levels and, through inspection and direction, seeing that they are maintained. (2) Local budgets are often subject to review by state authorities, who may protest items which they consider excessive or otherwise unjustified. Deficiency appropriations and transfers from one fund to another may also come under the critical eye of a state auditor, board of accounts, or other agency. (3) Local finance officers are often compelled to use uniform systems of records and accounting, and in any event, in nearly all states, representatives of a state finance officer or department pay annual (usually unannounced) visits to spending officers of local governments, look over their accounts, require carelessness to be corrected, and cause embezzlers to be brought to justice. (4) Debt limits are commonly imposed; and while borrowing within these limits may usually proceed without intervention from the outside, a county board or city council proposing to issue bonds to build a highway, develop a park, or construct a court house or city hall may find a group of taxpayers arguing before a proper state authority that the outlay is unnecessary, extravagant, or ill-advised at the particular time, and may be obliged to convince state examiners that the proposal is sound, on penalty of seeing it vetoed from the state capital. In protest against all of these forms of state intervention, it is easy to cry out that the sacred principle of home rule is being violated, and that the officials who impose and enforce the restraints are too far away to know the needs and conditions involved. In almost every state, however, vasts sums have been saved by protection given in these ways against the looseness and waste too often characterizing the local administration of affairs by inexperienced, careless, partisan, or even corrupt public officials.

State and Local Debts

A final phase of state and local finance requiring a word of comment is borrowing and indebtedness. Unlike the national government, which can borrow without effective restraint, the governments of all but three states [1] are restricted in this matter by constitutional provisions designed to prevent a recurrence of the reckless piling up of debts which marked the careers of state legislatures before the Civil War and during the Reconstruction period.[2] Nevertheless, state borrowing—principally for highway construction, aiding veterans, farmers, and the unemployed, and funding deficits—increased approximately five-fold between 1915 and 1937, and nowadays all states except Nevada carry some debt,

State indebtedness

[1] Connecticut, New Hampshire, and Vermont.

[2] Constitutional provisions on state borrowing are tabulated in *The Book of the States, 1941-42* (Chicago, 1942), 132-135. Cf. B. U. Ratchford, "Constitutional Provisions Governing State Borrowing," *Amer. Polit. Sci. Rev.*, XXXII, 694-707 (Aug., 1938).

although in the case of two others the amounts are less than a million dollars. Greatly increased state revenues arising from wartime economic conditions enabled some states to provide considerable sums for debt retirement, with the result that by 1945 the total of state debts was brought down to $2,471,000,000; and of this amount a large portion was covered by accumulated sinking funds.

Local debt

In the period 1912-32, local governments, notwithstanding restrictions, incurred debt burdens which weighed heavily on taxpayers during the years of the depression; indeed, during the two decades indicated the net debt of cities, towns, villages, and boroughs increased 208.2 per cent and county debts 514.7 per cent, while the debts of school districts, townships, and all other civil divisions mounted by 1,636.5 per cent. Fortunately, this upswing was halted in 1932-40, when per capita debt-growth was confined to ten states and the District of Columbia, while in thirty-eight states there was an actual decrease. On account of the increase in tax-delinquency and the shrinkage in all sources of revenue during the depression, many local-government units were, however, unable to pay the interest on or principal of their bonds or other forms of indebtedness—cities alone defaulting to the extent of approximately two billions. And for the relief of such communities, Congress, as we have seen, in 1934 passed a Municipal Bankruptcy Act under which defaulting local governments could voluntarily go into a bankruptcy court and obtain approval of plans for readjusting their outstanding obligations.[1] On the other hand, during the wartime years after 1940 debts of all kinds of local-government units were reduced, at varying rates of speed, except in the case of special districts;[2] and in 1945 the total of such debts stood at $14,164,000,000.

Methods of borrowing

State and local governments borrow money ordinarily by issuing interest-bearing bonds running for periods of from ten to twenty years, and taking the form of either sinking-fund issues or serial issues—differing principally in the method provided for payment. Under the sinking-fund system, all bonds of a given issue mature at one time, and a definite sum is set aside each year from current revenues to meet principal and interest. Serial bonds, on the other hand, mature in instalments or series, thus enabling a definite proportion of a given debt to be extinguished every year, or at other stated intervals, by payments from current revenues which, under the other system, would go into the sinking fund. Serial bond issues have grown rapidly in popular favor in the past two decades, and are fast supplanting the earlier sinking-fund system.

[1] This act was declared unconstitutional in May, 1936. But a new statute of 1937, introducing somewhat different methods, was upheld by the Supreme Court in United States *v.* Bekins, 304 U. S. 27 (1938). On February 1, 1941, 1,261 local-government units and political subdivisions were still in default: 146 counties, 493 cities and towns, 497 school districts, and 125 other districts.

[2] The exception is accounted for by a doubling of indebtedness for housing. The reasons for wartime reduction of local debts lay in (a) increased revenues in a time of high national income and (b) curtailed building and other capital expenditures.

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CHAPTER XXXIX

THE STATE JUDICIARY

Functions

The last, and in some respects the most important, of the three coördinate branches of state government remains to be considered, namely, the judiciary. The state courts[1] perform a number of very significant functions: (1) they provide means for the orderly adjustment of disputes between individuals, and between individuals and state or local governments; (2) they constitute the sole instrumentality in time of peace for determining the guilt or innocence of persons accused of violating the criminal laws of the state; (3) they serve as guardians of the constitutional rights of the citizen against infringement by state or local authorities; (4) they keep the different branches of government from overstepping the boundaries marked out for each of them by the state constitution; and (5) they furnish agencies for settling the estates of deceased persons. In not a few states, too, certain non-judicial duties of an administrative nature have been imposed upon the judiciary, especially in connection with elections, management of certain county affairs, appointment of school-boards, and granting of various licenses.[2]

The System of State Courts

For the performance of these varied functions, every state has a more or less elaborate system of courts, some of which are created by the state constitution and have their jurisdiction defined with great particularity therein, while others are established and regulated only by act of the legislature.[3] Although in no two states is the system precisely the same, a considerable degree of uniformity is found, with the result that a general description will hold true except in matters of detail.

[1] As will appear, these embrace not only tribunals operating on a state-wide basis (of such, indeed, there are few), but also those functioning in counties, cities, and other local areas. All are bound up together in the "state judicial system."

[2] The extent to which such administrative duties may be imposed upon the judiciary is limited in an indefinite way by the doctrine of separation of powers. The highest courts are commonly held to be exempt, but the inferior courts are often assigned work of this character. Like the federal courts, state courts have in recent years become increasingly the managers of important businesses through their power to appoint receivers. See p. 336 above.

Certain quasi-judicial powers are exercised also by state administrative boards, such as public utility and railway commissions, civil service commissions, and tax commissions.

[3] The high importance of the courts of the states is indicated by the fact that of all the cases, civil and criminal, tried in the United States, something like nine-tenths are handled exclusively in those tribunals. Here it is, rather than in the federal courts, that most people have their contacts (if any) with the processes of justice.

1. Justices of the peace

The lowest courts are those held by justices of the peace, who are almost always men devoid of legal training, although now and then one hears of a lawyer serving in such a capacity.[1] As a rule, justices are chosen by popular vote in townships or other subdivisions of the county, and for short terms (usually two years); although in a few states, they are appointed by the governor. In any event, their jurisdiction usually extends throughout an entire county, and includes both petty civil suits (involving perhaps up to one hundred dollars) and breaches of the peace and other minor infractions of law. Practically everywhere the justices may also issue warrants for the arrest of persons charged with criminal offenses, and may conduct preliminary examinations of persons accused of felonies; and if the evidence seems to warrant doing so, they may "bind over" such persons to await the action of a grand jury. Justices may also perform marriages, administer oaths, and take the acknowledgment of many legal instruments. In contrast with practically all other state and local courts, the justice courts have no clerks; no permanent official record of their proceedings is kept; and they have no official seal. Accordingly, they are not "courts of record," as are the others. Furthermore, they may render final decision in only the most petty misdemeanor and civil cases; in all others, appeal lies to the next higher court.[2]

Jurisdiction

In incorporated villages and towns, it is common to find police magistrates with jurisdiction similar to that of the justices of the peace, but restricted to cases arising within the limits of the incorporated area. In some of the largest cities, the office of justice of the peace has disappeared within the city limits, and special municipal courts have been set up, consisting of numerous judges and having a wider jurisdiction than justices of the peace in both civil and criminal matters.

2. County or circuit courts:

(a) Organization

The next level above the justice and police courts is occupied by a group of courts in which most important litigation originates and most persons accused of crime are tried. In some states, *e.g.*, Illinois, there is such a court—commonly called the county court, and with a single judge—in each county. More often, however, two or three counties are grouped for the purpose, with a district or circuit court serving each group, and with usually a single judge except in urban or other areas where the volume of work requires two, three, or even more. In any event, a "trial" court session is held at least once a year in practically every county,

[1] In the absence (almost invariably) of a salary, justices derive their compensation from fees, usually aggregating, at the most, a few hundred dollars a year; and unscrupulous and otherwise dubious practices connected with the fee system, *e.g.*, advertising for business, have many times brought the office into disrepute. As an agency of the state for law enforcement, the institution of the justice of the peace certainly leaves much to be desired.

[2] In Arkansas, Kentucky, and Tennessee, the justices of the peace of each county constitute the county court, which acts as the principal administrative board for county affairs; and in New York, Michigan, and Illinois, justices serve as members of the "town board" in their respective townships. Under her new constitution of 1945, Missouri has replaced justices of the peace with a system of magistrate courts, with at least one magistrate in each county.

either by the county court judge or by a district or circuit judge making the rounds in accordance with a regular schedule.[1] In thirty-seven states, all county, district, or circuit judges are chosen by popular vote, and for terms most commonly of four years.

(b) Jurisdiction

Whether held by a local county judge or by a district or circuit judge making periodic visitations, county courts regularly have both criminal and civil jurisdiction, and also both original and appellate. On the criminal side, they handle practically all cases except those of a petty nature taken care of by the justices of the peace or magistrates; and it is in them also that persons accused of crime and bound over by a justice of the peace or magistrate to await action by a grand jury usually have their guilt or innocence determined. Ordinarily, too, the decisions of these courts are final in so far as questions of fact are concerned, although if disputed matters of law are involved, a case may usually be carried on appeal to a higher tribunal. Jurisdiction in civil cases is commonly unlimited, although in a few states restricted to cases involving less than a thousand dollars or some other stipulated amount; and here again most cases receive their first hearing, although some are brought up on appeal from decisions of justices of the peace or magistrates. In populous counties, the settlement of the estates of deceased persons and the discharge of functions relating to the property, custody, and welfare of minor children and other persons under guardianship are in the hands of a separate probate, surrogate, or orphans' court. Elsewhere, however, these duties commonly devolve upon the regular judges, who also, in several states, have important administrative duties in connection with the enforcement of certain state laws and with specified phases of county government.

3. Supreme courts:

(a) Structure

The highest state court is almost always called the supreme court, although in New York it is known as the court of appeals, and in New Jersey as the court of errors and appeals; in both of these states there is a "supreme" court, but inferior in rank to the courts just mentioned. Usually the supreme court consists of either five or seven judges, commonly sitting together in the hearing of cases, although in a few states it is permissible to sit in sections. In any event, a majority of the whole number of members of the court or section must concur in any decision rendered. The judges are nearly always elective, most often on a general state-wide ticket, although in a few states by districts; and there are instances in which nominations are made in districts, but with election by the voters of the state as a whole. Ranging all the way from life or good behavior in Massachusetts, New Hampshire, and Rhode Island, and from twenty-one and fifteen years in Pennsylvania and Maryland,

[1] In some New England states, there are no county, district, or circuit judges of the types mentioned, but instead the several judges of the superior (or supreme) court hold court in the different counties throughout the state, in addition to serving collectively as an appellate court. There are, however, special probate districts, each with an elective probate judge.

respectively, to two years in Vermont, the term of office is most often six years (in nineteen states); and salaries range from $5,000 a year in Kentucky to $23,000 in New York.

(b) Functions

The work of the supreme court consists almost entirely in hearing and deciding appeals on questions of law coming up from the lower trial courts, although in most states the court may issue certain writs, and in a few others one or two types of cases, *e.g.*, those in which the state is a party, may be heard initially by it. In performing these functions, the state supreme court not only adjudicates disputes, but becomes—like the federal Supreme Court within its sphere—the highest interpreter of the constitution and laws. Its decisions and interpretations, too, are final, with only the exception that when in a given case it can be shown (or at least plausibly alleged) that the construction of the federal constitution, of a federal law, or of a treaty is involved, appeal may be taken to the national Supreme Court.[1] In ten states, moreover, the constitution or a statute authorizes the governor, or the legislature, or both, to require an advisory opinion of the supreme court judges upon important questions relating to the form and constitutionality of existing or proposed legislation.[2] Ordinarily, however, the supreme court of a state, like the highest federal court, will express an opinion upon such questions only as they arise in the ordinary course of litigation.

4. Intermediate courts

Between the highest court and the trial or county courts, about one-third of the most populous states have established one or more intermediate courts, called superior, circuit, or appellate courts, whose judges are usually elected from a few large judicial districts into which the state is divided for the purpose. Such intermediate courts may have original or appellate jurisdiction, or both. The cases in which they have original jurisdiction are often determined by act of the legislature, and usually include, among others, contested election cases and civil cases involving large sums of money. As appellate courts, they hear appeals from the county or other inferior courts, being often empowered to render final decisions in such cases in order to relieve the congestion of business before the supreme court.[3]

[1] The decisions of the supreme court, and, in some states, of the next inferior court also, are published regularly in volumes known as *Illinois Reports, Indiana Reports,* etc., prepared under the editorial supervision of a reporter of decisions appointed by the court. For many years, state supreme court decisions have been summarized annually in the August issue of the *American Political Science Review.*

[2] Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, New Hampshire, North Carolina, Rhode Island, and South Dakota. Before the Civil War, state supreme courts frequently rendered advisory opinions, even in the absence of any constitutional authorization. Subsequently, however, the tendency has been for them to decline to do this—although in 1923 the supreme court of Alabama upheld as constitutional a mere statutory authorization of advisory opinions.

[3] In most states, the same judges administer both common law and equity; but in six there are separate courts of equity or chancery to handle cases to which, for one reason or another, common law forms of action do not apply. Some states also permit themselves to be sued in what are called courts of claims. Where such a court does not exist, private appeals are often made to the legislature; and in some states this has been productive of grave abuses.

State courts independent of federal courts

All of the state courts described exist quite independently of the system of federal courts established by the national constitution and by acts of Congress; there is no foundation whatever for the common notion that the highest state court is subordinate to the lowest federal court. Certain classes of cases may be commenced in either the state or the federal courts; and any case originating in a state court but involving determination of a right claimed under the national constitution, laws, or treaties may be removed or carried on appeal to the federal courts.[1] The great majority of cases coming before the state courts do not, however, raise any such "federal question," but involve simply the adjudication of rights claimed under the state constitution, the state statutes, or the common law when the latter has not been modified by state legislation.

The Jury System

The trial jury

Many civil cases are tried by one or more judges without a jury; but all of the state constitutions contain provisions guaranteeing trial by jury in most civil cases, unless waived by the parties to the suit, and also in all criminal cases with the frequent exception of petty misdemeanors.[2] In most states, the trial jury is judge merely of the facts in the case, the court itself passing upon all questions of law arising incidentally to the introduction of evidence before the jury, or otherwise applicable. In some states, however—Illinois and Maryland, for example—the jury is made the judge of both the law and the facts. At common law, the petit or trial jury consisted of twelve impartial men, and their unanimous agreement was required for a verdict. In a majority of the states, this rule still prevails. In about a third of the number, however, modifications of the old form of jury trial, in both civil and criminal cases, have in recent years been introduced. For example, the constitutions of twelve states now authorize civil trials, in courts of record, by juries of less than twelve persons; and seven states make similar provision for criminal trials.[3] Half of the states, including New York, authorize verdicts by something less than unanimous vote (usually three-fourths) in civil cases; and eight states apply the same rule to most criminal cases, although in capital cases practically all states still require a unanimous verdict of a jury of twelve. Twenty-nine states now (1947) permit women to serve on juries.

The grand jury

Like the petit jury, the grand jury has been inherited from English common law. Unlike the former, however, it has nothing directly to do

[1] See p. 333 above.

[2] A considerable number of states allow waiver of jury trial in criminal cases other than those involving the death penalty. Even in capital cases, the defendant may waive jury trial in California, Connecticut, Illinois, Indiana, Maryland, Michigan, New Hampshire, New Jersey, Ohio, and Wisconsin. In Illinois, New Hampshire, and New Jersey, this result has been reached by judicial action; in the other states named, it is based upon constitutional or statutory provisions.

[3] In trials before justices of the peace, juries of six persons are authorized in some states.

with determining the guilt or innocence of persons accused of offenses, being concerned instead merely with the commencement of proceedings against such persons. On its own initiative, it may bring indictments against persons who, in its judgment, have violated state laws. In most instances, however, the initiative is taken rather by the prosecuting attorney, who lays before the grand jury the evidence which, in his judgment, is sufficient to justify placing the accused person on trial. If the grand jury concurs, it endorses upon the draft indictment prepared by the prosecuting attorney the words "A true bill," and the foreman of the jury attaches his signature. If, on the other hand, the grand jury is not satisfied that the prosecuting attorney has sufficient evidence to make out a "prima facie case" against the accused, it generally instructs its foreman to endorse on the draft indictment "This bill not found." Proceedings before a grand jury are secret and wholly *ex parte*, unless the accused voluntarily submits to questioning by the body.

Indictments

At common law, a grand jury consisted of not fewer than thirteen nor more than twenty-three persons, of whom at least twelve must concur in order to bring an indictment. Constitutions or statutes in almost a third of the states, however, now provide for some smaller number, with corresponding reduction of the quota required for indictment. Under modern conditions, however, such indictment seems an unnecessarily cumbersome and expensive method of instituting criminal proceedings.[1] In Great Britain, it has been abandoned almost entirely; and although about half of our states still require it in the case of all more serious offenses known as felonies, the other half have departed in varying degrees from the ancient common-law practice. Some constitutions expressly authorize abolition or modification of the grand-jury system by the legislature; others make prosecution by indictment optional, regardless of the seriousness of the offense, thereby opening a way for use of a simpler alternative procedure known as "information," under which the prosecuting attorney merely files with the proper court a formal charge in which, upon his oath of office, he "gives said court to understand and *be informed*" that the crime described therein has been committed by the person named.[2]

The grand jury's diminishing importance

The alternative procedure of information

Defects of the State Judicial System

When eminent leaders of the bar, able and respected judges of both state and federal courts, deans and professors of the best law schools,

[1] This, however, need not diminish the grand jury's usefulness as an adviser in reforming the criminal law and its administration, or as an agency for bringing to light misconduct in public office, as on various occasions in New York City, Chicago, and San Francisco.

[2] California was one of the first states to authorize (1879) the prosecution of felony cases by information instead of indictment. In a murder case, it was contended that the new procedure violated the due process clause of the Fourteenth Amendment. In Hurtado *v.* California, 110 U. S. 516 (1884), however, the Supreme Court held to the contrary.

and an ex-president and chief justice of the United States concur in pronouncing the organization of our state courts and their methods of administering justice in both civil and criminal cases sadly defective, if not in grave danger of breaking down, the average lay citizen may well become interested in the situation and in the remedies proposed.

1. In organization of the courts

The criticisms most frequently directed against the state judicial system fall into two main groups. The first relates to the structure or organization of the courts, including the terms for which judges are chosen, and especially the method of selecting and removing them; the very general failure to provide adequately for handling the administrative side of court work;[1] and the equally general absence of centralized supervision over the work of judges of the different courts, at present legally independent of one another and usually quite uncontrolled by any central directing head.

2. In procedure

A second group of criticisms, although arising in part from the situation just described, relates chiefly to court procedure: protests against (1) the frequent lack of rule-making power on the part of courts,[2] (2) the numerous petty limitations imposed upon the trial judge by legislative action; (3) the frequent amendment, in some states, of the rules of court procedure by the legislature, sometimes at the behest of litigants who hope to gain some advantage in a particular case; (4) the inability of the trial judge to control procedure in his court, as an English judge is able to do, or to comment upon the weight of evidence and the credibility of witnesses for the purpose of assisting juries; (5) the unlimited right of appeal which, in civil cases, works against the interest of the poor litigant and, in criminal cases, often defeats the ends of justice; (6) the tendency (happily diminishing) of appellate courts to reverse decisions of lower courts on purely technical grounds not affecting the merits of the case; (7) the long delays in bringing criminal cases to trial (on account partly of the cumbersome grand jury system), with the result that criminals often go scot free because of the death or disappearance of important witnesses; (8) the unrestricted admission to bail of old offenders; (9) the poor pay and often poor quality of jurymen, and the excessive delays attending the selection or empaneling of juries in criminal cases; (10) the long-drawn-out examination of witnesses and the unlimited number of objections to testimony permitted to counsel; (11) the rule that the failure of the accused to testify may not be commented upon before the jury by the prosecution; (12) the requirement of unanimous verdicts by juries; (13) the rule in a few states permitting juries to be judges of the law as well as of the facts; and finally (14) the

[1] The administrative work here in mind includes the preparation of jury lists, supervision of grand jury work, service of court processes, keeping records and transferring cases from one court to another, and appointment and supervision of receivers, administrators, executors, referees, and masters in chancery. The problems of judicial administration are not unlike those arising in connection with the state administrative departments.

[2] The courts have full rule-making power in a total of only twenty-two states.

absence of unified control over the various prosecuting officers throughout the state, resulting in uneven enforcement of criminal laws and lowered efficiency in the conduct of criminal prosecutions.

Limitations of space permit consideration here of only four principal criticisms: the lack of unity throughout the judicial system, the popular election of judges, the absence of any wholly satisfactory method of removal, and the judicial veto upon legislation.

Shortcomings of Court Organization

Lack of articulation

In our study of state administration, we saw how very important it is to provide for unified supervision and control over the many separate administrative agencies. The same sort of supervision and control is essential to the most effective functioning of the state's judicial machinery. Yet it commonly is lacking, not only for the different courts throughout the state, but also for the judges making up any particular court. It seems self-evident that all of the courts belonging to the so-called *judicial system* should be closely articulated with one another, and that there should be some chief justice or judicial council to coordinate the work of the several courts and devise plans for an effective division of labor among them. Instead of this, however, we find in a majority of states "a jumble of disconnected and disjointed courts, each pursuing its own way, with little regard to any other"—a "heterogeneous assortment of miscellaneous courts of miscellaneous and often overlapping jurisdiction."[1]

Likewise, in the case of any particular court, it seems equally manifest that the maintenance of judicial efficiency calls for a chief justice or small committee of judges clothed with authority to supervise the work of all judges belonging to that court, to require them to make periodic reports showing the state of business on their dockets, to admonish the careless and indolent, to relieve the overworked, and to keep all reasonably busy. As matters stand, however, in nearly every part of the country the judges in the same court are elected independently of one another and seldom are made subject to any actual directing or supervisory control. Each judge can hold court when he pleases, for as few hours a day as he pleases, and hear cases on such calendars as he pleases; whatever coöperation, teamwork, or division of labor exists depends almost wholly upon the voluntary coöperation of the judges constituting the court.

Insufficiency of judicial statistics

With such a loose judicial organization, or lack of organization, it is not surprising that there are few reliable statistics showing what our different state courts are doing or how much they are costing the taxpayers; so that, of most of our states it may truly be said that "the judiciary is the one department which publishes no data bearing upon the efficiency of its work, and without such data there is no adequate

[1] For illustrations from Cook county, Illinois, see *Ill. Law Rev.*, XXXVI, 628-642 (Feb., 1942).

basis for judging how well it is performing its duties or what changes are needed to increase its efficiency."

Need for and function of a department of justice

An important aid to the efficient functioning of our state courts should be a state department of justice, charged with the duty of exercising general supervision over the administration of both criminal and civil justice, and also with the collection and publication of judicial statistics covering the entire state—an agency performing for the state courts functions analogous to those now performed for the federal courts by the Department of Justice and the Administrative Office of the United States Courts at Washington.[1] Only seven states, however, have provided themselves with such a department;[2] and in no one of the number does the new establishment appear to be working effectively as an agency for imparting vigor and uniformity to the administration of criminal justice. In addition, about one-fourth of the states have conferred upon the attorney-general a limited power to supervise the work of local prosecuting attorneys.[3] Here again the results have not proved important; although undoubtedly the attorney-general's office may in time become a nucleus around which to develop an effective state department of justice. With this object in view, California, in 1934, adopted a constitutional amendment expanding the office of attorney-general into what is substantially such a department.

Other partial remedies

In about a dozen states, including Wisconsin, Michigan, and Louisiana, the constitution vests in the supreme court "a general superintending control" over all inferior courts. But as yet the contemplated authority has rarely been employed to bring about any notable measure of unification and coördination. More significant has been the setting up, in Ohio (1923), Massachusetts (1924), California (1926), and more than a score of other states, of judicial councils charged with collecting and studying court statistics, formulating rules for the equalization and more efficient handling of court business, and recommending to the legislature changes in the laws governing court organization and procedure.[4] In these states, as elsewhere, however, really adequate improvements remain to be made, with often the adoption of constitutional amendments a necessary first step.[5]

[1] See pp. 345-346 above.

[2] Iowa, Louisiana, Nebraska, New Mexico, North Carolina, Pennsylvania, and South Dakota.

[3] See pp. 643-644 below.

[4] Most such councils include both judges and members of the bar; a few are composed of judges alone; and at least two include laymen. Some also include state officials and members of law-school faculties. The Ohio and Michigan judicial councils have been especially active. The judicial-council device is perhaps the most important development in connection with state courts during the past twenty years. E. R. Sunderland, "The Judicial Council as an Aid to the Administration of Justice," *Amer. Polit. Sci. Rev.*, XXXV, 925-933 (Oct., 1941).

[5] The "model state constitution" proposed by the National Municipal League provides for a "general court of justice," as a single, integrated tribunal for the entire state, divided into a supreme court department and such other departments, divisions, or special tribunals as the legislature should establish. At the head of the

Popular Election of Judges

Development and present extent

A matter of even more frequent criticism than the lack of integration in the judicial system is the prevailing method of selecting judges. In the early history of the country, judges were chosen by the legislature or appointed by the governor with the concurrence of the executive council or the senate. But one or the other of these methods is now retained in only ten states; in the others, the judges of practically all courts are chosen by popular vote, and usually after party nomination.[1]

Long experience has disclosed two inherent weaknesses of the elective system: first, in populous communities, especially in metropolitan areas, popular election is no more likely to result in the choice of persons qualified to perform the highly technical work required of the judiciary than it is to secure the selection of experts in other branches of state government or in the field of municipal administration; [2] second, what passes under the name of popular election of judges is often such in only the most superficial sense, being in reality nothing more than a method of appointment by politicians who succeed in putting their judicial "slates" through a so-called non-partisan primary, or through party primaries, or through nominating conventions. All that is generally left for the voter to do on election day is to endorse one or the other of two judicial tickets thus submitted by irresponsible persons who are not interested primarily in the efficient administration of justice, and who, therefore, often fail to pick candidates having the qualities most needed in a judge, namely, unquestioned integrity, dignity, independence, judicial temperament, and adequate legal training for highly technical duties.[3]

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general court, under this plan, would be a chief justice, elected by the people for a term of eight years; and all other judges, on the various levels, would be appointed by him from a panel of three names in each case, presented by the judicial council, but with each such judge subject, after four years of service, to popular decision upon his retention or removal. Judges would be removable also by the legislature, and inferior ones likewise by the judicial council. The chief justice would be expected to function as executive head of the state judicial establishment. Nearly four decades ago, a committee of the American Bar Association proposed a very similar plan.

[1] In four states (Vermont, Rhode Island, Virginia, and South Carolina), the judges of the highest courts are chosen by the legislature; in six (Maine, Massachusetts, New Hampshire, Connecticut, Delaware, and New Jersey), they are appointed by the governor, subject to confirmation by the executive council, the senate, or the legislature; in the remaining thirty-eight, they are elected by the people.

[2] "The chief objection to choosing judges by popular vote lies in the fact that a judge, in addition to any other qualifications, must possess certain technical knowledge and experience. However high his character, however sound his general intellectual equipment, however wide his acquaintance with business or public affairs, he must also possess a technical knowledge of the law and of legal procedure. To ask the public at large to pass upon a question of technical fitness in the case of a lawyer is as inappropriate as it would be to ask for a similar judgment regarding the technical fitness of an engineer, or a doctor, or a musician . . . the determination of technical fitness is obviously a task in which only a comparatively few persons can helpfully take part." W. MacDonald, *A New Constitution for a New America,* 182-183.

[3] Our state judiciary, the country over, contains many learned and otherwise highly qualified judges, but also many deficient both in learning and in ability.

The problem of a substitute

Despite widespread and well-justified dissatisfaction with the practical workings of popular election of judges, the system has become so firmly entrenched, and has contributed so greatly to the influence of numerous political leaders, that there seems little prospect of an early return to either the method of legislative election or the superior one (as in the federal government) of executive appointment. Most of the newer plans on the subject have, therefore, while continuing popular election, associated with it arrangements designed to place some check upon it in the interest of better choices. In Wisconsin and some other states, for example, nominations on the higher levels are made, not by the usual agencies, whether partisan or otherwise, but by the state bar association, as a body presumed to have special knowledge of the qualifications most to be sought and of the fitness of persons aspiring to judicial preferment; and, in Wisconsin at least, the results have been generally satisfactory.

The California plan and its advantages

Another significant plan is found in operation in California. In 1934, the voters of that state approved a constitutional amendment under which a judge of the supreme court or of a district court of appeal may, as the end of his term draws near, declare his candidacy to succeed himself. If he does not desire reëlection, the governor is authorized to nominate a candidate for the position soon to become vacant. In either case, only one candidate's name appears on the ballot, and the voters simply vote for or against him. If this candidate is defeated, or if any judicial vacancy occurs otherwise, the governor makes a temporary appointment until the next general election, when the voters approve or disapprove of the person appointed; but a defeated candidate is ineligible for such an appointment. As a check upon the governor, all of his judicial appointments have to be approved by a commission consisting of the chief justice of the supreme court, the presiding justice of the local district court of appeal, and the attorney-general.

This California plan has several significant advantages.[1] In the first place, judges are nominated by intelligent and responsible agents, while the ultimate selection, nevertheless, remains in the hands of the people. Secondly, judges are relieved of the necessity of devoting a large amount of their time to political activity in order to secure and retain their positions. Finally, a nominee is not running against somebody, but upon his own record as a judge or as a lawyer, thus greatly diminishing the likelihood that irrelevant considerations will influence the voters.[2]

Inadequate Methods of Retirement

How to retire from office judges who prove incompetent or unworthy of public confidence presents a problem of peculiar difficulty, and no state has solved it in a way that meets with anything like general ap-

[1] The amendment does not apply expressly to the choice of superior (county) court judges, each county being left to decide for itself whether to apply it.

[2] Missouri, in 1940, adopted a plan for selecting judges generally similar to the California system, and it was continued in the new constitution of 1945.

proval. A truly satisfactory method must be one which can be put into operation without undue delay, and one that at the same time insures for the judge whose removal is sought a fair hearing before a tribunal free from partisan bias and not subject to the influence of waves of popular passion. Three or four principal methods now in use in the different states fail, in varying degrees, to meet these requirements.

1. Failure to renominate or reëlect

A judge sitting by popular election may, of course, be retired by failure to secure renomination, either because his character or work is considered unsatisfactory or because party leaders want his position for some one else; and even though he wins renomination, the people may retire him by failing to vote for him in sufficient numbers at the election. Popular choice, however, is almost as likely to bring wrong results as right ones, for it often happens that a judge whose work has been beyond reproach is defeated for renomination or reëlection by circumstances wholly unrelated to his record as judge—for example, because of the greater personal popularity or capacity for self-advertisement of some less qualified rival candidate; or because some overshadowing issue in state or national politics, wholly unconnected with the judicial election, has swept down to defeat the entire party ticket on which his name appeared. Furthermore, popular election furnishes a means of retiring an unworthy judge only at a given time, *i.e.*, at the expiration of his term of office.

2. Impeachment or legislative removal or address

In most states, judges may be removed before the close of their term only by impeachment proceedings begun in the lower house of the legislature and tried before the senate, a two-thirds vote of the latter usually being required for conviction and removal. The constitutions of twelve states, however, provide for removal by the legislature; and in nine others the governor can remove, upon "address," *i.e.*, concurrent resolution, of the legislature, after the English manner.[1] Neither impeachment nor legislative removal is without serious defects. Under either method, there is much delay; and partisan considerations are likely to exert undue influence. Furthermore, evidence sufficient to convince two-thirds of the senate or legislature may be difficult to obtain; and the dereliction may not be grave enough to be in any sense criminal, yet sufficiently serious to warrant public condemnation and impair the judge's usefulness. In actual practice, it has been found that impeachment and legislative removal do not work, and that unfit judges have remained on the bench because no other modes of removal were available.

3. Recall election

This experience has led eight states[2] to adopt the drastic remedy of authorizing special elections at which the voters may recall judges whose removal is desired. The people of these states have, however, rarely

[1] About half of the states have constitutional or statutory provisions permitting the retirement of judges on account of age or physical infirmity—but only four have a compulsory retirement age.

[2] Arizona, California, Colorado, Kansas, Nevada, North Dakota, Oregon, and Wisconsin.

availed themselves of the power. In no state has the recall been invoked against a judge of a superior or supreme court; and no judge of any rank has been recalled because of popular dissatisfaction with a decision involving any question of constitutional interpretation.[1] Contrary to early predictions, the recall appears not to have impaired judicial independence.

Judicial Veto of Legislation

Increasing frequency

Another prolific source of criticism of state courts, among both lawyers and laymen, is their power to declare state laws null and void because inconsistent with some provision of the state constitution.[2] In recent decades, this veto power has been exercised with increasing frequency. The tendency may be explained in part by the minuteness with which the newer constitutions define the organization and functions of the various branches of the government; in part, by the incorporation in the constitution of matters which more properly belong in the sphere of legislative discretion; and especially by the attempt to set precise metes and bounds to the activity of the legislature, thus rendering the work of lawmaking the hazardous occupation described in an earlier chapter.[3] The experience of Illinois and other states shows that cases in which the constitutionality of legislation has been challenged before the courts have multiplied as the number of restrictions on the legislature has been increased by successive revisions of the constitution.

"Due process" as a source of dissatisfaction

Most of the protests against the judicial veto have been prompted by decisions nullifying social and economic legislation on the ground that it amounted to the taking of property or a deprivation of liberty without due process of law; and the dissatisfaction arising from such decisions has been deepened by the prevailing uncertainty as to the meaning of the phrase "due process." Whether or not a given law will be upheld under this phrase frequently depends, not upon any definitely ascertainable standard or definition as to what constitutes due process, but upon the economic and political views of the members of the court at the time when the case comes up for decision. Under such circumstances, the judiciary not only exercises judicial authority in the stricter sense, but passes upon and decides questions of public policy as well. In other words, the judicial servants of the people have come to exercise a political power which enables them, if they are so minded, to defeat the public will as expressed in legislation—at all events, until the state constitution can be amended, or until the court has been reconstituted with judges holding different views of what is good public policy.

[1] On two different occasions, judges of the municipal courts in San Francisco have been recalled, namely, in 1913 and 1921. Three judges of the superior court in Los Angeles county were recalled in November, 1932. Cf. pp. 155-156 above.

[2] The judges of state courts are bound also to declare state laws unconstitutional if they conflict with the "supreme law of the land," as defined in Art. VI of the federal constitution.

[3] Chap. XXXIV above.

A possible check on the judicial veto

Perhaps the most satisfactory check on the judicial veto of social and economic legislation would be the omission from the state constitution of the so-called due process clause or its equivalent. Since the state supreme court is the final judicial interpreter of the constitution, the clause now means whatever the supreme court of each state interprets it to mean. With forty-eight different state courts interpreting identical clauses, due process is found to mean one thing in one state and another thing in another state, and something still different when the federal Supreme Court interprets a similar clause in the national constitution—with the result that state supreme courts have frequently annulled legislation when practically identical laws were being upheld by other state courts, and by the federal Supreme Court under the due process clause of the Fourteenth Amendment. Criticism of the exercise of the judicial veto would, therefore, largely disappear if the due process clause were omitted from state constitutions, leaving the protection of private rights mainly to the federal courts, guided by the precedents of the national Supreme Court. In the opinion of good lawyers, no rights are protected under state due process clauses which are not quite as adequately safeguarded under the corresponding federal clause.[1]

Some Newer Developments

Preventive justice:

1. Declaratory judgments

In concluding our survey of the state judicial system, brief mention should be made of two significant developments within comparatively recent years. For a long time, our legal system largely confined its remedial work to the redress of wrongs after they were committed, and agencies of what has been well described as "preventive justice" remained almost entirely undeveloped. Only within very narrow limits was it possible to clear up *in advance* of hostile litigation any doubt as to the legal status of persons, the title to property, or the meaning of a contract. The last two or three decades, however, have shown that people are coming to understand that "a system of law that will not prevent the doing of a wrong, but only affords redress after the wrong is committed, is not a complete system, and is inadequate to the present needs of society; that whenever a person's legal rights are so uncertain as to cause him poten-

[1] Three states (Ohio, North Dakota, and Nebraska) have adopted constitutional amendments making more than a bare majority of the supreme court necessary to declare a law unconstitutional. The Ohio amendment of 1912 requires the concurrence of at least all but one of the judges, except in affirming decisions of lower appellate courts pronouncing a measure unconstitutional. In North Dakota, a similar amendment, adopted in 1918, calls for the concurrence of at least four of the five judges constituting the supreme court; and the Nebraska amendment of 1920 requires the concurrence of five out of the seven supreme court judges. In Minnesota, a like proposal, requiring the concurrence of five out of seven judges, was submitted to a popular vote in 1914 and rejected. In 1912, Colorado adopted a constitutional amendment providing for the "recall," or popular review, of judicial decisions, on lines advocated by ex-President Theodore Roosevelt in an address before the Ohio constitutional convention of that year. In 1921, however, the supreme court of the state held that the amendment was in conflict with the national constitution, and therefore invalid.

tial loss or disturbance, the state ought to provide instrumentalities of preventive relief to remove the uncertainty before a loss or injury has been sustained." And in recognition of these considerations, more than half of the states, beginning with New Jersey in 1915, have authorized their courts, on proper application being made, to define or declare rights and duties before actual cause for a hostile law-suit has arisen. In 1934, too, the federal courts were authorized to render similar "declaratory judgments."

2. Conciliation and arbitration

The courts have always favored the settlement of legal disputes by arbitration, or compromise, after a trial has commenced; and almost contemporaneously with the adoption of declaratory-judgment laws, legislation appeared authorizing less formal, time-consuming, and expensive methods of adjusting legal disputes than prevail in ordinary judicial proceedings. Small-claim courts have become very common, especially in cities; and special courts of conciliation and arbitration have been set up, or existing courts have been empowered to adopt rules providing for such procedures. Conciliation takes place when parties to a dispute reach a settlement through the mediation of a third party called a conciliator; although an agreement of the kind is not legally enforceable in the courts if either party fails to abide by it. In arbitration proceedings, on the other hand, the parties submit their controversy to a third party, called the arbitrator, and agree in advance to be bound by his decision; and his award is enforceable by either side like the judgment of a regular court.[1] Not the least among merits of these newer judicial agencies and practices is the way in which they tend to encourage a spirit of good-will between parties to a dispute, thereby lessening or averting the animosity and rancor usually attending hostile litigation.

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PART IV

LOCAL GOVERNMENT AND ADMINISTRATION

CHAPTER XL

THE COUNTY AND ITS GOVERNMENT

Some General Aspects of Local Government

Multiplicity of areas

Although at some points a self-contained mechanism, the government of a state is tightly interlocked with, and in fact operates extensively through, the governments of local areas such as counties, cities, townships, and villages. Fixed in "horse and buggy" days—largely, indeed, before the American Revolution—the local-government pattern is predominantly one of small, highly subdivided, and therefore exceedingly numerous, units for the management of affairs. Until of late, no one—not even the federal Census Bureau—could have indicated the number for the country as a whole. Even now, all that one can say is that the figure is somewhat above 155,000; because not a year passes without some being added and others disappearing.[1] Under modern conditions, such multiplicity is unnecessary and undesirable: people can easily reach and deal with authorities at greater distances; conversely, such authorities can operate over wider areas; the piling up of jurisdictions too frequently results in duplication, confusion, and waste. As we shall see, some of the most urgent problems of local-government reform spring from the relative uselessness of various petty jurisdictions and the inability of many to carry the burdens imposed by newer concepts of public action. Except in cities, where a good deal of improvement has been realized, only a beginning has been made toward more scientific planning of local areas, more logical distribution of functions, and the fitting out of local units with governmental machinery better adapted to the tasks now devolving upon them.

[1] The first complete enumeration and analysis of governmental units appeared in W. Anderson, *The Units of Government in the United States* (Chicago, 1934). As revised in 1942, Professor Anderson's figure for all such units in 1941 (including the national and state governments) was 165,049 (smaller by 10,369 than in 1930-33). The number reported by the Bureau of the Census for 1942 (omitting the national and state governments) was 155,116, including 3,050 counties, 18,919 towns or townships, 16,220 municipalities, 108,579 school districts (seventy per cent of the over-all total), and 8,299 special districts other than school.

Constitutional and legal position

A second major feature of our local-government system is that all local-government units are created by, or on authority of, the state in which they are situated, and by it are endowed with whatever functions and powers they possess. Any state so minded may make of itself a laboratory, or experiment station, for testing untried forms and arrangements—so long, of course, as in doing so it violates no provision of the federal constitution. The relation between the state and its subdivisions is therefore totally different from that existing, in the reverse direction, between the state and the United States. In the latter case, the state is not primarily an administrative division existing for the use and convenience of the national government; on the contrary, it is, within limits, a separate and sovereign area of government, in some respects on a footing of equality with the nation itself. The county, city, and township, on the other hand, while organized partly to meet the demand for local control of local affairs, exist by no original or inherent right and have no reserved or residual powers. On the contrary, they are at bottom instrumentalities of the state, being as such extensively employed by it in the enforcement of its laws, the collection of its revenues, and the performance of many of its administrative functions. In other words, the United States is organized on a federal basis, while the governmental system of each state is strictly unitary. The inhabitants of all of the subdivisions enjoy more or less extensive rights of local self-government. Nevertheless, the subdivisions are themselves creatures of the state constitution or state statutes; and, subject to numerous constitutional restrictions, the legislature may exercise almost unlimited authority over them, altering or abolishing their forms of government, or even depriving any and all units of their very existence. If it chooses, it may deny to the inhabitants practically all voice in their local affairs; conversely, it may grant them almost complete local self-government, or what is commonly called "home rule." And the state not merely possesses such ultimate power, but in our time develops and extends its regulative activities and direct administration so as to overshadow locally-controlled activities as never before.

Growing relations with the federal government

Moreover, notwithstanding that the federal government has legally no authority to dictate to the states concerning their local governments, the depression of the thirties may prove to have brought about permanently a good deal of national control over local affairs. Impelled by the breakdown of state and local relief agencies, excessive expenditures, and the inability of many local governments to pay their debts, the government at Washington for some time provided relief funds to be expended for purposes, and by state and local agencies, meeting the approval of national authorities; it also made loans to embarrassed local units, in addition to providing means by which defaulting local governments could arrive at adjustments with their creditors in federal bankruptcy courts. And although these relationships of depression days have now been

largely liquidated, there are still, and will continue to be, significant federal-local contacts, notably in the domains of agriculture, public works, housing, and social security. Indeed, since both state and local governments must meet conditions prescribed by the national government in order to obtain federal funds for a variety of purposes of permanent character, a new and lasting relationship is manifestly in the making between the government at Washington and local-government areas. Without upsetting the strictly legal relationships existing, the national government seems likely to secure a voice in some fields of local administration scarcely inferior to that possessed in, for example, state highway administration under the system of grants-in-aid described in an earlier chapter.[1] It has aptly been remarked that nowadays we have "not only local government in the old sense of locally-controlled government, but also government locally by national and state governments in the same communities." [2]

The County and Its Functions

Spread of county and township organization

As the nation expanded westward after the Revolution, the emigrants from the older Eastern states, moving, as a rule, along parallels of latitude, transplanted into the new states the system of local government with which the majority in each case had been most familiar in the old home-state. Hence the county is the principal unit of local government in Southern and South-Central states, while the combined county-township system predominates in the North-Central states. In Michigan, Illinois, Wisconsin, and Minnesota, whose early settlers came principally from New York and New England, the township is relatively a more important area than in states whose first white inhabitants came largely from the South, *e.g.*, Ohio, Indiana, Kansas, and Nebraska, where the county preponderates. Sometimes—as in Illinois and Nebraska—two lines of migration, one from the old South and the other from the old North, meeting in a single state, have given rise to a compromise under which the inhabitants of each county are permitted to decide for themselves, by popular vote, whether they will subdivide the county into townships or retain the county unit intact.

General features of the county

In any case, the largest and most typical local-government area is, in every state except Louisiana, the county; there the principal political subdivision, corresponding to the county elsewhere, is the parish.[3] Most

[1] On federal-local relations, see further pp. 102-104 above.

[2] W. Anderson, in *Proceedings of ... Governmental Research Association* (1945), 12.

[3] The total number of counties that have separate county governments, including the sixty-four Louisiana parishes, is, according to the Census Bureau, 3,050. This number does not include twenty-four cities in Virginia which exercise within their limits all essential county functions; nor does it include the following: five counties in Rhode Island which have no county government; five areas in South Dakota called counties but without any county government; the five county areas in the city of New York, which have lost their separate corporate character although electing certain county officers; and the county areas corresponding to the cities of Baltimore, Boston, Denver, Philadelphia, St. Louis, and San Francisco, where city and county

states have from sixty to one hundred counties. In Delaware and Rhode Island, however, there are only three and five, respectively, while in Texas there are 254. Massachusetts, with fourteen, has the smallest number in proportion to population. New York county and San Bernardino county, California, have the distinction of being, respectively, the smallest and the largest of counties, the former having an area of only twenty-two square miles, while the latter comprises 20,175 square miles—an area almost equal to that of Massachusetts, Connecticut, and New Hampshire combined. The most common areas are between four hundred and six hundred square miles. In population, also, there is great variation, running all the way from Armstrong county in South Dakota, which at the census of 1940 had only forty-two inhabitants, to Cook county, Illinois, with more than four million. The majority have populations somewhere between ten and thirty thousand. The greater number are rural in character; not more than one-fifth have any urban communities of over ten thousand inhabitants.

County functions.

The county has been well termed the "dark continent of American politics"; for not only (until recently at all events) has less attention been paid to it by students of government than to nation, state, and city, but the average citizen takes little interest in, and knows almost nothing about, his county government and its activities. Nevertheless, the county is, from a number of points of view and in most parts of the country, a very important governmental unit. (1) It is a much-used unit for the administration of state laws, especially such as relate to taxation and the prevention and punishment of crime. (2) It is a leading area of judicial administration, being the sphere of justices of the peace, the surrogate or probate court, the county court, and of the officials connected therewith, notably the sheriff and the prosecuting attorney. In the county court, almost all important law-suits and prosecutions for serious criminal offenses are begun; and to this court, minor civil and criminal actions may be carried on appeal from the city and rural justice-courts. Practically every county maintains a court-house and at least one penal or correctional institution. (3) The county is an important recording agency for a large variety of documents, including deeds and mortgages, surveys of land plats, wills, and court proceedings. (4) Outside of New England, the county is an important district for school purposes, with an elective superintendent of schools who exercises more or less supervision over public schools, especially those located outside of cities or incorporated towns and villages, which frequently are removed from the jurisdiction of the county superintendent. (5) In most sections of the country, the county is the principal agency for laying out and repairing highways and constructing and maintaining bridges. (6) In many states, the charitable or welfare work done by counties constitutes one of their

have been largely consolidated. W. Anderson, *The Units of Government in the United States*, 13-15.

most important functions. The county poor-farm or almshouse is a familiar institution outside of New England, and not altogether unknown there. One not infrequently finds county hospitals; indeed, nearly five hundred such have been established in about twenty states; and a variety of other welfare activities are carried on under the auspices of county government. (7) In a number of respects, the county is an important political unit: the selection of polling-places, the appointment of election officials, and canvassing the votes cast at primaries and general elections are commonly county functions. Counties are also units of representation in one or both branches of the state legislature; they are important units in the state party organizations; and, lastly, they have often been convenient subdivisions for determining questions of public policy, such as authorizing or prohibiting the sale of intoxicating beverages under local option laws.[1]

Re-allocation of functions desirable

From the foregoing summary it will be seen that counties are performing services which, although properly local functions in an earlier and simpler age, have now become essentially state functions. Highway construction and maintenance, support of public schools, health protection, poor relief, and the care of defectives and delinquents do not concern merely a particular county, but involve interests of the entire state. Some of these services are costly, require special qualifications on the part of those who administer them, and are indifferently supported and performed in hundreds of thinly populated and economically cramped counties. Many such counties, indeed, find it impossible to raise the sums needed to support them adequately; and the locally-chosen officials in charge of the services are often lacking in proper qualifications.

Centralizing tendency

Considerations such as these have led some states to come to the relief of counties in various ways; and state governments have assumed a larger interest in matters previously left mainly, if not wholly, to county control. Sometimes state assistance has taken the form of grants of state funds for the support of historic county functions. At other times it has taken the form of systematic coöperation between state and county authorities in certain fields, the state setting up standards for certain services, advising the local officials enforcing these standards, and passing upon the qualifications of such officials. Advantageous as such coöperative arrangements often are, numerous services can be administered more efficiently and economically by the state than by the counties. This is especially true of highway construction and maintenance, and of the social services mentioned above. Certain of the states have, therefore,

[1] Other county activities encountered here and there include the maintenance of libraries, recreational facilities, and airports; protection against forest fires; and aid to housing. In 1938, two Tennessee counties pioneered in another direction when they acquired electric distribution systems and entered into contracts with the Tennessee Valley Authority for the purchase of power to be resold by the counties to private consumers and municipal corporations within their borders. Still another newer county function now encountered is planning and zoning, with a view (among other things) to promoting the best use of land.

taken over some or all of these functions—to the great relief of local taxpayers and to the benefit of the county's inhabitants generally. This "trend toward centralization," as it has been called, has appeared on a noteworthy scale in North Carolina, Virginia, California, Oklahoma, and a number of other states, and in all probability still others will similarly come to the relief of counties. The way will then have been prepared for the more efficient performance by counties of the functions remaining to them. Meanwhile, the depression prompted a good many states to extend some form of control over county financial operations, with a view to checking the extravagance of county boards and the unbusinesslike methods of other county officials.[1]

The Constitutional and Legal Position of Counties

Powers

The county, like the city, is a governmental subdivision of the state, endowed with certain rights and powers. As a quasi-municipal corporation, it can acquire, hold, and dispose of both real and personal property, make contracts, and sue and be sued in the courts. Its corporate powers are, however, less extensive and varied than those of an ordinary city, being indeed quite incidental and secondary in importance to its governmental functions. Furthermore, its powers are seldom granted in a single document like the city charter or a general municipal code, but usually are to be found scattered through a score or more of statutes passed at different times by the state legislature.

Limitations

In most states, constitutional stipulations protect counties against legislative annihilation or impairment by requiring a popular referendum before drastic changes take effect. Other such stipulations, however, severely limit the power of counties themselves. Among the most common are provisions setting a limit to the rate of taxation that may be authorized by county officials, and prohibiting counties from incurring indebtedness beyond a specified amount; although not infrequently such debt limits may be exceeded for some particular purpose after special authorization by the legislature or after a popular referendum. The discretionary authority of both the legislature and the county is further curtailed in about two-thirds of the states by constitutional provisions specifying the officers which each county shall have and fixing the amount and method of their compensation. None of the offices thus provided for can be abolished, nor may the method of filling them be changed, either by the county or by the legislature; and herein lies one of the most serious obstacles to the adoption of a shorter ballot. At the same time, the legislature is generally free to create as many additional county offices as it sees fit.[2]

[1] See p. 651 below.

[2] The "model state constitution" sponsored by the National Municipal League contemplates a general law (allowing optional forms) for the government of counties, cities, and other areas, with every county and city permitted to adopt a "home rule" charter for its own use.

The Structure of County Government

To the governmental organization of counties, very little thought appears to have been given by constitutional conventions, state legislatures, or the general public—at all events, in comparison with the amount of attention bestowed on the government of states and cities. There is everywhere a large number of elective county officials. Curiously, furthermore, county government all over the country has been organized in entire disregard of the traditional three-fold division of governmental powers, with its accompanying system of checks and balances. The county courts which one finds everywhere, together with their officials, are merely parts of the state judicial machinery, not a coordinate branch of county government; and county legislative functions, which indeed are extremely few, are assigned to a body whose work, like that of the commission in commission-governed cities, is almost wholly administrative. Commonly known as the county board, this agency comes nearest to being the central governing body; and it, chiefly, calls for somewhat detailed consideration.

County commissioners or supervisors

A county board is found in all states except Rhode Island, and is everywhere an elective body, except in Connecticut, where the members are appointed by the state legislature, and in the majority of South Carolina counties, where they are appointed by the governor on recommendation of the local members of the legislature. The usual term is two years. The board bears different names in different parts of the country, and from state to state its composition varies greatly.[1] Where there are townships, and in a few other states as well, it is called the board of supervisors; in states or counties without township government, it is commonly known as the board of county commissioners. Sometimes boards of supervisors and boards of commissioners are found in the same state, as in Illinois, where eighty-five counties have the former and sixteen the latter, while a special board has been created for Cook county (Chicago).

A board of supervisors is composed—in most states having such (chiefly New York, Michigan, and Wisconsin)—of representatives elected from the various towns or townships and cities in the county, one commonly being chosen from each town or township and each city ward. Under this plan, very large boards often result; in Wayne county (Detroit), Michigan, the board once had 152 members and still has 84; in Dane county (Madison), Wisconsin, there is a board of 82. Where, on the other hand, the board of commissioners is employed,[2] the number of members is commonly no more than three, five, or seven—elected from the county at large in most states, but in a few chosen in districts. Rarely is there any chief executive officer in a board of either kind. Each, to be

[1] In Louisiana parishes, the board is called the police jury.
[2] Called supervisors, however, in California, Iowa, and Nebraska.

sure, elects a chairman; but he has no veto and little, if any, more power in other respects than any other member.[1]

Powers of the county board:

Like city councils, county boards, in general, can exercise only such powers as are expressly conferred upon them by statute or are clearly necessary to the performance of their public functions. Even in the same state, boards will sometimes be found with widely varying powers, owing to the large amount of special county legislation enacted from time to time. The county board is, however, for most purposes the general public agent by which the powers of the county—to some extent legislative, but mostly administrative—are exercised; and a detailed study of the work of these bodies throughout the country will show that commonly, although not in every state, their duties and powers relate to (1) financial matters, (2) county property and public works, (3) elections, (4) charities and corrections, (5) appointment and supervision of county officers, and (6) a large variety of miscellaneous matters.

1. Finance

The financial activities of the county board include levying taxes for county purposes; levying the county's share of the general property tax for the support of the state government; authorizing and arranging for loans on the credit of the county, usually through bond issues; equalizing, in many states, the assessment of taxes among the different townships and cities in the county; serving, in some states, as a board of review to hear and decide protests of taxpayers against property valuations made by local assessors; passing upon the allowance of all bills and accounts against the county, where there is no separate county auditor or comptroller; fixing the salary or other compensation of minor county officials and employees; and, in practically all states, making appropriations of county funds for various county purposes.

2. Custody of county property

The county board is the official custodian or trustee of all county property, real and personal, including the court-house, jail, work-house, poor-farm or almshouse, hospital, and libraries, and is required to lease or erect buildings suitable for the use of all county officers. In some sections of the country, the board also undertakes various public works, such as locating, constructing, and repairing the more important roads, building the principal bridges, erecting levees or dikes, and constructing drains, ditches, and irrigation works. Usually, however, such public works and the erection of county buildings are left to private parties, in which case the necessary contracts are awarded by the county board. To the board also falls the duty of letting contracts for printing, and for purchasing equipment for county buildings, office supplies, and materials used in county institutions.

3. Control of elections

In most states outside of New England, the county board marks out voting precincts, designates polling places, appoints election officials, prepares, prints, and distributes the ballots used on primary and election

[1] Exceptions appear in the case of the president of the Cook county board in Illinois and the county supervisors in Essex and Hudson counties, New Jersey.

days, and, after the election is over, serves as a board to canvass the results of primaries and general elections, which it later certifies to the proper county and state officers.

4. Charities and corrections

The county board is ultimately responsible for the charitable and other welfare work of the county. The administration of the county jail, the poor-farm or almshouse, the county hospital, and other similar institutions, and the carrying on of varied forms of welfare activity, come within its general jurisdiction; although the actual management of these institutions may be delegated to other elective or appointive officials. Frequently the patronage attached to the poor relief and charitable work of the county is considerable, subjecting the officials in charge to much local pressure, both political and social.

5. Appointments

Outside of the most populous counties, the appointing power of the county board is not extensive, and its power of removal even less so. In populous counties, where many activities are carried on by the county government, the board is likely to have the power to fill a very large number of positions on the county payroll, and the appointments frequently show the spoils system at its worst. In more than two hundred such counties, however, a serious attempt has been made to eliminate, or at least to reduce, this evil by the introduction of competitive civil service examinations.

6. Miscellaneous

The miscellaneous matters falling to county boards include the issuing of licenses for certain trades or occupations, such as liquor-selling, keeping hotels or inns, auctioneering, peddling, and operating ferries; offering bounties for the destruction of wild animals or noxious weeds; regulating fishing; safeguarding grade-crossings; incorporating literary and benevolent societies; preparing lists of persons eligible to serve as jurors in the courts; serving as a board of health, and as a forest preserve board; and organizing townships, school and road districts, and other county subdivisions created for various purposes.

Other County Officers

1. Sheriff

Besides the county board, counties in every state except Rhode Island have six or more elective officers, all largely independent of one another and of the county board, and usually of the higher state officials as well. Of these officers, whose titles and duties vary widely throughout the country, the most important are the sheriff and the prosecuting attorney. The sheriff is found in every state of the Union, and is everywhere an elective official except in Rhode Island, where he is appointed by the governor. His term is generally two years, although three-year and four-year terms are not uncommon; and in a number of states the constitution makes him ineligible for immediate reëlection. He has the right to appoint an almost unlimited number of deputies, whose powers become the same as his own; and he is made responsible for all their official acts. In most states, the sheriff is a salaried official; but usually both he

and his deputies receive much (if not all) of their compensation in the form of fees, which, in the largest counties, sometimes mount to tens of thousands of dollars a year.

Police duties

The duties most commonly assigned to the sheriff fall into two main groups: those relating to the preservation of the public peace, sometimes called police duties, and those connected with the operation of the courts. On paper, the sheriff's police duties are impressive, including as they do the control of the county jail, the arrest and safe-keeping of persons charged with crimes or misdemeanors, and the enforcement of statutes against gambling, vice, and liquor-selling. Except, however, in some of the more sparsely settled portions of the country, they are actually quite limited. No county police, corresponding to city police forces, is at the sheriff's command, and town constables and village and city police forces are in no way subject to his control. In time of public disorder, therefore, the sheriff is likely to be obliged to call upon the governor of the state for the assistance of the state militia or—where such a body exists—the state police.

Court duties

The greater portion of the sheriff's time is consumed in the performance of his duties as executive agent of the courts. He serves the various writs and other processes in connection with civil suits, and also warrants for the arrest of persons accused of crime, and subpœnas for the attendance of witnesses; he carries out the judgments of the courts in civil cases, and executes court sentences upon persons convicted of crimes or misdemeanors; in addition, he is, in some states, *ex officio* tax collector.

Although sheriffs are elected locally, they are, in law, agents of the state; and many, if not most, of their functions have to do with the enforcement of state laws. In only very few states, however, do the higher state officials exercise effective control over them. In Michigan, New York, and Wisconsin, the governor may remove a sheriff for cause; and in Illinois, he must remove a sheriff who allows a prisoner to be taken from his custody by a mob.

2. Prosecuting attorney

Of equal or greater importance is the prosecuting attorney—known in different states as state's attorney, district attorney, or county solicitor. Generally, such an official is elected in each county; but in some states the attorneys are chosen in districts containing more than one county, in which case their jurisdiction is, of course, not restricted to a single county, but extends throughout their district. In a very few states, the attorney is appointed by the governor, as in Florida, or by the judges of some court, as in Connecticut. Selected in most instances county by county, and by popular election, such attorneys inevitably vary greatly in character and abilities; and they are likely to reflect the dominant sentiment of their communities toward law enforcement, a fact that partly explains the unfortunate lack of uniformity in the enforcement of laws against gambling, vice, liquor-selling, and other offenses sometimes prevalent in different parts of the same state. However chosen and

supervised, the prosecuting attorney is paid a salary in a number of states, and is recompensed with fees in others; but the tendency is to substitute salaries for the fee system.

Duties

The most conspicuous duties of the prosecuting attorney, as the title implies, relate to the enforcement of criminal statutes; and the extent to which crime is repressed depends largely on the ability, energy, good judgment, and character of this official. He investigates crimes which come to his attention through the public press, the police, or on complaint of private citizens; he institutes proceedings for the arrest and detention of persons accused or suspected of crime, and of important witnesses who otherwise might leave the state; he commences criminal actions where in his judgment the facts warrant it, either by filing an "information" with the proper court or by drawing up indictments and submitting evidence in support of them to a grand jury; and, either in person or by deputy, he conducts the trial of criminal cases.[1] Recommendations which he makes concerning the fixing of bail, the discontinuance or nolle-prossing of criminal actions, and the severity of sentences to be imposed are usually given serious consideration by the courts. It is often made his duty, also, to bring to trial public officers whom he deems guilty of official misconduct.

Demands of the office

The office is indeed one of great responsibility, and invested with weighty possibilities for good or evil. Control of it in counties containing large cities is a political prize of the first magnitude for both the law-abiding classes and the criminal and vicious elements interested in lax law-enforcement and a "wide-open town." It should invariably go to a lawyer of unquestioned ability, a citizen of the highest character, a man forceful and fearless in the discharge of duty, and one who is above suspicion of being controlled by, or under obligations to, a political organization. Courageous and efficient prosecuting attorneys have often won distinction and political advancement.

In most states, the prosecuting attorney also has important civil duties: he is the legal adviser to most, if not all, of the county officials; he draws up and passes upon the validity of county contracts; he institutes and conducts suits brought by the county and defends those brought against the county, or against any officer thereof in his official capacity; he prosecutes all cases of forfeited official or jail bonds; and frequently he coöperates with the attorney-general of the state in the handling of important cases affecting the county.

3. Coroner

The office of coroner is of nearly the same antiquity as that of sheriff, but is now far less important. Almost everywhere, the coroner is an elective official, although in six or seven states he is appointed by the county board or by the judges of one of the higher courts. In Rhode

[1] In order that poor persons charged with crimes or misdemeanors may have better legal advice and competent representation at their trials, the office of public defender has been created in some parts of the country, notably in Los Angeles county, California.

Island, he is appointed by the town council, and therefore is not a county official at all. The main duty of the coroner, as set forth in a New York statute, is to investigate the circumstances under which any person has died "from criminal violence or by casualty, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in any suspicious or unusual manner." Elsewhere, the scope of the coroner's functions is often somewhat more restricted. In actual practice, in most states the office really forms a part of the machinery of criminal justice, and only in cases where a crime is involved, or thought to be involved, do the findings of the coroner or his jury have any special significance. In such cases, there should, of course, be the closest harmony and cooperation between the coroner and the prosecuting attorney; but not infrequently the two pull in opposite directions. In many counties, the coroner's office is nothing but a booby prize awarded to some insignificant adherent of the dominant political machine.

4. Clerk

County clerks are found in about one-half of the states. They are usually elected for two-year or four-year terms; but in Rhode Island they are chosen annually by the legislature, and in Vermont they are appointed for an indefinite term by the assistant judges of the county court. In some states, the county clerk has a great variety of tasks to perform. In Illinois, he is becoming, indeed, the chief executive officer of the county; and in New York he has duties in connection with the administration of at least a score of important state laws. As a rule, however, his functions are neither numerous nor of first-rate importance.

5. Court clerks

In almost all states, even where the county clerk serves as clerk of the county court, there are one or more separately elected or appointed court clerks. Both county clerks and court clerks may appoint deputies, for whose official acts they become responsible. Court clerks keep minutes of court proceedings and orders, issue processes or writs in law-suits, and have custody of records and the court seal.

6. Other county officers

Other appointive or elective county officers, found in one state or another, can only be mentioned, their nature and functions being sufficiently indicated by their names. Chief among the number are the treasurer, auditor, or comptroller; register of wills; register of probate; recorder of deeds; boards of assessors; and boards of review.

County Government in Need of Reform

A "dark continent" being gradually explored

Thirty years ago, county government was a labyrinth whose intricate windings were known to very few people except professional politicians. Within that period of time, however, an increasing number of disinterested explorers have penetrated the jungle in different states (notably New York, Illinois, New Jersey, North Carolina, and Virginia), afterwards reporting significantly on what they had found. And all accounts agree that in general the county has been untouched by reform move-

ments which have yielded improvements in city and state; that not one of the forty-eight states has worked out a genuinely satisfactory system of county government; that, almost everywhere, cumbersome machinery and antiquated methods persist, along with divided, diffused, and diluted authority and responsibility—defects which, until the depression of a decade or more ago, went practically unchallenged.[1]

Interest stirred by depression experiences

Troubles associated with that hard experience did what reformers never had succeeded in doing: they convinced public officials and taxpayers alike that there was more ground for criticism than they had been wont to admit, and that county government generally was a costly and antiquated patchwork. Even yet, actual improvements have been only sporadic. People, in general, however, now have somewhat increased appreciation of the problem, as also of the obstacles to be encountered in solving it; and the critics get more attention for what they have to say about (1) the number of counties, (2) the uniformity of county government, (3) the size and powers of county boards, (4) the selection of other county officers, (5) the absence of a county chief executive, (6) undesirable duplication of activities between counties and large cities, and (7) looseness and extravagance in matters of finance.

Existing Defects and Suggested Remedies

1. Too many counties

In early days, when travel was mainly on horseback or by horse and buggy, a large number of counties in a state could be justified because of making possible the location of county seats within a day's round-trip journey from all parts of the county. Today, despite the coming of the railroad, the automobile, and the telephone, the number of counties remains about what it was in remoter days, some states having a hundred or more. With the shifting of population and of economic centers, many of these old counties have come to be sparsely inhabited. All, however, are required by rigid constitutional or statutory provisions to maintain the same sort of government as more favored counties; in addition, they must meet the costs of improved highways and of the multiplied social services now so conspicuously added to the older county functions—all with the result that numerous small and poor counties have been utterly bankrupted. In this situation, taxpayers would find it greatly to their advantage to inquire into the economies that might be realized from merging two or more small neighboring counties, or consolidating a small county with a larger and more prosperous one. Indeed, in most states they would be better off with the number of counties reduced by a third, or even half. The matter has received attention in some communities, and a very limited number of consolidations (in fact, two) have taken place. Local pride and the opposition of county officeholders and county-seat tradesmen, joined to constitutional obstacles,

County consolidation

[1] See H. S. Gilbertson, *The County; The Dark Continent of American Politics* (New York, 1917).

have, however, kept the reform from moving at more than a snail's pace.[1]

County unions

Sometimes it is feasible to secure certain of the advantages of consolidation without going as far as a complete merger of county governments. Two or more counties too scant in population and too limited in resources to carry on necessary social services independently, *e.g.*, providing hospitals or almshouses, may form a union or district in which such activities can be carried on coöperatively, with expenses shared. Instances of such combinations are numerous in Virginia, but are found also in Michigan, Mississippi, and other states; and in her new constitution of 1945 Missouri provided for voluntary coöperation of any number of counties from two to ten in the performance of any governmental function.

2 Excessive uniformity

With the exception of a few very populous counties, all counties in a state usually must have the same form of government, with the result of small and sparsely settled ones being compelled to maintain a needlessly elaborate and cumbersome governmental organization, at a cost out of all proportion to the services rendered. A possible alternative would be to classify counties with a view to a uniform scheme of government only for those belonging to the same class; and on these lines Missouri, in her new constitution of 1945 not only authorizes four classes of counties, but empowers the legislature to provide a different form of government for each class.[2]

Optional and home-rule charters

Another alternative would be to institute a system of optional county charters, analogous to the optional city-charter system,[3] thereby enabling each county to adopt, by popular referendum, any one of several standard schemes of government; and Georgia authorized this plan in her constitution of 1945. Still another possibility takes the form of county home-rule charters, the voters of a county being authorized to elect a charter commission to draft a county charter, subject to the state constitution and statutes, and to final popular ratification. Obviously resembling the home-rule charter system often employed for cities,[4] this plan has been gaining in favor, although only five states have thus far adopted it, all by constitutional amendment: California in 1911; Maryland in 1913; Ohio and Texas in 1933; and Missouri in 1945. It appears

[1] Consolidation was urged in New York by Governors Alfred E. Smith and Franklin D. Roosevelt; state surveys or commissions have strongly recommended it in Virginia, North Carolina, and other states; in 1919, Tennessee led off with a consolidation of two counties; and in 1932, in Georgia, two small counties were consolidated with Fulton county (Atlanta). In 1933, county consolidation was authorized by the Minnesota legislature; in 1934 and 1936, Montana adopted constitutional amendments to the same effect; in 1935, the Wisconsin and Oregon legislatures authorized consolidations by majority vote of the electors in the counties concerned; in 1939, the Tennessee legislature passed a consolidation enabling act; and the new (1945) constitution of Missouri provides methods for county consolidation, dissolution, and partitioning.

[2] For this plan as applied to cities in some states, see p. 657 below.

[3] See pp. 658-659 below.

[4] See p. 658 below.

that county home-rule has as yet been installed only in California, and there in only nine counties.

b. Defects of the county board:

County boards of supervisors in some states, especially New York, Illinois, Michigan, and Wisconsin, are too large. The large board has in the past been supported on the theory that it is the legislative branch of county government, and therefore should represent in its membership all townships, villages, or other county subdivisions. In point of fact, however, the board has, except in Michigan, practically no legislative power beyond that of levying taxes and making appropriations; the remainder of its work consists almost entirely of administration.

Too large

The objections to a large board are several. In the first place, such a body, made up of members from all parts of the county, can meet only at comparatively infrequent intervals, and hence is not in continuous touch with what is going on in the various county offices and institutions, although the running of a county is a complex administrative operation, requiring constant and active supervision. A large board rarely can act with a proper degree of promptness. In the second place, a large board is unwieldy as an administrative body, and therefore is obliged to leave much to be done by virtually irresponsible committees.[1] In the third place, no executive head is charged with the duty of supervising and correlating the work of these committees and keeping the board informed on the needs and transactions of the various county offices; for, aside from his right to make committee assignments, the chairman of the board, with but few exceptions, has no more power than other members Lastly, individual members of the board, being usually township or other local officers serving *ex officiis*, are selected primarily for township functions, and are county officials only secondarily. Accordingly, they have every incentive to serve their township first; and as a result, log-rolling and other evils characteristic of the ward system of selecting city councilmen abound in county government.

Powers too restricted

One prerequisite, therefore, of more efficient county government is the abolition of the large board of supervisors (where it prevails) and the substitution of a small body of from three to seven members, elected either at large or from very few districts. If made alone, however, this change might not result in any conspicuous improvements; a considerable enlargement of the board's legislative and administrative authority is also desirable. A much larger degree of home rule in matters not transcending county boundaries would relieve state authorities of many burdensome duties which at present are often performed very indifferently.

4. Multiplicity of elective offices

With respect to the other county offices, it has been pointed out repeatedly that too many of them are elective, with the result of lengthening the ballot and tending to confuse the voter on election day. There

[1] In Illinois, several county boards have more members than the state senate, with the number of committees ranging from three to as high as twenty-six.

should be a small elective county board, with enlarged powers of legislation, appointment, and removal; all other county officers, with the possible exception of the auditor or comptroller, should be made appointive. The coroner, in particular, should cease to be an elective official; and the office might well be abolished and its duties transferred to the prosecuting attorney or to a medical examiner, trained in medico-legal jurisprudence, as in New York City and in New England.

If these county officers ceased to be elective, where should the appointing power be lodged? The answer is that it should be distributed according to the nature of the work to be performed. First of all, the state should not only appoint but pay all so-called county officers whose chief, if not only, duty is to enforce state laws for the suppression and punishment of vice and crime, precisely as the national government appoints and pays the corresponding national officials, *i.e.*, the United States marshals, commissioners, district attorneys, and district judges. The work of the sheriff, prosecuting attorney, and county judge is really not county work at all, except geographically; in nature, it is state work; and although elected by the people of the county—the officers who perform it serve the people of the state as a whole. Their appointment, compensation, and removal by the state would tend to prevent much of the local nullification of state laws now so common, and rightly would throw upon the state legislature the burden of facing any public hostility to given laws. The sheriff should be appointed and made removable by the governor; the prosecuting attorney, either by the governor or by the attorney-general of the state, preferably the latter. On the other hand, clerks of courts should be appointed by the courts which they serve; and county treasurers and collectors, assessors, superintendents of schools, and all other purely county officials should be appointed directly or indirectly, and should be removable also, by the county board, or (as explained below) by a county manager representing the board.

In a word, officers having state functions should be appointed and controlled by the state; and actual county officers should be put under full control of the county board, which thus would become, far more than now, the head of the county government. Responsibility for administration of county affairs would be better placed and unified; and the situation would be further improved if it were provided that all subordinates and county employees should be selected, promoted, and dismissed in accordance with a carefully planned merit system.[1]

5. Lack of a chief executive—the county-manager movement

But reform should not stop at this point. With rare exceptions, county governments have no executive head; and as a result, they are little more than a collection of nearly independent and poorly coördinated offices. There ought to be some effective apex to the county organization, as in the case of the city, state, and nation; and this could best be sup-

[1] Nine states already have such a provision, applying either to all counties or to more populous ones.

plied by a single executive officer empowered to check waste, correct abuses, institute needed changes or reforms, enforce a proper degree of harmony, coöperation, and subordination, and furnish the essential element of leadership. County boards might profitably follow the example of more than six hundred cities by appointing a manager and delegating to him the supervision of the details of administration, including full control over subordinate officials through the power of appointment and removal, subject to proper civil service regulations. The elective county board would then serve as the representative legislative, or policy-determining, body; and its chief functions would be to select a competent county manager, pass upon the annual budget and tax levy, and enact such local ordinances as might be needed.

Under one name or another, the county-manager plan has won much favorable attention in the past few years, and its authorization by a number of state constitutions and statutes, followed by actual adoption in eighteen scattered counties, is the most significant advance recently made in the field of county government. Furthermore, where it has been impossible to create a county manager with the comprehensive powers usually associated with the office of city manager, county boards have sometimes vested duties of a managerial character in some one of the older county officials, *e.g.*, the chairman of the county board, the county clerk, the engineer, the auditor, or the accountant.[1] Commission-manager county government might also properly include such incidents of commission-manager city government as the recall, the initiative, and the referendum.

6. Duplication of activities—the county-city problem

Another serious and costly administrative defect in counties containing large cities is the existence of two sets of officers, county and municipal, performing the same kinds of services for practically the same people. Perhaps the most striking illustration of such duplication is in the case of Chicago and Cook county. Within the corporation limits of this municipality reside more than nine-tenths of the people of the county, and from them comes about the same proportion of the county taxes; nevertheless, more than a dozen different activities are substantially duplicated. No useful public purpose is served by such an arrangement; the cost of government is greatly augmented; and the lengthened ballot imposes an unnecessary burden upon the voters. The proper remedy in such a case seems to be (1) to place the city outside of the jurisdiction of the county officers, transferring the functions of the latter to appropriate city departments, and to retain the county government solely for the rural or semi-urban portions of the county; or, on the other hand, (2) when city and county are coterminous, to consolidate the city and county governments completely. Important steps in one direction or the other—separation or consolidation—have been taken in Milwaukee, St.

[1] Such quasi-county managers exist in a number of counties in Missouri, North Carolina, and Virginia; also in Los Angeles and San Mateo counties, California.

Louis, Denver, San Francisco, and to a less extent in Boston, New York, Pittsburgh, and Philadelphia.

7. Financial looseness and extravagance

Inefficiency and needlessly expensive methods prevail widely in the transaction of county business in general, and particularly in the handling of county finance and the management of county jails and charitable or welfare institutions. In more populous counties, and as an effect of spoils influences, one often finds an excessive number of employees on the payroll. All too frequently, likewise, there is nothing worthy of the name of county budget; illegal expenditures, made either in ignorance or in disregard of the law, are not at all uncommon. Often there is lacking anything that a business man would recognize as an accounting system; and when there is something of the kind, it is seldom uniform for all of the county offices. So crude, indeed, has been county bookkeeping at times that a newly elected county board might be quite unable to ascertain the amount of bonded indebtedness, the extent of outstanding obligations, and the volume of uncollected taxes, or to secure other essential information.

Reforms in some states

The pocket-book nerve is the most sensitive part of the average taxpayer's anatomy, and it is not surprising to find that here and there significant steps have been taken to remedy loose financial methods. In Indiana, a specially elected county council has taken over both the taxing and appropriating powers of the county board;[1] and in Iowa, Minnesota, Massachusetts, New York, Ohio, and other states, provision has been made for state supervision, audit, or inspection of county financial transactions. In New York, for example, the state comptroller has authority to send examiners to any county to investigate and report on its financial condition. Iowa, New York, Nebraska, and a number of other states prescribe uniform systems of accounting for all counties; North Carolina, California, Florida, and half a dozen other states require counties to follow a uniform budget system; and in 1938 New Jersey established a new state department of local government vested with broad powers of supervision and control over the fiscal affairs of local units. In not a few instances, state supervision has resulted in noteworthy improvement in the handling of county finances; but much more might be accomplished if legislative appropriations for inspectorial work were more adequate.

Prerequisites of Reform—Legislation and Constitutional Amendment

Even if the people of a county are fully aware of the need for changes such as many of those suggested in the preceding paragraphs—which usually they are not—they are, by themselves, not in a position to carry out any thorough renovation. Nevertheless, they need not feel completely frustrated. An aroused public opinion might compel the county

[1] The state tax commission, too, has been empowered to revise county tax levies and to approve or disapprove proposed bond issues.

board to adopt a sort of self-denying ordinance and introduce the managership into the existing government, as a number of cities and villages have done, without waiting for special authorization from the legislature. A progressive county board might also, without waiting for legislative action, authorize an expert survey of county government and administration, such as in many instances has paved the way for the reorganization of a city government. Capable and progressive county officers, especially county boards, can likewise, on their own intiative, consolidate certain offices, or at least introduce more business-like methods in those existing. Sooner or later, however, if reform is to be carried far, necessity will arise for appealing to the legislature, and even beyond it to the procedures of constitutional amendment.

Potentialities of legislation

Probably no legislature is without the power to provide for a thorough survey of county government, either throughout the state or in a few typical counties; to authorize the employment of county managers or purchasing agents by the county board; to abolish or revise the fee system still adhering to many county offices; to require a uniform accounting system, periodical financial reports in prescribed forms, and modern budgetary methods; and to introduce some measure of reform in the assessment and collection of taxes. Furthermore, every legislature could order a codification of all existing laws relating to the duties of the various county and local officers, to be accompanied by a handbook or manual for ready reference, thereby relieving unskilled officials of the burden of threading their way through the labyrinth of compiled statutes and confusing session laws in a more or less futile effort to find out what their duties and limitations are—a task not always performed satisfactorily even by the most conscientious. The legislature might also enact a civil service law for the elimination of the spoils system in connection with subordinate positions on the county payroll, abolish any county offices created by statute and transfer their functions, and convert statutory elective offices into appointive offices, thereby hastening the advent of the short ballot and facilitating intelligent voting.

Ultimate need for constitutional amendment

In most states, however, "the roots of county government are imbedded in the legal granite of the state constitution and can be removed only by blasting them out with a constitutional amendment." Even the most intelligent and sympathetic legislature is thus limited in what it may do to promote better county government. Not only is it often restrained from shortening the ballot by constitutional provisions making various offices elective, but it is hampered by provisions imposing a uniform type of government upon all counties, limiting the amount and incidence of county taxation, restricting the amount of bonded indebtedness, and requiring unnecessary and costly duplication of county and city offices. Nothing less, therefore, than a series of constitutional amendments will clear the way, in probably any state, for the simplification and unification of county organization essential to truly democratic local govern-

ment.[1] Reform proposals on such extensive lines, however, especially if involving even temporary disadvantages for local politicians, are likely to encounter strenuous opposition; for the county is commonly the most important unit of "grass-roots" party organization, and county government the chief reservoir of party resources in local political contests.

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[1] See H. P. Jones, "Constitutional Barriers to Improvements in County Government," *Nat. Mun. Rev.*, XXI, Supp., 523-542 (Aug., 1932).

CHAPTER XLI

THE GOVERNMENT OF CITIES

The growth of urban population

"City government," it has been remarked, "touches more people at more points and more frequently than any other branch of government." Until of late, the number of people so affected in the United States has increased with remarkable rapidity. In 1800, when there were only six cities in the country, urban population amounted to less than four per cent of the total; by 1900, the proportion had risen to somewhat over forty per cent; and by 1940, the figure stood at 56.5 per cent. The rate of growth for urban, as for total, population has for some time been receding; between 1930 and 1940, few cities grew very much and many actually declined.[1] It still is true, however, that in 1940 four leading municipalities (New York, Chicago, Philadelphia, and Detroit) contained approximately one-tenth of the entire population of the country; that there were then ninety-two cities with more than one hundred thousand inhabitants each, and that the number of places classified by the federal Census Bureau as "urban" was no fewer than 3,464.[2]

The City in Relation to State and Nation

Mutual interests of urban and rural communities

This impressive growth of urban population is of concern not only to city dwellers themselves but to rural dwellers as well; many of the conditions and problems directly affecting city folk indirectly affect the welfare of non-urban populations also. It is, for example, a matter of more than local municipal concern if an epidemic breaks out in a large city, or if a city seeks to dispose of its sewage in a stream from which the people along its course draw their water supply, or if the criminal laws are poorly enforced by city authorities, or if city primaries and elections are disorderly and dishonest, or if the financial transactions of a city are characterized by waste and extravagance. No city, indeed—especially if one of considerable size—can live wholly unto itself; the welfare, prosperity, and good government of not only the county in which it is situated, but of the state as a whole, and even of the nation, depend in no small measure upon the welfare, prosperity, and good government of the cities within its borders.

[1] Suburban, or "satellite," cities, towns, and villages, are, however, multiplying and growing rapidly, so that the population of *metropolitan areas* is holding up, even though that of cities in the narrower sense is not. On this phenomenon and its political implications, see J. A. Perkins, "The Government of 'Rurban' Areas," *Amer. Polit. Sci. Rev.*, XXXVII, 306-313 (Apr., 1943).

[2] With population of 2,500 or more as the standard.

On the other hand, the city is vitally dependent upon the state in which it is located. To begin with, it owes its very existence, legally, to the state. As a municipal corporation, it is endowed with power to sue and be sued, to acquire, hold, and dispose of property, to enact ordinances, to raise money by taxation, and to exercise the right of eminent domain. But corporate character comes to it exclusively through state action. Further, every city has a fundamental law, called a charter, which defines its powers, outlines its system of government, prescribes the method of electing its council and choosing its mayor and other officials, assigns to some or all such officials their respective duties, and fixes with varying degrees of precision the relations of officials with one another. But city charters, or at all events the right to frame them, usually come from the state legislature. And since charters differ in no essential respect from other acts of the legislature, that body has authority to grant, withhold, suspend, alter, or revoke them at will, even in defiance of the expressed wishes of the people of any city concerned. In practice, however, such legal autocracy is tempered more or less by considerations of political expediency, by moral inhibitions where charters have been made locally under specific grant of authority by the legislature, and of course by such restrictions upon state legislative power as may be found in the national or state constitution. In organizing or reorganizing their governments, too, and in carrying on various municipal activities, cities frequently find themselves thwarted or handicapped by constitutional or statutory provisions; whereupon it becomes incumbent upon the legislature, and perhaps the voters of the state at large, to give consideration to laws or amendments calculated to remove the obstruction.

The city's legal position

Coöperation from the national government as well often becomes essential to the successful prosecution of some municipal undertaking, *e.g.*, in the domain of housing, or to the solution of some serious social problem, *e.g.*, cost of living, in our great urban centers. As pointed out, too, in various earlier connections, both the depression of the thirties and the defense and war effort after 1940 brought the national government into closer relations than ever before with local units—counties assuredly, but cities also and in even greater degree. As for the depression period, one has only to recall the efforts of federal authorities to aid cities in the administration of unemployment relief, the loans made by the Public Works Administration, the development of programs for the elimination of slums, the promotion of plans for home renovation and modernization in urban as well as rural communities, the working out of arrangements by which financially embarrassed cities might reach adjustment with their creditors in the federal bankruptcy courts, and, notably, the impact of the federal social security program launched in 1935 on municipal problems of relief and social welfare. Furthermore, in the defense and war period, aggravated problems of law enforcement,

Relations with the national government

finance, sanitation, water supply, housing, schools, recreation facilities, and new problems of civilian defense, though devolving primarily upon municipalities, had their national aspects as well, and entailed many novel federal-municipal interrelations. Certain situations involved, both in depression and in war, were largely or wholly temporary; and some newer federal contacts with municipalities have now been, or in time will be, broken. At least equally with the county, however, the city will permanently retain direct federal relations exceeding any existing or envisaged even a score of years ago.

Charter Systems

Speaking broadly, five successive methods of granting or obtaining city charters have been developed, namely: (1) the special charter system, (2) the general charter system, (3) the classification system, (4) the home-rule charter system, and (5) the optional charter plan. These methods are not mutually exclusive; sometimes two or three are found concurrently in the same state. Thus, whereas New York long had only the classification system, her constitution and statutes now sanction also the home-rule and optional charter plans. Obviously, the basis and character of city government depend largely on who makes the charter and what is put into it. Hence these alternative systems call for a word of comment.

1. Special charter system

Where the special charter system prevails, as it still does in New England and some older states in other sections, each city has a charter granted to it individually by separate act of the legislature; and there may be as many different varieties of charters as there are cities. The chief merit of this plan is that it enables each city to obtain, if the legislature is willing, the style of government and the corporate powers best suited to its size and general needs; in other words, the system permits adaptation to varying local conditions. On the other hand, the plan is seriously defective in that under it the legislature has at all times practically a free hand to interfere in the affairs of any municipality, as by creating or abolishing offices at the behest of local political factions or machines, or by transferring duties from elective to appointive officials, or *vice versa*.

2. General charter plan

The general charter system arose as a reaction against legislative abuses connected with the handling of special charters. For the diversity provided for in the special charter plan, the general charter method substitutes uniformity; a state-wide municipal code constitutes the charter for each individual city; and all cities presumably have the same form of government and the same corporate powers. This plan has the obvious merit of simplicity; and it largely removes from the legislature the temptation to tinker with local-government machinery. Nevertheless, even the most perfect municipal code will need amendment from time to time; and experience shows that one city or another will be constantly finding

some change essential to its welfare. Hence the system does not, in practice, do away with special legislation or with simple legislative meddling in local affairs, although this was its original purpose. The plan, furthermore, has some inherent defects, chiefly an excess of uniformity. If, as often happens, a state contains cities varying widely in size, or if some of the municipalities are inland and others are on the coast or on an important water-way, it is difficult, if not impossible, to frame a general code that will satisfactorily meet the needs all around;[1] and only a few states have undertaken to do so.

3. Classification method

A compromise between the two systems thus far described is the plan of classifying the cities of a state according to population and providing a different kind of charter for each class; and the wisdom of taking into account the varying needs of cities differing in size and location is conceded in the provision commonly made for three or more classes. The legislature is left practically free to provide for each class whatever form of government, and to grant to the cities in a given class whatever corporate powers, it may see fit; but whatever governmental organization or corporate powers are granted to a class must be granted to all cities included in that class. On the one hand, there is greater leeway in dealing with cities than under the general charter plan; on the other hand, there may not be discrimination against, or in favor of, a particular city,[2] which is the peculiar vice of the special charter system. The classification plan has for many years been employed in Pennsylvania, where it came about by virtue of judicial construction of a clause of the state constitution.

Defects

Like most compromises, the plan of classifying cities is not altogether satisfactory. Cities of the same class, even when they have approximately the same population, seldom have exactly the same local conditions, and therefore require different governmental arrangements and corporate powers and responsibilities. Cities, also, as they grow in population, may pass from one class to another, and thus be forced to change their scheme of government and to assume new burdens and responsibilities which to them may seem unnecessary. Moreover, where classification is not expressly authorized or defined in the state constitution, legislatures have sometimes resorted to ingenious and minute subdivisions of classes, making it possible to enact special legislation, disguised under some general phraseology, for a single city. And where such practices persist, and are sustained by court decisions—as, for a long time, they were in Ohio—constitutional prohibitions of special legislation are in effect nullified.

[1] An example of a general municipal code is the Illinois Cities and Villages Act of 1872. On account of the authorization of commission and commission-manager governments since 1910, the original uniformity of city governments in that state, however, no longer exists.

[2] Unless, as sometimes happens, a class contains but a single city, *e.g.*, Milwaukee under the Wisconsin system.

4. Home-rule plan

The home-rule method of charter-drafting is authorized by the constitutions of not fewer than twenty states;[1] in six additional ones, the legislature has given a broad grant of authority to some or all cities to amend their charters or adopt new ones;[2] and, in all, over four hundred cities and villages are now operating under home-rule charters, including fifteen of the thirty largest ones in the country. The fundamental idea is that, inasmuch as the inhabitants of each city are the people most interested in and directly affected by their municipal government and administration, they should have the right to draft their own charter and embody therein whatever plan of government they prefer, as well as to exercise all corporate powers not inconsistent with the constitution and general laws of the state. In other words, each city may make its own charter if it wishes to do so, just as each state is free to adopt its own constitution, and to put therein whatever it sees fit to include—subject, of course, to the national constitution and laws.[3]

Advantages

The home-rule plan has three or four principal merits. First, it enables the people of a city to have whatever form of government they consider best adapted to their needs. In determining, too, what is best adapted, they are free to experiment, and the results soon become known to a wide circle of communities. Second, a genuine home-rule charter plan not only gives cities greater freedom in governmental organization, but confers upon them the right to perform any functions not forbidden by the constitution or general laws of the state. Third, municipal home-rule benefits the state legislature by relieving it of the necessity of considering a multitude of local questions which it is poorly prepared to pass upon intelligently, even if it had unlimited time; and more freedom is thus gained for the consideration of matters of importance to the state as a whole. Finally, home rule stimulates greater interest of citizens in their own local government. If things go wrong, they cannot lay the blame upon the legislature. Their government may be good, bad, or indifferent, but whatever it is, no one else is responsible; and they alone have it in their power to make it different. If anything can inspire a keen sense of civic responsibility, it would seem that home rule should do it.

5. Optional charter system

An optional, or alternative, charter system has come into favor recently in a few states. This plan introduces a sort of *à la carte* charter

[1] Missouri (1875, 1945), California (1879), Washington (1889), Minnesota (1896), Colorado (1902), Oregon (1906), Oklahoma (1907), Michigan (1908), Arizona, Ohio, Nebraska, and Texas (1912), Maryland (1915), Indiana (1921), Pennsylvania (1922), New York (1923), Nevada and Wisconsin (1924), Utah (1932), and West Virginia (1936). As a rule, the home-rule provision is applicable only to cities of specified population, and in Maryland it applies only to Baltimore.

[2] Iowa (1858), Louisiana (1896), South Carolina (1899), Mississippi (1900), and Connecticut and Florida (1915).

[3] There are different modes of framing home-rule charters, but in most states the procedure is to elect delegates to a charter convention (or freeholders' convention, as it is commonly called), which drafts a charter and submits it for ratification, much as a constitutional convention drafts and submits a new state constitution. As a rule, the charter goes into effect when ratified by popular vote; and amendments are usually initiated by petition, with popular ratification required for adoption.

service by incorporating in the general law of the state several standard types of charter providing for different forms of government, including the commission form, the council-manager plan, and sundry varieties of the mayor-council type, and permitting each city to select for itself a form of government from the varieties thus offered.[1] Obviously, this optional, or alternative, charter system, with its high degree of flexibility, has many genuine advantages; and it is hard as yet to discern any serious drawbacks to it. Designed to avoid the disadvantages of both a uniform municipal code and a special charter system, it at the same time does not permit the extremely wide freedom of the home-rule plan; and on this account it meets with favor among people who have some sympathy with the principle of local choice, yet believe straight home rule liable to serious abuse.

Limitations on Municipal Freedom

Some restrictions inevitable

After all, it must be recognized that no one of the plans for relaxing legislative control over its fundamental law makes a city entirely free. Even under the most thoroughgoing home-rule system, locally-made charters are subject to the general state laws; and the legislature, if it cares to use its power, can encroach indefinitely upon the city's freedom. This must inevitably be so; for the city is in the state, is a part of the state, and is inextricably interlocked with the state in its interests and duties. Even if the legislature is disposed to leave the city entirely free to deal with purely local matters as it desires, there is not always a clear line of demarcation between things which are wholly local and those which, while perhaps primarily local, transcend city boundaries and concern the people of other portions of the state. The legislature can hardly be expected to make such a surrender of its powers over elections, police, health protection, methods of taxation, and school administration, for example, as will prevent it from intervening to restrict municipal authority in ways which may not be locally acceptable. Nevertheless, despite its limitations, wherever the home-rule system has been fairly tried, it has greatly lessened the danger of unjustifiable legislative intermeddling in municipal affairs.

Administrative supervision over cities

The main object of all of these different plans of charter-framing, except the special-charter system, is to reduce to a minimum arbitrary or factious legislative interference with local autonomy. This end may, however, be partially attained in a manner quite independent of any method of granting or obtaining charters, namely, through administrative supervision over certain municipal activities by state officers or boards; and important beginnings in this direction have already been made. Whenever, for example, a problem of public service transcends in scope the boundaries of several adjacent municipalities, there is a natural

[1] A New York law of 1914 authorizes selection of any one of six standard types of charter. Massachusetts has a similar law allowing choice among five forms.

tendency to invoke state administrative control; and under these circumstances, we are likely to find such metropolitan park, sewerage, or police boards as exist in Massachusetts, with authority over the metropolitan district of Boston. As a rule, too, state administrative supervision on these lines has proved far more beneficial to the cities directly affected by it than has legislative supervision. With a view, indeed, to unifying and harmonizing administrative supervision, and providing a body to advise municipal authorities in numerous matters, it has been urged that every state create a distinct department of municipal affairs or of local government—as did Pennsylvania in 1919, when a state bureau of municipalities was set up, or New Jersey in 1939, although the functions of the department of local government in the latter state are confined largely to matters of finance. Small cities, in particular, would be helped by such a central agency.

Mayor-Council Government—Legislative and Executive Branches

In whichever of the ways enumerated above a city obtains its charter, its scheme of government is almost certain to conform to one or another of three distinct types: mayor-council, commission, and council-manager; and to the salient features of each of these we now turn.

The council:

At one time almost monopolizing the field, the mayor-council form still is found in more than three-fifths of all municipalities of over five thousand population—in all, indeed, of over five hundred thousand except Washington, D. C. Based, too, on the historic principle of separation of powers, its most distinguishing characteristic is a sharp division of authority between an elective council and an elective chief executive, or mayor. Following federal and state analogy, municipal councils in earlier days, especially in larger cities, consisted almost invariably of two branches or houses. No useful purpose, however, was served by such an arrangement, and many practical disadvantages appeared, with the result that municipal bicameralism has now been very widely abandoned. Not one of our twenty-five largest cities any longer adheres to it;[1] only a small minority of places of over thirty thousand retain it;[2] and no municipality that has once discarded it has ever gone back to it. Except in Illinois, where the number of council members is graduated by law according to population, there is usually little correspondence between population and the council's size. New York has (1947) a council of twenty-one members[3] and Cleveland one of thirty-three; Chicago has a

1 Structure

[1] Until 1938, a board of estimate and apportionment in New York City served as a second chamber in the enactment of "local laws." Under a new charter of the date mentioned, its approval continues to be required for the budget and certain enactments by the council; but, with functions sharply reduced, it does not deserve to be regarded as in any proper sense a second chamber and is not so regarded by New York officials.

[2] Richmond, Va., and Atlanta, Ga., are examples.

[3] Until 1938, the New York board of aldermen consisted of the president of the board, elected by the voters of the city at large, the five borough presidents (one

council reduced in 1920 from seventy to fifty; and elsewhere the number runs downward all the way to nine, even in cities as large as Detroit, Denver, Seattle, and Pittsburgh.[1]

2. Method of election

At one time, council members were chosen almost invariably by districts, or wards, each returning one or two representatives; and this is still a common method, especially where the council is large. Except perhaps in smaller cities, the ward plan has, however, revealed serious shortcomings, and many places with smaller councils have discarded it, substituting election on a general city-wide ticket giving every voter a voice in the selection of the entire membership. This latter plan, too, has disadvantages, especially in cities of great size; and in not a few instances some combination of the two systems is found, a small proportion of the councilmen being elected from the city at large, leaving the majority to be chosen by wards. As noted elsewhere, eleven municipalities, including New York City, Cincinnati, and Toledo, elect councillors not only by general ticket, but under a system of proportional representation. And while the term of members is most commonly two years, more progressive places are gradually going over to four.

3. Functions

To the council it falls chiefly (1) to adopt the yearly municipal budget and allocate funds to the spending offices and services, and (2) to serve as the municipal legislature for enacting local laws known as ordinances. In the state municipal code, or in individual charters, the scope of the ordinance power is always set forth in more or less detail, and no council enactment is valid or enforceable unless clearly authorized in, or properly inferred from, some code or charter provision—and, of course, unless consistent with all statutes and all provisions of the state or national constitution.

The mayor—"weak" and "strong"

In earlier days, when popular suspicion of strong executives still lingered, municipalities had a mayor as head of the executive branch, but trusted him with comparatively little authority. He could make but few appointments, and only with council approval; if he had a veto, it could be overridden rather easily; and management of the municipal services was largely in the hands of officers, boards, or commissions subject to little mayoral control. In other words, under this "weak-mayor" plan, the city's chief executive was in pretty much the position in which the state governor is still found—and with the same bad effects upon unity, economy, and efficiency in the government. In not a few cities, this weak-mayor system persists today. In many, however, the mayor has been given considerably greater authority; and some, *e.g.*, New York, Boston, and Detroit, have gone over unreservedly to a "strong-mayor" type, in

elected in each borough), and sixty-five aldermen chosen from single-member districts. Under the new charter, however, the council consists of one member from each borough for every 75,000 votes cast; and on the basis of the vote of November, 1945, the number today is as indicated.

[1] As will appear, commission-governed cities have councils, or commissions, of five members. They, however, are in a different category from the cities here under consideration.

which power of appointment and removal is substantially increased, the veto power strengthened, and control over administration expanded and integrated. And, although the majority of cities still present only varying compromises between weak-mayor and strong-mayor types, the office has been distinctly on the up-grade,[1] with the council correspondingly declining. In cities retaining the mayor-council form at all, reform movements have rightly been aimed principally at making the mayor actual as well as nominal head of the city government, and responsible for unified management of the city's affairs.

1. Election and term

American mayors are uniformly elected by direct popular vote[2]—never by the council, as in Europe. Terms range from one year in some smaller cities, especially in New England, up to five years; in the largest cities, *e.g.*, New York, Chicago, Philadelphia, Los Angeles, and Detroit, the period is four years; elsewhere it is most commonly two. Salaries vary also from mere nominal sums in smaller places to $12,000 in Philadelphia, $18,000 in Chicago, $20,000 in Boston, and $25,000 in New York —the figures in the last three cases equalling or exceeding the governor's salary in the respective states.

2. Powers and duties

From what has been said about the varying and transitional position of the mayor in our mayor-council governments, it will be apparent that no single generalized statement of powers and duties is possible. A few broad facts, however, may be indicated. Everywhere it falls to the mayor to represent the city in its dealings with other municipalities and on ceremonial occasions, and everywhere he is expected to enforce the council's ordinances, to maintain order, and in general to coöperate with the law-enforcing authorities of county, state, and nation. Everywhere, too, as chief executive, he is supposed to exercise some supervision over the work of the various city departments. How effectively he can do this, however, depends on the actual authority with which he has been endowed, and especially on his power of appointment and removal. The tendency has been to confer more independent power at these latter points. Nevertheless, in the great majority of cities, appointments (and often removals also) are still contingent on approval by the council; and especially where removals cannot be made independently, the effect is to lessen responsibility for efficient conduct of administration. Some growth of mayoral authority has come also in connection with budget-making. In earlier times, this function belonged to the council exclusively, and in most cities it still does so, being exercised as a rule through a council committee. In New York, Boston, and an increasing number of other cities, however, it has been vested in the mayor alone; and in some other places, more opportunity has been created for that official to share in it, in at least an advisory capacity. Finally may be mentioned the mayor's relation to municipal legislation, *i.e.*, ordinance-making. In Illinois and

[1] Except, of course, in commission and council-manager cities, as explained below.
[2] Except, again, in some commission and council-manager cities.

some other states, he presides over council meetings. Everywhere he transmits messages and recommendations, along with reports of department heads or of other officials. And invariably he possesses the veto power (not infrequently extending to the veto of items); although nearly always a veto can be overridden in the council by a two-thirds vote—increased in some truly strong-mayor cities to three-fourths, or even five-sixths.[1]

Mayor-Council Government—Administration

Municipal government mainly administration

Although covering many pages in the average municipal charter and bulking large in the public eye, the legislative function of city government is much less important than the administrative. It is the departments that manage the multifold, and sometimes highly technical, public services rendered by the modern municipality, and carry on the daily routine of municipal business. They attend, for example, to the collection and disbursement of the city revenues, the negotiation and retirement of city loans, the organization, training, and daily activities of the members of the police force and the fire department, the operations of construction and engineering in connection with public works, the enforcement of health, building, and fire regulations; and they carry on a multitude of other activities which more or less directly affect the safety, comfort, and general well-being of every citizen. This administrative work is often given scant publicity in the newspapers, and the average city dweller knows too little about it. On the other hand, political machines and special interests are fully aware of its political and pecuniary possibilities, and often resort to desperate and corrupt expedients to control it.

Administrative departments

In number, names, and organization of administrative departments, as in so many other features of city government, there is general lack of uniformity. In most commission-governed cities, all the varied municipal activities are compressed, and sometimes cramped, into no more than five departments. But from this the number runs, in cities generally, to some thirty in Chicago and Boston, with formerly as many as forty in New York.[2] Like the size of the council, the number of departments bears little or no relation to the population of the city. In places, however, of moderate size—say from thirty thousand to one hundred thousand—one is almost certain to find at least six departments, somewhat as follows: (1) a law department, headed by the corporation counsel or city attorney, and charged with giving legal advice to the mayor, council, and all city departments, prosecuting and defending suits brought by or against the city, drawing up or approving all city contracts, and drafting municipal ordinances; (2) a department of finance, commonly including the offices of city treasurer, city comptroller, auditor, and tax assessors or collectors; (3) a department of public safety, including the machinery of

[1] In New York, the mayor is permitted to appoint a deputy mayor, who performs many of the routine duties of the office.

[2] Under the 1938 charter, the number of departments has been considerably reduced.

fire, police, health, and building administration; (4) a department of public works—usually the largest of all—with subdivisions or bureaus attending to streets, public buildings, parks and playgrounds, sewerage and water systems, and practically all the engineering work of the city; (5) a health department, charged with enforcement of the sanitary code; and (6) a department of education—although in numerous cities the administration of school and library affairs is handled by more or less independent school or library boards, chosen by popular vote or appointed by the mayor.

Single and plural heads

At the head of departments in which promptness of decision, maintenance of discipline, and capacity for vigorous action are the qualities most needed, *e.g.*, the police and fire departments, one finds, ordinarily, a single commissioner. On the other hand, those activities which entail discussion, deliberation, and decision of matters in which the differing views, and perhaps conflicting interests, of various racial, religious, or other local elements are involved, *e.g.*, school and library administration and welfare and recreational work, are usually in charge of a board or commission. No city finds it wise or expedient to adhere to either of these arrangements to the entire exclusion of the other; each type of organization has its strong points and its limitations. In the selection of department heads, different methods are employed, and in few cities is any one method followed exclusively. The influence of personal and political considerations is, however, everywhere conspicuous. For the selection of subordinates, including bureau chiefs and the great mass of clerical and technical employees, and even laborers, competitive examinations are widely used, yielding results far superior to those of the old spoils system in which administrative efficiency and the city's welfare were considerations entirely secondary to political influence and rewards. Indeed, the merit system has made considerably greater progress in the field of municipal than in that of state administration.[1]

Defects of Mayor-Council Government

1. Fundamental

The mayor-council form of government is sometimes referred to as the federal type of city government, because at a number of points its organization bears striking resemblance to that of the national government. In the municipal domain, the fundamental defect is division of authority and consequent scattering of responsibility. Legislative authority, for example, is divided between the council and the mayor, and each may, with some show of right, maintain that the ultimate responsibility rests with the other. In administration, likewise, authority is diffused and responsibility scattered. Administrative functions are placed in the hands of a group of officials separate and distinct from the legislative

[1] Out of 1,072 cities of over ten thousand population in 1946, 390 had substantially service-wide merit systems, while 600 had systems applying to certain services only, usually fire and police.

body, and formal contacts between the two arise only when the council is called upon to confirm the mayor's appointment of a department head, to vote the annual appropriations for department work, or to pass ordinances creating, reorganizing, or abolishing departments. Because of their joint participation (usually) in the selection of department heads, the mayor and council divide responsibility for the efficiency or lack of efficiency in the city's administrative services—a situation made the more certain to exist by the fact that while, as a legislative body, the council has no legal right to meddle with the details of administration, in practice few city activities are found wholly outside the sphere of councilmanic influence, since the council alone can provide the money for carrying them on.

2. Incidental

The defects mentioned seem to be inherent in, and hence more or less inseparable from, the system of checks and balances, "another name for which is friction, confusion, and irresponsibility." In addition, however, there are shortcomings which, although not fundamental and inherent, are quite as universally associated with the mayor-council form. In the first place, the council is often a much larger body than is necessary in order to represent the various elements in the city and to transact the city's legislative business satisfactorily. Where the bicameral plan persists, the division of authority and responsibility is carried still farther; and the ordinary citizen is usually completely in the dark as to who is to blame for what passes the council or is smothered in committee. In almost every mayor-council city, there is also an unnecessarily large number of elective officers who have purely routine functions—all, or practically all, minutely prescribed by state law or city ordinance. To these defects, too, must be added evils arising from the almost universal ward system of electing members of the council, from their nomination and election by a cumbersome and expensive partisan primary and election system, from the absence of any method of quickly removing unsatisfactory officials from office, from the inability of the people to secure needed ordinances if the council fails to enact them, and, on the other hand, the absence of any popular veto upon legislative acts regarded as detrimental to the best interests of the community.

Reformed mayor-council government

Not a few cities, attributing the unsatisfactory character of their government merely or mainly to these incidental defects, have simply lopped off one or more of them; or, more rarely, have attempted to graft upon the old stock some of the newer political devices. Thus, many cities have (a) reduced the size of the council and the number of elective officials, or (b) abolished one branch of the bicameral council, or (c) replaced the ward system with election at large, or (d) discontinued partisan primaries and substituted either nomination by petition or non-partisan primaries and elections, or (e) concentrated the appointing power in the mayor, or (f) authorized popular referenda in the case of all franchise ordinances, or (g) provided for the popular initiative

and referendum in connection with other ordinances,[1] or even (h), in a few cases, adopted the recall.[2] Such piecemeal reforms have often produced good results; but they do not go to the root of some of the most serious municipal ills.

Commission Government

Recognizing this fact, some seven hundred cities of over five thousand population (and many smaller ones), starting with Galveston in 1900 and Des Moines in 1907, have openly repudiated the old doctrine of separation of powers, with its checks and balances, divided authority, and diffused and diluted responsibility, and have substituted therefor either the commission or the council-manager form of government; and the number of such cities is still increasing.

Essential features

Commission government involves greatly simplified machinery.[3] In place of a bicameral council, or the large and unwieldy single chamber, in place of a mayor and a council each having some of the powers which belong primarily to the other and each serving as a check upon the other, in place of theoretically separate and independent legislative and administrative departments, one finds a small commission, consisting usually of five members elected on a general ticket, and made conspicuous by the smallness of their number and the abolition of most of the remaining elective municipal offices; and in this commission are concentrated all of the legislative, and most of the administrative, authority of the city government. As the legislative body, the commission has the ordinance power enjoyed by the council in mayor-council cities, including the right to fix the tax rate and pass the annual appropriation bills. As an administrative body, it exercises all of the administrative authority which in mayor-council cities is shared by the mayor, administrative departments, and council. Each member serves as head of one of the five departments into which the administrative work is usually divided; and the commission as a whole appoints the subordinate officials unless the power has been assigned to individual commissioners or to a special civil service commission. In brief, the essence of commission government is a complete concentration of legislative and executive functions, and therefore of responsibility, in a very small group of officials standing out prominently in the community.

[1] The New York charter of 1938 provides for the initiative and referendum, although restricted to charter amendments and other fundamental measures.

[2] An election for the recall of Mayor Bowles was held in Detroit in September, 1930, resulting in his removal. In July, 1931, Mayor Edwards was recalled in Seattle; and in September, 1938, Mayor Shaw was recalled in Los Angeles. In July, 1946, a recall election in San Francisco, directed against Mayor Lapham, resulted in his retention in office by a majority of more than thirty thousand.

[3] This form of municipal government is authorized in all but four states—New Hampshire, Vermont, Rhode Island, and Delaware—and in 1946 it was in use in a total of 325 cities of over five thousand population (sixteen per cent of the total number). It has been tried in seven places of more than 200,000 population—Buffalo, New Orleans, Jersey City, Newark, St. Paul, Oakland, and Portland (Ore.). Buffalo, however, abandoned it in 1927, as did Oakland in 1931.

Incidental features

The foregoing constitute the *essential* features of the commission system. In addition to them, however, certain incidental features almost invariably appear and contribute in no small measure to such success as the plan has achieved. For example, almost everywhere the ward system has been abolished and the members of the commission are elected from the entire city—an arrangement helping to make the office of commissioner more conspicuous and attractive.[1] Moreover, candidates for the commission are generally nominated either by petition or by non-partisan primary, and are voted for on election day on a non-partisan ballot. With such extensive powers vested in a small group, it is wise, too, for the public to retain means of direct and prompt control over the commissioners; and to this end, provision is made in practically all commission-governed cities outside of Pennsylvania for the recall of an unsatisfactory commissioner, and of any other elective officer, by means of a special election before the expiration of the term of office. Another common safeguard is the initiative and referendum in connection with ordinances. In varying degree, all of these devices have contributed something to the improved civic conditions which usually have followed the adoption of the commission system. It should, however, be clearly understood that, with the possible exception of the initiative and referendum, they are neither essential nor peculiar to the commission form of government, and that any mayor-council city can make use of them, as some do, without adopting the commission plan.

The mayor under the commission form

In almost all cases, a mayor is still provided for—as a rule, being elected directly to the office by popular vote, although in a few cities the commissioner who receives the highest popular vote automatically becomes mayor; and in New Jersey and Nebraska, the commissioners select a mayor from their own number. In any event, far from being the "too conspicuous and overburdened mayor" found in so many cities, the commission-government mayor is little more than first among equals. He wields no veto power; usually he has no separate appointing power; and he never has independent power of removal. To be sure, he is the nominal head of the city government, and on ceremonial occasions he acts as such. But of real authority he has little or none beyond that of each of his colleagues.

Defects of the Commission System

1. Insufficient concentration of responsibility

The commission plan has much to commend it. It is, however, not satisfactory in all respects; and, after trying it, perhaps ten per cent of the cities adopting it have reverted to the mayor-council form. Perhaps the most serious defect is that it does not carry the concentration of authority and responsibility to its logical conclusion, but leaves them divided among the five persons usually composing the commission. A five-

[1] In the largest cities, the general ticket system, *i.e.*, election at large, is open to serious objections, and election from a few large districts seems preferable.

headed administrative system, even supposing each head to be a genuine expert, makes attainment of the highest efficiency difficult, if not impossible. Friction is certain to arise sooner or later, and from one cause if not from another. A single commissioner, for example, may stubbornly adhere to a policy of his own, though disapproved by his colleagues; or he may find himself forced to adopt a policy to which he is strongly opposed. What is lacking in all cities governed simply by a commission (and this is an inherent defect of the system) is an apex to the administration which will insure leadership, teamwork, and a proper degree of subordination—qualities as essential to efficient administration as is individual expertness.

2. Over-emphasis of political aspects

Other important, although incidental, defects of commission-government laws or charters are to be found in their stress, as a rule, upon the political, rather than the administrative, side of city government, and in the inadequate provision commonly made for scientific budget-making, for modern methods of accounting and reporting, for centralized purchasing, or for numerous other important business details. Such provisions are essential to efficient government, and the seriousness of their omission has become apparent in many a city.

Counterbalancing merits

In view of these shortcomings, one may well be surprised at the degree of success which the commission system has attained in most places where it has been tried. The explanation is to be found in certain very obvious merits which have repeatedly offset the system's inherent or incidental weaknesses. There is a marked simplification of governmental machinery in comparison with what is usually found in mayor-council cities; expeditious handling of city business is facilitated; the introduction of more business-like methods is encouraged, even though not insured; the conspicuous position of, and large authority vested in, the commission tend to attract into the city's service men of higher caliber than commonly found in the old type of city council; the combining of taxing and appropriating powers in the same small group tends to produce greater care and circumspection in making appropriations and preventing departmental deficits. To these general advantages might be added a long list of benefits appearing here and there in individual cities and under peculiar conditions. As a rule, an awakening of civic interest has accompanied the adoption of commission government and has contributed incalculably to its success. Indeed, it is often hard to apportion the credit for improved municipal conditions under the commission system, so much has been contributed by the awakening of civic consciousness and popular interest in city affairs, as well as by the improved governmental machinery. The latter alone cannot regenerate any city.

The Council-Manager System

With a view to remedying the defects of commission government without sacrificing any of its main advantages, a modified form has been

introduced under the name of the commission-manager, council-manager, or simply the manager, system. The first large city to experiment with the new type was Dayton, Ohio, beginning in 1914. Proving highly satisfactory there, the plan was soon taken up elsewhere, and in 1946 it was in operation, either by charter or by ordinance, in a total of 653 cities—363 of them places of over five thousand population.[1]

Principal features

Under this scheme, the small popularly elected commission is retained as a council, with all the powers of the commission in an ordinary commission-governed city except in the domain of administration; and the body enacts ordinances and regulations, levies taxes, votes appropriations, creates or abolishes departments, and investigates the financial transactions or official acts of any officer or department. Serving, however, only as the legislative, policy-determining, and general supervisory body of the city, the council devotes only limited time to the city's affairs, and its members are paid only nominal sums for their services. The full-time job of administrative management, which in commission-governed cities is parcelled out among the commissioners, is here devolved rather upon a new type of official, a well-paid, non-political "manager," selected by the council and in the fullest sense responsible to it. And thus a five-headed administrative system is replaced by a highly integrated one, while, nevertheless, a greater degree of flexibility is attained, since the need no longer exists to compress city activities into five or any other fixed number of departments merely to satisfy the arbitrary requirement that there shall be only as many departments as there are commissioners.[2]

Selection of the manager

Notwithstanding that power and responsibility remain ultimately in the council, the central figure in the city government becomes very clearly the manager; and to the end that a council may secure the best manager available, choice is usually not restricted to residents of the city;[3] many city managers now in office in larger places started in comparatively small ones, sometimes in other states. The council ought also to be free, and usually is, to fix the manager's salary; otherwise, the city may be prevented from obtaining a properly qualified person merely because of some charter provision regulating the amount of compensation. Whether

[1] Maine led with 71. Michigan followed with 59, Texas with 52, Virginia with 47, Florida with 44, California with 38, and Pennsylvania with 34. States with conspicuously small numbers included New York and Illinois. Among larger council-manager cities are Oakland, San Diego, and Sacramento, Calif.; Miami, Fla.; Portland, Me.; Cambridge and Lowell, Mass.; Flint and Grand Rapids, Mich.; Kansas City, Mo.; Rochester and Yonkers, N. Y.; Cincinnati, Dayton, and Toledo, O.; Oklahoma City, Okla.; Knoxville, Tenn.; Dallas, Ft. Worth, and Houston, Tex.; and Norfolk, Va. For complete list, see *Municipal Year Book* (1946), 527-538. Twenty-eight cities (including Cleveland in 1931) have abandoned the system. There were 119 adoptions (in places of all sizes) during the five-year period 1941-45—28 in each of the years 1944 and 1945.

[2] In about three-fourths of the manager cities, the council does not exceed five members; in Kansas City, however, it numbers eight, and in Cincinnati, nine.

[3] In practice, however, a "home man" has frequently been chosen, notably in Cleveland and Kansas City.

or not appointed for a definite term, a manager is subject to removal by the council at any time when he ceases to give satisfaction.[1]

The manager's functions

The powers and duties of the manager make him easily the most conspicuous official in the city government, although his responsibility to the council is, as has been indicated, always perfectly clear and direct; and the members of the council are, in turn, commonly subject to popular control through the initiative, referendum, and recall. The entire city administration revolves around the manager. He appoints all heads of departments, and sometimes the deputy heads; he assigns to each his functions; and he may suspend or remove heads or subordinates at any time for cause. Minor employees are usually selected under a system of competitive examinations administered by a civil service commission of three members appointed by the council. But the manager has general supervision over all of the work done in the various departments, and is held responsible for results. In fact, the greater part of his time is occupied with attending to the details of city administration.

Next in importance, and closely related to these tasks, is the manager's duty of keeping the council informed on the city's financial conditions, preparing the annual budget, and going over and explaining the significance of various items. Responsibility for the enactment of the budget rests, however, not with the manager, but with the council, representing the body of taxpayers. Finally, the manager is made the chief executive of the city for the enforcement of all municipal ordinances, and of such state laws as the city is expected to administer. There is still a mayor, sometimes directly elected to the office, but usually the councilman receiving the largest number of popular votes. In any case, however, he has even less power than in ordinary commission-governed cities, and in reality is little more than a figurehead.

The manager and the council

Although without a vote, the manager has a right to be present at all meetings of the council, to take an active part in its deliberations, and to make recommendations. Thus, legislation and administration, the money-raising and the money-spending branches of the government, are brought into close and open relationship with one another. Members of the council are expected to refrain from meddling in roundabout ways with administrative activities, and from attempting to influence the manager in the selection of department heads and subordinates and in awarding city contracts. It must, however, be understood that manager government provides no automatic check on this sort of thing. The members of the council are always subject to some temptation to take a hand in administrative work, especially in filling subordinate appointive positions; and nothing but the establishment of sound traditions as to the proper sphere of activity of the council, backed by a vigilant interest on the part of the

[1] A newly engaged manager usually insists that the council execute a contract to employ him at a fixed salary for a definite period. But, even so, such an arrangement can be terminated at will by the council, subject to an adjustment concerning the unpaid balance of salary.

citizenry, can prevent a recurrence of undesirable councilmanic meddling in administrative business.

Under the council-manager form of government, the results achieved appear to have been more uniformly satisfactory than in commission-governed cities: expert administrators, or persons with administrative experience in private business, have usually been secured as managers; there has been a decided improvement in general administrative efficiency; modern business methods have been introduced; financial methods, in particular, have been toned up; and last, but by no means least, politics of the baser sort has thus far been largely eliminated from city administration. In a few cities, election of the council by proportional representation has probably contributed its share to better government; while as for the rest, credit, as in the case of commission-governed cities, has to be divided between the improved governmental organization itself and an active and continuous interest in municipal affairs on the part of a greater proportion of the taxpayers.

Results

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CHAPTER XLII

ACTIVITIES OF CITY GOVERNMENTS

In the preceding chapter, city government has been described with respect to its form or structure. We now turn to municipal functions and activities. Speaking broadly, these are the same, whatever the structure of the governmental system. And yet, organization and function are intimately related. For, after all, machinery is only a means to an end, namely, the proper performance, not only of the more obvious and primary functions of all governments—the protection of life and property—but also of a steadily growing variety of business and social-welfare activities in fields where daily human wants can be satisfied more adequately through public than through private action. A very great part of the work of city government consists, indeed, in ministering to such wants.

Municipal functions classified

When entire volumes have been written on single phases of municipal activity, a brief chapter can, of course, offer only the barest outline of the subject. Nor is any very satisfactory classification possible, because many activities fall partly in one field and partly in another. For present purposes, however, five main groups may be distinguished, relating respectively to: (1) protection of life and property, (2) public works, (3) public welfare, (4) education, and (5) finance.

Police Administration

Organization

Municipal police forces vary in size from twenty or thirty patrolmen in cities of from ten to thirty thousand up to small armies of some 5,000 (including clerical employees) in Philadelphia, 6,500 in Chicago, and nearly 15,600 in New York. Although legally officers of the state, and largely occupied with the enforcement of state laws, the police are practically everywhere organized, appointed, paid, and controlled by municipal authorities.[1] At the head of the police department one usually finds a single director, the police commissioner or the superintendent of police, who may be either a layman with little or no knowledge of police affairs when he assumes office or a professional member of the force who has

[1] In Boston, St. Louis, St. Joseph (Mo.), and Baltimore, the organization and control of the police force has for a good many years been vested in a single commissioner or a board appointed by the governor. In March, 1932, a state supreme court decision restored to Kansas City the control of its police force. But in 1939, state control, through a commission of four members appointed by the governor, was revived. Police affairs have been administered by state boards at one time or another in other cities, notably New York and Chicago. But this arrangement is usually resented as a violation of the principle of home rule.

risen from the ranks. Sometimes, however, police affairs are supervised by a small appointive bipartisan board.

Below the chief or head of the department in larger cities are deputy chiefs, captains, lieutenants, sergeants, and patrolmen—the last by far the most numerous and constituting the backbone of the force, upon whose efficiency largely depends the quality of the entire establishment.[1] Organized thus along military lines, the force is apportioned to the various precincts of the city, in each of which is often a station-house serving as police headquarters. Policewomen, too, are now found in New York, Chicago, Los Angeles, and about two hundred other cities. To them are assigned special duties connected with the supervision of dance halls, rest rooms in department stores and other public places, railway stations, and motion-picture theaters; and police matrons are also commonly employed at police stations to care for women offenders.[2]

Specialization of functions

In every large city, the police department has many different functions to perform; and this has led to the organization of various specialized squads. The first and most important of police duties is patrolling the streets, day and night, for the prevention of crime and other offenses. When a crime has been committed, and the perpetrator is unknown, a second police function comes into play, namely, the discovery and arrest of the criminal, and the collection of evidence; and in a large city, this falls to detectives or plain-clothes men. In large cities, too, one finds a mounted squad, an automobile patrol, and a motorcycle squad to assist patrolmen in handling street traffic and exceptional throngs of people. Sometimes there is also a harbor squad to patrol the water-front. Crime prevention bureaus, such as that established in New York City in 1930, have likewise made their appearance.

Exposure to corruption

In no branch of municipal administration are there greater opportunities for corrupt influences to make themselves felt than in the police force of a large city. It is therefore something more than a mere coincidence that in practically every startling revelation of political corruption connected with city government the police have been more or less deeply involved. "All the lawless elements of the city which derive profit from their respective trades are willing to share their ill-gotten gains with the police in return for protection," or immunity from prosecution. Opportunities for corruption are especially great when the police are expected to enforce laws not supported by sentiment or moral standards in the community, as sometimes happens in the case of laws prohibiting the sale of liquor, or gambling, or the social evil, or requiring Sunday-closing of stores, theaters, and other places of business or amusement.

[1] Appointments to the police and fire forces used to be distributed by the dominant party or faction as rewards for political services, in accordance with the well-known standards of the spoils system. Nowadays, however,—as indicated in the previous chapter—they are on a merit basis in nearly every city of more than ten thousand population, and indeed in some smaller ones.

[2] C. Owings, *Women Police* (New York, 1925).

Relations with local courts

To all intents and purposes, even though not in form, the local criminal courts—provided for either in the city charter or in general state laws—are likewise a part of the police system; certainly the efficiency and integrity of these courts go far toward determining the effectiveness of the local police administration. Judges in these so-called "police courts" usually get their places by popular vote, which in reality often means that their selection is determined largely by political bosses and organizations supported by elements ready to pay for immunity from law enforcement; and because of unfortunate experiences resulting, popular election has been abandoned in New York and some other cities, where police magistrates are now appointed by either the mayor or the governor, with somewhat more satisfactory results. In the past two decades, also, considerable progress has been made in the direction of differentiating between various classes of offenders and providing special courts for dealing with each class. For example, many, if not all, of our larger cities now have juvenile courts, under one name or another, for cases involving youthful offenders; and some of these have attracted nation-wide attention.[1]

Fire Protection

Organization

Scarcely second in importance to the work of the police department is that of the fire department. Indeed, the functions of the two touch at several points, inasmuch as the police are frequently required to make the inspections essential for the full enforcement of regulations laid down by the fire department. Not illogically, therefore, these two branches of municipal service are often brought together in a single administrative department presided over by a commissioner of public safety. In a majority of cities, the control of the fire department is vested in a single commissioner (whether or not combined with police administration). In the others, the department is in charge of a board or of a committee of the city council. A few decades ago, paid professional fire departments were to be found in only the largest cities; elsewhere, the work of fire-fighting was carried on by volunteer unpaid companies, consisting of men employed most of the time in other pursuits. Now all this is changed; any city, small or large, without a professional paid fire department is regarded as decidedly backward. Fire departments are regularly organized in small units or companies, stationed at different points throughout the city; and in large places the companies in a district of considerable size are organized into battalions, to be called out as such in cases of serious conflagration. In any event, at the head of the active fire-fighting force is

Functions:

1. Fire-fighting

[1] Los Angeles, Portland (Ore.), and some other cities have appointed officials, called public defenders, who, at public expense, conduct the cases of accused persons too poor to employ legal counsel. Cf. M. C. Goldman, *The Public Defender* (New York, 1917).

In addition to police courts, larger cities commonly have special municipal courts to handle civil cases.

the fire chief or fire marshal, who may or may not be the administrative head of the department.

One naturally thinks of the fire department primarily in connection with its most conspicuous activity, namely, fire-fighting. In this line of work, the equipment, methods, and achievements of American fire departments far surpass those of any European city. Nevertheless, the annual peacetime fire loss in European cities has been decidedly less than in American cities; and the reason is, chiefly, that in Europe greater stress has been laid upon measures designed to prevent the outbreak and spread of disastrous conflagrations, with less need for spending energy and money on the development of fire-fighting agencies. American cities, however, in the past two decades have been waking up to the truth of the old adage that an ounce of prevention is worth more than a pound of cure; and growing popular concern about controlling the causes of fires has led numerous cities to set up a separate bureau of fire prevention, organized within the fire department. Agencies of this kind have done much to reduce fire hazards and to stimulate the public to greater precaution—although fire losses continue to mount, reaching in 1945 the stupendous total of $450,000,000.[1]

2. Fire prevention

Health and Sanitation

Few, if any, municipal activities are of more importance than the work of the department (whatever called) having to do with health and sanitation. Yet the amount of city money set aside for this service is nearly everywhere less than the amount granted for police and fire protection or for education. Few departments are brought into close contact with as many other branches of the city government as is the one charged with protecting the public health. Its relationships extend to the bureau in control of water supply and purification, the department or bureau in charge of garbage collection and disposal, the sewerage and street-cleaning departments, the police department in the enforcement of the sanitary code, and to the educational authorities, especially in the matter of medical and dental inspection of school children. Harmonious coöperation with all of these various bureaus and departments is, therefore, indispensable to the proper functioning of the health department—a situation which, unfortunately, does not always exist.

Organization

In commission-governed cities, health protection is usually combined with police and fire administration in a department of public safety; elsewhere, especially in larger places, there is a separate department of health, at the head of which a board or commission is more frequently found than in the case of the police and fire departments. In New York City, for example, health administration is in the hands of a board composed of the health commissioner (serving as the department's

[1] After the United States, in 1941, became liable to air-raids, auxiliary fire-fighting forces were organized in most cities as a phase of civilian defense.

responsible head) and four other members, all appointed by the mayor. In Chicago and many other cities, on the other hand, the health department is presided over by a single commissioner, appointed by either the mayor or the city council. Many places, especially small or medium-sized ones, do not employ full-time health officers, such public health activities as are carried on being looked after by a physician devoting most of his time to his private practice. In this situation, a genuine health department is, of course, practically non-existent, and public health activities are likely to be of a very restricted nature. In times past, the work of health departments consisted almost wholly in discovering and abating nuisances and in fighting epidemics that might have been prevented; nowadays, efforts run far more largely along the lines of preventive medical and sanitary science.

Public Works

The foregoing activities spring from the primary function of all government, the protection of life and property. Many activities of the modern city, however, are aimed primarily at serving the citizen's convenience (even though the aspect of protection, in a broader sense, may also be present), and involve the exercise of powers neither necessary nor peculiar to government. Such undertakings are, rather, engineering, commercial, or social enterprises which might be—indeed often have been —carried on by private persons or corporations.

A city's engineering activities are commonly grouped in a single department of public works, although in many instances, too, they are distributed among several departments. At the head of a department of public works one rarely finds a board or a commission, as in the case of health and education departments, but almost invariably a single commissioner—usually a person with some engineering experience, although this is not entirely essential if his subordinates include properly trained engineers and other technical experts. Under any circumstances, however, direction of a department of public works in a city of considerable size calls for a man of large administrative ability and business experience.

1. Water supply

The most common forms of municipal public works in this country have to do with water supply, waste disposal, and streets. First in importance comes provision of an adequate water supply for domestic and industrial purposes. The storing and distribution of water is primarily an engineering enterprise, but one which in the great majority of cities has been made a municipal, rather than a private, business because of the intimate relation which the water supply bears to the health of the community and to the efficiency of its fire department. It is also one of the most remunerative of the city's undertakings, and therefore is often made to contribute to the support of other activities of the city government.

In many places, the water supply, in its natural condition, is so turbid

or muddy, or so impure, or both, as to require special treatment before being used for domestic purposes. To eliminate turbidity, water is often stored in huge reservoirs or tanks where sedimentation is hastened by the introduction of quantities of alum. To sterilize water and thus destroy most of the harmful bacteria in it, liquid chlorine gas is in common use, being injected frequently and in carefully measured quantities. To remove, and not merely kill, noxious bacteria, filtration plants have been introduced in many of our larger cities, with results usually reflected almost immediately in a lowered death-rate from typhoid fever.

2. Waste collection and disposal

The collection and disposal of wastes is everywhere an important municipal activity, although far more is undertaken on this line in some cities than in others. Few people appreciate the fact that, counting all kinds, a city's wastes exceed a ton a day per capita. In every city of size, the problem of collection and disposal is, therefore, one of serious magnitude.

Garbage

There are five principal forms of municipal waste, namely, ashes, inorganic rubbish, street sweepings, garbage, and sewage. Collection and disposal of the first three present no serious difficulties, and are often left to private individuals or concerns. Garbage and sewage, on the other hand, offer problems of much difficulty and importance. Garbage consists chiefly of the kitchen wastes from hotels, restaurants, and private dwellings, and hence materials in which putrefaction early sets in, and which soon become offensive, if not actually dangerous to health. Garbage collection is in some cities wholly a municipal undertaking; in others, it is left to private agencies; while in still other cases a combination of the two methods is found. In recent years, garbage reduction plants have come into favor in Chicago and elsewhere, the oils and fats being extracted for commercial use in the form of soaps and axle-grease, leaving a residue salable as a fertilizer.

Sewage

Sewage consists primarily of water-borne human effluvia from dwellings and wastes from many industrial plants such as laundries and slaughter-houses. More than other forms of waste, this bears the germs of disease, and proper collection and disposal become of prime concern to the health of the community. A prime municipal engineering activity is, therefore, the installation, operation, and maintenance of an adequate sewerage system, consisting of trunk lines, lateral branches, and connections for every building used as a dwelling or for commercial or industrial purposes. In many cities, the problem is not solved with the construction of a sewerage system, the chief purpose of which is to collect sewage and carry it off; there remains the question of final disposal. In cities on the ocean or on large lakes or rivers, the problem may find ready solution. But where the same lake or river serves as the source of water supply for other communities, different methods of disposal have to be found, or the sewage must be subjected to special treatment before it is turned into the lake or stream in question.

3. Streets

Within the jurisdiction of the department of public works, when not assigned to a separate department of streets (as is sometimes the case in large cities), falls the work of planning the width and direction of streets, making the necessary surveys, curbing, paving, cleaning, repairing, sprinkling, and lighting the streets, and laying sidewalks. Enormous progress has been made during the past few years in street paving, cleaning, and lighting. One seldom comes across a city nowadays, no matter how small, in which at least the principal streets are not paved, and in which not all are lighted by either gas or electricity. As a rule, street lighting is not carried on directly by the municipality, but rather is left to be done by private corporations under contract. Nevertheless, there has been a noteworthy increase in the number of cities owning and operating their electric lighting plants for street and commercial purposes, although the same cannot be said with respect to gas-works.

Direct *vs.* contract work

Other activities included in the term "public works" are the erection and maintenance of the city hall and other buildings owned by the city, the construction and care of bridges, and in some places the care and upkeep of parks, playgrounds, and cemeteries, and the operation of municipal airports, markets and transportation systems.[1] In carrying on the varied enterprises mentioned, every city is called upon to decide whether it will lay the sewers, pave, repair, and clean the streets, and erect public buildings with its own labor force and materials, or whether it will let out the work on contract to be done by private parties under carefully specified conditions. Each system has its advantages and disadvantages; and experience shows that in some kinds of work the direct plan is quite satisfactory, while in others the contract system yields better results. In many cities, both systems are in use. The construction of the great majority of public works is, however, carried out on a contract basis.

Public Welfare Activities

Reasons for municipalization

Municipal functions which, for want of a better classification, may be lumped together as public welfare activities have increased astonishingly, in both number and variety, during the past thirty-five years. Practically every city, however small, carries on at least two or three such activities, and in our larger cities the number is almost legion. Scores of cities have, since 1908, formally recognized the importance of this branch of municipal activity by creating, under one name or another, departments or bureaus of public, or social, welfare, among them being Dayton, Chicago, Los Angeles, St. Louis, Philadelphia, and New York. Such departments or bureaus have taken over many phases of philanthropic or charitable work previously performed by private individuals or unofficial organizations, but with which these are unable to deal ade-

[1] Serious postwar problems of transportation are confronting our cities, relating particularly to increased air transportation both of passengers and of freight and express matter, the location and planning of routes in metropolitan districts, traffic congestion, and parking facilities.

quately; although private activities, through churches, community chests, and other agencies, still find plenty of scope. Municipalization of undertakings in this field has grown out of increasing realization that society at large should regard the defective, delinquent, and otherwise handicapped classes in the city, as, in a sense, the wards of the community, and should therefore provide, through governmental machinery, ways and means of promoting their physical, moral and economic well-being—beyond any and all that private agencies may still prove able to contribute.[1]

Scope

The multifold aspects of welfare work—which may or may not be carried on under a formally organized welfare department—may be seen from the following list of more or less common welfare activities and agencies: the establishing of free employment bureaus; relieving poverty and other forms of individual and family distress; maintaining infant milk stations, day care-centers for children of working mothers, and child-welfare stations; employing a staff of visiting nurses to give instruction and care in maternity cases; establishing municipal lodging-houses and municipal tenements; providing free public baths and public laundries; and conducting important investigations into sociological problems such as the causes and extent of, and remedies for, poverty, disease, crime, and juvenile delinquency. The establishment and maintenance of parks and playgrounds have long been recognized as legitimate municipal activities in all of our larger cities; but the number of small parks and playgrounds and neighborhood centers, with their varied opportunities for both indoor and outdoor recreation, has been greatly multiplied in recent years in cities of all sizes. With this development has gone also the systematic supervision of games of all sorts, and of field athletic sports, by competent playground leaders. Long as this list may seem, it by no means includes all of the welfare activities now carried on in American cities; and it seems unlikely that the list will ever become shorter.

Education

School boards

Educational activities are among the oldest of municipal functions in the United States. Like towns and villages, cities are given large freedom in organizing their public school systems and in raising money for their support; and ordinarily provisions have been reasonably generous. As a rule, school affairs are not directly under the control of either the council or an administrative department, but are placed under more or less separate, and even independent, jurisdiction of a school board or committee, or a board of education—exceptions to this practice being found chiefly in some of the commission-governed cities. Members of the

[1] In several areas of social amelioration, the burdens resting upon cities, and upon private agencies operating within them, have been lightened by the federal aid extended under the Social Security Act of 1935 and its amendments. See pp. 456-460 above.

board (whatever called) are chosen in a variety of ways, the two most common being popular election, as in Boston and Cleveland, and appointment by the mayor, as in New York and Chicago; although in some places, especially in the South, there is appointment, either by the city council or by a local court. In the great majority of cities, the members serve without pay, although in San Francisco and Rochester they receive compensation.

Duties

Upon these school boards is placed responsibility for administering the entire public school system. They attend to the selection and purchase of land and buildings for school purposes, and pass upon plans and specifications and let contracts for the construction of buildings; they provide the necessary fuel and other supplies and janitor services; they are the custodians of all school property; they determine many points connected with the educational policy of the city; they estimate the sum needed for educational purposes each year, and either ask the city council for the amount, or, if their authority permits (as it often does), make a direct tax levy; finally, they appoint the school superintendent and have more or less to say, directly or in roundabout ways, concerning the appointment, promotion, and transfer of teachers. The superintendent is the responsible expert executive directly in charge of school activities, standing, in relation to the board, very much in the position of the city manager in relation to the council in cities having the council-manager form of government.

Expansion of educational activities

The last thirty years have witnessed a remarkable expansion in the educational and allied activities of American cities. These now include medical, dental, and psychopathic examination of school children; special classes for children found to be mentally or physically defective; evening classes for immigrants and illiterates; vocational guidance, including manual training, domestic science, and commercial courses; the operation of low-priced or free lunch-rooms for school children (with much aid from federal school-lunch subsidies); and numerous other services. In hundreds of cities, schoolhouses are lighted with gas or electricity, and thus are made available for evening lectures and entertainments and as centers of neighborhood sociability. Many school yards, too, have been enlarged and transformed into general public playgrounds equipped with special apparatus, with children of the neighborhood not only permitted, but encouraged, to resort to them outside of school hours. Hundreds of schoolhouses throughout the country, also, are now used as polling-places on election day, and even some of the so-called conservative New England states permit public meetings to be held in them, including political gatherings during electoral campaigns.

Municipal Finance

Growing expenditures

To carry on these multifold activities, and to meet steadily increasing demands of still other sorts upon all of our city governments, the collec-

tion and expenditure of immense sums of money are required. New York City's budget for 1946-47 amounted to more than $865,000,000—a sum exceeding the budget of the state, and four times the combined budgets, in 1946, of all six of the New England states. Partly because of these increasing demands upon the city's exchequer, and partly because of the aftermath of economic depression, many cities are now finding it difficult to raise the necessary funds to carry on present activities—to say nothing of taking on new functions—without resorting to burdensome taxation.[1]

Sources of revenue

The principal sources of municipal revenue are: (1) direct taxes on real and personal property, which have long furnished by far the largest part of the revenue of every American city, the rate of the tax being fixed by the city council or commission and limited in many states by constitutional or statutory provisions; (2) taxes derived from public service corporations, such as street railways, gas and electric lighting companies, and telephone companies; (3) poll taxes in a few cities, including Boston, the returns from which are comparatively small; (4) motorists' taxes in a number of cities; (5) license and permit fees exacted from a multitude of different enterprises and pursuits, including businesses, theaters, operators of mechanical amusements, plumbers, news dealers, and street vendors; (6) state grants or subventions for special purposes, such as education and sometimes highway improvement; (7) income from municipal enterprises, especially from water-rates and the sale of electricity to private consumers, and from a few municipally-owned street-railways —sources which once were vastly more productive in European than in American cities; (8) charges for services rendered, as in hospitals; (9) endowment or trust funds provided by private benefaction, the income being usable for certain specified activities, especially along social-welfare lines, a notable instance being found in Cleveland; (10) sales or business taxes, found in New York, Philadelphia, and a number of municipalities in the South and West, including New Orleans; (11) special assessments levied upon property-owners to meet, in large part, the cost of local improvements, such as street-paving and laying sewers; and (12) revenues of several kinds collected by the states and shared with municipalities.

Borrowin

The total revenue from all of these sources is, as a rule, scarcely adequate to meet ordinary running expenses. Consequently, when new enterprises are started, resort generally has to be had to loans, usually in the form of either sinking fund or serial bond issues. Many charters or state laws require, however, a popular referendum before bonds of either description can be issued. Furthermore, in practically all states

[1] More than two hundred cities adopted new sources of revenue in 1945, the most common being refuse collection charges, sewage rentals, and new forms of amusement and utilities taxes, and of business licenses and fees.

Municipal debt is, however, less of a problem than formerly, both because of prevailing low interest rates and because of a certain amount of debt retirement (as there also was by states) during the recent war. The total at the end of 1944 was $7,492,000,000.

there is either a constitutional or a statutory limitation upon the amount of indebtedness that cities may incur. The object of the restriction is praiseworthy.[1] But, although the debt limit is usually fixed in some ratio to taxable valuation, and is therefore flexible, it takes no account of the resources of other kinds, and of the general financial situation, of different cities, and, in its actual operation, is open to serious criticism.

Budgetary methods

Subject to such limitations as may be set by the state constitution or laws, determination of the kinds of taxes to be employed and the amounts to be levied is exclusively a function of the council or commission, as the body directly representing the taxpayers. It is likewise exclusively a function of this body to pass the annual appropriation ordinance, allotting the city's income to the various departments and activities. The compilation and revision of the estimates of the financial needs of the different departments, together with a forecast of the amount of revenue to be expected from various sources—in other words, the preparation of the budget—is another most important phase of the city's financial activities. Different cities follow different budgetary methods: in Chicago and many other municipalities not under commission government, the budget is prepared by a committee of the city council; in commission-governed cities, it is prepared by the commission, and in council-manager cities by the manager; while in New York, Boston, and some other places the mayor alone is responsible for formulating it. Enactment of the budget, with or without modifications, takes the form of the annual appropriation ordinance, and is the proper function of the city council or commission, which in this way is made responsible to the taxpayers, at least in part, for the uses to which the city's money is put. Sometimes the mayor is given a limited veto power on separate items of the budget as passed; and in Boston, New York, and a few other cities the council may modify the proposals submitted to it only by reducing the total appropriated for any given purpose or by striking out items.[2]

Assessment and collection of taxes

The assessment of taxes, the collection of revenues from all sources, and the expenditure of money in accordance with appropriation ordinances are distinctly administrative functions, exercised by one or more city departments or officials. Assessment of property for purposes of municipal taxation is sometimes in the hands of county officials; but generally each city forms a separate unit with its own corps of assessors, who seldom, if ever, enter upon their task with training or experience qualifying them to carry it out with any approach to scientific method or accuracy. In recent years, a few cities have introduced improvements at this point which have attracted wide attention.

[1] During the depression of the thirties, many cities found themselves in serious financial straits, and hundreds defaulted in the payment of principal or interest of their loans. Banks and the national government came to their aid in various ways. See p. 393 above.

[2] It is not to be forgotten that the council is rarely the only tax-levying authority in a city. Taxes may be levied quite independently by the school board, by a park board, and by other agencies.

Disbursements and accounts

The city treasurer serves as the custodian and disbursing officer of municipal funds. Revenues may be paid to him directly by the taxpayers or collected by another official called the city tax collector and then turned over to the treasurer. Department heads draw requisitions or warrants upon the treasurer from time to time for amounts allotted to their departments; but before such warrants will be honored, they must be approved by the city auditor or comptroller.

Finally, it is highly desirable that the accounts of all city departments be kept in accordance with a single, uniform, scientific plan. Unfortunately, this feature of an up-to-date fiscal system is too frequently lacking; although the past few years have brought rather widespread adoption of improved methods of departmental accounting. On the whole, considerably greater success has been attained in reforming the financial (including purchasing) methods of cities than has been realized in connection with the governments of either counties or states.

Postwar reserves

Many cities, like some of the states, have been making provision to meet persistent postwar financial problems. In nearly half of the states, laws authorize cities to set up reserve funds for postwar capital improvements, equipment replacement, repair of public works, and utility extensions; and various cities elsewhere have set up such reserves without awaiting specific statutory authorization.

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CHAPTER XLIII

TOWNSHIPS, VILLAGES, AND SPECIAL DISTRICTS

Towns and townships

Next to cities in importance as local-government units are the towns and townships found in the great group of states comprising New England, New York, Pennsylvania, and the North Central states, including Nebraska and the Dakotas. In the South and Far West, on the other hand, township government is practically non-existent. Functions which elsewhere are performed by town governments are, in these regions, exercised by county authorities, or are distributed among relatively unimportant county divisions (like the road districts in some Illinois counties), which have no corporate powers and seldom have the authority to levy taxes. In sharp contrast with these anæmic local-government units of the South and West are the town governments of New England, some of which are older than the counties and states under which they operate, but are still vigorous and flourishing.

The New England Town

New England towns[1] have practically all of the rights of municipal corporations; and, although without charters, they enjoy, by legislative grant, almost all of the powers that a city charter confers. In addition to the management of purely local affairs, the town acts as agent of the state in the assessment and collection of taxes, in keeping records of vital statistics and of land transfers,[2] in enforcing health laws, and in various other ways. Except in one or two states, the town is also the unit of representation in the state legislature for one house, or even both houses; and everywhere it is an election district for state and national purposes.

The town-meeting

Most of the powers granted to New England towns are vested in, and exercised by, the principal organ of town government, *i.e.*, the town-meeting—a primary assembly of the town's qualified voters, called together at least annually in the town hall. The town-meeting is primarily a legislative body; and the business that it transacts may relate to a great variety of subjects of local interest, including the upkeep of the town water-works, cemetery, library, high school, town hall, and other public property; construction of a sewerage system; laying out and im-

[1] The New England town is not necessarily an urban center. Some are such, and have populations running into the thousands. But the majority are rural communities (with or without a hamlet or town) covering twenty-five or thirty square miles. In other words, geographically they resemble the townships of other parts of the country. Historically, they corresponded roughly to the area of church attendance.

[2] In Vermont, Connecticut, and Rhode Island.

proving highways; authorizing contracts for street lighting; and enacting local police regulations, known as by-laws. An especially important function is that of providing the necessary funds for meeting the costs of these and other town enterprises—which means that the town-meeting not only appropriates money for the different town activities (including support of public schools), but fixes the tax rate and also authorizes the borrowing of money when such a step becomes necessary. In the discussion of these varied items of business, any voter present has a right to participate; and sometimes meetings are as exciting as political conventions, although more often they are dull and lifeless, following merely the customary formality and routine.

As towns grow in population,[1] a general mass-meeting is likely to be found unwieldy and ill-adapted to the expeditious and thoughtful handling of business. Sometimes a "limited" town meeting is introduced, composed of persons elected to represent the voters; in any case, there is likely to be a permanent or standing advisory committee of from ten to forty members, appointed by the selectmen, to investigate and report on any matters referred to it as being too complicated to be handled solely in mass meeting. Special committees, too, are sometimes employed for the same purpose; and as a rule, committee recommendations carry much weight with the voters or their representatives.

Executive officers

The policies determined upon in town-meeting are carried out, the taxes levied are collected, and the appropriations authorized are expended by officers chosen by the town-meeting and directly responsible to it for the greater part of their official acts. Instead, however, of a single chief executive to carry into effect the will of the local lawmaking body, one finds a variety of boards or single officials, usually chosen directly by the voters. Most important among these is the small group of three, five, or sometimes nine, persons called the selectmen. Chosen by the town-meeting, and forming a sort of executive committee of that body, these officials act almost entirely as the town-meeting directs, and hence enjoy very little independent or discretionary authority. They are generally chosen for a single year, although reëlections are very common; and they manage town affairs from one general meeting to the next.[2]

Select-men

Clerk

Second in importance is the town clerk, also elected annually, but often continued in office year after year until he becomes the acknowledged authority on town history, precedents, and genealogy. He keeps the records of the town-meetings, issues marriage licenses, prepares vital statistics, and, in Vermont, Rhode Island, and Connecticut, records deeds, mortgages, and other legal documents. There is always a town treasurer,

[1] The largest New England town is Brookline, Massachusetts, just outside of Boston, which in 1945 had a population of 56,940. In that town and a score of others in Massachusetts, a limited, or representative, town-meeting system has been instituted.

[2] Town managers are authorized in Maine, Vermont, Massachusetts, and Connecticut, and a number exist, especially in Maine.

sometimes an auditor, and invariably at least one constable to arrest violators of the law, serve court processes, and act as tax collector. There is also an elected school committee, or board, which in most New England states has direct control over the town schools. Finally, there is a long list of minor officials, mostly appointed by the selectmen and having merely nominal duties: for example, justices of the peace; road surveyors charged with keeping public roads and bridges in repair; sealers of weights and measures, who test the accuracy of scales and measures; keepers of almshouses; and park commissioners. Many of these petty officials serve without pay, or, at the most, receive only small fees.

Treasurer

School committees

Miscellaneous officers

Western Townships

Unlike the towns of New England, New York, New Jersey, and Pennsylvania, which have very irregular boundaries and differ greatly in area, the townships of the Middle-Western states are, with rare exceptions, of uniform size and shape, consisting of a rectangle approximately six miles square with straight sides.[1] These are often called civil townships, in order to distinguish them from the geographical or congressional townships of the same size and shape mapped out when the original land surveys were made under authority of some act of Congress. Their boundaries may or may not coincide with those of the congressional townships, but there is no necessary legal or political connection between the two. Congressional townships are found practically everywhere west of the Alleghenies, whereas civil townships exist only in the states of the Middle West; and in several of these, notably Illinois, Nebraska, and Missouri, they exist in only certain parts of the state. The boundaries of civil townships are always determined by the state or county authorities, whereas those of congressional townships are fixed by officials of the national government. Finally, the civil township is an important unit of local government, while the congressional township has no governmental organization and performs no governmental functions, serving almost solely as the basis for land surveys and records.

"Civil" and "congressional"

Although the Western civil township, as a municipal corporation, has substantially the same legal status as the New England town, and has elective officers closely corresponding, both in title and in functions, to those of its Eastern prototype, the most distinctive feature of New England town government, *i.e.*, the town-meeting, either is entirely absent or exists in a greatly attenuated form. Town officers may be elected in what is called a town-meeting, and questions may be submitted for popular approval. But in the Northern tier of Central states, including New York and New Jersey, township meetings have very much less authority than in New England; indeed, nowhere west of the Hudson does the town-meeting show any such vitality as has characterized it in its native habitat. And in the Southern tier of Central states, including Pennsyl-

Township government

[1] The rectangular system is found also in the northern part of Maine.

vania, Ohio, Indiana, Iowa, Kansas, and Missouri, there is no assembly of the township voters at all.

Corresponding to the New England selectmen—a name, however, which nowhere appears in the Central or Western states—is a committee or board of supervisors or trustees in Pennsylvania, Ohio, and Minnesota. In other states, there is a well-defined head official (quite unlike any New England official) called the supervisor in New York, Michigan, and Illinois, and township chairman or township trustee in other states. Remaining township officers correspond rather closely, in both name and function, to the officers of the New England town, although often they are chosen in a different manner.

On the whole, township government, outside of New England, plays a relatively unimportant rôle. This is especially true in the West, where the township is an artificial area, almost totally lacking the social unity of the old New England town. Other factors go to produce the same result: the relatively larger part taken by county officials in poor-relief, and in highway and school administration; also the common practice of incorporating portions of townships as villages or other separate municipal corporations, thus taking them largely out from under the jurisdiction of the township authorities. Among those who have studied the subject closely, there is a growing opinion that, under modern conditions of travel and communication, the township, where and as it exists, is an outworn institution and might well be dispensed with as a unit of government.

Villages

Status

When a portion of a township, or of a county that does not have township government, becomes more thickly settled than the rest and begins to take on a semi-urban aspect, its inhabitants are certain to demand more in the way of special public services, such as fire protection, street paving and lighting, water-supply and sewerage facilities, than the township or county authorities will care to undertake to provide. Sooner or later, therefore, such communities usually are incorporated as villages or boroughs.[1] Incorporation gives a village the power to undertake the special community services mentioned above, to borrow money and raise taxes to support them, and to have its own village government distinct from the governments of township and county. There are more than ten thousand of these incorporated villages in the United States, and they are found in all parts of the country, including New England and the Southern and Western states; although by far the greater number are in the North-Central section, where Illinois alone has some eight hundred. The boroughs of Connecticut and Pennsylvania and the incorporated towns of Illinois are merely villages under other names.

[1] Oak Park, a suburb of Chicago with 65,590 inhabitants, still retains the village form of government.

Government

The government of villages is a comparatively simple affair. In some states, notably New York, there is a village meeting, much like the town-meeting. In most states, however, there is no meeting of the kind, decision of practically all questions being left to certain elected officials. In such villages, the main governing body is likely to be a village board, called by various names, *e.g.*, trustees (New York), assessors (Maine), commissioners (New Hampshire), burgesses (in boroughs), or the village council. Other village officers include a mayor or president or chief burgess, who is the village chief executive, with sometimes a veto upon the acts of the village board; also a clerk, a treasurer, a marshal or police officer, and a police magistrate with functions similar to those of a justice of the peace. Thus, in structure and functions, the government of villages bears a striking resemblance to that of cities, except, of course, that usually it is on a decidedly smaller scale.[1] Indeed, it might almost be said that villages are miniature cities; at any rate, they often mark transitional stages in the evolution of cities from what were originally rural communities. Speaking broadly, the distinction between cities and villages is not one of area, population, or importance, but merely one of legal status.

Special Districts

Nature

No description of local government in the United States today is complete unless it at least mentions the newer districts created in many parts of the country to serve some special purpose for which the older units of local government have been found inadequate. Such units are commonly called special districts, or quasi-municipal corporations, in order to distinguish them from the older municipal corporations called cities and villages. Sometimes these newer districts lie wholly within the boundaries of a city, a town, or even a village; and generally they are entirely within a county. Nevertheless, their boundaries seldom coincide exactly with those of any older political subdivision. In the majority of instances, they are unions of two or more villages, townships, or small cities, or they comprise territory lying within more than one such unit. At all events, and despite the fact that they may contain practically the same inhabitants, they are legally quite independent of county, township, village, or city authorities in dealing with matters falling within their jurisdiction.

Classification

How extensively these special municipal corporations have developed, particularly in recent years, is indicated by the fact that a few years ago such corporations existed under eighty-nine different names, representing forty-seven distinct varieties, counting school districts only once. For convenience, all may be classified in five main groups: (1) school

[1] In New York, a general village law became effective in 1927, providing a model charter for all incorporated villages, about 450 in number. The chief executive, now called mayor, and the village trustees are the only elective officers.

districts, (2) public utilities districts, (3) sanitary districts, (4) water-control and soil conservation districts, and (5) miscellaneous.

1. School districts

School districts are probably the oldest and most numerous of these local subdivisions; they are also more widely distributed over the country, and appear in a larger variety of forms, than any other class unless it be the fifth named. No fewer than eight different species, under at least thirty-four names, have been discovered and catalogued, five or six varieties not infrequently being found in the same state. A school district is the unit of local government with which the great majority of native Americans first come into conscious personal contact; and no agency of local government possesses greater potentialities for the training of intelligent and useful citizens. By whatever name they may be called, all such districts—whether coterminous with a city or a township, or formed from a number of townships and villages or portions thereof—exist for essentially the same purposes: to provide the necessary land, buildings, and teachers, and to levy and appropriate the necessary taxes, for the maintenance of elementary, intermediate, and perchance high schools. Each district has its school board, school committee, or board of education, usually chosen by popular vote in smaller communities, but commonly appointed in places of considerable size; and the board generally selects a clerk or secretary, a treasurer, and, in the larger places, a school superintendent.

2 Public utilities districts

Public utilities districts have been created in considerable variety for the sole, or chief, purpose, as the name indicates, of constructing, owning, and operating works necessary to provide the local inhabitants with water, gas, electricity, or transportation. The Metropolitan Water District of Massachusetts is one of the most imposing instances of the kind.

3. Sanitary districts

Sanitary districts, under various names, have for their main object the improvement and protection of public health by providing for the establishment of boards of health and the creation and maintenance of drainage and sewerage systems. The best known example is the Sanitary District of Chicago, which operates over sixty miles of canals connecting the Chicago and Illinois rivers.[1]

4. Water-control districts

Water-control districts have to do primarily with impounding or distributing water supplies, diverting water courses, draining swamps, or protecting given areas against floods or tidal waves. Among notable examples are the Metropolitan Water District of Southern California, which includes fourteen cities, and the Miami Conservancy District in Ohio, created in 1913 after the Dayton flood, and covering nine counties. Perhaps the most common illustrations are the irrigation, drainage, or reclamation districts which have been established in about a dozen states. Nearly three hundred reclamation and irrigation districts are found in

[1] For a number of years, this district has been engaged in the construction of enormous sewerage treatment plants, in order to diminish the amount of sewage disposed of through the drainage canal system.

California alone, and nearly five hundred drainage districts in Illinois. Here also may be included more than fourteen hundred soil conservation districts in forty-five states, created since 1937 for the purpose of preventing soil erosion.[1]

5. Miscellaneous districts

In the miscellaneous class, one finds a heterogeneous, not to say motley, array of local-government districts: road, paving, and bridge districts in a dozen states; fire and forest-fire districts in New England, New York, and California; forest-preserve districts;[2] local improvement districts or associations, almost without number; several hundred housing districts; and a large assortment of park districts.[3]

Corporate powers

In the methods by which they are created, in their form of government, and in the powers which they enjoy, these special districts show, the country over, an almost boundless diversity. All, however, are endowed with some of the attributes of a municipal corporation, including the right to acquire, hold, and dispose of property, to sue and be sued in the courts, to have a corporate seal, to pass regulations called by-laws, and, most important of all, to levy taxes, issue bonds, and take such other steps as may be authorized by law for attaining the special objects for which the district was created. Such corporate powers are commonly exercised through a small governing body of commissioners, directors, or trustees, either elected by popular vote, or, less frequently, appointed by some state or county authority; and almost invariably, these officials serve for short terms and without compensation.

Some undesirable consequences

In many—perhaps most—instances, such special municipal corporations have justified their existence. Multiplication of them, however, has had a number of unfortunate results: (1) it has given rise in some states to a most bewildering system of local government; (2) it has burdened the voters, in those states particularly, but everywhere in some degree, with an excessively long ballot; (3) it has added incalculably to the cost of local government; (4) it has resulted in wasteful duplication of services, and in tax levies for the same or similar purposes by different authorities; (5) it has entailed a diffusion of administrative

[1] Nearly all states have soil-conservation-district enabling acts closely conforming to a "model" law drafted by the federal Department of Agriculture. See p. 429 above.

[2] Perhaps the most important of these forest preserve districts is that of Cook county, Illinois, created in 1915 for the purpose of providing for the metropolitan district of Chicago an elaborate system of outer parks and connecting boulevards. More than 25,000 acres have been acquired and permanently set apart for recreational purposes.

[3] Numerous other political subdivisions existing in every state are not described here; for example, congressional districts for the election of representatives in Congress; assembly and senatorial districts for the election of members of the state legislature; judicial districts for the choice of judges of the circuit, district, superior, supreme, or other state courts; and probate districts in New England for the election of judges of the probate courts. Such districts usually embrace more than one county, although the most populous counties are frequently divided into two or more districts. Since these divisions exist solely for electoral or judicial purposes, and have no general governmental organization or corporate powers, further attention to them is unnecessary in the present connection.

responsibility, and (6) it has kept in existence numerous administrative areas palpably incapable of performing the functions for which they are supposed to exist.

Local-Government Reform

Too many layers of government

In no state can a citizen live under fewer than four governments—national, state, county, and city, village, or town;[1] and, in addition, a citizen in New York, for example, who lives in a town outside of an incorporated village may be in school, fire, water, lighting, sewer, and sidewalk districts—in which case he is living under "ten layers of government." But to Illinois belongs the rather dubious distinction of having perhaps the most intricate system of local government of any state in the Union. Besides 102 counties, there are 1,143 cities, villages, and incorporated towns of all sizes, 1,444 townships, 12,129 school districts of one kind or another, 468 drainage districts, 179 special road districts, and 163 park, forest preserve, fire prevention, mosquito abatement, sanitary, tuberculosis, and other districts—making a total of 15,628.[2] The nadir has been reached in the local-government system of Cook county, comprising a veritable jungle of nearly four hundred separate units of government and over 2,500 elective officers.

Superficially, the United States appears to have democratic local government exalted to the *n*th power. But if the test of true democracy were applied, one would often find merely little oligarchies masquerading in the trappings of democracy.

Against this *mélange* of local governments, attacks no less vigorous, and often even more justified, than those against counties have been launched, especially during the depression of the thirties. New England towns, to be sure, have largely escaped criticism. But the special districts, and especially the townships, of New York, Pennsylvania, and the Middle West, have not been spared. Taxpayers are widely of the opinion that they are paying for "too much government"; that most, if not all, of the functions now performed by townships, school districts, and road districts could be carried on, not only more economically, but in other respects more satisfactorily, by the counties or by the state. In several states, from three to twenty-five per cent of the townships have a population of less than four hundred living outside of any village or city; and in many of these, the dissolution—at all events the consolidation—of townships and other small units may not unreasonably be expected in the near future. In fact, some seventy townships in northern Minnesota have been dissolved since 1933; all those of Oklahoma were, for all practical purposes, abolished in the same year by withdrawal of their power to levy taxes, followed by transfer of their

[1] Except that in some parts of the country the county, while existing for certain purposes (*e.g.*, judicial), does not have, speaking strictly, a "government."

[2] For these figures, we are indebted to Dr. J. F. Isakoff, director of research for the Illinois Legislative Council.

functions to counties; while in Maine a number of little towns have voluntarily given up their corporate organization. The purpose of such changes is not to destroy, or even to impair, local self-government, but rather to re-shape local governments, in larger units and on more responsible lines, in the interest of economy and efficiency.

Simplification and unification are the outstanding needs of our counties and other local areas; indeed, they are indispensable prerequisites to the effective functioning of local governments as instruments of a genuine democracy. Verily, verily, true democratic government consisteth not in a multiplicity of governments nor in a multitude of elective officers; but, rather, in the adaptation of governments to modern community needs and in the discriminating choice of a few officials who can be relied upon to be continuously sensible of their responsibility to an electorate at once informed, intelligent, and alert.

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APPENDIX

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION II

The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years,[1] and excluding Indians not taxed, three fifths of all other persons.[2] The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.[3]

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

[1] Altered by the Fourteenth Amendment.
[2] Rescinded by the Fourteenth Amendment.
[3] Temporary provision.

SECTION III

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof,[1] for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[2]

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of the President of the United States.

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION IV

The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.[3]

SECTION V

Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

[1] Modified by the Seventeenth Amendment.
[2] Modified by the Seventeenth Amendment.
[3] Superseded by the Twentieth Amendment

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION VI

The Senators and Representatives shall receive a compensation for their services, to be ascertained by law and paid out of the Treasury of the United States They shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

SECTION VII

All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President[91] of the United States; if he approves he shall sign it, but if not he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION IX

The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress

prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.[1]

The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or *ex post facto* law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION X

No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of 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.

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.

ARTICLE II

SECTION I

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[1] Temporary provision.

The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.[1]

The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

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.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the 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 President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he may have been elected, and he shall not receive within that period any other emolument from the United States or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability preserve, protect, and defend the Constitution of the United States."

[1] Superseded by the Twelfth Amendment.

SECTION II

The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he 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, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall 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 President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION III

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

SECTION IV

The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which

shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State;[1] between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION III

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every 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.

SECTION II

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.[2]

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on 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.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.[3]

[1] Restricted by the Eleventh Amendment.
[2] Extended by the Fourteenth Amendment.
[3] Superseded by the Thirteenth Amendment in so far as pertaining to slaves.

SECTION III

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular State.

SECTION IV

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.

ARTICLE V

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing 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 amendments 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,[1] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the confederation.[2]

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.

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

[1] Temporary clause.
[2] Extended by the Fourteenth Amendment.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in convention by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

[Signed by] [1]

ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES [OR CONVENTIONS THEREIN] PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION:

Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II. A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV. 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 person or things to be seized.

Article V. 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; nor shall private property be taken for public use without just compensation.

Article VI. 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

[1] The signatures are omitted here.

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.

Article VII. 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 re-examined in any court of the United States, than according to the rules of the common law.

Article VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X.[1] 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.

Article XI.[2] The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

Article XII.[3] The electors shall meet in their respective States and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each; which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted. The person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the person having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve

[1] The first ten amendments took effect December 15, 1791.
[2] Proclaimed January 8, 1798.
[3] Proclaimed September 25, 1804.

upon them, before the fourth day of March[1] next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.

The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Article XIII.[2] *Section* 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.[3] *Section* 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized

[1] Superseded by the Twentieth Amendment.
[2] Proclaimed December 18, 1865.
[3] Proclaimed July 28, 1868.

by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV.[1] *Section* 1. 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.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Article XVI.[2] The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Article XVII.[3] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Article XVIII.[4] *Section* 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. 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.[5]

Article XIX.[6] *Section* 1. 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 sex.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

[1] Proclaimed March 30, 1870.
[2] Proclaimed February 25, 1913.
[3] Proclaimed May 31, 1913.
[4] Proclaimed January 29, 1919.
[5] Rescinded by the Twenty-first Amendment.
[6] Proclaimed August 26, 1920.

Article XX.[1] *Section* 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Section 3. 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.

Section 4. 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.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Article XXI.[2] *Section* 1. The Eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

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[1] Proclaimed February 6, 1933.
[2] Proclaimed December 5, 1933.

INDEX

A

Adamson Act (1916), 437
Absent voting, 147, 152
Administration (national), relation to politics, 290
importance, 290-291
fundamental features in U. S., 291-294
functions, 294
basic principles, 297-298
criticisms, 298-299
obstacles to reorganization, 299
Reorganization Act of 1939, 299-300
Reorganization Act of 1945, 301-302
reorganization under War Powers Act, 301
regulatory commissions, 302-305
Administrative Procedure Act (1946), 303-304
references on, 305
See Civil Service
Administration (state), growth, 588
activities, 577 ff.
agencies, 589-590
defects, 590-592
bipartisan boards, 590
removals, 591
defects, 590-592
accounting and purchasing, 593
budget-making, 592
reorganization, 592-594
civil service, 594-596
references on, 596-597
Administration (municipal), services, 663
departments, 663-664
under manager government, 670
police protection, 672-673
fire protection, 674-675
health and sanitation, 675-676
public works, 676-678
social welfare, 678-679
education, 679-680
finance, 680-682
Administrative legislation, reasons for, 296
Administrative Office, U. S. Courts, 338
Administrative Procedure Act (1946), 303-304
Administrative reorganization, national, 299-302
state, 592-594
Admiralty cases, 336
Advisory opinions, by state courts, 621
Agricultural Adjustment Act (1933), purposes, 415-416
crop reduction features, 416
marketing arrangements, 416-417
declared unconstitutional, 417
act of 1938, 418-419
Agricultural credit, 421-422
Agricultural education, 414
Agricultural Marketing Act, 415
Agriculture, in the American economy, 410
government aid, 411-412
state activities, 581-582
Agriculture (Department of), established, 412
scientific research, 413-414
education, 414
marketing, 414-415
crop reduction, 416, 418
wartime developments, 419-420
credit, 421-422
references on, 432
Alaska, government, 511-512
Alaska railroad, 406
Aliens, numbers and registration, 87, 99
status in peacetime, 87-88
deportation, 88-89
status during war, 89
naturalization, 91-93
debarred from voting, 115
president's obligation to protect, 472-473
references on, 109
Ambassadors, status, 468-469
functions, 469-470
Amendment (of federal constitution), methods, 29-30
numbers proposed, 31
twenty-one ratified, 31-35
characteristics as a group, 35
further proposals, 35-36
criticism of amending process, 36-38
changes of method improbable, 38
references on, 43

Amendment (of state constitutions), by legislative proposal, 531
by popular initiative, 531-532
by constitutional convention, 533-535
American Labor party, 132
American Political Science Association, report of committee on Congress, 260-261 n.
Amnesty, 287
Annapolis convention, 12
Anti-Racketeering Act (1946), 453 n.
"Anti-Strike" Act (1943), 450-451
Anti-trust legislation, 394-398
Appointments, by president, share of Senate, 280
by courts and heads of departments, 281
senatorial courtesy, 281-282
by heads of departments, 295
in classified service, 319
in state governments, 569, 595-596
in county governments, 649
in city governments, 662
Appropriations. *See* Finance
Aristocracy, in early America, 2-3
Arizona, adopts recall of judges, 57 n.
Arms, right to bear, 100
Army, duty of Congress to provide for, 486-487
regulations for, 487
relation to War Department, 498-499
reorganization and the new "commands," 499-500
in World War II, 500-501
of today and tomorrow, 501
Articles of Confederation, drafted and ratified, 9
sovereignty of states, 9
Congress, 9-10
state infractions, 11
movement for revision, 11-13
references on, 13-14
Assembly, right of, 100
Assessment of taxes, 601, 603
Atomic Energy Commission, 503 n.
Atomic power, impact, 503-504
Attainder, bills of forbidden, 101-102
Attorney-general, national, 346
state, 576
Auditor, state, 575
Australian ballot, 154

B

Ballot, forms, 154-155
question of shortening, 154-155
preferential, 158
Bankhead-Jones Farm Tenant Act (1937), 423
Banking Act (1933), 372
Banking laws, federal, 371-372
Bankruptcy, legislation on, 393-394
Banks, national system established, 371
federal reserve system, 371-372
home loan, 402
agricultural credit, 421-422
Bicameral system, in colonies and early states, 6
in Congress, 180
in the states, 542-544
in cities, 660-663
Bill-drafting bureaus, 560
Bill of rights. *See* Civil rights
Bills, in national House of Representatives, how introduced, 222-223
authorship, 223-224
multiplicity, 224
reference to committees, 224-225
hearings, 226
forcing report, 227
selection for consideration, 228
handling in state legislatures, 556
Bituminous Coal Conservation Act (1935), 428
Boards, county, 640-642, 648
Bonds, national, 364
state and local, 616
Borrowing money, 364-365
constitutional authority, 364
by national government, 364-366
by state and local governments 615-616
Boulder Dam, 427
Bridges, Harry, deportation proceedings against, 88 n.
Budget and Accounting Act, 350
Budget Bureau, 350-351
Budget messages, of president, 352
Budget system (national), antecedent conditions, 350
organization and workings, 350-352
desirable improvements, 353-354
Budget system (state), 611-612
Budget system (municipal), 682
Bureau of Customs, 366
Bureau of Internal Revenue, 366
Bureau of Labor Statistics, 437
Bureau of Mines, 427
Bureau of Placement, 441
Bureau of the Public Debt, 367
Business, general relations with government, 390-391
government aids, 391-394
regulation of combinations, 394-398
regulation by states, 583-584
and government in wartime, 404-406
government ownership and operation, 405-408
references on, 408-409

C

Cabinet, origins, 274
relations with president, 274
meetings and influence, 274-275
selection of members, 275-276
Cabinet government, compared with presidential, 239-240
proposals for adoption in United States, 265
Calendars, in Congress, 228
Campaign, presidential, 169
Cannon, Joseph G., speaker of the House of Representatives, 198
Canton island, 509
Caucus, nominates candidates for presidency, 161
in national House of Representatives, 204-205
Censorship, in wartime, 497-498
Census, Bureau of, 388
Central bank for cooperatives, 422
Centralization, criticism of present trend, 82
counter-arguments, 82-83
conclusions concerning, 83
Centralized purchasing (state), 592
Chairmanships, of committees in national House of Representatives, 201-202
Charities and corrections, in states, 578-579
Charter (municipal), grant of, 655
special charter system, 656
general charter plan, 656-657
classification plan, 657-658
home rule plan, 658
optional plan, 658-659
Charters, as contracts, 64-65
Checks and balances, in early state constitutions, 5
in state governments, 527-528
Chief Justice, U. S., 338
Child labor, proposed constitutional amendment, 36
under Fair Labor Standards Act, 446
Children's Bureau, 437
Children's Bureau, 437
Circuit courts of appeals, 337-338
Cities, relation to county government, 650
growth, 654
relation to state and national government, 655-656
legal status, 655
special charters, 656
general charters, 656-657
classification, 657
home rule, 658
optional charters, 658-659
limitations, 659
administrative supervision, 659-660
mayor-council government, 660 ff.
mayor, 661-662
council, 660-661
ordinances, 661
administration activities, 663
departmental organization, 663-664
defects in mayor-council government, 664-666
commission government, 666 ff.
council-manager government, 668 ff.
classes of functions, 672
protective activities, 672-676
police, 672-673
fire protection, 674-675
health and sanitation, 675-676
public works, 676-678
water supply, 676-677
waste removal, 677
sewerage, 677
streets, 678
public welfare activities, 678-679
education, 679-680
finance, 680-682
budget, 682
references on, 671, 683-684
Citizenship, privileges and immunities, 65-66
interstate aspects, 68
defined in constitution, 89
modes of acquiring, 90-91
married women and naturalization, 93-94
termination, 94
as a qualification for voting, 115
references on, 109
Civil Aëronautics Administration, 387
Civil Aëronautics Authority, 387
Civil Aëronautics Board, 387
Civilian Conservation Corps, 441
Civil Liberties, *See* Civil rights.
Civil Liberties Union, 126
Civil rights, under early state constitutions, 5
how arise, 94-95
complexity of American system, 95
no full enumeration possible, 95-96
continual change, 96
not absolute, 96
in wartime, 97
personal freedom, 97-98
religion, 98
speech and press, 98-99
assembly and petition, 100
bearing arms, 100
equal protection of the laws, 100-101
limitations upon treason, 101
bills of attainder, 101-102

Civil Rights (*cont'd*)
ex post facto laws, 102
indictment by grand jury, 103
habeas corpus, 103-104
jury trial, 104
searches and seizures, 104-105
due process of law, 105-107
relating to taxation, 108
under eminent domain, 108-109
regulation in wartime, 489
censorship during World War II, 497-498
references on, 110
Civil service (federal), numbers and scope, 307-308
early history, 308-309
beginnings of reform, 309-310
Pendleton Act, 310
early growth of classified service, 310-311
problem of merit system in higher levels, 311-312
retrenchments in reform, 312-313
progress in 1938-40, 313-314
wartime experience, 314-315
status of postmasters, 313-314 n.
reversion to peacetime operations, 315-316
present status, 316
Civil Service Commission, 315-316
examinations, 318-319
making appointments, 319
veteran preference, 319-320
apportionment by population, 320
discipline, 320-321
removals, 321
immunity from partisan pressures, 321-322
Hatch Acts (1939, 1940), 322-323
promotion and transfer, 323-324
classification, 324-325
scales of pay, 325-326
retirement and pensions, 326
organization, 327
as a career, 328-329
references on, 329
Civil service (state), 594-596
Civil service (municipal), 664, 670
Civil Service Commission (federal), 316-317
Civil service commissions (state), 595-596
Civil Service Reform League, 310
Civil townships, 687
Clayton Anti-trust Act (1914), 397, 437
Clerk, county, 645
"Closed" primaries, 149
Closure, in national House of Representatives, 230-231
in Senate, 232-234
Coal industry, 428
Coast and Geodetic Survey, 388
Codes of fair competition, 400
Colonies, governments, 1-3
autonomy, 2
efforts to control, 2
aristocracy and people, 2-3
Columbia, District of, 522
Commander-in-chief, president as, 491-492
Commerce, lack of power to regulate under Articles of Confederation, 11
question in Constitutional Convention, 21
limits upon state control, 62-64
constitutional provisions, 376
importance of national control, 376, 378
judicial definition, 376-377
prohibitions of, 377
Congress and regulation, 379-380
embargoes, 381
tonnage duties, 79, 380
navigation and inspection laws, 387
merchant marine, 380
protective tariffs, 380
immigration laws, 380
laws stimulating, 379
Export-Import Bank, 379
interstate defined, 381
scope of control, 381-382
state laws affecting, 382
Interstate Commerce Act (1887), 383
Interstate Commerce Commission, 384
motor vehicles, 385
water carriers, 385
regulation of communications, 386
regulation of aviation, 387
bureau of foreign and domestic, 387
subsidiary commercial bureaus, 388
references on, 388-389
Commerce, Department of, established, 387
organization and activities, 387
Commission government (in cities), essential and incidental features, 666-667
mayor, 667
defects, 667-668
merits, 668-669
references on, 671
Commissioners, U. S., 347
Commissioners on Uniform State Laws, 564-565
Commissions. *See* Independent establishments
Committee of the whole, in national House of Representatives, 229

Committee on Administrative Management, 299
Committees (in Congress), number and size in House of Representatives, 199-200
present list in House, 200
mode of selection, 201
chairmen, 201-202
on rules, 202-203
in Senate, 209-210
reference of bills, 224-225
at work, 225
sources of information, 225-226
hearings, 226
possible courses of action, 226-227
discharge rule, 227
of whole, 229
of conference, 234-235
changes under Legislative Reorganization Act, 261-262
proposals for joint committees, 264
Committees, in national nominating conventions, 165-167
Committees (party), national, 138-139
congressional and senatorial, 139-140
state and local, 137
Committees (in state legislature), general aspects, 556
joint committees, 557
number and size, 557-558
other defects, 558
Commodity Credit Corporation, 418, 422
Commodities Exchange Act (1936), 403-404
Comptroller, state, 575
Comptroller-general, U. S., 354-355
Comptroller of the currency, 367
Conciliation Service, 437
Concurrent resolutions, in Congress, 222 n.
Conference. *See* Caucus
Conference committees, in Congress, 234-235
in state legislatures, 558
Conference, Federal Judicial, 338
Congress (under Articles of Confederation), composition, 9
powers and limitations, 10-11
calls Constitutional Convention, 13
refers completed constitution to the states, 22
expires, 24
Congress (under present constitution), given bicameral form, 20
first organized, 25
rôle in amending constitution, 29-30
rôle in admission of states, 56-57
and republican government in the states, 58-59
consent to interstate compacts, 61
rôle in election of president and vice-president, 172-175
bicameral form, 180
by whom elected, 181
apportionment of seats in House, 180-182
election for House by districts, 182-185
regulation of elections, 185
contested elections, 185
qualifications of congressmen, 185-186
equal representation of states in Senate, 186-188
original mode of electing senators, 188
popular election of senators, 188-189
term and service of senators, 189-190
senatorial qualifications, 190
privileges and immunities of members, 190-191
pay and perequisites of members, 191-192
personnel, 192-193
sessions, 194
organization at beginning of session, 195-197
speaker of House of Representatives, 197-199
committees of House of Representatives, 199-203
caucus in House of Representatives, 204-205
steering committee in House of Representatives, 205
majority floor leader in House of Representatives, 205-206
whips, 206
problem of leadership, 206-207
organization of Senate, 208-211
non-legislative functions, 212-214
impeachments, 213-214
directive and investigative activities, 214
general scope of legislative function, 214-216
express grants of power, 216
permissive and mandatory powers, 216
implied powers, 216-217
resulting powers, 217
so-called emergency powers, 217-218
exclusive and concurrent powers, 218
delegations of legislative power, 218-220
general aspects of procedure, 222
introduction and authorship of bills, 222-224
multiplicity of bills, 224
committee stage, 224-227
selection of bills, 228

Congress (*cont'd*)
order of business, 228-229
committee of whole in House, 229
three readings of bills, 229-230
closure in house, 230-231
methods of voting, 231
Senate procedure, 231-232
filibustering and closure in Senate, 232-234
conference committees, 234-235
publicity of proceedings, 235-236
published records, 236-237
relative importance of Senate and House, 237-238
presidential control over sessions, 240-241
presidential messages, 241-242
presidential initiative in legislation, 242-243
presidential veto, 243-247
other modes of presidential control, 247-248
need for leadership, 249-250
control over president, 251-252
defects and criticisms, 253-255
handicaps, 255-257
lobbying, 257-259
effects of Legislative Reorganization Act (1946), 260-263
remaining questions of improvement, 263-264
proposed improvements of relations with executive, 264-268
rôle in treaty-making, 473-477
relation to executive agreements, 477-479
control over foreign policy, 481
providing for Army and Navy, 486-487
enacting military and naval regulations, 487
control over National Guard, 487-488
declaring war, 488
national mobilization, 488-489
regulating wartime civil liberties, 489
caring for veterans, 490
references on, 193, 211, 220-221, 238, 252, 268
Congressional townships, 687
Congressional Record, 236
Congressmen-at-large, 182 n.
Connecticut Compromise, 20
Conservation of natural resources, federal aid, 78
basis of federal action, 425
public land policy, 426
reclamation, 426-427
forests, 427
minerals, 427-428
oil, 428
soil erosion, 429
water, 429
hydro-electric power, 429-430
regional planning, 431
state activities, 582
references on, 422-423
Constitution (federal), framed, 17-22
objections raised, 23
ratification by the states, 23-24
put into operation, 24-25
long survival, 25
characteristics as a document, 25-26
flexibility, 26
sources, 27
amending clause, 29
methods of amendment, 29-30
amendments adopted, 31-35
other amendments proposed, 35-36
criticisms of amending process, 36-38
expansion by interpretation, 39-40
statutory elaboration, 40
judicial construction, 41-42
growth by usage, 42
references on, 27, 43
Constitutional Convention (1787), steps leading to, 12-13
delegates chosen, 13
characteristics of members, 15-16
common objective, 16
organization and procedure, 16-17
records, 17
constitutional plans considered, 17-18
adopts compromises, 20-21
completes work, 23-24
references on, 27
Constitutional conventions (state), how called, 533
size, 534
organization, 534
procedure, 534
authority, 534-535
submission of work, 535-536
Constitutions (state), origins, 4
early features, 4-5
contents, 529-530
bills of rights, 530
methods of amending, 530 ff.
excessive length, 536-538
future, 538-539
references on, 539
Consuls, functions, 470
Contempt of court, 335-336
Contested elections, in connection with presidency, 172-173
in connection with national House of Representatives, 185
Continental Congress, 418
Contracts, impairment by states forbidden, 64-65

Convention (national nominating), rise, 161-162
arrangements for, 162
membership, 162-163
size, 163
methods of choosing delegates, 164
surrounding conditions, 165
temporary organization, 165-166
permanent organization, 166
platform-making, 166-167
nomination of candidates, 167
Democratic unit rule, 167
Democrats abandon two-thirds rule, 168
balloting, 168
closing acts, 168-169
Conventions (state), for making or revising state constitutions, 533-536
Coöperation, among states, 85
Copyrights, 392
Coroner, 644-645
Corporations, created by federal government, 293
Corrupt practices acts, 142-144
Council of State Governments, 85
Council-manager government (in cities), extent, 669
function of council, 670
selection of manager, 669
manager's functions, 670
results, 671
references on, 671
County, in colonies and early states, 8
legal status, 635, 639
number and size, 636-637
functions, 637-638
schools, 637
hospitals, 638
centralizing tendencies, 638-639
powers, 639
restrictions on, 639
governmental structure, 640-642
officers, 642-645
supervisors (or commissioners), 640-642, 648
finance, 651
appointments, 649
civil service, 649
sheriff, 642-643
prosecuting attorney, 643-644
coroner, 644-645
clerk, 645
criticism of, 645 ff.
unions, 647
consolidation, 646-647
home rule, 647-648
optional forms, 647
managers, 649-650
relation to cities, 650
reform, 651 ff.
references, 653
County boards, 640-642, 648
County courts, 619-620
County managers, 649-650
Court clerks, 645
Court of claims, 337
Court of customs and patent appeals, 337
Courts. *See* Judiciary
Credit agencies, national, 371, 373-374, 421-422
Crime control units (national), 345-346
Crimes, against the U. S., 217, 333-334
Crop insurance, 419
Currency, restrictions on states, 64, 369
silver demonetized, 369
gold standard abandoned, 369
nationalization of gold and silver, 370
paper money, 370
present forms, 370
references on, 375
Customs duties, 357-358

D

Declaration of Independence, adopted, 9
Debt, national, 364-366
state, 615-616
Defense, restrictions on state powers, 61
present questions, 503-505
references on, 505-506
See National defense
Defense Homes Corporation, 374
Defense Plant Corporation, 374
Defense Supplies Corporation, 374
Deficits, federal, 365
Delegation, of powers by Congress, 218-220, 285-286
Democracy, limitations in the colonies, 2-3
limitations in early state constitutions, 5
Democratic party, composition of national convention, 163
employs unit rule, 167
abandons two-thirds rule, 168
Denaturalization, 94
Direction, by heads of departments, 295
Direct primary, Negro participation in South, 118 n.
adoption and spread, 149
open and closed, 149
non-partisan, 149-150
merits and defects, 150
Discharge rule, in national House of Representatives, 227
District attorney (federal), 346
in counties, 643-644, 648

District courts (federal), 337
District of Columbia, courts, 337
government, 522-523
proposed decontrol by Congress, 263
Districts, former use in choosing presidential electors, 174
proposed revival, 175
use in congressional elections, 182
problems raised, 182-185
Districts (in local government), 689 ff.
Diverse citizenship cases, 333
Division of Labor Standards, 437
Division of Territories and Island Possessions, 516
Divorce, diversity of state laws, 67-68
Dollar, revaluation, 369-370
Dorr rebellion, 59
Due process of law, nowhere fully defined, 105
and procedural rights, 105-106
and substantive rights, 106
and the police power, 106-107
in the states, 630

E

Economy and efficiency commissions in the states, 592-594
Education, federal aid, 78
in states, 577-578
in cities, 680
Eighteenth Amendment, adopted, 32
repealed by Twenty-first, 34-35
Elections (congressional), qualifications of electors, 180
district system, 181-185
contests, 185
Elections (presidential), nominating procedures, 161-168
electors, 169-171
electoral count, 171-174
Electoral Count Act (1887), 173
proposed changes of method, 174-175
references on, 177-178
Elections (senatorial), original mode, 188
change to popular basis, 188-189
Elections (state), non-voting, 120-123
registration, 150-151
counting and canvassing votes, 153-154
ballots, 154-155
system criticized, 156-158
preferential ballots, 158
proportional representation, 158
of legislatures, 542
of governors, 567
of judges, 627-628
references on, 158-159
See Suffrage, Direct primary, Nominations, etc.
Electoral Count Act (1887), 172
Electors, presidential, how selected, 169-170
district and general ticket systems 170
casting electoral vote, 171
Eleventh Amendment, 31-32
Embargoes, 380-381
Emergency boards (railway), 449
Emergency court of appeals, 337
"Emergency powers," of Congress, 217-218
Emergency Price Control Act (1942), 496
Eminent domain, 108-109
Employers Liability Act (1908), 437
Employment offices, state and federal, 78
Enderbury Island, 509
Enemy aliens, 89
Equal protection of the laws, 100-101
Equal rights amendment, 36
Equity cases, 335-336
Estate and gift taxes, 361
"Ever normal granary," 419
Excise taxes, 361
Executive. *See* President, Governor, Mayor
Executive agreements, growth and nature, 477-478
relations of Congress to, 478-479
Executive departments (federal), proposal to admit heads to floor of Congress, 265-266
proposal to select heads from members of Congress, 266
relation to presidential succession, 273
appointments by heads, 281
pattern of organization, 292-293
activities of heads, 294-297
Executive departments (state), 567
Executive Office of the President, 271-272
Expenditures (national), constitutional powers, 349
rôle of Congress, 350, 352-353
former mode of appropriation, 350
budget system introduced, 350
workings of budget system, 350-352
preparing the budget, 351-352
executing the budget, 354-355
growth, 355-356
Expenditures (state), main categories, 609-610
appropriation methods, 610-613
Export-Import Bank, 379
Export subsidies, 419
Ex post facto laws, forbidden, 102

F

Fair Employment Practice Committee, 453
Fair Labor Standards Act (1938), 438, 445-446
Farm Credit Administration, 422
Farm loan associations, 421
Farm loan commissioners, 421
Farm Relief Act (1933), 421-422
Farm Security Administration, 424
Farm Tenant Act (1937), 423
Federal aid, earlier forms, 74-75
  grants of land and money, 75
  development of conditional grants, 75-76
  growth, 76
  defense, 76-77
  highways, 77
  social welfare, 77-78
  employment offices, 78
  conservation, 78
  education, 78
  to local authorities, 79
  criticisms, 80
  defense, 80-81
  sustained judicially, 81 n.
Federal Communications Commission, 386
Federal Corrupt Practices Act (1925), 143
Federal Council of Personnel Administration, 318
Federal Crop Insurance Corporation, 419
Federal Farm Board, 415
Federal Farm Loan Board, 421
Federal Farm Mortgage Corporation, 422
Federal Home Loan Bank Administration, 374
Federal Housing Administration, 462
Federalist, 24
Federal Judicial Conference, 338
Federal land banks, 421
Federal Power Commission, 430
Federal Power Act (1935), 403
Federal Public Housing Authority, 463
Federal Radio Commission, 386
Federal Register, 286 n.
Federal Regulation of Lobbying Act (1946), 258-259
Federal Reserve System, 371-372
"Federal short ballot," 147
Federal Securities Act (1933), 401-402
Federal Security Agency, 459
Federal Trade Commission, 398-399
Filibustering, in Senate, 232-234
Finance (national), presidential guidance 243
  constitutional basis of spending power, 349
  earlier methods of appropriation, 350
  budget system introduced, 350
  budget system in operation, 350-352
  budget before Congress, 352-353
  executing the budget, 354-355
  recent expenditures, 355-357
  borrowing money, 364-366
  restrictions on taxing power, 357-358
  direct taxes, 358
  scope of taxing power, 357-358
  tax pattern, 360-361
  enactment of revenue laws, 362-363
  currency system, 369-370
  banks and banking, 371-372
  new credit agencies, 373-374
  references on, 375
Finance (party), expenditures in presidential campaigns, 141-142
  laws regulating, 142-144
Finance (state), sources of revenue, 598-599
  kinds of taxes, 596-600
  general property tax, 600
  assessment methods, 601
  equalization of assessments, 601-602
  collection of taxes, 607-608
  custody of state funds, 609
  income taxes, 605
  effect of depression, 606
  sales taxes, 606-607
  property exemptions, 604
  appropriations, 610-612
  budgetary reform, 611-613
  ancillary reforms, 613
  local governments, 613-615
  debts, 615-616
  references on, 617
Finance (municipal), expenditures, 680-681
  sources of revenue, 681
  debt, 681-682
  budgets, 682
  assessment of taxes, 682-683
  disbursements, 683
  postwar reserves, 683
Fire protection, in cities, 674-675
Flood Control Act (1938), 430
Floor leader, in national House of Representatives, 205-206
Food stamps, 419
Foreign relations, constitutional basis, 465
  diffused responsibility, 465-466
  Department of State, 466-467
  Foreign Service, 467-468
  ministers and ambassadors, 468-469
  diplomatic functions, 469-470
  consular functions, 470
  president's rôle, 471-473
  treaty-making, 473-475

Foreign relations (*cont'd*)
criticism of treaty system, 475-476
executing and terminating treaties, 476-477
treaties and legislative powers, 477
executive agreements, 477-479
president and foreign policy, 480-481
congressional limitations and controls, 481
rôle of public opinion, 482
United States and international organization, 482-484
references on, 484
Foreign Service, organization, 467
personnel, 467-468
examinations, 468 n.
ministers and ambassadors, 468-469
diplomatic functions, 469-470
consular functions, 470
references on, 484
Forest preserve districts, 691
Forest service, 413, 427
Fourteenth Amendment, adopted, 32
penalty for disfranchisement not enforced, 119-120
"Full Employment" Act (1946), 441-442
"Full faith and credit" clause of constitution, 66-67

G

General Accounting Office, 354
"G.I. Bill of Rights" (1944), 374
General property tax, decline in yield, 600
theory, 600-601
tax calendar, 601-602
objectionable features, 602-603
substitutes, 603-604, 605
assessment and equalization, 601-602, 604
Geological Survey, 427
Georgia, constitution of 1945, 531
Gerrymandering, of congressional districts, 183
Gold standard, abandoned, 369
Government corporations, 293
Government ownership and operation, Inland Waterways Corporation, 385, 406
Alaska Railroad and Panama Canal, 406
Reconstruction Finance Corporation, 373-374
Tennessee Valley Authority, 430-431
Government Printing Office, 406
postal service, 406-408
Government Printing Office, 406
Governor, in colonial period, 5-6
under early state constitutions, 6
rendition of fugitives, 68-70
in the present states, 567 ff.
election, 567-568
qualifications and term, 568
removal, 568
succession, 568-569
contrast with president, 569
veto, 571-573
messages, 571
budget-making, 571
leadership, 573-574
executive powers, 569
appointing powers, 570
removal powers, 570
miscellaneous powers, 574
references on, 576
Governor's council, 570
Grand Coulee Dam, 427
Grand jury, indictment by, 103, 623
Grants-in-aid. *See* Federal aid
Great Britain, as source of American political institutions, 1
efforts to control the colonies, 2
civil service, 318-319
Greenbelt communities, 423
Guam, government, 515-516

H

Habeas corpus, 103-104
Hamilton, Alexander, and *The Federalist*, 24
on constitutional amendment, 37
Hatch Act, of 1939, 143, 322-323
of 1940, 323
Hawaii, government, 511-512
movement for statehood, 512
Hawes-Cooper Act (1934), 440
Hay, John, on treaty-making, 474
Health department, in cities, 675-676
Health insurance, 460
Hearings, on bills in Congress, 226
Highways, federal aid, 77
Hobbs Anti-Racketeering Act (1946), 453
Home Owners Loan Corporation, 374
Home rule, for counties, 647-648
for cities, 658
"Hot Oil" cases, 428
Hours of Service Act (1907), 437
House of Representatives (national), by whom elected, 181
apportionment of seats, 180-182
general ticket and district systems, 182-185
regulation of elections, 185
contested elections, 185
qualifications of members, 185-186
privileges and immunities, 190-191

pay and perquisites, 191-192
personnel, 192-193
sessions, 194
process of organization, 195-197
powers and functions of speaker, 197-198
speaker as party man, 198-199
standing committees, 199-203
caucus, 204-205
steering committee, 205
majority floor leader, 205-206
whips, 206
problem of leadership, 206-207
how bills are introduced, 222-223
authorship of bills, 223-224
multiplicity of bills, 224
reference of bills to committees, 224-225
committees at work, 225-226
possible courses of committee action, 226-227
discharge rule, 227
selection of bills for consideration, 228
order of business, 228-229
committee of whole, 229
three readings of bills, 229-230
closure, 230-231
methods of voting, 231
publicity of proceedings, 235-236
published records, 236-237
compared with Senate, 237-238
effects of two-year term, 256
custom of residence in district, 256
lobbying, 257-259
changes under Legislative Reorganization Act (1946), 261-262
salary changes and retirement allowances, 262-263
proposed reduction in size, 263
references on, 193, 211, 238
Housing, legislation, 462-463
postwar problems, 463
Howland Islands, 515
Hydro-electric projects, 429-430

I

Illinois, reapportionment problems, 184 n.
cumulative voting, 547
local government, 692
Illinois Civil Administrative Code, 592
Impeachment, constitutional provisions, 213
procedure, 213-214
of federal judges, 337
of other officers, 327
of governors, 568
Implied powers, historic question of, 48
practical necessity, 49
Chief Justice Marshall on, 49
development, 73
basis and extent, 216-217
Income taxes, authorized, 358
use by national government, 361
use by states, 605
"Incorporated" territories, 510
Independent establishments, growth and multiplicity, 292
functions and status, 302-303
criticisms and proposals, 303
Administrative Procedure Act (1946), 303-304
references on, 305
Indictments, 623
Industrial peace, rôle of government, 447
grounds for federal action, 447
anti-trust laws, 447-448
injunctions, 448
federal agencies for, 449 ff.
Indian reservations, 522
Information, in wartime, 497-498
Informations, in judicial procedure, 623-624
Initiative and referendum, for constitutional amendments, 531-532
for statutes, 551-553
pros and cons, 553-554
Injunctions, defined, 335
in labor disputes, 437-438, 448-449
Inland Waterways Corporation, 385, 406, 483
"Instrumentalities," state and federal taxation, 63
Insurance, of bank deposits, 372
as commerce, 377 n.
state laws on, 584-585
Interior, Department of, 425 n.
Intermediate credit banks, 421
Internal revenue, 361-362
International Monetary Fund, 372 n.
International organization, forms taken, 482-483
rôle of United States, 483-484
Interstate Commerce. *See* Commerce
Interstate Commerce Commission, organization, 384
power over rates, 384
Interstate compacts, illustrations, 60-61
consent of Congress, 61
Investigations, congressional, 214
Item veto, proposed for president, 246-247

J

Jackson, Andrew, strengthens the presidency, 287
views on civil service, 309

Japanese, evacuation from West Coast, 89
Jarvis Island, 515
Jehovah's Witnesses, 98 n.
Joint Committee on Organization of Congress, 261
Joint Legislative-Executive Council, proposal to establish, 267-268
Joint-stock land banks, 421
Jones Act (1916), 517
Judges. *See* Judiciary
Judicial review, early development, 50-52
by the federal Supreme Court, 51-52, 340-342
of administrative decisions, 304-305
by state courts, 630-631
references on, 53-54
Judiciary (national), reason for creation, 331
scope of power, 331-333
how cases are brought, 333
kinds of cases tried, 333-336
criminal jurisdiction, 333-335
civil jurisdiction, 335-336
equity cases, 335-336
admiralty cases, 336
courts as business managers, 336
district courts, 337
circuit courts of appeals, 337-338
composition of Supreme Court, 338
unified administration, 338
jurisdiction of Supreme Court, 339-340
Supreme Court and legislation, 340-342
impeachment of judges, 337
controversy over reorganization, 342-344
legislative courts, 337
references on, 347-348
Judiciary (state), in colonies and early states, 6-7
functions, 618
justices of the peace, 619
county courts, 619-620
supreme courts, 620-621
intermediate courts, 621
state departments of justice, 626
jury system, 622-623
trial jury, 622
grand jury, 622-623
administrative work, 624
procedural defects, 624
defects in organization, 625-626
judicial councils, 626
selection of judges, 627-628
retirement of judges, 628-629
veto power, 630-631
declaratory judgments, 631-632
conciliation and arbitration, 632
references on, 632-633
Jury trial, guarantees, 104
in states, 622
Justice, Department of, rôle in pardon cases, 286-287
establishment, 346
organization, 346
functions, 345-346
in state governments, 626
references on, 347-348
Justice, state department of, 626
Justice of the peace, 619

L

Labor, an organized force, 434-435
governments and, 435-436
early protective measures, 436-438
under New Deal, 438 ff.
unemployment problem, 439-440
collective bargaining, 443-444
fair labor standards, 445-446
industrial peace, 447 ff.
proposed anti-strike measures, 451-452
Case bill, 452
state laws, 580-581
references on, 453-454
Labor, Department of, 437
LaFollette Seamen's Act (1915), 381, 437
Land bank commissioner, 421
Law enforcement, national agencies, 345-346
state, 585-586
Leadership, need of Congress for, 207
presidential, 248-249
of Franklin D. Roosevelt, 250-251
in state legislatures, 561-562
League of Women Voters of the United States, 115
Legal tender cases, 370
Legislation. *See* Congress, Legislature
Legislative councils, in "model" constitution, 562
in states, 562
Legislative courts (national), 337
Legislative reference libraries, 560
Legislative Reference Service, for Congress, 225
Legislative Reorganization Act (1946), antecedents, 260-261
provisions, 261-263
Legislature (state), in colonies and early days, 6
as central power-house, 540
distrust of, 537-538, 542, 548
bicameral system, 542-544
powers of, 547-548

non-legislative functions, 541
constitutional restrictions, 548-551
financial restrictions, 549
special legislation, 549-550
procedure, 550
frequency and duration, 550-551
initiative and referendum, 551-554
bicameral form, 542-544
size of houses, 544-545
bases of representation, 545-546
discrimination against cities, 545-546
social and economic groups, 546
proportional representation, 546-547
officers, 556
committee system, 556-559
conference committees, 558
rules, 558-559
congestion of business, 559
aids to legislation, 559-561
bill-drafting bureaus, 560
legislative reference libraries, 560
relations with executive, 561, 574-575
leadership, 561-562
legislative councils, 562
lobbying, 563
self-improvement, 563
special sessions, 571
references on, 554-555, 565-566
Lewis, John L., contempt case, 448-449
Liberal party (New York), 132
Lieutenant-governor, 575
Literacy, as qualification for voting, 116
"Little N. R. A.," 400
Lobbying, nature and extent, 257-258
problem of regulation, 258
regulation under act of 1946, 258-259
in state legislatures, 563
Local government, in colonial period, 7-8
and federal aid, 79
relations with national government, 634-636, 655-656
general features of county, 636-637
county functions, 637-638
county powers and limitations, 639-640
county board, 640-642
sheriff, 642-643
prosecuting attorney, 643-644
other county officers, 644-645
need for reform, 645-646
suggested improvements, 646-653
the city and its charter, 656-659
limitations on municipal freedom, 659-660
municipal council, 660-661
municipal administration, 663-664
commission government, 666-667
council-manager system, 668-671
municipal activities, 672 ff.
municipal finance, 680-683
New England towns, 685-686
Western townships, 687-688
villages, 688-689
boroughs, 688
special districts, 689 ff.
reform, 692-693
references on, 653, 671, 683-684, 693
Logan-Walter bill, 303
Long ballot, 157
Low-cost housing, 462
Luce, Robert, quoted, 226 n.

M

McCulloch *v.* Maryland (1819), and implied powers, 49
Madison, James, rôle in promoting revision of Articles of Confederation, 12-13
in Constitutional Convention, 17
Majority floor leader, in national House of Representatives, 205-206
Marshall, John, on implied powers, 49, 338
Martial law, 489 n.
"Massachusetts ballot," 154
Mayor, "weak" and "strong," 661-662
powers and duties, 662
relation to administration, 662
salary, 662
recall, 666
Mayor-council government, structure, 660-662
administration, 663 ff.
defects, 664-666
references on, 671
Merchant Marine Act (1936), 380
Messages, of president to Congress, 241-242
of governor to legislature, 571
Mid-Pacific islands, 515-516
Midway Island, 515
Military law, 487, 489 n.
Militia. *See* National Guard
Minimum wages, legislation, 445-446
Ministers (in diplomatic service), status, 468-469
functions, 469-470
Missouri, constitution of 1945, 537
"Model" state constitution, on amendments, 536
on legislatures, 543
on leadership, 562
on executive, 574
on judiciary, 626
Money. *See* Currency
Morrill Act (1862), 75

Moses-Linthicum Act (1931), 468
Motor Carrier Act (1935), 385
Multiple taxation, 359-360
Municipal affairs, department of, 660
Municipal Bankruptcy Act (1934), 393

N

National banks, established, 371
relation to reserve system, 371-372
National committee (of political parties), composition, 138
functions, 139
officers, 139
calls national conventions, 139
election, 139
rôle in presidential campaign, 169
National Committee on Strengthening Congress, 264 n.
National defense, a major national concern, 485
constitutional principles, 485-486
powers and functions of Congress, 486-490
powers and functions of president, 490-494
government activities in World War II, 494-498
Army organization, 498-500
Navy Department, 501-503
present questions, 503-505
references on, 505-506
National Defense Mediation Board, 450
National Federation of Federal Employees, 327
National forests, 427
National Guard, federal aid, 76-77
status and control, 487-488
called into federal service, 500
plans for, 501
National Housing Act, of 1934, 462
of 1937, 462
National Housing Agency, 463
National Industrial Recovery Act (1933), 399-400
National Labor Relations Act (1935), passed by Congress, 443
constitutionality upheld, 444
criticisms, 444-445
National Labor Relations Board, 443-444
National Mediation Board, 449
National Railroad Adjustment Board, 449
National Railway Labor Panel, 449
National Recovery Administration, 400
National Wage Stabilization Board, 437, 450
National War Labor Board, 450
National Youth Administration, 441
Natural Gas Act (1938), 430
Naturalization, of inhabitants of annexed territories, 91
of individual aliens, 91-93
ineligible aliens, 93
married women, 93-94
Natural resources, conservation of, 425
basis of federal action, 425-426
public lands, 426
reclamation, 426-427
forests, 427
minerals, 427-428
petroleum, 428
soil conservation, 429
water conservation, 429
hydro-electric power, 429
Tennessee Valley Authority, 430-431
regional planning, 431
references on, 432-433
Navy, duty of Congress to provide for, 486-487
regulations, 487
composition and strength, 502-503
Navy, Department of, organization, 501-502
future status, 505
Nebraska, unicameral legislature, 544
Negroes, enfranchised, 113
methods of disfranchisement in the South, 117-119
attitudes on voting, 119
Neutrality Act (1937), 387
"New Jersey plan," in Constitutional Convention, 18
New York, ratifies constitution, 24
New York City, health department, 663
council, 660-661
budget, 662, 681
Nineteenth Amendment, 33-34, 113-114
Nominations, congressional control, 146-147
other legal regulations, 146-147
early methods, 147-148
the convention system, 148-149
of president by congressional caucus, 161
rise of national convention, 161-162
procedures in national conventions, 163-168
Non-partisan elections, 135-136
Non-party organizations, 125-126
Non-voting, amount, 120-121
causes, 121-122
suggested remedies, 122-123
Norris-LaGuardia Act (1932), 437-438, 448
Northwest Ordinance, 507-508
Northwest Territory, 508

O

Office for Emergency Management, 495
Office of Censorship, 497-498
Office of Civilian Defense, 498
Office of Defense Transportation, 497
Office of Price Administration, 496-497
Office of War Information, 497
Oil production and conservation, 428
Oklahoma, constitution, 537
Old age assistance, 457-458
Old age insurance, 458
Old age and survivors' insurance, 458
"Open" primaries, 149-150
Ordinance power, of president, 284-286
  in cities, 661

P

Packers and Stockyards Act (1921), 399
Panama Canal Zone, 514-515
Parcel post, 406, 407
Pardon, president's power, 286-287
Parishes, in Louisiana, 636, 640
Parity prices, 415, 420
Parties (political), importance, 127-128
  affiliation with, 129-131
  legal status, 127
  economic-sectional factors, 129-131
  bi-party system, 131
  membership, 132-133
  minor parties, 131-132
  national parties in states, 134-136
  non-partisan elections, 135-136
  national organization, 138-140
  state and local organization, 136-137
  "machines," 137-138
  finance, 141-144
  references on, 144-145
Patent Office, 388, 393
Patents, regulations concerning, 392-393
Payroll taxes, 361, 600
Pendleton Act (1883), 310
Pensions, in executive civil service, 326
  for veterans, 490
Petition, right of, 100
Philippine Islands, acquired by U. S., 516-517
  as "unincorporated" territory, 517
  Independence Act (1934), 517
  in transitional period, 518-519
  independence established, 519-520
  government of Republic, 520-521
  references on, 523-524
Pocket veto, of president, 244
Police activities, of states, 585-586
Police department, in cities, 672-673
  relation with local courts, 674
Police power, of Congress, 217
  of states, 547-548
Political Action Committee (C.I.O.), 126
Political parties. *See* Parties (political)
Polling officials, 151-152
Postal power, 406
Poll tax, as qualification for voting, 116
Postmaster-general, 407
Postmasters, civil service status, 314-315 n.
Postal savings, 407
Post Office, Department of, 406-407
Postwar "reconversion," 405
Powers (of government), distribution in United States, 46-48
  implied, 48-49
  growth of national powers, 72-73
  methods of such growth, 73-81
Preferential voting, 158
President, original method of election, 160-161
  change by Twelfth Amendment, 161
  nomination by congressional caucus, 161
  rise of nominating convention, 161-162
  convention nomination, 162-168
  campaign for election, 169
  choice by electoral college, 171-174
  proposed changes in method of electing, 174-175
  aspects of availability, 176-177
  qualities to be sought, 177
  control over sessions of Congress, 240-241
  messages, 241-242
  legislative initiative, 242-243
  guidance in finance, 243
  constitutional basis of veto power, 243-244
  courses open on bills, 244-245
  frequency of vetoes, 245
  few vetoes overridden, 246
  veto of items, 246-247
  use of threat, persuasion, and appeal, 247-248
  party leadership, 248-249
  control over by Congress, 251-252
  proposed improvements in relations with Congress, 264-268
  term and reeligibility, 269-270
  qualifications, 270
  salary and allowances, 270
  demands upon time and energy, 271
  Executive Office, 271-272
  succession, 272-274
  relations with cabinet, 274-275
  selection of cabinet members, 275-276

President (*cont'd*)
sources of executive power, 276-277
question of inherent power, 277
powers classified, 278
execution of the laws, 278-279
suppression of domestic disorder, 279
power of appointment, 280-282
power of removal, 282-283
direction of administration, 283-284
ordinance power, 284-286
powers of pardon, reprieve, and amnesty, 286-287
general growth of power, 287-289
conduct of diplomatic intercourse, 471
power of recognition, 472
protection of citizens abroad, 472-473
protection of aliens, 472-473
initiative in treaty-making, 473-474
rôle in executing and terminating treaties, 476-477
executive agreements, 478-479
control over foreign policy, 480-481
rôle in beginning of war, 490-491
as commander in chief, 491-492
powers during war, 492-494
references on, 177-178, 282, 289, 484, 505-506
President, of Senate, 209
Presidential agents, 471 n.
Presidential electors, under original electoral system, 160-161
effect of rise of political parties, 161
choice by the people, 169-171
casting votes, 171
electoral count, 171-173
proposed abandonment, 174-176
Presidential primary, 164
Press, freedom of, 98-99
Preventive justice, 631-632
Previous question, in National House of Representatives, 230
Price control, 496-497
Primary. *See* Direct primary, Presidential primary
Privileges and immunities, of members of Congress, 190-191
Processing taxes, 416
Production and Marketing Administration, 421
Production Credit Corporations, 422
Prohibition, under Eighteenth Amendment, 33
repealed by Twenty-first Amendment, 34-35
Promotions, in federal civil service, 323-324
Proportional representation, in cities, 158
Public defenders, 674
Public employment agencies, 440-441
Public health, state activities, 579-580
Public opinion, 124-126
rôle in foreign relations, 482
Public prosecutor (or district attorney), in counties, 643-644
Public Salary Tax Act (1939), 63
Public utility districts, 690
Public Utility Holding Company Act (1935), 403
Public works (in states), 582-583
Public works (in cities), water supply, 676-677
waste removal, 677
sewage problems, 677
streets, 678
Public Works Administration, 441
Puerto Rico, citizenship status, 512
government, 513-514
movement for statehood, 514

R

Radio, use by president, 248
regulation, 386
Railway Labor Acts (1926, 1934), 449
Ramspeck Act (1940), 313
Ramspeck-O'Mahoney Postmaster Act (1938), 314 n.
Rationing, of commodities, 496-497
Readings, of bills, 229-230
Reapportionment, of seats in Congress, 181-184
of seats in state legislatures, 546
Recall, of judges in Arizona, 57 n.
adoption in states, 155-156
operation, 156
of mayors, 155
of state officials, 629-630
of judicial decisions, 631
Reciprocal tariff agreements, 363-364
Reclamation service, 413
Recognition, of foreign states or governments by president, 472
Reconstruction Finance Corporation, 373-374
aid to agriculture, 421-422
Recreation in cities, 679, 680
Regional agricultural credit corporations, 421
Registration, of aliens, 87
of voters, 150-151
Regulatory commissions, growth, 292
functions and status, 302-303
criticisms and proposals, 303
Administrative Procedure Act (1946), 303-304
references on, 305
Religion, freedom of, 98

Removals, by president, 282-283
in classified service, 321
Rendition, of fugitives by states, 68-70
Reorganization Act, of 1939, 299-300
resulting changes, 300
of 1945, 301-302
Reprieve, president's power, 286-287
Republican government, guaranteed to the states, 58-60
Republican party, composition of national convention, 162-163
Resettlement Administration, 423
Resulting powers, of Congress, 217
Resources. *See* Natural resources
Revenue. *See* Finance (national), Finance (state)
Revolution (American), causes and nature, 2
Robinson-Patman Act (1936), 398
Rogers Act (1924), 467
Roosevelt, Franklin D., warning to Congress, 247 n.
leadership in 1933, 250-251
breaks third term tradition, 269-270
carries out administrative reorganization, 299-301
promotes civil service reform, 312-313, 322-323
powers during World War II, 493-494
Roosevelt, Theodore, conception of presidency, 277
"Rule of reason," 395-396
Rules, of national House of Representatives, 196-197
of Senate, 209
committee on in national House of Representatives, 202-203
"Run-off" primaries, 149
Rural betterment, 422-424
Rural electrification, 424

S

St. Lawrence, deep waterway project, 431
Sales taxes, 606-607
Samoa, government, 515
Sanitary districts, 690
Schechter *v.* United States, 400
School districts, 690
Searches and seizures, restrictions upon, 104-105
Secretary of state, national, 466
state, 575
Securities Act (1933), 401
Securities and Exchange Commission, 401-402
Securities Exchange Act (1934), 402
Selective Service and Training Act (1940), 500
Selectmen, in New England, 686
Senate, equal representation of states, 186-187
proposed changes, 187-188
original mode of election, 188
popular election, 188-189
term and service, 189-190
qualifications, 190
privileges and immunities, 189-190
pay and perquisites, 190-191
personnel, 192-193
sessions, 194
organization, 195, 208
officers, 209
rules, 209
committees, 209-210
general aspects of procedure, 231-232
filibustering and closure, 232-234
publicity of proceedings, 235-236
published records, 236-237
compared with House, 237-238
salary changes and retirement allowances, 262-263
changes under Legislative Reorganization Act (1946), 261-262
share in appointing power, 280-282
rôle in treaty-making, 474-475
references on, 193, 211, 238
Senate (state). *See* Legislature
"Senatorial courtesy," 281-282
Seniority, in committees of national House of Representatives, 200-201
Separation of powers, in early state constitutions, 5
in state governments, 527
Servicemen's Readjustment Act (1944), 374, 460
Seventeenth Amendment, 33, 188-189
Sewage problems, in cities, 677
Sherman Anti-Trust Act (1890), 395
prosecutions under, 396-397
suspension in wartime, 397-398
Sixteenth Amendment, 32-33
Slavery, questions in Constitutional Convention, 20-21
prohibited by Thirteenth Amendment, 32
Slum clearance, 461
Smith-Connally War Labor Disputes Act (1943), 450-451
Social security, background of national policy, 455-456
legislation of 1935, 456-458
old-age assistance and insurance, 457-458
legislation of 1939, 458
other forms, 459
constitutionality upheld, 459

Social security (*cont'd*)
postwar aspects, 459-460
references on, 463-464
Social Security Act (1935), 456-458
Social welfare, federal aid, 77-78
Soil conservation districts, 429, 691
Soil Conservation and Domestic Allotment Act (1936), 418
Soil Conservation Service, 414
Soil Erosion Act (1935), 417
Southwest Territory, 508
Sovereignty, of the people, 45-46
Speaker, of national House of Representatives, powers and functions, 197-198
as party man, 198-199
proposed succession to presidency, 273
Special districts, 689-693
Speech, freedom of, 98-99
Spoils system, in the national government, 308-310
in the states, 591
Standards, Bureau of, 388
State, Department of, organization, 466-467
relation to Foreign Service, 467-470
relations with president, 471-474
State central committee, 137
State Guards, 586-587
State police, 586
State tax commissions, 601-602
States, sovereignty under Articles of Confederation, 9
appoint delegates to Constitutional Convention, 13
ratify constitution, 23-24
place in the Union, 44-45
powers, 47
importance and uses, 55
"original" and "admitted," 56
process of admission, 56-57
legal equality, 57-58
respect for geographical identity, 58
protection against invasion and domestic violence, 58
guarantee of republican government, 58-60
limits on foreign and interstate relations, 60
interstate compacts, 60-61
restriction of defense functions, 61
restrictions on taxing powers, 61-63
restrictions on commerce powers, 63-64
restrictions as to currency, 64
forbidden to impair contracts, 64-65
privileges and immunities of U. S. citizens, 65-66
mutual recognition of processes and acts, 66-68
interstate citizenship, 68
rendition of fugitives, 68-70
disputes, 70
criticisms and proposals, 83-84
not yet "finished," 84
methods of strengthening, 85-86
administrative services to national government, 291
common features, 526-528
constitutions, 528-530
government, 540 ff.
governmental activities, 577 ff.
educational work, 577-578
charities and corrections, 578-579
public health activities, 579-580
labor laws, 580-581
agriculture and conservation, 581-582
public works, 582-583
regulation of business, 583-584
police activities, 585-586
National Guard, 586
State Guards, 586
references on, 70-71, 86, 587
Statutes at Large, 236-237
Steering committee, in national House of Representatives, 205
Suffrage, constitutional basis, 112
a privilege rather than a right, 112-113
property and religious qualifications disappear, 113
enfranchisement of Negroes, 113
enfranchisement of women, 33-34, 113-114
present qualifications, 115-116
poll-tax requirements, 116
literacy requirements, 116
methods of disfranchisement in South, 117-119
penalty for disfranchisement not enforced, 119-120
prevalence of non-voting, 120-121
causes of non-voting, 121-122
remedies for non-voting, 122-123
references on, 123
Superintendent of public instruction (state), 576, 578
Supervisors (or commissioners), county board of, 642
Supreme Court (national), apex of federal judicial system, 338
number of justices, 338
compensation, 338
chief justice, 338
sessions and quorum, 338-339
decisions and opinions, 339
reports, 339
no advisory opinions, 339

jurisdiction, 339-340
proposal to enlarge, 342-343
references on, 347-348

T

Taft, William H., conception of presidency, 277-278
Tariff, bills in Congress, 362-363
trade agreements, 363-364
Tariff Commission, 363
Taxation (national), constitutional basis, 357
restrictions, 357-358
and social reform, 359
double (or multiple), 359-360
kinds, 360-361
revenue bills, 362
tariff legislation, 362-363
Taxation (state), restrictions on, 61-63
forms, 596-600
general property tax, 600 ff.
assessment, 601, 603
collection, 607-608
Tax Court of the United States, 337
Temporary National Economic Committee, 397
Tennessee Valley Authority, 430-431
Tenure of Office Act, of 1820, 308-309
Territory (dependent), origins, 507
Northwest Ordinance, 507-508
power to acquire and govern, 508-509
insular decisions, 510
classified, 511
government of Alaska and Hawaii, 511-512
government of Puerto Rico, 512-514
division of territories and island possessions, 516
movement for Philippine independence, 517
Philippine Independence Act, 517
political and economic status, 518-519
Philippine independence, 519-520
government of Philippine Commonwealth, 517
government of Philippine Republic, 520-521
government of Virgin Islands, 514
government of Panama Canal Zone, 514-515
Mid-Pacific islands, 515-516
references on, 523
Third parties, 131-132
Thirteenth Amendment, 32
"Tidelands" oil controversy, 428-429
Town, in New England, 685-686
Town-meeting, New England, 685-686
Township, forms, 687
government, 687-688
Trade agreements, 363-364
Transportation Act (1940), 385
Treason, defined in constitution, 101
Teasurer (state), 575
Treasury, Department of, established, 366
financial functions, 366-367
non-financial functions, 367-368
references on, 368
Treaties, constitutional provisions, 473
presidential initiative, 473-474
Senate's rôle, 474-475
dissatisfaction with methods, 475-476
proposed changes, 476
execution and termination, 476-477
relation to legislative powers, 477-479
executive agreements as alternative, 477-479
references on, 484
Truman, Harry S., proposals on succession to presidency, 273-274
requests power of administrative reorganization, 301
"Truth-in-Advertising" Act (1938), 398 n.
Twelfth Amendment, 32, 161
Twentieth Amendment, 34
Twenty-first Amendment, 34-35

U

Unemployment, assistance by national government, 439-440
by the states, 581
insurance, 457
assistance by the states, 581
"Unfair" labor practices, 444
Unicameralism, in Vermont, 6 n.
in Nebraska, 544
Uniform state laws, 564-565
Unincorporated territories, 510-511
United Nations, rôle of United States, 483-484
United States Conciliation Service, 449-450
United States Employment Service, 437, 441
United States Housing Authority, 462
United States Maritime Commission, 380
United States Military Academy, 500 n
United States Naval Academy, 500 n.
United States Reports, 339
United States Shipping Board, 380
United States Tariff Commission, 362-363
Unit rule, in Democratic national convention, 167
Unorganized territories, 511

V

Veterans, in federal civil service, 319-320
  benefits extended by Congress, 490
Veto (presidential), constitutional basis, 243-244
  courses open to president on a bill, 244-245
  frequency, 245
  expansion of power, 245
  effectiveness, 245
  of items, 246-247
Veto (of governor), under early state constitutions, 6
  in present states, 571-573
Veto (of mayor), 663
Villages, government, 688-689
  New York law, 689
Vice-president, nomination of candidates, 168-169
  presiding officer in Senate, 209
  succession to duties of president, 272
  share in government, 272-273
Villages, government, 688-689
Virginia, negotiates on navigation of Potomac, 12
"Virginia plan," in Constitutional Convention, 17-18
Virgin Islands, government, 514
Vocational Rehabilitation Act (1920), 459
Voting, preparations for, 151
  in absentia, 147, 152
  in armed services, 147
  by machines, 153
  ballot forms, 154-155
Voting machines, 153

W

Wage and Hour Division of Department of Labor, 437, 446
"Wages and Hours" Act (1938), 445-446
Wagner (Labor Relations) Act (1935), 443 ff.
Wagner-Murray-Dingell Bill, 460
Wagner-Peyser Act (1933), 440
Wake Island, 515
Walsh-Healey Act (1936), 437
War, civil rights during, 97
  declared by Congress, 488
  mobilization for, 488-489
  civil liberties during, 489
  president and beginning of, 490-491
  president as commander-in-chief, 491-492
  presidential powers during, 492-494
  agencies employed in World War II, 494-495
  major fields of governmental activity in World War II, 495-498
War Department and Army, 498-499
Navy Department, 501-502
  naval organization and strength, 502-503
  impact of atomic power, 503-504
War, Department of, status, 498-499
  reorganization and the new "commands," 499-500
  future status, 505
War Labor Disputes Act (1943), 450-451
War Manpower Commission, 440, 496
War Powers Acts, of 1941-42, 493-494
War Production Board, 495-496
Washington, D. C., government, 522-523
Washington, George, rôle in Constitutional Convention, 16
  becomes president, 25
Waste, collection and disposal, in cities, 677
Water-control districts, 690-691
Water supply, in cities, 676-677
Weather Bureau, 388
Webb Act (1919), 379
Weights and measures, 391
Welfare work, in cities, 678-679
"White primary." *See* Direct primary
Wilson, Woodrow, proposal on presidential nominations, 164 n.
  observations on Congress, 254 n.
  on the presidency, 288 n.
Wool Products Labelling Act (1939), 398
Works Progress Administration, 441
Work Projects Administration, 441
Women, enfranchised by Nineteenth Amendment, 33-34, 113-114
  rôle in political life, 114-115
  in federal civil service, 308