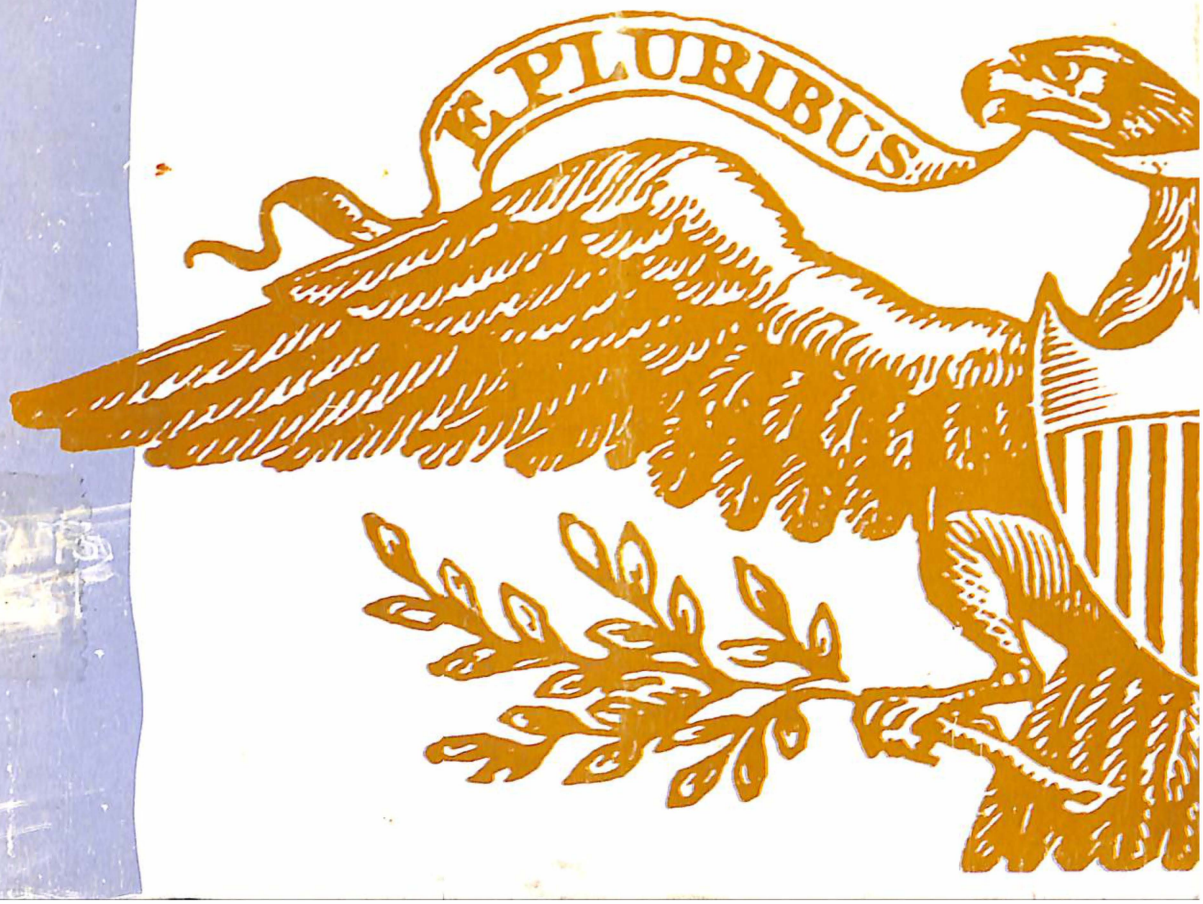
Ogg and Ray's

# ESSENTIALS OF AMERICAN GOVERNMENT

## The National Government

William H. Young

8th Edition






INDIAN INSTITUTE OF
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THE CENTURY POLITICAL SCIENCE SERIES

# *Ogg and Ray's*
# ESSENTIALS OF
# AMERICAN GOVERNMENT

*The National Government*

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NEW YORK



# AMERICAN GOVERNMENT

*The National Government*

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by William H. Young
UNIVERSITY OF WISCONSIN

EIGHTH
EDITION

APPLETON-CENTURY-CROFTS, INC.

# PREFACE

It is a pleasure to introduce to the public in paper-bound form a compressed edition of what has been for many years a standard college text and reference book on American government. The *Essentials of American Government* is a condensed version of the larger *Introduction to American Government* with most of the detailed footnotes eliminated and with the lists of references at the end of each chapter sharply pruned. This edition of the *Essentials,* furthermore, deals with the structure, powers, and policies of the national government. The material on state and local governments has been deleted in order to make this paper-bound edition feasible. Despite these necessary omissions, the reader will find hereafter a thorough and comprehensive treatment of the American system of government: the principles which support it and the practices and procedures by which it operates. Our government is undoubtedly one of the most complex and delicately balanced systems for exercising responsible authority over willing citizens that the world has ever known. It requires an informed, interested, and responsible body of citizens to make it work well. And it is now facing challenges unprecedented in its 170 years of existence.

W. H. Y.

*Madison, Wisconsin*

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# Part I

# THE FOUNDATIONS OF GOVERNMENT IN THE UNITED STATES

# I. THE CONSTITUTIONAL BASIS

## CHAPTER 1

## *The Setting*

The great experiment in self-government

In just two more decades we shall celebrate the two-hundredth anniversary of the American experiment in self-government. We might, therefore, be justified in concluding that our political institutions have proved themselves by the test of time and are no longer on probation. In the history of the world, however, self-government under law has been achieved and practiced by few peoples and for short periods, whereas the practice of despotic, authoritarian, or monarchical regimes has been more widespread and more durable. Toward the close of the last century, it seemed that the ultimate triumph of democratic institutions throughout the world was merely a matter of time and education. The present century has brought new gains to the despots and fear and disillusionment to the democrats. The present era has also brought the American nation to a position of world leadership for which it was and is largely unprepared. Our system of government is undergoing its severest test since 1861. No man can now say what of our precious political heritage we may have to discard in the interest of national survival. It is proper, therefore, that we continue to regard our institutions as experimental and to tend and nurture them as befits a fragile and delicate plant.

### THE AMERICAN PEOPLE

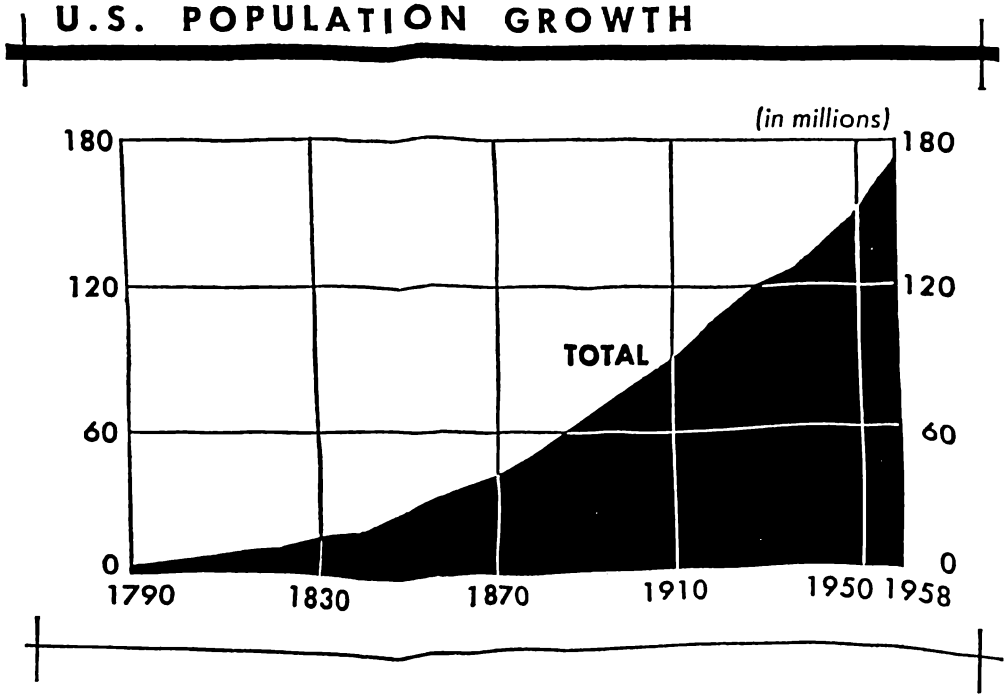
The people of the United States

It is fitting to begin the study of the American system of government with the people by whom and for whom it is operated. It is they who make it what it is, and it is out of their desires, hopes, fears, and frustrations that arise its greatest difficulties, its greatest triumphs, and its greatest failures. To begin with, the 180 million residents of the continental United States occupy more than 3 million square miles of the earth's surface possessing an abundance of natural advantages unmatched by any area of comparable size. The reach of the American government, however, extends outward from our shores to embrace another 3,600,000 persons and 600,000 square miles of land area in our island and continental possessions. The attempt to practice self-government over an area so vast and by a people so numerous is without parallel in history. From it spring some of the most perplexing of our political problems. Only the revolution in transportation and communication that has accom-

panied the rise of the American nation has made it possible to unite such an area in a single system of legal and political institutions. Even so, the centrifugal pull of sectional and regional interests and ambitions has repeatedly threatened the unity of our party system and of our central government.

Population increase

The Constitution of the United States was written for a nation of 4 million people occupying an area of 890,000 square miles. The rapid growth of our population by immigration and natural increase, and of our territory by purchase and conquest, tested our governmental institutions to the utmost. In virtually any decade of the nineteenth century our population increased by one-fourth or more. Only in the 1890's did the rate begin to slacken and thereafter, with the curtailment of immigration and the decline in the birth rate, it

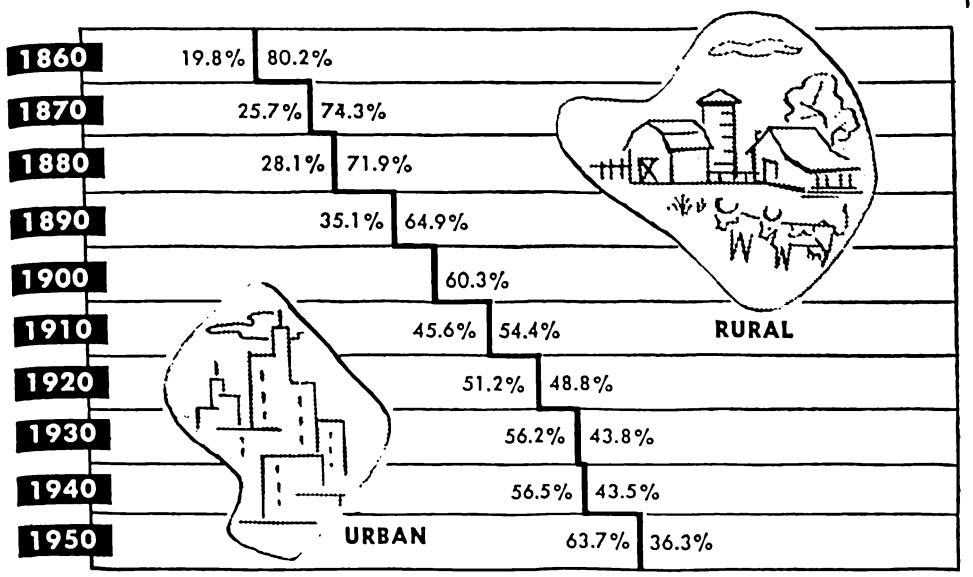



SOURCE: U. S. Bureau of the Census.

fell finally to 7.2 per cent in the decade 1930-40. This contraction played as much havoc with our economic institutions, adjusted to an ever expanding market, as the rapid growth had tested our political arrangements. A sharp upturn in the birth rate in the middle forties sent the decennial rate of increase back up to 14.5 per cent in 1940-50. Already the public school facilities of the nation are being loaded beyond endurance as once again we must adjust to a changing population pattern.

Not all of the sections of the country have grown at a uniform rate. The center of population has steadily moved westward. Although the most densely populated areas are still east of the Allegheny Mountains, the Pacific Coast has been gaining rapidly while New England, the South, and the Great Plains

## PROPORTIONS OF RURAL AND URBAN POPULATION, 1860-1950




SOURCE: U. S. Bureau of the Census. Since 1910 the Census Bureau has broken down the category of rural into farm and nonfarm.

are either declining or barely holding on. Regions once accustomed to a certain and substantial influence in the national life tend to cling stubbornly to their status, and newly advancing sections usually must battle intensely for a place in the scene. All of these regional stresses are reflected in the Congress—in the long battle over reapportionment of seats in the House of Representatives, for example—and also in the national committees and conventions of our two great parties and in the claims for place in the cabinet and the courts.

The swing to urban living

More significant than either growth or distribution has been the revolution in the economy of our people. Of those 4 million who founded the nation, more than 90 per cent were farmers. The outlook of the self-reliant freeholder, expressed for the ages by Thomas Jefferson, dominated the nation for generations. Today more than 63 per cent of our people live in cities or villages of 2500 or more and another 20 per cent in smaller settlements. Fewer than 17 per cent of our people live on farms, and this percentage is declining. The preference of our people for the life of the city, made possible by a tremendous revolution in agricultural technology, has necessitated the most striking changes in their political arrangements. It is the urban wage earner who invites, if he does not compel, the ever widening concern of the government in all phases of daily life. Dependent, insecure, huddled together, the city masses expect the government to protect their far-flung system of food and water supply, to shelter them against the storms of economic recession, to educate their young and care for their old, to protect them against bombs and

germs. The growth of the modern pervasive state may be traced directly to the urbanization and industrialization of our society. The rural outlook yields grudgingly, however, and in many states (perhaps a majority) and counties continues to dominate the polity, even though in some instances its sponsors are outnumbered by their urban neighbors. To many the great city still stands, as it did for Jefferson, for wickedness, greed, ignorance, and decadence. Somewhere in every contest for ascendancy within and between our parties, in Congress and in the state capitols, the conflict of urban and rural views can be found. The constitutional fabric of American government was largely designed for rural people, and adjusting it to the continuing urbanization of the American nation is a never ending task requiring the highest order of statesmanship.

The increase in longevity

The great attack on communicable disease, incident to the discovery of germ causation, and the spread of preventive public health has added more than 20 years to the life expectancy of Americans in this century. The falling death rate has contributed heavily to the increase in our population over the years. More than this, it has changed the age distribution of our population so that our aged grow in numbers both relatively and absolutely. The basis of modern programs of old-age security can be found in the fact that more and more of our people are living beyond their productive years and must somehow be cared for during the sunset of life.

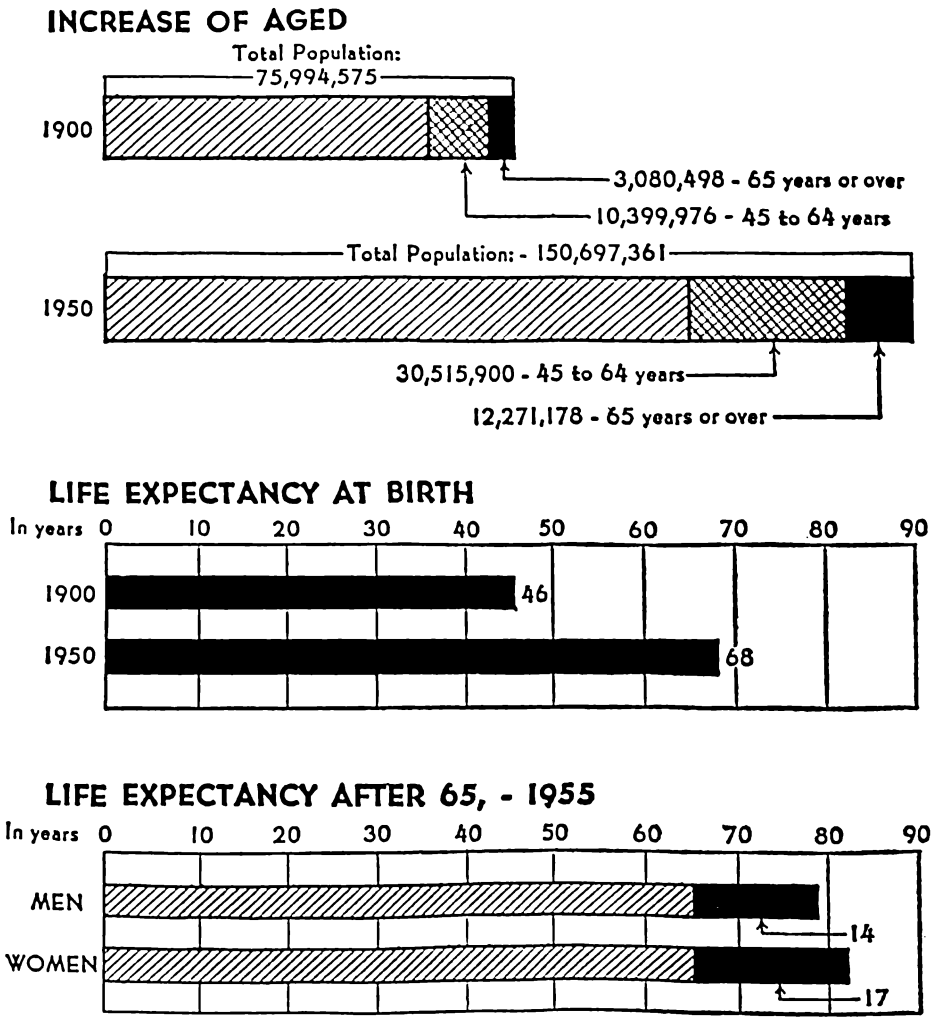
Racial complexion

The first census of the American people (1790) revealed that among our 4 million inhabitants were 757,000 Negroes, more than 90 per cent of whom were slaves. According to the most recent census (1950), there are more than 15 million Negroes in the United States. Assimilating the African slave into the American polity has been one of the most difficult of our national problems, and we are still far from according them a place in our society consistent with their numbers. For half a century the Negro was largely an adjunct to the southern plantation system of agriculture. After freedom, and especially during the world wars of this century, the Negroes moved in large numbers to northern and middle-western industrial cities. Here they are testing the tolerance so long expressed for them by northerners when they lived in the South. The race problem has rarely been quiescent in national politics. Today it is as acutely alive as ever. Along the southwestern border, the Mexican and Indian residents present the same kinds of problems, as do the Chinese and Japanese on the West Coast, for our population numbers more than 700,000 members of nonwhite races in addition to the Negroes.

## AMERICAN SOCIETY

Groups and American politics

The great emphasis in the history of the American nation on the free, self-centered, atomic individual should not be allowed to obscure the fact that the American people associate together in groups for many purposes. And the activities of these groups are as much a part of the setting of American government as the activities of free-wheeling individuals. Americans have never




SOURCE: Redrawn from *The New York Times*, February 24, 1955.

embraced the idea of the totally pervasive state. They believe that society embraces more than government and that outside the realm of politics exist other realms of religion, business, and family life. Furthermore, they expect their government to react benevolently to the needs of these other social institutions and to respond to their legitimate claims upon it. These other institutional loyalties of our people profoundly influence their political behavior.

Religion

In the main, this nation is composed of Protestant Christians. Approximately 60 per cent of all those who profess some religious faith are members of one of the Protestant sects. About 30 per cent are Roman Catholics. We are thus inheritors largely of the spirit of the Reformation—individualistic and anti-authoritarian in religion as well as in politics. Our religious diversity, however, has frequently meant political conflict in those areas of public policy where religious beliefs and governmental objectives collide, for example, the

public school system. The Catholic minority, actually a majority in some states and cities, has had to tread softly at times lest it invite reprisal and state regulation.

American economic system

America has brought itself to a standard of living not rivaled nor even closely approximated in the modern world by a combination of rich natural resources and a strong addiction to privately owned and operated economic institutions dependent upon the peculiar calculus of the market place for the distribution of goods and services. The preferred method of industrial organization is the corporation. Some of these have grown to such size, wealth, and power that they overshadow many states and most cities. Although ownership through stock shares is increasingly widespread, some 10 million Americans participating, control is still rather tightly confined to small directorates. The economic power of corporate management, however, has been closely challenged in the past few decades by the spread of labor unions among the industrial workers. Twenty-five per cent of those gainfully employed are now members of some labor organization. Many of these unions control the labor supply of particular industries throughout the length of the nation. Government, representing in this case the consuming public, has been less and less able or willing to watch indifferently while the titans of labor and industry do battle.

Although the American economy is characterized by private enterprise, it is by no means a pure system of private capitalism. Every variation of government intervention in the economy has been or is now being practiced, and a substantial amount of public enterprise exists alongside of private enterprise, sometimes in direct competition with it. Governmental regulation of the great privately owned sector of our economy has been steadily growing in scope and impact. Many of the major political controversies of our national history have stemmed from public efforts to mitigate the disadvantages of unrestrained private decision in the production and distribution of wealth. In no other modern nation, nevertheless, has the government allowed such free play to private initiative and personal acquisitiveness. Private economic groups provide much of the stimulus to political controversy in America. Opposition by them to government control of their affairs has been more than offset by their demands for benevolent governmental intervention on their behalf. There has never been the clear separation of government from the economy that "classical" economics or "laissez-faire" politics is supposed to entail.

The family

Under the impact of urbanization and industrialization, the American family has been staggered and bruised. Children, an economic asset in agrarian culture, are an economic liability in urban culture, their dependence and helplessness continuing well into the teens. The spread of birth-control information, the economic difficulties in the way of adequate housing, the high cost of food and clothing, the lack of free play space, the dangerous congestion of the streets—all of these combined to promote a decline in the size and the importance of the family unit in urban society. The public school

system inherited one of the major functions of the family, that of transmitting our cultural inheritance, and the neighborhood cinema acquired the entertainment function. The entrance of women on a large scale into gainful employment—more than 13,000,000 in 1960—has been another hard blow at the family. Slowly and painfully the family is now being refashioned. The flight to the suburbs from the congestion of the central city for more space and quiet, the introduction by public effort of playground and recreation space, the spread of public housing projects, the decline in the work week and the resultant increase in leisure time for all sectors of the population have all re-created an atmosphere in which the family has found new functions or recaptured some traditional ones. The recent sharp upturn in the birth rate among the urban middle classes testifies to the emerging new strength of the family unit.

Classes

Perhaps nothing so sharply distinguishes American society from that of its European neighbors and ancestors as the absence of rigid class distinctions. Since the fall of the southern plantation aristocracy built upon slavery, a class of landed gentry has not appeared on the American scene. Neither Junker nor English squire has fashioned a code of gentlemanly conduct or honorable military service which could claim the loyalty of any segment of the American people. On the other hand, the great appeal of the Marxists to the proletariat, so enthusiastically received by European wageworkers, has fallen largely on deaf ears. In America, more than 80 percent of our people consider themselves members of the middle class. Virtually every American youth carries a presidential commission or a certificate to high public or private office in his school kit.

Attitudes

The American character, if such there be, is not without its paradoxes and inconsistencies. Our people are probably the most optimistic on earth in their belief in rejuvenation by self-will with the aid of wise legislation. They are also among the most irreverent and lawless. They exhibit little real deference to the institutions of law enforcement and will explode in more violence in the city of Chicago in one month than the people of England do in a whole year. We are not as a people very much given to abstract philosophic speculation and rather pride ourselves on our expedient practicality. And yet we cling firmly to some of the most grandiose myths (free market, social contract) of all times and habitually clothe our foreign policy in the most idealistic and humanitarian terms ("open door in China," "making world safe for democracy"). Although we have ever exhibited the most profound and abiding distrust of government and officialdom, we scurry to the public authorities to help us in time of trouble. We are constantly heaping more tasks on our public bodies and are at the same time stubbornly refusing either to pay enough to perform them or to grant to officialdom the co-operation it needs to achieve effective results. Regimentation in economic affairs we generally oppose with vigor, but under the influence of national advertising we are one of the most regimented people on earth in matters of dress, taste, music, entertainment, decoration, and food. All this ambivalence in the body politic

is reflected in our system of government and adds immeasurably to its difficulties. Ours is not an easy people to govern—we are neither docile nor deferential; we are not very consistent governors—we expect too much and contribute too little.

## OUR ENGLISH POLITICAL HERITAGE

English experience dominates our political inheritance:

Much of the color and regional diversity of American society stems from the numerous migrants from the continent of Europe who brought with them some of the culture of their native lands. Our main lineage, however, is undoubtedly English, and it is especially to them that we owe the basic forms and concepts of our system of government. The fathers of the American Constitution and of the War for Independence were inseparably linked to centuries of English institutional development. The triumph of the Revolution separated our people from the English government of the day; it did not, fortunately, sever all ties of memory or shared experience between them and their English forebears. Our political institutions did not emerge suddenly and in complete form in 1776 nor yet in 1787, but had been long abuilding in the colonies and in the mother country as well. Our people lived in the British Empire for almost as long before independence as they have lived outside of it since.

1. The idea and practice of representative government

The Englishmen who settled this land brought with them, among many other concepts, the idea that the powerful parts of any government ought in some sense to represent those who are governed by it. The English Parliament had been in existence for several centuries when this nation was founded and had come to represent the major classes of English life, even if it had not yet achieved effective representation of the great mass of peasants and artisans. The period of settlement of America coincided with a constitutional revolution in England in which the representative branch of the government successfully wrested power from the monarchical branch. Although settlers sympathetic to both sides came to America, those favorable to Parliament were especially influential throughout New England.

The colonies were established under various auspices—private proprietors, trading companies, and monarchical endowment—but whatever their origin, a representative assembly was established sooner or later in every one of them to share power with, occasionally to dominate, the executive agents of the sponsors. The members of these legislatures were everywhere elected by vote of a limited number of their fellow citizens (property owners or taxpayers mainly) under much more systematic schemes of representation than in the mother country. There was no need in America to represent an almost nonexistent landed aristocracy in an upper house, for example. These colonial legislatures proved the training grounds for colonial politicians and provided this nation with more than a century of experience with elected representative assemblies before we struck off the ties of the English crown.

In our long colonial history something very like the contest between

Crown and Parliament occurred. These representative bodies proved their ability time and again to keep the imported English executives under close control. The idea that the legislature ought to represent the people—or at least the better (richer) part of them—that it ought to control the public treasury and determine major public policy was, therefore, firmly established in practice when the constitutions for a new nation were written. It should also be added that most of the colonial assemblies formed the lower house of a two-house legislature, the upper house being a governor's council. The practice of bicameralism was thus well established in America before 1776.

2. The idea of limited government

The essence of constitutional government is that power is limited by law and these limits are enforced upon rulers by established procedures. Our English forefathers, for the most part, brought with them a firm attachment to the idea that this kind of government is both wise and practicable. The citizens of a nation, they believed, had certain rights which were beyond the power of any government to impair. As Englishmen, they claimed a sphere of personal freedom and asserted that fair procedures must be observed by executive officials. These conceptions linked them with hundreds of years of English constitutional development. The English settler brought tangible records—some old like the Magna Charta and some new like the Petition of Right—to support and illuminate these assertions. In the contest with the mother country, the colonists repeatedly claimed that the English government was trampling upon their rights as Englishmen. There is no more lucid statement in the literature of Western civilization of this English idea of human rights than the opening paragraphs of the Declaration of Independence. Every constitution written for the newly organized states during the Revolutionary period contained guarantees of individual liberty and requirements for fair procedure. In at least seven of these charters these safeguards against undue power were grouped in bills of rights.

3. The idea of popular sovereignty

That the ultimate source of all legitimate public authority is the people themselves is an idea which our forefathers took for granted. To most of them government came into being by agreement of the governed (social contract), found its justification in protecting their liberties, and received only so much authority as the people felt it necessary to grant. The great English philosopher John Locke, who in the late seventeenth century formulated these views for all time, was speaking for the Englishmen in America as well as for those in his own country. The practice of colonial America—illustrated by the Mayflower Compact, the self-written charters of Connecticut and Rhode Island, and the state constitutions drafted by the colonists at the time of separation—more nearly approached the theory than did any experience of European or English history. When the colonists became their own masters they conferred power upon their own governments in the most grudging and distrustful manner. Frequent elections, short terms of office, and specific limitations on power characterized every one of the first state constitutions. It should not be assumed, however, that the idea that power rested upon consent included the notion that all or even most of the governed were qualified by

merit or by right to participate in the processes of selection or decision. The right to vote was not one which either practice or theory attributed to the great majority of adult citizens. In other words, our English political heritage was constitutional government, not democratic government; and popular sovereignty was a theory about the origin of power, not about its exercise or its organization.

4. The common law

Perhaps the most complete institutional transfer from England to the New World was that of the English system of jurisprudence. From the beginning of our history to the present day, the English common law has been the basis of our legal system. Deeply imbedded in it at the time of its transportation were conceptions like "due process," "trial by jury," "freedom from arrest except for demonstrable cause," equity, and many others which constituted important and specific elements in American bills of rights and in our ideas of limited governmental authority. The common law is largely judge-made law, built up over centuries by the application of traditional legal doctrines (precedents) to new situations. The slow and deliberate adjustment of the laws to the changing fabric of life, which adherence to the common law of England encourages, has been and is now one of the major conservative influences in our national life.

5. The institutions of local government

English institutions of local government, evolved over centuries, were also transplanted almost intact to America. The county was established in 1634 in Virginia and in 1643 in Massachusetts. The town dates almost from the landing of the Pilgrims, the chartered municipal corporation from 1686.[1] The borough took root, however, only in the middle colonies like Pennsylvania. Local officials like the sheriff and the justice of the peace continue to this day to remind us that the history of our political institutions reaches backward without interruption into Anglo-Saxon England. The states of the new nation made no important modifications in these agencies of local government.

American contribution

Upon this heritage of English ideas and institutions the American system of government was established. Overlaid, one must add, by a strong belief especially among the Puritans in the wickedness of man and the corroding effects of power. To the stock of English political wisdom with which our ancestors launched this nation as an independent unit in the world of nation-states, the American contributions have been: (1) the democratization of the entire system; (2) the practice of written constitutions and the ultimate interpretation of their meaning by an independent judiciary; (3) the practice of separation of powers among the principal branches of the state and national governments; and, most important of all, (4) the achievement of federal union of the 13 independent states.

[1] From 1653 if the Dutch charter for New York City is counted.

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# CHAPTER 2

# *The Constitution of the United States*

## THE ACHIEVEMENT OF FEDERAL UNION

The Continental Congress

Although strung along a seaboard almost 1300 miles in length, nothing more hostile than wooded hills and swift rivers separated the English colonists from one another. The great majority were English-speaking Protestants. Founded under different auspices, however, they seemed more aware of their dissimilarities than of their resemblances—more concerned about achieving their own destinies than about working toward common goals. Fearful of the consequences of concerted colonial action, the English government never gave ideas of unity much encouragement. Scattered proposals like Franklin's Albany plan and experiments like the New England Confederation (1643-83), looking to solidarity, had captured little loyalty. Growing controversy with the mother country, after the defeat of the French removed the compelling need for English support, stimulated the idea of union, and events after 1770 gave the idea of co-operation new impetus. Even yet, there was slowness to act. With the colonies involving themselves ever more deeply in bold and hazardous resistance to English authority, the creation of at least some intercolonial consultative and directing machinery became a matter of the most obvious common sense, and in the autumn of 1774 the First Continental Congress assembled in Philadelphia. It brought together irregularly chosen delegates from every colony except Georgia. For seven weeks the Congress devoted itself to considering the common peril, planning co-operation, adopting a "declaration of rights," and formulating resolutions for consideration by the colonial legislatures. It concluded with a call for a similar congress to meet the following year unless in the meantime the emergency became war. When the Second Continental Congress convened in May, 1775, it found itself obliged, in the absence of any other common authority, to step into the breach, take measures for raising armies and funds, and in effect transform itself into a government. Moving from place to place as the exigencies of hostilities required, this body served as the country's sole organ of national authority until March, 1781.

Need for a stronger government

Without some such unifying medium as the Continental Congress, the War for Independence could hardly have been carried to a successful conclusion. As an agency of government, however, the body 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 govern-

ments and peoples of the newly established states. To meet a temporary emergency, makeshift arrangements such as these might serve. However, finance, commerce, and foreign relations, to say nothing of military and naval operations, called for management by a government resting on some regular basis, endowed with definite powers, and assured of some degree of permanence. Out of this practical necessity 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 first constitution for a union of states was the Articles of Confederation adopted in 1781 after five years of consideration by the Continental Congress and the states. When this new form of government finally was put into operation, the war that had evoked it was nearly at an end.

Sovereignty of the states

Under these Articles, the United States for the first time achieved a government resting on a written constitution and with functions and powers defined therein. Three main features characterized it. The first was the recognition of the practice under the Continental Congress of state sovereignty, expressly asserted in the document's second "article." The states, it is true, relinquished important powers to the new central establishment, but on the whole the union remained a loose confederation or league. In this respect as in others it closely resembles the General Assembly of the United Nations.

A Congress of delegates

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 for a single year as the legislature might 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. Voting was by states, and each state had a single vote regardless of the number of delegates it sent. Committees might, of course, be set up and subordinate officers appointed. There was no separate executive branch and no national system of courts.

Powers and limitations

In the third place, powers and functions conferred on the national government were few and severely restricted. Far from being a general lawmaking authority like our present Congress, the Congress of the Confederation was 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 entrusted to it—for example, making treaties and coining and borrowing money—could be exercised only if the delegations of as many as nine states concurred.

Controversy over the Articles

Even before the Articles took effect, several leading statesmen of the new nation—Washington, Hamilton, Madison, Jay, among others—felt that the power of the central government was inadequate to its tasks. The Confederation period was thus marked from the outset by controversy over the fundamental law itself, and as the years passed the controversy grew in intensity and scope. On the one side were the nationalists—including many of the officers of the Revolutionary army, the merchants, the holders of certificates of public debt, and the manufacturers—who felt the new union cut but a sorry figure internationally, inviting abuse if not invasion by the boastful and aggressive nations of Europe. Only a strong central government could muster cash, soldiers, and armaments sufficient to compel respect abroad. This group was skeptical of the competence and disillusioned by the behavior of the state legislatures which were the centers of political power in the nation. Distrustful of anything that savored of democracy, they disdained the frequent elections, short terms of office, and the agrarian biases of the state lawmakers. Only a central authority, they argued, could establish the public credit, restrain state imposition on trade, deal with foreign nations, and stimulate the development of national rather than regional loyalties and ambitions. On the other side there was a numerous group, composed largely of freehold farmers and not as brilliantly led, who supported confederation and opposed granting any more power to the central government. Central governments are far removed from the immediate problems of domestic life and are apt to be despotic, they said. We have not thrown off the chains of a transoceanic monarch only to fetter ourselves to a home-grown one. The states are the important units for the exercise of power. Their governments under new constitutions are everywhere close to "the people" and sensitive to their needs. In this way did one of the enduring issues in American politics originate. These two conceptions ultimately contributed to the formation of political parties and under the new Constitution of 1787 continued to clash for generations thereafter.

Achievements under the Articles

The extreme charges of the talented nationalists have rather easily obscured the significant achievements under the Articles. A new national domain was created by the cession to the central government of the claims of the states to lands west of the Alleghenies. In a series of acts culminating in the famous Northwest Ordinance of 1787, the Congress laid the foundation for the development of five republican institutions in this vast area and their ultimate admission to the Union as states. Executive departments were created and staffed with a permanent bureaucracy: the Post Office, Treasury, War, and Foreign Affairs agencies were created under individuals designated by Congress. The vest debt created by the war was brought into manageable form by the settlement of accounts and was substantially reduced. New loans were rather readily negotiated with Dutch bankers. The country successfully

weathered the economic depression following victory, and signs of recovery were everywhere apparent at the end of the Confederation period.[1]

Weaknesses of the Articles

The nationalists were, however, able to point to the lack of an independent income and the inability of the Confederation government to meet all of its fiscal responsibilities, either to foreign or domestic creditors, as a serious flaw in the United States government. Without dependable income, the government could not meet its past obligations and it could not prepare the nation to defend itself from hostile European powers. The nation could do little to compel obedience to its mandates; it was wholly dependent upon the states for execution as well as for income.

The immediate impetus to reform of the Confederation was interstate controversy over regulation of commerce. Successful negotiations between Virginia and Maryland, held under the auspices of George Washington, led to another conference on tariff barriers to which Virginia, at the suggestion of Washington and Madison, invited other interested states. To the convention in Annapolis in 1786 came representatives of only five states, but among them were Madison and Hamilton, leaders of the nationalist cause. They induced the delegates to invite all the states to send delegates to a new convention in 1787 in Philadelphia at which all of the defects of the Confederation could be considered, together with proposals for the reform of the Articles. Congress added its weight by formally "calling" the conference, specifying that it be held for

> . . . The sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several state legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the states, render the federal constitution adequate to the exigencies of government and the preservation of the Union.

The nationalist leaders threw their full influence behind the conference, and out of it came the Constitution of the United States.

## THE CONVENTION OF 1787

Membership

The convention opened formally on May 25. Though characterized by Jefferson as "an assembly of demigods," the convention contained men of widely differing temperaments, abilities, and aptitudes. 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. Most 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. Thirty-one had served in Congress. A large proportion of the most active and influential delegates were comparatively young.

[1] For a detailed account of the Confederation's achievements as well as its failures see M. Jensen, *The New Nation; A History of the United States During the Confederation* (New York, 1950).

Conservative temper

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 resisting British authority and fostering independence, nor were they ardent supporters of the Confederation. In general, they were concerned about order rather than liberty. 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 classes, chiefly in the tidewater areas where such wealth as existed was largely concentrated. Forty of the 55 who actually attended owned public bonds or other securities; 14 or more had acquired land for speculative purposes; 24 were loaning money at interest; 11 had mercantile, manufacturing, or shipping connections; 15 were slave owners. Not one was a frontiersman or a wage earner, and only one had a small farmer background. Few were as conservative as Hamilton, who wanted to see a highly centralized and more or less aristocratic political system set up. But few, also, could be classed as democrats, in the sense of springing from and speaking for the small-propertied or propertyless elements of the population.

Common objective

Plenty of disagreements were bound to arise, once the delegates had started their discussions. Upon the objective chiefly to be aimed at—namely, a government of sufficient strength not only to take care of national defense and to discharge national obligations, but to withstand agrarian-debtor agitation typified by Shays rebellion in Massachusetts, preserve social order, and keep the country on an even keel—there was little real difference of opinion. And although the resulting Constitution provided for a more popular plan of government than could at that time have been found in any other important country in the world, it is not surprising that, motivated as it was, it should have been purposely shaped—by means of checks and balances, indirect elections, perpetuation of suffrage limitations in the states and presidential veto—to prevent democratic majoritarian elements from capturing control of affairs. Initially, it contemplated government largely by people of economic substance. Yet it did not close the doors against more democracy later on, and therein lay one of its principal merits.

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,[2] but only 55 ever attended; of these, some were present only part of the time, and the average attendance seems not to have exceeded 30 or 35. 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 speech-making than any other delegate. He performed his duties as moderator in a manner to allay strife; in private conversation and informal

[2] From 12 states; Rhode Island, dominated by inflationists suspicious of the undertaking, was at no time represented.

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 that each state, regardless of number of delegates, should have one vote, as in the contemporary Congress. In order to enable the members to speak freely and plainly and to protect them against outside criticism and pressure, the convention further decided that the sittings should be behind closed doors, and that nothing should be put into print or otherwise made public until the work was finished. 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 votes by states. Happily, Madison, one of the most vigilant and efficient delegates, sensing the importance of what was being done, kept a record of his own. 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 comes mainly from the clear and candid *Notes* laboriously compiled by the learned and methodical Virginian.

## 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 never would have prevailed if the people of the states had 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 Virginia, the state that had taken the initiative in bringing the convention about. Governor Edmund Randolph presented it, although Madison was its principal author. 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 after it was submitted the fiction that a mere revision was intended was soon dropped. A national 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 reconstructed, the national government was to have greatly increased powers, among them those of levying taxes, vetoing state legislation when considered contrary to the national constitution or to a treaty, and calling forth the militia against any member of the union "failing to fulfill its duty." 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, such power should be apportioned in accordance with numbers of free inhabitants or perhaps contributions to the national treasury. To forestall such an innovation, a group of delegates from the less populous states decided to present a counterplan based on a "purely federal" principle. This alternative scheme was laid before the convention by William Paterson of New Jersey. It went far toward meeting demands for a drastic change. 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 enlisted the support of the delegates of about half of the states. Its introduction, indeed, split the convention sharply into two factions or groups: one representing the nationalist view, the other the federationist view. One wanted political power proportioned to the ability of the states to aid in bearing the public burdens; the other wanted the states to retain the full equality they had enjoyed since independence, and argued that on any other basis the less populous ones would be placed at grave, and even ruinous, disadvantage. Happily, it was not necessary that either element have its way completely. The delegates were, after all, not dogmatic theorists and were accustomed in their business relations and in their state politics to the saving principle of give and take. They expressed their widely differing views freely, sometimes acrimoniously. Having done so, most of them were not averse to compromise. The constitution upon which they finally agreed became, clause after clause, a product of mutual concession.

Decision in favor of a strong national government

The delegates were united 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 if the convention wanted to do more than merely revise the Articles, its members ought to go back to their states 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." Madison, Hamilton, and other delegates made it perfectly clear that this meant a government embodying one supreme power, with "complete and compulsive operation." The federationists protested, saying at first that they would have no part in such a union; the nationalist delegates declared they would accept nothing less. The federationists, 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 driving the convention on the rocks—the initial determination was wisely adhered to.

From this key decision flowed certain great corollaries: (1) the powers of the national government should be sharply increased; (2) the machinery of government should be expanded, as indeed was proposed in all of the plans offered; (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.

Adoption of the third principle, in particular, meant that the national government was to be put on a wholly new basis. Instead of resting only upon 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 explained, over each citizen 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. If the experience of the Confederation indicated anything, it was that states might fail to live up to their obligations; and every plan presented to the convention had embraced or assumed some arrangement for coercing states proving delinquent. The nature and method of such coercion stirred grave differences of opinion. The issue was deftly avoided by providing for a national government endowed with power to enforce its authority directly upon *people*.

A national government resting upon the people

These fundamentals settled, the nationalist forces were ready to make concessions. The first and most notable one related to voting power in Congress. The nationalists wanted representation, and with it voting power, proportioned to population; the federationists wanted voting power to be equal; delegates on both sides 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

The great compromises:

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1. The Connecticut compromise

a stronger union—brought forward a proposal for equal representation in the upper house, combined with representation in the lower house in proportion to numbers; and after heated debate the deadlock was broken and the compromise adopted. The agreement has ever since been known as the "Connecticut compromise." Its acceptance removed the greatest single obstacle to harmony.

2. The three-fifths clause

The decision in favor of proportioned 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 wanted slaves included; the northern and middle states, having few slaves, wanted them disregarded. 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 initial 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 reduced basis as representation—although, in point of fact, direct taxes were actually imposed by the national government only four times before slavery was abolished.

3. Commerce and the slave trade

Still another compromise pertained to the powers of Congress over commerce. The delegates north of the Potomac were keenly interested in commerce and 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 noncommercial 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 state would never accept the new plan "unless their right to import slaves be untouched." The outcome was an agreement which pacified all elements. Congress was to have broad powers to regulate navigation and foreign trade, including power to lay duties on imports. But national taxes on exports were forbidden, and the importation of slaves might not be interfered with by the national government prior to the year 1808.

The Constitution completed

Many other important matters claimed the attention of the delegates through the sultry midsummer 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 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 broadened 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; and the convention, as Franklin testified, spent a great deal of time "sawing boards to make them fit." From first to last, the Virginia plan, as progressively amplified, formed the main basis of discussion. The growing document was turned over, after a couple of months, to a committee of detail which worked it into a balanced constitutional text. 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. On September 17, 39 delegates, representing 12 states, signed it.

The test ahead

Franklin, whose contributions had been chiefly those of wise suggestion and quiet conciliation, remarked to a group of delegates 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 actual 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 approve what it had done? Many of the delegates were not very enthusiastic about the results of their labors. Three of those present when the document was signed refused to put their names to it. Of 13 who were absent, at least four are known to have been critical if not actually hostile. Few, if any, were entirely satisfied.

## THE CONTEST OVER RATIFICATION

Procedures

A decade earlier, adoption of the Articles had been held up for three and one-half years awaiting ratification by every one of the states. To ease matters this time, the Constitution provided in its closing article that it should take effect when ratified by nine states only. To give it a more popular basis, action was required to be taken in each state not by the legislature, as in the case of the Articles, but by a convention chosen for the purpose by the voters.

Assenting to both procedures, Congress, on September 28, formally transmitted the proposed instrument to the states without recommendation or other comment.

Objections to the new plan

The controversies that had stirred the convention were now transferred to the country at large. 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 debtor 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 that the document failed to take any notice of numerous fundamental rights and liberties, e.g., freedom of speech, freedom of the press, freedom of assembly, right of petition, and religious liberty, so carefully guaranteed in the bills of rights prefixed to a majority of the state constitutions, and likely to need protection even more, popular elements thought, against a strong central government. 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 opposition extremely difficult to convert or overcome.

Ratification by nine states

In the Philadelphia convention, the interests hardest to satisfy were the delegates of less populous states. The conclusions arrived at 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, Georgia, and Connecticut followed within a few weeks. Pennsylvania, although a large state, was centrally located and federally inclined, and its convention ratified early. This rapid pace, however, could not be maintained. In Massachusetts, Virginia, New York, and other states, time was required to rally support. There was grave danger lest some state indispensable to the proposed union because of its location or 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 pending plan won in Massachusetts by a close vote, and only after agreeing to a series of suggested amendments aimed at reducing the power of the central government. Maryland, South Carolina, and New Hampshire then followed, each after a hard contest; and this brought 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, the battle was not yet 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

The opposition in New York, especially in the rural sections, was formidable; and, realizing this, the friends of the Constitution made every effort before the state convention met at Poughkeepsie to convince the people that the proposed plan of government was moderate, safe, and workable. Most active in this was Hamilton, who, after having been "praised by everybody but supported by none" at Philadelphia, 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, Madison. The result was the remarkable group of papers, 85 in number, appearing over the pen-name "Publius," but known ever since to students of American history as *The Federalist*. Taken as a group, the papers, though frankly propagandist and presenting only one side, have never been surpassed as examples of direct, lucid, and convincing exposition. Completed by six papers first appearing in book form, the whole constitutes one of the world's really great treatises on government. Better than anything else—unless possibly Madison's *Notes*—it shows what the Constitution meant to the men who made it.

**Ratification of the Constitution of 1787**

| *State* | *Date* | *Vote* |
|---|---|---|
| Delaware | Dec. 7, 1787 | Unanimous |
| Pennsylvania | Dec. 12, 1787 | 46-23 |
| New Jersey | Dec. 19, 1787 | Unanimous |
| Georgia | Jan. 2, 1788 | Unanimous |
| Connecticut | Jan. 9, 1788 | 128-40 |
| Massachusetts | Feb. 6, 1788 | 187-168 |
| Maryland | April 28, 1788 | 63-11 |
| South Carolina | May 23, 1788 | 149-73 |
| New Hampshire | June 21, 1788 | 57-46 |
| Virginia | June 25, 1788 | 89-79 |
| New York | July 26, 1788 | 30-27 |
| North Carolina | Nov. 21, 1789 | 184-77 |
| Rhode Island | May 29, 1790 | 34-32 |

The Constitution put into effect

Either won over by Hamilton and his collaborators or 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 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 instructed to choose presidential electors, senators, and representatives, and New York City was fixed as the

temporary seat of government. Then the old Congress, already incapacitated by lack of a quorum, 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 a decision of Congress to submit 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.

## THE CONSTITUTION AS A DOCUMENT

> 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.—Preamble of the Constitution.

Thus was framed and adopted one of the greatest instruments of government ever contrived by human wisdom. It is a brief and simple document, organized according to a clear and logical pattern. Its framers wisely eschewed trying to solve all the problems of present and future. Broad in scope and precise in language, it deals only with what had to be settled in 1787 and leaves room for future generations to work out their own remedies. Its omissions stamp it as much as its contents. The high-sounding phrases of theorists are absent from it; it bears the impress of the practical statesmen who wrote it.

Great principles embodied

All of the great ideas and institutions of our English heritage were embodied in the Constitution as adopted in 1788 and amended by the First Congress and the states. The government established by it was limited in power, representative in character, and based upon the people. By leaving the prescription of voting qualifications to the states it opened the door to the spread of the voting privilege throughout adult America, and thus paved the way for the democratization of American government which has so strikingly modified the entire machinery it provided. By providing a written instrument self-designated, as the "supreme law of the land," the framers stimulated the innovation of judicial review, that is, the ultimate and authoritative interpretation of its provisions by an independent national judiciary. The system of separation of powers and of checks and balances which it contains, although directly traceable to colonial and state experience, marks one of the major departures from both the tradition and evolving practice of the British government. The greatest achievement of the framers, however, was unquestionably the federal union—the creation of a strong national government side by side

with strong and effective state governments. The Constitution, finally, provides for orderly change, and by legislation, custom, executive action, judicial interpretation, and formal amendment it has proved adaptable to the revolutionary changes in the life of our people since it was adopted. Despite all of the modifications and adaptations of time and circumstance, the great principles of the Constitution have endured.

## THE PROCESSES OF CONSTITUTIONAL DEVELOPMENT

> 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. . . .—Art. V.

Actual Constitution is more than a document

The constitutional system under which we live is not simply an array of numbered articles, sections, and clauses. These are but the framework or skeleton. The moment the new instrument became effective, executive officers, congressmen, and judges began to interpret and apply its provisions and thus to build up year by year in accumulating practice and precedent the flesh of government that covers the skeleton. The governmental system of our own times, therefore, embraces the whole fabric of these documents, practices, and conceptions. It is appropriate that we examine the ways in which the Constitution, thus conceived, expands and adjusts itself to the never ending flux of American society. The first method to be considered is that of formal amendment.

The amending process:

Desiring that the new fundamental law should neither be impossible to amend, as the Articles had been, nor yet capable of too easy change, the framers devised a difficult but not prohibitive procedure. The only restriction placed upon the free operation of the procedure (aside from a temporary one relating to the slave trade) is that no state may be deprived of its equality in the Senate without its consent.[3] Although two methods of initiating amendments and two methods of ratifying them are provided, all thus far adopted have been proposed in the same way: by joint resolution of the two branches of Congress. All except the Twenty-first (repealing national prohibition) have likewise been ratified in the same manner: by action of the state legislatures.

[3] Opponents of the Eighteenth (prohibition) Amendment sought to convince the Supreme Court that the amending power does not extend to matters not "germane" to the Constitution, or to changes tending to invade the reserved powers of the states or to restrict personal liberties; but the effort was unsuccessful. National Prohibition Cases, 253 U. S. 350 (1920).

84TH CONGRESS
1ST SESSION

# H. J. RES. 214

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 14, 1955

Mr. JOHNSON of California introduced the following joint resolution; which was referred to the Committee on the Judiciary

## JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States providing for the election of President and Vice President.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein),* That an amendment is hereby proposed to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by three-fourths of the legislatures of the several States. Said amendment shall be as follows:

**THE BEGINNING OF AN AMENDMENT TO THE CONSTITUTION**

1. Initiation

Any amendment receiving a two-thirds vote, that is, at least two-thirds of a quorum, in both House and Senate is transmitted by the head (administrator) of the General Services Administration to the governors of the several states, to be laid before the legislatures or conventions. The president can interpose no veto. Not being legislative acts, amendments are not officially submitted to him at all (Hollingsworth *et al. v.* Virginia, 3 Dallas 378, 1798). Repeated efforts to use the alternative method of calling a national convention to propose amendments have all failed.

2. Ratification

Whether a given amendment shall be acted upon by state legislatures or by conventions especially chosen for the purpose is determined by Con-

gress. Although the original Constitution was ratified by conventions, the legislative method was adhered to uniformly for amendments until 1933. Conventions, although more costly, 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. The device was used for the first and only time to ratify the repeal of the Eighteenth Amendment. Whichever plan is used, reports of actions taken are sent by the governors to the General Services Administration, which, if the necessary three-fourths majority is attained, proclaims the amendment effective as part of the Constitution. Until fairly recently, a proposal failing to get the requisite majority was never officially announced as rejected, and accordingly was looked upon as remaining before the states indefinitely. By their own terms, however, four out of the last five amendments were to become operative only if ratified by the necessary three-fourths within seven years. How long an amendment with no time limit shall be considered pending is, the Supreme Court has said (Coleman *v.* Miller, 307 U. S. 443, 1939), a political question and therefore one for Congress alone to decide. No decision on the matter has ever been made; and a child labor amendment submitted in 1924 is commonly regarded as still "alive." Congress has gone so far as to decree that while a state which has rejected an amendment may change its mind and ratify, a state, once having ratified, cannot reverse its action. Finally, under judicial interpretation of Article V, ratification must be literally by state legislatures or conventions, as Congress may ordain, and not by the people acting directly (Hawke *v.* Smith, 253 U. S. 221, 1920).

Number of amendments proposed and adopted

The states were not yet safely gathered under the "new roof," as the Constitution was popularly termed in early days, before proposals began to be made for "extensions of the eaves." In all, no fewer than 4020 drafted amendments (many of them duplicates, of course, or relating to the same matters) were introduced in Congress between 1789 and 1941. Nowadays, anywhere from 40 to 60 proposals are presented in the House of Senate (or both) during an average session, referred to the appropriate judiciary committee, filed, and mostly forgotten. The total number of amendments actually endorsed by the two houses is only 27, and the number ratified by the states only 22. The Constitution really has been amended only 12 times, because the first 10 amendments were, to all intents and purposes part of the original plan promised to many state ratifying bodies.

The first 10 amendments

As submitted to the states in 1787, the Constitution contained scattered provisions relating to habeas corpus, bills of attainder, ex post facto laws, treason, and contracts, but no formal bill of rights covering basic civil liberties such as speech, assembly, petition, press, and religion. The deficiency was promptly noted and made a leading argument against ratification. Hamilton contended that since 11 of the existing state constitutions contained either a bill of rights or an equivalent, and since in any event the new government was given no powers that would enable it to encroach on private rights, no guarantees of the kind were needed. 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. Indeed, the requisite number of ratifications might not have been obtained at all but for assurances given that the defect would be promptly remedied. Madison was chosen to the first Congress under pledge to use his influence to bring about the adoption of a bill of rights; and in June, 1789, he introduced a long series of proposals looking to that end. Of 17 amendments voted by the House, 12 were endorsed by the Senate, and 10 were ratified by the states. Eight of the number embodied the desired guarantees of personal and property rights; the Ninth protected other rights existing under the reserved powers of the states; 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 Dallas 419, 1793), the Supreme Court held that a citizen of one state could sue another state in the national courts. To people of strong states'-rights views, this was shocking doctrine. To meet their objections the Eleventh Amendment was adopted in 1798, specifying 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 the Eleventh Amendment was either necessary or desirable depends on the point of view. But the tie in electoral votes in 1800 between Jefferson and Burr and the consequent conniving of the Federalists in Congress convinced the Jeffersonians that a change must be made. The Twelfth Amendment, ratified in 1804, provided for separate balloting for president and vice-president.

The Civil War amendments

Thereafter, the first half of the nineteenth century saw many new state constitutions framed and many older ones revised but no change in the national written Constitution. 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. All were enforced upon the southern states as a condition of restoration to their former place in the Union. One—the Thirteenth (1865)—prohibited slavery; another—the Fourteenth (1868)—defined citizenship, laid important new restrictions upon the states pertaining to interstate citizenship, due process of law, and equal protection of the laws; and the third—the Fifteenth (1870)—forbade both state and national 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, mo-

mentous changes in political, economic, and social conditions and attitudes; and in the space of 20 years (1913-33) the Constitution was amended no fewer than half a dozen times. First came an express grant of authority for national taxation of incomes. Notwithstanding that a Civil War national income tax had been sustained as an indirect tax, a clause of the Tariff (Wilson-Gorham) Act of 1894 levying a 2 per cent tax on incomes over $4000 was construed by the Supreme Court as imposing a direct tax which, under terms of the Constitution, must be apportioned among the states "according to their respective numbers" (Pollock *v.* Farmers' Loan and Trust Co., 158 U. S. 601, 1895)—a thing obviously impossible in the case of a tax of this nature. After prolonged agitation, Congress in 1909 submitted to the states a proposal that the national 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." In 1913 (after three and one-half years, as compared with the average of 21 months required for ratification) this provision—the basis of our present drastic taxation of incomes—was added to the Constitution as the Sixteenth Amendment.

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 Constitution. During the next 100 years it grew in favor; and although the Senate itself long held out against it, the proposal finally prevailed.

Eighteenth Amendment

Nineteenth Amendment

The next two amendments came shortly after World War I 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 resolution submitting the woman suffrage amendment 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 proclaimed.

Twentieth Amendment

Until 1933, our national political calendar preserved the tempo of a stagecoach 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 13 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 reelection, sat in more or less perfunctory and futile session from December until the close of its term on March 4. For a decade, Senator George W. Norris of Nebraska led a movement aimed at correcting this glaring defect. On February 6, 1933, the Department of State was able to proclaim the Twentieth 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, on January 3. On this day, unless provided otherwise by law, the two houses must assemble and start work. "Short"—or "lame-duck" sessions of the earlier type became virtually a thing of the past.

Twenty-first Amendment

Although ratified by the legislatures of 46 states and unshaken by attacks upon it in the courts, liquor prohibition on a nation-wide basis lasted only until 1933. The task of regulating the personal habits of a vast, heterogeneous population—much of it still under the influence of European traditions—proved one of the most difficult that our national government had ever undertaken. 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 amendment swept through the promptly elected state conventions (now employed for the first time) with such speed that the thirty-sixth state ratified on December 5, 1933.

Twenty-second Amendment

Notwithstanding much difference of opinion, the Constitution's framers gave the president the relatively brief term of four years but left him indefinitely eligible to re-election. Before the nineteenth century was far advanced, sentiment developed for lengthening the term to six years but forbidding any re-election. In 1913 a constitutional amendment to this effect passed the Senate, although not the House of Representatives. Public reactions to Franklin D. Roosevelt's election to third and fourth terms in 1940 and 1944 brought the subject again sharply to the fore. And in 1947 a Republican Congress submitted to the states an amendment retaining the four-year term but permitting a maximum tenure of not more than 10 years. State ratifications were rapid in 1947, meager from then until 1951, but in the latter year carried swiftly, and somewhat unexpectedly, to the necessary 36; whereupon the Twenty-second Amendment—the first in 18 years—was duly proclaimed.

Observations on the amendments as a group

Looking over the 22 adopted amendments as a group, one observes three or four significant facts. (1) In the main, they deny powers rather than confer new powers. Sometimes (as in the first eight) it is only or chiefly the national government that is restrained; sometimes (as in the Civil War group) it is only or chiefly the state governments. But in any event, most of the number are restrictive rather than otherwise. (2) The amendments are to only a slight extent responsible for the remarkable growth of governmental functions and activities in the last few decades. The phenomenal extensions of national power associated with the New Deal and World War II came without any change in the written fundamental law. From a somewhat earlier amendment, it is true, the central government derived the exceedingly important power to tax incomes and this has been an important factor in

financing the new programs. If it is asked how so much could happen without more resort to amendments, the answer is that there has been frequent, indeed ceaseless, resort to fresh and broadened interpretations of words, phrases, and clauses happily chosen a century and a half ago to allow precisely such flexibility. (3) While, however, the amendments have not conferred many express powers on the national government, they have imposed enough restrictions upon the states to have augmented national supremacy indirectly, and hence may be said to have had a nationalizing tendency. Finally, (4) the amendments, while introducing relatively few changes in governmental machinery and procedures, have contributed materially to the advancement of democracy. The first eight defined and guaranteed civil liberties; the Fifteenth and Nineteenth removed barriers to universal suffrage; the Sixteenth shifted the burden of government costs in the direction of the well-to-do; the Seventeenth definitely placed the election of senators in the hands of the people.

Proposed amendments

Of proposing new changes in the Constitution there is, of course, no end. In recent years Congress has repeatedly been urged to adopt amendment resolutions: (1) granting equal rights to women; (2) changing the method of counting the electoral vote in presidential elections; (3) straightening out the tangle of marriage and divorce laws in the 48 states; (4) prohibiting tax-paying qualifications for voters in national elections; and (5) changing the treaty-making procedure by making it easier to ratify treaties, by increasing congressional control of executive agreements, and by limiting the subjects on which treaties might be negotiated.

Conclusions on the amending process

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." On the whole, history has sustained his judgment. Although throughout the years the amending process has been criticized for being too difficult or too easy, too democratic or not democratic enough, any change is highly improbable. Our people have found that the process will work, if they want it to. More than this, we have found that by other procedures the Constitution can be subtly accommodated to changing conditions without the necessity for formal amendment. Finally, the so-called "undemocratic" features of the process are part of the whole scheme of American government and will not lightly be thrust aside.

## OTHER METHODS OF CONSTITUTIONAL GROWTH

The secret of the endurance of the Constitution will be found not in the formal amending process but in the other processes of constitutional elaboration: legislation, executive action, judicial interpretation, and custom. Illustrations of each of these are found throughout this volume, but a general comment is here appropriate.

Legislation

Desirous of avoiding what one of them called "a too minutious wisdom," the framers of the Constitution outlined clearly enough the general

framework and functions of the new government, but wisely left a multitude of matters to be taken care of, as need might arise, by Congress, and even at certain points by the state legislatures. For example, they provided for a vice-president to take over the duties of the presidency in case of necessity, but said nothing about what should happen if there was no vice-president; and Congress later supplied the deficiency. They assumed the existence of executive departments and twice referred in the Constitution to the heads of such establishments; yet left Congress to create the departments and to determine what should be their functions and interrelations. The composition of the two houses of Congress was prescribed carefully, but the times, places, and manner of electing both senators and representatives were left to be fixed by the state legislatures, subject to control by Congress itself. In a somewhat belated 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 Congress may from time to time ordain and establish." Aside from the Supreme Court, therefore, the entire national judicial establishment—the names, numbers, grades, and jurisdictions of the courts, together with their procedures—rests upon acts passed from time to time by Congress.

Congress defines commerce and creates agencies like the Interstate Commerce Commission and the Federal Communications Commission to regulate it. The means and methods of governing territories are provided by Congress. And so one could go on. Every time, in fact that Congress enacts a law it, in effect, starts with some express or implied constitutional provision, interprets it, and applies it, perchance in some new area or in some new manner, thereby projecting the Constitution into a new field or extending its meaning in an old one. In doing these things, Congress, of course, does not have a completely free hand; its constitutional interpretations may be challenged and the courts may overrule them. In the great majority of instances they stand; legislation thus becomes one of the principal means by which the Constitution grows.

Executive and administrative action

It is not Congress alone that interprets and applies and adds. Within their spheres, the other two great branches of government, executive and judicial, do the same thing. On the executive side, the power starts with the president, who not only is as much entitled to construe the constitutional provisions as is Congress, but is equally entitled to make decisions and perform acts in accordance with his interpretations—subject to similar check from the courts. In the exercise of their powers, many presidents have taken and maintained positions virtually settling constitutional questions previously considered open, or even giving the Constitution some meaning and application never before attributed to it. Moreover, from the White House this function of constitutional interpretation and adaptation filters down through the various levels of administration. Confronted almost daily with the necessity of making decisions, heads of departments, and even inferiors within their proper spheres, adopt positions, perform acts, or give orders resting, however re-

motely, upon some interpretation of a constitutional provision and perhaps stretching the provision's meaning. When such actions escape successful challenge and establish themselves as precedents, the Constitution may be found to have undergone permanent extension, in however limited a particular.

Judicial interpretation

Then there is the significant matter of constitutional expansion at the hands of the courts. How this comes about must already be apparent. Congress, or a state legislature, passes a law, or a national or state official performs an act, which some person or group of persons affected adversely challenges for exceeding proper authority. A case is brought in the courts and the law or action is attacked for 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 provision or reasonable construction. To do this, it is, of course, necessary to determine what the pertinent constitutional clauses mean. This opens wide opportunity to make them mean something different from, and probably more than, they previously had been supposed to mean. The Constitution is thus given a new twist or slant. The process operates cumulatively. A disputed phrase is so interpreted as to give it new scope and content. This, in turn, furnishes a point of departure for a further extension when the next similar case comes up. Nearly all of the more important implied powers of Congress are traceable to this source. And these implied powers have never been projected farther into new areas than during the past two decades. The most important single reason why the Constitution has not been amended more frequently is that from an early stage in the nation's history the Supreme Court has sat (in Woodrow Wilson's words) as "a kind of continuous constitutional convention," interpreting, developing, and expanding the basic law. One almost may say that every time the Court hands down one of its weekly batches of decisions, we have a constitution in some respects new.

Usage or custom

"Time and habit," remarked Washington, "are at least as necessary to fix the true character of governments as of other human institutions"; and our Constitution expands and develops by usage or custom. This method of change attracts less attention than the others; it does not—at all events at the outset—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 broad and steadily developing "unwritten constitution," consisting of usages that determine actual governmental practice quite as truly as do the provisions of written law. Many illustrations will be encountered as we proceed; for the present, it must suffice merely to call to mind the manner in which the electoral college functions in choosing the president, the assembling of department heads in the advisory body known as the cabinet, the frequent use of "executive agreements" in lieu of treaties, the caucus and committee systems in Congress, the introduction of all appropriation bills in the House of Representatives, 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 apparatus—caucuses, conventions, committees, platforms, funds—of political parties.

"The living word and deed of living men"

The upshot of all that has been suggested is that the bare outline of a governmental system contained in the Constitution as it came from the hands of the framers, and as it still 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. And the process goes on unceasingly. The actual Constitution at any time is what citizens, lawmakers, administrators, and judges think it is. If a time comes when the fundamental law neither grows nor changes, the nation it serves will vanish.

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# CHAPTER 3

# *The Federal System*

> 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.—Tenth Amendment

American federal system unique

Although determined to create a stronger and more effective central government, the framers of the Constitution were constrained by the circumstances of the day to preserve an important role for the states. The compromise which they and their successors effected between a highly centralized or unitary government and a league or confederation of states is called a *federal system* of government. Federal denotes an arrangement of political institutions with two centers of power, one central and one regional. More than any other type of arrangement, it requires fairly clear-cut assignments of powers and responsibilities to each center. These assignments, as prescribed in the Constitution, are not the product of abstract political speculation but of the felt needs of the times. As such, therefore, they adhere to no preconceived formula by which power is divided between center and region, and the federal system of the United States is unique. The framers, moreover, did not go any further in specifying the powers of the various levels of government than they had to. They left a great many unresolved and unforeseen problems concerning the relation of the levels of government to one another. Around these much of our later history has resolved. The division of governmental responsibilities can never be precisely determined once and for all in a dynamic society. The federal system as it stands today is very unlike that of 1790, and yet it still retains many of the attributes with which it began what has proved an exciting adventure.

## THE CONSTITUTIONAL DISTRIBUTION OF POWERS

National power

The agencies of the national government created by the Constitution have, for the most part, expressly assigned powers. The legislative power "herein granted" is conferred upon the Congress; the jurisdiction of the national courts is rather clearly marked out. Only the executive power is not precisely confined. However, the Tenth Amendment clearly reserves to the states all powers not delegated to the national government. The influence, functions, and prestige of the national government are immeasurably greater today than in Washington's time, but whatever expansion has occurred

—except that provided by constitutional amendment—has been based upon authority assigned somewhere in the Constitution.

State power

Although the state governments are the recipients of the largely undefined residue of power not specifically conferred upon the national government, they are also circumscribed by constitutional prohibition. A number of powers are expressly denied to them by the Constitution. It must be added that the states are limited further by their own constitutions in the exercise of the powers reserved to them. It is impossible precisely to say what powers may be found in the vast reservoir of authority preserved to the states by the Constitution. Over the years the states, like the national government, have undertaken ever greater functions and responsibilities.

All governments are limited

It should be abundantly clear at this point that no government in our system possesses unlimited power. Taken together, the national and state constitutions create areas of immunity for all of our people into which no governmental authority can rightfully penetrate.

The constitutional pattern of authority may, therefore, be briefly set forth as in the diagram on the next page.

## THE SUPREMACY OF THE NATIONAL GOVERNMENT

> The Constitution and the Laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.—Art. VI, cl. 2.

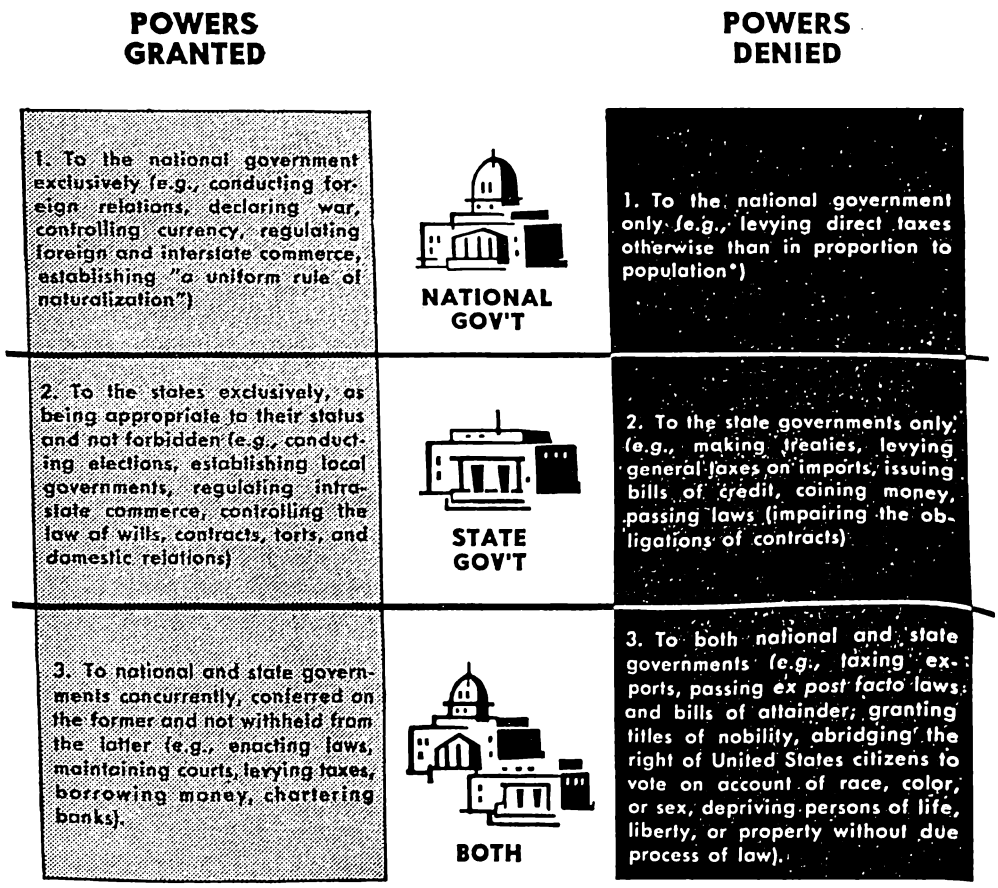
National government superior to states

Theoretically, under our federal system each level of government is supreme within the sphere assigned to it. And it is true that there are many actions states may take within their boundaries which may not validly be challenged elsewhere. However, over the years the national government has emerged as the arbiter in all cases of conflict between state and national authority, and has been able to enforce its will throughout the land regardless of state opposition.

Judicial review

The problem of upholding national authority against anticipated encroachments of the states gave the fathers at Philadelphia a difficult time. One proposal, that Congress be authorized to disallow state legislation, was agreed to at one stage but ultimately developed so much opposition it was abandoned. The method finally selected was the famous "supremacy of the law" clause which stands at the head of this section. This clause was expected to bind state judges to invalidate state legislation conflicting with national laws, treaties, or the Constitution. Whether it was also intended to confer upon the national supreme court the power to declare state actions unconstitutional is not clear. Under the vigorous leadership of Chief Justice

## POWERS SPECIFICALLY GRANTED OR DENIED THE NATIONAL AND STATE GOVERNMENTS BY THE CONSTITUTION




* Under the Sixteenth Amendment, the limitation does not apply to income taxes, whether or not considered direct.

Marshall, the Supreme Court declared that such was the intention [1] and it has successfully exercised this power ever since. The Congress, on its part, made the same assumption. The first judiciary act passed in 1789 conferred upon the Supreme Court the power to review any case in which a state court had upheld a state law alleged to be in conflict with the national Constitution, a statute, or a treaty. The question of how the national government, Congress especially, would be confined to its proper sphere, also left unresolved by the

[1] See, for example, his opinions in McCulloch *v.* Maryland, 4 Wheaton 316 (1819) and Gibbons *v.* Ogden, 9 Wheaton 1 (1824). The first decision holding a state law unconstitutional was Fletcher *v.* Peck, 6 Cranch 87 (1810). A recent decision in which the Court discusses some of the principles that have guided it in determining when national laws take precedence over state laws is: Commonwealth of Penna. *v.* Nelson, 350 U. S. 415 (1956).

constitutional convention, was settled in the same manner: by the Supreme Court successfully asserting its authority to review acts of Congress and of the executive to determine their constitutionality.[2] The development of this practice of judicial review of the actions of the other branches of government, as well as those of the other levels, is a distinctively American contribution to the art and science of constitutional government.

The national government as judge of its own power

Judicial review as developed by the Supreme Court is of major importance with respect to the boundary lines between national and state powers. In all disputes touching this subject, the last word is, or may be, spoken by national 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. Over against the clear principle that the national government is a government of limited powers stands the hard fact that there is no limitation on its authority in relation to state authority that Congress, the president, and the Supreme Court—indeed, merely Congress and the Court—acting concurrently, may not override if they wish. The Congress is restrained in practice, however, by the federal character of the Senate and of our political parties and by the strong disposition toward state power which has long characterized certain sections of the country. Between Congress and the courts, nevertheless, marvelous discoveries of previously unsuspected national power have already been made and others undoubtedly lie ahead.

Other contributions to national supremacy

The supremacy of the national government has been established in practice by other than judicial means. Sporadic efforts at nullification of national laws by states [3] and at secession from the Union have been firmly repelled, the latter by a fierce and bloody war. The development of an interdependent national economy with internal free trade has also played its part in strengthening the hands of the central government in relation to the states. Furthermore, the emergence of the nation into a position of world leadership has presented the nation with a series of problems that only the national government can wisely and legally meet. Finally, the fact that the national executive enforces the laws directly on the people and that states as such may not challenge such enforcement makes the national authority supreme throughout the land in all of the areas it may validly regulate.

## ADMISSION OF NEW STATES

"Original" and "admitted" states

A major contribution to the practice of national supremacy is the fact that 37 of the 50 states were admitted into statehood by actions of the national

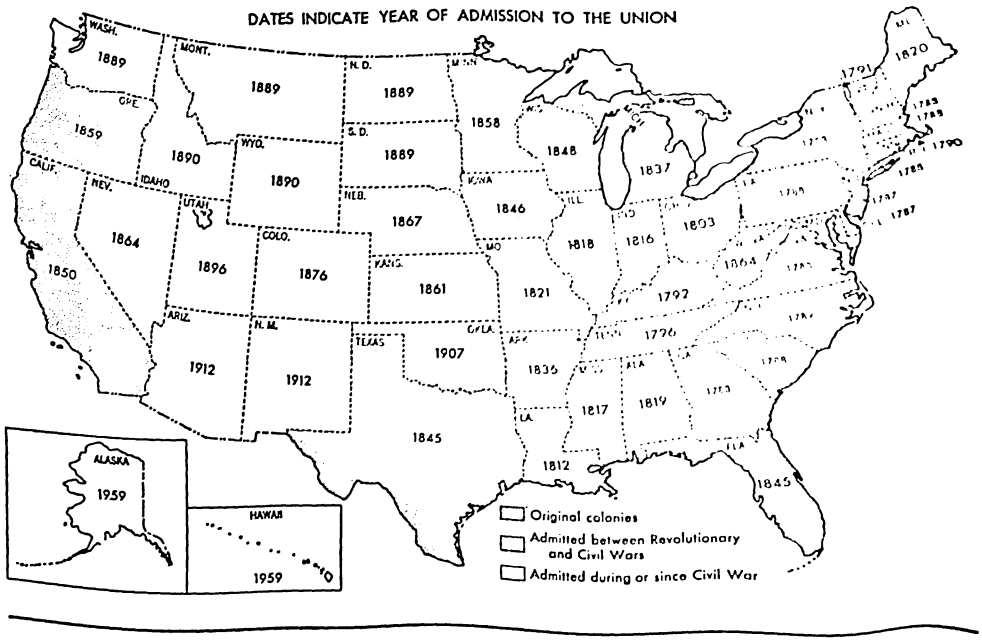
[2] The power to declare acts of Congress unconstitutional was first asserted in the celebrated case of Marbury v. Madison, 1 Cranch 137 (1803). Whether or not the framers intended the Court to exercise this power is still a matter of some dispute. On the whole, however, the evidence seems to indicate that they did.

[3] The resistance of some southern states to the Supreme Court's decision to outlaw segregated public schooling has taken the form of revival of some of the old nullification doctrines under the name of "interposition." The executive branch, however, has attempted direct enforcement of the decision only in Little Rock, Arkansas (1957), and thus far the battle has largely been confined to the judicial arena.

government and 30 of these came to that status after having been territories administered under national authority.

The 13 "original" states became members of the Union by participating together in the Revolution and ratifying the Articles of Confederation and the Constitution. Five states were formed by separation from other states: 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. Texas was an independent republic before its admission in 1845. California was formed—also without passing through the territorial stage—out of a region ceded in 1848 by Mexico.

## OUR GROWTH FROM 13 TO 50 STATES




**Process of admission**

The Constitution confers on Congress general power to admit new states, subject only to the 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. Traditionally, the procedure of admission has been started by the people of a territory, who, if a substantial proportion desire statehood, petition Congress through their territorial assembly or territorial delegate to specify and authorize the steps necessary to be taken so

that the territory may be received into the Union as a state. If favorable to the petition, Congress has passed an "enabling act" under which the people of the territory elected a convention and framed their constitution. If the resulting instrument met the approval of the territorial population when submitted for adoption, it went to Congress for inspection. If Congress, in turn, found it acceptable, all that remained was to pass a joint resolution recognizing the territory as a new member of the Union as soon as its elected senators and representatives were seated. Occasionally (as when a western area ceded by North Carolina became the state of Tennessee in 1796), a territory omitted the initial petition and went at once to Congress with its proposed constitution. In a few instances controversies (e.g., in the case of Missouri over the slavery question and in that of Michigan over a question of boundaries) entailed long delays in the final stages.

The newest members, Hawaii and Alaska, were admitted by a somewhat different process. The Alaskans had in 1956 drawn up and popularly endorsed a constitution to be used if statehood was achieved. In the enabling legislation enacted in 1958, the Congress accepted this constitution but required the Alaskans to hold a public referendum not only on the question of immediate admission but also on the terms of the admission prescribed in the act. When the Alaskan voters endorsed admission, approved the reservation of national property and power contained in the law, and elected their Congressional delegation, then Alaska was admitted by presidential proclamation on January 3, 1959. Hawaii had also adopted a proposed constitution in 1950 and its admission, proclaimed on August 21, 1959, followed the Alaskan pattern.

Special conditions may be imposed

If Congress has found something in the proposed state constitution it disliked, or failed to find something it thought should be there, it communicated its dissatisfaction to the authorities of the territory, either in the form of a suggestion or of a definite requirement to be met as a condition for admission. In the latter event, there was nothing for the territory to do but comply, or wait for a possible change of opinion in the two houses. Without the consent of Congress no territory can become a state, and there is no way to compel that consent. In this manner, several incoming states have been subjected to requirements not imposed upon others. Ohio, for example, was required in 1802 as a condition of admission to agree for five years not to tax any public land sold within its borders by the United States; Nevada, in 1864, to bind herself never to deny the suffrage to persons of color; Alaska in 1958 to allow retention of national control of fish and wildlife resources until the Secretary of the Interior should certify that Alaska had made adequate provision for assuming them. The president, too, can take exception to a proposed constitution, and can veto a resolution providing for admission. Once admitted, however, the state becomes the equal legally of all the others in the Union. It need not thereafter comply with conditions imposed on it that compromise its freedom to manage its internal affairs (Coyle *v.* Smith, 221 U. S. 559, 1911).

## OBLIGATIONS OF THE NATIONAL GOVERNMENT TOWARD THE STATES

1. Protection against involuntary dismemberment

By way of further defining the position of the states in the federal system, the Constitution requires of the national government a number of significant guarantees in their behalf. To start with, that government must scrupulously respect every state's geographical unity and integrity. 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. It may not allow a state to be formed by uniting two or more states or parts of states unless the legislatures of all states affected signify their approval. 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 resting upon the national government is to protect every state against invasion and (when requested) against domestic violence. An invasion of a state by a foreign enemy is, of course, also an invasion of the United States, and the right and duty of the national government to repel such attack is clear, quite apart from any action independently taken, or any request made, by the state or states affected. Repression of insurrections, riots, and other domestic violence is, however, a different matter. One of the things 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 for assistance, national authorities will not interfere, 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 (by the legislature or the governor), the president will comply, unless he is of the opinion that the state can and should handle the situation alone. If national interests are menaced, he may act without invitation and even against the wishes of the state authorities.

3. Guarantee of a republican form of government

A third requirement made of national authority is that it guarantee to every state a republican form of government. Viewing the existing state governments as unmistakably *republican* and assuming that every one would understand what *republican* meant, the constitution's framers attempted no definition of the term. With differences then existing from state to state, it is clear that they did not contemplate requiring any one precise governmental set-up to the exclusion of all others. How much latitude for experimenting in governmental institutions does the Constitution allow?

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, however, say what branch of the national government shall make the decision. In handling cases turning on the nature of republicanism, the Supreme Court has always held that the question is of a political nature, and hence one to be decided not by the judiciary but by the government's political branches. As for the president, he undoubtedly might pronounce the government of a given state to be other than republican and might use force to dis-

possess it. Indeed, in the single instance in which the guaranty clause was invoked prior to the Civil War, the Dorr rebellion in Rhode Island in 1841-42, President Tyler recognized the established government of the state as the rightful government and took steps to aid it against a rival government set up by an insurrectionary element led by Dorr. According to the Court (Luther *v.* Borden, 7 Howard 1, 1849), the really decisive factor in the national government's handling of the Rhode Island problem was the action of Congress in continuing to receive the state's elected senators and representatives. 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 funds gives Congress the whip hand in the matter.

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, the Court would be satisfied (Pacific States Tel. and Tel. Co. *v.* Oregon, 223 U. S. 118, 1912). Congress itself took the sensible view that as long as representative institutions are maintained by a state, it does not matter if they are *supplemented* by occasional direct action by the people.

Tendency to liberal construction

## CONSTITUTIONAL LIMITATIONS UPON THE STATES

To protect the national government in the exercise of its expressly delegated authority, the Constitution specifically imposes a number of limitations upon the power of the states. A number of other limitations have been inferred from the language of the document and from the character of the relations it creates. Some of these are in the nature of civil rights and will be treated in a subsequent chapter on that subject. Several of them, however, bear directly on the nature of our federal system.

The national government is plainly intended to conduct all official relations with foreign nations and the states are consequently forbidden to enter any "treaty, alliance, or confederation." A state may enter into a "compact or agreement" with a foreign state with the consent of Congress, but only if the agreement does not create a political relationship such as an alliance.

1. Foreign and interstate relations

The Constitution does authorize interstate agreements or compacts provided Congress gives its consent. This device for regulating matters of interest to neighboring states or to states in a single region has proved increasingly

Interstate compacts

popular. Although used sparingly in the nineteenth century, the compact has taken a firm hold in this century. More than 100 are now in existence and the device is serving a steadily widening range of interests.[4] Compacts are now used not only for settlement of boundary disputes as of old but for: (1) the development, exploitation, and conservation of interstate water resources, for example, the creation of the Port of New York Authority in 1921 by New Jersey and New York, and the Colorado River Compact of 1922; (2) the stabilization and conservation of other natural resources such as petroleum, wildlife, or fish; (3) the control of floods; (4) the development of interstate toll highways; (5) the co-ordination of higher educational facilities; (6) mutual protection against forest fires; (7) the co-ordination of civil defense measures; (8) the reciprocal supervision of probationers and parolees. The compact has attracted great interest as a method of dealing with certain interstate problems of a regional character without enlarging the expense and administrative responsibilities of the national government. There is currently much support for the device in some quarters, as an alternative to the nationally organized corporation such as the Tennessee Valley Authority, for providing river valley development and control programs.

Congressional consent

The Constitution seems to make all interstate agreements contingent upon the consent of Congress. In practice, however, such consent is not always necessary. As construed by the courts (Virginia *v.* Tennessee, 148 U. S. 503, 1893), 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." Furthermore, where consent is necessary, it may be given either before or after the compact is entered into. Indeed, blanket permission to make agreements on a given subject may be given before any have actually been undertaken. Sometimes, indeed, authority is granted, but no compact actually follows.

2. Defense

In general, defense, like foreign relations, is a national rather than a state function. 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." The restriction, however, does not preclude the states from maintaining organized militia for use primarily in repressing domestic disorder. Such militia have, however, long since been assimilated to the armed establishment of the nation. The states are still free to direct their use inside the state boundaries.

3. Commerce

The most important limitation imposed on the power of the states by the Constitution, excluding only those contained in the Fourteenth Amendment, is the grant of power to Congress to regulate commerce among the states. In the first place, the national courts have defined "commerce" to include virtually every type of movement of persons or things and every type

[4] See F. L. Zimmerman and M. Wendell, *The Interstate Compact Since 1925* (Chicago, 1951), and the biennial edition of the *Book of the States*, Council of State Governments, Chicago, for a full discussion of the interstate compact and a listing of those in effect.

of communication or negotiation whether for business purposes or not. They have defined "interstate" to embrace any such movement across state lines at any stage of a transaction. They have defined the total regulatory power of Congress to embrace any operation or transaction which might affect the "commerce" they have so broadly defined. There are, in consequence, relatively few business transactions in modern America which do not come within the purview of congressional power. Furthermore, all of the navigable or potentially navigable rivers of the country come under national authority by these interpretations. Congress and the courts have left some small freedom to the states to deal with business, transportation, or communication within their boundaries in their own way under the following circumstances: (1) if the enterprise or activity is wholly and exclusively intrastate and does not substantially affect interstate commerce; (2) if Congress has not seen fit to exercise the power it possesses, provided that the courts find that state regulation in these circumstances either is authorized by the Congress or is not inconsistent with the courts' views of national needs; and, (3) if a state regulation in the interests of public health and safety imposes only an incidental and insignificant burden on interstate commerce. The area of state freedom has been progressively contracting by the economic development of the nation, with more and more businesses serving regional, national, and international needs, and by the expanding definitions of the Supreme Court. Congressional and judicial interpretation of the "commerce clause" has, in addition, sharply restricted the taxing power of the states over enterprises, commodities, or transactions in interstate commerce.

4. Taxation:

The power of the states to levy and collect taxes for revenue or regulatory purposes is limited expressly by the Constitution and also by judicial inference from its provisions. In order to assure uniform national impositions on interstate and foreign trade, the Constitution forbids any state, without the consent of Congress, to levy any duty on imports or exports, except for the purpose of financing inspection at terminals or harbors. Such duties, if laid by a state, are subject to validation, revision, or control by the Congress and net proceeds must be turned over to the national treasury. State duties of this type, while collected for a time in the early days of the nation, are now virtually unused. States are also forbidden without congressional approval to levy "tonnage duties," that is, taxes on the cargo or carrying capacity of ships.

a. Export and import duties

b. Tonnage duties

State taxing power is also restricted by the general limitations on states such as those forbidding them to impair the obligation of contract or to deprive any person of property without due process of law, or to deny to anyone the equal protection of the laws.

c. General limitations

One of the most significant limitations on state taxing power stems from a decision of the Supreme Court in 1819 (McCulloch *v.* Maryland, 4 Wheaton 316) written by Chief Justice Marshall in which he asserted that a state could not levy a tax on a national instrumentality. The power to tax, he said, is the power to destroy, and the federal system prescribed by the Constitu-

d. Exemption of national "instrumentalities"

tion did not intend the states to be able to hamper the national government by burdening its agents or functions. Under this general doctrine, the property of the national government has been immune from any type of state or local taxation. This is true even though the property may be leased to private interests for profitable purposes. This policy has worked some hardship in areas where national holdings are vast, such as in the Tennessee Valley. Congress has, therefore, on occasion authorized cash contributions by national agencies to local units of government in lieu of tax revenues lost to the unit by national ownership. The doctrine of national tax immunity also shelters fiscal institutions chartered by Congress and their shares, unless Congress authorizes state or local taxation. Congress has so authorized the taxation of national bank stock and bank property but only under conditions which it imposes. For a time, the Marshall doctrine was construed as protecting the salaries of national employees from state income taxation, but the Congress in 1939 authorized such taxation and the Supreme Court reversed its earlier position and concurred (Graves *v.* People of New York, 306 U. S. 466, 1939). The income from national securities, even when issued to finance farm or business loans, is still exempt from state taxation despite the efforts of the Roosevelt administration to procure congressional authorization for such taxation.

State immunity from national taxation

The states, it should be added, long enjoyed a similar, but not identical, immunity for their instrumentalities from national taxation. Congress and the courts have, however, been steadily narrowing the allowable exemptions from national taxes. And the national government may now tax salaries of state and local employees, state or local property when used for business purposes, and many other state activities. The Court still insists that some immunity remains to the states, but it is not nearly so broad as that remaining to the national government.

5. Currency

One of the advantages the framers hoped to derive from the Union was a common currency system. Hence the Constitution gives the national government full control over the country's currency and forbids the states to coin money, to emit bills of credit (any evidences of indebtedness intended to circulate as money), or to "make anything but gold and silver coin a tender in payment of debts." 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 1865, however, this latter power was stripped of all practical significance by an act of Congress laying taxes up to 10 per cent on such notes and thereby making it unprofitable to issue them. The Supreme Court upheld the measure (Veazie Bank *v.* Fenno, 8 Wallace 533, 1869), and as a result state bank currency has passed entirely out of existence.

6. Contracts

Frightened by Shay's Rebellion and by the continuing threat to creditor interests of the agrarian-debtor-dominated state legislatures, the framers were

determined to place the sanctity of contracts beyond the power of states to diminish. The Constitution, in consequence, forbids any state to pass any law impairing the obligation of contracts. This clause has been especially fruitful in litigation and in pleas for the Supreme Court to overturn state legislation. Early in our history, in two celebrated cases,[5] the Court held that the contracts protected by the Constitution included public grants of land or privilege, including charters or franchises granted to corporations. The effect of this broad interpretation has been mitigated subsequently by judicial exclusion of charters to public corporations such as municipalities, by state legislation reserving the right to alter or amend charters granted by the state, and by judicial acceptance of the idea that the needs of public health, safety, and welfare may override the sanctity of some types of contractual relations. Since 1900 there has been a growing area of judicially accepted state power over contracts and a consequent diminution in the protection to vested interests prescribed by this constitutional prohibition. Even creditor-debtor relations have been invaded by state legislation during the depression of the 1930's—with the approval of the Court. The clause, nevertheless, continues to provide a basis for judicial review of the justification for the exercise of state power. It also stands as a strong bulwark protecting many rights of creditors.

7. Privileges of citizens of the United States

The Fourteenth Amendment forbids any state to make or enforce any law abridging the privileges and immunities of citizens of the United States. Designed to protect the freed Negroes against discriminatory treatment by southern state governments, this clause was early construed to add little or nothing to the existent system of protection of personal rights (Slaughterhouse Cases, 16 Wallace 36, 71, 77, 1893). The Supreme Court has stated that the privileges here protected are those expressly conferred by the Constitution and laws, that are manifestly attributes of national rather than state citizenship. This particular provision of the Constitution has not, thus, imposed any serious limitation on state power.

## OBLIGATIONS OF THE STATES TO ONE ANOTHER

One of the great strengths of the American nation undoubtedly arises from the relative freedom of people and commodities to move about within the national domain despite the 50 separate governments which regulate so many aspects of our society. Among the many factors which contribute to this mobility are the constitutional obligations imposed on the states in their dealings with one another.

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." This means that transactions of government and commerce which are authenticated by valid legal instruments must be recognized and accepted everywhere in the land, regardless of the state in which they originated. Of

[5] Fletcher *v.* Peck, 6 Crandall 87 (1810), and Trustees of Dartmouth College *v.* Woodward, 4 Wheaton 518 (1819).

course, these legal instruments must be duly authenticated in the manner prescribed by Congress. Thus, the courts in Illinois, for example, must recognize and carry out a decision made by a court in Michigan if invited to do so under proper circumstances. Contracts entered into in New York may be enforced in Florida. Corporations chartered in Delaware, and many of them are, must, in general, be admitted to do business in North Dakota. It is not possible to evade legal obligation by the simple expedient of moving out of one state into another. Although the effort to make state laws on commercial transactions more uniform throughout the nation has been gaining headway, there is still a large variation from state to state in these matters. The effect of the constitutional obligation is to require a state to recognize actions properly taken in other states regardless of the fact that such actions may be out of line with the practice in that state.

Divorce decrees

One aspect of this obligation has, in recent years, proved troublesome: what recognition must be granted by strict states to divorce decrees granted in states like Nevada? Two cases in recent years have arisen over the obligation, or lack of it, of North Carolina to recognize Nevada divorce decrees for a couple who took up temporary residence in Reno to obtain the decrees, then married and returned to their home state of North Carolina. The Supreme Court at first held that North Carolina must necessarily recognize the decree, then later said that the parties had not established a bona fide domicile in Nevada and the Nevada court had, therefore, no jurisdiction over them.[6] The latter decision opened the door for states to challenge the validity of divorces granted by other states where the decree had been preceded by only temporary residence on the part of one or both parties. Although in subsequent cases,[7] the Court has appeared somewhat more disposed to enforce Nevada decrees, nevertheless the matter still is in doubt and some groups are sponsoring a constitutional amendment to resolve it.

2. Interstate citizenship

The framers of the Constitution rightly thought that no state should be allowed to discriminate, in favor of its own citizens, against persons coming within its jurisdiction from other states. To do so would jeopardize basic rights common to all of the people and seriously interfere with national unity. Hence it is provided (in a clause carried over almost literally from the Articles of Confederation) that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." In general, 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—occasionally after a certain period of residence—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

[6] Williams *v.* North Carolina, 317 U. S. 287 (1942), and Williams *v.* North Carolina, 325 U. S. 226 (1945).

[7] Sherrer *v.* Sherrer, 334 U. S. 343 (1948); Coe *v.* Coe, 334 U. S. 378 (1948).

nature, for example, 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 admission or the right to move property in or out. Such 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.

3. Rendition

A third obligation resting upon each 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." The object is, of course, to prevent criminals from "beating the law" by taking refuge on soil over which the state from which they have fled has no jurisdiction. 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 differences, however. Rendition of fugitives in the United States is based upon the Constitution, not upon interstate treaties; states, typically, give up even their own citizens on proper demand; there is no rule against trying a fugitive for some other offense than that for which his return was demanded.

Procedure

An act of Congress specifies that after the accused has been properly indicted, the demand for his return shall be addressed to the executive of the state into which he has fled and by which he has been captured. The governor, if he chooses to honor the request, then returns the fugitive to the police officers of the state making the request. Governors, in practice, have not always elected to honor such requests. The announced reasons for the occasional refusals are usually that the individual has become a law-abiding citizen of his new state in the meanwhile, or that (in case of Negroes demanded by southern states) he may not expect a fair trial in the state making the request, or that there is not sufficient evidence against him. Despite the mandatory language of the Constitution and the laws of Congress, there is no legal way to compel a reluctant governor to act. The Congress, however, has made it a national offense (Fugitive Felon Act of 1934) for a person to flee across a state line to avoid prosecution or to escape appearing as a witness in a criminal case.

## DISPUTES BETWEEN STATES

Modes of adjustment

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 (1) direct agreements reached through negotiation, (2) arbitration undertaken by some neutral ruler or similar authority, (3) adjudication in an international court, or (4) in the last resort, 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 direct negotiations. But the method of settlement chiefly contemplated by the Constitution's authors was that of judicial determination. 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 provision that in all cases in which a state is a party (regardless of the identity of the opposing party) the Supreme Court shall have original jurisdiction. The road to amicable adjustment of interstate differences by regular judicial process is thus always open, and many troublesome disputes over boundaries, water diversions, fishing rights, and other matters have been cleared up by resorting to it.

## CHANGING NATIONAL-STATE RELATIONS

Two characteristics of the American federal system should now be apparent: (1) it is a marvelously complex piece of governmental machinery depending upon thousands of daily adjustments by all branches of all levels of government for its smooth functioning; and (2) the relations between the two centers of power—nation and states—are dynamic, not static. They cannot be settled once for all times but must be readjusted and reshaped by each generation to meet the changing needs of our society.

Growth of national power

The federal system we have today is quite different from that of 1800. The most significant difference is the present extent of the power, influence, prestige, and importance of the national government compared to the state governments. Throughout the generations which separate us from the architects of our system of government, the central government has burgeoned and spread its influence until it far overshadows the states. In part, this is a reflection of the growth of all governments in our society, for the states and the local communities are also more costly, more influential, and more pervasive than ever before. The rise of the national government, especially since 1861, has, however, been so remarkable and so great that it has left the states far behind. How has this come about?

The change in national economy

Many factors have worked together to produce the situation. The most important of these has been the change in the national economy. When people lived mostly on farms, in villages, and in small towns, along the Atlantic seaboard, their interests were largely local, and most needs for government on any higher level were met by the states. To be sure, a national government was necessary for some purposes—to conduct foreign relations, to co-ordinate defense, to regulate interstate commerce. But, relatively, the government over which Washington and Jefferson presided had little to do. In time, however, the country expanded to include the Louisiana territory, the regions thence

westward to the Pacific and eventually Alaska and islands of the seas. Population increased rapidly. Cities developed; industry was built up; railroads penetrated the great West; wealth increased; life became more complex; state lines were increasingly transcended. Gradually what had been an association of more or less isolated and self-sufficient states became a far-flung and highly interdependent nation, with more and more matters demanding management on national lines. Commerce, transportation, communication, linked the country from coast to coast. So did corporations, holding companies, labor unions. At first the states tried to cushion the shocks of this rapid change in our mode of living from agrarian isolation to urban industrial interdependence. They were unable to cope with institutions and problems which transcended their boundaries and their resources. People demanded services that states could not—or did not—provide. With the misery created by recurring economic depression, the states repeatedly proved they were largely unable to deal. And step by step—significantly, too, with general public approval—the government at Washington assumed responsibility for regulating what had become a national economy and protecting the individual from its uncertainties and insecurities. In this century, America became a more consequential part of the world. Our produce flowed out in greater and greater volume to distant lands. We became self-conscious of our potential power and wished to take a place in the world of great powers. Threats to our position stimulated engagement in great wars and the exigencies of military strategy spread the national power throughout the fabric of our society. Some did not and do not like what has been happening, but there was little they could do about it. By building a big, populous, and highly industrialized country in an age of swift technological advance, Americans made big, centralized government both necessary and inevitable.

The doctrine of implied powers

The national government, as arbiter of the limits of national power, has occupied the key position subtly to mold the constitutional fabric to meet the needs of a great industrial nation. We have noted that interpretation rather than formal amendment has been the preferred method. We have observed how a broadening definition of interstate commerce and national power over it has supported demands for national action in the field of economic regulation. One of the most useful tools of constitutional interpretation in favor of national power remains to be mentioned: the doctrine of implied powers.

a. 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, Hamilton, as secretary of the treasury, proposed the establishment of a national bank. His opponents 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 replied that while the Constitution truly enough did not 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—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, 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." The Hamiltonian view prevailed, and the bank was established. Opinion on the matter, however, continued divided.

b. Opposing views

Led by Jefferson, the strict constructionists argued that the national government had no powers except those that were expressly conferred upon it in the Constitution, or, at most, those that could be shown to be indispensably involved in the exercise of the expressly delegated powers. To take a single step beyond the boundaries "specially drawn" around the powers of Congress by the Tenth Amendment, urged the Virginian, "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.

On purely legal grounds, Jefferson's argument was plausible. He was clearly 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 Hamiltonian view was the more practical. 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. After they gained control of the government in 1801, it was not long before they were invoking implied powers almost, if not quite, as freely as had their Federalist rivals.

c. 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 inferred—gave the Hamiltonian 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 (4 Wheaton 316), 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.

The principles here laid down gained general acceptance and are 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 government regulation, the implied-powers concept is nowadays applied in directions and in situations of which Marshall and his colleagues never dreamed.

d. Legislative and judicial action

With implied powers as a mighty lever, national powers have been expanded by legislation, backed by judicial action. In great fields like finance, commerce, agriculture, labor, defense, and social security, Congress often has started with the most meager phrases in the Constitution's text, or indeed with none of direct application at all, and, spinning a web of inference and deduction, has projected regulating authority into the deepest recesses of the national life. The courts have followed, hearing objections, weighing the validity of powers asserted, and usually, although of course not invariably, giving the stamp of approval, and perchance of finality, to new national-state frontiers.

National financing of state and local activities

The most powerful device in this century for reshaping national-state relations has been the "grant-in-aid" system of national financing of state and local activities. Grants by the national government to the states are no novelty; on the contrary, they go back almost to the beginning of our national history. Starting with Ohio in 1802, Congress made a regular practice of bestowing on newly admitted states public land to be used for the development of permanent school funds. In the famous Land Grant College (Morrill) Act of 1862, it set aside still more land for the benefit of the states, specifying that the proceeds should be used by each to endow and to maintain 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." Funds derived from this source continue to contribute to the support of many of our "land-grant" colleges. 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 modern pattern of conditional grants

In recent decades, a new form of *conditional* grant has been devised and used widely, and it is this new form that has enlarged national power. Referred to commonly as a "grant-in-aid," its cardinal principle is that Congress will grant money to the states, on four conditions: (1) that the state shall spend the national money only for the exact purpose indicated 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, but sometimes more, sometimes less, and occasionally none at all); (3) that the state shall maintain a suitable administrative agency—highway commission, extension director, vocational education board, or whatever it may be—with which the national government can deal in connection with the activity to be carried on; and (4) that in return for the assistance received, the state shall recognize the national government's right (with suitable regard for local conditions) to approve plans and policies, interpose regulations, fix minimum standards, and inspect results. Often, of course, it has been necessary for states to enact new legislation in order to qualify for sharing in a given grant. Usually administrative machinery has been 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. Ostensibly, no 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 subsidy. 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 national authority, presents. Compliance by the states is, however, less voluntary than appears. The national 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 do participate. The same considerations that initially induce a state to accept its share of a grant commonly impel it to live up to the standards and specifications required rather than run the risk of having its subvention withheld. Virtually all existing forms of grants-in-aid are in practice shared in by all of the states.

**Expansion of grant-in-aid procedure**

Beginning in 1887 with cash grants for the maintenance of agricultural experiment stations in the states, the national government through the modern grant-in-aid program has steadily reached out to direct ever larger areas of state and local action. Forestry was added to agricultural research and education as an object of grant-in-aid in 1911, highways in 1916, vocational education in 1917, health in 1918, social welfare in 1935, airports and hospitals in 1946, and libraries in 1956. From 1895, with the requirement of national audit of state expenditures under the agricultural experiment station program, the amount and character of national administrative supervision of state agencies has also steadily expanded to the point that under the social welfare aid legislation of 1935 even the personnel policies of state agencies spending national funds come under national review. Furthermore, the dependence of the state governments upon income from this source to finance their operations has progressively become greater. In recent years the national payments have averaged more than 13 per cent of total state receipts from all sources. Finally, the total demands on the national budget made by the grant-in-aid programs have risen from $33 million in 1920 to almost $3.3 billion in 1957.

The end of this period of expansion in national financing of state and local functions is not yet in sight. For example, there is a mounting pressure for national financing of general public education.

**GROWTH OF REGULAR NATIONAL GRANTS-IN-AID TO STATES AND LOCALITIES, 1902-1957 ***

**(Excludes emergency grants, shared revenues, loans, and special payments to one or a few states)**

**(In thousands)**

| *Program* | *1902* | *1912* | *1920* | *1930* | *1940* | *1957* † |
|---|---|---|---|---|---|---|
| Highways | — | — | 20,306 | 77,891 | 153,379 | 954,732 |
| Airports | — | — | — | — | — | 20,629 |
| Agric. Experiment Stations | 786 | 1,593 | 1,440 | 4,335 | 6,848 | 28,829 |
| Agric. Extension | — | — | 4,472 | 7,540 | 18,448 | 49,787 |
| "Land Grant" Colleges | 1,200 | 2,500 | 2,500 | 2,550 | 5,030 | 5,051 |
| Vocational Education | — | — | 2,107 | 7,385 | 19,299 | 37,582 |
| School Lunch | — | — | — | — | — | 97,790 |
| Vocational Rehabilitation | — | — | — | 736 | 2,125 | 34,228 |
| Public Health & Hospitals | — | — | 1,759 | — | 13,689 | 54,742 |
| Maternal & Child Welfare | — | — | — | 10 | 9,545 | 38,251 |
| Public Assistance | — | — | — | — | 279,181 | 1,556,422 |
| Unemployment Compensation & Public Employment Service Administration | — | — | — | — | 61,702 | 248,315 |
| Public Housing—Annual Contribution | — | — | — | — | — | 86,687 |
| Forestry | — | — | — | 1,318 | 2,212 | 10,831 |
| Public Libraries | — | — | — | — | — | 1,440 |
| Miscellaneous ‡ | 1,015 | 1,162 | 1,302 | 725 | 2,200 | 37,685 |
| *Total* | *3,001* | *5,255* | *33,886* | *102,490* | *573,658* | *3,263,001* |

* Figures 1902-1940 from Council of State Governments, *Federal Grants-in-Aid* (Chicago, 1949), p. 32
† Figures 1957 from Budget for 1959.
‡ Includes aid to state homes for veterans, to marine schools, and for wildlife restoration.

National financing of local services

The grant-in-aid procedure has, furthermore, reached beyond the states down into the local units of government. Direct fiscal and administrative relations have been established between the national government and cities and counties in such programs as housing and airport construction. For a time during the depression, local relief and public works programs were also supported by national funds. In these programs the state government has been bypassed to link national and local units of government together.

Results of aid program

The result of this twentieth-century development has been to cast the states and their local units into a new relationship of subordination to the national government. The states are today for those programs involving national

financing largely administrative subdivisions of the national government. Although they are subdivisions of a novel kind—a good deal of autonomy of method and objective is permitted—nevertheless they are more dependent upon national money and more susceptible to national control than ever before in our history.

Criticisms of the grant-in-aid system

Over the years, the grant-in-aid policy has been opposed vigorously. It is argued that: (1) under it the national government practices a species of bribery, that is, in effect buys the right of prescribing and supervising activities over which it otherwise would have no control; (2) the system coerces the states (however gently) into overloading themselves with expenditures and obligations; (3) in addition to depriving the states of their proper powers, it engenders the habit of relying on Washington handouts and encourages the demoralizing notion that the government at Washington can and should solve every social and economic problem in the land, and if adhered to means "the gradual breakdown of local self-government in America"; (4) "national aid" is a misnomer, since all that the central government does is 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 redistribute it—with the value of the dollar exchanged greatly decreased through administrative expense; (5) returns to the states are in very different proportions from contributions made, with more prosperous states compelled to bear most of the burden and progressive ones penalized for the benefit of backward ones; (6) with revenues substantially increased in recent years, states now have less excuse than in depression time for seeking national "handouts"; and (7) if grants are 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 and without accounting to any national authority. In large measure these criticisms are made by the Republicans rather than the Democrats and by state officials rather than congressmen.

Defense of the system

Defenders of the grant-in-aid programs and procedures respond to these criticisms by arguing that: (1) the system encourages the states to undertake social services which many of them otherwise would ignore or feel that they could not afford; (2) it enables minimum national standards to be set up in fields of social and economic regulation in which the people of the entire country have a vital interest; (3) it divides burdens which states often are unable to bear alone, quite justifiably requiring the richer states to help the poorer ones improve conditions in which all have a common concern; (4) the initiative and responsibility left to the states is sufficient to keep the system elastic and prevent dictation from Washington; (5) opposition to national aid for socially desirable activities sometimes is merely a disguise for opposition to the activities being undertaken at all; (6) legally, at least, no state is obliged to subject itself to the operation of the system unless it desires to do so; and (7) in the final analysis, the grant-in-aid system is the only alternative to an enormous expansion of direct national control in ways that would be still more damaging to state power and pride.

Conclusions

It seems clear that whatever the merits of these conflicting views the grant-in-aid system is here to stay. No national administration has attempted seriously to abandon any of the aid programs, and it is doubtful if Congress would concur if one should hereafter attempt to do so. In each program the aid system has been resorted to usually after other expedients have failed and, typically, only after a substantial segment of the population has demanded national action. There is no doubt, however, that the conditional grant method diminishes the autonomy of state executives and legislatures and enhances the power of state and national administrative agencies. Some method ought to be devised to limit the erosion of the authority of the politically responsible parts of the state government and to give them more general control over dealings with the national government. Republican party leaders have been especially critical of the growth of the grant-in-aid system. In 1953, when they gained control of the national government, they authorized the creation of a Commission on Intergovernmental Relations to evaluate the system and, it was hoped, recommend its curtailment. However, the report of this Commission, delivered in 1955, contained no proposals for drastic changes in the present system but rather accepted the aid system as fundamentally sound and recommended changes of a relatively minor nature.[8]

## THE OUTLOOK FOR THE STATES

The role of the states

What then is the future of the states? Are they to be completely overborne by the advancing might of the national government? Have they or will they become but provinces in a great centralized colossus of governmental power? In the first place, it must not be overlooked that the states too within their boundaries are more powerful than once they were. They perform more services, employ more staff, spend more money, and have a greater impact on the lives of their citizens than they ever have done. They are not dying but are growing and expanding. All talk of the weakness, helplessness, and moribund character of state governments is at odds with the facts. There are, it is true, several of our most pressing problems—economic security, international peace, and military preparedness—with which the states cannot cope. As public interest has centered in them much of the time recently, the activities of the states may have been forgotten or ignored. In the second place, the states, as we shall presently observe in more detail, are vital parts of our system of political parties. Our great national parties are not highly centralized at all but are more nearly federations of state party organizations. In the states, the parties practice their tactical exercises; leaders are trained

[8] *Report of the Commission on Intergovernmental Relations* (Washington, 1955). This report, together with the staff studies of the various subcommittees, is the most comprehensive account of contemporary national-state relations now available. Again in 1957, President Eisenhower named a new committee of national officials to work with a committee of governors named by the National Governors Conference in developing proposals for returning certain functions and fiscal resources to the states. Meanwhile, the Eisenhower administration has substantially expanded many of the aid programs in existence when it took office and has curtailed none.

in the ways of democratic statecraft; workers energize the electorate into participation in the processes of self-government. The states, further, provide testing grounds for embryonic statesmen. Many congressmen gained their experience of popular lawmaking in state legislatures; the governor's offices have frequently tested candidates for the presidency; the state courts supply recruits for the national judiciary. The states too are our greatest laboratories for experimenting with new ways by which the government can serve and enrich the lives of our people. From their experience, the nation has saved itself numerous failures and heavy additional costs. The states even today, assume the heaviest responsibilities for the leadership, the costs, and the day-to-day services in education, law enforcement, rehabilitation of criminals, care of the mentally ill, construction and maintenance of our far-flung system of highways, protection of wildlife, regulation and supervision of the entire election process, and many other areas of major public concern. The states of the United States have a useful and important life ahead of them. Our federal system, although different from that of Jefferson, is still one of partnership between nation and states. One partner has gotten very big and one somewhat bigger, but the smaller partner is quite active and extraordinarily useful.

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# CHAPTER 4

# *Civil Rights and How They Are Protected*

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed.—Declaration of Independence

**Two opposing theories of government**

Nothing quite so appropriately characterizes the deep ideological gulf separating the leading members of the Atlantic community from the Iron Curtain states or from the totalitarian aggressors of World War II as their various conceptions of the proper relation between the individual and his government. Emphasizing the dignity and worth of the individual, the people of Great Britain, France, the United States, and other Western nations regard government as resting on the consent of the governed and ascribe to even the humblest of citizens a sphere of personal liberty which no state authority, however organized, can impair. Everything that is valuable in this earthly realm, they assert, is created by individual effort and this creativeness requires a large measure of freedom in order to bear fruit. The state they regard as the traditional enemy of individual development and hold tightly to the conviction that its power over individuals must be confined by effective constitutional machinery and fair and workable legal procedures. The communists and authoritarians of other shades practice, if they do not subscribe to, the conception that it is enough for the state to serve man. It is neither necessary nor desirable that he possess any right to develop in his own way. The individual has neither right nor destiny apart from that of the group of which he is a member. He must and should conform his behavior and his thoughts to what his rulers have determined group welfare requires. To be an effective instrument of group welfare, the state must not be restricted in any significant way.[1]

[1] For a time after World War II had brought disaster to the more strident dictatorships of Europe and Asia it seemed as if the Western nations might bring much of the world to accept their ideas of human dignity. In Article 55, the United Nations Charter proclaimed the principle of "universal respect for and observance of human rights and fundamental freedom for all without distinction of race, sex, language, or religion." The United Nations General Assembly in Paris in 1948 adopted a Universal Declaration of Human Rights and an International Covenant of Human Rights was prepared several months thereafter and submitted to the General Assembly for ultimate transmission to the member states as a treaty. Since that time the matter has more or less languished. The ardor of the West has cooled somewhat as the underdeveloped areas pressed for the inclusion of economic and social rights as well as civil and political ones. In the United States, a strong contingent of senators has repeatedly evidenced hostility to American ratification of any such covenant. The Eisenhower administration has indicated that it has no intention of asking Senate ratification of the Covenant.

American ideals not easily reconciled

Each of the Western democracies has developed its own institutional arrangement to embody these great ideals of freedom. In the United States, we place our faith in the democratic process by which our officials are chosen and in the constitutional recognition of and protection of civil rights. These two facets of the American system are not easily harmonized, however. The democratic process is predicated upon the idea that the scope and direction of governmental effort will be determined by the majority and in this process each participant is equal to every other one. The constitutional system of civil rights is predicated upon the idea that there are some personal liberties which even majorities may not infringe and that a semi-independent and politically irresponsible judiciary is essential to enforce these limitations. It is hard for the American people to conceive of genuine citizen participation in the processes of government without freedom publicly to criticize, explore, and discuss the problems of the day. For the exercise of free speech, they are nevertheless dependent upon a judicial rather than an electoral procedure. Another area of conflict between the two notions concerns the rights of property. In the late nineteenth and early twentieth centuries, one of the major battlegrounds of American politics concerned the question of whether property rights were, equally with personal rights, immune from governmental infringement. A strong and vigorous argument in behalf of property rights issued from those who maintained that the practice of personal freedom depended upon the sanctity of property and an equally insistent claim for governmental regulation from those who maintained that personal freedom was enhanced by restrictions on property. In this conflict judicially enforced restraints upon government came into disrepute with those who claimed the most progressive democratic ideals. More recently, judicial efforts to widen the sphere of personal liberty have been staunchly defended.

Renewed concern for civil rights

The rise of the continental dictatorships both red and black has stimulated in America a renewed appreciation of the importance of civil rights. The present generation is witnessing some of the liveliest agitation on the subject since Reconstruction days. As leader of the free world in promoting the conception of human dignity, the nation is faced with the question of whether its own practice corresponds to the ideals it professes. There is a growing insistence on a better and more broadly conceived application of the traditional *restrictions upon government* in the interest of personal liberty and a mounting demand for *positive governmental exertion* to achieve a more adequate realization of these ideals.

As early as 1941, President Franklin D. Roosevelt, in a message to Congress, sought to redefine prevailing concepts, bracketing freedom from want and freedom from fear with the more traditional freedom of speech and religion as rights to which men everywhere are entitled. Attention was directed to a number of concrete conditions and practices widely regarded as calling for remedy. Early in 1947, President Truman, responding to growing public concern, set up a Committee on Civil Rights, the report of which—"To Secure These Rights,"—is rated as one of the great public documents

of our time. On the basis of this report, Mr. Truman early in 1948 transmitted to Congress a strongly-worded message affording a blueprint for bringing our civil-rights system into better accord with our professions. Included in the President's program were a number of proposals calling for governmental action to promote the enjoyment of rights, thus going far beyond the traditional view that governmental action poses the chief threat to such rights.[2] Later in the same year, both major parties adopted platform declarations on the subject, the Democrats after a convention fight resulting in a walkout by 35 incensed Alabama and Mississippi delegates and a party split in the ensuing campaign. Platform declarations were made again in 1952 and in 1956, the Democrats soothing over internal dissension by more diplomatic and evasive language.

The Civil Rights Act of 1957

Repeated urgings by Truman and to a lesser degree by Eisenhower bore no significant legislative fruit until 1957 when the first national civil rights legislation since Reconstruction days was passed. Under the Civil Rights Act of 1957, a temporary bi-partisan Civil Rights Commission of six members was established in the executive branch to: (1) investigate alleged deprivations of rights by citizens; (2) study all legal developments that involve denials of equal protection of the laws; and (3) appraise the policies of the national government relative to equal protection. This Act also strengthened the powers of the Department of Justice to intercede to prevent threatened or accomplished deprivations of voting rights of citizens.

The Civil Rights Act of 1960

A second act passed in 1960 gave the Attorney General even more authority to try to prevent capricious and biased administration of voting requirements. Courts were authorized on proper motion to appoint local referees to inquire into "patterns of deprivation of voting rights" and to report findings to the court for actions leading to enrolling the individuals as voters.

In this chapter we shall consider both the traditional and the emerging conceptions and practices in the field of civil rights. Greater attention will be given to those that have already achieved constitutional recognition and judicial, administrative, or legislative implementation.

## THE TRADITIONAL AMERICAN SYSTEM OF CIVIL RIGHTS

How civil rights arise

All of the governments operating in the United States are conceived by our citizens as having only limited powers. The people who created and those who continue to support these governments have withheld from them power to invade the sphere of private liberty which is believed to surround

[2] For the text of this message, see C. L. Rossiter, *Documents in American Government* (New York, 1949), 64-74; also *N. Y. Times*, Feb. 2, 1948. Ten legislative objectives expressly enumerated included: (1) fair employment practices, barring discriminations on grounds of race, color, and the like; (2) national protection for the right to vote, with poll-tax requirements abolished; (3) national protection against lynching; (4) end of discriminations in interstate transportation facilities; (5) home rule and presidential suffrage for residents of the District of Columbia; and (6) statehood for Hawaii and Alaska.

each one of us. It is out of this denial of authority that civil rights spring and find their tangible expression in the "bills of rights" of our state and national constitutions. These rights expressly recognized in constitutions are enjoyed as against the government and can be transgressed only by governments. There is as yet no constitutional recognition that rights of this kind may be asserted as against deprivation by private citizens. There is, however, a growing body of statute law aimed at punishing discrimination practiced by private individuals.

The federal system and civil rights

Constitutionally recognized civil rights are not identical—although nearly so—throughout the length and breadth of the nation. Our federal system introduces many variations in the pattern of rights. There are rights—for example, "the privileges and immunities of citizens of the United States"—that can validly be claimed only by national citizens. There are others that are assigned only to state citizens—by state laws and constitutions. There are still others to which all "persons"—natural or artificial (corporation), citizen or alien—are entitled. Some rights may be properly invoked only against the national government; others may be invoked against the states; and still others against both. Of those which may be claimed against state action, some are based on the prescriptions of the national constitution, others on the provisions of state constitutions, and still others on the absence of any express or implied grant of authority to any government.

Rights nationalized

Since the Civil War, and especially since 1925, there has been an unmistakable trend toward centralizing the guarantees of many civil rights in the national government. During the first half-century of our national history, the bill of rights embodied in the first 10 amendments to the Constitution was construed (as plainly had been its intent) as restricting the national government only. The states enjoyed a good deal of latitude for interfering with personal liberty (maintaining slavery, restricting freedom of religion, speech, and press, tolerating judicial processes now generally discarded, and imposing other restraints forbidden only to the national government). There was, thus, a dual system of civil rights and a very wide divergence between rights that were national and those that were state. The Civil War amendments mark the change in this policy—the Thirteenth making it impossible for a state to legalize slavery, and the Fourteenth going much further by forbidding a state (1) to make or enforce any law abridging the privileges or immunities of citizens of the United States, (2) to deprive any person of life, liberty, or property without due process of law, or (3) to deny to any person within its jurisdiction the equal protection of the laws. The broadening of national power to guarantee civil rights which these amendments made possible was, however, realized but slowly. For almost half a century, the Supreme Court construed the Fourteenth Amendment's mandates so narrowly that no great changes resulted. In the 1920's, however, at a time when state legislatures were attempting restrictions upon freedom of speech, press, and teaching, the Court began "discovering" the Amendment and declaring its full impact upon the states. In 1925 it affirmed free-

dom of speech and of the press to be "among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states" (Gitlow *v.* New York, 268 U. S. 652). When in later decisions the same view was asserted of religious liberty and freedom of assembly, there arose a single (and nationalized) system of rights in the four great areas mentioned. In the area of judicial procedures, rights nationally protected and those state protected still differ significantly.

No full enumeration possible

Another characteristic of the American system of rights is that it is impossible to compile a complete and definitive list of the civil rights to which each of us is entitled. If we turn first to the Constitution we discover—chiefly in the first eight amendments—a long and impressive list, followed, however, by the baffling provision of the Ninth Amendment that "the enumeration . . . of certain rights shall not be construed to deny or disparage others retained by the people." What others? No man can say conclusively. Similarly, we find in all of the state constitutions articles and sections comprising bills of rights, but in no instance any indication that the rights mentioned form an exact and exhaustive list. Quite the contrary. The Supreme Court, speaking of guarantees contained in the Constitution, has said that interpretation of them must be "a gradual process of judicial inclusion and exclusion." By the same gradual process of legislation and executive action and public discussion rights are being broadened and redefined all of the time.

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 utter or publish slander or libel or to incite persons to crime or panic; freedom of assembly does not entitle any group to interfere with public order and safety. To be validly claimed, a right must be exercised so as to cause no impairment of the same or any other right possessed by others. The attempt to apply this principle, however, catapults us immediately into all of the major controversies of civil rights. If it is carried to extremes, it spells the end of any rights at all.

Civil rights in war

The history of the United States teaches us that the emphasis on public order and safety is likely to grow with a concomitant reduction in the area of allowable individual liberty when the nation is engaged in or feels itself threatened by war. Although, legally speaking, constitutional rights are not created or suspended by "national emergency," they are, in practice, sharply curtailed and, typically, with both electoral and judicial consent. Since 1939-40 this nation has been living through just such a period of real or supposed emergency. Although technically at peace since 1953 and from 1945-51, the fear of Soviet Russia has mounted to such intensity that restrictions have been piled upon restrictions until the sum total of prohibitions of various kinds of expressions and activities is probably as great as has existed at any time in our history. It is certainly greater than those existing during the actual fighting in the period 1941-45.

Civil rights which have received legal or political recognition in America may be classified into (1) those dealing with personal liberty, (2) those dealing with fairness in governmental procedures, and (3) those dealing with property.

Civil rights classified

## RIGHTS OF PERSONAL LIBERTY

> 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.--Thirteenth Amendment

1. Right to personal security

"Freedom can exist," says the President's Committee on Civil Rights, "only where the citizen is assured that his person is secure against bondage, lawless violence and arbitrary arrest and punishment." [3] No general immunity from personal servitude was legally recognized in the United States until the adoption of the Thirteenth Amendment in 1865. Since that time, slavery in all of its forms has been eliminated. This amendment has been interpreted to mean that a laborer cannot be compelled to work out a debt in his employer's service.[4] National statutes as well as several state constitutions and statutes forbid peonage in this or any other form, and several state constitutions also prohibit imprisonment for debt. A person may, however, validly be held to the completion of a term of service for which he has contracted (a sailor, for example) and may also be conscripted for military, police, jury, or highway laboring duty. These latter are considered appropriate exercises, of governmental power and do not, therefore, involve "servitude."

Mob violence and intimidation

The most serious problems of personal security in the nation today are those resulting from private individual or group violence or intimidation. The concept that constitutional guarantees are aimed at official or governmental actions has acted as a barrier to effective national action to suppress such private behavior. It is argued that keeping the peace is exclusively the province of the state authorities and that if they are unable or unwilling to act nothing more can be done. For a time, after the Civil War, the national government took the position that it could and should use its authority to prevent intimidation and to guarantee to the Negroes the new status which Northern forces sought to win for them. In a series of acts (Civil Rights Acts) passed between 1866 and 1875 national officials were authorized to prevent intimidation of or violent assault upon American citizens. The Supreme Court and later the Congress, however, returned to the older view that it was constitutionally unsound and politically unwise to authorize national regulation

[3] *To Secure These Rights* (Washington, D. C. 1947).

[4] Laws of Georgia, Alabama, and Florida permitting this form of compulsion were invalidated by the Supreme Court as recently as 1942 and 1944. Peonage cases occasionally cropping up elsewhere further indicate that involuntary servitude still tends to persist locally—a situation of which the President's Committee on Civil Rights took due notice. A Workers Defense League devotes itself to ferreting out instances of the kind, particularly in the southern states.

of private behavior toward the Negro. The demand for positive national action to guarantee personal security has, however, been voiced with new vigor and assurance in the past three decades. Congress has repeatedly been urged to enact laws against lynching and to strengthen the remnants of the old civil rights acts, so as to secure effective national intervention in cases of intimidation or coercion. For a time, it seemed that racial tensions and the accompanying violence and intimidation were declining. Lynching virtually disappeared. The effort to mix the races in the public schools has, however, led to new assaults on personal security and to new tensions between the races. Congress has, nevertheless, been unwilling to accept the pleas of those who want national laws and national intervention to guarantee rights against private assault. The executive branch has also been unwilling sharply to depart from the traditional paths. In the debates on civil rights legislation in 1957 and 1960 the Eisenhower administration and many of the Northern Democrats wanted to authorize intervention by the Department of Justice in school desegregation incidents. The Southern leaders were, however, adamant and national power to intervene was not augmented except in the case of denials of voting rights. The present policy is to intervene under the existing laws in cases involving abuses by public officials (police brutality, for example) but to refrain from intervention in school or other disorders unless invited by the local officials or ordered by a national court to do so.[5]

An illustration of the lengths to which curtailment of the rights of personal security will be tolerated in a wartime atmosphere is provided by the wholesale, compulsory relocation of 110,000 Japanese-Americans (citizens as well as aliens) from the West Coast in 1942 by congressional and executive authority with the approval of the Supreme Court and without trial.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .—First Amendment

2. Right to religious freedom

Freedom of religious worship is guaranteed against national legislative impairment by the First Amendment and against state impairment by the prevailing interpretation of the Fourteenth Amendment. It is also guaranteed against state restriction by the constitutions of the states, although not always in identical terms. By these guarantees individuals are, in general, free to cherish such religious convictions as they please, to declare them publicly, to seek converts to them, and to engage in whatever forms of worship they prefer. These guarantees do not, however, confer any exemption from the criminal laws of the land, for example, to practice polygamy or to extract fees from the gullible for occult cures.

[5] The arrest of the leaders in the Clinton, Tenn. violence of 1956 by national officers resulted from a court order as well as an invitation from local authorities.

Jehovah's Witnesses

Religious beliefs, on occasion, come into conflict with cherished norms of conduct as well as with governmentally ordained principles of safety and order. In recent years the vigorously nonconformist sect known as Jehovah's Witnesses has repeatedly raised issues of this kind. This sect attracted national attention several years ago when it denounced the practice of saluting the American flag as idolatry and refused to allow its children to join in the ceremony in school. At first the Supreme Court upheld the right of local school authorities to exclude these children from school (Minersville School District *v.* Gobitis, 310 U. S. 586, 1940). Then it reversed itself and declared such expulsion invalid (West Virginia State Board of Education *v.* Barnette, 319 U. S. 624, 1943). The strident anti-Roman Catholic tenor of their literature and preaching, coupled with their penchant for street corner and house-to-house solicitation, have stimulated a number of communities to attempt to curtail the Witnesses by local ordinances or police regulations. A number of such efforts have been brought to the courts with varying results. On the whole, religious canvassers have been given a rather wide latitude to proselytize without licensure or payment of fees so long as they are careful to keep the streets free and to observe other local regulations governing public meetings in public parks or on public thoroughfares.

Subsidization of parochial schools

The right of religious bodies to establish and maintain their own schools and thus to avoid compulsory public school attendance has long been recognized.[6] In recent years, the related problem of subsidizing religious schools from the public treasury has come increasingly into prominence. In a number of states (Wisconsin, for example) the state constitution forbids subsidy of any kind (books, transportation, buildings, etc.), but in some (New Jersey, for example) the practice is expressly sanctioned by law or constitutional prescription. A few years ago the United States Supreme Court was invited to declare state subsidy of parochial school pupil transportation, a violation of the religious freedom guarantees of the Constitution. In a close and vigorously contested decision, the Court ruled that states could validly subsidize private schooling if they wished to do so. (Everson *v.* Board of Education of Ewing Township, 330 U. S. 1, 1947). The question of religious freedom was not involved but rather one of public benefit, said the Court majority.

Religious instruction in the public schools

Religious education in the public schools, long a sensitive nerve in the anatomy of free public education, has repeatedly been touched in recent years by controversy. The sharpest jar to widely accepted practices came in 1948 when the Supreme Court declared that an Illinois practice of offering religious instruction to willing children by various denominations in the school buildings on time "released" for the purpose by the school authorities was inconsistent with the principle of separation of church and state imbedded in the Constitution (Illinois *ex rel.* McCollum *v.* Board of Education, 333 U. S.

[6] An Oregon law undertaking to suppress all private schools for children between the ages of 8 and 16 was promptly invalidated in 1925. Pierce *v.* Society of Sisters of Holy Names, 268 U. S. 510 (1925).

203). This decision spread consternation among the hundreds of communities then using this or a similar procedure and started several new cases to the courts to discover if any extant practice could be accepted. The Court, in 1952, set at rest much of the uneasiness by approving a New York City procedure in which denominational religious instruction was provided to those who wanted it on released time outside the public school buildings (Zorach *v.* Clauson, 343 U. S. 306). "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person," said Justice Douglas for the Court. "It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."

Positive governmental assertion of the value of religious freedom has also occurred in this country and under the trying circumstances of world war. The Congress, as an act of grace, has authorized draft boards to call "conscientious objectors," those with bona fide religious scruples against military service, only for noncombatant service or for service in other public programs not operated by the armed services (park improvement, conservation, care of the ill) and thus has excused them from combat.

Conscientious objection in wartime

> Congress shall make no law . . . abridging the freedom of speech or of the press. . . .—First Amendment

Controversy over freedom of speech never involves the right to say or to print things that a majority of the people already believe. It is the right to say unpopular, unorthodox, or unconventional things which is really at issue. Further, an untrammeled right to say anything one pleases has never been recognized by any nation. And in the United States from the beginning, speaking and writing have been confined by prevailing standards of decency of language and subject and of slanderousness of intention as well as by certain imprecise requirements of public peace and safety. Although standards and tastes in these matters have changed from generation to generation, even the most ardent exponents of unfettered communication recognize the wisdom and necessity of some limitation. In our day, as in many prior epochs of our history, the major problems of speech and press arise from the determination of a large number of our people to use the authority and prestige of the government to suppress opinions which they detest and which they believe tend to undermine our scheme of social values, our system of constitutional government, or our national independence. This determination, now as in earlier years, gains added vigor when applied to utterances which betray or seem to betray or can be made to appear to betray an affinity for some foreign state or imported ideology. When, as in the case of England in 1776, France

3. Right to speak and write freely

in 1798, Germany in 1917 and 1941, and Russia since 1946, this foreign state is an actual or potential enemy the determination becomes well-nigh irresistible. Under these circumstances, restrictions on freedom of communication have gone and do now go far beyond the suppression of allegedly "alien" ideas. They embrace positive injunctions to loyal behavior and speech. Even criticism of the conduct of the government by those in power, essential as it is to the conduct of a democratic state, tends to be regarded as seditious and disloyal. The modern problem is further complicated by the fact that the opinions and movements which the prevailing restrictions are aimed at suppressing, communism and totalitarianism, are themselves hostile to freedom of expression. Should tolerance be accorded to those who do not believe in it and would not practice it if they had the opportunity?

National legislation restricting speech

The long history of national legislative and executive efforts to restrict speech and publication in the interests of national safety begins with the Alien and Sedition Acts of 1798, which forbade the uttering of defamatory remarks about the president or the Congress. In the Civil War period, the president took the initiative in suppressing pro-southern expressions in the North. Congress passed no general limitations on speech, although it did later ratify some of the executive actions. In World War I, the Congress passed sweeping restrictions on expressions critical of the government or its wartime policies. In each epoch the courts have, with very few exceptions, sustained these laws and their application to individuals. During the 1930's a wider latitude for attacks on the governmental and economic system of the United States gained favor as the Supreme Court adopted the "clear and present danger" doctrine [7] as its guide in such matters. A new wave of restrictive legislation, however, soon engulfed the nation.

Contemporary restrictions aimed at communists

The first peacetime sedition act since 1798 was passed in 1940 aimed especially at advocates of the violent overthrow of the government of the United States. This was followed in 1950 by the Internal Security Act designed to force communist-dominated organizations to reveal themselves as such and to place their activities under rigid surveillance. A Communist Control Act in 1954 withdrew from the Communist party or any of its offspring the rights, privileges, and immunities of legal bodies in the United States or in any state. By these and other statutes individuals found to have advocated forceful revolution are denied positions on the public payroll, in the armed services, or in defense plants and are required to disclose their affiliations. In this atmosphere, the clear and present danger doctrine has been on the defensive in judicial circles. The Supreme Court in 1951 sustained the conviction of eleven top communist leaders under the Sedition Act of 1940 and held that the communist leaders did advocate the violent overthrow of the government and that Congress had the power to prohibit such advocacy (Dennis *et al. v.* United States, 341 U. S. 494). It also has

[7] This doctrine, first enunciated in dissenting opinions by Justice Holmes, holds that restrictions on freedom of expression in the interest of public safety can be validly applied only when the utterances or the circumstances surrounding them involve a clear and present danger of evils which the government has the right to prevent. See Thornhill *v.* Alabama, 310 U. S. 88 (1940).

sustained state and national efforts to bar communists or other "subversives" from public employment. Speaking for the Court in the communist case, Chief Justice Vinson said, "an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent." The clear and present danger doctrine, he also observed, should not be applied or construed to force the government to wait for a violent uprising before it can act.

More recently, however, the Court has indicated that convictions of communist leaders may be more difficult to obtain. In 1957, it freed a number of West-Coast communists (Yates *v.* U. S., 354 U. S. 298) on the grounds: (1) that the statute of limitations outlawed charging the communists with "organizing" a conspiracy to overthrow the government and (2) that the advocacy validly outlawed by the Act of 1940 must be advocacy to take action leading to violent revolution and not just advocacy of an abstract doctrine of revolution. The question of whether mere membership in the communist party constitutes violation of the Act of 1940 has not yet been fully adjudicated.

Loyalty-oaths

During the height of the communist scare, executives and legislatures were not content with mere prohibitions and sought by law, order, or committee fiat positive declarations of "loyalty to America" from civil servants, teachers, soldiers, and others. Typically, these have taken the form of loyalty-oaths for employment and these have also been upheld by the Court in several instances. A noteworthy exception arose out of the attempt of Congress to demand such oaths from the tenants of public, low-rent housing projects. These were declared invalid by several state courts with the tacit approval of the Supreme Court. Since 1956, the national executive has made no attempt to enforce them. A California effort to obtain loyalty-oaths from those claiming exemption from local property taxes—churches, for example —was also invalidated in 1958 (Speiser *v.* Randall, 2 L. ed. 2d. 1460).

One final word on the contemporary efforts to root out "subversive" influences in American life. There is a great deal of disagreement on what constitutes subversion. Many of the state and national statutes, executive orders, and legislative committee fiats are loosely worded and imprecisely aimed. There is some danger that in rooting out the communists we may also be intimidating every type of unconventional opinion. There are far too many in the land ready to stamp out any kind of opposition to those in power on the grounds that any criticism of the existing policies or institutions of our society gives aid and comfort to our enemies.

Censorship by states

On other frontiers in the age-old struggle between liberty and order, courts and public alike have developed in recent years a broader tolerance in the enforcement of standards of public decency. The Supreme Court, for example, struck a heavy blow at state censorship of motion pictures when in 1952 it invalidated the New York ban on "The Miracle" (Burstyn *v.* Wilson, 343 U. S. 495) and a Texas municipality's ban on "Pinky" (Texas

v. Gilling, 343 U. S. 960) on the grounds that the power granted to the censoring agencies by legislation was too vague and uncertain. Books and magazines today deal with sex in a more uninhibited fashion than would have been tolerated in any other period of our national life. Numerous decisions have stayed the arms of local and state censors. A Michigan censorship law, for example, was invalidated by the Court in 1957 on the grounds that it forbade to adults what apparently might corrupt only children (Butler v. Michigan, 352 U. S. 380).

Censorship in the national government

The ability of the national government to restrain the circulation of undesirable opinions or materials is greatly aided by its operation of the mails. Congress has authorized the postal authorities to exclude from postal privileges indecent, fraudulent, and seditious materials and has conferred rather wide discretion on these authorities in deciding what falls within the prohibition. The licensing of radio and television broadcasting also places the national government in a strategic position from which to exclude by administrative determination similar materials from the air waves. The Federal Communications Commission, although denying censorship, nevertheless does in fact exercise it both directly and indirectly. In wartime, the government is obliged to introduce rigid and stern controls on the flow of news on the conduct of military operation. Frequently, however, these have gone far beyond the strict requirements of military security. The post-World War II period of international tensions, Korean police actions, and "secret" weapons has stimulated the continuation of many types of restriction on free communication to the press and public by executive departments and agencies. The most recent controversy in this field has concerned the security regulations issued by President Truman and continued by President Eisenhower governing the flow of information from the executive branch. It is charged by the press that the excuse of national security is used by executive agencies to prevent access to data that has little or nothing to do with national defense.

> Congress shall make no law . . . abridging the right of the people peaceably to assemble, and to petition the government for a redress of grievances.—First Amendment

4. Right to peaceable assembly and to petition

The right to peaceable assembly is regarded by the Court as equally fundamental with those of free speech, press, and religion and, therefore, as guaranteed against state encroachment by the Fourteenth Amendment (De-Jonge v. Oregon, 209 U. S. 353, 1937). The right of petition has the same status. It also includes the right to demand positive actions by government as well as a redress of grievances. It does not, however, include a right to have the government take action on the request. Petitions now, as for many years, are regularly delivered by any member of Congress to the clerk for entrance on the records of Congress. Many of these are referred to the appropriate committee. Most are never heard of again. The regulating of public assembly

has presented the Court with more difficulties than the preservation of the right of petition. In 1939, the Court struck down a Jersey City ordinance under which the city officials had been prohibiting many types of meetings by "leftist" organizations (Hague *v.* C.I.O., 307 U. S. 496). In general, the courts have sustained regulations where the major purpose has been to keep streets and thoroughfares free of obstruction and where licensure is used without discrimination among groups seeking authority to hold meetings in public places.

> 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.—Second Amendment

5. Right to keep and bear arms

Provisions similar to that above may be found in many of the state constitutions. The arms referred to are those of the soldier; and it is not only the right, but also the duty, of every citizen, if called upon, to bear such arms in the service of his country. The "bearing" of arms intended for private use, however, may be regulated and restricted by both the national government and the state. There are many laws forbidding the carrying of concealed weapons (pistols, revolvers, dirks, bowie-knives, sword-canes, etc.) and the sale, possession, or use of sawed-off shotguns and other weapons not employed for military purposes but habitually used by criminals.

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.—Fourteenth Amendment

6. Equal protection of the laws

The original intent of this provision was to protect the lately emancipated Negroes against discriminative treatment at the hands of the southern states. In practice, it has developed into a general guarantee against arbitrary classification in legislation and administration and against other forms of discrimination. As such, it is applicable alike to all persons (citizens and aliens, individuals and corporations) and to all kinds of civil rights. Furthermore, although the Fourteenth Amendment lays the injunction upon the states only, equal protection is now construed as contained within the broad concept of due process of law, and therefore as binding upon the national 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. 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. People of large income may be taxed at higher rates than people of low income, but higher rates for Protestants than for Catholics would be invalid as constituting classification unrelated to the legitimate objectives of taxation.

Racial discrimination:

To some, the right to equal protection carries with it an implied denunciation of discrimination in any form. The constitutional guarantee, however, is aimed at discrimination by official state action. Excluding only the controversies arising from the antisubversive crusade, the most controversial frontier of civil liberties in our day has centered around racial discrimination. In this controversy the "equal protection" clause has played an important role. In recent years, however, the government has been urged not to confine itself to the negative restraints of the Constitution but by positive action to cast out discrimination and penalize its practice. At the same time, the traditional view of civil rights as essentially restraints on government action has been broadened. The problems arising from the status of the Negro which have challenged the lawmakers as well as the law-interpreters may be grouped under those concerned with (1) residential rights; (2) employment rights; (3)educational rights; and (4) rights in public facilities.

a. Residential rights

With respect to residence, the traditional issue has been whether, in many of our cities, Negroes can be debarred as owners or renters from specified blocks, streets, or districts. No one ever supposed this could be done by public regulation. But in numerous places the objective has been attained through white "covenanting" to keep colored people out; and in no fewer than 19 states supreme court rulings have at various times upheld such discriminatory contracts. In cases coming up from Detroit and St. Louis, the United States Supreme Court, however, in 1948 (Shelley *v.* Kraemer, 334 U. S. 1) ruled unanimously that although property owners signing agreements not to sell real estate in a given area to Negroes violate no law, such covenants cannot constitutionally be enforced through either state or national courts. The Court went even further in 1953 (Barrows *v.* Jackson, 346 U. S. 249) when it held that a state court may not validly entertain a suit for damages against violators of such covenants.

b. Employment rights

The main problems of discrimination against nonwhite groups in employment have not arisen under constitutional "bills of rights" at all. Rather the effort to end discriminatory employment practices by private employers and labor unions has taken the form of positive legislation aimed to prohibit such practices. New York state pioneered in the enactment of so-called "Fair Employment" laws by its act of 1945, and New Jersey, Massachusetts, Connecticut, Washington, Rhode Island, Oregon, and New Mexico followed during the next few years. Several cities have also enacted local ordinances aimed at the same evil (Chicago, Minneapolis, Philadelphia, Cleveland, for example). A few states have enacted laws based upon consultative and advisory techniques rather than compulsive ones (Indiana and Wisconsin, for

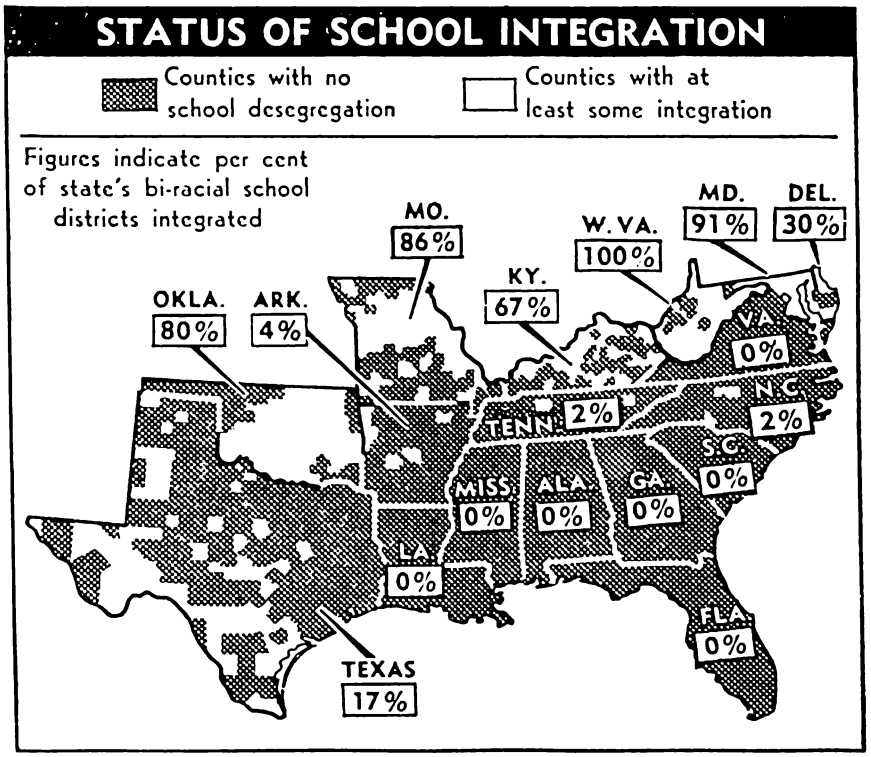
example). Congress, although urged repeatedly from 1948 to 1960, has not adopted a national fair employment law. The southern congressmen have steadfastly and successfully opposed compulsive legislation. The executive branch has, however, by executive order struck at discrimination in civil service employment and at segregation of races in the ranks of the armed forces.

c. Education

For half a century, the practice of segregating the races in the public schools of southern and border states was sanctioned by the national judiciary (Plessy *v.* Ferguson, 163 U. S. 537) under the doctrine that separate facilities could be provided if they were substantially equal. As Negroes sought larger and larger educational opportunities, especially at the collegiate and professional level, they began steadily to assail this time-honored doctrine and a sympathetic Supreme Court began to erode it. Several states in the period 1948-53 were compelled to admit Negroes to state-supported graduate and professional schools (Oklahoma and Texas, for example.) Finally, in 1954, the Court ordered (Brown *v.* Board of Education of Topeka, 347 U. S. 483) the abandonment of all segregation in publicly supported educational institutions at all levels everywhere and specifically reversed the traditional doctrine. "Separate educational facilities are inherently unequal," said Chief Justice Warren for the Court. "Segregation (itself) is a denial of equal protection." Recognizing that such a drastic change in the practices and attitudes of many decades invited caution, the Court delayed the execution of its judgment pending further review and after further argument the Court ordered (June, 1955) the lower national courts to determine in each case how best to end segregation in the schools. The lower courts were instructed to allow time for the necessary readjustments but to insist on reasonable efforts at compliance. In all cases the burden of proof was placed on the local authorities to show why they could not move faster and that they had a plan to end segregation.

Progress in desegregating schools

The states of the "deep South"—Virginia, North and South Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana—have resisted the court order from the outset. One after another of them has erected legal barrier after legal barrier to avoid compliance. Laws have been passed authorizing the governor to abolish the public schools where they may be ordered to desegregate, resolutions declaring the court decision invalid and unenforceable have been passed, and other actions have been taken to avoid or postpone giving effect to the Court decision. In these states little or no integration of races has as yet taken place. In some of the border states, such as West Virginia, Maryland, Missouri, Kentucky, and Delaware compliance has been, on the whole, quick and without major incident. In others, efforts to comply have provoked violence and prolonged controversy. At Clinton, Tennessee violence erupted in late 1956 and the ringleaders were prosecuted in a national court and convicted of criminal contempt for their efforts to nullify a court order. In Little Rock, Arkansas in 1957 the President sent in




SOURCE: *The New York Times*, June 29, 1958.

national troops to enforce court ordered desegregation at Central High School after the Governor had ordered national guard units to halt the admission of Negroes. The use of troops in Little Rock and of national prosecutors in Clinton has made the extremists on both sides more determined. Complete implementation of the 1954 decision lies many years in the future.

d. Public facilities

In the past, southern states have been held to be justified—with a view to minimizing special antagonisms and promoting public order—in sanctioning, or even by law requiring, the segregation of white and colored people in hotels and restaurants and on railway trains and buses. The modern Supreme Court has gradually been sweeping these practices away also. After assailing "Jim Crow" laws and practices in several minor cases, the Court in 1950 (Henderson *v.* U. S., 339 U. S. 816) outlawed all forms of discrimination in public transportation. The Interstate Commerce Commission followed this decision with a sweeping order ending segregation in all trains and buses under its jurisdiction. In later cases, the Court in 1956 indicated (see Gayle *v.* Browder, 352 U. S. 903) that it would not sanction segregation in intrastate facilities. Segregation of races in public parks, playgrounds, golf courses, and bathing beaches was outlawed in another series of decisions late in 1955

(Mayor of Baltimore *v.* Dawson, 350 U. S. 877 and Holmes *v.* Altanta, 350 U. S. 879). The changed attitude of the Supreme Court accompanied a widespread movement in many northern, middle-western, and western states to abolish discriminatory practices in hotels, restaurants, and resorts by legislation similar in character to that aimed at discrimination in employment. Human-rights or civil-rights agencies have been established in several states to direct the campaign against racial and religious discriminatory practices by private citizens.

## RIGHT TO FAIRNESS IN GOVERNMENTAL PROCEDURES

It is an axiom of Anglo-American jurisprudence that a person suspected or accused of illegal behavior is entitled to a fair trial, by humane procedures, and with the burden of proof resting on his accusers. This conception sharply differentiates the English-speaking world from that of the modern authoritarians with their secret police, torture-chambers, and stealthy apprehension. The constitutions of the United States and of the several states, in pursuance of our traditional ideas, surround the entire process of criminal justice with restrictions. And while the guilty occasionally escape conviction by hiding behind the ancient guarantees, the innocent usually find refuge in the shelter of their time-tested rights.

1. Indictment by grand jury

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . .—Fifth Amendment

The Fifth Amendment requires that persons may not be held for crimes against the national government except on the indictment of a grand jury. Many state constitutions contain similar guarantees in the case of crimes against the states. The grand jury is an institution of ancient English origin, consisting of 12 to 23 citizens who hear the public prosecutor make accusations of crime and determine whether there is sufficient evidence to require the suspects to be held for trial. It was designed to prevent frivolous or capricious detention of persons by public officials. It is, however, a slow and cumbersome procedure which several states have now abandoned in favor of indictment by the "information" of the district attorney. And while the Constitution continues to require the grand jury in national offenses, these new state procedures have been accepted by the Supreme Court (Hurtado *v.* Calif., 110 U. S. 516) as within the spirit of the "due process" clause of the Fourteenth Amendment. When the grand jury is used by a state, however, it must be constituted so as not to discriminate among races.

2. Writ of habeas corpus

> 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.—Art. I, Sec. ix, cl. 2

The most revered of the great safeguards of personal security required by the Constitution is the privilege of the writ of habeas corpus. This writ is a court order, addressed to any officer having custody of a prisoner, directing that the petitioner be brought before the court that the court may inquire if there is sufficient ground for detention. President Lincoln's suspension of the privilege in certain areas of the North during the Civil War evoked considerable legal controversy over the question of which branch of the government has this power. The general conclusion from this debate is that the function belongs to Congress but may be exercised by the president if authorized by statute. The state governments are similarly bound by provisions in state constitutions, although some of them have forbidden the suspension of the privilege under any circumstances.

3. Trial by jury

> The trial of all crimes . . . shall be by jury; . . .—Art. III, Sec. ii, Cl. 3

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. . . .—Sixth Amendment

Like indictment by grand jury, trial by jury passed into American usage with the English Common Law. The Constitution provides for it in three different clauses, and no state constitution fails to ordain it also. The Constitution requires it to be employed in all criminal cases and "preserves" it as a right, too, in civil cases in which the value in controversy exceeds $20. It is, however, by common law that a jury must consist of 12 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 Supreme Court has now held (Patton *v.* U. S. 281, 1930), 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 national proceedings; and many states allow the same discretion. The Court, moreover, has ruled that where juries are employed, they must not be made up deliberately to exclude workingmen, Negroes, or any other particular class of persons—although there still are states in which women are debarred. State civil procedures that modify the old jury requirements have generally been held by the Court as in compliance with the requirements of the Fourteenth Amendment.

4. Miscellaneous procedural rights

One could go on at some length listing and describing the guarantees of the Constitution to those caught in the toils of the criminal law. In general, individuals are protected against invasion of their properties except by approved procedures. A person accused of crime is entitled to a speedy trial, to counsel in making his defense, to confront his accusers, and to compel the attendance of witnesses on his behalf. A person may not be compelled to give evidence against himself, except that congressional committees may, since 1954, grant immunity from prosecution to individuals required to testify before them provided the Attorney General is notified and a district court agrees. Further, cruel or unusual punishment or excessive fines may not be imposed nor may any individual be placed in jeopardy of imprisonment more than once for the same offense. The government is also forbidden to pass bills of attainder (acts declaring an individual guilty of a crime) or *ex post facto* laws (laws that make an action a criminal offense that was not an offense at the time it was committed). Most state constitutions contain these same guarantees.

5. Right to due process of law

The broadest of all guarantees of governmental fairness is the Constitution's requirement that neither the nation (Fifth Amendment) nor the states (Fourteenth Amendment) may deprive any person (individual or corporation) of "life, liberty, or property" without "due process of law," a guarantee which is also contained in all of the state constitutions. 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 clauses than any other provision of the Constitution.

"Due process" and fair procedure

As applied to the national government, the "due process" clause supplements the more specific guarantees of the other amendments dealing with fair procedure. It imposes on national authorities the duty of providing "persons" with a *fair* trial before a proper agency—court or administrative agency. They must be given proper notice, be allowed to present evidence and be permitted, ordinarily, an appeal to a court of law to assert their rights. As applied to the states by the Supreme Court, it imposes upon them the duty in civil and criminal cases to provide a regular proceeding before a proper court with a *fair* hearing for both parties. The Court has said, for example, that the "due process clause" of the Fourteenth Amendment guarantees the right of counsel to the accused in state criminal proceedings. It does not guarantee a jury trial nor an indictment by grand jury nor does it protect an individual, contrary to state practice, from self-incrimination. It does, generally, outlaw the

use of evidence or confession obtained by force or fraud or, for example, by wire-tapping.

Although the "due process" guarantee is one of the major constitutional supports of proper governmental procedure, it would claim much less interest and attract very must less litigation if this were all it involved. Toward the end of the last century the Supreme Court gave the phrase a new meaning and a new direction which represented a sharp departure from the traditional view. Industrialization and urbanization of the nation were at that time revealing some of their less benevolent aspects and state governments were attempting by various types of remedial legislation to mitigate the evils of rapid expansion. The Court, repeatedly invited to upset state efforts at regulating the economy, finally yielded to the idea that the "due process clause" conferred upon it the power to review legislation to determine if it contemplated an *arbitrary* or *unreasonable* limitation on property rights. The problem was not whether the judicial or administrative procedures used by the state or prescribed by the law were fair but rather whether the legislation or regulation was itself proper. This use is usually referred to as *substantive due process* to distinguish it from the procedural due process already described. The Court in a series of decisions proceeded to invalidate state laws regulating industry, hours of labor, wages, rate-fixing for utilities if not based on proper evaluation of economic factors, and other aspects of the economic relations of individuals and groups. It also discovered new limits on the statutory authority of Congress arising from the Fifth Amendment's "due process" clause. In general, the Court seemed to interpret the clause as if it prescribed the economic tenets of Adam Smith and made them the law of the land. Thus, it found efforts to equalize the power of workers in dealing with corporations as unduly interfering with the freedom of contract of both parties. In doing this, the Court necessarily defined the power of the states to promote the health, safety, and welfare of its citizens (police power) in very narrow terms. In adopting this interpretation of the "due process" clause, the Court further found that the word *person* was meant to include corporation. This view allowed it to consider any legislation which might be shown to threaten corporate property. The result of the attitude and theory of the Court was to plunge it into the middle of some of the bitterest political controversy of the past half-century and to earn for it the scorn of those determined to bring the economy under public control and the applause of those striving to stave off public regulation. The depression of the 1930's brought a new appreciation to the vast majority of the nation of the necessities of energetic governmental action in the economic field and, after some political maneuvering by President Roosevelt, it brought a new view to the Supreme Court. From its first reversal of precedent in 1937 when it sustained a state law regulating the wages of women and children, the Court has steadily broadened its view of allowable interference by the government in the economic relations of our society. Today, the "due process clauses" are nothing like as potent as once they were in limiting state and national regulatory activities.

"Substantive due process"

## RIGHTS OF PROPERTY

Government and property

The functions of government in relation to private property are fourfold: to define, to protect, to regulate, and to take for public use as needs require. Except that they may not establish or recognize property in man or man's labor—in other words, legalize slavery or involuntary servitude—the states are severally free to determine for themselves what shall be regarded as property. Upon them and their subdivisions rests also major responsibility for protecting property, not alone by policing, but by rules of law, procedures in the courts, devices such as the recording of deeds, and the like. Many forms of protection are also afforded by the national government. Similarly, governments—both state and national—regulate the ways of using property, and such regulation accounts, indeed, for a very large part of the legislation enacted, and of the judicial decisions handed down, both at Washington and in the state capitals. At this point, too, enter the civil rights which property and property-owners constitutionally enjoy—rights of somewhat distinctive character, but often bracketed with those of personal freedom. Thus the due process of law provided for in the Fifth and Fourteenth Amendments applies to deprivation of property no less than to that of life and liberty; so likewise do the guarantees of interstate citizenship and equal protection of the laws; and the states are restrained from legislation impairing the obligation of contracts. Moreover, while all governments have—and must have as a prerequisite of subsistence—power to take private property from individuals and corporations, owners always have rights which public authorities are bound to respect. Many of the restraints on governmental power to take property involve taxation and these are discussed elsewhere. The power to take a piece of property for public use, as for example to build a school or a road, is referred to as the power of "eminent domain," and the Constitution requires that in all such actions "just compensation" must be paid to the owner.

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# CHAPTER 5

# *Citizenship and the Regulation of Immigration*

## THE REGULATION OF IMMIGRATION

A nation of immigrants

The United States is a country of immigrants. Except for the Indians, all of our people have come from foreign lands or are descendants of those who did. The movement in a little over a century of 40 million Europeans to our shores is unparalleled in the history of mankind and has made one of the important contributions to our national strength and vitality. Until about 1880, the newcomers were largely from the United Kingdom, Germany, and Scandinavia, but thereafter the Italians and the Slavic peoples of Central and Eastern Europe provided the bulk of the migrants. As long as land was plentiful and the need for labor in our rapidly expanding industries was acute, the policy of this nation was to encourage and even to stimulate the entrance of new blood. The closing of the land frontier in 1890, the growing power of organized labor, the recurring depressions that accompanied the triumph of industrial capitalism, and the antipathy which the more remote and exotic cultures of the later immigrants aroused, combined to change this policy and ultimately to reverse it.

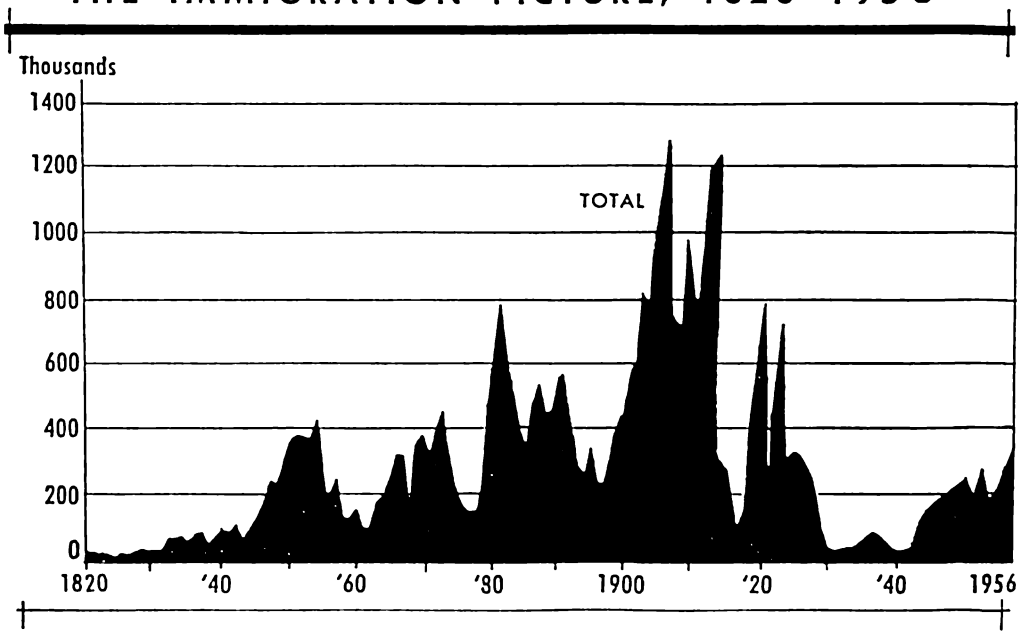
From state to national control

The policy of encouragement to newcomers required little or no legislative implementation, and for many decades the only national regulations were those designed to promote better conditions on immigrant-carrying vessels. The eastern port states, however, early attempted to deal with some of the problems which this great movement of people entailed. Controversy over the validity of state action led the Supreme Court to adjudge this traffic as within the national authority and thus not properly subject to state regulation (Passenger Cases, 7 Howard 282, 1849). The Congress finally, in 1882, accepted the responsibility for regulation and the Court fully sustained its actions.[1] The first barriers to settlement erected by the national legislature were aimed at eliminating certain allegedly undesirable elements from the flow of newcomers rather than at reducing the flow. Congress, in 1882, enacted the first Chinese exclusion act and also barred paupers, convicts, and lunatics from any nation. Laborers under contract to individuals or corporations were excluded in 1885, anarchists and immoral persons in 1903, illiterates (persons over 16 years of age unable to read some language) in 1917. Altogether more than thirty different categories of individuals had been added to the prohibited list by 1920. Only in the case of Oriental peoples had the Congress, however, recog-

Qualitative restrictions first imposed

[1] Chinese Exclusion Case, 130 U. S. 581 (1889); Fong Yue Ting *v.* United States, 149 U. S. 698 (1893). The Court, in these cases, declared the power to control immigration is incidental to the power to regulate foreign commerce and is a power adhering to any sovereign nation to control its own foreign policy.

THE IMMIGRATION PICTURE, 1820-1956




SOURCE: *Annual Report of the Immigration and Naturalization Service.*

nized as undesirable the members of an entire race or national group. The major pressure for many of these enactments was supplied by organized labor interested in preserving American wage levels.

Adoption of the quota system

Despite the growing body of restrictions, the alien tide continued to swell and in the decade 1905-14 the average annual influx exceeded 1 million persons. A sharp business recession following World War I and the fear of Bolshevism—then spreading among Central European peoples—added to the pressures already described to convince the Congress that the time had come sharply to reduce the flow. After much debate the Congress in 1921 added to the existing restrictions a temporary quota system to be applied to all European migration. This "temporary" system was continued in effect until 1924 when it was replaced by a more comprehensive statute embodying a more restrictive system. The Immigration Act of 1924, as amended in 1929, has formed the basis of our immigration policy since that time. The heart of the quota policy was the "national origins" formula by which an annual European allowance of 150,000 was to be allocated among the nations in proportion to their respective contributions to our national stock as revealed by the census of 1920. These acts allowed some migration under very small quotas from Asia, Africa, and Oceania, but excluded members of most Oriental races who were at that time ineligible for American citizenship.

Cessation of immigration

The disastrous depression which shortly ensued relieved most of the immigrant pressure. In fact, during several depression years more aliens departed from our shores, willingly or unwillingly, than entered. The entrance of the United States into World War II virtually halted all movement one way

or the other. The return of peace, the "cold war," burgeoning American prosperity, and the uprooting of millions of Europeans by Nazi and Soviet terrorism revived the desire of Europeans to seek American refuge. After a brief retreat from the policy of 1929 in the interests of displaced European refugees, the restrictive policy was reaffirmed when the Congress in 1952 enacted, over a vigorously worded veto by President Truman, a comprehensive restatement of the laws of immigration and naturalization, the Immigration and Nationality Act of 1952.

Present policy

The salient features of our present immigration policy may be summarized as follows:

1. Admission of migrants from Canada and Latin America without quantitative restriction but subject to the qualitative restrictions imposed upon all migrants.
2. Authorization of an annual migration of 154,657 from the rest of the world on the basis of a quota for those from any one nation equal to one-sixth of 1 per cent of the inhabitants in the continental United States in 1920 from that nation.
3. Prescription of minimum quotas of 100 each for the nationals of most nations or trust territories in Africa, Asia, and Pacific Oceania.
4. Admission of spouses and children of citizens without regard to quotas.
5. Retention of all of the earlier qualitative restrictions including several recently enacted ones aimed at Communists, Nazis, and totalitarians of all shades.
6. Abandonment of all racial barriers to citizenship by naturalization and to immigration.

**ANNUAL IMMIGRATION QUOTAS OF SELECTED NATIONS AUTHORIZED BY ACT OF 1952**

| | | | |
|---|---|---|---|
| Austria | 1,405 | Italy | 5,645 |
| Belgium | 1,297 | Japan | 185 |
| The Republic of China | 105 | Korea | 100 |
| Czechoslovakia | 2,859 | Netherlands | 3,136 |
| Denmark | 1,175 | Norway | 2,364 |
| Egypt | 100 | Palestine | 100 |
| France | 3,069 | Philippines | 100 |
| Germany | 25,814 | Poland | 6,488 |
| Great Britain, North Ireland | 65,361 | Spain | 250 |
| India | 100 | Sweden | 3,295 |
| Ireland | 17,756 | U.S.S.R. | 2,697 |

Results

The result of the restrictive policy has been that since 1924 immigration has ceased to be a factor of consequence in the growth of the American population. So long as the present policy endures, we must rely on our own birth rate for population growth. In the years since the restrictive quota system was adopted, less than half of the total potential influx has actually arrived. The national groups that under the various formulae have been entitled to the lion's share of the quotas (United Kingdom and Ireland) are no longer exporting individuals in appreciable numbers, whereas the national groups still interested in coming here (Italians and Central Europeans) are entitled

to very small annual quotas. Our international dealings have been slightly aided by the abandonment in this past decade of the policy of complete exclusion of Asiatic peoples.

The problem of displaced persons

The major challenge to our restrictive policies has come in recent years from the aroused sympathy of many of our people, especially the more recent immigrants, for the plight of the hundreds of thousands of Europeans torn loose from their homes by first Nazi and then Russian tyranny. Jews, Poles, Czechs, and many others, assembled after World War II in refugee camps administered by various friendly powers, unable to return to their homes, have sought refuge in the New World. Spurred by President Truman, the Congress in 1948 enacted a Displaced Persons Act authorizing the admission of 205,000 of these refugees over a period of two years. The lawmakers were careful, however, to provide that migrants must be charged to the extant and prospective quotas of the countries from which they originated. Included in this first act were also a number of provisions governing eligibility manifestly discriminating against Jews and Catholics. Continued pressure from the White House led to a bipartisan amending act early in 1950 which eliminated many of the discriminatory provisions and which increased the number of admissibles to 341,000 and extended the duration of the program to 1952. The Displaced Persons Commission created to supervise the execution of this program ceased to exist late in 1952, leaving several hundreds of thousands of refugees uncared for. As the Russians have fastened ever firmer controls upon the German and Central European populations they dominate, the number of such persons seeking asylum in friendly western nations has continued to mount and has placed serious financial and economic pressures upon these governments and upon the Allies who support them. In consequence, President Eisenhower in 1953 once again urged upon Congress an easing of our restrictive policies to allow the special admission of 240,000 refugees. Congress responded by an act (The Refugee Relief Act of 1953) authorizing an additional 209,000 admissions without regard to quotas. The authority to admit under this Act expired Dec. 31, 1956. The bloody Hungarian uprising of 1957 added many more thousands to those seeking refuge from Soviet tyranny and lead to a new request by the President for authority to admit refugees. The Congress (Immigration and Nationality Act Amendments of 1957) authorized the use of the unused balance of admission visas from the Act of 1953, in the main, for escapees from communist-dominated areas.

Attack on the present policy

Embarrassed in the ideological struggle with Soviet communism by the discriminatory and "racist" philosophy which appears to underlie the immigration policy of the United States, emphasizing as it does the superior virtues of the Northern and Western European peoples, many groups in America are attacking the main tenets of our present immigration policy. A commission appointed in 1952 by President Truman to reconsider our immigration program recommended the complete abandonment of the "national origins" system and the substitution for it of a "unified quota" system under which 250,000 persons would be admitted annually on the basis of American and international

needs.[2] It proposed the establishment, in lieu of race or nationality, of categories such as need for asylum, reunion of families, the possession of occupational skills in short supply in the United States, and alleviation of population pressure in the homeland. The friends of the restrictive policy point to the facts that no other major nation in the world is admitting many refugees, that we have more than 4 million unemployed, and that there is no evidence that migration seriously lessens population pressure at home. President Eisenhower has proposed several times that the present law be modified to make it easier to gain entrance to the United States. His most recent message to Congress on this subject (Jan., 1957) proposed to use the census of 1950 instead of that of 1920 to determine quotas for immigration. This, if adopted, would increase the number allowed to migrate annually from 155,000 to 220,000. Congress has, thus far, failed to follow the President's lead.

Non-immigrant visitors

The movement of foreigners in and out of our country is, of course, not entirely a matter of immigrants. Every year large numbers of visitors are admitted without regard to quota restrictions. Students, businessmen, travelers, and government officials enter our nation constantly for visits of varying duration. Some come here for more or less permanent residence as "nonquota" aliens—wives and minor children of American citizens, for example. All of these, however, are required—since World War I—to have visas or permits, and the issuance of these is very closely regulated by the State Department. Most of the prohibitions aimed at the immigration of so-called undesirables, including all the more recent ones aimed at communists, apply to these visitors under the Act of 1952. Many notable visitors have been stopped at our doors because of their questionable associations and because of their refusals to be fingerprinted.[3] All in all, it is much more difficult than ever before for foreigners to enter the United States for any reason.

## ALIENS—RIGHTS AND RESTRICTIONS IN PEACE AND WAR

Alien privileges and liabilities

Contrary to general impression, an alien in this country is subject to most of the same impositions that citizens complain about. He must pay taxes and obey the law. He may be drafted for police or militia duty, and under some circumstances may be called into military service. He shares also several privileges with his citizen neighbors. He is entitled to "the equal protection of the laws." He may sue or be sued in the courts, may enter into contracts, may send his children to the public schools, and may acquire citizenship by naturalization. There are, however, several distinct disadvantages attaching to the condition, and the tendency in recent years has been to make the status of alien more and more unattractive. An alien cannot vote or hold public office. Rarely is he eligible to serve as a juror. Attempts have

[2] *Whom We Shall Welcome*, Report of the President's Commission on Immigration and Naturalization (Washington, D. C., Jan., 1953), 73ff.

[3] The Immigration and Nationality Act Amendments of 1957 authorize the Secretary of State and the Attorney General to waive the fingerprinting requirement for non-migrant visitors.

been made by several states to restrict or forbid land ownership to certain classes of aliens but these laws are now of questionable validity.[4] Although in general an alien can engage in any gainful occupation, increasing numbers of vocations and professions have been placed under licensing requirements by the various states and many of these laws prohibit the issuance of licenses to aliens. The alien may also be excluded from employment on public works or in manufacturing of implements of war or of defense and is excluded from participating in the benefits awarded under some welfare programs. Of course, if an alien travels abroad he can claim no protection from our government, as can a citizen.

Inadequate protection against mob violence

At various times aliens have been the victims of mob violence, and the character of our constitutional system is such that it is difficult for the national government to see that they are accorded the same protection of life and property which it demands of foreign governments in respect to American citizens. The states are primarily responsible for the maintenance of law and order, and local officials have usually been as reluctant to intercede in behalf of the "foreigners" as the states have to award any damages to the victims. At least four presidents have asked Congress to grant jurisdiction in these cases to the national courts, but to no avail. We continue, therefore, to respond to diplomatic addresses in behalf of such victims that these are state matters and to deny to the diplomats access to state authorities on the grounds that the national government alone is responsible for international dealings. The matters have usually been "settled" by a congressional vote of money to the aggrieved persons. Happily, these incidents have become extremely rare.

Requirement of registration

Apprehension over the loyalty of the newcomers and the explosive character of the international situation induced the Congress in 1940 to depart from previous tradition and require the registration of all aliens. Since that time, every alien over 14 years of age who is in the country longer than 30 days is required to register, be fingerprinted, keep the government informed of his whereabouts and his occupation, and carry his registration card with him at all times.

Liability to deportation

One of the major discomforts of the resident alien is his liability to deportation. As a corollary of its virtually unlimited power to exclude aliens, Congress has plenary power to deport them. It may add new grounds for deportation or change old ones at any time. As entrance has been increasingly restricted so have the grounds for deportation been multiplied. The period since the Russian revolution has witnessed the addition to the grounds for

[4] In 1948 the U. S. Supreme Court held the California alien land law of 1920 invalid insofar as it prevented an ineligible alien from buying land in behalf of his native-born son. Oyama *v.* California, 332 U. S. 633. In 1952, the California Supreme Court declared the entire act of 1920 invalid as contrary to the 14th Amendment to the Constitution of the U. S. and cited the current trend of opinion in the U. S. Supreme Court in support of its position. See Fujii *v.* California, 38 Cal(2d) 718 (1952). In making this decision the California high court rejected the argument of a much-publicized decision of a lower court in the same case in which the lower court had held the land law invalid as contrary to the provisions of the United Nations Charter.

deportation of several restrictions based upon the political or economic views of the individuals. Congress in 1918 authorized the expulsion of alien revolutionists, anarchists, and advocates of sabotage, assassination, and other forms of violence. In 1940, aliens who advocate or who, since entry, have ever advocated or belonged to a group which advocated "revolutionary" doctrines or "doctrines of violence" were made liable to deportation. The Internal Security Act of 1950 named membership in the Communist party of the United States or any other totalitarian party as grounds for deportation. The Expatriation Act of 1954 added the commission of any act of treason against or attempting forcefully to overthrow our government to the existing provisions. Immediately after World War I and World War II public interest in ridding this nation of subversive persons was aroused and deportation on these grounds increased sharply. The Department of Justice in 1919-20 conducted a widely publicized drive against suspected "reds" and made numerous arrests. This campaign aroused considerable protest against the methods used and the standards for determining what was a "red." The drives of the late 1940's were attended by less public criticism. The major criticism of contemporary deportation procedures is voiced by those who feel that the procedures used do not comport in all respects with prevailing legal standards of fairness.[5]

Alien status in wartime

When the United States becomes involved in war, restrictions on aliens, especially those of enemy nationality, are sharply increased. Friendly aliens during World War II were required to report assets in excess of $1000 and, if they had declared their intention of being naturalized, were subject to military service. Enemy aliens, however, were placed under special surveillance. They were required to register and carry special identification cards, were forbidden access to "restricted" or "prohibited" military and industrial establishments, were prohibited from changing employment without advance notice, and were denied possession of firearms, cameras, short-waves radios, and so on. Many were arrested and interned on suspicion. It has been customary also for the government to seize certain property in this country held by enemy aliens, especially by nonresidents. Alien property agencies have been created in both world wars to administer these captured assets. In 1942, under military auspices and on joint congressional-presidential authority, 110,000 Japanese —citizens as well as aliens—were forcefully evacuated from the West Coast Military "Zone" and interned in concentration camps—"relocation centers"—further inland. After elaborate screening, those found to be loyal were released but not to return to the West Coast. This action aroused criticism, but one of the most civil-liberties-minded members of the United States Supreme Court, Justice Hugo Black, said, "Hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure (Korematsu *v.* United States, 323 U. S. 214, 1944)."

[5] See *Whom We Shall Welcome, op. cit.*, Chap. II and Carlson *v.* Landon, 342 U. S. 524 (1952), Shaughnessy *v.* Pedreiro, 349 U. S. 48 (1955), and Jay *v.* Boyd, 351 U. S. 345 (1956).

## CITIZENSHIP AND HOW IT IS ACQUIRED

> 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.—Fourteenth Amendment

The first requisite for participating in the great experiment in self-government which is the government of the United States is citizenship. Taken for granted by most of us, what has already been said about the status of aliens and the hopes of refugees indicates that American citizenship is a prize of great value to many people of the world.

Fourteenth Amendment defines citizenship

The Constitution refers in one place to "citizens of the different states" and in another to "citizens of the United States." The confusion thus created about state citizenship and national citizenship and which level of government could confer the latter was not dispelled until after the Civil War. The adoption of the Fourteenth Amendment clarified the issue, and, today for every important purpose national citizenship is primary and state citizenship is secondary. Certain residents of Washington, D. C. and of other territories are still national citizens and yet not citizens of any state. Other than this, dual citizenship is no longer consequential.

How citizenship may be acquired:

1. By birth

In virtually every country of the world, citizenship is acquired by birth or by naturalization. Citizenship by birth is determined generally in the civilized world either by the rule of *jus sanguinis* (law of blood or parentage) or by the rule of *jus soli* (law of soil or place). In continental Europe the rule of *jus sanguinis* is most widely observed and children take the nationality of their parents. In English-speaking and Latin American countries the fundamental rule is *jus soli*, according to which citizenship is determined by the place of birth. Thus all persons born in the United States [6] are citizens even if the parents are aliens and are themselves ineligible to become citizens. However, the place of birth must be subject to American jurisdiction, and therefore children born to foreign diplomats stationed in this country are not citizens. On the other hand, children born to American parents outside the United States can also claim citizenship by birth if both parents are citizens and one of them has lived in the United States prior to the birth of the child concerned or if one parent is a citizen and has lived in this country for at least 10 years (five of which must be after attaining age 16) prior to the birth. In this latter case, the child must be brought to this country before he reaches age 23 and live here for five years between the ages of 14 and 28.[7]

[6] For purposes of citizenship, the "soil" of the United States includes, in addition to the continental area, Alaska, Hawaii, Puerto Rico, the Virgin Islands, Guam, American territorial waters, American embassies and legations abroad, and American warships and *public* vessels.

[7] For further details on the law of citizenship see Title III, Chap. 1, of the Immigration and Nationality Act of 1952, 66 *U. S. Stat. at Large*, 163. Prior to 1934 the citizenship status of children born abroad to American parents was rather differently determined and what has been said above does not apply to those born before that date.

2. By naturalization

American citizenship may also be acquired by naturalization, that is, by some kind of established legal process. Naturalization may be either collective or individual. Typically, collective naturalization is accomplished by an act or treaty extending citizenship to the people of an area acquired by purchase or conquest. Until the war with Spain, the United States regularly conferred citizenship upon the inhabitants of territories which it acquired. As recently as 1927, citizenship was similarly extended to all inhabitants of the Virgin Islands who did not elect to retain their Danish citizenship. The acquisition after the Spanish War of several territories of non-English-speaking natives presented a different kind of problem than the nation had experienced in its continental expansion. The treaty of peace by which Puerto Rico, Guam, and the Philippines were acquired expressly provided that the cession did not include an automatic extension of citizenship to the natives. Congress was to determine their status and rights. Congress at first declared the natives of Puerto Rico and the Philippines to be citizens only of these islands but conferred some of the privileges of American citizenship upon them. Finally, in 1917 full citizenship was conferred upon the Puerto Ricans. The Filipinos remained "nationals" and not citizens until they achieved independence in 1946, when they ceased to have any American status.

a. Of populations

b. Of individuals

The immigrant to the United States may achieve citizenship by individual naturalization. Authority to provide a uniform rule for this process throughout the country is expressly granted to Congress by the Constitution. From the beginning of our national life, this work had been assigned to the courts. It is now carried on by national district courts, including those in the territories, and by state and territorial courts of record which have unlimited jurisdiction in actions at law or equity. The courts have been aided since 1903 by employees of the Naturalization Service. The matter is now governed by the Immigration and Nationality Act of 1952.

Present naturalization procedure

The procedure for individual naturalization involves two main steps. The first step is the filing of a petition with an appropriate court containing sworn evidence designed to support the qualifications of the applicant alien. These qualifications include: (1) an understanding of the English language, including the ability to read, write, and speak it; (2) an understanding of the "fundamentals of the history, and of the principles and form of government, of the United States"; (3) an attainment of 18 years of age; (4) an absence of advocacy of subversive ideas or of association with individuals or groups who advocate them within the 10 years preceding the prospective naturalization. The petitioner must, furthermore, demonstrate that he has been lawfully admitted to this country, that he has lived here continuously since admission and for at least five years, that he is of good moral character, and that he is "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States." Investigation of the alien applicant to determine the truthfulness of his assertions and affidavits is made by agents of the Immigration and Naturalization Service. The court is supplied with their evidence and recommendations. Since 1926,

much of the work of examining the applicants and the evidence has been borne by hearing examiners of the Service who then report their findings and recommendations to the court.

The second step is final hearing and examination in open court at the end of which the judge administers the oath of allegiance and authorizes the issuance of letters of citizenship (final papers). This step may not occur until at least 30 days after the filing of the petition.

The slipshod methods by which many judges naturalized aliens during the last century have been gradually replaced by careful, methodical ones in which there is a review of each case involving more or less elaborate investigation. The chief criticisms of the present law and procedure are: (1) the process is essentially a matter of fact-finding and should be administered largely by an administrative agency rather than the courts; (2) under the present laws naturalized citizens do not attain all of the rights of native-born citizens; they are really "second-class" citizens because their citizenship may be revoked not only for fraud in its acquisition but for certain conduct after it has been achieved; (3) the standards for determining good moral character and acceptable political views involve a great deal of judicial and administrative discretion which may be abused, especially during periods of national hysteria.

Criticism

It should be emphasized that the Act of 1952 eliminated all the racial and religious barriers to naturalization which at one time characterized our qualifications for citizenship.

## OTHER ASPECTS OF CITIZENSHIP

A married woman's status was for many years determined entirely by that of her husband. As a result of persistent agitation by women's organizations Congress, in 1922, 1930, and 1931, conferred upon women progressively expanded rights of independent citizenship. Finally, in 1934, nationality rights as between the sexes were made equal and uniform in every important respect. An alien woman marrying a citizen of the United States now must acquire citizenship on her own by naturalization. An American woman marrying an alien retains her American citizenship, unless she chooses to renounce it.

Citizenship status of married women

Citizenship, once acquired, cannot be abrogated except by constitutional procedures. However acquired, it may be voluntarily relinquished or lost, or, if obtained by naturalization, may be set aside as a punishment or penalty. Congress, in 1865, expressly recognized the right of a citizen to "expatriate" himself, and the Nationality Act of 1940 made this possible even when this country is engaged in war. Under the most recent legislation (1952) a person can lose his citizenship:

How citizenship may be terminated

1. by being willingly naturalized in a foreign state;
2. by taking an oath of allegiance to a foreign state;
3. by serving in a foreign army without advance consent by American authorities;

4. by accepting any employment in the government of a foreign state if the employment requires one to be a national of the state concerned;
5. by voting in an election in a foreign state;
6. by formally renouncing American citizenship in the prescribed manner;
7. by being convicted of desertion from American armed services in time of war;
8. by being convicted of treason or attempt to overthrow the United States government by force; or
9. by being willfully absent from this country to avoid military duty.

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# II. THE DEMOCRATIC PROCESS

## CHAPTER 6

## *Voting and Elections*

Government to many of us is some remote *they* who make decisions which affect us but for which *we* have no direct responsibility. We read about *them* in our newspapers, criticize *their* bungling, speculate about *their* motives and objectives. *We* feel no direct connection with *them*. We like to think that we believe in something called democracy, a noble conception by which men, or a large part of them, govern themselves. Only occasionally do many of us identify our own parts in this noble scheme. On election day, for example, thousands of us troop to the polls moved by some deep feeling that what we do on that day will in some way determine the course of national destiny. It is when we come to consider how, in fact, the people govern themselves that we begin to realize the complexities of this system of government and also to feel any strong sense of personal identification with it. What then is the basis of our proud boast that here in America the people govern? How do you and I influence the conduct of our national, state, and local governments?

There are at least six ways by which every adult citizen may, and many in fact do, participate in this great experiment in popular government:

How citizens participate in public affairs

1. by voting on election day for candidates for the positions of power;
2. by expressing publicly views on the questions of the day;
3. by entreating public officials in behalf of or against a particular program or policy;
4. by joining an organization that expresses to those in power the views of its members on questions of public policy;
5. by contesting a governmental decree before the courts; and
6. by joining a political party and perhaps working for it and contributing money to it.

It is impossible to say which of these methods is the most effective at any given time or in any particular controversy. Some of the methods, for example, joining an interest group, are not accepted as legitimate by every thinker on the subject of the democratic process. All agree, however, that the selection at the ballot box of those who will hold the reins of the state is fundamental to a democratic society. It is appropriate, therefore, to begin our analysis of how you and I and other Americans participate in running our government

## THE NATURE AND HISTORY OF THE "SUFFRAGE"

Constitutional basis

Every democratic system defines those who are entitled to vote for the officers of the government. In every system known to history this definition has excluded some persons (aliens and children most commonly). It is of great consequence who makes this definition and on what basis, since if any great numbers are excluded, especially if any particular class, race, or religious group is excluded, to that extent the system is not genuinely based on the great body of citizens. In the United States, this determination has been made by each of the 50 states. Each state has been left largely free to determine for itself who might vote for national as well as for state and local officers. The states are restricted by the Constitution only to the extent that they may not deny the right to vote to those otherwise qualified because of their race, color, previous condition of servitude (Fifteenth Amendment), or sex (Nineteenth Amendment), nor may they deny to any person the equal protection of their laws (Fourteenth Amendment). The national *electorate* (all those entitled to vote) is, therefore, the sum of separate electorates determined by state constitutions and laws.

The "right" to vote

It might well be asked, how can any person be denied the right to vote? The answer to this in American theory and practice is that it is not a natural right of the type called civil rights. It is a *legal* right and belongs only to those who have been properly endowed with it. The Constitution does not guarantee to anyone the right to vote as it does guarantee that freedom of speech may not be infringed by the Congress. Furthermore, it does not confer the privilege of voting on anyone.

Expansion of the suffrage

When the Constitution of the United States was adopted it could hardly be said to have established a democratic system of government. Although it recognized the idea of popular participation as the basis of just government and although, in fact, a larger number of people were authorized to and did participate in the processes of government than in most major nations of the world at that time, nevertheless, the suffrage was restricted to white, male, property-owners. A large majority—certainly more than 75 per cent—of the adult population was barred from voting. Since that time, one after another of the restrictive qualifications has been abandoned and the suffrage progressively widened to embrace nearly 95 per cent of the adult population of this country.

Elimination of property qualifications

The main battle against property or taxpaying qualifications for voting occurred in the older states along the Atlantic seaboard in the period 1810-50. The frontier states had no such economic distinctions and virtually all of them entered the Union without property qualifications of any kind. It was partly the political strength and example of the newer states which forced the older ones to extend the vote to the "common" people. Antipathy to Irish-

Catholic immigrants induced Connecticut in 1855 and Massachusetts in 1857 to require reading and writing tests designed to disqualify the illiterate foreign-born, but by 1860, the nation had substantially achieved universal, adult, white, male suffrage.

Enfranchisement of the Negro

Since 1860, the suffrage has been broadened to include Negroes and women. A few Negroes were authorized to vote in a few states (mainly in New England) before 1860. General enfranchisement of the Negroes came in the northern states, however, only in the Civil War period. In the South, the Negro was enfranchised as a result of the pressure of the radical Republican majority in Congress during the Reconstruction era. The Fourteenth and Fifteenth Amendments were added to the Constitution by the victorious northern forces in an attempt, largely unsuccessful, to guarantee Negro suffrage in the South for all time. In most of the southern states, the Negroes were effectively disfranchised as soon as possible after the Union troops were withdrawn in 1877. In this century, the vote is once again being gradually extended to the southern Negro.

Enfranchisement of women

Demand for the enfranchisement of women was heard as early as the Jacksonian era. It was pressed rather vigorously in some states during the later stages of the Abolition movement, but no legislature or constitutional convention in this period gave serious attention to the petitions presented on the subject. After the Civil War, the situation changed. The Negro had been enfranchised; the great majority of men were voters; advocates of votes for women could no longer be simply laughed out of court. The first major 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. Before the close of the century, Colorado, Idaho, and Utah became equal suffrage states and by 1914, seven more states had extended the vote to women. The female suffragists now sought nation-wide enfranchisement by constitutional amendment. After much controversy, the Congress ratified the Nineteenth Amendment in 1919 and the requisite number of states approved it. Women, thus participated for the first time on a national scale in the elections of November, 1920. Victory for the feminists in the struggle for the ballot was but part of a larger movement for feminine independence in the home, in industry, in government, and in society. As such it both celebrated their newly won position in society and contributed to it.

Contraction of the suffrage

Together with the wide extension of the voting privilege in the past century there have also been a few contractions. The addition of the requirement of registration, the development of more rigid residence requirements, and the imposition of literacy tests in some states all have served to reduce the number of persons eligible to participate in any particular election.

## THE SUFFRAGE TODAY

General qualifications:

Although the qualifications for voting vary from state to state at the present time, there are some that are almost universally imposed: These are age, citizenship, and residence.

1. Age

The legal voting age in every state but four is 21. Georgia in 1943 and Kentucky in 1955 lowered the required age to 18. In Alaska the voting age is 19 and in Hawaii 20. The governor of Georgia said the state needed the "fresh viewpoint of youth" and that young people would benefit from acquiring active political experience at an earlier age. Throughout the nation, however, the view that if men and women were old enough to serve in the armed forces they were old enough to vote provided the main argument for lowering the voting age. Many states have considered the matter in the last decade, no others have approved it as yet. Constitutional amendments, are, however, pending in South Dakota and in Tennessee. President Eisenhower, in his annual message to Congress in 1954, urged the Congress to submit to the states a constitutional amendment that would authorize citizens of 18 and older to vote. This proposal failed later in the same year to receive the required vote in the Senate. The President unsuccessfully called upon Congress again in 1955 for favorable action. Most of the opposition comes from southern senators who favor state determination of voting qualifications.

2. Citizenship

Western states used to bid for settlers by offering voting privileges to aliens who had taken out "first papers." Since 1926, when Arkansas at last fell into line, every state has required citizenship of its voters. Connecticut requires a person to have been a citizen for at least five years.

3. Residence

The common requirement relating to residence is that the voter shall have lived in the state at least one year, some specified portion of which (frequently three or six months) must have been spent in the county, and some briefer portion (often 30 days) in the district in which one's ballot is to be cast. No one may vote in a given election in more than one place; and this place must be the voter's legal residence, however little of his time he may actually spend there. Residence requirements tend to prevent importations of "floaters" at election time, but operate also temporarily to disfranchise honest voters who have moved from one place to another—even across a street if the street happens to be a boundary between voting districts.[1]

Special qualifications:

There are some qualifications that are imposed only by a minority of states. Among these the most important relate to tax payments and literacy.

1. Payment of taxes

The payment of taxes as a qualification for voting was at one time a requirement in as many as 19 states. In the period 1889-1902, the southern states enacted poll-tax requirements as a part of a concerted movement to disfranchise the Negro by legal methods. Since about 1930, this requirement has been under strong attack and several of the states have abandoned it or have authorized so many exemptions that it is no longer of consequence. In 1957, only Arkansas, Mississippi, Texas, and Virginia required of most of their voters the prepayment of a poll tax of one or two dollars.[2] In six states,[3] some

[1] For a complete tabular view of residence requirements by state, see Council of State Governments, *The Book of the States, 1958-59* (Chicago, 1958), 20-21.

[2] In Mississippi and Virginia the tax liability is cumulative, i.e., a person must have paid his tax each year for several years prior to the election. Alabama also has a poll tax cumulative for two years, but veterans and all adults who were 47 years of age in 1953 are exempted.

[3] Michigan, Montana, Nevada, New Mexico, Texas, and Utah. In South Carolina ownership of property is an alternative to the literacy requirement.

kind of property tax payment is required for voting on local bond issues or special assessments.

2. Literacy

The imposition of educational or "literacy" qualifications for voting began in Connecticut in 1855 and spread from there to Massachusetts and much later to New York and other New England states. In these states it was aimed at immigrants. The device was borrowed in the 1890's by several of the southern state to keep Negroes and "poor whites" from voting and was copied by a few western states to exclude Orientals. Eighteen states (including four in New England, four in the West, and six in the South) and two territories now have this requirement in some form. In a few states the test is confined to ability to read English. In most, however, the ability to write in English is also required—though in some the ability to write one's name is adequate. A few southern states employ an alternative test in the form of demonstrating to an election board (of white members) ability to "understand and give a reasonable interpretation" of a selected passage from the national or state constitution. The test is ordinarily conducted at the time of registration, and in the South at least, wide latitude in administering it is conferred on the local election officials. The best system in the country is that adopted by New York in 1921 in which a test of reading and writing designed by experts is administered by the state educational department annually for those who have not successfully completed the sixth grade in public school or who have not previously passed the test. Where fairly administered, there is much to be said for this type of qualification, in view of the necessity for understanding the issues of the day in order to participate effectively in the processes of election. No real hardship is imposed on anyone by such a test so long as free public education for youth and adults is widely available.

Disqualifications

Certain categories of persons are almost universally disqualified from voting: inmates of prisons or asylums; violators of certain election laws, for example, those forbidding bribery; vagrants. In one state or another, the voting privilege may be denied for anyone of fifty reasons and there are an average of six reasons per state.

## THE PROBLEM OF ENFRANCHISING THE SOUTHERN NEGRO

> 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.
>
> The Congress shall have power to enforce this article by appropriate legislation.—Fifteenth Amendment

Disfranchisement by force

The southern states, as we have noted, were compelled to give Negroes the vote if they wished to be restored to partnership in the Union. For more than a decade the armies of the central government occupied the South to insure compliance with these commitments. The results of the northern policies

were disastrous from the southern point of view, and the Reconstruction Era has always been for them a black page in the nation's history. Gullible freedmen led by northern "carpet baggers" depleted their treasuries and mocked their cultural and social traditions. The southern whites resorted to violence and intimidation through the Ku Klux Klan to regain control of their governments and, when the troops were withdrawn (in 1877), firmly and vigorously re-established white supremacy. Fearful that national intervention might again by attempted, unhappy over the demoralizing effects of forceful methods, and anxious to legitimatize white dominion, the southern statesmen cast about for "respectable" methods for surmounting the plain requirements of the Fifteenth Amendment. Agrarian discontent in the 1880's further stimulated certain groups to find methods for weakening the political power of the sharecropper and the small farmer—white or black.[1]

Negro disfranchisement by legal means

Constitutional and statutory disfranchisement of the Negro south of the Mason and Dixon line was accomplished in the period 1890-1905 with one legal barrier after another erected against the colored man. Residence requirements were lengthened to bar the mobile sharecroppers. Poll taxes were levied and would-be voters required to produce the receipts—in some instances receipts from several years past—at the time of registration. The grounds for disfranchisement were broadened to include assault and battery, petty thievery, perjury, and other minor offenses. Literacy tests were cunningly contrived to require not only reading but interpretation—before a hostile election board—of constitutional provisions. None of these devices was aimed at the Negro as such and the courts could find in them no violation of the Fifteenth Amendment (Williams *v.* Mississippi, 170 U. S. 213, 1898). Clearly many poor whites were also disfranchised by these requirements. To get the whites on the voter lists, "Grandfather clauses" were adopted temporarily as parts of several state constitutions. These clauses exempted from taxpaying qualifications and literacy tests those whose lineal ancestors had been eligible voters before January 1, 1867. The Supreme Court ultimately declared this procedure unconstitutional (Guinn *v.* United States, 238 U. S. 347, 1915) but not until long after the whites had been added to permanent registration lists. When early in this century the direct primary became a regular part of the nominating procedure, the Southern white leaders crowned their efforts by excluding Negroes from participating in the Democratic party's primaries.

It should be understood that the Negro was not kept from voting solely by these devices. Much evidence exists to show that the Negro had been "persuaded" to stay away from the polls before these laws were enacted. The laws tended to insure that intimidation would be unnecessary in the future. The result of the "persuasion," followed by the laws, however, was that Negro voting in the southern states after 1890 fell to insignificant proportions. In the

[1] See V. O. Key, *Southern Politics in State and Nation* (New York, 1949), Chap. 25, for a thorough study of the disfranchisement of the Negro in the South.

border states of West Viriginia, Kentucky, and Tennessee, however, Negro participation did not drop so sharply as in the states of the Deep South.

New attack on the poll tax

Gradually the suffrage policies of the South became part of the accepted pattern of American politics. The acrimonious attacks of the nineteenth century abated. The Republican party even stopped writing into its platform its traditional denunciation of southern practices. In the past two decades, however, the issue has exploded once again into national politics. This time, however, it is the northern Democrats who have taken the lead in demanding the vote for the southern Negro. The two world wars of this century were accompanied by heavy migration of the Negroes into northern industrial centers. Here they have become increasingly articulate participants, typically in Democratic organizations, inspiring sympathetic attention to their demands on behalf of their southern brethren. As a part of a general movement to eradicate racial discrimination in all its forms from the American scene, many other groups have also sought to give the vote back to the southern Negro. A major target of the urban Democrats of the North has been the poll tax. Although the literacy test as administered is probably a more effective barrier to Negro suffrage, it is harder to attack nationally. Several northern states have such tests and it is the administration of the test rather than the test itself which does the discriminating. The first attack on the poll tax was made unsuccessfully in the courts (Breedlove *v.* Suttles, 302 U. S. 277, 1937). Congress has then been called upon repeatedly to outlaw taxpaying qualifications for voting in national primaries and elections. Each time the Senate has frustrated action, several times by filibuster or threat of it. President Truman (1948-50) urged the Congress without success to pass legislation of this type in connection with his civil-rights program. The southern senators have consistently taken the position that this is a state matter constitutionally and practically and that the southern states alone can and will solve the problem. In support of their contention, they can point to the several southern states that have repealed the tax requirement.

The attack on the "white" primary

The friends of Negro enfranchisement have been more successful in demolishing the barriers to Negro participation in the Democratic primaries. This has been achieved, however, not in the legislative arena but in the judicial one. In the "Solid South" the Democratic party is so paramount that nomination to carry its label is equivalent to election. In as many as 10 states, the majority party at one time or another procured the enactment of "white" primary laws excluding the Negro from the Democratic primary. The favorite method was to empower political parties to impose qualifications of their own for voting in their primaries, over and above any laid down in the state constitution and statutes.

The end of the "white" primary

When Texas in 1923 tried to bar Negroes from Democratic primaries by express statutory provision, the Supreme Court declared the law a violation of the "equal protection" clause of the Fourteenth Amendment (Nixon *v.* Herndon, 273 U. S. 536, 1927). The Court also overthrew an alternative

statute which empowered the state executive committee of the party to fix qualifications for voting in the primary (Nixon *v.* Condon, 286 U. S. 73, 1932). The Court, however, could find no fault with a "white" primary rule imposed solely on the authority of the state party convention (Grovey *v.* Townsend, 295 U. S. 45, 1935). There the matter stood for almost a decade. Meanwhile, attacks on the Negro-exclusion system of the South increased in volume and scope. A new Court in 1944 took another look at the "white" primary system and this time held that Negroes could not be excluded as such from participating in primaries or elections by party rule or by state law (Smith *v.* Allwright, 321 U. S. 649). The primary said the Court is an integral part of the election process. Every subsequent effort by the southern states to get around the logic of the decision has been frustrated by the Court in more recent decisions. The doom of the "white" primary has meant that the southern leaders are again placing their reliance on vigorous enforcement of the older suffrage qualifications already described. In most of the southern states these voting requirements have been extended to the primary elections.

Recently, Republican leaders have sought to take the lead in advancing the cause of Negro enfranchisement. Capitalizing on the school segregation decision enunciated by a Republican Chief Justice (Warren), many northern Republican leaders see an opportunity to capture the northern Negro vote and thus weaken the hold of the Democrats in the big cities. Led by President Eisenhower and Senator Knowland (California), they have sought legislation in 1957 and in 1960 authorizing national intervention in behalf of eligible Negro voters. As a part of the first civil rights legislation of this century, a Republican-Democratic coalition pushed through the Congress in 1957 an Act (Civil Rights Act of 1957) authorizing the attorney general to seek injunctive relief in a national court to prevent threatened intimidation or coercion designed to prevent any person from voting for national officials.[5]

**The extent of Negro voting in the South**

Until the school segregation question aroused such intense feelings, there appeared to be a gradual increase in voting by southern Negroes. Many groups in the South sought to improve the civic status of the Negro and the national debate and agitation stimulated re-examination of the southern attitudes. As we have noted, poll-tax requirements were repealed in several states and weakened in others. Election boards became more lenient especially in the cities. A survey in 1953 in Alabama by the National Association for the Advancement of Colored People indicated that from 1946 to 1953 the number of Negro voters had increased from 6000 to 25,000. This was still a small portion of the 516,000 adult Negroes in the state at the time.[6] A more recent study by the Southern Regional Council suggests there may have been an even larger vote in 1956.

[5] The original version of this Act as proposed by the President would have allowed violators of national court injunctions to be punished summarily for contempt of court. After prolonged and bitter debate, a compromise provision was enacted that requires a jury trial in contempt cases arising under this provision when the summary conviction has resulted in a fine of more than $300 or imprisonment in excess of 45 days. This Act was amended in 1960. (See page 64.)

[6] *New York Times.* May 10, 1953. See also D. S. Strong, "The Rise of Negro Voting in Texas." *Amer. Polit. Sci. Rev.,* XLII, 510-522 (June, 1948).

**NEGRO REGISTRATION IN THE SOUTH**

| *State* | *Non-Whites over the Voting Age—1950 Census* | *Negroes Registered to Vote in 1956* | *Per Cent Registered* |
|---|---|---|---|
| Alabama | 516,245 | 53,366 | 10.3 |
| Arkansas (1955) | 232,191 | 67,851 | 29.2 |
| Florida | 366,797 | 148,703 | 40.2 |
| Georgia | 633,697 | 163,389 | 25.6 |
| Louisiana | 510,090 | 161,410 | 31.6 |
| South Carolina | 390,024 | 98,890 | 25.3 |
| Texas * | 550,992 | 209,897 | 38.1 |
| Virginia | 422,670 | 84,931 | 20.1 |

* The registration data from Texas covers only 95 of the state's 254 counties; however, an estimated 90 per cent of the Negro population of the state resides in these counties.

Table is from a speech by Senator Paul Douglas of Illinois before the United States Senate, June 10, 1957. The figures came from the Research Office of the Southern-Regional Council.

The Council could not secure accurate figures for Mississippi and the registration data for many North Carolina counties were incomplete; however, no estimate of Negro registration in Mississippi exceeds 5 per cent of the adult Negro population.

The school issue may, however, result in an intensification of racial antagonism and some observers believe that Negro participation may be declining somewhat at the present time.

Suffrage provision of Fourteenth Amendment not enforced

A final word on this problem should be said about the suffrage provision of the Fourteenth Amendment. The provision of this amendment that a state's representation in Congress may be reduced if it denies or abridges the right to vote of any of its male inhabitants for any reason except "participation in rebellion or other crime" has never been enforced and probably never will be. It would catch northern states with literacy tests as well as southern ones.

## PARTICIPATION BY THE VOTER

Amount of non-voting

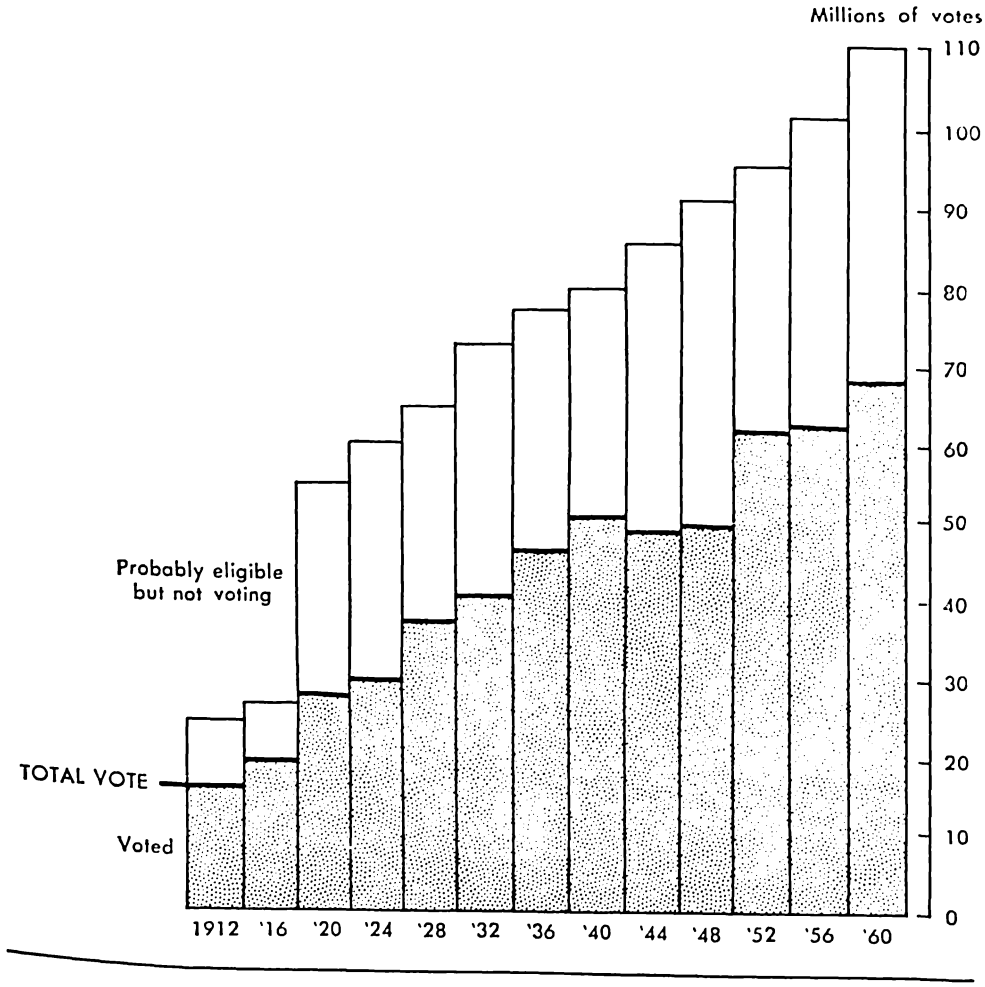
The hard-won privilege of voting is of no value if it is not used. The sad fact is that a great many adult members of our society rarely, if ever, use the power which so many worked so hard for so long to win for them. Accurate figures on the number of eligible voters throughout the United States are not available, but those we have suggest that millions of American adult citizens stay home from the polls every election day.

One of the major factors influencing the amount of nonvoting is the type of election. Presidential elections, typically, attract the largest amount of voter participation, congressional and state elections a lesser amount, and local elections, the least. The presidential election, however, in this century has rarely been attended by more than 65 per cent of our adult citizen population and commonly only 50-60 per cent participate. Local elections in which as many as 40 per cent of the adult residents vote are unusual.

Reasons:

In view of the variations from state to state in the requirements for voting, it is impossible to say how many adults do not vote because they are

**POPULAR VOTE FOR PRESIDENTIAL ELECTORS, 1912-1960**




SOURCE: U. S. Bureau of the Census.

1. Disqualification

ineligible to do so at any given election. In every election some number of adult citizens are disqualified by reason of: (1) residence in the District of Columbia where no elections are held and whose permanent residents are not eligible to vote in any state; (2) failure to satisfy the local residence requirements—the mobility of our population makes this a substantial factor in disqualifying adult citizens; (3) inability to meet taxpaying or literacy qualifications when these are imposed. Because of the disfranchisement of adult Negroes in many of the southern states and because of the one-party system in those same states (the result of the election is a foregone conclusion), par-

ticipation in elections is least in the South with rarely more than 20 per cent of the adult citizens voting even in presidential contests.

2. Discouragement by procedural difficulties

Perhaps a larger number of adult citizens are discouraged from voting than are disqualified. Some are unwilling to take the trouble to register—and in a few jurisdictions where registration must precede every election, registration procedures are inconvenient and time-consuming. Some are necessarily absent from their home districts on election day and are unwilling to go to the extra trouble associated with absentee voting—this procedure is made quite inconvenient by some states. Many are confined to their beds by illness and others are unwilling to venture forth if the weather is bad.

3. Lack of interest

After all allowances are made, however, it is highly probable that most of those who stay at home on election day do so because of lack of interest.[7] This lack may be rationalized—it can never be justified—by such factors as (1) lack of real issues in the election; (2) fear of employer or neighborhood disapproval; (3) the complexity and size of the ballot in many states. Studies of voter behavior show that education, sex, economic status, and age are influential factors in nonvoting. Women fail to vote more frequently than men; uneducated or little-educated persons vote less frequently than high school and college graduates; unskilled and semiskilled manual workers vote less frequently than skilled laborers and professional persons; those in lower income groups vote less frequently than their more comfortable compatriots; persons under 30 vote less frequently than those above 30.[8]

Results

Many politicians have assumed that the amount of voter participation has important partisan consequences. A heavy vote, it was felt, favored the Democrats because nonvoting was more characteristic of the groups which support that party. The Truman victory in 1948 in a light vote and the Eisenhower victory in 1952 with a heavy vote have cast much doubt on this assumption but have not completely dispelled it.

## THE CONDUCT OF ELECTIONS

Importance of election administration

The intentions of the voter are not completely realized unless he can record them in secret, on a ballot which provides him with a choice, in a place which he can get to, under circumstances which are not oppressive, and unless his vote is honestly counted and weighs in the result exactly as much as that of any other qualified voter. The administration of elections is thus an important element in the processes of popular government. More than a century and a half of experience has brought us nearer to the achievement of a fair, convenient, and honest election system but there are still many weaknesses.

[7] A survey by the American Heritage Foundation in connection with the election, Nov. 6, 1956, estimated that of the 40 million adults in America who did not vote in the election, 17 million may be accounted for as follows: insufficient residence in voting district—6,000,000; travelling on business—2,600,000; illness—5,000,000; noncitizens—2,500,000; unable to meet literacy requirements—800,000; residents of the District of Columbia—500,000; contrary to religious beliefs—115,000. *New York Times*, Nov. 28, 1956.

[8] Survey Research Center, University of Michigan, *A Study of the Presidential Vote: November, 1948* (Ann Arbor, 1949).

Registration

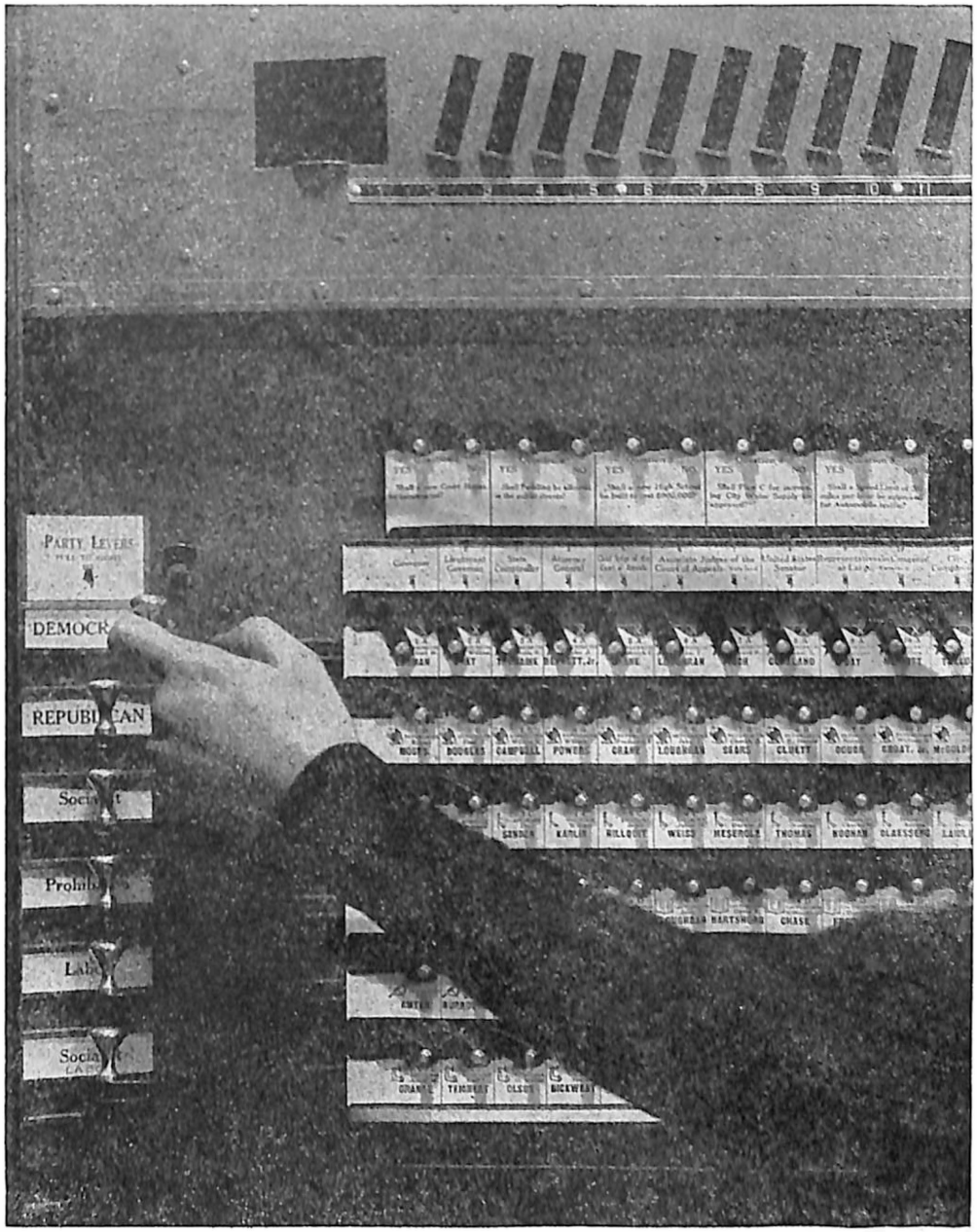
As the number of voters increased as a result of the expansion of the suffrage and the growth of population, and especially as people huddled in ever larger numbers in our great cities, the problem of identification of those qualified to vote became increasingly acute. In the small town, where everybody knows everybody, almost any resident could tell who could vote and who could not. In the great cities, however, ruthless political organizations began early in our national history to exploit the anonymity of the city throng by sending their lackeys to vote in one district after another. Some system of identification which would allow only those qualified to participate became necessary. Hence, the rise of systems of registration and of the preparation of voting lists to be used by those directing the election proceedings. Every state but Arkansas and Texas now requires some type of registration in connection with virtually all elections. In general, a voter must appear in person before a registration official some days in advance of the election and establish his qualifications. An earlier preference for *periodic* registration—a system requiring the voter to register annually or at fixed intervals—has gradually given way to the less expensive and more convenient system of *permanent* registration. In the permanent system now used by 47 states (state-wide in 35 states and for certain areas in the others) a voter registers but once and his name remains on the list as long as there is no reason for removing it. Typically, if he does not vote in any election for two years his name is stricken from the list. The main problem of the permanent registration system is keeping the lists up to date by adding newcomers and deleting those who have died or moved away. Sluggish and partisan administration of the system opens the door for the "cemetery" and the "vacant house" vote.

Creation of precincts

In order for each voter to be able to get to the polls and to cast his ballot in the same day cities and counties must be divided into polling districts. These districts are called *precincts* and are laid out by city or county officials. Typically, a precinct is designed to contain from 200 to 1000 voters and is a subdivision of a city ward or a rural township. Each precinct contains a polling place where the voting occurs. School houses, fire stations, or other public buildings are now widely used for this purpose but in some areas private quarters (stores usually) are rented by the local officials.

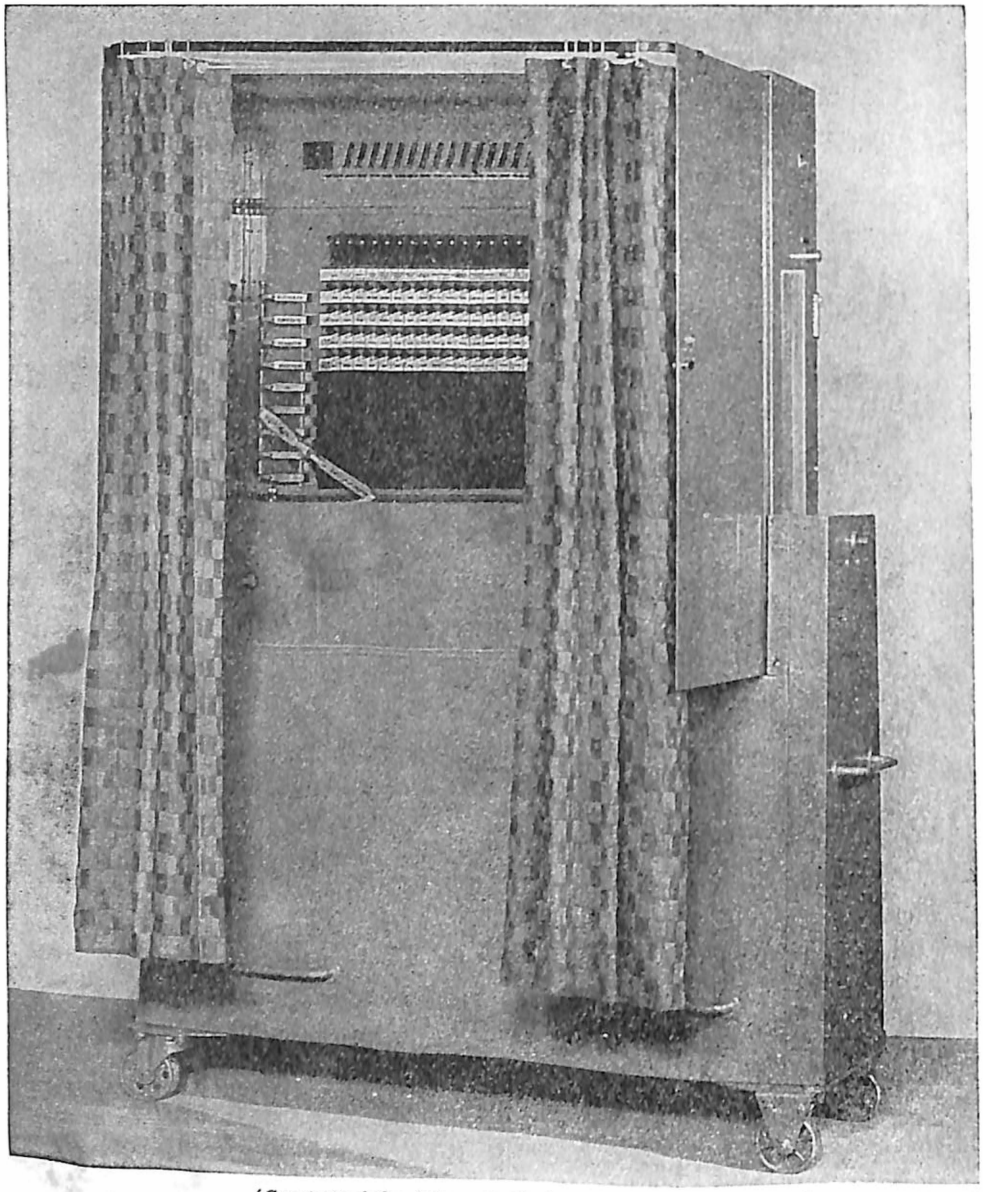
Election officials

The next stage in preparing for elections is the designation—usually on a temporary basis—of a large number of election officials to preside over the polls on election day, to count the ballots and to decide disputes. These officials are selected most everywhere on a partisan basis, with the leaders of each party designating their choices for each precinct to the city, county, or state officials charged with the selection. Most state laws require that some from each party serve in each district. The theory that bipartisan selection will prevent fraud in the polling place is only partly supported by the facts. Typically, five officials preside at the polls: an inspector, in charge; two judges to help decide disputes; and, two clerks who keep the voters lists, check off the citizens as they vote, and issue ballots or attend the voting machines. In an effort to improve the quality of polling officials, Milwaukee




*(Courtesy of the Automatic Voting Machine Corporation, Jamestown, N. Y.)*

**DETAIL OF A VOTING MACHINE**



*(Courtesy of the Automatic Voting Machine Corporation, Jamestown, N. Y.)*

**FULL VIEW OF A MODERN VOTING MACHINE**

in 1936 and Minnesota in 1940 authorized the use of qualifying examinations. Printed instructions are now occasionally used to inform the officials in advance of their duties. There is still much room for improvement, however, in the quality and, in some places, in the honesty of the officials.

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, folds the ballot, and emerging, 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 normal arrangements in most states, enter the booth to give it.

Voting machines

Paper ballots are gradually disappearing as a part of the voting process and voting machines are coming more and more into use. More than two-thirds of the states now authorize them. Where such machines are employed, the voter identifies himself at the polls in the usual way, but instead of receiving a printed ballot, is directed to a curtained space in which stands the machine showing on its face the candidates' list which the ballot would contain if one were used, and where he votes by merely pulling levers—a single master lever (in state providing such) if voting a straight ticket, otherwise individual levers for particular candidates. Automatically recording the votes, and simultaneously adding them up, the voting machine has the great advantages of complete secrecy, economy of time, elimination of defective votes, and full tabulation of results the moment the polls are closed. Aside from hesitancy to adopt new ways, and perhaps in some cases the lukewarmness of politicians toward a device that cannot be easily manipulated, the main obstacle to wider employment of voting machines is the cost of the machines themselves—something like $1400 apiece, exclusive of transportation and upkeep.

Absentee voting

Many voters are so situated, at a given election, that they are unable 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, 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. Considering it unjust that people so situated should be compelled to lose their votes, Vermont led off in 1896 with a statute making general provision for absentee voting; and today all states except New Mexico have laws on the subject, although in some instances applying only to certain (e.g., presidential) elections rather than to all, and in some states, South Carolina, for example, only to persons in the armed services. Procedures vary in detail, but in general the voter concerned makes application to the proper home official for the privilege of voting *in absentia,* receives a ballot directly or through an official in charge of elections where the voter is, and—after

validating himself before a notary or other official—marks his ballot and mails it to the proper home authority. The Congress in 1955 recommended to the states the adoption of uniform procedures for absentee voting by members of the armed forces, sailors of the merchant marine, and civilian employees serving outside the country. In the same legislation, national officials were directed to facilitate voting by persons under their jurisdictions.

Counting and reporting the results

When the polls close, the results are tabulated by the election officials and entered upon an official "return" which is sent to the county or city election board to be consolidated with those from other precincts. In a state-wide or national election these city or county returns are then forwarded to a state canvassing authority. All of this, of course, takes some time and it is usually several days after the election before the official canvass is completed and the results formally recorded. Meanwhile, however, the totals from each precinct are phoned into the newspapers, the city clerk, the police, or the party headquarters where they are totaled, and these unofficial returns are announced hour by hour through the night so that the public is informed how the election is coming out.

The task of the precinct officials is completed when they return to their superiors all of the voting machines, ballots (used, spoiled, and unused), pollbooks, voters lists, and tally sheets which had been issued to them. When paper ballots are used, all are deposited in a sealed ballot box where they are kept for a specified period. Dishonest counting, stolen ballot boxes, stuffed ballot boxes, and mutilated voting machines appear to be a diminishing characteristic of this phase of election administration. In the past these practices were all too common in many large cities.

Disputed elections

The final stage in the process is the issuance of a certificate of election to each person declared elected by the official county (county clerk) or state (secretary of state) canvassing authority. This certificate is prima facie evidence of legal right to hold the office. It is not, however, conclusive. All state laws make provision for disputed elections. Such cases are commonly settled in the courts except that legislative bodies, national, state, and local, invariably have the power to settle all such contests involving their own membership. Most states also make some provision for a "recount" in disputed cases. Many such laws require the candidate making the protest to pay all or part of the costs.

## BALLOT FORMS

The Australian ballot in general use

It took about a century for the American voter universally to achieve secrecy in casting his vote. Votes for many decades were cast orally and in public with untold pressures and irregularities surrounding the process. Then, for a time, each party printed its own ballots, frequently on colored paper so that watchers could tell how any person voted. Since 1888, however, the "Australian" ballot has been adopted by every state. The essence of the Australian system is that the only ballots allowed to be used at the polls are




## Democratic Ticket

| | |
|---|---|
| DEM. | For United States Senator ALEX M. CAMPBELL |
| DEM. | For Secretary of State CHARLES F. FLEMING |
| DEM. | For Auditor of State JAMES M. PROPST |
| DEM. | For Treasurer of State F. SHIRLEY WILCOX |




## Republican Ticket

| | |
|---|---|
| REP. | For United States Senator HOMER E. CAPEHART |
| REP. | For Secretary of State LELAND L. SMITH |
| REP. | For Auditor of State FRANK T. MILLIS |
| REP. | For Treasurer of State WILLIAM L. FORTUNE |




## Prohibition Ticket

| | |
|---|---|
| PROHI. | For United States Senator LESTER N. ABEL |
| PROHI. | For Secretary of State J. RALSTON MILLER |
| PROHI. | For Auditor of State GARNETT JEWELL |
| PROHI. | For Treasurer of State HORACE N. SMITH |

PARTY COLUMN BALLOT FORM

To vote for a Person, mark a Cross X in the Square at the right of the Party Name or Political Designation. X

**GOVERNOR** — Vote for ONE

- PAUL A. DEVER - of Cambridge ~~~ Democratic
- ARTHUR W. COOLIDGE - of Reading ~~~ Republican
- HORACE I. HILLIS - of Saugus ~~~ Socialist Labor
- MARK R. SHAW - of Melrose ~~~ Prohibition

**LIEUTENANT GOVERNOR** — Vote for ONE

- CHARLES F. JEFF SULLIVAN - of Worcester ~~~ Democratic
- LAURENCE CURTIS - of Boston ~~~ Republican
- LAWRENCE GILFEDDER - of Boston ~~~ Socialist Labor

**SECRETARY** — Vote for ONE

- EDWARD J. CRONIN - of Chelsea ~~~ Democratic
- RUSSELL A. WOOD - of Cambridge ~~~ Republican
- ELLSWORTH J. M. DICKSON - of Needham ~~~ Prohibition
- FRED M. INGERSOLL - of Lynn ~~~ Socialist Labor

To vote for a Person, mark a Cross X in the Square at the right of the Party Name or Political Designation. X

**CONGRESSMAN**
With District — Vote for ONE

- EDITH NOURSE ROGERS - of Lowell ~~~ Republican
- CLEMENT GREGORY McDONOUGH - of Lowell ~~~ Democratic

**COUNCILLOR**
Third District — Vote for ONE

- OTIS M. WHITNEY - of Concord ~~~ Republican
- JOHN A. DOLAN - of Boston ~~~ Democratic

**SENATOR**
Fifth Middlesex District — Vote for ONE

- RICHARD L. FURBUSH - of Waltham ~~~ Republican
- JAMES J. VAHEY - of Watertown ~~~ Democratic

OFFICE BLOCK BALLOT FORM

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 or person for whom one has voted. The ballot is normally in blanket form, that is, bearing on a single sheet the complete list of offices to be filled and of candidates. When national, state, and city elections are held simultaneously, the names of candidates for presidential elector, and also of candidates for municipal offices, are sometimes printed on separate sheets. Where voting machines are used these are prepared by public officials in accordance with state laws and are identical for all voters in the same constituency.

Ballot forms:

The arrangement of names on the ballet or machine varies from state to state but, in general, tends to conform to one or the other of two plans. In the party-column ballot, introduced in Indiana in 1889, the names of the candidates for the various offices are listed in vertical columns under the name and symbol of the party with which they are identified. Typically, there

a. Party-column

is a box at the top of the column in which the voter by making a cross (or pulling one lever in the voting machine) may vote for the entire slate of candidates for that party. This type of ballot arrangement is designed to facilitate "straight-ticket" voting and is highly favored by professional politicians. Some

b. Office-group

variation of the party-column ballot is now used by 30 states. The other ballot arrangement is the "office-group" ballot and was introduced in Massachusetts in 1888. On this type of ballot, the names of the candidates of all parties are grouped under the offices for which they are contesting. Designed to place more emphasis on the office than on the party and to discourage "straight-ticket" voting, this system is less popular with the politicians. It is now used in some form in 20 states. Some states using the office-group ballot also make provision for voting a "straight-ticket."

## RECALL ELECTIONS

Purpose

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. Elections are sometimes held in reverse, aimed at "recalling" an official in the midst of his term. In the early part of the present century, with a tide of "direct" popular government running strong, many people became enamored of the idea that the voters ought to be in a position to oust an elected official in the midst of his term if they were displeased with him. The idea took hold to such an extent that a dozen states adopted some form of recall procedure for use against state and local officers (usually elective ones only).[9]

Procedure

Except for the manner in which it is initiated, a recall election does not differ greatly from any other one. When a movement to oust a given official

[9] Oregon (1908), California (1911), Washington, Colorado, Idaho, Nevada, and Arizona (1912), Michigan (1913), Louisiana and Kansas (1914), North Dakota (1920), and Wisconsin (1926). In only eight of these states does the recall apply to judges. The device made its first appearance in a municipal charter of Los Angeles in 1903.

gets under way, a paper setting forth the charges against him, and known as a "petition," is circulated in a quest for signatures. If the requisite number (usually about 25 per cent of the electorate of the area concerned) is obtained, the city clerk or other official with whom it is filed sets a date for a recall election (unless a regular election is about to take place). If the official whose recall is sought chooses not to face the issue, he may simply resign. 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. The voters then render the verdict. If the incumbent polls the largest number of votes, he continues in office. But if one of his opponents outstrips him, the victor forthwith assumes the office and fills out the remainder of the term.

Results

In practice, the recall has proved a very modest addition to our electoral usages. There is, it is true, no way of measuring its moral effect upon officeholders, but one can hardly believe that the comparatively few instances in which the device has been successfully invoked by dissatisfied voters represent all of the situations in which officials deserved to be ousted. A goodly number of local officers, including a mayor of Los Angeles, have been recalled in California—a mayor also in Seattle and one in Detroit. But in only two instances have officials chosen by the voters of an entire state been reached.[10] It is significant that there have been no new state adoptions of the plan in more than 30 years. The terms of most public officers are short enough that dissatisfaction can readily be registered in the regular election.

## CRITICISM OF THE ELECTORAL SYSTEM

The task of the electorate

Although much remains to be done, especially in our larger cities, to insure a fairer, less expensive, more convenient, and more honest system for casting and counting the votes, the improvements of the past half-century in all these respects have been substantial. The most persistent and thoughtful criticism of our electoral process is that it heaps too large a task on the voter. He is called upon to vote too frequently on too many offices and propositions. Not only is there an election of some kind in many states every year but, if primaries are included, there are two and even three a year. It is not easy for the average citizen to keep up an intelligent interest and to take an active part in so many electoral contests. More serious than this, when he does go to the polls he is confronted with a long ballot filled with scores of names and dozens of offices. He cannot easily be familiar with the duties of so many offices or the qualifications of all of the candidates for them. The length and complexity of the typical ballot result from: (1) the fact that in many states national, state, and local elections occur at the same time; (2) the use of popular referenda in many states which require the voter to express his views on proposed constitutional amendments, municipal charter changes, pieces of

[10] In 1921, the governor, attorney general, and commissioner of agriculture of North Dakota were recalled. In 1922 two members of the public utility commission of Oregon were recalled

legislation, or bond issues; (3) the large number of state and local offices that are filled by election. A great many voters start off well by voting for president, governor, senator, and perhaps member of the House of Representatives but then succumb to "voter's fatigue" and never reach members of the state legislature, the elected state officers, local officers, or referred propositions. The vote on constitutional amendments, for example, is rarely more than 75 per cent of the vote for governor or senator. Politicians with a small but solid block of votes to be cast for local officials can frequently determine the outcome of these minor contests. Few voters trooping to the polls to select a president of the United States will be even slightly informed on the candidates for coroner when they reach that office on the ballot.

The short ballot

The movement for reform of this defect is called the "short-ballot" movement. One of the remedies proposed is to hold state and local elections at a different time from national elections. This simplifies the ballot in any given election and also has the merit of focusing attention on state and local issues. This is now being done in a number of states. Another remedy is sharply to reduce the number of elective officers. Only the president and members of Congress among our national officials are elected. If the same policy were adopted in state, county, and municipal government, the ballot would be much simpler. There is no excuse, say the critics, for electing essentially administrative or judicial officers. Provision should be made for appointing judges, sheriffs, coroners, district attorneys, state treasurers, and all of the other offices of this type which clutter up the ballot and confuse and irritate the voter. Promoters of these reforms, however, find a deep resentment among many voters against proposals that appear to be taking away the power of the people.

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# CHAPTER 7

# Public Opinion and Political-Interest Groups

Voting is not the whole of democracy

The solitary citizen in the privacy of the polling both casting his vote for those who will direct his government is a stirring dramatization of the processes of democracy. In this great drama each player, the humble and the proud, the rich and the poor, the intellectual and the workingman, is equal to every other player. It is easy, however, to mistake election day for the whole of government by the people. The people of the Soviet Union also vote and in very large numbers. With them, however, voting is a testimonial to the virtue of their rulers; it is not a process for giving them direction. We believe that a democratic system must offer the voter a choice among competing programs or policies. The victor in the contest must emerge with some sense of what he is to do with his victory. Furthermore, the governors of the nation should, as we believe, be made rather persistently aware of the desires of the governed. We expect our officials to resolve the conflicts in society, and this requires that they know what these conflicts are and who and what is involved.

Group basis of politics

*Influencing public policy* is a far more complex task than *selecting persons* to hold office. Electing persons committed to the policies that we desire is but one way in which this is done. A great deal more than voting is involved even in making sure that the persons who stand for office are committed to some policies. In this aspect of democratic government the individual, as such, is relatively powerless and ineffectual. By associating himself with others of similar persuasion he mobilizes and articulates his interests and desires and places himself in a position to give direction to parties, to candidates, and to the government itself. The constituent elements of society are not solely atomic individuals or even families but also groups of many kinds. It is through the group that the individual participates in and reacts to society. It is in terms of the group that the individual very largely defines the "public good" or the "general welfare." It is as members of a group that individuals realize their personal or familial ambitions. Group activity is as much a part of the processes of government as individual behavior. Not all groups, of course, have political ambitions. A great many of them are formed to advance the interest—religious, economic, social, fraternal, racial—of the individuals who compose them. Advancing the interest of a group, especially the economic interest, normally involves participation in the political process. The state with its vast power and its traditional prestige is in a position benevolently to advance or harshly to curtail the interest of any segment of society.

Political-interest groups

Groups which seek to advance the interest of their members in the political arena may be called *political-interest groups* to distinguish them from groups with other objectives. Some authors refer to these groups as *pressure*

*groups*, which is rather a designation of one of their typical methods than a description of their general orientation. It is through such groups, however named, that citizens influence the policies of government.

Interest groups in American society

One of the outstanding characteristics of the American system of government is the great multiplicity and diversity of political-interest groups which operate within it. The ease of formation, the intensity and scope of activities undertaken, and the political concern of these groups in our society exceeds that in any other in the modern world. This may be attributed in part to the tremendous technological development in the United States in the last century, accompanied as it has been by increasing specialization of function, by increasing interdependence, and by increasing ease of communication over wide distances. The rapidity of technological change has stimulated the formation of groups to soften the hardships associated with such rapid change. To put it another way, groups spring into being as a result of maladjustment in social or economic relations and seek to order anew relationships which have been shattered by technological change. The second factor contributing to the growth and activity of political-interest groups in American society is the tolerance of our laws and customs. Freedom of association is a cherished cornerstone of the American way.[1] Some observers assert that we are a nation of joiners; the necessity for group identification is a characteristic of the American individual.

The clash of interests

The interests of some groups are very frequently served only at the expense of the interests of others. The clash of such interests is the very essence of political dynamics. From the beginning of our national life the activities of interest groups have been regarded by many as sordid, unpatriotic, and dangerous to social unity and political stability. Sensational exposés of the "behind-the-scenes" activities of the "interests" in the legislative halls or the administrative offices still shock large segments of the American populace and fill them with a sense of the futility of democratic government and the treachery of their officials. Group interest, in this view, is opposed to "national" or "public" interest. It is unkind but just to point out that the interest groups whose conduct revolts us and whose machinations we distrust are not the groups to which we belong. James Madison, in the most frequently quoted of the Federalist papers (No. 10), revealed his keen understanding of the role of interest groups in society and of the place of the government in respect to them:

> A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.

In the same essay Madison took some pains to show that the constitutional arrangements of 1787 were designed to prevent any one group from ever get-

[1] See B. Smith, *A Dangerous Freedom* (New York, 1954).

ting the upper hand. Whether regarded as signs of illness or of health in the body politic, the activities of interest groups are an essential part of the American scheme of democratic government. It is impossible to understand the behavior of political leaders, legislators, executives, or even judges except in terms of the groups with which they tend to identify themselves.

American government and interest groups

One other characteristic feature of our governmental system influences not only the number but the activities of the interest groups of our society. The federal system, the division of power among three branches of government at the various levels, and the two-party system provide an unusually large number of points of access to power and influence. Interest groups thus may aspire to influence by working at a number of entrances, and each of the doors is likely to be well attended by numerous and conflicting groups. No single door leads certainly and inexorably to domination of the state.[2]

## POLITICAL-INTEREST GROUPS IN ACTION

Numbers of groups

How many political-interest groups are active on the American scene no one can say with accuracy. At least 500 maintain permanent headquarters in the national capital but this is only a small portion of those that are politically active at some level of government. The Department of Commerce in 1949 listed 4000 national trade, professional, civic, and other associations.[3] If account is taken of local branches, chapters, affiliated units and independent local groups, there are perhaps 150,000 groups more or less active in politics. The number swells or recedes daily. Most of these groups and associations have interests other than political ones and the intensity of their political activity varies widely from one year to the next and among themselves. All of them are at least potentially political forces. Even among those that are regularly active politically there is great diversity. Some number only a handful of adherents; others have membership running into the millions. Some have little money to spend; others have a great deal. Some have more or less elaborate headquarters and secretariat; others engage the attention of one part-time employee.

Business groups

One of the largest and most aggressive spokesmen for the "business community" is the Chamber of Commerce of the United States. The Chamber is essentially a federation of local Chambers of Commerce and these include firms as well as individuals and typically embrace the merchants, manufacturing establishments, and financial and service institutions in each substantial community. It is thus a cross section of the "business" interests of the country and cannot and does not commit itself to political issues about which the business community is sharply divided. In the national scene it can regularly

[2] For balanced and comprehensive treatments of the role of interest groups in American government consult D. B. Truman, *The Governmental Process* (New York, 1951) and A. F. Bentley, *The Process of Government* (New York, 1908). This section is very largely based upon these two works.

[3] U. S. Department of Commerce, *National Associations of the United States* (Washington, D. C., 1949).

be found attacking governmental regulation of prices or wages, supporting reductions in the tax rates on profit or investment, advocating rigid economy in government—except in the public works field where many of its local chapters are strong pleaders for new post offices and river and highway improvements—and assailing government protection for labor unions. The national headquarters produces and publishes material for the members, for Congress, and for congressional committees, urging its point of view on matters in which it is interested. Its position on national questions is frequently determined by the results of a referendum of its members.

Close to the Chamber in size and even more aggressively belligerent in behalf of the interests of industrialists is the National Association of Manufacturers (N.A.M.) organized in the 1890's. Composed of firms engaged in every type of manufacturing, its chief focus throughout this century has been to counteract the power and influence of organized labor. Since 1933, when it was reorganized, it has been more or less dominated by the large corporations.[4] It can be relied upon to support private enterprise, economy in government, low taxes (on profits, incomes, or manufacturing), governmental curbing of labor unions, and similar views on which industry as a whole is agreed.[5] It maintains friendly, and in some cases paternal, relations with the thousands of trade associations organized in the last three or four decades to promote the interests of particular industries, such as the Cotton Manufacturers Association, Newspaper Publishers Association, Iron and Steel Institute, Automobile Manufacturers Association. For years the N.A.M. was a staunch advocate of the protective tariff, but its membership is now divided on this question.

Labor groups

The outstanding pleaders for the interests of organized labor are the American Federation of Labor and Congress of Industrial Organizations (A.F.L.-C.I.O.) and the railroad brotherhoods. The A.F.L.-C.I.O., like the Chamber of Commerce, is a federation, in this case of unions and represents a recent merger of the A.F.L. with the C.I.O. Many of the older A.F.L. unions are organized on the craft basis (carpenters, plumbers, etc.) while many of the C.I.O. unions are organized on the industrial basis (auto workers, steel workers, etc.). The federation is importantly concerned with achieving peaceful relations among these unions and with representing the unions' point of view to the public and to the government. Traditionally, the A.F.L. had opposed governmental restriction on the freedom of labor to use its customary methods in dealing with employers. It had also opposed the use of governmental power in regulating many aspects of the economy. It has been gradually modifying its laissez-faire attitude to one more sympathetic to governmental intervention in behalf of workingmen. And now it will usually be found with its new partner supporting minimum wage legislation, unemployment insurance, public housing, and many public welfare programs.[6]

[4] V. O. Key, *Politics, Parties, and Pressure Groups* (New York, 1952), 112.
[5] See *Industry Believes*, annual statement of the N. A. M.
[6] See the *American Federationist*, monthly organ of the A.F.L.

The C.I.O. has been more disposed to governmental action from its origin than its parent, the A.F.L. Its representatives can usually be found supporting emergency price controls, wage and hour regulation, social insurance, expanded public educational programs and many other policies aimed at benefiting the laboring man.[7] The merger of these two great federations late in 1955 has created one of the most formidable interest groups in American politics. The railroad brotherhoods are the most conservative of the union organizations. They direct a large share of their political energies to those special programs of government dealing with the railroad industry.

**Farm groups**

The most powerful organization representing the farmers' interests is the American Farm Bureau Federation. A product of agrarian discontent in this century, it is a federation of county farm bureaus organized around the county extension program of the United States Department of Agriculture. Although its membership blankets the nation, it is especially strong in the Midwest and South and is sometimes described by its critics as an alliance of cattle and corn. Clearly it represents the more successful farmers. The Bureau speaks with a strong, and frequently a compelling, voice on such subjects as price supports, parity, increased agricultural research and extension and against high property taxes, governmental production controls, and trade regulation. The National Grange dates from the agrarian upheavals of the 1870's and at one time was one of the most belligerent of all farm organizations. Its membership and strength are now largely confined to New England and the Middle Atlantic states and it reflects the conservatism of the farmers of those areas. It is a strong supporter of the family farm against the large commercial farm and an eloquent advocate of the spiritual superiority of rural life. The National Farmer's Union is the most reform-minded of the great farm groups and represents the marginal farmers of the Plains. Its strength is centered in Oklahoma, Nebraska, Colorado, and the Dakotas. Its has recently supported the controversial Brannan plan for agriculture against the Bureau and the Grange.

**Other groups**

This is a small sample of active and influential groups identified with the great sectors of our economy. Every sector has its group or groups. And not only every sector of the economy, almost every sector of our society has a spokesman for its interests. The American Legion and the Veterans of Foreign Wars are constantly pressing the claims of ex-servicemen for bonuses, pensions, rehabilitation grants, hospitalization, and other services and also are active policemen of the purity of our national ideology, laying about them against all critical, "pink," radical, or unorthodox political or economic opinions. The National Association for the Advancement of Colored People battles discriminatory legislation and private prejudice against the Negro. The Navy League sponsors appropriations for expanding the fleet; the Civil Liberties Union patrols the frontiers of the Bill of Rights against judicial, legislative, or executive encroachment; the National Education Association promotes the interests of teachers and administrators of the public schools;

[7] See the *C.I.O. News*, weekly publication of the Congress of Industrial Organizations.

the League of Women Voters pushes vigorously for administrative reform and for many other items on its national, state, or local agenda. For every interest—consumer, homemaker, child, patriot, censor, preacher—there can be found some group seeking to protect or advance it.

Group organization

Effectiveness in advancing the interests of the group in the political arena depends in large part on organization. A treasury, a permanent staff, a headquarters, an annual convention, a news organ, these are minimal needs for group success. Many groups are organized in the most casual way with little money and no staff. The group interests, however, which persist and which command attention and enjoy influence are highly organized. Commonly, the group is supported by dues or contributions from the members supplemented by gifts from affluent supporters. Several of the groups operate profitable enterprises (publishing, insuring, loaning) as a source of part of their fiscal requirements. Many groups which lay claim to large membership and substantial popular sympathy are entirely supported by a few large contributors whose backing is not apparent. Many of the groups operating in national politics are federations of local or state groups which are active at those levels. These groups are likely to exhibit less cohesion and to have more internal disagreements on policy than the groups with unitary-type organizations. Some groups are directed and controlled by elections and referenda and periodic conventions in which a large part of the membership participates. Most groups, however, are dominated and directed by a small portion of the total membership. Some are controlled completely by one man. Some groups make no pretense to democratic procedures for determining the group position on public issues. In recent years, however, most groups have claimed to be democratic. Almost every group operates on the basis of a formal constitution approved by the members at some stage in its organization. The permanent staff is likely to be especially influential in most group activities and decisions, regardless of how it may be selected. In some groups the entire staff spend all their time promoting group political interests. In others, with broader scope, this phase of the group interest is assigned to a special bureau, committee, or person.

Methods employed:

How do these organizations promote group interest in the politics of the nation? The best-known method is lobbying before the legislature. This method, as we shall describe later in more detail, takes many forms but may be summarized as presenting the group point of view to individual legislators or before legislative committees. Urging the peculiar claims of one interest group upon public officials is not confined to the legislative halls. In modern American government, wide discretion to benefit or to harm certain interests is conferred on administrative agencies and individual administrators, and increasingly the spokesmen of interest groups seek out those concerned in the executive branch to make timely representations on behalf of their members. Even the courts are not immune to these representations.[8] A substantial

1. With the government

[8] See, for example, C. E. Vose, "NAACP Strategy in the Covenant Cases," *Western Reserve Law Review*, 101-145 (Winter, 1955).

amount of litigation, contesting legislative or administrative decisions, is carried before the judiciary by interest groups rather than by individuals. The smaller, less affluent groups are likely to hire skilled pleaders to present their views before the various governmental agencies; the larger groups make this the business of their permanent staffs. Not all of the special pleading before the government is done by or in behalf of interest groups. Some corporations and individuals make representations on behalf of their own interests.

2. With the parties

Interest groups seek to influence the policies and personnel of political parties as well as of the government directly. Claims on behalf of these groups are frequently urged upon party platform committees at all levels of government and upon individual members of important party committees and conventions. Although many of the groups prefer, and some practice, a kind of neutrality as between parties or among candidates, several of them seek to promote the candidacy of individuals favorably disposed to their claims and to assist one or the other of the major parties to victory. Influence in party circles is sought, and sometimes achieved, in many ways: by contribution to campaign chests, by grants of publicity or office space, by loans of skilled personnel to candidates or parties. Some avowed spokesmen of large interest groups stand for office as candidates in their own right.

3. With the public

In the modern age, interest groups have more and more sought to go beyond the traditional methods of dealing with a few important statesmen or party leaders on a private and personal basis and by propaganda to cultivate a favorable attitude on the part of the great mass of citizens not members of the group. In other words, they have tried to build a broadly based support, a favorable climate of opinion, which legislators and executives will be obliged to respect. Every known medium of communication with the public is used by one or more interest groups: newspaper releases, radio broadcasts, periodicals, television programs, leaflets, brochures, speeches, advertisements. Much of this publicity is so artfully contrived and so skillfully inserted in the stream of daily communication that its source is not apparent and its bias not disclosed. Much of it, of course, bears the imprimatur of the group which has sponsored it.

## LIMITATIONS ON INTEREST-GROUP EFFECTIVENESS

Interest-group politics not all of democracy

Having been exposed for the first time to the activities, especially the successes, of interest groups in our governmental system, young citizens are apt to be disillusioned. The idyllic view of the unselfish, responsible citizen majestically casting his ballot in behalf of what is good for the public and not necessarily for himself, and by this process electing statesmen who take the same attitude, is an easy one to puncture. Unfortunately, many citizens never grow in understanding beyond the sophomoric conception that all of the processes of democracy in America can be summarized in the selfish, ruthless, immoral, and deceitful behavior of certain interest groups and their representatives. It is as easy to mistake interest-group operation for the whole of

American democracy as it is to mistake voting for the whole of it. What saves us from a polity dominated wholly at each level by the stronger or the wilier interest group or groups at that level?

Conflicting loyalties of group members

In the first place, many citizens identify themselves with a number of interest groups. It is quite possible for a person to be a member of the Retail Grocers' Association, a member of the American Legion, a Republican, a Lutheran, a member of the Parent Teachers Association, and a member of the Chamber of Commerce all at the same time. These groups may frequently be found urging mutually contradictory policies upon the government. His Grocers' Association may be attacking a sales tax which his Chamber of Commerce is supporting. His veterans organization may be demanding preference for veterans in teaching positions which his educational association is opposing. His party may require his support of a candidate who is wholly obnoxious to his Legion Post. No group can fairly represent the whole of a citizen's public views. No group can make the politician's job of balancing and reconciling conflicting views unnecessary. When group conflict occurs where overlapping membership is common, the group spokesman cannot command the effective loyalty of the whole membership and cannot, therefore, swing it behind the group program either at the ballot box or before the officers of the government. The larger the group, the more likely it is that most of its members will have other loyalties which may at any time conflict with loyalty to that group. In any group there is usually only a hard core of members who react to all political issues as members of that group.

Lack of internal cohesion in groups

In the second place, members of the same group frequently disagree on policies which affect the group. The larger the group, the more unlikely it is that it can reach agreement on anything. The huge federations like the Chamber of Commerce or the A.F.L.-C.I.O. find that the numerical strength which makes them formidable makes them soft. The "business" community is to some extent a myth. Individual men and firms have decided differences on what is good national policy. A high tariff may be a fine thing for the watchmaking industry; it is a bad thing for the automobile industry. What stand can the N.A.M. or the Chamber of Commerce take on the tariff issue and still hold their members' loyalty? Furthermore, there is a tendency for the permanent staff to act as if it were the whole group, to arrogate to itself power to make policies which the group does not in fact support. Balloting has frequently revealed that the members do not act like the leaders say they are going to do. The point is that if the group leaders cannot punish on election day the politicians who have opposed the group interests, they have, to that extent, made it less necessary for the politicians to please them. A politician will, typically, be more responsive to interest-group pressure if he feels that the group can hurt him. Parenthetically, the representation of group interests informs the politician of possible repercussions to policy decisions which he is contemplating. Lobbying, thus, serves the valuable purpose of a barometer of the political weather in the politician's district.

The unorganized interests

Finally, there are a large number of genuine and deeply felt interests in society which are rarely expressed and are almost never organized. There is a great deal of loyalty among our citizens to the traditions of American government as they understand them and to ethical conceptions like the Golden Rule or the Ten Commandments—to the "rules of the game" in a phrase. An organized group interest which flouts any of these traditions is likely to lose the loyalty of many of its members. What is more serious, it is likely to arouse these deep-seated interests on the part of the public, that is, the nonmembers of that group. It is easy to underestimate the force of these unorganized interests in our society simply because they are not organized and have no spokesman. When any of these interests are threatened, however, they come vigorously to the surface of the political sea and assail those who endanger them. The best example of the role of the unorganized interest is the attack on corruption in government. There are interest groups that promote their own advantage by coarse methods: bribery, entertainment of officials, expensive presents. When exposed to public view, these methods frequently stimulate the expression of the unorganized interest in honesty in government. When corruption is rife, this interest in preserving honesty in government is likely to become organized and mobilized to "throw the rascals out." Many politicians and interest-group leaders have found to their sorrow that there is a limit beyond which they cannot go without arousing this slumbering interest in clean and honest government. Loyalty to interests like those in maintaining the separation of powers, respect for the individual, fair play in governmental procedures, and the federal system may seem to be weak and ineffectual in everyday life, but let a group, a party, or an individual attempt or seem to attempt to undermine or destroy them and these interests arise quickly to the surface of political consciousness of many of our citizens. Loyalty to the rules of the game is quite as strong, even if latent, as loyalty to any interest group.

## PUBLIC OPINION

1. Nature

Campaign speakers and interest-group propaganda frequently appeal to the latent interests of citizens in preserving the traditions of our society. What is called "gaining public support" is really the arousing of these latent interests and identifying them with party policy or interest-group program. Every group and every politician likes to pose as an upholder of traditional moral and legal values. In doing so they exhibit their belief in the force of the unorganized attitudes and interests of the people. This force comprises one of the most important elements in *public opinion*—the shared opinion of a number of individuals.

2. Formation

As a factor in the political process, public opinion has of late come in for a good deal of observation and inquiry. Although much more is known about it than before, many questions remain. How is public opinion on political matters formed and influenced? Through what channels does it express itself?

To what extent, and how, can it be measured? Speaking broadly, public opinion in the political sphere is shaped by any and all agencies that influence the attitudes and thoughts of men. Back of all else stand the family, the school, the church, the club, the college and university, the political party, the labor union, and other organizations from which the individual draws ideas. Business connections, employment relationships, and social contacts contribute. So do books and pamphlets, newspapers, magazines, plays, radio broadcasts, motion pictures, outdoor advertisements, and indeed every instrumentality by which information and ideas on public matters are disseminated. Systematic propaganda, carried on through channels like these, sometimes plays a dominant part. Government itself does not hesitate to try, through publications, speeches, and other means, to mold the opinion of the people to its viewpoints and policies. Wherever a person goes or whatever he does, he is surrounded by influences, of which he may be but dimly aware, inclining him to one viewpoint or another, one body of doctrine or another, of a political nature or at least with political implications. Public opinion is often an invisible, intangible, even elusive, but yet a real, collective attitude, or compound of such attitudes, flowing from such daily contacts and experiences of the people.

3. Expression

The expression of opinion through interest-group organizations is one of the most common ways by which individual opinion is brought to bear on the policies, personnel, and procedures of government. The spokesmen for these groups always present themselves as representing the entire membership. Frequently, as we have seen, this is not exactly the case. That it is the case much of the time, however, is one of the chief sources of strength for such group leaders. The ballot, too, is an enormously powerful vehicle for registering opinion on the personalities of the day and on many of the issues. The ballot, as we have noted, allows the individual to indicate his attitude not only toward parties and candidates and through them on policies but on policies directly where referenda are used. In general, however, the ballot speaks decisively only on candidates. Its voice on policies is not ordinarily clear and unmistakable. A third way by which opinion is registered on questions of the day is by direct appeal to those in power. Every elected official in the United States receives advice from his constituents by letter, card, telegram, telephone, or personal visitation. Much of this opinion is really group inspired and group organized. The citizen is urged by his Legion Post or his union to write or wire his congressman urging his support for or his opposition to a pending legislative proposal. Some of it, however, is self-generated and represents a private and unsolicited view. The effect of such communications is hard to estimate. Most public officials claim that they are more likely to be influenced by the uninspired, self-written plea than by the great mass of group-inspired form letters. Few officials, however, feel that they can ignore "mail-bag opinion" whether of groups or individuals and most of them watch it closely, tabulating the sentiment.

Of course, expressions of opinion by influential individuals are likely to be more consequential than those by comparatively unknown citizens. In this connection, one of the more important groups of individuals, whose opinions are consequential, are the editorial writers and the publishers of the nation's newspapers. On the theory that newspaper readers buy the journal which reflects their opinions, newspaper opinion is likely to be accepted as public opinion. When politicians talk about what the public is thinking they frequently base their statements on what newspapers are saying. It is true that newspapers influence opinions, that many people decide what they think about a particular issue on the basis of what their favorite columnist tells them to think, and that the news of the day can be, and frequently is, written in such a way as to convey approval or reproach. This is still a long way from making newspaper opinion and public opinion synonymous. Newspaper opinion is, in fact, the opinion of a relatively small number of individuals (publishers, editors, and reporters) but its power to influence the opinions of those who read it—statesmen or citizens—is great. Many citizens, perhaps a majority, learn what they know about the conduct of public affairs, the character of statesmen, and the operations of the government from the newspapers. The primary function of the newspaper, according to journalists, is to inform public opinion. This admittedly is difficult to do without also molding opinion. "Facts" are hard to handle meaningfully and interestingly. Which facts are to be reported? There is not room for all. Which will be read? However informative, factual, and dispassionate the story, if not read it will not inform the public. What significance is to be attached to the "facts"? Reporting happenings without background and statements without context is almost meaningless. Some papers, however, place primary emphasis on the molding and attach only secondary importance to the informing.

The newspaper and public opinion

Both as sources of information and as sources of influence, the newspapers play a critical role in American democracy. On the whole, ours is probably the best-informed citizenry in the world today. Nevertheless, our newspapers are not perfect vehicles of public communication: (1) They have become large-scale enterprises and thus cautious, semi-monopolistic, and dependent upon maintaining a wide reader-interest; (2) they labor under a great shortage of time for reflection and review—they must publish each day; (3) the people who write the news cannot possibly know enough properly to evaluate everything they must report. These attributes of the modern metropolitan daily newspaper reflect to a large extent the social environment in which they operate. Circulation is the key to business success in journalism. Getting and keeping readers consists in serving them what they want to read. Mass circulation means mass appeal and this means sensationalism, comics, department store advertising, advice to the lovelorn, sports, and glamor. The editorial page, the commentary on the world of politics and of society, is read by a small percentage of those who purchase the news. In spite of their obvious limitations and in view of their vital role in a democratic polity, it is easy to overestimate the influences of newspapers. For 20 years—from 1932

Limitation on newspapers as media of communication

to 1952—the overwhelming majority of American newspapers were unsympathetic, if not openly hostile, to the party and its leaders repeatedly returned to power by a majority of the voters. On attitudes on issues, newspaper opinion is undoubtedly more influential than on attitudes on candidates.

4. Measurement

Practitioners of the art of democratic government, statesmen, politicians, and thoughtful citizens, have sought for decades to develop more reliable methods for measuring public opinion. Some have been anxious to establish a clear channel to connect majority opinion with governmental decision. Others have been eager to find out what the people want in order to offer it to them and thus to achieve power. (It may come as a shock to the student that these two ambitions are virtually identical although differently expressed.) Successful politicians have for years operated their own crude polls of opinion of their constituents. Some of the big-city organization leaders have had polls on candidates and parties which were not crude at all. In general, however, politicians have had to rely upon intuitive judgment and fragmentary data in estimating public attitudes on questions of the day. In the past 25 years, there have developed on a large scale, scientific attempts to measure opinion on candidates, on parties, and on issues. Modern techniques of opinion measurement differ from the older and cruder ones largely in the use of sampling techniques. Extraordinarily satisfactory results obtained in sampling attitudes on commercial products suggested the validity of this same procedure in the realm of politics. Capturing and recording the attitudes of every adult citizen are manifestly impossible. Earlier efforts at opinion measurement, especially the straw vote system, sought to achieve accuracy by reaching large numbers of people. The sampling procedure allows conclusions on the attitudes of large numbers of people on the basis of interviews with very few of them. On the assumption that attitudes on political issues or candidates are influenced by economic, religious, geographical, and similar factors, public-opinion pollsters attempt to construct a small sample of the body politic in which each of these factors is appropriately represented. The attitude of the individuals in the sample are then taken to reflect the views of the entire electorate. Clearly the reliability of the results in this method depends on the validity of the sample selected.

Political polls

The best known, and in many ways the most successful, of the opinion polling organizations are the American Institute of Public Opinion (Gallup poll) and *Fortune* magazine (Elmo Roper poll). Sampling techniques for measuring public opinion achieved wide acceptance when both of these polling organizations more accurately forecast the results of the presidential election in 1936 than had the *Literary Digest* magazine using the traditional straw vote system. Until 1948, these and other polling organizations gained increasing prestige for and acceptance of their sampling techniques by forecasting victories for the Democratic presidential candidate, although the margin of victory typically differed from the forecast. The forecast of a victory for Thomas Dewey, Republican, in 1948, by both polls brought the pollsters

Polling experience

under a cloud. Their cautious forecasts in 1952 and 1960 and the more accurate predictions in 1956 have not completely rehabilitated them.[9]

Critics of election forecasts by polls

There are many who question the utility, as well as the accuracy, of pre-election polls. Candidates and their organizations, it is argued, are discouraged from campaigning by adverse polls. This reduces the effectiveness of campaigns and thus may reduce participation in elections. The polls create a "bandwagon effect." Timid voters are anxious to support the victor and thus a prediction of victory, may, in fact, produce one.[10] The pollsters respond that they have the most scientific apparatus yet devised for measuring something which a democracy ought to want to measure. The experts readily admit there is much still to be learned about reliable measurements of public attitudes.

Difficulties in election forecasting

Some of the difficulties in election forecasting revealed by polling experience are: (1) constructing a valid sample—in this connection emphasis is now being placed on measuring "typical" precincts rather than on constructing samples representing ethnic, geographic, religious, and economic factors; (2) forecasting what people will do on election day on the basis of a sample of their opinions before that time—the problems here are how to handle the "undecided" who may represent as many as 10 percent of the total and how to determine who will in fact go to the polls and record their opinions; (3) eliminating the margin of error in any sampling procedure—many experts agree that some margin of error necessarily arises from sampling procedures and that this margin is great enough to make it impossible to forecast the results in a close election.

Polls of attitudes on policy

The polling technique is used widely also to measure sentiment on public questions. This use of the sample polls is not so dramatic as election forecasting but is believed by many experts to be more reliable and by some to be more useful. The two national polling organizations and many others have for several years repeatedly polled opinion on timely issues and published the results. Political leaders have not been indifferent to the opinions reflected by these polls. The ballot box, it might be argued, reflects sentiment on candidates but there is no comparable procedure for testing public sentiment on controversial policies as they emerge in the conduct of government. For these reasons some of the leading polling organizations assert that they are valuable additions to the democratic process. Both the value and the accuracy of opinion polls on issues have been vigorously challenged. The value is questioned on the grounds that: (1) everything depends upon how the question

[9] See F. Mosteller *et. al., The Pre-election Polls of 1948* (New York, 1949), for a thorough study of the failure of 1948 in the light of previous polling experience. In 1952, the polling organizations made no flat predictions although both the Roper and Gallup polls showed Eisenhower leading Stevenson. In 1956, Roper made no outright prediction; Gallup forecast an Eisenhower victory. In 1960, Roper's final poll showed Nixon 49% and Kennedy 47%. Gallup's final poll in 1960 gave Kennedy 49% and Nixon 48%. All pollers, however, qualified their final predictions to allow victory for either candidate.

is worded; (2) minority sentiments may be muffled and discouraged; (3) the public is not adequately enough informed on issues to arrive at useful judgments and this task ought to be entrusted to the elected officials; and, (4) the sentiment for a given policy is vastly increased whenever the government decides to pursue that policy. The accuracy is assailed for (1) invalid sampling procedures; (2) "loaded" questions; and, (3) indifference to the intensity and constancy of the opinion expressed. To all of this the public-opinion measurement experts respond: (1) the polls, although not perfect, are more reliable than any other extant procedures; (2) every effort is made to phrase the questions fairly; (3) public officials want and need to know how the public feels about what they are doing; (4) polling stimulates public interest in government and reveals areas of ignorance and indifference which aid educators in planning civic education.

It seems clear that the sampling technique can give valuable and illuminating results in studies of how people behave politically. Much of what is now being learned about the character of a democratic polity is being discovered by opinion-measurement techniques. Whether opinion polls on issues or candidates will prove eventually to be benevolent influences in the democratic process is still to be demonstrated.

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# CHAPTER 8

# *Political Parties*

Parties are essential to democratic government

None of the procedures thus far described by which individual citizens participate in directing the government would be wholly effective without political parties. Unless candidates for office stand for something, voting will not give direction to the machine of state. Unless the range of choice is narrowed down, the electorate is likely to be divided among numerous claimants with no single claimant representing more than a small portion of the total. No political-interest group can claim the loyalty of more than a minority of the voters and cannot, therefore, itself dominate and direct public policy. The results would be tragic if it could, for it might push its own claims to the exclusion of those of other groups and so divide our society that rebellion or revolution would ensue. None of the methods for voicing or recording opinions on the questions of the day makes certain that the opinions will be influential. Although for decades there were grave doubts about the usefulness or the necessity of political parties and even today there are lingering suspicions, it is now generally conceded that strong parties are essential to the practice of democratic government.

## THE NATURE OF A POLITICAL PARTY

Nature of a party

In a sense a political party is a kind of political-interest group. It is a group of voters consciously bound together by a shared interest in promoting some kind of public policy and a shared adherence to some sort of traditional values. A party differs rather strikingly, however, from all other political-interest groups or associations in that it seeks to capture the power of the state. It is not content merely to persuade those in power to follow a particular policy. The party offers candidates for office and is willing to assume the responsibility for running the government. Although devoted to some kind of program, its major aim is power and, within certain broad limits, it will shift its program to attain it. The ordinary political-interest group is much more rigidly dedicated to a program of governmental benevolence to its own members than is any party. Strong parties are much larger than any other type of interest group and embrace members of many different groups. Of course, parties may be large or small, national or local, highly organized or loosely built. The major parties of American experience, however, have operated on a national scale and have permeated all levels of government.

Party membership

American parties are loose and amorphous associations. Membership in a party is a vague and elusive matter. How does one join a party? A few

minor parties have regular enrollment, the members subscribe to a body of doctrine and, in many instances, pay dues. The major parties, however, have nothing so clear cut. There is no enrollment, except that arising in several states from preprimary registration of party affiliation. There are no dues, although many efforts have been made to institute regular contributions. There are no rules of behavior for members and no effective sanctions for improper conduct. In common with the large interest groups, there is at the center of each party a hard core of party officials and workers surrounded by a steadfast band of supporters who contribute money and time and influence, if they have it, to promote the success of the party. Close to this core, but not always part of it, are the officeholders whom the party has helped elect. There is the party in Congress and the party in state legislatures and in city and county councils and commissions and the party in the executive branch at all levels. These groups are closely identified with the party hierarchy, may even be part of it, but as a result of their official positions have responsibilities and loyalties which transcend party status. At any particular time, a segment of the party in office may be at odds with the party hierarchy. Beyond the hierarchy and the officeholders are the office-seekers and others who aspire to influence in the party and in the government. Then there are the myriad hosts of those who regularly support the party at election time, occasionally work for it, usually talk for it in their own circles, and sometimes contribute to its treasury. Beyond this group are a large number of persons who usually support the party but cannot be depended on to do so and who are rather quick to change their loyalties and support another party or candidates. Surveys by the American Institute of Public Opinion place this "independent" vote at about 20 per cent of the total electorate.[1] Finally, there are all of those who vote for the party's candidates. Many of these, however, are not members in any sense save this one and for this short period.

**The usefulness of parties in American government**

How can a group whose membership is so hard to determine and whose character is so difficult to define be so useful to democratic society? No better agency for mobilizing the electoral power of large numbers of people and channeling it to drive the wheels of government has been found in almost 200 years of experimentation. No other agency assumes for its chief task the formation of a majority so that officials can assume office with the knowledge that they may speak and act for their fellow citizens. No other agency so persistently or so successfully stimulates citizen interest and participation in the processes of self-government. No other agency is quite so responsive to the feelings of the people. No other agency is in a position effectively to harness the multiple seats of power provided by our federal and tripartite constitutional system and drive them toward an agreed goal. Finally, no other agency has, at the same time that it has promoted political division, also promoted national unity. The political party reaches across sectional boundaries, economic distinctions, interest-group competitions, religious differences,

[1] *Public Opinion Quarterly*, XV, 175 (1951).

and racial antagonisms and softens the conflicts, bridges the gulfs, and helps to cement together a divergent, mobile, and aggressive people.

Parties in authoritarian states

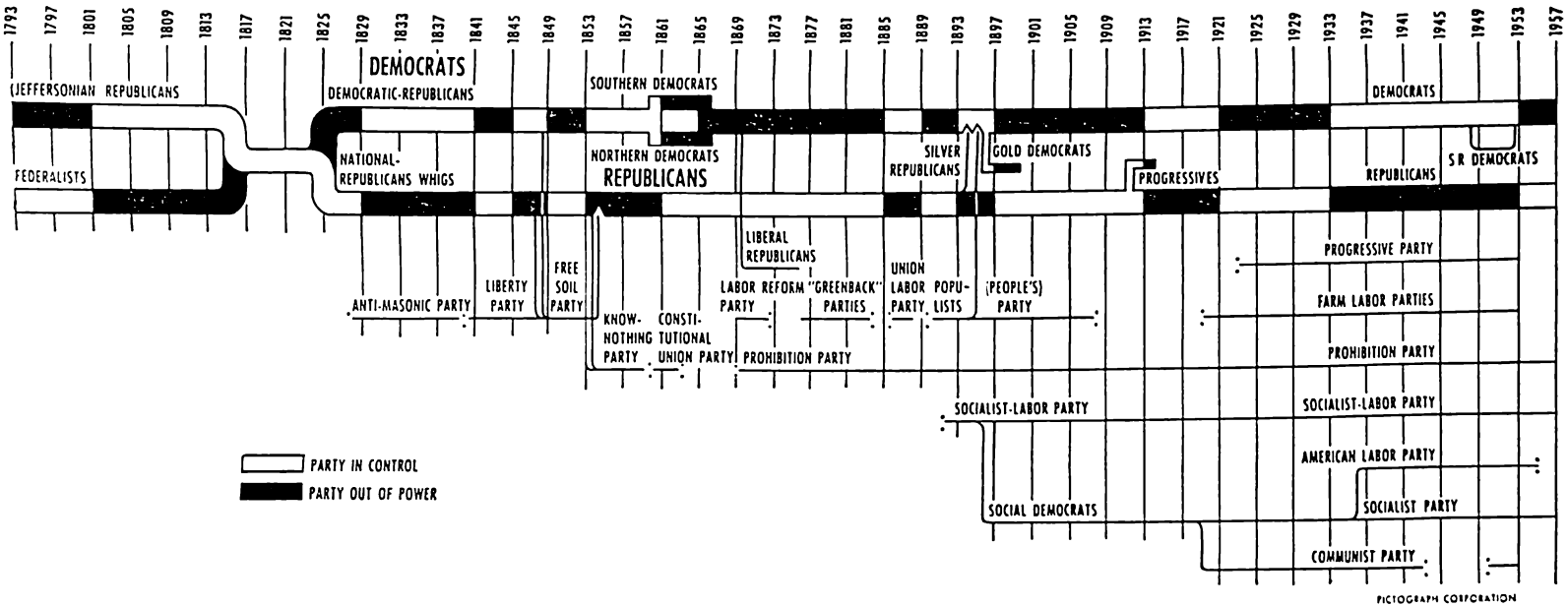
One of the distinguishing characteristics of genuinely democratic government everywhere in the world is the free competition of political parties. The ruling cliques in some authoritarian governments also call themselves parties largely because of their origins in differently organized regimes. In the democratic sense the Communist party in the Soviet Union, for example, is not a political party at all and the system is not a party system. Parties, to correspond to our definition and to function as they do in democratic states, must be free to compete openly for public support.

## THE DEVELOPMENT OF THE AMERICAN PARTY SYSTEM

The history of party cleavage in America

The disposition of the American electorate to divide into two major groups identified with particular governmental policies or conceptions extends back to the very beginnings of our national government. The movement for separation from England sharply divided the people of the colonies, with the Loyalists or Tories opposing the revolutionaries. Achievement of independence was accompanied by a general suppression of Loyalist sentiments. The attempt to replace the Articles of Confederation with a new constitution providing a stronger central government evoked a loose union of its sponsors into Federalists and of its opponents into anti-Federalists. The Federalists drew their chief strength from the commercial, financial, industrial, and plantation interests, their opponents from the small farmers and frontiersmen. These loose coalitions more or less dissolved with the establishment of the new government, only to reappear in slightly different array during the late phases of Washington's presidency. The commercial, financial, and industrial elements of New England and the Middle States retained their party label of Federalist and, led by Hamilton and Adams, sponsored new national programs for the benefit of these sections and interests. Their policies in regard to national debt, a protective tariff, and the role of the national government, however, stimulated Jefferson and Madison to rally the planters along with the small farmers and artisans into a new party—the Jeffersonian Republicans. Jefferson's skill as a party leader, continued expansion of the frontier, quarreling among the opposition leaders, the War of 1812, and other factors too complex for easy summary brought such sweeping victories to this party that by 1816 the Federalist party was driven from the field. Renamed Democratic Republicans and then Democrats, the party of rural America held the field unchallenged nationally until 1832. The Jacksonian Democracy of 1828, however, was a coalition different from that of Jeffersonian Republicanism. Jackson's appeal to the artisans of the city and the farmers of the frontier was much stronger than his appeal to the southern plantation aristocracy. Many of the slave-holders were driven into an alliance with northern manufacturing, commerce, and finance in the National Republican or Whig party organized about 1832 and contesting national offices with the Democracy from 1832 to 1856.

# AMERICAN PARTIES



The slavery controversy rended the Democratic party and created an unbridgeable gulf between southern and northern agriculture. The Whig party, too, disintegrated under the fires of abolitionism and secession, its southern wing joining hands with the slave-holding Democrats and its northern industrial wing forming the chief sinews of the new Republican party which emerged in 1860. Lincoln's party successfully united the northern industrial and financial groups with the midwestern free farmers in a coalition for union, against the spread of slavery, and for tariffs. The shades of rebellion hung over the Democracy for decades after the Civil War, but farm depression, rigid credit controls, high tariffs, and industrial exploitation drove more and more northern workingmen and farmers to embrace the Democratic standard. Deep distress in American agriculture in the 1920's, followed by an unparalleled depression in industry in the 1930's, cemented a powerful new farmer, laborer, southern plantation coalition which is the basis of the modern Democratic party. The Republican party continues to receive the support of the manufacturing, commercial, and financial interests of the North and Midwest and of the more prosperous farmers of these regions. The Democratic party can thus trace its ancestry back to Jeffersonian Republicans and the Republican party to Hamiltonian Federalists. Each, thus, draws upon traditions and conceptions reaching far back into the past.

Economic and sectional interests not sole determinants of party cleavage

The idea that American major parties have been based largely upon economic and sectional interests has only rough validity. There were many cross currents of interests, religious and social, for example, which influenced party affiliation at every epoch of our national history. No party ever enlisted the undivided support of any economic interest or section. Family tradition has proved capable of maintaining party loyalties long after any direct economic attachment is discernible. Regional devotion too has been a strong contributor to party loyalty. The South, for example, still shuns the Republican party as the author of its defeat and the despoiler of its culture. The older a party becomes, the more likely is habit to be a large factor in the devotion of its followers.

A two-party system

This capsule history of the American party battle does show, however, that certain great economic and sectional interests have persistently sought political expression through the vehicle of a party. Some of them, industry, for example, have been consistent supporters of a particular party. Most significant of all, however, the history of American parties reveals the deep attachment of the American voter to one or the other of two major parties. In sharp contrast with continental practitioners of democratic government, English-speaking peoples seem to prefer a two-party alignment to a multiparty one. Despite the great diversities of sections, economic groups, and religious loyalties that in France, Italy, Germany, Belgium, Holland, and the Scandinavian countries have promoted numerous parties contending for power the American people have tended to coalesce into two great combinations of such interests.

Reasons for bi-partisan-ship

A number of explanations have been offered for bipartisanship in American politics. On the one hand, some have ventured the belief that the two-party system is more natural than any other. People "naturally" tend either to conservatism or reformism by temperament, upbringing, and disposition. A conservative party and a reform party are, therefore, in keeping with human nature. This explanation is not very satisfying. Human nature is not so simply catalogued; few of us are consistently conservative or consistently reformist throughout all of the phases and facets of our lives. Some find the explanation in American constitutional history. They find that there have been only two main attitudes toward our constitutional arrangements: a strict constructionist, states'-rights attitude; and a loose constructionist, nationalist attitude. This explanation fails to reckon with the fact that the party in power in the national government has usually been nationalist while it was in power—whether Democrat, Whig, or Republican—while the party out of power nationally has typically been in favor of states' rights. The Republican devotion to state's rights of the last two decades would sound strange to the supporters of Lincoln. Elihu Root felt that the two-party system was the product of longer practical experience of self-government than the continental peoples had enjoyed. Contemporary students believe that the following factors are more important than any thus far mentioned: (1) the single-member district system for electing legislators—plurality election in each district invites if it does not compel coalition of interests in order to achieve a decision at the polls; (2) the popular election of the president—this contributes a powerful impetus to unite groups across state, sectional, and economic lines in order to make the voting decisive.[2]

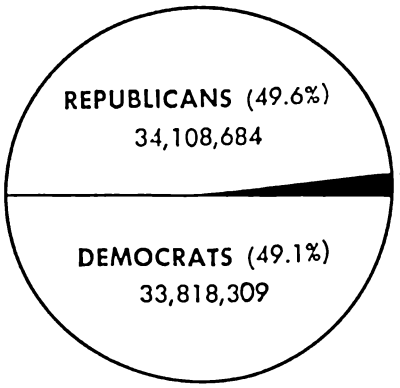
Why we have a two-party system

Minor parties in America

Not all Americans have been content with the two-party division. Dissident elements in the electorate have periodically launched independent or "third-party" movements. One of the first of them was the Anti-Masons, appearing in 1826 and speading over New England, New York, and Pennsylvania. It made a lasting contribution to American politics in the national convention system for nominating presidential candidates. It also formed part of the opposition to Jackson which later became the Whig party. The equivocation of the major parties on the slavery question stimulated the formation of the Liberty party about 1840, dedicated to abolition, and of the Free Soil party, active in the campaign of 1848 and determined to sustain the Wilmot Proviso. Antipathy to immigrants, especially Irish Catholics, led to the formation of the Native-American or "Know-Nothing" party which flourished in the fifties. The Republican party, itself, began as a third party in 1854-56. Agrarian discontent on the Plains and in the South after 1870 was largely responsible for the Greenback party of the seventies (it was still offering candidates in 1956) and the People's or "Populist" party of the nineties. Urban industrial capitalism was the target of the Socialist party organized in the late nineties and of the Communist and Socialist-Labor parties organized

[2] V. O. Key, *Politics, Parties, and Pressure Groups* (New York, 1951), 224-232.

## MINOR PARTIES IN THE PRESIDENTIAL ELECTION OF 1960




MINOR PARTIES (1.3%)

| Party | Candidate | No. of votes |
|---|---|---|
| LIBERAL (N.Y.C) | KENNEDY | 406,176 |
| NATIONAL STATES RIGHTS | FAUBUS | 214,522 |
| INDEP. ELECT. (Miss.) | UNPLEDGED | 116,248 |
| SOCIALIST LABOR | HAAS | 48,031 |
| PROHIBITION | DECKER | 46,197 |
| SOCIALIST WORKERS | DOBBS | 39,692 |
| OTHER | --- | 38,184 |
| TOTAL MINOR PARTIES | | 909,050 |

after World War I. In this century the National Progressive party of 1912 embodied the presidential aspirations of Theodore Roosevelt and the Progressive party of 1924, those of the elder LaFollette. The LaFollette tradition was embraced in a new Progressive party in Wisconsin in the years 1934 to 1946. A Farmer-Labor party in Minnesota joined with the Democratic party in 1944 after several years of independent existence. New York City was for twenty years the home of two vigorous labor parties, the American Labor party—dissolved in 1956—and its less radical and still active offshoot the Liberal party.[3] Opposition to contemporary efforts to raise the status of the Negro by national action produced States' Rights parties in 1948 and again in 1956.

Their strength and role

Some of these parties momentarily attained sufficient strength, especially in pivotal states (New York is a good example), to affect the results of a presidential election. One—the Republican—grew into a major party. In only two elections in this century (1912 and 1924) has the combined vote of all minor parties exceeded 6 per cent of the total vote cast, and since 1932 it has exceeded 4 per cent only once (1948). The Progressive parties which did so well in 1912 and in 1924 were both short-lived. These minor parties—free to cultivate ideas rather than worry about power—have been important mainly in revealing and crystallizing dissenting opinion (usually on economic and social matters). As threats to the rather evenly balanced major parties, third parties have impelled them, whether they liked it or not, to bid for support by

[3] A brief account of the history of minor parties together with a bibliography of the principal works can be found in W. B. Hesseltine, *The Rise and Fall of Third Parties* (Washington, D. C., 1948).

taking up issues sponsored by these minority groups. A large proportion, indeed, of leading party issues in the past several decades—the income tax, the regulation of railroads and other corporations, the use of injunctions in labor disputes, woman suffrage, prohibition, farm relief, and others—were "borrowed" from third-party platforms. Except for occasional "one-purpose" parties like the Prohibitionist, minor parties are typically more radical than the old-line organizations. The internal heterogeneity and lack of cohesion of our major parties stand in sharp contrast to the rigid and doctrinaire character of minor parties.

## THE TWO MAJOR PARTIES TODAY

Two parties hard to distinguish

The two major parties of today are notoriously composite and disunited. In order to capture the loyalty of great numbers of voters scattered throughout the nation, they must stand for many different things and not too rigidly for any one thing. To a foreign observer, especially one accustomed to the doctrinaire parties of Europe, it must seem that the Republican and Democratic parties are identical. James Bryce 80 years ago described them as two bottles carefully labeled but empty. Many observers since his time have been baffled by the excitement engendered in an American political campaign when the contestants seem to be so much alike. Although the line of demarcation between the two parties is blurred, and ideologically there is much overlapping of views, the center of gravity of the two parties is different. They do stand for somewhat different things.

The Democratic party

The modern Democratic party is a loose coalition of the dominant white agricultural leadership of the South and the industrial workers of the large urban centers of the North and Middle West. Stated another way, it is a combination of conservative southern politicians and the highly-organized political machines of the large cities of the nation. To this coalition has been attached a large number of farmers, ranchers, and miners of the Plains, the mountain states, and the West Coast. Only three times in this century has the Democratic party failed to carry all of the states of the South. Hoover in 1928 and Eisenhower in 1952 and in 1956 carried Florida, Texas, Tennessee, and Virginia. Eisenhower also carried Louisiana in 1956. New York City and Boston have been firmly in the Democratic fold for decades and virtually every large city was captured by the party in the period 1932-52. Only in 1952 and in 1956 did the Republicans make serious inroads upon northern urban Democratic strength. Numerous studies of voter preferences indicate also that the Democratic party has a very strong appeal to lower-income groups everywhere. The labor unions are strongly pro-Democratic in sympathy. The orientation of the Democratic party is revealed also by the kinds of programs it has sponsored. In general, the Democrats have been more willing than the Republicans to control the industrial economy in the interests of farmers and workers rather than of management and to sponsor programs of public succor for the poor, the underprivileged, and the unfortunate. They have also

been in favor of freer international trade and, recently, of more extensive international political and military commitments than the Republicans.

The Republican party

The sectional strongholds of the modern Republican party are New England (except Massachusetts and Rhode Island) and the Northern Great Plains (Kansas, Iowa, Nebraska, and the Dakotas). The small towns and the rural areas of the Midwest and Middle Atlantic regions (Wisconsin, Illinois, Indiana, Ohio, Michigan, Pennsylvania, New Jersey, and New York) have also been strongly in the Republican camp for many decades, although the Democrats attracted a large number of Midwestern and Plains farmers in the period 1930-50. The Republican party is also strong in the rapidly growing suburbs surrounding our large cities. The manufacturing and financial interests have been especially influential in the party as have upper-income groups everywhere but in the Deep South. In contrast to the Democrats, the Republicans have been less sympathetic to governmental restriction on private industrial management and have tended to emphasize individual initiative and free enterprise as against governmental benevolence and economic security. In international affairs, the Republican party contains a much higher proportion than the Democratic party of those who are critical of international commitments and who are sympathetic to high tariffs on imports and strong home defense.

Composite character of both major parties

It should not be inferred from these thumbnail portraits of the two parties that there are no wealthy Democrats nor poor Republicans, that there are no Republican laborers and no small-town Democrats. There are some of every kind of class, race, religion, and sectional patriot in each party. Each party is furthermore sharply divided within itself. Its unity is assailed by factional contests of the bitterest kind. The conservative southern leaders of the Democratic party are staunch foes of the demands of northern urban labor leaders for an end to racial discrimination and for stronger governmental protection for labor unions. Agrarian Democrats in the Middle West are likely to find southern preferences for cotton and tobacco do not square with their own aspirations in regard to dairy products, corn, and hogs. Eastern Republicans committed to international trade and the support of friendly nations in Europe find themselves vigorously assailed by isolationist Republicans of the Plains and Middle West and by "Asia-firsters" on the West Coast. New England farmers oppose the agricultural programs sponsored by the Republican corn farmers of Iowa and Illinois. These intraparty squabbles are often as animated as are the contests between the two parties. Each party does, however, have a center of gravity in particular sections and interests which is different from that of its chief rival. Neither of the central blocs is powerful enough to capture majority support unaided. Each must appeal to other sections and interests to gain victory at the polls. Since it frequently occurs that each of them is appealing to the same groups for support, it is not strange that they should sound very much alike at campaign time.

The parties and the states

Although both major parties and most minor parties offer candidates for national office and campaign on national issues over the whole nation,

the real strength of the major parties is in their state apparatus. The major political parties of America are federally organized in much the same way as the government. In the government, however, the national level is more powerful in relation to the state level than in the parties. Party activity in state and local government is constant and extensive. Candidates are sponsored for state and local offices; platforms are written dealing with city and state problems; campaigns are conducted for governor, legislator, mayor, councilman, sheriff, district attorney, and all the other offices filled by election. In these contests for local and state power the parties prepare themselves for the national contests. It is here that the skills of the politician are learned and that political leaders are developed. Here the professional politician finds his livelihood in public office and puts himself in position to participate in national campaigns. Here party organization attains its maximum of effectiveness and detail. Each of the major parties has arisen from devastating defeat in national election to contest vigorously the next election with its rival because it still holds place and power in numerous localities and states from which to strike out anew. No party can hope for success nationally unless it is strong in many states and dominant in some.

Separating national and state politics

The co-operative union of national, state, and local politicians in the American party pattern promotes a similar co-operative union of national, state, and local government. It helps to overcome the centrifugal tendencies in the federal system. To some, however, the mixture of national issues into state and local campaigns—a necessary consequence of federated party organization—is a monstrous evil. Only misgovernment locally results from confusing the voter by injecting national party positions on war, taxes, or international affairs into municipal campaigns, they argue. The stock remedy for this alleged illness is the nonpartisan ballot (one having no party emblems or identifications). And a number of states have adopted such ballots for municipal officials, judges, and state officials. Two states, Minnesota and Nebraska, now select the members of their legislatures in a nonpartisan election and somewhat more than half of all the members of city councils in municipalities with more than 5000 population are selected in this way. This method has not completely eliminated partisan campaigning but it has certainly reduced it. It has also weakened the influence of city officials in state and national politics. The separation of national, state, and local elections is another way which has been widely adopted for getting at the same problem and one that does not weaken municipal party influence.

## REGULATION OF PARTIES

Parties are voluntary associations

Political parties are as much a part of the American system of government as the Congress of the United States. They are the most important vehicles for translating individual will into public policy. And yet they developed almost wholly outside the law. The national and most state constitutions are completely silent about them. Even the statutes were relatively

indifferent to their existence for 100 years. Congress passed its first laws touching them directly in 1907. State laws dealing with their machinery and operations are, typically, of more recent origin. Legally speaking, parties are voluntary nonprofit associations with no personality apart from the individuals who compose them. Over the recent decades, however, national and state regulation has invested them with a public status without, however, making them organs of the government.[4]

The development of public regulations:

1. National

Under constitutional authority to regulate national elections including primaries [5]—an authority which in practice would extend also to state and local elections not separately held—Congress might control party machinery and operations. This, however, it has not chosen to do, except with respect to campaign finances. Accordingly, the task is left largely to the states. Congress has, however, closed party competition to the Communist party (1954).

2. State

The old situation in which parties determined their own form of organization, made their own rules, nominated their candidates, and raised their funds with no external controls, was gradually brought to an end in most states by demand that party activities be recognized as matters of public concern and abuses curbed. Regulations (following no single pattern) are now found in nearly every state covering:

1. definition of what constitutes a party, with the privilege of a place on the ballot;
2. processes of election, including forms of ballots, use of voting machines, counting of votes, and the like;
3. composition and powers of party committees;
4. manner of making nominations;
5. dates for holding primaries;
6. membership tests for voting in primaries;
7. settlement of disputes in connection with nominations;
8. campaign contributions and expenditures, and other aspects of party finances;
9. corrupt and illegal electoral practices, financial or otherwise;
10. outlawry (in many states) of parties advocating totalitarianism, overthrow of the government by violence, or other "subversive" doctrines or objectives;
11. protection for parties against imposters as candidates in primaries, against misleading and unauthorized use of party names (including adoption of them by separate organizations), and against appropriation of party emblems duly adopted and recorded.

## PARTY ORGANIZATION—STATE AND LOCAL

Characteristics of party organization

Every successful party has more or less elaborate organizational machinery to hold its members together, stir them to action, raise funds, carry on propaganda, recruit new members and supporters, and guide the party effort in primaries and elections. This machinery in each of the two major parties enlists more than 150,000 men and women who make a profession or at

[4] J. R. Starr, "The Legal Status of American Political Parties," *Amer. Polit. Sci. Rev.*, XXXIV, 429-455, 685-699 (June and Aug., 1940).

[5] See U. S. *v.* Classic, 313 U. S. 299 (1941), on national power to regulate primaries.

least a major vocation of their party work. Although there are many local variations, the pattern of party organization is roughly uniform throughout the country. Its characteristic feature is a pyramid of committees ranging upward from the city or county to the national level but with co-operative rather than authoritative relations among the levels. Although in earlier times parties were free to contrive their own organizational arrangements, today the structure and mode of election of party committee members is regulated almost universally by state law. Typically, they are elected by the voters in connection with a direct primary election on candidates for public office.

Precinct organization

The real strength of the parties is at the bottom of the pyramid of party organization. Here is where elections are likely to be won or lost. The primary unit or cell of party organization, particularly in the large cities, is the precinct or voting district. The party functionary at this level is called a precinct leader, captain, or committeeman, and usually is elected by the party voters of the precinct, although sometimes appointed by the ward chairman or city committee. The precinct captain is the key man in the highly organized apparatus of metropolitan parties. In the rural areas, a town, township, or village chairman is more important than the precinct leader. In fact, the precinct position is often vacant in rural areas even in states where the post is prescribed by law. In the big cities, however, the success of the party organization, locally at least, depends in large part on the skill and energy of the precinct leader in getting his people to the polls on election day. Commonly the precinct leader is given a quota (based on the registered party members in his district) by the city leaders which he is expected to produce on election day. To this end, the successful precinct leader works tirelessly *all* the time—cultivating acquaintances, passing out favors, interceding with the government on behalf of troubled constituents, instructing citizens how to register, sponsoring sociables and clambakes, distributing literature, naming watchers on election day, seeking employment (public or private) for his friends, and in general making himself useful to his neighbors so that they will remember him on election day and vote for those he tells them to. The motto of the large-city precinct captain is "favors 364 days in the year in return for votes on 1 day." The typical precinct leader occupies a public job (by patronage appointment) the duties of which are such that he can work in his district much of the time. Many, however, are justices of the peace, real estate dealers, merchants, labor-union executives, or salesmen. As a class, they are hard-headed realists with little genuine interest in theories or issues. Their job is to deliver a solid majority for their party, and especially for their city leaders, on election day. Usually they love the game of politics and the prestige which they get from their "influence." The best ones go on to become ward leaders and city leaders. The pecuniary rewards are often substantial but rarely do they become wealthy. In some cities, they are allied with vice rings or criminal interests in a corrupt conspiracy to subvert the laws on gambling and prostitution. In others they dispense other kinds of favors to their supporters.

The precinct leaders represent their precincts in some form of ward com-

mittee organization. The ward committee, headed by a ward chairman, coordinates the work of the various precinct leaders within the ward. A ward is a major political subdivision of a municipality and in many cities forms the basis of representation in the city council. The various ward chairmen together form the city committee of the party, the executive of which is the city party leader. In highly organized urban political machines, the ward leaders are extremely powerful and the city leader is likely to be the most powerful party official in the area. The city committee frequently directs the entire local campaign of the party, collects and distributes funds to wards and through them to the precinct leaders, and operates a headquarters for the dissemination of campaign literature. The city leadership ordinarily determines the local slate of candidates for city office and for the state legislature and commands the distribution of patronage if the local ticket is successful.

Ward and city organization

In rural areas, and even in many urban ones, the most powerful local party organization is the county committee and its chairman. This committee is composed of township, village, and city representatives commonly elected by the party voters in those areas, and the chairman is elected by the committee or sometimes by a convention or even by the voters in the primary election. The county chairman, typically, directs the party campaign locally, selects the candidates for county office and for the state legislature that the organization will support, controls the distribution of county patronage as well as state and national patronage if his party is in power at those levels, dispenses party funds, plans rallies, and directs local publicity. In rural America, where a high percentage of all public offices are filled by partisan election and where virtually all appointed positions are filled by partisans, the county chairman is by far the most important local politician. Even in some urban areas, New York and Chicago, for example, the county chairman comes closest to being the real boss of the local party.

County organization

Intermediate between the county and the state organization, various types of district committees may usually be found. Congressional and state legislative districts are apt to be formed of several counties and the parties frequently make some effort to create a campaign organization to support their candidates for these posts. A district committee made up of representatives of the county committees in the district is the most common. Rarely are these district organizations effective. They function at all only during a campaign and in many areas have only a shadowy existence.

District organization

In earlier days, the highest party authority in a state was the state convention whose members were elected, in counties or other areas, by the party voters directly or in local conventions. For most practical purposes, however, the state convention has now lost its importance. Supreme party authority on the state level is now typically centered in a state central committee and its chairman. State committees vary greatly in size, and their members are chosen in different ways. Occasionally they consist of all county chairmen in the state. Usually they are elected directly or indirectly by the voters in counties or other units of representation, with the trend strongly toward direct choice through

State organization:

1. State convention

2. State central committee

primaries. Frequently, men and women are elected in equal numbers. Their functions include maintaining effective organization throughout the state, adjusting dissensions, promoting the election of party candidates (in co-operation with the national committee in presidential years, with congressional committees when members of Congress are being chosen, and at all times with county and other local committees), raising funds, occasionally nominating candidates for certain minor offices, sometimes preparing the party platform, and in some states selecting the state delegation to the national nominating convention. Committee membership is often far too large to permit effective collective action, and tasks tend to fall into the hands of a small executive committee and especially to such officers as the chairman and treasurer.

3. State chairman

The state chairmanship is a post often bitterly fought over by rival party leaders or factions. The state central committee commonly elects the chairman. In doing so, however, it may merely ratify a choice already made by the party nominee for governor or even by a powerful party leader who prefers not to occupy the titular post. In many cases, the United States senator is likely to be influential in selecting the chairman. The party leadership, in any case, is often shared with the governor or a senator. Whether the real leader of his party or a member of the top party team, the chairman, presumably working with the state committee, is the principal director of state-wide party campaigns. He usually is influential in making up state-wide slates and, in the event of party victory, is importantly involved in dispensing patronage, both state and national.

Criticism of party organization

Throughout our experience of organized political parties the apparatus just described has evoked much criticism. Before the advent of the direct popular election system for filling many party offices, party organizations fell rather easily under the domination of a few ruthless and unprincipled leaders who solidified their position by carefully contrived organization and bolstered it by corruption, graft, and spoils. This was notably true in the large cities.

"Bossism"

The scandals of the Tweed Ring and of Tammany Hall in New York City, of the Penrose and Vare machines in Philadelphia, of the Pendergast machine of Kansas City, of the Kelly-Nash machine in Chicago, and of many others during past decades blackened the reputations of party organizations everywhere. The word *machine,* used to characterize a highly organized and tightly controlled party apparatus, is still an epithet connoting corruption and oligarchy. "Boss," as the leader of the "machine" is still called, is also a term of opprobrium. The system of filling party office by election was widely adopted in the period 1900-15 to make oligarchic or dictatorial control of the party organization more difficult. It was supposed by the reformers that the voters disapproved of machine politics and if given an opportunity would destroy it. The convention and caucus system, it was argued, was much easier to manipulate in the interests of the leaders. State regulation of party organization involving the prescription of party offices and the methods of filling them has not wholly solved the problem or mitigated the criticisms. The fundamental difficulty is that only a small percentage of the electorate are really interested

in party organization or in party work. Elections of party officials ordinarily attract a very light vote. It does no good to elect to party office persons who are neither fitted for nor interested in working at the job. The small band of party enthusiasts who do the party's chores and, of course, enjoy the party's rewards are indispensable to strong parties. Since they are a small minority, they can always be criticized as an oligarchy. Even the most dictatorially managed party organization, however, depends in the final analysis on public support. It cannot survive repeated repudiation of its candidates at the polls. The voters in any area have today and have always had it in their power to destroy a "machine" or a "boss." Wherever they continue to exist, and they still do in some places, it is a fair assumption that a majority of those voting approve of what they do.

Development of informal party organization

One unintended result of state regulation of party organization has been the development of informal or "voluntary" party organizations outside the legally-constituted party organization. In Wisconsin, for example, the elected "statutory" party committees are relatively unimportant parts of the party apparatus and real power has shifted to party committees and groups which have grown up outside the law. These groups use the old caucus and convention procedures for selecting officials and candidates just as was done in the last century. "Reform" has brought us full circle.

In concluding these observations on state and local party organization, it is essential to add that the worst practices of machine politics of the nineteenth century are not nearly so prevalent today.

## PARTY ORGANIZATION—NATIONAL

Although most of the strength and vitality of our major political parties is in their state and local organizations, they also are organized nationally to conduct campaigns for the presidency and for members of Congress. In general the national machinery of the parties is a federation of state organizations and lacks the powerful central direction characteristic of some state and many local organizations.

1. Senatorial and congressional campaign committee

First among national agencies are two committees of which as a rule the public hears little—(1) a senatorial campaign committee, composed usually of six or seven United States senators chosen by the party group in the upper branch and charged with promoting the election or re-election of the party's senatorial candidates in the biennial contests; and (2) a corresponding congressional campaign committee consisting in the case of the Republicans of one member of the House of Representatives from each state having a Republican delegation, and in that of the Democrats, of one member from each state having a Democratic delegation, plus an outsider designated by the chairman for each state not having Democratic representation, plus also a woman member from each state insofar as the chairman chooses to designate such. In a presidential contest, these two committees place their resources at the disposal of the national committee (with which, however, they have no organic

connection) and become its close allies. In "off years" the committees (which now maintain permanent working staffs) tend to play an independent role. Relying, of course, upon the co-operation of national, state, and local committees, they conduct senatorial and congressional campaigns. In meeting this responsibility they distribute political literature, maintain a speakers' bureau, raise and disburse money (giving special attention to doubtful states or districts), and often intervene to smooth out local factional differences.

2. The national convention and its agencies:

Although on the lower levels party conventions have largely been displaced, the supreme organ of the national party is still the national convention. It nominates candidates for the highest offices, formulates a platform, regulates the party organization, and enacts the "constitution." This convention which meets every four years will be discussed in some detail shortly. The two major arms of the convention—the national committee and the national chairman—concern us here.

a. The national committee

The national committee of the Democratic party consists of two party members—a man and a woman—from each state and territory. The Republican party, since 1952, has in addition to these two, the state party chairman from each state that voted Republican in the preceding presidential election or that had a Republican governor or a Republican majority of its members of Congress. The two traditional state members of the committee of each party are formally designated by the convention on the nomination of the respective state and territorial delegations. In at least 30 states, however, the real selection is made at primaries or at state conventions and the national delegation simply confirms the local selections.

The national committee is most active during a presidential campaign year. It decides where and when the nominating convention will be held and makes all the necessary local arrangements. It issues the call to the state party organizations, compiles the temporary roll of delegates who may attend, and selects the temporary officers of the convention. Both of the latter decisions are subject to review at the convention. The committee also makes recommendations to the convention for changes in the rules governing the national organization. The convention once assembled selects a new national committee which then bears a heavy responsibility for conducting the national campaign. Between campaign years, the committee is not nearly so active. Its continuing responsibilities for "off year" campaigning and for mobilizing sentiment nationally for the party and its leaders are discharged largely by the permanent staff in Washington, D. C.

b. The national chairman

The chairman of the national committee is the active campaign manager of the presidential candidate of the party. He is selected by the candidate and formally invested with office by the committee. When the campaign is over, the defeated candidate's manager typically resigns. Under these circumstances, the committee picks a chairman to serve until a candidate for president is named. If the campaign is successful, the chairman traditionally steps into the new president's cabinet as postmaster general and the president in consultation with the committee selects a new chairman. The tasks of the chair-

man are many and difficult and only the most skillful politicians of long experience are selected for this post. In the party, he ranks second only to the president himself as one of the directors of its operations.

## PARTY FINANCES

Parties need money

To maintain party organization, carry on propagandist and other activities, and wage campaigns require money, and a great deal of it. There have been instances in which use of large sums backfired against a candidate or a party, but no party management ever thinks it has money enough or relaxes its efforts to get more. The first, and often the principal, task of many of the party committees is to raise funds. As a rule, the burden devolves primarily upon the treasurer of the committee concerned, although in states and localities it may be assigned to a director of finance. Such officials commonly leave no stone unturned in their search for the "sinews of war," appeals going not only to people of wealth, but to any and all party adherents. Money is only one factor in winning elections, but it is important enough to tip the scales in close contests.

No accurate figures of party expenditures available

If they are to remain going concerns, parties must spend money all of the time to support the permanent headquarters and the organizational work that is always going on. Their outlays are highest and attract the most attention in connection with campaigns. It would be interesting if figures could be compiled showing precisely what such outlays are. Few accurate records are kept, however, and it is impossible to discover with exactness what is spent in campaigning or on the party apparatus in the United States. There are, it is true, certain published figures. Party organizations engaging in national campaigns are required by law not only to stay within a specified maximum ($3 million in any calendar year), but to make full reports on their financial operations, both intake and outgo. Various states also require reports. However, the regular channel for party expenditure on a campaign—the party's national, state, or local committee—is by no means the only one through which money is spent. All sorts of voluntary, unofficial committees and organizations raise and spend large sums. Some of this is reported; some is not. In the presidential campaign of 1956, more than $33 million was reported spent by or on behalf of the various candidates and parties according to a tabulation prepared by a Senate committee.[6] Perhaps three times this amount was spent through informal channels or in states where financial statements of campaign expenses are not required to be filed. In the campaign of 1952, $23 million was reported as spent by the various organizations required to file national reports.[7]

[6] The report, one of the most exhaustive ever made, was prepared by the Subcommittee on Privileges and Elections of the Committee on Rules and Administration. See *Congressional Record*, April 12, 1957, 5003-5022.

[7] Reported expenditures in 1952 may be found in *Congressional Quarterly Almanac*, 1953, 40-56. For expenditures in the campaign of 1948, see *Congressional Quarterly*, VII, No. 3 (Jan. 21, 1949). Expenditures for campaigns from 1932 through 1944 may be found in the articles by Louise Overacker in *Amer. Polit. Sci Rev.*, Oct. 1933, June 1937, Aug. 1941, and Oct. 1945.

Why expenditures are so large

Many people contemplate such outlays with apprehension, wondering whether money in politics is not a menace to our democratic institutions. Rival party organizations or candidates, especially if blessed with less ample resources, habitually take advantage of this popular concern and loudly denounce the "slush funds" of their opponents. It is, however, possible to spend large sums of money in perfectly legitimate ways. The permanent staff must be paid, office space rented, and supplies purchased. Both major parties pour money into party periodicals: *Democratic Digest* and *Republican News*. All in all, a party, if alive and vigorous, must spend a great deal, and all of the time, merely to keep itself going. The public knows little of all this and probably cares less. Criticism centers chiefly about the spectacular outlays, especially on presidential campaigns.

Any fair-minded person, however, who will look into the facts will find that in a nation-wide political effort it takes only a few items of a perfectly legitimate nature to account for outlays running into the millions. Like other forms of publicity and salesmanship, campaigning has come to be tremendously expensive. It takes millions of dollars to reach 100 million potential voters. Headquarters rentals, billboard and newspaper advertisements, brochures, leaflets, handbooks, biographies; all of these require hundreds of thousands of dollars. The major outlay in modern campaigning is for radio and television time. Roughly $10 million of the total of $33 million reported in 1956 was for this one item. When all of these entirely proper objects of expenditure are duly listed and footed up, it will not be difficult to understand why, in spite of protracted and searching investigations by special Senate committees in connection with the big outlays in every presidential campaign from 1920 to 1956 inclusive, almost no evidence has come to light justifying suspicion of misuse of funds in the national politics of recent years. This is perhaps the price we pay for stirring interest and getting our citizens to do their civic duty. If we remember that a few tobacco companies will spend as much as $25 million in one year to advertise their products, expenditures for electing our national officers may not seem excessive.

Sources of party funds

Whence come the funds with which to meet party outlays on the present scale? Speaking broadly, from anybody who can be induced (or coerced) to give. Raising money in humdrum times between elections is a thankless task. Party officers charged with the responsibility do what they can. Most money, however, is gathered in at campaign time, and for immediate use. To begin with, candidates are almost invariably expected to dig into their pockets to take care of part of their own campaign expenses. Party members already in public office, whether or not up for re-election, are likewise counted on for contributions, frequently in terms of some fixed percentage of salary received. Especially are public officers or employees, national, state, or local, who get their jobs by partisan appointment expected to contribute to the party. Contributors among the general public during past campaigns are invited to help, and especially associates or friends of candidates.

Contributions at campaign time

All of these sources would not carry a major party far toward the vast sums required. By and large, the money for national, and to some extent for state, campaigns comes rather from businessmen, bankers, government contractors, and other private citizens who have, or think they have, something at stake in the success or defeat of a given party. These chiefly are the "prospects" on whom the party treasurers and members of finance committees work in their money-raising drives. Corporations are forbidden by law to contribute. This does not stand in the way of gifts by officers, directors, stockholders, acting as individuals. The list, especially of Republican contributors, is filled with the names of the executives of large corporations. Since 1943, labor unions also have been forbidden to contribute to campaign funds, but this has not prevented the C.I.O. from aiding the campaigns of several Democratic candidates through an auxiliary agency, the Political Action Committee. Although the number of large gifts to either party is small, the bulk of the contributions come from a comparatively few persons. The six top party committees in 1952 reported 55 per cent of their contributions were received from 2407 gifts of $1000 or more. The Senate Committee report on the 1956 campaign indicated that the members of 12 of the wealthiest families gave a total of $1.1 million. ($1 million to the Republicans; $.1 million to the Democrats.) Both parties have tried energetically in the past few campaigns to increase the number of small donors. Undoubtedly they feel that the small gift ties the giver more strongly than otherwise to the party. An increasingly popular device for this purpose is the $50 to $100 plate dinners invented by the Democrats but now also used by the Republicans.

## REGULATION OF CONTRIBUTIONS AND EXPENDITURES

The need for regulation

The high cost of modern campaigning and the resultant pressure on the party organization to raise huge sums of money raise a number of difficult problems. In the first place, the candidate in modest circumstances who cannot afford a large outlay on his own behalf is either unable to compete or is completely dependent upon the party organization to support him. In the second place, some of the contributions are not wholly disinterested. Some contributors expect personal favors from a successful party or candidate in the form of an appointment to office—ambassador, for example,—or of benevolent governmental policies toward the enterprise or group with which they are identified. The political-interest group, for example, is likely to want legislation or administration favorable to the group in return for campaign aid. Concern over the excessive domination of candidates or parties by a few wealthy persons or special interests has induced national and state governments to attempt to regulate political contributions and expenditures by laws known as "corrupt-practices acts."

State regulation

The corrupt-practices legislation of the 50 states varies widely. Typically, such patently corrupt behavior as bribery, treating, intimidation or impersonation of voters, ballot-box stuffing, and tampering with voting machines is

prohibited. Many other practices not in themselves corrupt are outlawed and both giving and spending party funds are regulated. About three-fourths of the states, for example, forbid contributions by banks and other corporations —although not by the officers or directors as individuals. About one-fourth of the states forbid levies on officeholders. Nearly all the state laws attempt to place a ceiling on expenditures by or on behalf of candidates either as a flat sum or as a percentage of salary of the office sought or as a multiple of the number of voters in the constituency. A few states place a limit on the total expenditures of a state committee. Few of these regulations are effective anywhere. If the law limits the party committee or the candidate, expenditures can be made by unofficial committees or by friends of the candidate. If assessments of officeholders are forbidden, contributions by officeholders rarely are. A more effective part of most state corrupt-practice laws is that requiring publicity of receipts and disbursements. About three-fourths of the states require candidates and parties to file reports of their finances either before or after election or at both times. Publicity after the election is usually not effective, however, and that before the election is incomplete.

National regulation

Congress, on its part, has also attempted to regulate campaign financing and practices in connection with the election of national officers. The congressional efforts have been as ineffective as those of the state legislatures. They may be summarized under four heads.

1. *Limitations on the raising of money.* Persons on the national payroll may not be solicited for contributions for political purposes by any officer or employee of the government or by anyone in a government office building. National banks or other corporations organized under national law are forbidden to contribute to or make any expenditure in connection with any campaign fund. Any corporation under whatever laws it may be organized and any labor union are forbidden to contribute to or make an expenditure in connection with any national election or any primary, caucus, or convention held in relation therewith.[8] Finally, no contributions from relief workers (when such exist) may be received, and no individual, committee, or association may donate more than $5000 in any calendar year to the campaign of any candidate for a national office, exclusive of any contribution to a state or local committee.

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 $2500, unless a lower maximum is fixed by law of the candidate's state, in which case that law governs. 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

[8] Some question the constitutionality of these prohibitions and labor unions have on several occasions sought judicial relief. The Supreme Court has thus far sidestepped the question of whether an infringement of free speech or press is involved. A major case in which the U.A.W.-C.I.O. paid for a political broadcast is still pending in the courts. See United States *v.* C.I.O. 355 U. S. 106 (1948) and United States *v.* U.A.W.-C.I.O., 352 U. S. 567 (1957).

given office in the last preceding general election, with a maximum of $25,000 for a senatorial candidate and $5000 for a candidate for the House. One other restriction (Political Activities [Hatch] Act of 1940) is that no "political committee" operating nationally may receive or expend more than $3 million in any calendar year.

3. *Limitations on the purposes for which money may be spent.* State laws cover this matter. National restriction does not extend much beyond prohibition of the more obvious types of corrupt practice; indeed, in limiting the amount of expenditure as indicated above, the law expressly exempts outlays of candidates on travel, subsistence, stationery, postage, circulars, telegraph and telephone service, and for "personal" items.

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, both before and after election, a full report of all contributions received in support of his candidacy 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 under oath make periodic reports of their financial operations. Pre-election reports are due in September and in October, and must include the names of all donors of $100 or more (in the case of national organizations, $10 or more).

Weaknesses:

None of the laws on campaign expenditures is effective. Everyone of them has loopholes.

1. Excludes primaries

At the time the Corrupt Practices Act of 1925 dealing with Senatorial and Congressional campaigns was passed, it was widely supposed that Congress could not constitutionally regulate primary elections preceding national elections. Although the Supreme Court now holds the primaries to be subject to congressional regulation, the Congress has never extended the act to include expenditures in primaries. In the South, for example, primary campaign expenditures are larger than those in the election campaign. Secondly, a candidate need not report as expenditure any sums paid out for his travel, subsistence, stationery, postage, printing, or personal services. A larger loophole is that there is no restriction or even any reporting required of amounts spent on behalf of candidates by friends or associates or local or state party groups, whether such expenditures are with the knowledge and consent of the candidate or not. The attempt to limit national committee expenditures to $3 million a year has the same weakness. All sorts of new clubs, associations, and informal committees have grown up alongside the national committee as vehicles for additional expenditures, for example, Citizens for Eisenhower, Associated Willkie Clubs of 1940, Republicans for Roosevelt. The prohibition of labor union or corporation expenditures does not apply to auxiliary organizations which may be supported by union or corporate funds. As for individuals who have contributed the legal maximum of $5000 to a national committee, they are not prevented from making further contributions to auxiliary organizations and to state and local committees.

2. Excludes personal expense

3. Excludes indirect expenditure

4. Excludes auxiliary organizations

5. Excludes loans

In their desperate campaign-time search for funds, party authorities not only seek gifts but sometimes contract loans, usually from affluent well-wishers. Whether originally so intended by the lenders, such loans often turn into actual contributions, though at campaign time are unaccounted for as such.

6. Deficits

Parties sometimes emerge from campaigns with sizable deficits and may raise the money to meet them long after the accounting for the year's expenditures has been made.

7. Publicity

Publicity requirements of both national and state statutes are very imperfectly met, and accounts are often so poorly kept and reports so carelessly prepared as to be almost unintelligible. In a single recent campaign year, 122 candidates for the House of Representatives completely failed to turn in any reports—and apparently nothing happened. Such looseness and obscurity balk anyone trying to find out what actually goes on and, of course, defeat the purpose of well-meant legislation.

8. Enforcement

Finally—and it is now hardly necessary to add this—the entire system (apart from the main reports of the two national committees) suffers from inadequate enforcement. In fact, there is no proper and permanent enforcing machinery at all. A candidate alleged to have overspent in his campaign may be haled into court or before a congressional committee by a rival contesting his seat; and after each quadrennial campaign, special congressional committees on campaign expenditures dig through such records as they can lay hold of and issue voluminous reports. By and large, however, it is only occasionally, and often largely by accident, that anything is done really to put teeth into the laws.

The problem of improvement

The problem of regulating campaign finances is clearly one of great difficulty and complexity. Parties must have money and lots of it. Few people are willing either to give money or to do political work voluntarily. Under the circumstances, it is not surprising that great influence in party affairs and in the government accrues to those who are willing and able to give or to those who although unable to give are willing to work at the chores of democracy. Disappointment with the results of corrupt-practices legislation should not obscure the fact that there has been a great deal of genuine improvement over the years in the ethics of political competition. There is little outright bribery, vote buying, and ballot-box stuffing today, and there was a great deal 75 years ago. Party leaders are not quite so anxious to throw money around, callously indifferent to the public reaction, as they used to be. On the other hand, campaigning is more expensive than it used to be. Voters will no longer attend the old-fashioned rallies which are relatively inexpensive; they want to sit at home and be reached by radio and television. Many proposals for tightening the laws or making expenditure limitations more realistic have been proposed to the Congress, the most recent by Senator Gore early in 1957. None has been favorably received.

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# CHAPTER 9

# *Nominations*

Importance of nomination procedure:

1. Facilitates majority rule

Among the many useful purposes in the American system of government served by political parties, none is more fundamental than the designation of candidates to stand for public office. In sifting out the many aspirants for power and place in the vast constituencies of American politics, the parties facilitate majority decision. Without this sifting process the power of the electorate would be scattered among numerous choices, no one of which might command the support of more than a small handful of the voters. Although party efforts do not universally produce majority decisions, they do tend to prevent domination of the electoral process by one or two groups.

2. Has become a part of elections

The grip of the party organizations on the nomination process has been loosened but not shattered by the introduction of direct participation by the voters in the selection of party candidates. The primary election systems have also made the nominating of candidates an integral part of the election process. An understanding of nominating procedure is indispensable, therefore, to a proper appreciation of the meaning and nature of the power of the voter in American democracy.

3. Replaces election in one-party areas

In many communities and in several states, where one political party so far overshadows any others that its nominees are virtually assured of election, the nominating procedure is the main point at which real influence can be exerted by the average citizen. In the Democratic South, Republican New England, and cities such as Chicago and New York, dominated by entrenched political organizations, the nominating process is more influential in determining the policies of the government of those areas than is the election.

## THE EVOLUTION OF NOMINATING PROCEDURES

Nomination by petition

Contemporary nominating procedures are the product of many decades of political experience. They have evolved through successive forms—caucus, convention, primary—each of which has broadened the amount of popular participation over its predecessor but none of which has ever been wholly abandoned. Before we embark on a survey of this development we must digress a moment and point out that candidates do not have to be nominated in order to be elected. A qualified person may, legally at least, be elected to almost any office in the nation without ever having been nominated in any formal sense. Aspirants for public office in nearly every state may have their names appear on the ballot on election day by filing a petition supported by some specified number of qualified voters. Such aspirants are not, however,

entitled to bear the label of a major political party. They must run as independents or as representatives of a party which cannot or will not participate in the regular nominating process. Moreover, candidates may be selected to office whose names do not appear on the ballot at all. Virtually every ballot (or voting machine) in America makes provision for a voter to "write-in" for any office within his choice the name of an individual whom he wishes to support. Few persons ever attain office either as "independents" or as "write-in" candidates. Occasionally, in small constituencies and for local offices, such candidates are swept into office by their fellow citizens. In the state and the nation, however, election is normally achieved only by those who have been nominated by a party.

"Write-in" candidates

The earliest known nominating procedure in American experience appeared in pre-Revolutionary days in connection with election to city councils or colonial assemblies and came to be called the *caucus*. This method is simply an informal meeting of party or faction or community leaders in advance of the election at which they agree to support, and to propose that their fellow citizens support, some individual or slate of individuals to the office or offices presently to be filled by election. The caucus sprang up and flourished spontaneously without legal prescription or party rule, and until the Jacksonian era no other nominating procedure was used to any extent. As party organization became more formalized, caucuses also became more formalized and spread upwards to state and national politics much as the hierarchy of party committees reached across city, county, and state lines. Gradually the caucuses at the local (ward, town, city) level began to designate representatives to meet with those from other districts to form county and state bodies which coordinated the selection of party standard bearers for state and congressional offices. As they enlarged their scope they became formalized into county, state, and ultimately national conventions of representatives from local caucuses, and thus the convention system of nominations came into being.

Caucus

Side-by-side with the development of the caucus system for local nominations, a special form of caucus came into being at the state and national levels: the legislative caucus. In the absence of state-wide or national machinery for designating party candidates for governor and president, the party members in the state legislatures and in the Congress took it upon themselves to meet in caucus to agree on candidates for these high offices to be presented in behalf of the party to the voters. This procedure united the legislative and executive branches of the government more firmly than they have ever been since it disappeared. But it united them under circumstances which enlarged the legislative influence over the executive. Its abandonment paved the way for the gradual emergence of a more powerful and more dominating executive in both state and national government. The legislative caucus fell into disfavor and gradually disappeared in the decade after 1820. The attack upon it sprang from the fact that it was not representative—it contained no members to speak for the party in states or districts represented at the moment by members of the other party. And also from the fact that it promoted executive

The legislative caucus

dependence upon the legislature which was out of keeping not only with the aspirations of ambitious executives but with the spirit of the "founding fathers" as well. The caucus fell victim to the growing demand for more popular participation in slate-making. By 1835, it had virtually disappeared from the American scene as a nominating device.

Convention

The predominant mode of designating candidates from 1825 to 1910 was the party convention. Caucuses continued to function as devices for selecting delegates from precincts, wards, or towns to city, county, or state conventions. The national, state, and local conventions became more and more regularized institutions for naming party candidates. Apportionment systems were developed for determining the number of delegates to which each precinct, ward, or election district was entitled. Party rules were adopted, providing for such delegate apportionment and for the methods for selecting delegates. Typically, delegates were chosen from precincts for city or county conventions, from city or county conventions to state conventions and to congressional district conventions, and from state conventions to national conventions. This method, it was asserted, transmitted the wishes of the party voters from the precinct upward to the national conclave by an unbroken chain. The conventions also came to serve other partisan functions. They provided rallying places for energizing the party apparatus and enthusing the party workers. They provided a useful facility for the adoption and promulgation of local, state, and national platforms. They served as testing grounds for party orators and for influential party leaders from other areas of the nation. The convention, although characterized by noise, confusion, and drama, nevertheless provided a means through which party leaders could weigh and balance the qualifications of the candidates. Tickets could be properly balanced; sections, interest groups, racial and religious minorities could all be considered and, if possible, placated. Behind the scenes of the conventions, a few leaders continued as before to meet in caucus and propose slates which the rank-and-file delegates might accept. With this difference, however: a larger and more representative segment of the party members had the opportunity to ratify or veto the leaders' choices.

Criticism of convention

Toward the end of the nineteenth century, the convention fell increasingly into disrepute. The delegate selection procedures, irregular at best, fell periodically under the domination of ruthless leaders who packed local caucuses and frustrated genuine representation of local party sentiment. By the time that attempts to regulate such matters by law became general, the convention system was disappearing. The delegates, frequently an undistinguished group, were too often bought and sold or traded by bosses who callously disregarded public sentiment. In the state and national conventions, several stages removed from popular participation, opponents of the leaders found it especially difficult to make headway, although frequently they enjoyed wide public support. The continued surge of the democratic ideal, interpreted in this situation as demanding more voter participation, contributed to the downfall of the convention system as it had to the demise of the caucus.

Direct primary

After 1900, the convention system was gradually discarded as a nominating device. It survives today for presidential nominations and for state-wide offices in a few states (notably New York and Indiana). In its place the direct primary system for making nominations has been adopted in some form in every state. In addition, the device has come to be used in many states to select candidates for party offices (convention delegates, committeemen, etc.). The essence of the direct primary is the selection of candidates by direct action of the voters themselves. The procedures employed are similar to those used in the final elections and the primary has become, in effect, a preliminary intraparty election. Primaries of the different parties are commonly held on the same day, and at the places where the regular elections are held later; they are administered, typically, by the regular election officials, with all costs met out of the public treasury; the ballots are like those used in regular elections. In some southern states, it should be noted, only the Democratic party holds a primary.

Persons seeking nomination to an office may get their names on a primary ballot simply by self-announcement and perhaps payment of a fee, or they may have been picked at some sort of caucus or preprimary convention. The common method, however, is to file a petition signed by some specified proportion of the voters in the area, the proportion being gauged roughly in accordance with the importance of the office, and varying all the way from one-half of 1 per cent to as high as 5 or even 10 per cent.[1] Ordinarily a candidate receiving the largest number of votes for a given office is declared the party nominee for that office, even though, with often three or four persons seeking the same nomination, the victor may win by virtue of a plurality. Several southern states, however, require a majority; and if at the first balloting no candidate for a given position receives the requisite vote, a second or "runoff" primary is held, with the voters choosing between the two candidates standing highest at the first test. In any event, winners in the respective party primaries automatically get their names on the ballots for the later regular elections.

Partisan and nonpartisan primaries

The direct primary presupposes elections on a party basis, and consequently is itself partisan. Persons seeking nomination do so as Republicans or Democrats and are so listed on the ballots used. Where, however, nonpartisan elections have been introduced (as for legislative members in Minnesota and Nebraska, for judicial offices in several states, and for local offices in many cities and some counties), they usually are preceded by a single nonpartisan primary conducted in all respects like an ordinary party primary, except that the ballots carry no indication of the party affiliations of the persons to be voted for, and that no question as to the voters' own affiliations is raised at the polls. Partisan and nonpartisan primaries, for different offices, may indeed be held at the same time and place, with separate ballots employed for the

[1] A few states authorize preprimary conventions to be used to designate candidates to stand in the primary. Connecticut retains the convention system with the primary as an alternative procedure if convention nominations are challenged.

two. In any event, the two candidates on a nonpartisan ticket polling the highest and next highest number of votes for each office get their names on the nonpartisan ballot used at the ensuing election. The primary thus becomes "a sort of qualifying heat which eliminates the weaker contestants from the final race" and at the same time assures ultimate election by majority vote.

"Closed" and "open" primaries

Partisan primaries in turn may be classified as "closed" or "open," on the basis of the conditions laid down for participating in them. The "closed" primary is one in which participation is confined to bona fide members of the given party. The intention is to prevent members of the opposition party from helping to select the party's candidate. Two methods of guarding against this "raiding" are employed. One—required by law in 19 of the closed-primary states (including New York, Pennsylvania, and California)—is an advance enrollment of the party affiliations of all voters. This party registration is shown on the voter lists supplied to polling officials on primary election day and enables them to give to each voter only the ballot of the party with which he has claimed affiliation. The other method, employed in most of the remaining closed-primary states, involves a procedure for challenging voters who call at the polls for the ballot of a party with which they are not known to be identified. Such voters may, for example, be asked to state whether they supported that party at the last election, or at all events half of its candidates, or perchance whether it is their expectation to adhere to it in the future. Either of the two procedures can be flouted by persons of easy conscience if there is sufficient motive; the second is particularly weak.

A large number of voters, however, have no strong and abiding party allegiance, and 10 states frankly accept the fact and maintain "open" primaries in which there is no attempt to put the voters' party preferences on record.[2] Instead of asking for and being handed a Republican or a Democratic ballot when he presents himself at the polls, a voter in any one of those states is given either a blanket ballot listing the candidates of the respective parties in separate columns (*one* only to be voted) or a sheaf of ballots containing one for each party. In any event, he votes the ticket of his choice, with no one the wiser. Republicans may take a hand in Democratic nominations, and vice versa; and something of the kind often happens. Some states ostensibly having the closed form of primary really have the open form in disguise, since the tests which they prescribe notoriously fail to prevent voters from shifting their adherence from one party to the other. Professional politicians and strong partisans generally favor the closed primary on the theory that the primary is really a party affair and should not be open to "independents," nonpartisans, or members of some other party. The secrecy of the open primary has a compelling appeal to many voters.

The primary and the platform

The primary is a nominating device and serves none of the other purposes which conventions had come to serve. There is no room in the primary,

[2] Idaho, Minnesota, Montana, North Dakota, Utah, Vermont, Washington, Wisconsin, Alaska, and Hawaii.

for example, for preparing a party platform for the coming election. In the few states still using the convention system for state-wide purposes this is no problem. In the exclusively direct primary states, however, some other provisions must be made for platform preparation. In 14 states, some form of party conference is recognized by law as the platform drafting agency. The Wisconsin system illustrates this procedure. After the primary, the nominees of the party for the state legislature and for the state executive posts and the hold-over party members of the state senate are directed by law to assemble and prepare a platform upon which presumably they will collectively campaign.

Critique of the primary

The direct primary unquestionably gives the rank and file voter a larger share in the nominating process than either of its predecessors. It has not, however, eliminated the need for organization to achieve electoral success nor, consequently, the need for some agreement among party leaders on candidates that ought to be offered for the approval of the public. Thus the caucus of party leaders continues to function in many, if not in most, constituencies. With the primary, however, the party voters have to ratify the leaders' choices and minority groups may contest the leaders' slate. Although there is probably less outright vote-buying today than in the heyday of the convention, the cost of getting elected has been increased, not decreased, by the primary. With the primary system a candidate has to run twice. Important public office is farther out of the reach of poor candidates unsupported by an organization than ever before. The primary system also tends to weaken party organization and party responsibility. The party apparatus may well find itself obliged to support candidates who are distasteful to it and opposed to its ideology but who have captured the sympathy of the voters. In the home of the state-wide primary, Wisconsin, both major parties have gone outside of the legally prescribed party machinery and created unofficial and unregulated party organs (called voluntary committees) to breathe new ideological homogeneity and a sense of party responsibility into their operations. This has taken them back to the convention system; and the Republican party, at least, meeting in unofficial convention endorses candidates for state-wide offices and for United States senator to the rank and file of its members. This endorsement carries with it the support of the treasury and of the organization of the extralegal committee. Party organizations by these and other methods are gradually adjusting themselves to the primary system, but it has been a painful and difficult process for many of them. They are still not proof against a strong upsurge of popular feeling sweeping away their most cherished tenets of public policy. In considering the results of the direct primary system, it must also be remembered that state law and practice vary in many details from one state to another. No two systems are identical in every respect. There is, finally, no concerted effort of consequence to abolish the primary and return to any earlier nominating process.

## REGULATION OF THE NOMINATING PROCESS

By the states

Like other activities of political parties, nominations are regulated mainly by the states. The history of regulation of the nominating process parallels very closely that of party organization already described. The attempt to curb abuses in party procedures for naming candidates accompanied the growing dissatisfaction with the convention system. The movement for state regulation never, however, caught up with the movement for abolishing the conventions. Comprehensive state regulation of the nominating process really accompanied the introduction of the direct primary system. Virtually every state now has constitutional or statutory provisions governing the naming of candidates at all levels. Furthermore, where the convention system survives it is, typically, closely controlled by state laws governing its composition, organization, and procedures. State regulation in practice embraces the nomination and election of national officials as well as of state and local ones.

By the national government

State regulation of nominations is, however, subject to national modification. A constitutional power rests with the Congress, when it cares to exercise it, to regulate the time, places, and manners of electing senators and representatives. The Supreme Court has declared that the primary is an integral part of the election process and is, therefore, subject to the guarantees of the Civil War Amendments. Negroes, thus, may not validly be denied the right by any extant procedure to participate in the primaries of any party. The power of Congress to regulate spending and other aspects of national election and campaign procedures under the modern interpretation extends to the primaries for these elections as well. Congress has not, however, seen fit to occupy this field in any important way, and the state regulations continue to be the only effective ones.

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# CHAPTER 10
# *Nominating and Electing a President*

The democratic process realizes its most significant fruit in the quadrennial selection of the nation's chief magistrate. All of the elements of the process coalesce in this unique and dramatic spectacle. The political parties reach their maximum effectiveness; the nominating process, involving caucuses, conventions, and primaries, captures the interest and enthusiasm of the people as at no other time. Every medium of communication—radio, television, newspapers, magazines, books, pamphlets, leaflets—swamps the public with fact, argument, and exhortation on the affairs of the nation and of those who seek to run it. Political-interest groups strive for places in the sun of each candidate's appreciation. The voters troop out to the polls on election day in larger numbers than on any other occasion. A vast radio and television audience intensely follows the tabulation of the returns. The pageant of an American presidential election is the most remarkable exhibition of popular government anywhere in the world. No other election quite equals it in drama, suspense, oratory, participation in electioneering, carnival atmosphere, ink spilled, or money spent.

The pageant of a presidential election

In one sense this spectacle is continuous, for hardly has a new chief executive settled into the White House before some plans are afoot for the next campaign. Late in the year preceding an election year, however, "available" candidates begin to utter declarations or make decisions which convey their willingness to make the run. Organizations then begin to form, "booms" are launched, personal and party groups spar for advantage in the press, in the Congress, in state capitals, city halls, and courthouses throughout the land. Voter participation in the nominating process begins in March of a presidential year and continues sporadically through April, May, and June. In midsummer the tumultuous national conventions assemble to select their standard bearers. A pause follows while the campaign apparatus of the parties is geared and oiled for the great effort. Then from September until election day in early November, the drama moves from scene to scene, mounting in intensity, noise, and enthusiasm. At length the vote is cast, the decision made by 65 million people. It is a stirring demonstration of American democracy in action.

The timetable of a presidential election

## THE CONSTITUTIONAL ELECTORAL SYSTEM

> The . . . President of the United States of America. . . . 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. . . .
>
> 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 persons 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. . . .
>
> 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.—Art. II, Sec. 1, as amended by Art. XII

*The plan originally adopted*

This great spectacle is not at all the sort of thing that the makers of our Constitution had in view. They did not want the president elected by Congress, because then he would not be sufficiently independent. Neither did they want him elected by the people, because that, they thought, would (in Hamilton's words) invite "tumult and disorder"; besides, the voters, scattered thinly over what already seemed a large country, would not know enough about the qualifications of available men to be able to make wise decisions. The matter troubled the convention considerably, and 30 different votes on it were taken. At last, however, a plan of indirect popular election using electors was agreed upon. The entire procedure was to be quiet, dignified, and deliberate, with presumably the best qualified men emerging from the sifting. During the struggle over ratification, the plan proved one of the few features of the new Constitution that did not have to be defended. This system produced two presidents: Washington and Adams. By 1800, it had been modified almost beyond recognition.

Effect of the rise of political parties

In 1788, and again in 1792, every elector wrote the name of Washington on his ballot, with second names scattered. In 1796, with Washington retiring, 13 different persons received electoral votes, John Adams standing first and Jefferson second. In 1800, however, every elector except one, the country over, wrote on his ballot the names of either Jefferson and Burr or Adams and Pinckney. In the meantime two political parties—Federalist and Republican—had organized to capture the presidency. Each had taken steps in advance of the elections in the states to agree upon particular "candidates" (nominally for the presidency, but actually for the presidency and vice-presidency), and to put before the voters and legislatures making the choices lists of men who would, if chosen, cast their electoral ballots in all cases for the persons supported by the party to which they belonged. With the party system thus fastening itself upon the country, presidential elections from that time assumed an entirely different aspect from that planned. The way was opened for partisan, popular presidential campaigns to develop the "tumultuous" characteristics which the framers would have deplored. The presidential electors became the mere "row of ciphers," which we know today, with president and vice-president to all intents and purposes chosen by the people. No better illustration can be found of how the actual working Constitution changes without a hand being laid on the written fundamental law.

The Twelfth Amendment (1804)

In the new situation, since every elector voted for two candidates, a tie between the two candidates of a winning party was inevitable unless anticipated beforehand. Jefferson and Burr, in fact, each received the same number of votes. The Constitution provided that a tie was to be broken by the House of Representatives, voting by states; and in this manner Jefferson finally was elected. The Federalist opposition, however, came near to thwarting the intention of the victors by maneuvering Burr into the highest office. Before the next election came around 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." Thenceforth the issue between presidential candidates would have to be settled between them alone, and similarly that between vice-presidential candidates—although, of course, an election still might be thrown into the House of Representatives. With the vice-president thereafter being separately selected, the character of that office underwent a decided change. Thenceforth, the second place on the ticket was often awarded without regard to the individual's capacity to be president.

## MACHINERY FOR NOMINATING CANDIDATES —THE NATIONAL CONVENTION

Nominations become a necessity

The next significant development concerned a matter for which the Constitution made no provision, that is, the nomination of candidates. As originally set up, the electoral system did not contemplate "candidates" at all. When, however, political parties arose, their main object forthwith came to

be to capture the presidency. To do this, they must concentrate their support at election time upon a given individual, which, in turn, they could do only if such individual, or candidate, were agreed upon in advance. Thus arose the need for machinery for making the selection in advance of the regular election.

From congressional caucus to national convention

The first device hit upon was the caucus composed of the (national) senators and representatives of a given party; and it was employed steadily 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. The caucus fell from favor when it refused to endorse Andrew Jackson. In 1831 both the National Republican and Anti-Masonic parties turned to popularly chosen nominating conventions, already employed usefully in many state elections. The Democrats fell into line with a convention of their own in 1832. Thus the national convention became the generally accepted means of putting both candidates and platforms before the voters; and such it has remained.

Arrangements for conventions: time and place

The national conventions of the two major parties today, and likewise of such minor parties as have built up durable organizations, are held on call of the national party committee. A year or more preceding a presidential election, the committee meets, 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 major parties held their 1960 conventions in July. The most popular convention sites are Chicago and Philadelphia.

Convention membership:

Each party determines for itself how its convention shall be constituted. There is no national law regulating the matter. State laws, in most states, regulate the method by which delegates will be chosen. In the absence of state law, the party determines the selection procedure.

1. Earlier arrangements

The first national convention had no regular plan of membership at all but it was soon learned that without a plan partisans from nearby states and cities would swamp the convention. The earliest plan was quite simple: each state was assigned as many delegates as it was entitled to electoral votes (one for each member of both houses of Congress). In 1852, the Democrats doubled the number assigned to each state, probably to allow more persons to participate in the choice. The Republicans followed the same plan in 1860. This remained the plan of both parties until modified in this century.

2. Weaknesses

Weaknesses in the traditional system for apportioning delegates were revealed most clearly in the Republican party. The states of the Solid South repeatedly sent to Republican national conventions delegates who represented no consequential party strength. The Republican delegates from the South were, in practice, representatives of a small group of national officeholders ap-

pointed by Republican presidents. A Republican president could, therefore, and did control these patronage-delegates and thus was able to wield a powerful influence in the convention. Theodore Roosevelt certainly used these delegates to help bring about Taft's nomination in 1908. When, however, Taft used the same device in 1912 to achieve his own renomination, the party was badly split. Roosevelt, now a strong contender and the clear choice of many rank-and-file Republicans denounced the system by which Taft controlled the convention and took his followers out of the party into a new Progressive party. This move cost the Republicans the election and convinced many of the leaders that something would have to be done about the southern delegations. Beginning with the convention of 1916, the Republicans began paring down the relative strength of the southern delegations with some paring occurring as recently as 1952. The method used has been to make the number of district delegates contingent upon a minimum Republican voting strength and to grant bonus state delegates to Republican states.

3. Republican modification

The present Republican apportionment system provides:

4. Present apportionment systems:

a. Republican

*State Delegates* (at-large)

1. Two from each state for each senator and congressman-at-large (if any).
2. Six additional from each state casting a majority of its vote for the Republican nominee at the past presidential election or electing in an intervening election a Republican senator or governor.

*District Delegates*

1. One from each congressional district casting 2000 or more votes for the Republican presidential candidate at the last election or for the Republican congressional candidate in the intervening election.
2. One additional from each congressional district casting 10,000 or more votes for the Republican candidate in either election.

b. Democratic

The Democrats, with party strength more evenly distributed throughout the country, were able to operate on the old basis until 1940. In this party, however, the southern Democrats were underrepresented compared to those in New England. In the convention of 1936, when the rule requiring a two-thirds vote for nomination was repealed, the northern supporters of the repeal agreed to reward solidly Democratic states by instituting a system of bonus delegates. The repeal of the two-thirds rule greatly weakened the influence of the South on the Democratic nomination and the bonus system was introduced partially to offset this. The present Democratic apportionment system provides for two delegates for each senator and congressman from each state plus four bonus delegates for each state carried by the Democratic presidential candidate at the last election or carried by a Democratic senator or governor.[1]

Both parties authorize delegations of varying sizes from the territories and both authorize an alternate for each delegate.

5. Numbers

Speaking strictly, the composition of a national convention is defined in terms of votes, rather than of delegates. In Republican usage, the distinc-

[1] The Democrats authorized the bonus delegations earned in the 1948 election as well as those earned in 1952 to be seated in their 1956 convention. In 1960 no delegation was reduced below its 1956 strength.

tion is one without a difference, each delegate having one vote. A rule adopted in 1944 expressly forbids more delegates from any state or territory than the number of convention votes allotted to it. In Democratic usage, however, many states and territories send delegates in excess of their quota of votes, each delegate in such case casting only a fractional vote. In later days the practice, motivated usually by desire to provide good convention seats for the "boys from home," developed into a serious abuse. On complaint of officials in charge of seating arrangements, the 1940 convention decreed that thereafter no state might send delegates in excess of twice its quota of votes; and delegate attendance fell sharply. In 1952, the convention in violation of these rules seated several oversize delegations. In 1960, 3042 delegates were authorized to cast 1521 votes. This may be compared with a Republican total of 1331 delegates and votes in the same year.

## SELECTION OF THE DELEGATES

Rise of presidential primaries

The delegates to the national convention were, in its formative years, chosen in a variety of ways—by mass meetings, by caucuses, by district and state conventions, and by party committees. Gradually each party settled upon a fairly standard system. The Democrats, giving great emphasis to the state as the basic unit of representation, usually selected their delegations by means of a state convention or a state central committee. The Republicans, much less concerned about state solidarity, preferred to select district delegates in congressional district conventions and state-wide delegates in state conventions. When, however, the direct primary began sweeping the country, the application of this procedure to delegate and presidential candidate selection became an important public issue. The first application of the direct primary procedure to the selection of the delegates was made in Wisconsin in 1905. Thereafter the idea spread rapidly and by 1916 more than half of the delegates of the major parties were designated at primary elections.

The spread of presidential preference primaries

The application of the primary method to the designation of presidential candidates proved somewhat more complex and it was not until 1910 that Oregon first provided on the primary ballot an opportunity to the voters to express their preferences among presidential aspirants. The Democratic platform of 1912 urged every state to adopt a *presidential preference primary* and the Progressive platform urged a constitutional amendment which would make it compulsory. President Wilson in his first message to Congress asked for legislation which would allow presidential and vice-presidential candidates to be nominated by direct vote of the people and would thus relegate the conventions to platform-making agencies after the candidates had been selected. The presidential preference primary in this period became linked to the national-convention delegate primary (presidential primary) and shared in its rapid spread over the nation. After 1916, the movement, however, lost momentum and several states which had adopted either or both of

the primary procedures abandoned one or the other. The primary in either form made no important gains until 1954 and 1955 when two more states adopted preference and delegate primary systems.

In selecting delegates to the conventions of 1956, 20 states made use of a primary of one form or another. The wide variety of systems employed in these states may be classified roughly as follows:[2]

1. Direct election of unpledged district delegates accompanied by selection of state delegates by party convention and with no popular vote on presidential aspirants—New York.
2. Direct election of all delegates none of whom are formally pledged to any presidential aspirant and with no popular vote on aspirants—Alabama (Democrats only) and District of Columbia.
3. Direct election of district delegates with convention selection of state delegates and with a separate preference vote on presidential aspirants—Pennsylvania and Illinois.
4. Direct election of a group of delegates, each group, typically, an entire state delegation that state a collective preference for a particular presidential aspirant—California, Florida, South Dakota, Minnesota, and Wisconsin.
5. Direct election of all delegates each of whom must state a presidential preference—Ohio.
6. Direct election of all delegates each of whom may pledge support to a particular aspirant and a separate vote on presidential aspirants—Oregon and New Hampshire.
7. Direct election of all delegates some of whom are formally pledged to an aspirant and with a separate vote on presidential aspirants—Massachusetts, Nebraska, New Jersey, and West Virginia.
8. Popular vote on presidential aspirants the result of which may be binding on the delegates but no direct election of delegates—Maryland, Montana, Indiana, and Arkansas (optional with candidate).

Nonprimary selection procedures

A majority of the delegates to the two conventions in 1956 were selected by party procedures which did not include any type of general, public, primary election. In most states, the delegates were selected by district or state party conventions or both; in a few states, the delegates were selected by the state party committee. In many of the convention states, party voters selected the delegates to the local or state conventions. In several, there was little real opportunity for rank-and-file participation. The nonprimary selection procedures, thus, differ as widely from state to state as do the primaries.

Future of the primary system

The campaign and convention of 1952 awakened a new interest in the presidential preference primary, stimulated discussion of its value in many parts of the country, and led several states to re-examine their procedures and a few to modify them. It is appropriate, therefore, to review the successes and failures of the primary system as applied to delegates and presidential candidates. Despite obvious defects in many existing primary systems, there is at present no serious effort to abolish the delegate primary where it exists. Most

[2] Based on *Manner of Selecting Delegates to National Political Conventions and the Nomination and Election of Presidential Electors,* compiled under the direction of the Secretary of the Senate (Washington, D. C., 1955).

state party leaders prefer the convention method of selection because it is more of a party operation than a public one and thus party leaders are likely to be more influential in determining the result. The advantage of convention selection are perhaps best exhibited in states like New York and Illinois where both methods are used. The convention selection of the state-wide delegates in these states makes it possible to provide places in the delegation for important party leaders—the governors, for example—who do not wish to contest such places in a public election.

Controversy over the preference primary

The real controversy concerns the desirability of giving the voters an opportunity to participate directly in the selection of the presidential nominees of the parties. A secondary controversy concerns the best method for voter participation: the election of delegates pledged to a particular aspirant or a direct vote on the aspirant. The fear of those who strongly oppose direct voter participation is that the voters are in no position to assess the abilities of candidates to unite the party and to make a broad appeal to the nation. Voter sentiment is likely to be divided among many regional candidates, local "favorite sons," and representatives of large interest groups. Only a convention, runs the argument, can reconcile conflicting interests and select a candidate who will unite the party. Experience indicates that such a candidate may not be a willing one and may not, therefore, be in active contention for primary endorsement. In general, candidates enter state contests only when they think they can win and stay out of contests where they might lose. Thus the voters in many primary states are not now able to select among all of the aspirants. In Wisconsin, for example, in 1952 the voters had no opportunity to vote either for Eisenhower or for Stevenson. The preference primary system is best suited to advance the fortunes of avowed candidates and these, say the critics, are not always the ones that the nation needs or wants. If the system of pledged delegates is used as a vehicle for voter participation, the convention may find that no candidate has a majority and no delegate can change his vote. The costs in money and energy for a nation-wide primary campaign for presidential aspirants is forbidding. The presidency is already difficult enough without requiring nine or ten months of arduous campaigning to reach it. None of the present primary systems make any provision for the selection of the vice-presidential candidates or for writing a party platform.

On the other hand, the supporters of preference primaries argue that if the primary system is good for all other state and national offices it is good for the presidency. Popular participation will tend to prevent boss-dominated conventions and will open the presidential contest to the fresh-air of public opinion. There is nothing deliberative about the convention, say the critics. They are too big, too noisy, too expensive, and too tumultuous to do as adequate a job of selection as their supporters pretend. Although variation of procedure from state to state has some advantages, the nation ought to stipulate a minimal procedure which will allow the voters to express their wishes in the matter of candidates in every state.

## THE NATIONAL CONVENTION AT WORK

Surroundings

The delegates to the major party national conventions regardless of how they are selected are professional politicians. Most of them are holders of public office or of party post. Included in the delegations are many of the most prominent state leaders—governors, senators, representatives, mayors, state legislators, and county leaders. The convention meets in a large hall, with the delegates seated by states on the main floor and the alternates directly behind them. The press is accorded a large section to the right and left of the speaker's platform and the galleries accommodate the interested public. Radio and television carry the proceedings to virtually every corner of the nation.

The atmosphere of a convention is noisy and hectic. The hall is ordinarily jammed, making it difficult to move about. There is a buzz of conversation in the air except during major speeches and at tense moments in the procedure. Every interval of the official program is filled with music. Demonstrations in behalf of various candidates interrupt the proceedings periodically—especially during the nominating speeches—and hired noisemakers and cheer leaders whip the delegates and galleries into frenzied outbursts of movement and noise. The whole proceedings get entirely out of control of the presiding officers at times and sometimes for an hour or more at a stretch. The aisles, rest rooms, snack-bars, and lobbies are frequently crowded with caucuses as leaders negotiate and compromise and reconcile conflicting views. There is nothing in the outward show that resembles deliberation. All of the real issues are usually threshed out behind the scenes, in hotel rooms, restaurants, headquarters suites, and anywhere men can hold private conferences. The convention city also acquires the frantic air of the hall. The hotels housing the delegates and the headquarters of the parties and candidates are seething masses of people. Banners, music, streamers, and noisemakers of all types fill the lobby and corridors with noise and confusion. At the candidates' headquarters, skilled persuaders hand out their wares to public, press, and politicians. Soundtrucks, bands, balloons, and entertainers fill the streets and stimulate flagging emotions. Hundreds of thousands of dollars are poured out in an effort to exhibit the candidates as personifications of the American way and as certain winners in the election contest. Appeals are made to every level of emotion and reason. This froth is not the real decision-making process. The delegates are more or less immune to frenzied appeals and they sort and weigh chances and choices usually with the calm sagacity of skilled players of the great American game.

Temporary organization

Ordinarily the conventions last four or five days. On the first day, the meeting is called to order by the chairman of the national committee who, after the prayer and the reading of the official call for the convention, announces to the delegates the temporary convention officers agreed upon by the national committee. This slate of officers is virtually always accepted by the convention. The temporary chairman then takes the rostrum, perhaps after

a recess for some oratorical warm-ups, and delivers the "keynote" address to the delegates and to the world. The "keynote" speech is traditionally a cry to close ranks and prepare for battle and for ultimate triumph. The record of the party and of its great leaders past and present warms the delegates to the tasks ahead and the despicable record and potentiality of the opposite party puts the convention in fighting trim. The rules of the previous convention are then adopted temporarily and the convention committees are organized.

The committees

During the next day or two the convention marks time with oratory and music while the committees do their work. Both national conventions assign certain functions to four great committees: (1) credentials; (2) permanent organization; (3) rules and order of business; and (4) platform and resolutions. Each is composed of one delegate from each delegation (named by the delegation) except the fourth which has two. Typically, the chairman of the delegation supplies the names to the convention officers. The committees are obliged to report to the convention at the conclusion of their deliberations and the next major order of business is to receive these reports. The committee on rules submits a set of rules governing convention procedure, delegate apportionment and selection, and the composition and powers of the national committee. Typically, these are the same rules as have previously been in effect, but occasionally changes will be proposed. The report is usually approved with little or no debate. The committee on permanent organization submits a slate of officers to direct the convention for the remainder of the sessions. This too is usually accepted, although there have been contests as the managers of rival candidates have sought to place in the chair officers sympathetic to their candidates. The permanent chairman can wield great power in close contests by his rulings on points of order and by his recognition of those who may speak to the convention. The credentials committee prepares a permanent roll of delegates entitled to sit in the convention. For most delegates at most conventions there is no problem of determining who may rightfully participate, but every convention has some contested seats. The Republican convention, especially, has been troubled for several decades by credentials contests in the southern delegations. The party is so small, its organization so fluid, and the selection procedures so informal in the Deep South that contests are almost unavoidable. In 1952, for example, rival delegations appeared from Texas, Louisiana, Mississippi, Georgia, and Florida. The fight over these delegations was the highlight of the convention and the success of the Eisenhower forces in seating their delegates as against those of Senator Taft influenced the result of the convention. In 1952, as in some previous years, the recommendations of the credentials committee were not wholly accepted by the convention. Usually, however, the committee report is approved without debate and without a call of the roll.

Platform adoption

When the permanent officers are installed, the permanent chairman customarily delivers an address of the "keynote" type. The convention is then ready to receive the proposed party platform from the platform committtee. Typically, a small drafting committee designated by the national committee

from among prospective members of the platform committee has been at work for some days before the convention assembled preparing a draft of a platform. Hearings have been held to allow interest groups to urge their programs and the leading candidates have been solicited for their views. Working day and night in the first few days of the convention the committee will then whip into final shape a platform to be read to the convention. Platform writers are skilled craftsmen of the "glittering generality" and the "emotion-filled symbol," and most controversies within the party are resolved in favor of platitudinous noncommitment. Much labor, however, is poured into the exact platform language on controversial subjects. The convention almost invariably accepts the committee's proposals, although occasionally it has done so only after heated debate. As approved by the convention, the platform of a major party is likely to be about 10 pages long and cover a large number of subjects of national policy. On some matters the platform will be relatively clear and specific; on others it will be general and vague. The words *sound, stable, peace, prosperity, reasonable, fair, just,* will be used over and over again. The party's vast achievements will be extolled and those of the other party indicted. The platform is not so much an outline of proposals as a bid for support. It is invariably overshadowed by the announced views of the presidential candidates and is read in its entirety by very few people. Rightly viewed, it is but one of numerous guides as to what this party or its candidates will do if entrusted with power.

Nomination of candidates

At last, by the third or fourth day, the convention arrives at its main objective, the nomination of candidates. The secretary calls the roll of states alphabetically and each delegation, in its turn, has an opportunity to place a 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 would not be called until later. 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, is believed by some managers to be advantageous. From two or three to a dozen names may be presented, each in a vigorous, eulogistic, and sometimes flamboyant nominating speech followed by briefer seconding speeches by delegates carefully picked to give an impression of widely distributed support. No effort is spared by either the orators or the delegates and spectators favoring a given candidate to whip up enthusiasm for him. At the proper psychological moment, delegates and alternates may break forth with all manner of vocal and mechanical noise, seize flags and standards and start parading around the hall, and plunge the assemblage into pandemonium from which it can be extricated only when the enthusiasts have reached a state of exhaustion an hour or more later. Rarely are such demonstrations genuinely spontaneous. They are staged according to careful prearrangement and usually fail in their presumed purpose of sweeping the convention off its feet.

Voting on the candidates

When, finally, all of the names have been presented, the convention proceeds to ballot. The roll of states is called again, and each delegation, through its chairman, announces its vote. In both parties, votes as reported

may be unanimous for a given candidate or may be divided among two or more. Republican tradition favors full freedom for delegations to divide and to have their vote so recorded, except only as limited by instructions received in presidential primaries. Democratic tradition, however, has been different. Reflecting the states'-rights antecedents of the party, and yielding the practical advantage of greater power and importance for a state in a convention proceedings, a "unit rule" has been authorized under which a state convention may require a delegation to cast its votes in a block for a single candidate. Even if no such requirement is imposed, a delegation may itself, by majority vote, determine how the votes of all of its members shall be recorded. This practice is not imposed by the national convention. It is recognized and enforced when ordained by a proper state party authority. It is always employed by some southern states.

The Democratic "unit rule"

Until 1940, 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 (from as far back as 1836) required two-thirds. The rule was responsible for several convention deadlocks, and sometimes—as in 1924—prevented the party's strongest candidate from receiving nomination. In 1936 with President Roosevelt about to be renominated without opposition, the historic two-third requirement was rescinded, with nominations—for both the presidency and vice-presidency—thenceforth to be by simple majority. This change in Democratic practice amounted to a sharp reduction in the influence of the southern wing of the party over the nominations. Under the "two-thirds rule" the South had exercised a veto over candidate selection. Since the death of President Roosevelt, the power struggle between the northern and southern wings of the party has repeatedly broken out into the open at the national convention. In 1948, a portion of the southern Democrats seceded and founded a "Dixiecrat" party. In 1960 formal unity was preserved largely by the nomination for Vice President of a southern leader.

The Democratic "two-thirds" rule abandoned

After the votes of all of the states have been recorded and counted, the result is announced. When a president is being renominated a single ballot usually suffices. Often the votes are so divided among a number of candidates that no one obtains the requisite majority and additional ballots must be taken. These usually follow in quick succession as the leaders try to force a decision. Sometimes, however, a recess is called between ballots to allow the candidates' managers more time to maneuver. Typically, the "favorite sons" drop out early in the balloting and the contest centers around two or three strong candidates. The managers of these candidates work tirelessly dickering with the leaders of delegations, making promises, and bringing outside pressure to bear in an effort to capture a majority. Eventually some one of the contestants (or perchance a "dark horse" agreed upon behind the scenes) emerges a victor. Sometimes the balloting (and bartering) 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 nine days.

The balloting

Nominating the vice-president

The weary delegates now hurry their labors to an anticlimactic 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 usually is not very keen, and a decisive vote is soon reached. As a rule, the grounds on which the selection is made (sometimes largely by the presidential nominee and always with his assent) leave a good deal to be desired. The prize—such as it is—may be used to placate an important element in the party that has lost in the fight over the presidential nomination or over the platform, or to reward a "favorite son" who has thrown his support to the winning presidential candidates, or to enhance the chances of capturing a pivotal state. It will usually be bestowed also with a view to balancing the ticket: an eastern presidential nominee commonly calls for a western vice-presidential nominee; a dyed-in-the-wool conservative ordinarily must be counterbalanced with a man of known liberal views, or vice versa. Every sort of consideration, indeed, may contribute to the decision except one, the qualifications of the person nominated to be vice-president.

The convention's closing acts

One more task, purely formal yet necessary, remains: the party's national committee must be elected and charged with carrying on the coming campaign, looking after party interests during the ensuing four years, and arranging for the next national convention. With all members designated in fact by state conventions or primaries, by state committees, or by state delegations, election by the national convention is a mere gesture. The secretary reads the list of names proposed by the states, someone offers a motion that the persons named be elected, and the motion usually carries unanimously by *viva voce* vote.

## THE PRESIDENTIAL CAMPAIGN

Machinery

The thousands of party workers required to carry on a campaign are given central direction by the national committees. Shortly after the conventions, the new committees meet and organize for the great effort ahead. A chairman is selected to manage the campaign, nominally by the committee but actually by the presidential candidate. Headquarters are enlarged to house the hundreds of employees added temporarily and, frequently, regional offices are established in two or more key cities. Subcommittees are created to co-ordinate publicity, fund-raising, speaker activities, and the like. Individuals are assigned to direct all of these processes in collaboration with the committee or under the immediate direction of the chairman. Campaign biographies of the candidate are prepared; "textbooks" are compiled for ready reference by local and state party workers, containing the platform, important speeches, statistics, speech material organized by subject to support the party position on the issues of the campaign, and biographical data on the party candidates; leaflets and brochures of many kinds are prepared, and slogans and mottoes are manufactured for the occasion. Arrangements are also made to co-ordinate campaigns for state and local offices with the congressional and presidential

campaign. Since the limitation on total spending of a national campaign committee was enacted in 1940, more and more use is being made of auxiliary and semi-independent committees to supplement the work of the national committee and to serve as vehicles for the expenditure of funds beyond the ceiling established for any national committee. The Citizens for Eisenhower in 1952 and the Associated Willkie Clubs in 1940 are examples in recent years of effective auxiliary campaign organizations. Auxiliary organizations are used also to reach voters and financial supporters that the regular party organizations may not reach: women, "independents," supporters from the opposite party.

Funds

The combined costs of all the campaign activities of a single party in a national election reach an astounding number of millions of dollars. Raising this money is one of the most trying and most difficult of tasks for the campaign organization, and a great deal of effort must be put into it right down to the closing hours of the campaign.

"Literature" and broadcasts

A considerable portion of the money now spent goes for the purchase of radio and television broadcasting time and for the preparation and distribution of party literature. The amount spent for broadcasting has been increasing relatively and absolutely in recent years and there are many indications that television, in particular, will be the major campaign vehicle in the future. Most experts doubt, however, that it will ever completely replace stump speaking. The quality and character of the literature and the broadcasts vary widely. Party money is spent on everything from one-minute spot announcements to the televising of a formal oration by the candidate and from windshield stickers to full-length book biographies. More and more, parties are relying upon the cumulative impact of advertising through every medium and less and less upon elaborate, formal, and hortatory speech-making. One other trend deserves notice, and that is that the cost of campaigning is increasing and will continue to do so as more and more reliance is placed on broadcasting.

Strategy and tactics:

Through the years, professional politicians and seasoned campaigners have developed an elaborate folklore on the art and strategy of campaigning. Little of this has even been verified scientifically and much of it perhaps never will be. Experts in the matter are usually much more certain after the election is over than while the campaign is in progress. The character of a national campaign, however, can hardly be understood except in terms of those "rules of the game" which the campaigners follow. In most campaigns, in the first place, great stress is placed on the personality of the candidates. This usually overshadows the issues of public policy which may be involved. Each side attempts to build a picture in the eyes of the public of a personality which coincides with the supposed inner wishes of the electorate. This picture will, of course, vary with the times. In 1932, the Democrats were anxious to depict their candidate as daring, aggressive, and uninhibited by respect for tradition. More frequently, the candidate is cast in the role of the defender of the best traditions of the American past, as a man who knows the value of his American

1. The candidate

heritage. Horatio Alger has probably done more to set the style of the "people's choice" than any other American: the self-made hero, product of a harsh rural or small-town environment, a boyhood close to the soil and a manhood of successful achievement in competition with the sophisticated city "slickers." The voters, it is believed, choose more easily and more readily among personalities than among programs. The candidate's personality must also, however, symbolize an approach to the issues of the day: "normalcy," New England shrewdness, engineering efficiency, champion of the forgotten man, eager fighter for honest government, popular military genius. The real personality of the candidate is invariably swallowed up by the mythical hero which the publicists have carefully constructed for the campaign.

2. The issues

Much thought and effort is given by the campaigners to the selection of the issues or themes of the campaign. What in the record should be played up and what ignored? Of the many evidences of dissatisfaction in the electorate, which are the deeper and more decisive? In recent years, the strategists have paid close attention to the results of public-opinion sampling polls in determining what impresses the electorate. In 1952, the Republicans felt that their best issues were the Korean stalemate, communists in government, and corruption. In 1960, the Democrats emphasized the youth of their candidate and the need for new leaders for the Sixties. The Republicans pointed to the maturity and experience of their candidate and their record of peace and prosperity.

3. Offense or defense

One of the perennial campaign questions is how to treat the opposition: attack them or ignore them. Franklin Roosevelt was a master of pretending complete indifference to his opponent. Dewey tried this in 1948 and failed with it. In the 1952 campaign, the Republicans generally waged an aggressive and belligerent attack upon their Democratic rival. In 1956 the Democrats concentrated much of their attack on the Republican vice-presidential candidate. The 1960 campaign introduced televised debates of the two major candidates. An incumbent president can ignore his opposition more successfully than they can ignore him. A common device is to appoint a lesser party figure to debate the opposition and to answer their charges, and thus keep the presidential candidates above the debate. A great many politicians believe, however, that you can never catch up with your opponent's charges and, therefore, the best thing to do is to make no attempt to answer but rather to charge him with something else. A closely related problem is the extent of campaign tours. Should the candidate stay home and wage a "front porch" campaign (à la McKinley or Harding) or swing through the nation on an extensive speech-making tour (à la Wilson, Bryan, Willkie, or Truman). The answer to this problem depends upon the speaking ability of the candidate and on whether the party is in or out of power. The "outs" usually have to carry the campaign to the people; it is best to keep the poor orators at home. In 1940 and 1944, Roosevelt and in 1956, Eisenhower felt they had to do some travelling to prove that they were physically vigorous.

The dream of every campaign manager is to make his candidate the

4. The strategy of superior place

center of the campaign. He would rather have a lot of campaign oratory directed against his candidate than to have him ignored. How to achieve this goal is another question and on this the campaigners differ sharply among themselves. They all agree, however, that the candidate must act and talk as if he were confident of winning. No doubts on this score must ever be allowed to appear in the literature or in the words or actions of the candidate. In

5. The illusion of victory

recent years the statistical experts in the party headquarters supply the press and public with a great deal of "scientific" data which proves their assertions of victory.

6. Concentration in doubtful states

The electoral college method of counting the vote for president and vice-president has considerable influence in campaign planning and execution. Presidential campaign efforts are usually concentrated in "doubtful states" and in states with a consequential electoral vote. President Eisenhower, for example, is one of the few Republican candidates to invade the South; most of them have written it off as hopelessly Democratic. Democratic candidates avoid it because it is certain, as they do much of New England and the Great Plains because they are so strongly Republican. By far the largest effort in money, organization, and candidate speaking appearance is ordinarily made in New York, Indiana, Ohio, Illinois, Michigan, California, and Pennsylvania.

Value of campaign

For all of the planning, thought, money, time, and energy given to a national campaign, there is a growing body of evidence suggesting that it changes very few votes.[3] A vast majority of American voters—perhaps as many as 80 per cent—cast their votes in November exactly as they would have cast them in June or July before the campaign got under way. If true, does this mean that campaigns are useless? Not at all, say the politicians. Most elections are decided by a relatively small percentage of the voters. Furthermore, one of the tasks of a campaign is to infuse the supporters of a party with enough enthusiasm to bring them out to the polls on election day. Apathy is the dread disease of the body politic and especially of the traditional supporters of a party. Only the intense excitement of a campaign will bring to the polls the 69 million voters who came out in 1960. Furthermore, the campaign stimulates the party organization, infuses it with a renewed sense of purpose, tests the merit of its functionaries, and attracts to it new blood and talent without which it would soon wither and decay. Strong parties are essential to our system and campaigns make strong parties.

## CASTING AND COUNTING THE ELECTORAL VOTES

Presidential electors

What happens after the last local "spellbinder" has descended from the rostrum, the last national "hook-up" has brought the leading candidates' appeals to the voter at his fireside, and the last rosy forecast has been given out by a confident party chairman? Early in the campaign, party conventions,

[3] The Gallup Poll, for example, showed the voter division in April 1956 as 59% for Eisenhower and 41% for Stevenson, and in November, 1956 as 59.5% for Eisenhower and 40.5% for Stevenson.

## POPULAR AND ELECTORAL VOTE FOR PRESIDENT, 1960
## MAJOR PARTY CANDIDATES

| STATES | POPULAR VOTE | | ELECTORAL VOTE | |
|---|---|---|---|---|
| | *Kennedy* | *Nixon* | *Kennedy* | *Nixon* |
| Alabama* | 318,303 | 237,981 | 5 | — |
| Alaska | 29,809 | 30,953 | — | 3 |
| Arizona | 176,781 | 221,241 | — | 4 |
| Arkansas | 215,049 | 184,508 | 8 | — |
| California | 3,224,099 | 3,259,722 | — | 32 |
| Colorado | 330,629 | 402,242 | — | 6 |
| Connecticut | 657,055 | 565,813 | 8 | — |
| Delaware | 99,590 | 96,373 | 3 | — |
| Florida | 748,700 | 795,476 | — | 10 |
| Georgia | 458,638 | 274,472 | 12 | — |
| Hawaii | 92,364 | 92,505 | 3 | — |
| Idaho | 138,853 | 161,597 | — | 4 |
| Illinois | 2,377,846 | 2,368,988 | 27 | — |
| Indiana | 952,358 | 1,175,120 | — | 13 |
| Iowa | 550,565 | 722,381 | — | 10 |
| Kansas | 363,213 | 561,474 | — | 8 |
| Kentucky | 521,855 | 602,607 | — | 10 |
| Louisiana | 407,339 | 230,980 | 10 | — |
| Maine | 181,159 | 240,608 | — | 5 |
| Maryland | 565,808 | 489,538 | 9 | — |
| Massachusetts | 1,487,174 | 976,750 | 16 | — |
| Michigan | 1,687,269 | 1,640,428 | 20 | — |
| Minnesota | 779,933 | 757,915 | 11 | — |
| Mississippi† | 108,362 | 73,561 | — | — |
| Missouri | 972,201 | 962,221 | 13 | — |
| Montana | 134,891 | 141,841 | — | 4 |
| Nebraska | 232,542 | 380,553 | — | 6 |
| Nevada | 54,880 | 52,387 | 3 | — |
| New Hampshire | 137,772 | 157,989 | — | 4 |
| New Jersey | 1,385,415 | 1,363,324 | 16 | — |
| New Mexico | 156,027 | 153,733 | 4 | — |
| New York | 3,830,085 | 3,446,419 | 45 | — |
| North Carolina | 713,318 | 655,648 | 14 | — |
| North Dakota | 123,963 | 154,310 | — | 4 |
| Ohio | 1,944,248 | 2,217,611 | — | 25 |
| Oklahoma‡ | 370,111 | 533,039 | — | 7 |
| Oregon | 367,402 | 408,060 | — | 6 |
| Pennsylvania | 2,556,282 | 2,439,956 | 32 | — |
| Rhode Island | 258,032 | 147,502 | 4 | — |
| South Carolina | 198,129 | 188,558 | 8 | — |
| South Dakota | 128,070 | 178,017 | — | 4 |
| Tennessee | 481,453 | 556,577 | — | 11 |
| Texas | 1,167,932 | 1,121,699 | 24 | — |
| Utah | 169,248 | 205,361 | — | 4 |
| Vermont | 69,186 | 98,131 | — | 3 |
| Virginia | 362,327 | 404,521 | — | 12 |
| Washington | 599,298 | 629,273 | — | 9 |
| West Virginia | 441,786 | 395,995 | 8 | — |
| Wisconsin | 830,805 | 895,175 | — | 12 |
| Wyoming | 63,331 | 77,551 | — | 3 |
| *Totals* | 34,221,485 | 34,108,684 | 303 | 219 |

* Six of Alabama's electors ran as unpledged on Democratic ticket and are expected to vote for Senator Byrd of Virginia.

† An unpledged electoral slate defeated the electors pledged to Kennedy and to Nixon in Mississippi. They are expected to cast their 8 votes for Senator Byrd of Virginia.

‡ One elector cast his ballot for Senator Byrd.

primaries, or committees (as determined by the legislature) in each state made up "slates" of presidential electors. Each party designates as many electors as the state is entitled to, that is, one for each senator and for each representative in Congress. It is for these men and women that the voters actually cast their ballots on election day, although they may think of themselves as voting for the president and vice-president. This is true legally even though the voters may not know the names of the electors for whom they are voting, and though in a majority of states their names do not even appear on the ballot. Regardless of the formalities, the results are tabulated and announced on election night as if the people had on that day chosen the chief magistrate.

Choice by legislatures gives way to choice by the people

To many persons it would come as a surprise to be told that presidential electors were not always chosen exclusively, or even mainly, by popular vote. A national law of 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 never has been any nation-wide rule except that each state shall determine the matter for itself. 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. In the early days also many electors were chosen by congressional district and only gradually did general or state-wide selection come into use. Today, in every state, the voter casts his ballot for as many electors as his state is entitled to and the winner of the state contest captures the entire electoral vote of that state.

"Minority" presidents

A majority of electoral votes is necessary to victory. But this does not prevent us from having presidents who (speaking strictly, the electors who chose them) received fewer than half of the total popular votes cast. As a matter of fact, we have had 10 such—two of them at two different times each. All that a candidate needs in order to obtain the full electoral vote of a state is a plurality of the popular vote. An opposing candidate many have swept the states that he carried by heavy pluralities and thus gained a larger number of popular votes. But, lacking the requisite number of electoral votes, he nevertheless goes down to defeat.

Casting the electoral votes

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 (normally, the state capital); and if the electors receive any remuneration, it must come out of the state treasury. A national 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. Lists of the electors' votes are signed and sealed in duplicate and sent to the president of the Senate (nowadays actually to the head of the General Services Administration for transmission to the Senate's presiding officer) at the seat of the national government. As evidence of their power to act, the electors must transmit in addition their certificates of election, bearing the signature of the governor.

The electoral count as now carried out

With rare exceptions the counting of the electoral votes is a mere formality; the country knows two months in advance precisely what the figures will be. On the day fixed by law—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, and with four previously designated tellers—a Democrat and a Republican from each house—ready to tabulate and count. Starting with Alabama, and proceeding in alphabetical order, the presiding officer opens the certificates transmitted by the several electoral bodies and hands them one by one to the tellers; the latter read the contents aloud and set down the numbers of votes. The presiding officer announces the totals, which in due time are entered, with a list of the votes by states, 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, that is, a minimum of 269 out of a total of 537, 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 thrown into the House of Representatives, where each state has one vote, 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, or among those highest on the list (up to five). The Twelfth Amendment, however, provided for selection among "the persons having the highest numbers not exceeding three." Since Jefferson was so elected in 1801, the president has been chosen by the House only once, 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—chooses from the highest two, the victor being required 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 still is 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 person duly elected may have died before the inauguration date. Providing belatedly for such contingencies, the Twentieth Amendment, adopted in 1933, specifies (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 authorized Congress to make provision by law—which, in a Presidential Succession Act of 1947, it has done.

## PROPOSED CHANGES IN ELECTORAL COLLEGE

Present shortcomings

More than once, the mode of electing the president and vice-president has been pronounced the weakest point in our American system of government. Passing over faults of the nominating process, one finds the plan of election criticized on several grounds. (1) The electoral college no longer serves the sifting purposes for which it was designed, and as a mere recording machine has become useless. (2) The unit system under which a candidate captures all of a state's electoral votes merely by polling a state-wide popular plurality is unfair to sections of a state carried by a different party and places too great emphasis in the nominating process and in the campaign on a few large and "doubtful" states. (3) Occasionally, a candidate wins election with only minority popular backing. (4) In the absence of state laws so requiring (and these exist only in California and Oregon), there is no iron-clad guarantee that electors chosen in the states will vote for the presidential and vice-presidential candidates receiving the largest popular vote in their states.[5]

Principal proposals

Proposals for betterment have been many. Some of them start from the premise that the people should elect directly, with no intervention of electors or electoral votes, and from this advance to the suggestion either (1) that the country be thrown into a single grand constituency, with the people in the mass electing directly, by plurality or majority, without reference to state lines, or (2) that voting continue on a state basis, but with election by popular pluralities in a majority of states. The first suggestion defies all considerations of state interest and pride, and is predicated upon a uniform national suffrage and election law which could not easily be obtained. The second, opening a way for a number of smaller states to swing an election by means of only a minority (perhaps very small) of the nation-wide popular vote, is palpably objectionable. Every plan now receiving serious attention presumes the retention of ultimate choice by electoral rather than popular votes, the only questions being as to how such votes shall be allotted and whether they shall literally be "cast" by actual persons or be only abstractions mathematically calculated from the popular vote. Three main propositions in this vein have been made. (1) Abolish the electoral college and simply translate state-wide popular plurality votes into state quotas of electoral votes, all going in each state (as now) to the plurality candidates. Long advocated by Senator George W. Norris of Nebraska, a constitutional amendment of this purport twice narrowly failed to secure the necessary two-thirds vote in the Senate in 1934. Except for dropping out the electors, this plan would merely write into the Constitution what we already have, without touching the heart of the controversy, that is, getting away from a candidate's securing all of the electoral votes of a state simply by polling a state-wide popular plurality. (2) Continue choosing one elector at large in each state, by plurality, for each senator and for each representative-at-large (if any), but choose all others—as was the

[5] This has happened a few times (in 1824, 1912, 1948, and 1956). In each case one elector refused to vote for the candidates supported by the voters of his state.

practice of some states in early days—district by district, so as to make possible (and in most cases probable) a division of a state's electoral votes among different candidates. (3) Discard electors, let the people vote directly for president and vice-president, translate popular votes into electoral votes, and allot a state's electoral quota among the candidates in proportion to the state-wide popular votes polled.[6]

The last proposal has been vigorously debated in the Congress in 1948, 1952, and 1956. Incorporated in a constitutional amendment, it passed the Senate in 1948 but failed in the House. In 1956, a compromise proposal was suggested which would have authorized state legislatures to select method (2) or (3). After lengthy debate in the Senate, this also failed of adoption.

Reform by state action unlikely

Any state might now, if it chose, institute the district plan, or indeed any other plan for proportioning popular to electoral votes—so long as electors were retained. The states already, therefore, have it in their power to solve, at least in piecemeal fashion, the main problem involved in the whole matter. The same considerations of interest and pride (chiefly the increased political weight accruing from an undivided block of electoral votes) which originally induced one after another of them to give up the earlier district plan can be counted upon to frustrate any attempt within their own boundaries to revive it or anything resembling it.

## RESULTS OF THE PRESENT SYSTEM IN TERMS OF PRESIDENTIAL FITNESS

An uneven record

Thirty-three different men have attained the presidency—26 by being elected directly to the office and seven by succeeding a deceased chief executive. In exercising their electoral function, what sort of a record have the people achieved? How do the presidents that they have chosen measure up in terms of capacity, vision, diligence, and other qualities of statesmanship?

Some 80 years ago, the late Lord Bryce included in his classic treatise, *The American Commonwealth*, a chapter entitled "Why Great Men Are Not Chosen President." Looking back over a line of 20 presidents who had served the nation in its first 100 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 somewhat elusive quality of "greatness") to the highest office in their power to bestow. The judgment seems severe. It is true, however, that many of the ablest American statesmen have never been elevated to the presidency and have witnessed this high office bestowed on inferior colleagues. Hamilton, Gallatin, Marshall, Clay, Webster, Calhoun, Burton, Sumner, Hay, Blaine, Root, Sherman, and Robert Taft, to select a few giants of the past, although dominant in their parties were passed by in favor, typically, of less influential and, in many cases, of less able men.

[6] A detailed history of the various procedures used to select electors and an able commentary on the various reform proposals will be found in L. J. Wilmerding, Jr., *The Electoral College* (New Brunswick, N. J., 1958).

Party responsibility for selection

It is useless to wonder whether the original plan of the Constitution would have produced better results. The use of the party system and the spread of democracy doomed the arrangement almost from its inception. It is to the exigencies of party politics that we must look to discover why and how presidents are selected. The voters in November can pick among two or three candidates, but the party organizations screen the field to narrow the choice. This is not to say that if a big democracy is going to have an elective chief executive at all, there is any better method of choosing him; nor certainly to imply that it would be practicable for choices of such magnitude to be made in any way other than through the instrumentality of parties. It is merely to state a basic fact: that the few persons who ever have a chance under our system to become president get it only when, and because, parties give it to them.

What makes a good candidate

The considerations and circumstances making a man "available"—the "logical choice"—as a party candidate, and thereby narrowing the field of contenders, are not always such as to guarantee that he will be a strong president. There is, of course, no single formula, or pattern, for presidential timber; the same person might be wholly acceptable to a party under one set of conditions and not at all under another; everything depends on the character of the times, the prevailing public temper, and many other things. Experience indicates, however, that certain qualities or characteristics are likely to play a major role in making a candidate "available." (1) He should have demonstrated capacity for getting the voters to vote for him, that is, he should have run successfully for an important public office. (2) He should have attained his electoral successes preferably in a "pivotal" or "doubtful" state or section, especially one which the party must almost certainly carry to win the election (this rules out the statesmen of the South, the Plains, and New England). (3) He must be sufficiently regular in his party affiliation to be regarded as reliable on party matters by the leaders. (4) He must be well enough known nationally to have some following outside his own state and yet not be identified with a particular region, cause, or program which is offensive to some other area (this rules out many important congressmen who have been obliged to vote on controversial issues). (5) He must have a group of loyal, devoted, and able supporters who can manage his campaign for him and carry on negotiations with other leaders which he, personally, can never do. (6) He might well have had military experience (12 of our presidents have had military titles). (7) It is best if he has a normal family situation and is affiliated with a recognized church. The best route to the presidency is from the governor's chair in New York, Ohio, or Illinois where party strength is evenly divided between the two major parties. Congress and the Cabinet have produced few able candidates. Typically, the giants of the legislative halls have had to take positions on too many public questions in their careers and have on each occasion alienated an important sector of the party or the electorate. Luck is also an important factor in president-making. Strong candidates emerging at the same time in the same party have on several occasions battled

one another out of the race at the convention and opened the door for a "dark horse" less well known than either.

These are the factors that have brought to the presidency men of mediocre talent and have kept out of it their abler compatriots. Nevertheless, a system which has produced Washington, Jefferson, Jackson, Polk, Lincoln, Cleveland, Theodore Roosevelt, Wilson, and Franklin Roosevelt cannot be written off as a hopeless failure. It certainly works as well as the participants (the voters) have any right to expect.

One final word is necessary. The office of president, with its awesome responsibilities and its solitary dignity, has accumulated a tradition and a prestige through the years that lift the men who fill it beyond their realized talents. Men try to live up to the marks set by their illustrious predecessors. The ambition of thousands of politicians, although attained by few, its influence raises all to loftier conceptions of the public good.

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# Part 2
# THE NATIONAL GOVERNMENT

# I. ORGANIZATION, POWERS, AND PROCEDURES

## CHAPTER II

## *The Structure, Functions, and Powers of Congress*

Having concluded a survey of the constitutional basis of the American system of government and the democratic processes by which it is operated, we turn now to a consideration of the organizational structure through which legitimate power is exercised by our national government. We begin our discussion with the Congress. The legislature is provided for first in our Constitution and it may be said to have a certain primacy in any republican form of government. It can claim with some color of truth to be closest to the people and it is the major repository of power to make and declare public policy and to provide the means for its achievement.

### THE BICAMERAL PATTERN

> 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.—Art. I, Sec. 1

Why two houses were established

With the exception of the Continental and Confederation Congresses and the legislatures briefly established by Vermont and Pennsylvania, the entire political experience of England and of colonial and revolutionary America confirmed the view that a legislature ought to consist of two houses. If a popular assembly were to be provided, a second chamber representing sectional or substantial vested interests ought clearly to review its deliberations. The framers of our Constitution made this decision early in their deliberations and never seriously considered changing it. The compromise by which the federationists were mollified by representing states as such in one house and the nationalists by representing people in the other confirmed the wisdom of an arrangement already regarded as indispensable and provided a convenient basis for organizing the two houses upon different principles. In

this way, the framers could be assured of some antagonism between the two bodies.

General acceptance of the two-house system

The arrangement, although never entirely free of criticism, has become an accepted and approved part of the American system. Most of the criticism has come from those who decry the deadlocks, delays, duplications, and diffusion of responsibility which two equal and independent authorities tend to induce. All levels of government at one time or another imitated the national legislature but virtually all cities and one state, Nebraska, have abandoned the bicameral plan and gone over to the one-house legislature, partly as a result of the frustrations alluded to by these critics. Some criticism has come also from those who deplore any organizational arrangements which mitigate or obstruct the clear will of a numerical majority of the electorate as expressed by their representatives. The Senate, in which a majority of the membership does not necessarily coincide with a majority of the voters, is regarded by some as an obstacle to driving the popular will to the statute book. In any event, there are now few serious suggestions to abandon the two-house system in the Congress. A great many competent authorities see it as a positive source of strength to our republic, making possible the acceptance of national authority over a continental area as vast, as varied, and as populous as that of the United States.

## REPRESENTATION IN THE HOUSE—THE DISTRICT SYSTEM

> Representatives . . . shall be apportioned among the several States . . . according to their respective numbers, counting the whole number of persons in each State. . . . The actual enumeration shall be made . . . within every 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.—Art. I, Sec.2, cl. 3, as amended by Art. XIV

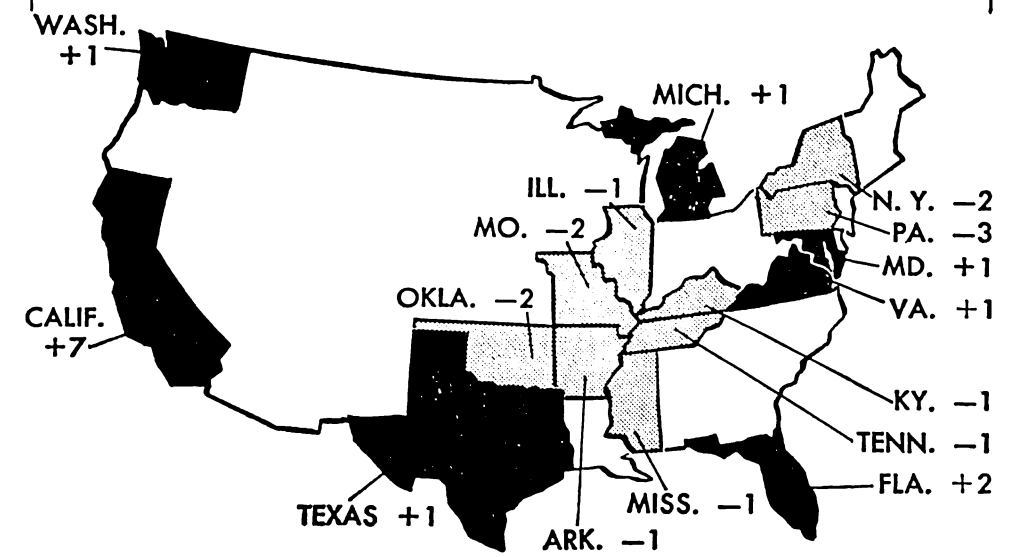
Reapportionment and increasing the size of the House

Although the Constitution does not expressly require a redistribution of the seats in the House of Representatives to accommodate that body to changes in population revealed by the decennial census, that is clearly what was intended. Until 1920, the Congress never failed to readjust its membership each decade. With the exception of that of 1842, every decennial readjustment up to World War I had been achieved, however, only by increasing the total number of representatives. By the turn of the century, apprehension was gaining that the House was becoming too large for effective deliberation. It is obvious, however, that a limit on the size of the House may be achieved only if some states and some representatives give up seats. This the state delegations in both houses were understandably reluctant to do. Unable to agree either to increase the size of the House or to take seats away from some states, the Congress after 1920 did nothing for several years.

Present method of reapportionment

Before a census would reveal exactly which states might gain or lose and how much, the Congress in 1929 provided for a "permanent" system of reapportionment designed to discourage any further growth in its own membership and to obviate the necessity for any further congressional action on the subject. This act, as amended in 1941, provides that: (1) the size of the House is fixed at 435; (2) after each census, the Bureau of the Census prepare for the president a table showing the number of inhabitants of each state and the number of representatives to which each state is entitled; (3) the president transmit the information to Congress; and, (4) the proposed distribution become effective 15 days after it is sent to Congress unless Congress enacts a different distribution. Up to this time, Congress has allowed the proposed arrangement to take effect without modification. However, the size of the House has been increased by the admission of Alaska and Hawaii temporarily to 437 until the next reapportionment in 1961.

**CHANGES IN REPRESENTATION IN THE HOUSE OF REPRESENTATIVES UNDER THE REAPPORTIONMENT OF 1951**




The single-member district system

For the first half-century of our national life the method of choosing representatives was determined by state legislatures. Some chose to have them elected by single-member districts, others on a state-wide (at-large) basis. In the apportionment act of 1842, Congress required every state entitled to more than one representative to divide the state into districts of contiguous territory, each entitled to elect one representative. The requirement that the

districts be composed also of compact areas was added in 1901 and thereafter until 1929. The present act, however, omits the requirement that the districts be composed of compact and contiguous territory and modifies the single-member district requirement by authorizing general (at-large) election of some or all of the representatives under specified conditions.[1] Even when the earlier rules applied, however, Congress made no effort seriously to enforce them upon the states.

Superiority of the district system

In spite of the qualifications and modifications mentioned, the single-member district system is predominant in practice and is firmly fixed in the American system of government. No one seriously expects that it will soon be abandoned. Unless some form of voting is used which will guarantee minority representation in connection with the state-wide form of representation, the single-member district system is decidedly the better of the two systems. It tends to assure representation to a wider variety of groups and interests, and thus to strengthen the representative character of the lower house. The district system as it now operates, however, is not without its difficulties, and the House of Representatives elected by this system is far from a perfect reflection of the national population for which it speaks.

Problems of redistricting

The major problems of the present system spring from the great difficulties—political, emotional, and geographical—of drawing the district boundaries, a job assigned to the state legislatures. There are two kinds of impulses that color the views of state legislators on this subject: (1) the hope of partisan advantage from drawing the lines in a particular way; and, (2) the fear, by rural and small-town legislators, of granting to the rapidly growing urban areas the representative strength to which their numbers entitle them. Obviously, it is not possible to have districts which are perfectly equal in population and which also pay some regard to local governmental boundaries. Thus inequality will occur to some extent in the most objective and impersonal efforts to draw the lines. State legislators, typically, have no strong impulse to be either objective or impersonal when drawing the boundary lines of the congressional districts.

Gerrymandering

The practice of drawing district boundary lines with a view to partisan or factional advantage is known as gerrymandering. The method is to spread the known support for your party or faction over as many districts as possible and to concentrate the known support for the other party into as few districts as possible. The results are districts of the most grotesque shapes. Few redistricting laws have been passed by state legislatures which do not bear evidence of some manipulation of lines for partisan purposes. The courts have been unwilling to intervene to curb the practice, and the admonitions of Congress in the "compact and contiguous" rule were largely ineffective. Today there is not even a congressional rule on the subject.

[1] These conditions are: (1) if a state gains seats by a reapportionment and the state legislature fails to redraw the district lines, the added members are elected at-large; (2) if the state loses seats and the state legislature fails to redraw the lines, all representatives for the state are elected at-large.

Effect of urbanization on redistricting

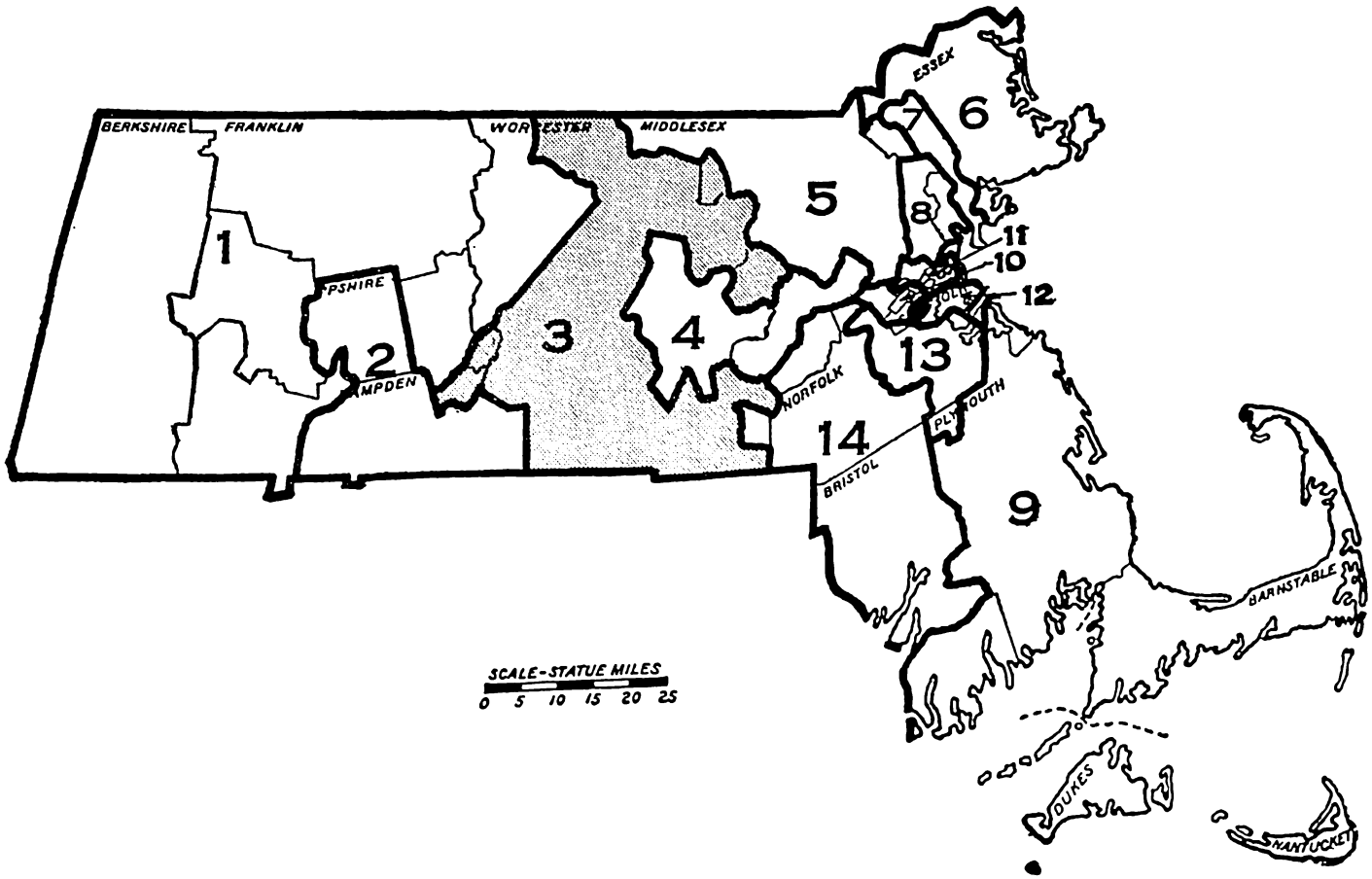
Virtually every census for the past century has revealed the continuing movement of the American people from farm to city. Every state legislature has, therefore, been repeatedly confronted with the necessity, if districts are to be kept reasonably equal, of increasing the number of seats in the urban areas and, since 1929, of decreasing the number in the rural areas. In most of our state legislatures the rural areas are grossly overrepresented in terms of population, and the rural legislators have been and are now reluctant to augment the strength of the urban contingent in Congress. Frequently this cleavage has been aggravated by the fact that one party, usually the Democrats, has been predominant in the large cities and another party in the countryside. This reluctance has produced redistricting in which the districts were still quite unequal in size, partial redistricting only, and, in some cases, no redistricting at all. The results of the rural influences in state legislatures are: (1) several states have had no redistricting for more than 30 years, for example, Colorado, Idaho, and Louisiana; (2) there are at least fifty districts with fewer than 250,000 inhabitants and another fifty with more than 450,000; (3) virtually all of the larger districts are city districts whereas the small ones are rural districts. Rural areas are, in consequence, somewhat overrepresented in the House of Representatives. Urban underrepresentation also stems from the constitutional requirement that each state have at least one representative. Thus Nevada, with a total population of only 160,000 is entitled to a representative, although the average district contains 400,000.

## REPRESENTATION IN THE SENATE—STATE EQUALITY

> 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—Art. I, Sec. 3, cl. 1, as amended by Seventeenth Amendment

Undemocratic character of the Senate

The Senate is not troubled by the problems of the district system. Representation in it is not and was never intended to be in any sense related to population. Every state, large or small, populous or not, rich or poor, industrial or agricultural, is entitled to two senators. And it may not be deprived of its equality with the others except with its own consent. The Senate is a federal institution. It is not a democratic one, at least insofar as democratic principles require an equality of representation for people as people. Until the Constitution was amended in 1913 to provide for the popular election of senators, it was not democratic in any respect. The tide of democracy which swept over and modified the American constitutional system during the last century left the federal character of the Senate untouched. To some adherents of the democratic faith, the fact that about 20 per cent of the population of the United States can control a majority of the senators remains a conspicuous failure of the American system. The Senate, of course, was not designed by democrats but by constitutionalists intent upon preserving and strengthening the American Union.




SOURCE: *Congressional Directory, 1955.*

THE GERRYMANDER

Political significance

The chief political significance of the structure of the Senate has been that agricultural interests which are predominant in more states than industrial interests, have always, regardless of number, had a profound and even a predominant influence in one branch of the national legislature. The will of the popular majority has always had to make its peace with sectional and regional interests, largely agricultural, if it was to prevail in the national capital. The fear of some that the Senate would necessarily and inevitably be the stronghold of political and economic conservatism and constitutional fundamentalism has not been borne out. The rural states have sent radicals and reformers to the Senate about as frequently as the urban states have sent them.

No likelihood of change

There is no substantial element in the United States that now advocates reconstruction of the Senate. It is doubtful if any major reconstruction could be achieved peacefully and by constitutional methods.

## THE SELECTION OF MEMBERS OF CONGRESS

Regulated by state law

The manner of electing senators and representatives is largely regulated by state law and thus varies in many details from state to state. Experience in this matter has been little different from that of electing all types of public officers in the United States. At the present time the predominant mode is nomination by direct primary and election by secret, partisan ballot. Congress has exercised its constitutional authority to regulate the election of its members by requiring: (1) the single-member district system for representatives (1842); (2) the secret ballot (1872); (3) the election everywhere (except Maine until 1960) to take place on the Tuesday after the first Monday in November of any even-numbered year. The Congress has also enacted regulations governing campaign expenditures in national elections. The qualifications for voting in congressional elections are established by state law also, but the Supreme Court has held that the right to vote for members of Congress is not conferred by the states but rather is one of the "privileges and immunities" of citizens of the United States protected by the Fourteenth Amendment (*Ex parte* Yarbrough, 110 U. S. 651, 1884).

The adoption of popular election of senators

The most important change in the method of selecting members of Congress was the adoption in 1913 of direct popular election of senators in place of selection by state legislatures. The swelling enthusiasm for democratic processes instilled in many the conviction that legislative election was undemocratic and ought to be abandoned. Political parties endorsed the idea in their platforms; two-thirds of the state legislatures went on record in favor of it; the House of Representatives repeatedly passed resolutions proposing constitutional amendments to accomplish it. In 29 states by 1912 some form of advisory primary in which the voters indicated to the legislature their preferences for senators was being held. The Senate finally though reluctantly concurred and the Seventeenth Amendment was added to the Constitution.

The effects of this change cannot easily be measured. The expectation of

Results of popular election

its sponsors that money would play a less important role in elections has certainly not been realized. Legitimate expenditures for individuals campaigning over an entire state are probably greatly in excess of what might have been spent to influence a state legislature. Excessive, perhaps illegitimate, expenditures have been made on several occasions. The change in the character or quality of the senators has not been appreciable. Virtually every senator who might have been continued by the legislature was elected by the voters. Contrary to expectation, re-elections have been more numerous than under the old system. Some observers detect a decline in party regularity in the Senate of the past half-century. State legislatures have clearly been made freer to concentrate on the tasks of state government than they were before and deadlocks have become impossible. If under the old system an occasional plutocrat bought his way into the Senate to satisfy purely personal ambition, under the new one the demagogue and the windbag probably get in more readily than before. If, however, our senators today are not demonstrably better than they once were, they are not demonstrably worse as the opponents of popular election predicted. Taft, Douglas, Fulbright, Millikin, Russell, among recent senators, are probably as able and as honest as any that the Senate of the past century can show.

Term

The term of senators is six years and this puts each senator in a much different position than a representative. He is able to devote himself for several years to his senatorial responsibilities without constant anxiety about re-election. He serves through several sessions of Congress and is able to acquire a great deal of understanding and experience before he is obliged to stand before the voters of his state and ask for a vote of confidence. Many senators serve more than one term and periods of service extending to 18 or even 24 years are not uncommon. Continuity of personnel is also obtained by the constitutional arrangement for the election of only one-third of the membership every two years.

## QUALIFICATIONS FOR MEMBERSHIP

> 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.—Art. I, Sec. 2, cl. 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.—Art. I, Sec. 3, cl. 3

To be seated in either branch of Congress, a duly elected person must meet the three requirements imposed by the Constitution. In addition to these

qualifications, the Constitution forbids members of Congress when sworn in, or at any time during their tenure, to hold any "office under the United States." This provision represents a rather sharp departure from the English tradition of our ancestors. According to custom Great Britain requires ministers to be also members of Parliament. An officer of the government may be elected to Congress but must resign the office when he takes his seat. Members of Congress may be appointed to national office but they must resign their seats when appointed.

Qualifications added by usage

Many decades of political experience have resulted in the addition by custom and usage to the bare constitutional requirements. It is virtually a universal requirement that a representative be a resident of the district for which he sits as well as of the state in which it is located. In some sections of the country, it is almost indispensable that an individual be a Republican and in others that he be a Democrat, in order to seek election with any hope of success. Every state and district has by this time a large number of unwritten qualifications which constitute "availability" in a candidate for the national legislature. These are so varied, however, that no safe generalization is possible. Suffice it to say that simple compliance with the age, citizenship, and residence requirements does not "qualify" a person for Congress.

The typical legislator is a college educated, county-seat lawyer, serving his third or fourth term, comfortable but not rich, a church member, a leader in his community and region, but not well known outside it, a member of one of the fraternal orders, and, more and more frequently, a veteran.

Qualifications imposed by the two houses

The two houses of Congress, furthermore, have each chosen to exercise their prerogative of judging the qualifications of those who present themselves for membership by excluding individuals on grounds unrelated to the constitutional specifications. The House in 1900 refused to seat Brigham H. Roberts of Utah on the grounds that he was a polygamist. Victor L. Berger of Wisconsin was excluded in 1919 because he had been judicially convicted of obstructing the war effort. In both instances there were members of the House who argued that this procedure was unconstitutional and the proper course was to seat such individuals and then, if they were deemed unfit for membership, expel them. It takes a majority vote to exclude and a two-thirds vote to expel, and the critics of the two individuals preferred, and successfully persuaded the House to prefer, the easier method. The Senate, on its part, has accepted "questionable" members after some debate on the grounds that the constitutional method is expulsion. Reed Smoot of Utah (1903) and William Langer of North Dakota (1941) were both seated although under attack. On the other hand, in 1928 it refused to seat Frank L. Smith of Illinois and William S. Vare of Pennsylvania on the grounds that they had exceeded by a great deal the legal limit on campaign expenditures in their contests for election. Grave doubts still exist of the propriety and legality of the imposition by the two houses of additional qualifications.

## DISCIPLINE OF MEMBERS

> Each house may . . . punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.
> —Art. I, Sec. V, cl. 2

Laxness of congressional self-discipline

Although the Constitution clothes the Congress with power to discipline its members for improper conduct, in comparison with other democratic legislative bodies, the Congress of the United States has been unusually tolerant. The misuse of a government railway ticket under extenuating circumstances resulted in the resignation and disgrace of a member of the British House of Commons. The Congress has failed to take action against its own members even when they have been under indictment for criminal offenses. Our Congress has never felt any embarrassment over the fact that legislators with direct financial interests participate in deliberations and vote on questions concerning those interests, and yet the American bar expects a judge to disqualify himself if he has any direct or even indirect personal or financial interest in the outcome of a case before him. Recent Congresses have been quick to criticize employees and officers of the executive branch for their laxness and tolerance of shady dealings. As soon as rumor or gossip points to any member of the legislature, the others seem to gather round to protect him from the same justice they dispense so sternly to the "bureaucrats."

This is not to say that Congress has more than its share of dishonesty or sharp practice, nor even that its leaders are more cynical or more indifferent to the proprieties than those of other institutions of our society. Habits of mutual tolerance of long standing have drawn the attention of Congress away from its own sinners. It has never tried to formulate a code of ethics for its members. The thoughtful members, in recent years at least, have probably dreaded doing anything to cast any more discredit on the institution which they regard as the heart and soul of the democratic process and which has suffered throughout history in the popular mind in comparison with the other two branches.

The disciplinary procedures of the two houses have been invoked most frequently to curb statements and actions of members which reflect upon other members. Some members have been officially censured, usually for intemperate statements about the motives or character of other congressmen.[2] Expulsions have been extremely rare.[3] As noted previously, the Congress has

[2] Only four members of the Senate have been rebuked in its entire history: Senators McLaurin and Tillman of South Carolina in 1902, Senator Bingham of Connecticut in 1929, and Senator McCarthy of Wisconsin in 1954.

[3] Senators and representatives from the seceding states were expelled at the beginning of the Civil War. Senator Patterson (New Hampshire) was recommended for expulsion in 1873 because of his role in the Credit Mobilier scandal. His term expired shortly thereafter and no action was taken. In 1862, Senators Simmons (Rhode Island) and Roach (No. Dakota) resigned before action could be taken as did Representative Whittemore (South Carolina) in 1870. Senator Bright (Indiana) was expelled in 1862 for a statement construed by his colleagues as favorable to President Davis of the Confederacy.

preferred, where it could, to deny "undesirables" admission rather than to drive them out of the chambers.

## THE FUNCTIONS OF CONGRESS

1. Legislative

Enacting laws, while perhaps the most important, is not the sole function of the Congress of the United States. Before we plunge into the complicated and delicate task of legislation, we might pause and consider the other functions which, each in its way, make heavy demands on the time and energy of our lawmakers. Consideration of the several nonlegislative functions will reveal also the extent to which the framers of our Constitution departed from any rigid theory of separation of powers but rather linked the various organs of government together in such a way that they cannot easily be fit into the categories of power recognized in theoretical political science.

2. Constituent

3. Electoral

We have in earlier chapters referred to the essential role of Congress in amending the Constitution and to the part it plays in electing the president and vice-president. We shall in a later chapter discuss the executive functions of treaty-making and appointments which the Senate shares with the president. It is appropriate here, however, to enlarge upon the judicial function of removal of civil officers.

4. Executive

5. Judicial

a. Impeachment

In order to furnish the legislative branch with a shield to protect itself and the people against treasonable and criminal officials who might by some mischance make their way into the highest offices of the nation, the framers endowed the representatives with the historic power of impeachment and the senators with the power to try those thus accused. Under the Constitution, the president, vice-president, and all civil officers of the United States are made subject to impeachment and removal. The grounds upon which such action may validly be taken are restricted, however, to grave criminal offenses. This is not a procedure to be invoked because of political disagreements, incompetence, or unethical conduct. Any member or group of members of the House of Representatives may prefer charges against an official. These are referred either to the Judiciary Committee or to a special investigating committee. The committee reports its findings to the House; and, if the majority votes to impeach, "articles of impeachment" setting forth the grounds for removal are drafted. Managers are then appointed to represent the house in presenting the case against the official in the Senate.

b. Trial

The Senate has no choice, once the procedure has gone this far, but to hear the case. A day is appointed for the hearing, the accused is furnished with the "articles" upon which he is to be tried, and when the appointed time arrives the Senate converts itself into a court to determine the fate of the accused. The chief justice of the United States presides over the trial of a president. For all other officials the regular presiding officer of the Senate directs the proceedings. The accused is allowed counsel, and testimony, his as well as that of witnesses for or against him, may be heard. At the close of the case, the Senate votes secretly on the charges. A two-thirds vote is necessary

for conviction. Anything short of this is acquittal. The penalty is removal from office, to which may be added disqualification forever in the future from holding "any office of honor, trust, or profit under the United States." Once removed from office, the individual may be tried and convicted in an ordinary court if he has committed an indictable offense. The president's pardoning power does not extend to senatorial removal in impeachment procedure.

Whatever may have been the experience of our English ancestors, the impeachment and removal powers of Congress have not proved very formidable in dealing with the executive branch. Only 12 officers, most of these judges, have been impeached in our national history and only four of these convicted.[4] President Johnson, however, escaped removal by a single vote. The difficulty with the impeachment process is that it is designed only for grave offenses, and few of our national officials, happily, have been flagrant offenders against the laws of the land.

6. Directive and supervisory

Although the immediate direction of and the major responsibility for the conduct of the huge administrative organization of the national government rests with the president, Congress participates in both direction and supervision. It creates most of the agencies of administration and authorizes those it does not create directly. It specifies in more or less detail how these agencies are to be organized, defines their powers and functions, prescribes many of the procedures by which they operate, fixes objectives and standards for them, and provides the money for carrying on their activities. All of this necessarily involves the Congress in continuous concern for the way in which the agencies perform. It receives from them a large volume of annual and special reports and, typically at budget sessions, hears the principal officers of each agency explain and defend the conduct of their organizations. Congressional admonitions and exhortations are frequently addressed to officials and agencies, occasionally by resolution, commonly by verbal exchanges at hearings, sometimes by the curtailment of function, and, on occasion, by the complete deprivation of funds. There is also a growing disposition to entrust congressional committees with veto power over certain types of executive action (for example, the purchase of sites for veterans' hospitals).

The inability of Congress to devote the time and energy to this great task of direction that its effective performance requires has led to repeated pleas that the president be given greater authority to rearrange the organizational structure of the national administration. The tremendous growth in the past thirty years in the size and complexity of the administrative machinery of the national government has been accompanied by an increasing amount of congressional participation in supervision but congressional processes have not been altered to meet the heavy demands.

7. Investigative

As an important, some would say indispensable, adjunct of its respon-

[4] The cases involving judges are discussed in the chapter on the Judiciary; the others involved Senator William Blount (1798), President Andrew Johnson (1868), and Secretary of War William W. Belknap (1876). Secretary Belknap sought to evade impeachment proceedings by resigning his office, but the Senate was not thus deterred from hearing the case.

sibilities for the conduct of the national administration, the Congress relies extensively on the legislative investigation. Although the investigative procedure has been widely used for the development of data and the revelation of opinion on national problems for the purpose of propounding legislative solutions, its major use, in the past decade at least, has been to bring to light the conduct of public employees and administrative agencies. The investigation has become one of the major ways by which the committees of Congress hold the administration accountable to the Congress and to the public for its conduct of affairs. In time, energy, expense, and publicity, the investigating activities of recent Congresses rivaled their legislative activities.

The use of the investigative procedure

Of the more than 800 investigations conducted in our national history, several have been outstanding in bringing to light and correcting egregious misconduct within the administration. Both the Teapot Dome oil reserve scandal of the Harding era and the income tax administration scandal of the Truman regime, to select two of this century, have been aired by this method. In the broader uses of the investigative power to inform legislative policy, there have also been many of lofty purposes and far-reaching accomplishment: the studies of immigration, lobbying, munitions manufacturing, stock exchange operations, conservation, monopoly in industry, the organization of Congress, and the organization of the executive branch of the government are examples. The investigative function, however, has not uniformly achieved its maximum potentiality. Although many, perhaps most, have been well intentioned and seriously pursued, some have had only personal or partisan malice as their stimulus and campaign ammunition or personal aggrandizement as their object. As the Congress has relied more heavily upon investigation in an attempt to redress the balance of power lost to the executive branch during this century, the difficulties and criticisms have increased.

Problems arising from use of investigative function:

a. Scope of the inquiries

In the first place, the field of inquiry has extended in recent years to the political sentiments and loyalties of numerous individuals and groups in American society, including teachers, preachers, writers, movie stars, labor union executives, and others. One standing committee of the Congress—the House Un-American Activities Committee—has no other major function.[5] In many cases, inquiries into alleged subversive opinion have borne no apparent relevance to contemplated legislation or to administrative incompetence. They have had for an apparent purpose the enlightenment of the public and for a real purpose the discrediting of certain opinions and of those who now hold or ever have held them. Many critics have argued that congressional inquiries ought to be confined to the legislative and administrative responsibilities of that body and that committees have no right to invade personal

[5] Established as a select committee in 1938, the House Committee on Un-American Activities was made a permanent standing committee in 1946. Its mission is to investigate: (1) "The extent, character, and objects of un-American propaganda activities in the United States; (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

privacy except under the impetus of grave policy-making enterprises. Increasingly these questions have been brought to the courts by reluctant witnesses and limits to the scope of the inquiries are now being enunciated. The Supreme Court in 1957 in the Watkins case (354 U. S. 178) summarized the matter thus:

> The power of the Congress to conduct investigations is inherent in the legislative power. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them. . . . But broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress.

The Court in this case went on to condemn the mission assigned by the rules of the House of Representatives to the Committee on Un-American Activities as ambiguous and the particular questions [6] addressed to the complaining witness as not clearly related to any legislative purpose.

b. Televising of committee hearings

Secondly, the congressional investigating process (1950 model) has been taking place amidst an inordinate amount of publicity. Newsreel and television cameras and radio microphones, not to mention crowded spectator areas, have become the standard environment for many of the hearings. The opportunity that this has provided for political adventure by those who direct the inquiries has stimulated competition among legislators for strategic posts from which to launch personal campaigns and has created concern for the abuse of the hearing process to serve these personal ambitions.[7] Criticism of the practice of making spectacles of these inquiries had mounted to the point that Speaker Rayburn early in 1952 and again in 1955, 1957, and 1959 ruled that meetings of the committees of the House of Representatives could not be broadcast, televised, tape-recorded, or photographed by moving picture cameras unless and until the rules of the House were changed specifically to authorize these practices.[8] In the interim, Speaker Martin allowed each committee to decide the matter for itself.

The third problem that has arisen in connection with recent inquiries and the publicity surrounding them concerns the status and rights of persons who appear before the committees. Traditionally, congressional committees have admitted many kinds of testimony under a variety of conditions. They have not been bound by the rules of the judicial branch in these matters.

[6] The questions which Mr. Watkins had refused to answer related to Communist affiliations of his past associates. His refusal had brought him into court on a "contempt" charge.

[7] At least one presidential candidacy in 1952 and 1956 (Senator Kefauver) could be traced in part to the popularity gained by the televising of investigating committee hearings, and a comparative unknown successfully achieved high public office in New York City as a result of the fame achieved from participation in these same proceedings (Rudolph Halley). Although not attended by the same amount of publicity, the popularity of the Truman Investigating Committee of the Senate during World War II contributed importantly to Truman's nomination as vice-president in 1944.

[8] One hearing was televised in 1957 in defiance of the Rayburn ruling. It was held in San Francisco by Representative Walter of the Un-American Activities Committee. Walter subsequently acknowledged his error.

c. Fair procedures for witnesses

Many legislators have felt that judicial procedures which include elaborate rules on hearsay evidence, accreditation of witnesses, admissibility of evidence, and rights of the accused are too restrictive for the type of information which committees hope to elicit. Concern for a "fair" trial and for the position of the "accused" is out of place in legislative halls, they would argue. We are not trying anyone; we can invoke no criminal penalties against anyone, save to compel testimony or to initiate proceedings against perjury. The labeling of individuals as subversive, the identification of them with unpopular and unorthodox opinions, or the recounting of their youthful indiscretions, argue those who are concerned for the witnesses, is or may be more damaging to them individually and socially than conviction of a crime. Their reputations can be placed under a cloud and their employment prospects seriously curtailed. Under these circumstances, say the critics, a more judicial attitude ought to be introduced and rules of procedure adopted which will prevent hearsay evidence, which will allow a person to confront and question those who assail him, and which will provide an opportunity for those who are attacked to appear and answer the attack. Several committees (really subcommittees conducting inquiries) have actually modified their rules to take account of these criticisms. The Senate has not as yet seen fit to adopt any general code of this type for all of its committees. The House of Representatives, however, early in 1955 amended its rules to provide more uniform procedures for its investigating committees, to abolish one-man hearings, and to afford greater protection for individuals called to testify. The Rules Committee of the House, beginning in 1955, is also scrutinizing carefully every projected investigation.

d. Compulsion of testimony from private citizens

The fourth problem relates to the extraction of testimony from unwilling witnesses. Persons from whom information is sought are not always disposed to co-operate. Gradually, however, the Congress, with the support of the judiciary, has gathered authority to employ compulsion. Any duly constituted committee now has power to subpoena witnesses and administer oaths, to require the production of books, papers, correspondence, contracts, or other records deemed relevant, and to invoke judicial aid, if necessary, to obtain them. Persons refusing to answer questions properly put to them or refusing to produce records or papers may be cited by either house for "contempt of Congress." During the period 1947-57, for example, more than 200 persons were cited for contempt, more than 100 of them witnesses before the House Un-American Activities Committee.[9] Testimony before congressional committees may lead to prosecution by the Department of Justice for perjury as well as for contempt. The celebrated case of Alger Hiss, former official of the Department of State, convicted of perjury arising out of testimony before the House Un-American Activities Committee, is an example of this type of action.

With more and more frequency, witnesses before congressional com-

[9] If found guilty in a proper trial, a person cited for contempt of Congress may be fined $1000 and required to serve one year in prison.

mittees have been claiming the protection of the Fifth Amendment and refusing to respond to questions that, if answered, they plead, might tend to incriminate them.[10] So frequently has this plea been raised that Congress in 1954 enacted a law granting to its committees the authority to grant immunity from prosecution to a reluctant witness to compel him to testify. This law requires, however, the notification of the attorney general and the approval of a district court and also stipulates that such grant must be requested by a two-thirds vote of the full committee membership. The Supreme Court in 1956 (Ullman *v.* U. S., 350 U. S. 422) upheld this law.

e. Compulsion of testimony from public officials

Thus far our discussion has centered about the problem of obtaining information from an unwilling private individual. A very different kind of problem arises out of the various attempts by committees of Congress to obtain papers and documents or testimony from the executive agencies or officials of the government. On the one hand, there is no doubt about the constitutional right of Congress to inform itself on the conduct of the executive branch. On the other hand, presidents, beginning with Washington, have regarded themselves as entitled to refuse to open their personal files for congressional inspection and even to throw the cloak of immunity around any department or agency if they believed that the public interest would be served by so doing. Thus far, at least, the president has successfully asserted the powers claimed. Under existing executive orders many types of papers and documents have been denied to congressional committees (personal loyalty investigation files and F.B.I. files, for example). Several congressmen have complained vigorously about the cloak of secrecy thrown around certain activities by the president. The legal rights of the two branches have never been fully adjudicated. The Congress has in every case stopped short of citing for contempt any official who has refused on executive order to honor a subpoena. The president, also, has opened the files when the public and the Congress have been sufficiently aroused.

8. Representative

Of all of the nonlegislative functions of the Congress none is more burdensome nor more time-consuming than the function of representing individuals and groups before the executive branch and informing them about its operations. Every day brings to each congressman scores of letters, dozens of phone calls and telegrams, and several callers from the home district or state. Many congressmen spend more working time running errands for their constituents, explaining the meaning of governmental requirements or policies to them, and adjusting conflicting interests between constituents and administrative agencies than they do in discharging their legislative responsibilities. As our government has grown larger, more complex, and more pervasive, this

[10] The courts have held that a person may refuse to answer the question of whether he or she is a member of the Communist party. The act of Congress which makes it illegal to advocate the forceful overthrow of the government and the decision of the Supreme Court upholding a lower court conviction of communists for such advocacy justify the fear of the incriminating character of such an admission. Blau *v.* United States, 340 U. S. 159 (1950) and United States *v.* Bryan, 339 U. S. 323 (1950). This accounts for the failure of the Department of Justice to obtain conviction in many of the contempt cases.

part of a congressman's job has become more demanding. Many lawmakers complain bitterly that they are unable to grapple intelligently with the great and forbidding questions of our times because they have to give so much of their energy to this "errand boy" work.

The demands upon a member of Congress for special and benevolent intercession with the executive agencies are numerous indeed. In a small portion of the cases they are highly improper. Although most are routine requests for information or pleas of unnecessary hardship, some are for undeserved privileges or favors. Few congressmen are in a position fairly to weigh the merits of the petitioner's claims and equitable administrative behavior is not well served by the sporadic and irresponsible intervention of legislators. Every administrative agency of any size has to maintain a staff just to process congressional inquiries. Congressmen, furthermore, are in a position to punish by deprivation of funds administrative indifference or resistance to their importunings. On the credit side it may be observed that congressmen act on these matters as humanizers of the vast impersonal machinery of government. If some of them ask for favors that are undeserved, all of them do much to obtain favorable acceptance of administrative activities by explaining to their people the need for the rules or regulations under which they are fretting. The representative duties of congressmen also have a healthy influence on administrative behavior, bringing to the attention of top executives callous, arbitrary, or capricious decisions by their subordinates and revealing the sources and character of popular discontent with their agencies. The legislative activities of the Congress are strengthened by the revelations of defects in existing programs which come in a congressman's mail. Every congressman feels that he can neglect this function only if he is willing to give up his chances of re-election.

## THE LEGISLATIVE POWER OF CONGRESS

Constitutional limits to legislative authority

Congress is primarily a legislature, and to it is assigned by the Constitution "all legislative power *herein granted.*" Unlike the legislatures of most other democratic states, our national assembly is restricted in its lawmaking function to the subjects especially entrusted to it by the Constitution. Every measure that it can validly enact must be based upon some authorization, express or implied, in the Constitution. Furthermore, the fact that Congress has been invested with authority to legislate on a given subject does not of itself exclude the states from acting on the same subject. Some powers are expressly denied to the states and others by their natures tend to preclude state action, but between these two extremes is a vast field of legislative authority that is or may be occupied both by the nation and the states.

"Emergency powers"

Many programs in the past three decades aimed at combating the depression or the external enemies of the nation, have been popularly described as stemming from the "emergency powers" of Congress. Legally there are no such powers. The Constitution makes no distinction between "normal" and

"emergency" situations in its grant of power to Congress. The Supreme Court has said that "emergency does not create power" (Home Bldg. and Loan Assoc. *v.* Blaisdell, 290 U. S. 398, 1934). Nevertheless, the periods of profound national crisis of our history have repeatedly called forth the exercise of powers not normally exercised, or the exercise of long-used powers in novel ways. Emergencies thus stimulate new congressional activities and conceptions, but legally these, to be valid, must all be traced to the constitutional powers of the Congress.

Delegation of legislative power

Although the Constitution vests legislative power in the Congress, it also vests legislative power of a sort, for example, the veto, in the president. Despite the language of Article I, therefore, legislative power is not exclusively entrusted to but one branch of the government. The question of whether any legislative power not specifically mentioned can constitutionally be entrusted to the executive branch has cropped up repeatedly in our history. Can the Congress delegate its authority to some agency of the executive branch? It has seemed wise on many occasions for the Congress to vest legislative duties in independent regulatory commissions (e.g., in the Interstate Commerce Commission to fix railroad rates), in executive departments (e.g., in the Secretary of Agriculture to fix standards for grain exchanges), and in the president (e.g., to fix customs duties by reciprocal trade agreements with foreign nations). Are there any limits to such delegation? The law on this matter is confused and contradictory and no simple generalization is possible. The Supreme Court has certainly indicated that there are some limits. It struck down the National Industrial Recovery Act of 1933 on the grounds that it was an invalid delegation of legislative power to an executive agency (Schecter Poultry Corp. *v.* U. S., 295 U. S. 495, 1935). This act, said the courts, did not contain clear standards to guide its administration and thus conferred large legislative discretion upon the agency entrusted with its enforcement. Congress alone, the Court has held, is competent to determine general policies and it may delegate only the function of making detailed applications of law, the guideposts for which have been clearly marked out in the statute. It is hard to see how the statutory standards that guide the Interstate Commerce Commission in rate-fixing ("fair and reasonable"), and those that limit the Federal Communications Commission in granting broadcasting licenses ("public interest, convenience, and necessity"), are sufficiently precise to provide any real limits upon administrative discretion. However, the courts have found nothing wrong with these particular delegations. One can only conclude, up to the present, that some kinds of delegation have been sustained and some kinds have been denied on the basis of no very clear-cut or consistent theory.

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# CHAPTER 12

# *The Organizaton of Congress*

> The House of Representatives shall choose their Speaker and other officers. . . .—Art. I, Sec. II; cl. 5
>
> The Senate shall choose their other officers, and also a president *pro tempore* in the absence of the Vice-President. . . .—Art. I, Sec. III, cl. 5
>
> Each house may determine the rules of its proceedings. . . . —Art. I, Sec. V, cl. 2

A new Congress organizes for business

Promptly at noon on January 7, 1959, the eighty-sixth Congress [1] of the United States assembled in the Capitol at Washington, D. C., for its first session.[2] The Senate was called to order in its north wing chamber by the Vice-President of the United States. After a short prayer, the certificates of election from the various governors were presented for the newly elected or re-elected senators and the oath of office was administered to these members in groups of four. Over in the south wing the clerk of the eighty-fifth Congress called the House of Representatives to order and after prayer called the roll of representatives-elect based upon the certificates of election received by his office from each state for each member. The two houses then proceeded to elect their respective leaders.

At this stage of the opening-day proceedings Congress reveals that it is a political institution, split by partisanship, and that its floor proceedings are frequently but formal ratifications of decisions taken in private by the leaders after many consultations and conferences. In the particular Congress under consideration, the Democratic party had captured control of both houses by a large majority. The Republicans continued to control the presidency.

Senate elects its officers

The Senate, having established its roll and admitted the new members, proceeded, after a debate on rules lasting several days, to elect Senator Hayden, Democrat of Arizona, as its president *pro tempore*. This official presides over the Senate in the absence of the vice-president and inherits all of the powers of the vice-president in case of his death, resignation, or achievement of the presidency. Senator Hayden was the only candidate presented by the

[1] Congresses exist for two years, the term of representatives. The first Congress assembled in 1789 and they have been numbered consecutively since that time.

[2] Congress is required to assemble at least once each year and hence every Congress has two regular sessions. It may be called, in addition, into extraordinary or special sessions by the president.

Democratic floor leader in behalf of his party, indicating clearly that the party had agreed beforehand on its choice. The minority Republican party nominated Senator Bridges of New Hampshire to the post, but only as a gesture, and the election of Hayden was by roll call vote. A few days later, by the same procedure, and with a similar result, the Senate elected a secretary, a sergeant-at-arms, and a doorkeeper. A secretary to the minority party was elected on the recommendation of the minority party leader.

House elects its officers

Over in the House of Representatives, on the first day, a Democratic congressman arose, indicated he was acting at the direction of the Democratic caucus, and nominated Representative Rayburn, a Democrat of Texas, to be speaker. A Republican congressman then arose and nominated Representative Halleck of Indiana to the same post, indicating that he also was acting at the direction of his party conference. No other nominations were made; none were expected. Both men had been leaders of their parties in the previous Congress; the newspaper accounts of the "private" party meetings held prior to the session revealed that each would be chosen. A roll call of the representatives assigned 281 votes to Rayburn and 148 to Halleck. By a "curious coincidence" there had been 281 Democrats and 148 Republicans voting on the question. Occasionally, the selection of speaker has not gone so smoothly; intraparty strife or a close balance of political forces has evoked deadlock and delay extending over several days. The speakership is a very powerful office, as we shall see, much more so than the president *pro tempore* of the Senate, and thus competition for it is unusually keen. Typically, however, the issue has been settled as easily and as certainly as it was in 1959.

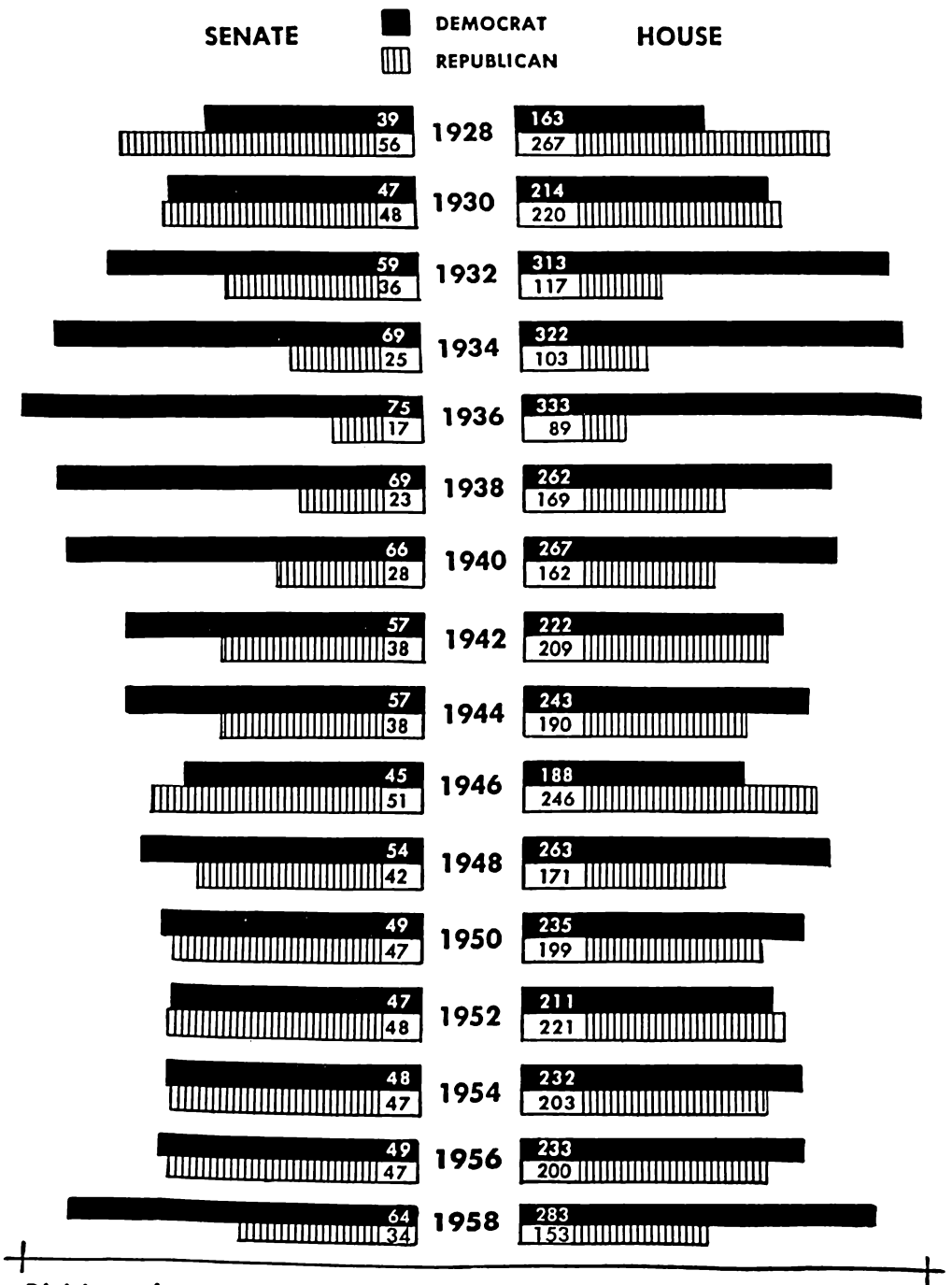
The Speaker was escorted to the chair by his defeated rival; each addressed the membership briefly in a spirit of good will, mutual respect, and promises of fair dealing. The new Speaker then administered the oath of office to all the certified representatives, the chairman of the two party conferences announced to the members the party selections for floor leaders, and the House then proceeded to elect a new clerk, sergeant-at-arms, doorkeeper, postmaster, and chaplain. Each party presented only one slate for all the offices; there was no debate. The Democratic slate was adopted by voice vote.

Adoption of the rules

The next order of business (excluding the adoption of certain formal resolutions of notification to the other house and to the president) was the adoption of the rules. The Senate, which is a continuing body, does not even consider its rules at this stage.[3] The House, however, ceases to exist with each Congress and is reconstituted by the procedure we are describing. Representative Smith, Democrat of Virginia, and prospective chairman of the rules committee, now offered a resolution that the rules of the House be

[3] In 1953 and again in 1957 and 1959 the formal organization of the Senate was delayed by a debate over whether the Senate was a continuing body and thus whether it had to adopt rules. A group of Senators wanted to amend the rules governing filibusters and felt this was their only chance for success. On each occasion, a majority of the Senate rejected the view that the rules must be adopted anew at the beginning of each session of Congress.

# MAJOR PARTY STRENGTH IN CONGRESS, 1928-58




*Divisions of seats based on election results of the respective years. Seats won by minor parties and vacancies account for the fact that figures do not always represent the legal complement of each house.*

adopted as set forth. The rules offered by the Congressman were those under which the House had been operating for many years. This is the only stage of proceedings in the House when it is possible to get any important change in the rules. Once the rules are adopted, any amendments must be approved by the rules committee, and this is most unlikely. At the time of original adoption, the rules have on several occasions, notably in 1910, been amended in important respects.

With the election of the members of the standing committees, the two houses were organized and ready to deal with the multitude of problems, foreign and domestic, which confronted them.

## PARTY GOVERNMENT IN THE HOUSE AND SENATE

Parties and the Congress

Clearly some form of government or leadership was already at work and manifesting its influence over the conduct of the Congress before the formal institutions of leadership contemplated by the Constitution and the rules of the two houses had been established. This government, sometimes called the "invisible government" of Congress, is provided by the political parties. It has developed outside the Constitution, was not intended by the framers of that instrument, and is largely unknown to the laws of the nation. It is impossible to understand the character or the conduct of our national legislature without a realization of its importance. All but a small handful of the nation's legislators come to Congress bearing the label of one or the other of the two great parties. Elected under the sign of the elephant or the donkey, the members profess a certain loyalty to these two great political organizations and to their aims and programs enunciated during the campaign. One of the two parties will normally command the support of a majority of the members of each house and will take possession of the formal positions of authority and leadership; the other, although a minority and therefore not obliged to assume any responsibility for what is done by the Congress, is nevertheless by usage and tradition entitled to certain rights and privileges. Loyalty to these party organizations is a necessary requisite to the achievement of position, influence, and prestige in the legislative process.

The party conference or caucus

The font of authority for the agencies of party government is the party caucus or conference. The members of each party in each house comprise the party caucuses of the two parties. Thus all of the Republican members of the House of Representatives comprise the Republican conference of the House. The party conferences always assemble prior to the convening of each new Congress and elect the officers and functionaries of the parties for the Congress and also agree on the party candidates for the major posts to be determined by the legislature. Thus, the House conferences will designate their choices for speaker, clerk, and so on, and the Senate conferences their choices for president *pro tempore,* secretary, and sergeant. Beyond this, the party conferences rarely meet. They prefer to entrust decisions thereafter to their designated agents. However, when rifts occur which threaten a major break-

down in party loyalty or when the leaders are unable to reconcile differences within the group on major legislative matters, the conferences may and sometimes do assemble and try to give new direction to the party apparatus. The practice of determining a party position on legislation by the caucus is a last resort. Leaders seek to avoid it at almost any cost and the members dislike it intensely. For one reason, it is next to impossible to enforce the caucus decision on reluctant members. The Republicans rarely even try. The Democrats, in the House at least, have a caucus rule which purports to bind the members to support a caucus decision reached by a two-thirds vote. The rule admits of certain exceptions, and enforcement has rarely been strict. We see, then, that the party caucuses select the leaders of the party machinery and, in the case of the majority party, the chief officers, of the House and Senate and they also exercise some, but not much, control over legislative programs. In the main, the latter object is achieved by the leaders whom the caucuses entrust with such powers as they command.

Agents of the caucus:

1. The policy committees

One of the major agents to which the caucuses in the Senate entrust the power and responsibility for the achievement of party goals is the policy committee. The policy committees were created in 1946 as part of a general reorganization of Congress and now completely overshadow the older steering committees. The primary concern of the policy committee is the direction and co-ordination of the party legislative program. Although the legislation of 1946 that created these agencies fixed the membership at seven, neither party has hewed to the letter of the law. The Republican Policy Committee now includes 14 senators and the Democratic Policy Committee nine. The members are selected in each case by the party conferences. Each party makes an effort to represent the major regions of the nation and the major factions in the party, although not necessarily in proportion to voting strength in the Senate or to population or party vote in the region. Typically, these committees have been composed of the most respected and experienced legislators in the two parties. The Republicans, however, insist on rotation on their committees. These two committees meet frequently and select bills to be given floor consideration, decide the time when they might be taken up, and, in general, formulate positions which they hope and believe their party colleagues will support. Neither of these committees has, thus far at least, really made party policy in the Senate. They have aided the leadership in reaching decisions on bills or issues before the Senate that many party members have been willing to accept.[1]

2. The steering committees

In the House of Representatives the older steering committees of each of the parties perform a similar function for that body. The Republican Policy Committee (Steering Committee until 1949) is composed of 17 members selected by the committee on committees, and five ex officio members (the floor leader, whip, conference chairman, conference secretary and chairman of the congressional campaign committee). The Democratic Steering Com-

[1] See Hugh A. Bone, "An Introduction to the Senate Policy Committees," *Amer. Polit. Sci. Rev.* L, 339-359 (June, 1956).

mittee, created in 1933, is composed of 15 members representing a similar number of geographical regions and six ex officio members. Each of the 15 area representatives is selected by the Democratic representatives from that area.

3. The floor leaders:

The party conferences in each house designate floor leaders to direct the legislative programs of the two parties. Under the general supervision of the steering or policy committee, of which they are members, the floor leaders guide the course of legislation.

a. House

In the House of Representatives, the majority leader helps to plan the business of the House, attempts to keep his party's bills moving through the legislative process, announces the intentions of his group toward future legislative business, speaks frequently in debate on behalf of his party and often on behalf of the national administration. He is the chief strategist of his party's legislative campaign. His favorable opinion is almost indispensable to the passage of important legislation. His power and influence over the operations of the lower chamber is exceeded only by that of the speaker, and he may expect to succeed to the speakership upon the death or resignation of the incumbent as long as his party possesses a majority of the House.

b. Senate

The majority floor leader of the Senate occupies a position similar in most respects to his counterpart in the House. His functions and responsibilities are identical but, typically, his personal influence is not as great because of the more individualistic, less regimented nature of the Senate. On the other hand, the Senate majority leader has neither a powerful presiding officer nor a powerful rules committee with which he must share some of his power. The Republican party in the Senate assigns different senators to preside over the party conference, to be floor leader, and to head the policy committee. The Democrats expect their floor leader to serve in these other posts also.

The minority leaders of the two houses have nothing like the responsibility of the majority leaders. Their party cannot expect to have a legislative program in any positive sense. As leaders of the opposition, they direct the floor strategy of their followers, attacking, criticizing, delaying the majority's program, or at least those parts of it they are unwilling to support. In frequent conferences with the majority leaders, they seek to gain appropriate representation in parliamentary institutions and adequate time for the minority to present its views in debate. They also obtain from the majority leaders commitments as to the ensuing course of legislative business so they can advise their members and plan their tactics. When the party majority shifts in either or both houses, of course, the minority leaders may expect to succeed to the speakership in the House and to the majority floor leadership or presidency *pro tempore* in the Senate.

4. The whips

The floor leaders for each party in each house are aided by assistant floor leaders usually called whips. These individuals are selected by the party conferences, typically on the recommendation of the floor leaders. The whips act for the floor leaders when the latter are obliged to be absent from the

chambers. The major duty of the whip is to canvass the views of the members of his party on issues before the Congress and to advise the floor leader how many votes he can count on, on any given item of legislative business. Another duty of the whip is to see that the voting strength of his party is fully brought to bear on every significant legislative decision. In the House, the whip ordinarily appoints several assistants to aid him in canvassing opinion and in mustering the members to important roll calls. The secretaries to the policy committees in the Senate perform many of the functions of assistant whips.

5. The committee on committees

One final and very important agent of the caucus is the committee on committees. This group performs the difficult and delicate task of selecting the party membership for each of the standing committees. The House Republican Committee on Committees consists of one representative from each state having Republican representation. Each state Republican delegation selects its own member. Each member of the committee has as many votes as there are Republican representatives from his state. The House Democratic Committee on Committees is the Democratic delegation on the Ways and Means Committee and this is designated by the caucus. The Senate Republican Committee on Committees ordinarily consists of from six to nine senators appointed by the chairman of the Republican conference. The Senate Democratic Steering Committee of 12-15 members designated by the caucus serves as its committee on committees.

## THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

From presiding officer to director

Of the formal institutions of leadership provided by the Constitution and by the rules of the two houses, by far the most important is the speaker of the House of Representatives. This office was transported to the colonial legislatures from the English House of Commons and from there to the legislatures of the states and of the nation. Almost two centuries of experience have made of the speakership, however, a very different office from its contemporary counterpart in the British Parliament. The speaker is the most powerful single individual in the House of Representatives in determining the legislative product of that body; whereas in England the speaker is simply an impartial presiding officer and has little or no influence on legislation. The power and influence of the speakership in the American system is the product of the rapid expansion of the size of the House, the continuous increase in the complexity of its business, and the growth in influence and importance of the informal party government. All of these created a demand for leadership and direction. The speaker, with his party majority behind him and from his strategic post of presiding officer, gradually gathered to himself the powers of direction, some have said of dictation.

The major instruments of speaker dominance were achieved gradually, but by 1910 collectively constituted a formidable array. In the first place, the speaker appointed the members of all standing committees as well as of all

special or select committees of the House. The fate of legislation in the lower house was, and still is, so completely determined by the standing committees that the power to determine the membership of these committees is probably the most important authority in the Congress. Originally the committees had been staffed by vote of the whole house, but the power had slipped gradually into the hands of the presiding officer. Secondly, the speaker was chairman of the most powerful of the standing committees, the rules committee. This small committee, consisting at the time of only five men, completely dominated the progress of legislative business on the floor of the House. In the next place, the speaker exercised the power to refuse to put motions offered by members which he considered dilatory or obstructive. Finally, the rules endowed the speaker with complete control over floor participation of individual members through his right to "recognize" members who wished to address the House.

The attack on the speakership in 1910-11

The dominion of Speaker Cannon in the first decade of this century was so complete and his own policies so at variance with that of most of the members of the House that a long-simmering revolt against "the system" boiled over in 1910, and a coalition of insurgent Republicans with the Democratic minority succeeded in capturing control of the House long enough to deal the speakership a heavy blow. The speaker was removed from membership on the rules committee. In 1911, the power to appoint standing committees was vested in the whole House by the same coalition. These actions deprived the office of two of its most important weapons, and the speaker has never been quite so powerful since.

Powers of the modern speaker

Although weakened by the changes of 1910-11, the speaker is still the most important and most powerful member of the House. He presides over all sittings of the House, preserves order and decorum, "recognizes" members desiring to speak, signs all acts, resolutions, writs, warrants or subpoenas ordered by the House, interprets and applies the rules, decides points of order (questions of parliamentary procedure raised by members), puts questions to a vote, determines the outcome of most unrecorded voting, appoints all special, select, and conference committees, and assigns bills to the various standing committees. As a member of the House he may speak in debate and vote on all questions before the House. He is not, however, required to vote except in case of a tie or when the House is voting by ballot.

The power of recognition

Among this imposing array of powers and responsibilities the power of recognition may be used to illustrate the role of the speaker in directing the lower house. Under the rules of the House, any member desiring to speak for any purpose must address the chair and be recognized by it. The speaker has the sole authority to accord the necessary recognition.[5] Under Cannon, for a member to be recognized he had first to obtain an interview with the speaker and gain his approval in advance. It still is the practice to notify

[5] The Senate rules, by contrast, give no such latitude to the presiding officer of that body. They require that he recognize the senator who first addresses him. The House rules say "the speaker shall name the member who is first to speak."

the speaker before proposing requests that deviate from the normal course of business.[6] By his refusal to recognize a member seeking the floor, the speaker can influence the course of business. If he knows that a member is seeking the floor to offer motions that might delay or sidetrack business the speaker wants pushed forward, he refuses to "see" him when he rises. It should not be inferred that the speaker will ignore the minority. Ordinarily, he allots to their adherents a fair share of the debating time, but he is under no obligation to allow them to interfere with the majority program. The speaker is also able to inquire the purpose for which members seek the floor and thus cannot easily be caught off guard by an unanticipated parliamentary maneuver. Debate on legislative measures is customarily controlled by the chairman and senior minority member of the standing committee to which a bill was referred and these men apportion the time for each side. The speaker customarily accepts these arrangements and by rule the two leaders must be allowed the floor. In summary, through the power of recognition the speaker can influence the course of legislative business but is not able to dominate debate.

**The power to halt obstruction**

The speaker is now accorded by the rules the powers, simply asserted in an earlier era, to refuse to put dilatory motions and to count as present all members who, in fact, are present whether they answer to their names or not. Both of these grew out of minority tactics designed to delay and obstruct majority legislative action.

**Partisanship**

The major characteristic of the speakership which distinguishes it from that office in the House of Commons is its partisanship. The House of Representatives has come to expect that the speaker will use his enormous power and influence to aid his party. Although the speaker is expected to preside in a judicial manner and to be as fair as the rules permit to the minority, he is an important leader of the majority party and is expected to use his influence in behalf of its legislative program. We have already observed that the speaker, although formally elected by the whole House, is actually the leader of the majority party and is designated for his high office by the members of the party in caucus. In his office, the formal leadership and the informal party leadership are combined. It is because he has his party behind him that he is able to exercise the influence over the proceedings that he does.

**Qualifications of the speaker**

There are no formal qualifications for the office of speaker. He does not even have to be a member of the House. Every speaker, however, has been a representative. Furthermore, every speaker, at least for the past half century, has been a member of long service. Seniority is not rigidly adhered to in the selection, and the speaker is not typically the member of longest service. He has, however, been one of the most experienced members of the House and, from this fact alone, has stemmed a considerable part of his influence. Like the chairmen of the standing committees, the speaker is likely to come from a "safe" district and, therefore, to emerge from a political environment quite different from that which produces the president.

[6] F. M. Riddick, *The United States Congress: Organization and Procedure* (Washington, D. C., 1949), 69.

## THE PRESIDING OFFICERS OF THE SENATE

The vice-president

There is no counterpart in the Senate to the speaker of the House of Representatives. The regular presiding officer of the Senate is the vice-president of the United States. He is not a leader emerging from the operations of the Senate and, therefore, has not enjoyed either the power or the influence of the speaker. He has all of the normal powers of presiding officers, but he is not designated by the majority caucus. He is not a member able to take the floor and argue for his party's program. He does not ordinarily bring to the post many years of continuous service in that body. The rules of the Senate are not designed to enhance the powers of its leaders. A vice-president is influential in the deliberations of the Senate, and some have been, only if he personally can by his experience and ability command such influence.

The president pro tempore

The president *pro tempore*, with whom the vice-president shares his presiding functions and who is selected by the Senate itself, comes a little closer to the speaker. Even he, however, is ordinarily overshadowed by the majority floor leader and typically exercises nothing like the speaker's influence. Only since 1890 has the post been a continuing one, and only in part of the period since then has it been an influential one. The reasons for the relative weakness of this post are many. The Senate is smaller. Senators are exceedingly jealous of their prerogatives. They are not easily led and on many occasions will not be led at all, even by someone of their own choosing. The president *pro tempore* is but one of several leaders of the majority party in the Senate. His is nevertheless an office of considerable power, prestige, and perquisites and it is vigorously sought after. Like the speakership, it is a partisan office and is used to forward the program of the majority party.

## THE COMMITTEE SYSTEM OF THE HOUSE AND SENATE

Development of the committee system

Legislative bodies achieve more careful review of proposed legislation and save the time of the members by referring most matters brought before them to committees for study and report. Nowhere, however, do these committees play such a dominant part in shaping the legislative product than in the American Congress, and especially in the House of Representatives. The development of an elaborate system of standing committees to which are referred almost every piece of legislative business took several decades. By the latter part of the last century it had become customary to assign each member of the House and Senate to one or more of the standing committees at the beginning of each new Congress. By the beginning of this century the referral of all legislation upon introduction to one of the standing committees had become the typical procedure. Though other types of committees are used —special, select, and conference—and occasionally one of these may achieve great prominence, their importance is minor compared with that of the regular standing committees.

The pressure of increasing legislative business and of members for

Standing committees:

greater recognition and perquisites tends to multiply the number of standing committees and to produce overlapping and duplication of committee jurisdictions. Periodically, the Congress has had to reduce the number and clarify the missions of its standing committees. The most substantial effort in this direction was made by the Congressional Reorganization Act of 1946. In the House, the number of committees was reduced from 48 to 19, and in the Senate from 33 to 15. The jurisdiction of each of the committees was carefully delineated in order to eliminate as much overlapping as possible, to divide the legislative business somewhat more equitably, and to assign to each committee a reasonably coherent and logical area of national affairs. The membership of each committee was also modified to make the committees of more nearly uniform size. The reduction of the number of committees was accompanied by an attempt, largely successful, to divide committee assignments more equitably among the members. Today, a member of the House typically has only one committee assignment and a Senator only two.

1. Number and size

Minor modifications of the committee system have been made in the years since the reorganization and the present (1959) committee system and the number of members are:

*House of Representatives*

| | |
|---|---|
| Agriculture | 34 |
| Appropriations | 50 |
| Armed services | 37 |
| Banking and Currency | 30 |
| District of Columbia | 25 |
| Education and Labor | 30 |
| Foreign Affairs | 32 |
| Government Operations | 30 |
| House Administration | 25 |
| Interior and Insular Affairs | 31 |
| Interstate and Foreign Commerce | 33 |
| Judiciary | 32 |
| Merchant Marine and Fisheries | 31 |
| Post Office and Civil Service | 25 |
| Public Works | 34 |
| Rules | 12 |
| Science and Astronautics | 25 |
| Un-American Activities | 9 |
| Veterans Affairs | 23 |
| Ways and Means | 25 |

*Senate*

| | |
|---|---|
| Aeronautical and Space Sciences | 15 |
| Agriculture and Forestry | 17 |
| Appropriations | 27 |
| Armed Services | 17 |
| Banking and Currency | 15 |
| District of Columbia | 7 |
| Finance | 17 |
| Foreign Relations | 17 |
| Government Operations | 9 |
| Interior and Insular Affairs | 15 |
| Interstate and Foreign Commerce | 17 |
| Judiciary | 15 |
| Labor and Public Welfare | 15 |
| Post Office and Civil Service | 9 |
| Public Works | 15 |
| Rules and Administration | 6 |

2. Selection of committee members

Although members of Congress are formally elected to the standing committees by vote of the house to which they belong, actually this vote is a ratification of selections made in private conference by the committees of each of the two parties in each house. The rivalry for committee posts is intense and the distribution of committee seats is one of the most difficult chores in the Congress. In the House of Representatives especially, the power, influence, and legislative success of each member is largely determined by his committee assignment. Almost his entire participation

the legislative process will stem from his committee work. Therefore, members are all keenly anxious to obtain posts on the more important committees and particularly on those which handle the problems of greatest concern to the districts which they represent. Many years of experience in the troublesome field of committee assignments have induced the two houses to evolve a very rigid but unwritten code to govern the process. Major weight is assigned to length of continuous service. Once assigned to a particular committee a legislator may confidently expect to advance up the ladder of precedence as long as he continues to be elected by the voters. The only major exception to this rule involves members who are willing to sacrifice seniority on minor committees to gain seats on major committees. The job of the selecting agencies thus includes: (1) determining the number of posts to be filled on each committee; (2) assigning newly elected members to the committees; (3) taking care of as many of those who have already served on each committee as the total party membership on the committee permits; and (4) accommodating as many as feasible of those who are interested in or are obliged to shift from one committee to another.

Party strength on committees

The number of seats assigned to each party on each committee is worked out by the majority party leaders, usually in consultation with the minority leaders. Traditionally, the posts on all but one or two key committees are assigned to each party in proportion to the relative strength of that party in the chamber concerned. The majority party usually insists, however, that it have a disproportionate representation on the committees on rules, ways and means, and appropriations. This is to enable it to control these committees so that a coalition of minority party and insurgents from the majority which might throttle the majority program would be hard to form. Independents and members of third parties fare poorly in committee assignments. If they are taken care of at all, it is usually by the majority party.

4. Committee chairmen:

a. Selection

The most coveted post on each standing committee is the chairmanship. This post, although formally filled by vote of the House or Senate, goes automatically to the majority party member of longest continuous service on that committee. Only a major failure by a member to support his party, in a presidential campaign, for example, or in voting to organize the House of Representatives, is likely to induce the party selection committees to pass over him in designating the chairman. The fact that the senior member may be ideologically at odds with his party leaders or most of his party colleagues will, typically, not keep him from the post he seeks.

b. Power

The power of the chairman of the committees is so great that it has allowed them repeatedly to defy their own leaders with impunity and to stifle programs demanded by the White House and by the floor leaders. It is not easy to account for their influence, for it is compounded of many bits of power. The chairman can reward and punish the members of his committee. He appoints the subcommittees and designates those who will participate in the debate for the committee majority. The chairman can usually prevent a meeting of the committee if he doesn't want one and can invariably control

the agenda when the committee does meet. Much of his power stems from tradition rather than rule, but it is a tradition that most congressmen support, presumably in anticipation of the day when they will be chairmen and entitled to the privileges of these offices.

Criticisms of the seniority system

The developing power of the committee chairmen and the method by which they are selected has given rise to an increasing volume of criticism of the system. There is no demonstrable correlation between seniority and competence, say the critics. There is a correlation between seniority and a "safe" constituency. Those districts or states dominated by one party or by one strong interest are likely to return the same congressmen again and again. Those districts where the party battle is intense and the interests divided are likely to change congressmen frequently. Thus, their representatives and senators never achieve seniority. The close districts, say the critics, are more decisive in national campaigns. The self-determined leaders of Congress may be, and frequently are, the critics allege, out of step with the main currents of public opinion in the nation. Young, able, and ambitious legislators are not given opportunity fully to utilize their talents and grow restive in the grip of seniority. In this way, legislative talent is wasted and discouraged. Of course, if the chairmen were not so powerful, the problem would not be so acute.

Defense of the system

The only answers to these criticisms put forth by defenders of the existing arrangements are: (1) they have served the nation well, that is, there is no real breakdown of the legislative process; (2) they guarantee that the Congress will be dominated by men of experience; (3) they provide an impersonal and objective standard for determining precedence and one that avoids personalities, bitterness, and manipulation, all of which would destroy the loyalty and co-operation which make legislation possible; and (4) no one, not even the Joint Committee on the Organization of Congress which labored so manfully at the problem of improving the Congress, has yet suggested a better plan that is acceptable to most congressmen.

## RULES COMMITTEE OF THE HOUSE

*How the rules committee controls debate in the House*

The impressive powers of direction of the speaker and the majority floor leader of the House of Representatives are shared with the Committee on Rules. Although this committee is concerned primarily with legislative procedure, it has become so influential in determining the way in which the time of the House will be spent that in this way it is able to influence what finally is passed. Although originally concerned only with formal rules changes, gradually, by rulings of speakers and orders of the House, the committee was invested with substantial powers. In 1841, for example, the speaker held that a resolution from the Committee on Rules which changed temporarily the established rules could be adopted by a simple majority vote. Since that time, therefore, the rules, in effect, may be suspended without the normal requirement of a two-thirds majority. In 1853, the committee was authorized to report at any time and this opened the door for it to intervene in the regular

process almost at will. In the last quarter of the past century the practice of proposing special orders to govern the course of floor debate on a piece of legislation took its present form. This practice constitutes the most important of its present repertoire of privileges and responsibilities. Most of the important bills emanating from the other standing committees must now go to the rules committee for clearance if time is to be found for their consideration. The rules committee, if it approves, may clear the way for floor con-

*Resolved*, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the bill (H. R. 1) to extend the authority of the President to enter into trade agreements under section 350 of the Tariff Act of 1930, as amended, and for other purposes. After general debate, which shall be confined to the bill and shall continue not to exceed 2 days, to be equally divided and controlled by the chairman and ranking minority member of the Committee on Ways and Means, the bill shall be considered as having been read for amendment. No amendment shall be in order to said bill except amendments offered by direction of the Committee on Ways and Means, but said amendments shall not be subject to amendment. At the conclusion of such consideration, the Committee shall rise and report the bill to the House with such amendments as may have been adopted, and the previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion, except one motion to recommit.

SOURCE: *Congressional Record*, Feb. 17, 1955, p. 1402.

**A SPECIAL ORDER OF THE RULES COMMITTEE**

sideration by bringing in a special order. If adopted by the House, the order establishes the time for debate and allots a share of it to the majority and one to the minority. The competition for place on the calendars is so intense, there are so many more bills received than can be debated, that the power to provide for the immediate consideration of a bill regardless of its order on the docket is of great importance. Through this procedure, the committee can demand changes in a bill as a condition for bringing it to debate, can even insist on a whole new bill, and can effectively stop consideration of a bill of which it does not approve. From 1949-51, as a result of pressure from dissident elements in both parties, the power of the rules committee was weakened by the adoption of a rule which made it possible, though difficult, for a standing committee chairman to bring a bill to the floor despite the opposition of the rules committee. Unsuccessful attempts to reinstate this limitation on the powerful rules committee have been made at the beginning of each Congress since 1951. The only other way that a bill can be pried out of a

reluctant rules committee is by a discharge petition signed by a majority of the House. As we shall see, this is a virtually unworkable procedure.

No counterpart in the Senate

The Senate has no counterpart to the rules committee. The time of the Senate is very largely determined by the members themselves; debate is thus freer and more extensive. The Senate leadership is not able to exercise the dominion over procedure that the House leaders enjoy.

## CONGRESSMEN AND THE INSTITUTIONS OF LEADERSHIP

The member and the "machine"

It must be a great shock to a new member of the House of Representatives who comes to Washington, frequently from a position of influence in his small state legislature, to find how insignificant he is in the Congress. He ranks at the bottom of any committee, even a minor one, to which he may be assigned. He is rarely allowed to address the House. In fact, he usually can speak, and even then briefly, only when a bill from his committee is before the House and when he has been assigned a role in the debate by his chairman. On many of the major questions of the day he gains his knowledge, like any ordinary citizen, by reading the newspapers. Only after he has served a few terms is he recognized as a lawmaker by Washington society, administrative agencies, and the nation's press. And only after he has served several terms is he able to assume a position of influence.

Domination of the House by its leaders

About 30 or 40 men dominate the activities of the House of Representatives, firmly directing the proceedings, controlling the debate, and determining the extent and character of the participation of the other 400 members. This handful of leaders are invariably men of long experience in the processes of the lower house. Ordinarily they command the support of their majority party colleagues. Periodically, however, the leaders, partly because they tend to represent "safe" districts, lose touch with the sentiment of the nation and of many of their fellow representatives. Revolts against the leaders and the institutions of leadership have occurred and these have provoked sharp criticisms of the House "machine" as repressive, ruthless, arbitrary, and essentially undemocratic. No system of leadership comparable to the ministry in parliamentary democracies is provided by the American Constitution. The president, although frequently giving important direction to the Congress especially on large matters of grave import, is outside the legislature and not in a position to provide intimate direction of its processes. Self-developed institutions of leadership have arisen in response to imperative needs, but according to no preconceived plan and largely as the exigencies of party politics have determined. Over the years, as the size of the House has grown and the complexities of legislative problems increased, the power of the leadership has become more and more firmly seated.

The "machine" defended

At no time has the present interlocking system of party and formal leadership which confers so much power upon such a small group of men lacked defenders. Leadership in a body the size of the House is essential if

anything except talk is to be achieved. All of the institutions of control are firmly anchored to a majority vote of the members. A dissatisfied bloc which is able to persuade a majority of the representatives can overturn the leadership at almost any time. Special orders of the rules committee can always be rejected by a majority vote. The rulings of the speaker can be rejected in the same way. No one requires the parties to have caucuses or floor leaders or steering committees. The system as it stands must, therefore, reflect the will of the membership and, by inference, of the electorate.

The "machine" criticized

The argument is not quite as plausible as it appears. The decisive majority is frequently not a majority at all but a majority of the majority party. The power of reward and punishment traditionally vested in the leaders is so great and the legislative success of a representative so dependent upon his gaining their favor that he is not as free to vote his convictions on questions of procedure and leadership as the defenders imply. A representative, it may be argued, has a duty to his constituents to achieve legislative recognition of their needs and aspirations. To do this he must gain a favorable committee assignment and opportunity to bring his proposals before the House for debate and disposition. If he rebels against the institutions of leadership or against the leaders, he is unlikely to be effective in either case. The most serious flaw, however, in the defense of the House apparatus is the seniority rule by which so many of the seats of the mighty are filled. Seniority is a guarantee of experience but not of either competence or representativeness of the nation as a whole. The evidence is the other way on the latter issue.

The situation in the Senate

At the other end of the Capitol, in the Senate, the situation is quite different. The institutions of leadership, although impressive, sit lightly on the backs of the senators. The business proceeds at a more leisurely pace, debate is more spontaneous and also more discursive, and program and procedural decisions are based on consensus among a fairly large portion of the members. The traditions and the rules of the Senate are sensitive to the position and perquisites of the individual senator and of the minority. Whereas the House, typically, disposes of a major piece of legislative business in about five or six hours of floor discussion, the Senate will require several days. Every senator that wants to usually can make his contribution to the debate. If the House is widely criticized because of its cursory disposition of significant bills, the Senate is condemned for the opposite. A determined minority can bring the legislative process almost to a complete halt in the upper house. The final product of senatorial deliberations is much more likely than that of the House to bear the stamp of a large number of members representing many different points of view. In weighing the criticisms of the lack of effective organization or leadership in the United States Senate it should be borne in mind that at a typical session of Congress, the Senate will dispose of as much major legislation as the House.

The sharp differences between the two houses in respect to the matters

The difference explained

under discussion may be explained by (1) the smaller size of the Senate; (2) the longer terms of the senators; and, (3) the fact that the senators are likely to be important party leaders in their home states.

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See also the references at the end of Chapters 11 and 13.

# CHAPTER 13

# *The Legislative Process*

Supervising the conduct of the national administration and representing the people of the districts before administrative agencies have emerged as important and time-consuming duties of our national legislators. The central responsibility of a congressman, nevertheless, continues as in the past to be lawmaking. Legislation is still the typical product and the legislative process the typical activity of the Congress.

Legislative activity may take several different forms—bills, simple resolutions, joint resolutions, concurrent resolutions. The procedure, however, is the same for each, except that private bills are handled somewhat differently than public bills. An adequate grasp of the process may, therefore, be obtained by tracing the main steps a bill takes on the way to enactment.

Importance of the rules of procedure

It might be well to pause at the outset of this journey and pay some regard to the rules of procedure in the Congress. The rules of the two houses are distillations and elaborations of many centuries of legislative experience and today are the most elaborate and complex of any legislature in the world.

It would be easy to underestimate the importance of proper procedure in our national legislature. In the first place, procedural questions can easily and do frequently consume a heavy share of legislative time which is already inadequate to the great responsibilities resting upon the Congress. Secondly, much of the debate and discussion over matters of considerable import turns on proper procedure. Thirdly, the rights of minorities to speak, to criticize, to propose alternative courses of action, rights that are essential to representative democracy, find their chief protection in the rules of procedure. Finally, the power of the majority to act, to deal decisively with the problems of the day, is supported and protected by the rules. A perfect balance between the power of the majority to act and the right of the minority to speak is rarely achieved at any time by any set of rules. In the Congress, the rules of the House lean a little heavily to the support of the power of the majority and those of the Senate to the support of the rights of the minority.

## INTRODUCTION OF BILLS

How bills are introduced

It is amazingly easy to introduce a bill into Congress. In the House of Representatives a member inscribes his name on a copy of it and deposits it in a box ("the hopper") on the clerk's desk. In the Senate, a member must first be recognized by the presiding officer, typically during the period when routine business is transacted (the "morning hour"), then announce the intro-

Union Calendar No. 16

84TH CONGRESS
1ST SESSION

# H. R. 1

[Report No. 50]

IN THE HOUSE OF REPRESENTATIVES

JANUARY 5, 1955

Mr. COOPER introduced the following bill; which was referred to the Committee on Ways and Means

FEBRUARY 14, 1955

Reported with amendments, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Omit the part struck through and insert the part printed in italic]

## A BILL

To extend the authority of the President to enter into trade agreements under section 350 of the Tariff Act of 1930, as amended, and for other purposes.

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84TH CONGRESS
1ST SESSION

# H. RES. 170

IN THE HOUSE OF REPRESENTATIVES

MARCH 10, 1955

Mr. PATMAN submitted the following resolution; which was referred to the Committee on Armed Services

## RESOLUTION

*Resolved*, That the House of Representatives does not favor sale of the facilities as recommended in the report of the Rubber Producing Facilities Disposal Commission.

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84TH CONGRESS
1ST SESSION

# H. CON. RES. 72

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 8, 1955

Mr. HOLIFIELD submitted the following concurrent resolution; which was referred to the Committee on Foreign Affairs

## CONCURRENT RESOLUTION

Whereas the preservation of democratic institutions everywhere demands united action by the world's leading democracies; and

Whereas the North Atlantic Treaty has already committed its members to "contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions", and to "encourage economic collaboration between any or all of them"; and

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Calendar No. 8

84TH CONGRESS
1ST SESSION

# H. J. RES. 159

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 1955

Ordered to be placed on the calendar

## JOINT RESOLUTION

Authorizing the President to employ the Armed Forces of the United States for protecting the security of Formosa, the Pescadores and related positions and territories of that area.

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**FORMS OF LEGISLATIVE ACTION**

duction of the bill, sometimes with a statement of explanation, and finally send it to the desk of the secretary. Any bill may begin its legislative career in either house except that bills raising revenue are required by the Constitution to begin in the lower house. Once introduced, a bill continues "alive" during the life of the existing Congress or until sooner disposed of. In a subsequent Congress the bill, to be considered, must be reintroduced.

Authorship of bills:

Because bills are introduced by members of the Congress and bear their names, it should not be supposed that these members conceived the ideas set forth in the bills or drafted them in the proper legal terminology. A large and increasing proportion of the major public bills introduced originate in the executive branch. Frequently these "administration" bills are in fully drafted form. The fact that no member of the administration can, as in parliamentary democracies, directly introduce measures has proved no serious obstacle to executive initiative in the American system, since a representative or senator can always be found to sponsor the introduction. Typically, the bill is given for introduction to the appropriate standing committee and introduced through it.

1. The executive branch

2. Private interests

Bills also originate with persons or organizations entirely outside governmental circles. There are literally thousands of groups and individuals who aspire to change the laws of the land benevolently to their interests or to the objectives of their group. Many of these persons and groups are served by legal counsel or legislative representatives (lobbyists) who cast the groups' desires in the form of a bill or bills and offer them to friendly legislators for introduction. Since introduction is so easy and the legislative sponsors assume no particular responsibility for the contents of measures bearing their names, every year thousands upon thousands of such bills are introduced into Congress. Frequently, the congressman will write "by request" on the bill to emphasize that he assumes no personal responsibility for the measure. In a large number of cases, one must hasten to add, the congressman and his colleagues have no intention of passing or even of seriously considering measures of this type. Of course, the more powerful interest groups are able, in many cases, to procure consideration of their bills and sometimes even passage. The largest share of these bills of private origin are private bills for the benefit of particular persons, places, or organizations; some, however are of far-reaching significance. The large numbers of measures introduced, however, clutter up the committee dockets and the calendars of the two houses and contribute mightily to the time and expense of the legislative process.

At the present time about 12,000-15,000 bills and resolutions are introduced into a session of Congress of which perhaps 1000 are enacted in some form.

Drafting bills

Casting legislative ideas into statutory language is a difficult and highly technical undertaking. Few members of Congress or private individuals are able to perform this task without competent advice. Each house, therefore, provides bill-drafting service for its members through an Office of the Legislative Counsel. These offices are staffed with technically trained bill writers,

many of whom are specialists in some branch of the law, and their services are available to any member who wishes to use them.

## COMMITTEE CONSIDERATION

Referral to a standing committee

Upon introduction, all bills are given a number (e.g., H. R. 144 or S. 177), printed, distributed to the members, made available to the interested public, and referred to one of the standing committees. In the case of private bills, the sponsoring senator or representative indicates on the bill the committee to which it should be referred and these instructions are usually observed. Public bills are assigned by the parliamentarian under the direction of the presiding officer in each house. In view of the fact that the subject-matter jurisdictions of the several committees still overlap somewhat and the fact that long and complex bills may involve subjects pertinent to several committees, the discretion of the presiding officer is occasionally exercised personally. Rarely is a bill sent to more than one committee or divided among two or more. The membership of either house possesses ultimate authority by majority vote to change the assignment made by the presiding officer and occasionally will direct the withdrawal of a bill from one committee and send it to a different committee. The committee to which a bill is assigned may be sympathetic or it may be hostile, and thus the discretion of the presiding officer and the occasional directions from the chamber sometimes determine the fate of the measure.

Importance of the committees

Both houses have come to expect that the committees will give thorough study to every "deserving" proposal and will then recommend to the parent chamber what should be done. The standing committees are the most important devices by which the legislators stamp their own imprint on the product of legislative activity. Certainly, most of the thoughtful and detailed analysis which is given to legislative proposals is given to them by the standing committees. The committees actually go much farther than just to stamp it with their approval or disapproval. They mold or cast the bill into a form which they believe will be acceptable. If the spectator in the gallery, especially of the House of Representatives, is disillusioned by the poorly-attended, superficial, and perfunctory debate in the chamber, he needs to remind himself that the Congress performs its central legislative duties in the committee rooms. In the Senate, the committee work does not so completely overshadow the general consideration of measures by the entire membership, but even in the upper house it is a rare thing for a committee recommendation to be rejected. The character of the legislative product is determined as much, perhaps more, by what the committees reject as by what they accept or modify. Of the thousands of bills introduced and of the scores, even hundreds, referred to any major committee, only a few are given any serious study. Most bills end their legislative careers in the "inactive" files of a standing committee.

ources infor- ation:

Upon receiving a measure which is deemed worthy of consideration by the chairman or, in some cases, by a majority of the committee, the com-

mittee has then to decide what to do with it. Frequently today it is referred to a subcommittee for study and recommendation, and the whole committee does not hear of it again or participate in the deliberations upon it until the subcommittee reports and recommends a course of action. Regardless of how it is handled, the first requisite for thoughtful analysis is information on the subject covered by the measure. Committees have tended in the past to rely heavily on one or more public hearings to elicit the necessary data. It has been supposed, if facts are needed on a pending bill, one should announce to the public that arguments will be entertained from its proponents and opponents on such and such a day and then each side will present its case to the committee and the "truth" will emerge. Of late, however, the defects in the hearing system for eliciting information have become apparent, and the committees are using the hearing rather as a device to influence public opinion or executive action or to discover the nature of public attitudes on the measure.[1] The weaknesses of the hearing system are that all of the needed data is not necessarily made available and that frequently only the proponents of the measure ever appear. The opponents expect the congressmen to protect their interests. Public hearings are still used extensively by the committees and are valuable legislative aids but not solely, or even mainly, to supply necessary information.

1. Public hearing

Much valuable data and opinion are supplied to the committee members by the lobbyists, or legislative representatives as they prefer to be called, representing those who are in favor of or opposed to the particular measure. Some of this is done through carefully prepared statements and exhibits offered during the public hearing on the measure. Much of it, however, is done in private conversations with committee members. It is hard to imagine how committees and congressmen would carry on without the lobbyists. There are many kinds of information about the conduct of particular types of business enterprises or labor unions or professions for which no data comparable to that which they can supply is readily available. A great deal of the data they give Congress is accurate, reliable, and useful. It is also, of course, one-sided.

2. Lobbyists

A great part of the information upon which congressional committees base their decisions has always been supplied to them by the executive branch of the government. From the first report of Alexander Hamilton, as secretary of the treasury, on public credit to the most recent report of the Defense Department to the Armed Services Committees, the executive branch has made its great store of information and experience available to congressional agencies, usually but not necessarily at the request of a committee. In these days, in which complete legislative programs may be drafted by the executive and sent to Congress, the executive departments are at great pains to see that the committees considering these programs are amply supplied with the data necessary to reach the "proper" conclusion. The interest of the executive in the result of legislative activity has, however, repeatedly aroused

3. Executive agencies

[1] See Ralph K. Huitt, "The Congressional Committee: A Case Study," *Amer. Polit. Sci. Rev.*, XLVIII, 340-365 (June, 1954).

the suspicion of many congressmen that they can not rely entirely on the executive departments as their major or especially as their single source of information. Where else, however, might they turn for data on such subjects as national defense?

4. Investigations

A few of the most important pieces of legislation may reach the Congress as a product of a more or less thorough investigation conducted by the Congress itself through a special or a standing committee, by the Congress and the executive jointly, or by the executive branch alone. Ordinarily these investigations are reported fully and the legislative measures arrive in the committee accompanied by elaborate charts, exhibits, tables, and explanatory material. In these situations, little more data is really required.

5. "Expert" assistants

Through the years many congressmen have felt the need for sources of information of their own independent of the executive branch, independent of the lobbyists, and not limited by the hearing procedure. It was for this reason that the Legislative Reference Service was established in the Library of Congress in 1914. Its program has slowly developed and in 1946 it achieved statutory recognition and substantial expansion. This Service consists of a professional staff of recognized experts in a large number of fields of legislative interest whose knowledge and research skill and experience are available to supply congressmen and committees with data in which they have expressed an interest.

The Legislative Reorganization Act of 1946, which provided the expansion in the Legislative Reference Service, did not stop with that in its effort to supply the need for disinterested data. It provided for "expert" assistants for each of the standing committees to aid them in reviewing the proposals submitted for their consideration and to supply them with disinterested data. This particular action virtually ended a previous committee practice of borrowing "experts" for this purpose from executive agencies. It did not, however, completely solve the problem, since about half of the "experts" seem to be partisans of one degree or another, i.e., identified with either the majority or minority party members on the committee.

Executive sessions

Legislative measures are considered in detail by the committee or subcommittee in executive (secret) session. Records are ordinarily kept, however, of the votes in these sessions and of the formal actions taken. Secrecy of committee deliberations has been strongly and repeatedly criticized, but most congressmen feel that the members make greater contributions in private than they might in public sessions. Furthermore, alert newspapermen are usually able to discover and report the occurrences in the "secret" sessions.

Alternative forms of committee action

In these private sessions, the committee has several alternative courses of action it may elect to follow. It may approve the bill as it stands and recommend its adoption by the chamber. This is very unusual. It may propose a number of amendments which change portions of the measure before it and then recommend the measure for passage with the amendments added. It may rewrite the bill completely, preserving only the number and title, and present the rewritten measure as a substitute. Finally it may reject the bill. In the latter

case, ordinarily the committee takes no further action. But if it approves the bill with or without amendments or in substitute form, it then prepares a report to this effect and seeks an opportunity to acquaint the whole membership with its recommendations. The chairmen of the committees are under obligation to report any approved bills "promptly."

Forcing bill out of committee

The ease with which a committee can kill a bill simply by not reporting it has been a subject of considerable controversy in the Congress. It is easy to see how, given the method of selecting committee members, a committee decision on some measure might not reflect the desires of a large portion of the membership in either house. One of the changes made in the House in 1910 coincident with the attack on the speaker was the establishment of a procedure by which the House itself might pry a bill out of a hostile committee. This "discharge rule" has gone through various changes since its enactment, but as it now stands a committee may be discharged from further consideration after it has had the bill at least 30 days and by a discharge motion initiated by a majority of the House membership. The discharge procedure, although it depends primarily on the wishes of a majority of the members, is difficult to operate and is rarely used. Most members of the House are apparently reluctant to upset the prerogatives of the standing committees and the desires of the leaders.

## CONSIDERATION OF BILLS BY THE HOUSE OF REPRESENTATIVES[2]

The calendars

A House standing committee reports a bill which it has considered favorably by returning it with its report to the clerk of the House. The clerk lists it on one of three "calendars" depending on its nature. Revenue and appropriation bills are placed on the Union Calendar; public bills not involving taxation or expenditure are placed on the House Calendar; private bills are placed on the Private Calendar. Bills are placed on these lists in the order in which they are reported and once on the list remain there throughout the two years of a Congress unless they are taken up and acted upon. The original purpose of these calendars was to regulate the order in which the House would consider the measures which its committees recommended to it. However, the volume of legislative business has become so great and the calendars consequently so congested that the order is never rigidly adhered to and the House usually adjourns with a lot of unconsidered measures still on the calendars. Revenue and appropriation bills can be taken up at almost any time if the member wishing to get them before the House can gain recognition, but the bills on the House Calendar ordinarily can get before the House only with the aid of a special order from the rules committee. It is from this situation that the rules committee derives its important influence on legislation. The House Calendar listing is thus a polite fiction and provides in most instances only a basis for negotiation, not an unassailable position. Conferences and

[2] From this point on in the discussion of legislative procedure it will be necessary to treat the procedure in each house separately. The discussion of Senate procedure will, however, merely emphasize the important differences from House procedure.

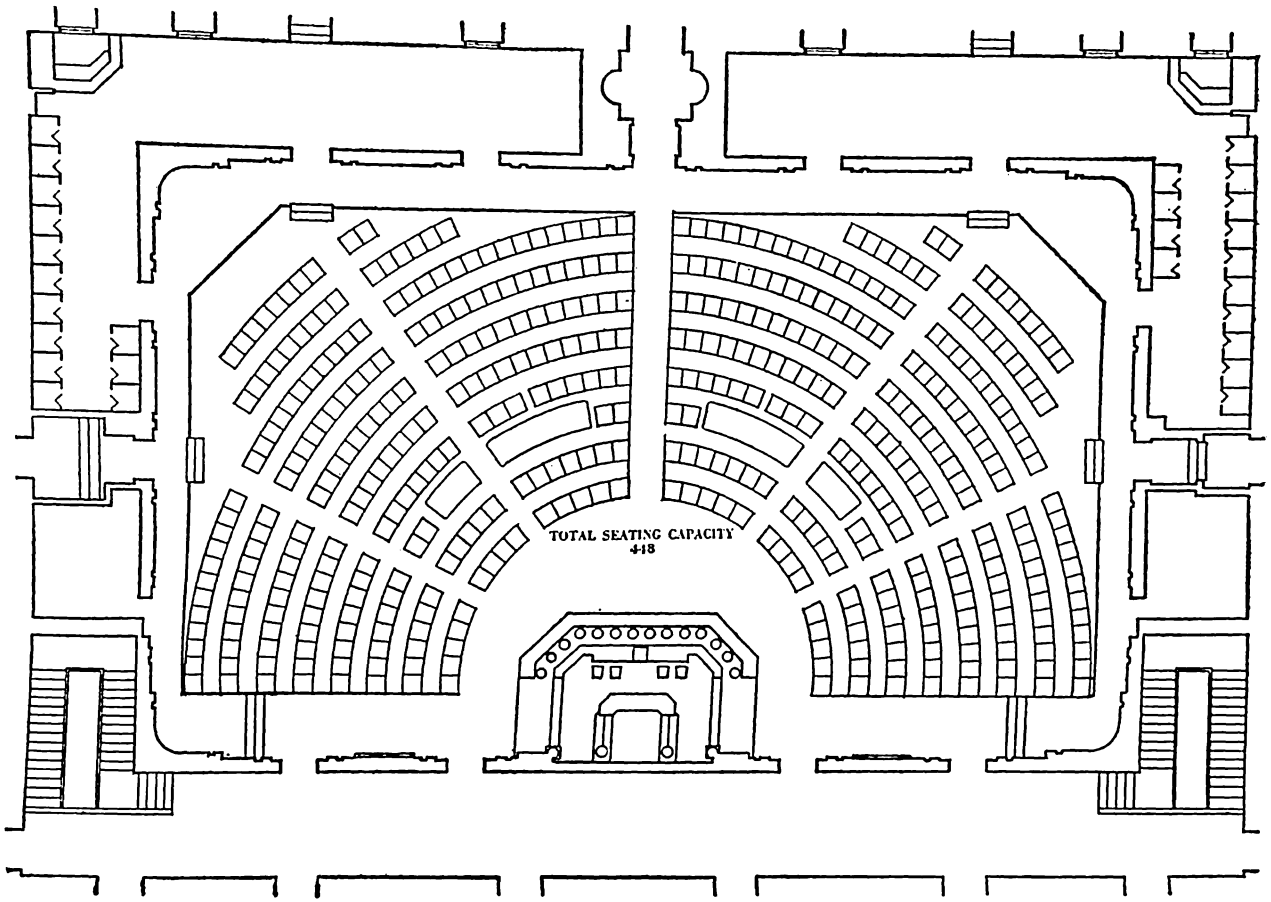



DIAGRAM OF HOUSE CHAMBER

negotiations among the leaders really determine which bills will be taken up and when.

Committee of the whole

An important share of the legislative business of the House of Representatives is conducted by means of the device of committee of the whole. The Union Calendar is made up of bills which are considered by this committee (revenue and appropriation measures) before they are considered, technically speaking, by the House of Representatives. The committee of the whole is simply the entire membership of the House sitting as a committee; but as a committee it operates under simpler, less rigid, and less demanding rules than does the House itself. Only 100 members constitute a quorum (the minimum number necessarily present to transact business) in place of a majority of the entire membership. Debate is governed by a rule which allows only five minutes to each speaker. There can be no time-consuming roll calls, since voting is always orally or by rising or by tellers, and there are no records kept of how any member voted. Certain types of dilatory motions, such as one to refer the matter back to the committee or to postpone consideration of it, are not allowed. At the conclusion of the debate the committee "rises," reports through its chairman back to the House, and then the House acts on the committee's actions. This device, the motion to create which is ordinarily in order, enables all fiscal measures to be considered line by line for amendment by the entire membership under circumstances which allow maximum participation and critical debate. The House in committee of the whole reveals itself in its best light with many members participating, short and pointed speeches, and quick decisions.

The three readings

It is customary to describe Anglo-American legislative procedure as involving three formal readings for each legislative proposition. This is an accurate description only in a very loose sense. The first reading occurs upon introduction and is not a "reading" at all. The title is simply entered in the records. When the bill emerges from the standing committee it is given its second reading, either in committee of the whole or in the House itself. This may be and occasionally is an actual reading of the bill line by line with opportunity for discussion and for amendments to be offered. The conclusion of this stage of legislative consideration is a vote on the question "Shall the bill be engrossed (i.e., reprinted as amended) and read a third time?" If the vote is favorable, the bill is then brought before the House again and is given its third reading. This reading is by title only, no further amendments are in order, and the debate, if any, is only on the whole bill as it stands. The conclusion of this phase is a vote on final passage. If the vote is favorable, the bill is signed by the speaker and sent to the Senate or, if it has already been passed by the Senate, to the president. This formal order of procedure here outlined may be and frequently is rudely set aside by unanimous consent, by special order of the rules committee, or by suspension of the rules.

Limits on debate in the House

The chief contrast between the procedure in the House of Representatives and that in the Senate is the limitation upon debate in the House. Normally debate occurs in the House only during the second reading and even

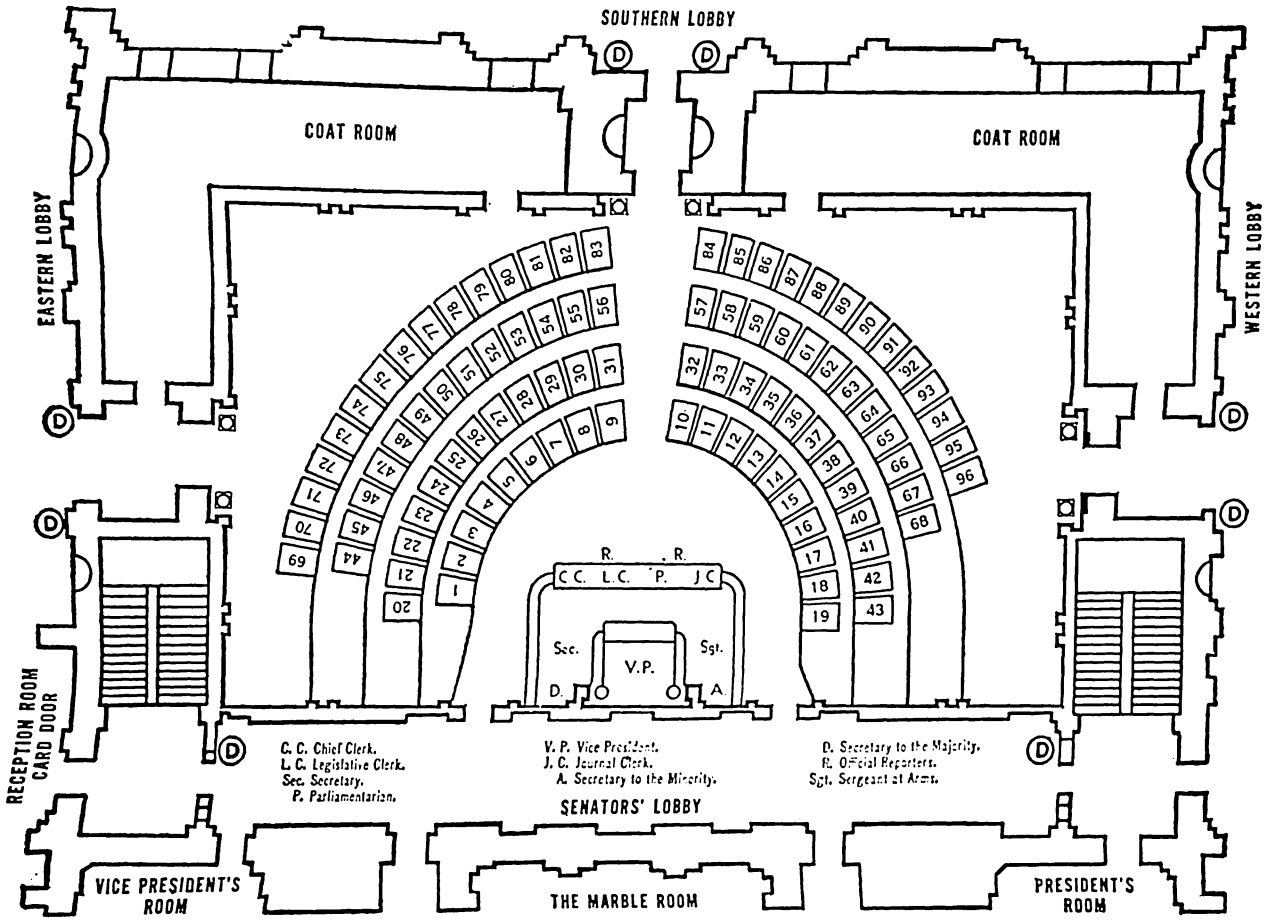



DIAGRAM OF SENATE CHAMBER

this debate is sharply curtailed. Over the years the House has evolved a number of devices that restrict debate. The most important of these are: (*a*) special orders of the rules committee which fix the total time for consideration of the bill and allot it between the proponents and opponents; and (*b*) the "previous question" rule which since 1811 has authorized a motion for the previous question to be made at any time during debate (except in committee of the whole) and which if adopted requires the House to vote immediately on whatever is pending. The motion itself is not debatable and may not be laid on the table. Debate in committee of the whole is limited by the five-minute rule and in the House it is limited by the rule that no member may speak longer than one hour. Typically, the time of debate is fixed in advance by the leaders and either by special order or by "gentleman's agreement" an equal amount of time is given to each side. The chairman of the standing committee reporting the bill ordinarily controls the time of the majority and designates the members of his committee who will speak for the proponents. The ranking minority member opposing the bill usually controls the time of the opponents. Tables placed about half-way up the aisle on either side of the chamber are used by the two teams to assemble their papers and documents for the debate. If any time remains after the two teams have made their respective contributions, members of the House who are not members of the committee may participate. This is unusual. The effect of all of these rules and customs is to make dilatory and obstructive tactics by the minority very difficult.

## CONSIDERATION OF BILLS BY THE SENATE

Differences between House and Senate procedure

After a bill is passed the House, it is certified by the clerk and delivered to the Senate. There it begins a journey which is quite similar to that it has already traversed in the lower house and to that traveled by a bill which originates in the Senate. There are, however, some striking differences in the procedures of the two houses when the bill emerges from the standing committee. The Senate uses only two calendars: the "Calendar of Business" on which are placed all bills and resolutions in the order in which they are reported; and the "Executive Calendar" on which are placed nominations and treaties. The Senate no longer uses committee of the whole except for the consideration of treaties. Furthermore, the Senate has few special devices for moving bills off the calendar onto the floor. There is in the Senate no powerful rules committee to step in with a special order bringing a bill before the chamber. The calendar listings are followed fairly closely, therefore, except that by unanimous consent measures may be taken out of order. The most notable difference in the two houses, however, is the relative freedom of debate in the Senate. By custom, supported in part by rule, debate in the Senate is virtually unlimited. There is no time limit on speeches; there has been no "previous question" procedure since 1806. There is no requirement

that the speaker must talk on the question. As long as any member has anything to say, whether pertinent or not, debate cannot easily be halted.

Filibustering

The great freedom of the individual senator to participate in the discussion on the floor of the chamber has provided minorities with one of their most potent weapons: the filibuster. When legislative time is precious, for example, when adjournment is near or when appropriation authority is expiring and money bills must be voted, a handful of members can get the floor and by spelling one another (yielding the floor to each other) can halt legislative business until their terms are met. There is no rule as in the House requiring the senators to speak to the question and these talkathons sometimes range over the whole field of human endeavor. Prior to the adoption of the "Lame Duck" Amendment (20th) in 1933, the Senate was most vulnerable to this tactic in the closing days of the short session. The Senate had to adjourn by March 4, for its life would then expire. The absence of a binding adjournment date since that time has strengthened the procedure against filibustering but has not made it impervious. There have been at least 10 significant filibusters in the Senate since 1933. This surrender of command of the Senate to a few senators at critical times in various sessions has provoked sharp criticism of the Senate rules. This is government by minority charge the critics and sometimes a small minority at that. Surely the majority should be allowed to act after a decent amount of debate. The major, although not exclusive, use of the filibuster in the past decade has been by southern senators to defeat various types of proposed legislation aimed at discriminatory practices against Negroes.

The closure rule

The device most widely considered as a remedy for this alleged defect in senatorial procedure is some form of closure rule. In 1917, as a result of a successful filibuster against President Wilson's proposed legislation for arming America's merchant vessels against German submarines, Wilson induced the Senate to adopt the current rule which can be used to limit debate. This rule (XXII), as modified since 1917, authorizes 16 senators to submit a motion for closing debate on any matter pending before the Senate and, after two calendar days, this motion must be put by the presiding officer and a vote taken on the question: "Is it the sense of the Senate that the debate shall be brought to a close?" If two-thirds of those present and voting vote for closing the debate, each senator is thereafter entitled to speak one hour and then the debate ends. This is obviously a very mild form of closure. It had been invoked successfully only four times and had been tried at all only 19 times prior to 1949. Changes in the rule since 1949, while eliminating many dilatory motions (e.g., to approve the Senate journal), nevertheless made the closure motion itself debatable and thus subject to filibuster.[2a]

Present controversy on the rule

The argument about the Senate closure rule is more vigorous today than ever. The recent use of the filibuster to frustrate attempts to legislate nationally on racial discrimination has stimulated many groups with whom this

[2a] In 1959, the rule was amended to make it applicable to rules-change debates and also to reduce the required majority from two-thirds of the full membership to that recited above.

legislation is popular to a concern over the Senate rules. The relatively new use of the filibuster technique to embrace even motions to take up a bill or to close debate has provoked great concern among some members of the Senate itself. The Democratic party, whose leaders include both southerners and the dominant figures in the large-city political organizations where anti-discrimination legislation is popular, has been torn by bitter dissention on this issue. The city faction in the national convention of 1952 insisted that the platform include a promise to amend the Senate rules so as to restrict filibustering, and the platform did contain a rather vague promise to do something about majority rule in the Senate. Thus far, the Senate has been unwilling drastically to change its rules on the subject of freedom of debate. On the contrary, many of the Senate leaders contend that the Senate does as well as the House in getting through its legislative agenda—in five recent Congresses, for example, it passed more bills and resolutions than the House—and that the frequently used device of "unanimous consent," by which the members agree in advance to limit speeches and vote at a certain time, serves every desirable need of the Senate. Finally, the protagonists argue that opposition to filibustering by some senators is largely insincere, since they do not hesitate to use the device when their own interests are threatened. The passage of the Civil Rights Act in 1957 under the existing rules and without any serious use of the filibuster has further weakened the hope for any major rules change in the near future.

## CONFERENCE COMMITTEES

Resolving conflicts between the two houses

A bill which passes both branches of Congress in identical form is sent to the president for signature. The Senate may, however, amend a House bill, the House may amend a Senate bill, and each of these actions occurs frequently. Unless one house will recede from its position and concur with the changes made by the other, a deadlock occurs which somehow must be broken. The device by which disagreements between the two houses on specific pieces of legislation are reconciled is the "committee of conference," appointed for each legislative measure in dispute. So frequent are these disagreements, especially on major legislative proposals, that the conference committee is a standard fixture of the American legislative process. From one-third to one-half of all the public bills, including virtually all of the important ones, have in recent years been referred to conference committees at the appropriate stage of their legislative careers.

The conference committee at work

The rejection by one house of the views of the other house on certain items in a bill or resolution under consideration is almost invariably accompanied by a request for conference. The request having been agreed to—and it is never refused—the presiding officer of each house names from three to nine members of his house to meet with those named by the other to attempt to reconcile the differences. By custom, the presiding officers name the chairman and ranking minority member of the standing committee which considered the bill, plus others from each side who have figured prominently in

the debate and who, typically, are also members of the same standing committee. The views of the majority of the chamber are always represented by a majority of the "managers" named to represent that house in the conference. The minority view, however, is always accorded some representation. The two sets of managers then meet and discuss the points at issue, seeking by compromise to arrive at something acceptable to both houses. Agreement must be reached under the rules by a majority of each group voting separately, so that the fact that one house occasionally names more managers than the other is of no consequence. Sometimes the task of reconciliation is easy and is performed in a few hours; sometimes it is difficult and requires days, weeks, even months to reach agreement. If no agreement can be reached, the bill fails or a new committee may be named to try again. Generally, agreement is reached and the proposals of the committee are accepted by both houses. It must be added that the rules and the customs of the two houses confer upon these conference committees an unexpected amount of power to determine the final form of legislation. The reports of conference committees are highly privileged in both houses and thus have the right of way over most other forms of legislative traffic. The reports of the committees must be accepted or rejected as a whole. They may not be further amended. Each house must take the dose compounded by the conference or go without any medicine. The deliberations of the conference committees are secret and unrecorded. They ordinarily hold no hearings and listen to no outside testimony. Finally, the bill—or those parts of the bill in dispute—which emerges from the deliberations of the committee may not resemble the view of either house and may, in fact, contain matters never before considered exactly in that form by either house. The conference committee is also an arena of continuous struggle between the two houses for legislative supremacy. The customary assumption that the Senate is predominant in conferences is not borne out by studies of these committees.

*Criticism of conference committee procedure*

The power of the conference committee thus partially to remake a legislative proposal and then to thrust it upon the two houses in an environment of "take this or nothing," with no opportunity for amendment, has attracted to this necessary device a great deal of criticism. Senator George Norris once characterized the conference committees as a third house of the Congress. The members of this "house," he said, are not elected by the people, keep no record of their work, and perform entirely in secret—but their product must always be accepted. Efforts to confine conference committees rigidly to the exact points in disagreement and only to those points have been made repeatedly but never with complete success. Recent revision of the rules, partly encompassed in the Legislative Reorganization Act of 1946, have made it easier to raise points of order against conference committee reports that go beyond the matters in dispute; but the committees, in practice, have much latitude. Another suggested method for reducing the influence of the conference committee is greater use of joint-standing committees of the two houses in considering legislation. This is on the theory that it is better to

prevent differences from arising than to reconcile them after the bills have passed both houses.

## PRIVATE BILL PROCEDURE

Private bills still consume much time of the House

More than 60 per cent of all the laws enacted by the eighty-fifth Congress were private laws. Although the Legislative Reorganization Act of 1946 took a long step in reducing the volume of this type of legislation, much still remains. The Act of 1946 banned bills for individual pensions, for building bridges across navigable streams, and for the correction of military records. In each case, administrative procedures were established to care for these matters. The Federal Tort Claims Act of 1946 also provided for judicial settlement of a number of types of individual claims theretofore processed by Congress. However, three main categories of private bills are still authorized and enter the Congress in great numbers; (*a*) claim bills not covered by the Federal Tort Claims Act; (*b*) immigration and naturalization bills dealing with specific individuals; and (*c*) land bills providing for issuing titles to individuals. The vast bulk of these private bills are handled in the House by two standing subcommittees of the judiciary committee: one handles claims, the other immigration and naturalization bills. A similar but not identical procedure is followed in the Senate.

## THE PROBLEM OF LOBBYING

The increase in interest-group activities

Interest groups and their legislative representatives have become an established feature of the American political landscape. Providing a kind of functional representation to the electorate, supplying the legislature with much necessary data, initiating countless proposals for public consideration, these groups undoubtedly render a unique service to democratic government. Their activities on the national scene are not, however, an unmixed blessing. Their information tends to be one-sided; their objective is usually economic gain; their methods are frequently devious; and their influence disproportionate to their numbers. Statesmen and students alike have been troubled by the problems of special-interest representation in the legislative process as the scope and scale of their operations have multiplied. Today more than 400 national organizations maintain more than 1000 paid agents in the national capital and spend uncounted millions of dollars to influence the course of legislation and the public attitudes which lie behind the legislation. In spite of numerous attempts to make the lobbyist a respected and indispensable adjunct to democratic lawmaking, the name is still an epithet and connotes some kind of wrongdoing. At least six major investigations of lobbying have been conducted in this century by American legislatures in an effort to deal with the real or alleged problems associated with the growth of interest-group activities. About three-fourths of the states have enacted laws designed to curb their operations and to disclose their objectives. None of these efforts has been

wholly successful and few of them have achieved anything substantial. In Washington, the matter has received intermittent attention over several decades, but the House of Representatives has typically stifled efforts at regulation initiated by the Senate. Not until 1946, in connection with the general reorganization of the Congress, were the two houses able to agree on a procedure for dealing with lobbying.

**The Regulation of Lobbying Act of 1946**

The system finally adopted by the Congress is based very largely on the practice of several of the states. The fundamental premise of the Regulation of Lobbying Act is that undesirable behavior by interest groups and their agents can best be controlled by publicity rather than by prohibition. Lobbyists, as defined in the law, are required to register with the clerk of the House and the secretary of the Senate and to disclose in their registration the association or individual by whom employed and how much paid. Quarterly thereafter, each registered lobbyist is required to file a statement of receipts and expenditures, including the purposes for which the sums were expended. Tabulations of these reports are published in the *Congressional Record* to apprise all interested persons of the facts. Furthermore, the law requires any organization which solicits or receives contributions to support its legislative activities to give annual public accounting of these contributions and the expenditures made from them. Failure to comply with the law may result in fine, imprisonment, or suspension of the privilege of lobbying.

**Results**

In practice, the registering and reporting provisions of this law have supplied the public with more significant information about the extent and scope of lobbying than has ever before been available. The enforcement of the law has, however, been embarrassed from the beginning by the uncertainties and obscurities in the law itself. In an effort to exclude organizations who lobby rarely or only incidentally to the regular and major purposes of the organization, the law covers only those whose "principal purpose" is to influence legislation. Many of the most energetic and extensive national organizations operating in Washington claim that the law does not apply to them because lobbying is not their principal purpose. Further, the Supreme Court has held that the law applies only to direct dealings with members of Congress and does not require reports on funds expended on propaganda directed at the voters.[3] The law, of course, does not in fact regulate lobbying and certainly was not intended to curb it. It merely brings certain types of information about lobbying out into the open where the public can, if it wishes, scrutinize it.

[3] As interpreted the Lobbying Act was declared constitutional by a majority of the Court in U. S. *v.* Harriss, 347 U. S., 612 (1954).

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# CHAPTER 14

# *The President and Congress*

"Presidential" and "parliamentary" democracies compared

The government of the United States differs strikingly from those of most other democratic nations in the world today in the relation between the executive and the legislature. In the parliamentary democracies (Britain, France, Canada, Italy, Sweden, etc.) the executive is inseparably yoked to the legislature. Prolonged disagreement or conflict between the two is impossible. The ministry or cabinet is drawn entirely or very largely from the legislature and remains in possession of the effective executive authority only so long as it commands the confidence of that body. Substantial disagreement results either in a new ministry or a new legislature. The parliamentary system is intentionally designed to guarantee harmony of the two central agencies of democratic government and to fix responsibility for the conduct of the government clearly and firmly upon the majority party or coalition of parties. The American presidential system, on the other hand, with its independently elected executive serving a fixed term and without power to dissolve the legislature, deliberately creates a gulf between the two branches and disperses responsibility for the conduct of national affairs. The American system suffers most when, as on numerous occasions in our history, the Congress has come under the domination of a party or a faction espousing a program quite at variance with that of the president or his party. Many students of comparative democratic institutions have, for these reasons, urged the greater merit of the parliamentary system. Few, if any, democracies established in the world since 1787 have copied this feature of the American system. Further, many American students and statesmen have recommended the adoption in this country of those features of the parliamentary system which tend to promote harmony between the executive and the legislature and to fix responsibility for public policy more clearly on the majority party.

Development of American presidency:

1. The view of the framers

The framers of the American Constitution would have made little sense out of the arguments of the twentieth century on the proper legislative role of the president. Steeped in the theories of Locke and Montesquieu, familiar with the colonial and state experience of gubernatorial-legislative dealings, frightened by the excesses of the legislatures, these statesmen contrived a chief magistracy that they hoped would be above the factionalism of representatives and equipped to deal firmly with their ambitions. The modern form of cabinet responsibility to the parliament had not yet clearly emerged in the British constitution. Parties in their modern form were unknown, and factional politics, the eighteenth-century equivalent of modern party politics, was repre-

hended. It was not executive domination or direction of the legislature that the framers feared, but legislative domination of the executive.

2. Washington to Jackson

For a few years after the establishment of the national government it seemed as if the relations between executive and Congress would evolve in about the same way as in England, where the modern cabinet system was taking shape. Alexander Hamilton, from his post as secretary of the treasury, strove skillfully to make himself first minister, Washington a sort of constitutional monarch, and the Congress a reviewing body for policies and measures formulated by the cabinet. This development was halted by the emergence of organized political parties. Hamilton's opponents rallied around Jefferson and Madison and, operating from the Congress, asserted the independence of the legislative branch and eventually wrested control even of the executive away from the Hamilton group. Jefferson as president maintained the appearance of legislative autonomy, although achieving executive direction in fact by intrigue and manipulation of his partisans in the Congress. When the presidency came into less skillful hands, presidential initiative in legislation subsided. Congressional dominance of policy formulation was strengthened also by the assumption by the legislature of practical control over the selection of the chief executive.

3. Jackson to Eisenhower

The development of the modern presidency begins with the Jacksonian era when legislative control of presidential nominations was swept away and the modern nominating convention emerged. This action removed the last obstacle to genuinely popular selection of our chief magistrate. The Jeffersonians and Federalists had already stultified the electoral college system by their organization of broadly national political parties. The selection of the president by popular and partisan processes paved the way for his emergence as a "tribune of the people" and encouraged him to assert his position as representative of the whole people against the sectional and local representatives of the Congress. Almost a century, however, was required to achieve the contemporary presidential position. The pull toward presidential leadership in the field of legislation, although erratic in force, has been persistent in direction. Chief executives learned that they and they alone were held accountable for the redemption of campaign pledges and for the realization in public policy of the programs to which they and their party had committed themselves. The fulfillment of these responsibilities demanded that the chief executive attempt to influence the Congress. Although Congress had meanwhile developed its own institutions of leadership, none of these sufficed to overcome its sectional and centrifugal tendencies. None of its institutional arrangements, further, achieved real co-ordination of the two houses. Furthermore, its preference for seniority as the major determinant of leadership tended to increase the likelihood that its leaders (typically from "safe" districts) could not rightly interpret the will of the nation. As Woodrow Wilson wrote in 1908:[1]

> The nation as a whole has chosen him [the president], and is conscious that

[1] *Constitutional Government in the United States* (New York, 1908), 68.

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.

Wilson's views remind us that the White House has also been occupied in this century by Theodore and Franklin Roosevelt, both of whom interpreted their responsibilities as did Wilson. All three of these men left an indelible impression on the office of president of the United States. To theirs must be joined the names of Abraham Lincoln and Grover Cleveland who, in their own ways and in an earlier age, added to the groundwork laid by Andrew Jackson. Today, national policy as expressed in legislation is a joint product of president and Congress. The chief executive has become also chief legislator.

Criticism of the modern presidency

The historical tendencies which produced the legislative position of the modern president have not been universally admired. The charge of dictator has been hurled at every one of the presidents who sought to direct the legislative process. And it certainly must be admitted that, whatever view the framers may have taken of the ultimate position of the president, there is little in the Constitution that foreshadows his contemporary role. Experience confirms also the view that much of what has been said about the president's legislative position depends, in fact, on the personality and ability of the individual who occupies the office. Presidents have achieved influence over the legislative process when they were able as well as willing to do so. Presidents have varied also in the vigor with which they have sought congressional support. Several presidents since Jackson have been content to defer to the Congress. There is a partisan complexion to this debate. Since the Civil War, the Republican party seems to have preferred for the highest office men who were likely to respect the prerogatives and autonomy of the Congress. The Democrats have tended to support avowed advocates of the view that it is the duty of the president by every fair means to influence, if not to direct, the legislative process.

Executive legislative relations not finally fixed

It seems clear that the relations between the president and Congress have not achieved their final form. The balance between the two is shifting and unstable and subject to the accidents of personality. The trend toward executive leadership in legislation has been persistent and unmistakable, but it has been achieved largely outside the formal constitutional arrangements and at the expense of traditional conceptions of separation of powers and checks and balances. American constitutional democracy has yet to work out a method for achieving harmony between these two great branches of our government.

## CONSTITUTIONAL BASIS OF THE PRESIDENT'S LEGISLATIVE ROLE

> 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. . . .—Art II, Sec. 3

The Congress and the president, although constitutionally separated, are not isolated one from the other. Despite the general injunction that "all legislative powers" are vested in the Congress, the president is expressly assigned several important powers and responsibilities in connection with the formulation and enactment of legislation.

1. Control over sessions of Congress

The Constitution confers a modest and relatively inconsequential power on the president to control the sessions of the national legislature. The power to adjourn sessions in case of disagreement has never been exercised and the power to call either or both houses into "extraordinary" or "special" session is rapidly falling into disuse. The Twentieth Amendment obviated the need for such sessions by changing the congressional calendar so that the Congress would be in session ready to receive the program and to act upon the appointments of a newly-elected chief executive. Almost the only present need for a special session would be a serious domestic or international crisis requiring immediate legislative action and arising in the fall or early winter.

2. Messages to the Congress

a. "State of the Union" message

The constitutional directive to the president to inform the Congress on the state of the nation and to recommend measures for its consideration has proved over the years to be of some consequence in influencing legislative behavior. The time, place, and manner of fulfilling this responsibility is discretionary with each president. It long ago became customary, however, for the president to transmit at the opening of each session of Congress a comprehensive statement of his views on all matters requiring legislative attention and on the kind of legislation which it ought to enact to meet each situation. Washington and John Adams appeared personally before joint sessions of the two houses to deliver their important messages. This practice, abandoned by Jefferson and his successors, was revived by Woodrow Wilson, and since Franklin Roosevelt has become standard procedure. The increasing utilization of radio and television broadcasting in our political life has enhanced the importance of these annual addresses. Today the "State of the Union" message of the president is an address to the people of America and of the world as well as to the Congress of the United States. It is a solemn occasion of state, and modern presidents have grasped the advantages that the spectacle offers for dramatizing their aims and policies. This appeal to the people is, in fact,

a procedure of increasing usefulness and importance in gaining congressional sympathy and support for the president's recommendations.

b. Other messages

In recent times the "State of the Union" message is followed in quick succession by the president's annual budget message—required by the Budget and Accounting Act of 1921—and by the economic report of the president—required by the Full Employment Act of 1946. Both of these messages, probably because of the statistical character of their contents, are invariably delivered in writing rather than in person. In such cases, the messages are actually read to the houses by their clerks and consequently do not capture national attention in anything like the degree that those delivered in person do. In addition to these, every modern president has sent numerous special messages to Congress at various times in any session. Ordinarily, these deal each with some special subject and are designed and timed to push some item on the president's legislative agenda a little nearer final passage. Sometimes these messages accompany reports embodying extensive investigations or studies by or on behalf of the executive branch. On unusual occasions the president will deliver a special message in person, for example, President Eisenhower in 1957 delivered in person his message on the troubled situation in the Near East even before his "State of the Union" message. This is especially true if the subject is of overwhelming importance or if the need for immediate congressional action is imperative.

Effects of the messages

The effect of the messages of the president upon national legislation is hard to measure. Congress is under no legal obligation to follow the president's lead It is free to act or not to act and, if it acts, to act in accord with or directly opposite to the president's stated wishes. The objective of the president himself is not always immediate legislative action in the form suggested. He may be using the message to stimulate public interest without desiring immediate action. He may, in fact, be willing to accept a more moderate form of action than he has outlined. He may be warning a foreign nation of possible American reaction to its prospective behavior. Whether the president succeeds in any or all of his stated or intended purposes depends on a number of factors unrelated to the messages. The constitutional duty to inform the Congress of his views has become an opportunity to convince both Congress and people of his wise leadership, but we must continue our analysis of the relations between president and Congress if we are to discover how or why he succeeds or fails in getting the Congress to adopt his suggestions.

3. Proposal of legislative measures

The Constitution directs the president to recommend specific measures for the consideration of the Congress. This might be construed as an invitation to the president to assume leadership of the legislative process. Not all of our chief magistrates have so regarded it, however, and the pattern of executive leadership established by Washington through Hamilton and by Jefferson was followed only by Jackson, Polk, Lincoln, and Cleveland in the last century and not completely even by them. In this century, however, Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, and Harry Truman have all aspired energetically to enhance the influence of the presidency.

President Eisenhower who was at first reluctant to press Congress has felt obliged to play a more and more active role in the legislative process. A large proportion of the major bills which crowd the calendars of a modern Congress originate in the executive branch. More and more commonly, messages are accompanied by or are shortly followed by bills designed exactly to achieve the president's desires. Although the Congress freely edits, amends, and modifies these measures, nevertheless at final passage many of them still carry numerous marks of their origin. Our chief executives now believe that they are expected to devote their major energies to devising the laws which Congress ought to pass and then trying to get Congress to pass them. When the time for a public reckoning occurs, every modern president has been anxious to exhibit an impressive record of legislative achievement.

4. Direction in the field of finance

Among the many areas of congressional concern, the national finances bring the president and Congress into the most intimate and mutually dependent relations. The Congress has never developed an effective agency of its own for attaining co-operation between the two houses or for formulating fiscal policy for the government as a whole. It has come, therefore, to depend entirely upon the initiative of the president in this field.

## THE VETO POWER

> Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President 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 . . . proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent . . . to the other house . . . and if approved by two thirds of that house it shall become a law. . . . 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 . . . shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives. . . .—Art. I, Sec. 7

The veto

Largely as a reaction against the concentration of power in the legislatures of the revolutionary state governments, the authors of our Constitution

endowed the president with one of his most impressive legislative powers: the power to veto bills and resolutions of the Congress. Although the president must proceed by suggestion and innuendo to obtain the approval of the Congress for what he wants, he is equipped to deal firmly and forthrightly with what he does not want. Despite the broad language of the constitutional grant, embracing as it does even resolutions and orders, the Congress through the years has carved out a small sphere of legislative authority free from presidential oversight by use of the concurrent resolution which it holds to be exempt from the veto. It has also with some frequency required the advance approval of one of its committees for certain types of executive action. At the same time, the Congress has probably surrendered more than it needed to by its own dilatory and complex procedures which expose a large share of its measures (those passed in the last few days of a session) to the absolute veto provided in cases where adjournment prevents reconsideration by the Congress of a vetoed measure.

**How the veto works**

When confronted by a bill or joint resolution, the president may constitutionally take any of four courses of action. (1) He may sign it, and it then becomes a law. (2) He may hold it for the prescribed time (10 days) and, if Congress is still sitting, it will become law without his signature. This is an unusual course for a president to adopt and it rarely occurs. But occasions have arisen when a president was unable or unwilling to make up his mind about a measure in the period. Some presidents have also used this procedure when they disliked certain measures but felt that a veto would be useless or unwise politically. (3) If Congress should adjourn during the 10-day period, the president may by inaction veto the measure. This "pocket veto" is absolute and does not require the president to make any explanation. Although some presidents, notably Franklin Roosevelt, have offered explanations of their decisions to the public or to the Congress, most presidents have welcomed the opportunity offered by the pocket-veto procedure quietly to kill a measure without explanations which may be embarrassing politically. (4) The president may veto the bill outright and return it to the proper house of Congress with his statement of reasons for disapproval. Such a course of action requires the Congress to reconsider its position on the measure in question and, if the required support of two-thirds of the members of each house can be mustered behind the measure, it may be repassed and become law without presidential signature.

**The use of the veto power:**

**1. Frequency**

Hamilton in *The Federalist* (No. 73) predicted that the veto would be employed cautiously and infrequently and that most presidents would use it too little rather than too much. He proved a good prophet, especially for the period prior to 1865. Since that time the veto has been used with increasing frequency and vigor. Not until Andrew Johnson did a president resort to the veto in defense of his constitutional authority and on only a dozen occasions in our entire history has it been used for this purpose. In fact, there were only 51 vetoes of all kinds by all of the presidents serving prior to Lincoln. The turbulent era of Reconstruction, accompanied as it was by bitter dis-

*To the House of Representatives:*

I am unable to approve H. R. 6645, to amend the Natural Gas Act, as amended. This I regret because I am in accord with its basic objectives.

Since the passage of this bill, a body of evidence has accumulated indicating that private persons, apparently representing only a very small segment of a great and vital industry, have been seeking to further their own interests by highly questionable activities. These include efforts that I deem to be so arrogant and so much in defiance of acceptable standards of propriety as to risk creating doubt among the American people concerning the integrity of governmental processes.

Legally constituted agencies of Government are now engaged in investigating this situation. These investigations cannot be concluded before the expiration of the 10-day period within which the President must act upon the legislation under the Constitution.

I believe I would not be discharging my own duty were I to approve this legislation before the activities in question have been fully investigated by the Congress and the Department of Justice. To do so under such conditions could well create long-term apprehension in the minds of the American people. It would be a disservice both to the people and to their Congress. Accordingly, I return H. R. 6645 without my approval.

At the same time, I must make quite clear that legislation conforming to the basic objectives of H. R. 6645 is needed. It is needed because the type of regulation of producers of natural gas which is required under present law will discourage individual initiative and incentive to explore for and develop new sources of supply.

In the long run this will limit supplies of gas which is contrary not only to the national interest but especially to the interest of consumers.

I feel that any new legislation, in addition to furthering the long-term interest of consumers in plentiful supplies of gas, should include specific language protecting consumers in their right to fair prices.

DWIGHT D. EISENHOWER.

THE WHITE HOUSE, *February 17, 1956.*

SOURCE: *Congressional Record*, Feb. 20, 1956, p. 2524.

sension between the president and Congress, witnessed the first really vigorous exercise of the veto power, if one excepts the administration of Andrew Jackson. Jackson, however, while he achieved a great deal of notoriety from his vetoes, actually vetoed only 12 acts of Congress during his eight years as chief executive. The number of vetoes in recent decades has averaged 15 to 25 a year.

**THE USE OF THE VETO—1789-1960**

| *President* | *Total Vetoes* | *Regular* | *Pocket* | *Vetoes Overriden* |
|---|---|---|---|---|
| Washington | 2 | 2 | 0 | 0 |
| Madison | 7 | 5 | 2 | 0 |
| Monroe | 1 | 1 | 0 | 0 |
| Jackson | 12 | 5 | 7 | 0 |
| Tyler | 10 | 6 | 4 | 1 |
| Polk | 3 | 2 | 1 | 0 |
| Pierce | 9 | 9 | 0 | 5 |
| Buchanan | 7 | 4 | 3 | 0 |
| Lincoln | 6 | 2 | 4 | 0 |
| Johnson | 28 | 21 | 7 | 15 |
| Grant | 92 | 44 | 48 | 4 |
| Hayes | 13 | 12 | 1 | 1 |
| Arthur | 12 | 4 | 8 | 1 |
| Cleveland | 414 | 304 | 110 | 2 |
| Harrison | 44 | 19 | 25 | 1 |
| Cleveland | 170 | 42 | 128 | 5 |
| McKinley | 42 | 6 | 36 | 0 |
| Roosevelt, T. | 82 | 42 | 40 | 1 |
| Taft | 39 | 30 | 9 | 1 |
| Wilson | 44 | 33 | 11 | 6 |
| Harding | 6 | 5 | 1 | 0 |
| Coolidge | 50 | 20 | 30 | 4 |
| Hoover | 37 | 21 | 16 | 3 |
| Roosevelt, F. | 631 | 371 | 260 | 9 |
| Truman | 250 | 180 | 70 | 12 |
| Eisenhower | 181 | 79 | 102 | 2 |

2. Scope

More important than the increase in numbers of vetoes since 1865 has been the change in presidential attitude on the scope of the veto power. Until Jackson, the veto power was used not to express presidential disapproval of the merit or wisdom of an enactment, but to question the constitutionality of it or to halt it because of technical errors. Jackson, however, employed the veto to stifle measures that he felt were unwise, even though he conceded they were constitutional and were properly drawn. Since 1865 our presidents have tended to follow Jackson rather than Washington, Jefferson, Polk, and the others. The veto is used now to express disapproval of any kind and to any degree of policy or legality, of technicality or of procedure, on major issues and on minor ones. In 1956, for example, President Eisenhower vetoed a bill (The Natural Gas Act) the contents of which he approved because he did

not like the lobbying activities accompanying its passage. The result has been to make the president a more potent factor in legislation than he was during the greater part of the past century.

3. Influence

One should not infer that in recent decades the veto has been employed loosely and without adequate grounds. On the contrary, it is typically employed reluctantly and only after considerable reflection. Presidents have, simply, come to rely more certainly on their own views of the needs and aspirations of the people. Furthermore, the output of the Congress has increased markedly in the past several decades and thus more bills and resolutions come under presidential scrutiny. Many presidential vetoes have been widely popular and few presidents have suffered serious election reverses because of them. Furthermore, relatively few presidential vetoes have been overturned by the Congress. In practice, therefore, the direct, messaged veto tends to become very nearly an absolute veto.

Reform of the veto power

Periods of acute tension between the president and Congress have produced criticism of the presidential veto. Some have proposed that the veto power be weakened by requiring only a simple majority to repass a vetoed measure and others have proposed strengthening the power by requiring the support of two-thirds of the entire membership, rather than of those present, to repass a measure over presidential objection. Neither of these suggestions is currently receiving any serious attention. The most serious contemporary criticism of the veto power is that it does not extend to items or parts of appropriation bills. Most states have equipped their governors with item-veto power in reviewing appropriation measures in an effort to achieve more responsibility and sobriety in the spending of public funds. Their experience has commended this reform to many observers of and participants in the national scene. As matters stand, the president has no effective veto power over appropriations. Confronted with one of the major annual appropriation bills passed by the Congress, the president must accept it or risk exposing one whole program of public services to extinction for lack of funds. Since he has to have appropriation authority to conduct the government or any part of it, he must accept whatever Congress sends to him. His discretion is reduced further by the fact that such bills ordinarily reach him quite late in the session, sometimes after Congress has adjourned, and thus there is no opportunity to repass a necessary appropriation, even one more nearly in line with the president's desires. Congress is, therefore, free to add sums to the appropriations suggested by the president without on many occasions adding to the national tax program to meet the obligation thus incurred. In addition, the argument runs, Congress has repeatedly added sections to appropriation bills which dealt with other aspects of public policy or administration and which it knew the president would disapprove if presented to him in any other way. These "riders" have been condemned by almost every president as an attempt to evade the constitutional system of checks and balances. Presidents Franklin Roosevelt and Harry Truman both asked the Congress to grant to

The item veto

them the item veto possessed by most governors, largely on the grounds that they should be allowed to strike down these "riders."

Opposition to the item veto

The reasons offered by the opponents for their refusal to accede to presidential requests have been: (1) That such a grant would add greatly to the president's legislative power, allowing him, for example, to discriminate among the appropriations to favor his friends and punish his enemies, and that the balance of power has already been tipped too far in the presidential direction; (2) that experience in some states indicates that the effect of such a veto might well be to increase rather than to decrease legislative irresponsibility, that is, legislators would fall into the easy habit of pleasing everyone by voting extravagant sums, knowing that the executive would veto them, and thus transferring to him the onus for so doing; (3) that, in view of the fact that the president already has the power to recommend the budget, if he could veto congressional additions to his suggested program, then Congress would be completely powerless in the field of national finance.

One of the difficulties in the debate over the presidential item veto is the continuing disagreement among statesmen and scholars alike as to the best way to accomplish this reform. Some, including the two presidents who recommended it, have held that an item veto could be conferred by the Congress by writing the pertinent language into each appropriation bill. Others, including several senators, have held that a constitutional amendment is the only valid way to achieve the change. President Eisenhower in 1955 selected a novel way of handling the "rider" problem. He announced in signing a major appropriation bill that the government needed the money but that he intended to ignore certain provisions of the bill that he believed were unconstitutional. A final observation on the item-veto debate; it seems quite unlikely that the Congress would enact the appropriations in their present form if the president's veto power were extended to items. The proponents of an appropriation that might draw presidential censure would certainly be sagacious enough to combine it with an item that the president could not or would not veto.

## EXTRACONSTITUTIONAL DEVICES TO ACHIEVE PRESIDENTIAL INFLUENCE IN LEGISLATION

The role of the president as a lawmaker is by no means confined to the powers and duties specifically mentioned in the Constitution. If one is to gain a real appreciation of the power and influence of the American presidency, it is necessary to consider the numerous practices devised by energetic presidents outside the Constitution and now accepted parts of the repertoire of our chief magistrate.

1. Threat of veto

Influence may be exerted not only by using the veto power but by threatening to use it. If a president allows congressional leaders to believe that he will veto a particular measure if it is presented to him in the form contemplated, he may be able to achieve changes before final passage and thus influence the final form of the measure. By indicating that he will veto

a given measure in any form, he may be able to prevent its passage and even its introduction. Theodore Roosevelt, in many respects the father of the modern presidency, was the first president who admitted using this technique extensively and also the first to proclaim its use publicly. Since Roosevelt, the threat of veto has become a familiar tool of presidential intervention. No chief executive in modern times has employed it as extensively as Harry Truman. It is necessary to add that on several occasions, notably in the Truman era, the threat has only succeeded in stiffening the resolution of the Congress to proceed on its intended course regardless of presidential hostility.

2. Use of patronage

Every president has at his disposal a very large number of favors which he may dispense to legislators and their friends and supporters. The discriminating distribution of these favors is perhaps the chief behind-the-scenes source of presidential influence in Congress. These favors range from administrative benevolence toward certain interests in the home district of the congressman to the appointment to national office of persons recommended by him. The distribution of public offices in this way is ordinarily referred to as patronage, although in the broad sense the word may be used to embrace any type of favor granted for political or partisan advantage. The extension of the civil service merit system of appointment to the national public service has gradually reduced the number of positions that any president may fill by partisan methods but there are still several thousand posts that change occupants with each change in the political character of the national administration. Virtually all of these positions require senatorial confirmation and this procedure encourages congressmen to urge the claims of their friends to posts in their own states or districts. By withholding such appointments from fellow partisans in Congress, the president is in a strong position to bargain for their support in his legislative policies. These matters are rarely handled by overt threats or definite bargains, but members of Congress are not indifferent to the advantages which accompany the position of supporters of presidential policies. This particular extraconstitutional device is obviously most effective in the first months of a term of a new president. Once most of the posts are filled by a new administration the president's bargaining power is reduced. The fact that presidents have typically experienced a declining influence on the Congress as their terms have progressed partially reflects this. Presidents have customarily striven to get as much of their programs as possible out of the first Congress they deal with and before all the job plums have been distributed.

Jobs for friends, however, are only one kind of presidential favor which can ease the political life of a legislator. As we have noted, constituent pressure brings every member of Congress into daily communication with agencies of the executive branch. The presidential blessing opens the doors of powerful administrators to congressional importuning much more readily than might otherwise be the case. At any rate, a legislator who incurs outright executive hostility is likely to find many obstacles in the way of serving his and his constituents' interests the way he would like to serve them. A congressman, on his own, has relatively few favors to bestow.

3. Personal conference and persuasion

Still another source of presidential influence is personal conference. While it is true that in our system the president does not appear on the floor of either house of Congress to participate in the debate, this does not prevent his achieving the same objective privately in consultation with members of the Congress. Every modern president's visiting list has contained the names of numerous legislators, and he has felt bound to spend a fair portion of his working hours persuading, cajoling, threatening, and pleading with legislators for support. From early in his first administration, Franklin Roosevelt made systematic use of a Monday morning conference with the leaders of his party in the Congress. This practice has been continued by his successors. Eisenhower meets with them on Tuesdays. At these meetings the president receives reports on the status of legislative business and of his measures in particular and indicates his wishes concerning the matters pending before the Congress. Presidents also call into conference the influential members of a committee that is considering one of their measures and by whatever arts of persuasion they can command try to get the committee to act favorably on their requests. It is not at all unusual for members of Congress during the course of debate to indicate that they have recently discussed the pending issue with the president and to indicate to their colleagues what the executive's views are. And these views, so reported, are likely to be influential.

4. The "presidential lobby"

The president does not have to carry the immense burden of dealing with Congress alone. He has under his direction what is sometimes called "the most powerful lobby in Washington." A large share of the work of persuading and of explaining administration policies and programs is, in fact, carried on by the executive departments and agencies. Virtually every one of these great organizations maintains close and continuing relations with the Congress. The secretaries, bureau chiefs, and other top administrators spend much time appearing before committees, conferring with party leaders, and interpreting their programs to individual members of the legislature. Each of the great departments and many of the independent agencies have a staff of officials who do little else than co-ordinate departmental or agency relations with the Congress. The president himself ordinarily assigns one of his own administrative assistants to keeping track of his dealings with the Congress, and in the Bureau of the Budget another group of officers undertakes to review all bills emanating from the executive branch and to screen out those not consistent with current presidential policy. All of this activity is clearly indispensable to the effective operation of our national government but it is also widely criticized as an abuse of administrative discretion, especially when views are urged upon the Congress that the Congress is reluctant to adopt.

5. Cultivation of popular support

None of the devices thus far described is quite so useful to the president as energetic and articulate public support. Members of Congress are most sensitive to the views of their constituents, and if the president is strong with the voters he is likely to be successful with the Congress. Realizing this, presidents court public approval in every way they can. Some, of course, are

much more adept at it than others. All have unequaled opportunities for publicity. We have noted how the messages and addresses to Congress are more and more commonly directed beyond the Congress to the people who support it. To these may be added the many addresses that presidents are called upon to give on occasions of state and to various influential groups throughout the nation, the consultations which are held with influential leaders of opinion, letters addressed to private individuals but intended for public consumption, "fireside chats" on the radio, and carefully prepared television programs. All of these are and can be used to build and maintain a public opinion that Congress dare not ignore.

The presidential press conference

"The White House," said Theodore Roosevelt, "is a bully pulpit." The "gospel" as there expounded is carried to the nation today largely by means of the press, the radio, and television. Special mention is therefore appropriate of the use of these media by the president to achieve the support he needs. The presidential press conference is one of the most effective contemporary devices of presidential politics. The practice of meeting regularly with the representatives of the press was initiated by Woodrow Wilson. He abandoned it for the prepared release when the United States entered World War I. President Harding revived it but proved unequal to the task of handling direct questions skillfully and required the advance submission of all questions in writing. This practice reduced the publicity value of the conference but it was continued by Coolidge and Hoover. Franklin Roosevelt cast the press conference in its modern guise. He had a shrewd sense of publicity and achieved the maximum in public sympathy and understanding through his semiweekly conferences. Presidents Truman and Eisenhower have attempted to continue the Roosevelt practice but each of them has met the press less regularly and less frequently. President Eisenhower has allowed his press conferences to be photographed for the cinema and television. Franklin Roosevelt also pioneered in using the radio to reach the American people, largely through his famous "fireside chats," and proved one of the most skillful of modern practitioners of radio broadcasting. Truman and Eisenhower have attempted to follow the Roosevelt pattern but neither has been as effective. President Eisenhower has been recruiting public support by short television programs.

## THE PRESIDENT AS PARTY LEADER

Presidency strengthened by role of president as party leader

The relations of the president with the Congress and the effective employment by him of the constitutional and customary techniques described are colored and influenced by the fact that the president is the leader of his party. The emergence of the president as a party leader, contrary to the intentions of the founding fathers, has been one of the major contributing factors to the contemporary legislative role of the chief executive. Chosen as a party candidate to head a government operated under a party system, the president surrounds himself with advisers of his own party, consults chiefly with the

leaders of his party in Congress, unites to his the interests of his fellow partisans in the legislature through patronage, and depends primarily on the loyalty and support of the members of his party in Congress for the realization of his legislative program. The president represents his party throughout the nation as his colleagues in Congress cannot. The country looks to him, much more than to the Congress, to fulfill the pledges made by his party. Under these circumstances, he is bound to claim, ordinarily successfully, direction of the party's national machinery. He selects, while still a candidate, the chairman of the national committee and frequently reviews the appointments of other dignitaries in the party apparatus. He suggests and sometimes even dictates planks in the national platform on which he expects to campaign. He is consulted and his views may be decisive on all important questions of national party policy.

Influence on Congress from party leadership

As leader of his party, the president derives an additional lever to pry his program out of the Congress. He succeeds to a very great extralegal power to reward and to punish individual legislators of his party. He can exert great influence in such party decisions as the distribution of campaign funds among the states and representative-districts, the issues that will be played up in the campaign, the local and state leaders who will be aided and encouraged. As the chief campaigner of his party, the president can take the stump or not in aid of his congressional colleagues. He can endorse the congressman to the voters of his district or withhold his approval. All of these courses of action are likely to influence the election prospects of a member of the legislature.

Party complexion of the Congress influences presidential success

It should be apparent from this discussion that the president's relations with the Congress, including his influence on legislation, depend very largely upon the party situation in the Congress. Confronted with a Congress dominated by the opposite party, few of the techniques of presidential leadership are likely to prove effective in winning congressional support. In these circumstances, and they have been all too frequent, the president's role as party leader is rather an embarrassment than an aid to his legislative aspirations. The presidency is the best prize of the American party struggle and the congressional leaders of the rival party are always strongly tempted to resist presidential advice in order that by discrediting his influence they can capture his office. The most favorable situation for presidential influence is for the White House to be newly occupied after an impressive election triumph which includes a strong majority in both houses of Congress. Midterm congressional elections have almost invariably diminished presidential influence. Commonly, the president's party loses ground in these elections and even when his party retains control, its legislative members do not feel quite so keenly the ties with a chief executive who has not been in the campaign himself. Furthermore, as we have noted, the job patronage will be all dispensed. The lowest point in the ebb and flow of presidential leadership is when it becomes clear that the president will not seek re-election. Both party and congressional leaders then seek identification with a new leader.

## CONTROL OVER THE PRESIDENT BY CONGRESS

Constitutional controls

The continuing gain in the influence of the president upon the Congress and the impressive array of constitutional and customary devices for making this influence effective should not be interpreted to mean that, as between the two branches, influence flows only in one direction. Congress in its turn is capable of bringing powerful influences to bear upon the president. Few of the powers of the president can be exercised without money, and for every dollar of executive branch expenditure, the president must depend on the Congress. If the president shares the legislative power of the Congress, the Congress, as we have seen, shares the executive and administrative power of the president. He and his deputies are ordinarily obliged to make an accounting of their stewardship in connection with the annual review of appropriation requests and his departments and agencies are periodically brought under critical scrutiny by the investigating arms of the Congress. The organization of the executive departments and commissions, the powers entrusted to them, and the procedures used by them are all dictated in more or less detail by congressional enactments. Except in the field of foreign affairs, the president must rely upon Congress for virtually every major change in public service, program, or policy. Even in the field of foreign affairs, the president must get senatorial approval of his treaties, congressional assent to war, and congressional approval of any financial support required for any international understanding. Finally, in extreme circumstances, the president can be impeached and removed from office by the Congress.

Extra-constitutional controls

Congress is not powerless either in those day-to-day dealings between the two branches that have developed outside the formal constitutional specifications. If senatorial confirmation of his appointments gives the president an opportunity to reward his congressional supporters, it also results in congressional selection of the incumbents in many executive branch posts. If the position of party leader endows the president with substantial influence upon the electoral success of his party members in Congress, it also requires him, more often than not, to accept and even to support members of his party whom he may find personally obnoxious and who may very well be working to accomplish the defeat of his most cherished ambitions. If he can cultivate popular support by the press, radio, and television, congressional committees have shown themselves quite adept at capturing national attention with these devices, commonly when they are investigating the national administration. Furthermore, Congress is so organized that even if the president achieves great influence over the rank and file of his party, a few hostile leaders can still defy him with impunity and effectively frustrate legislative action.

In sum, directing our national government is jointly the responsibility of the president and the Congress. Neither is in a position completely to dominate the other. The realization of public opinion in national action requires genuine co-operation between the two. When this harmony does not obtain,

the country pays a high price for the deliberate gulf our forefathers created between the two branches.

## PROPOSALS FOR IMPROVING LEGISLATIVE-EXECUTIVE RELATIONS

Adopting the parliamentary system

The boldest way to achieve greater harmony between Congress and president would be to abandon our traditions and frankly adopt a parliamentary system. This has been repeatedly proposed by well-meaning analysts of American institutions. One needs only to recite the major changes involved to understand how visionary and impractical such a scheme is. For better or worse, we have evolved a set of democratic institutions utterly unlike those elsewhere in the free world and nothing short of national catastrophe is likely to alter them so drastically as this.

Borrowing from the parliamentary system

Most of the proposals for reforming our presidency have sought rather to graft onto our existing arrangements certain practices associated with or inspired by the parliamentary system. The least drastic of these proposals is that the heads of executive departments be allowed to participate in Congressional debate or to answer questions on the floor of either house but not to vote on legislation. Presidents Taft and Wilson favored a cabinet drawn largely from among members of Congress who would retain their seats while serving in the executive branch. Some have proposed that the president be allowed to dissolve Congress and call for a new election when his program is not being favorably considered. Some, including a prominent Senator (Fullbright), have suggested that when the mid-term elections return a majority of the opposition party, the president ought to resign. Several proposals have been designed to regularize and formalize dealings between president and congressional leaders. One suggestion is that a legislative council of the chairman of the major standing committees be organized to confer with the president and work out a collective legislative program. Another is to create a special commission of members named by Congress and president to screen all proposed legislation and consult directly with the president. A grand cabinet has been proposed that would add the majority party policy committees to the president's cabinet.

Few of these suggestions are currently receiving much consideration. It is most unlikely that anything of worth can be borrowed from the parliamentary system without scrapping some fundamental feature of the presidential system. In fact, the parliamentary system itself is not nearly so popular as once it was. When combined with a multi-party system, as in France, it seems unable to produce a firm and stable executive. Meanwhile, presidents and congressional leaders go on quietly working out procedures for co-operation that tend to preserve the independence of each branch.

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# CHAPTER 15

# The Presidency

> The executive power shall be vested in a President of the United States of America. He shall hold his office during a term of four years. . . .—Art. II, Sec. 1

The president the most powerful elected executive in the world

The president of the United States of America is, without question, the most powerful elected executive in the world. He is at once the chief formulator of public policy as embodied in legislation, leader of a major political party boasting thousands of functionaries and millions of adherents, chief architect of American foreign policy and spokesman for this nation before the world, director of one of the most gigantic administrative machines ever created, numbering over 2,000,000 civilian employees organized into 65 separate jurisdictions and expending more than $70 billion annually, commander-in-chief of more than 2,000,000 men in uniform equipped with the latest weapons of offense and defense, and ceremonial head of the government of the United States. And his power and responsibility are increasing. It may seem ironic that a nation so mistrustful of officialdom and so certain of the corrosive effects of political power should construct such an office. However, the president falls heir to these powers by the peaceful suffrages of his countrymen and he holds them for but a short time.

The Constitution a poor guide to present office

Given the great apprehension of American revolutionary leaders of executive power, it is difficult to believe that the modern presidency is a deliberate creation of the founding fathers. The major decision of the Constitution-makers was that we should have a single executive. The remaining characteristics of the office are largely the product of practical political experience. Like the British cabinet system, it is not to the sagacity of a few solons but to the pragmatic adjustments to time and circumstance by ordinary statesmen that we owe the institution of the American chief executive. To no part of our American system is the Constitution so poor a guide. Custom and usage have wrought the office far more than constitutional prescription.

## THE OFFICE OF PRESIDENT

The third-term problem resolved

The decision of the constitutional convention for a four-year-term with no limitation on the number of terms any individual might serve turned out to be largely unacceptable to many of our nation's leaders. The first president was willing to serve only two terms, although he probably could have been re-elected. The third president, Jefferson, declined to serve more than eight years as a matter of principle. He steadily opposed indefinite re-eligibility of

the chief executive. Madison and Monroe both bowed out after eight years and Jackson, who undoubtedly could have been re-elected, vigorously supported Jefferson's precedent. Thus an "anti-third-term tradition" was established which lasted until 1940. The tradition had been questioned by Grant and some of his supporters and actually assailed by Theodore Roosevelt, but never set aside until Franklin Roosevelt successfully sought a third term in 1940 and then a fourth term in 1944. Franklin Roosevelt's departure from tradition called down upon his head a great storm of criticism and abuse and encouraged his opponents staunchly to reassert the tradition. Soon after his death and following a Republican victory in the congressional elections of 1946, an amendment to the Constitution limiting presidential tenure was laid before the states. The forces pushing the amendment finally achieved ratification by the thirty-sixth state (Nevada) early in 1951. The Twenty-second Amendment makes it hereafter impossible for any person to serve as president of the United States for more than 10 years.

## THE POWERS AND DUTIES OF THE PRESIDENT—A GENERAL VIEW

Constitution not clear on executive powers

Exactly what powers the Constitution confers or the framers intended to confer upon the president is anything but clear. Controversy has buzzed around this subject throughout our national life and the clamor has by no means abated. Demonstrably, the framers wanted firmness and vigor in the executive without autocratic domination. To make the executive the servant and not the master of the subjects has ever been the goal of constitution builders, and the history of tyranny testifies to the almost insuperable difficulties in the road of such endeavors. Probably the framers were content to allow time and experience to decide the major contours of executive authority in the American system. Perhaps this would have happened in any event, no matter in what language they had finally depicted the presidential power. They did, however, fall below the high standard of lucidity and consistency which characterizes most of our Constitution when they came to describe this high office. On the one hand, *all* executive power (not the power *herein granted* as in Article I) is conferred upon the president; and on the other, specific powers of an executive character—to appoint officers of the United States, to be commander-in-chief, to grant pardons, to make treaties, to take care that the laws be faithfully executed—are also conferred. Furthermore, the Congress is endowed with the power to make "all laws which shall be necessary and proper for carrying into *execution*" the powers granted to it. Does the Constitution mean that the president has some executive powers in addition to those specifically mentioned? Does it mean that the president must look to Congress to provide not only the means but the authority to act when, for example, rebellion, industrial violence, depression, national catastrophe, or war threatens the stability of our institutions and the happiness and security of our people?

Two conceptions of executive power:

If we allow for variations in detail, two competing conceptions of presidential power emerge from the debates engendered by circumstance, personalities, and constitutional obscurity. Hamilton, Madison (before he became president), Jefferson (while he was president), Jackson, Polk, Lincoln, Cleveland, Theodore Roosevelt, Wilson, Franklin Roosevelt, and Truman have supported the view that presidential power is broader than the specific items enumerated, that it is not completely dependent upon express congressional authorization, and that, although it should be carefully confined normally, the existence of a critical or emergency situation justifies the most vigorous and independent exercise of all of the forces and authority that the chief magistrate can command. In this view, the Congress, the courts, and the people of the time have generally concurred. Theodore Roosevelt best expressed this view when he labeled the president "the steward of the people" and insisted that it was not only his right but his duty to do anything that the national welfare required unless it was expressly prohibited by the Constitution or the laws.[1]

1. Broad view

1. Limited view

President Taft, in *Our Chief Magistrate and His Powers*[2] sums up the opposite view:

> The true view of the executive function is, as I conceive it, 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 specfic 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 interest.

To this view, many of our chief executives, the Congress, and the courts have also intermittently subscribed.

Precedents for the broad view of presidential power

The exponents of the broad, rather than the limited, view of presidential authority largely molded the office of the presidency as it stands today. They established most of the significant precedents. They inspired their successors. They also stimulated the vigorous assertion of the opposite view and invited reaction and retreat when they thrust too far beyond the ground already occupied. The landmarks in the evolution of presidential power are:

1. Washington's proclamation of neutrality in the Franco-British war.
2. Jefferson's decision to acquire the Louisiana territory, although he believed there was no constitutional authority for such an acquisition.
3. Jackson's resolute annihilation of the Bank of the United States despite its strong congressional support, and his strong determination to prevent the secession of South Carolina.
4. Lincoln's assumption of virtually plenary power to deal with the southern "rebellion" with or without congressional authorization, in consequence of which and without express grant of Congress he raised armies of volunteers, appropriated money from the Treasury, suspended the execution of the writ of habeas corpus,

[1] *Autobiography* (New York, 1913), 388-389.
[2] (New York, 1916), 139-140.

issued the Emancipation Proclamation, and restored states occupied by the Union armies (many of his actions were, to be sure, later validated by the Congress).

5. Grover Cleveland's determination to repress industrial disorder with national troops in the Pullman strike despite the opposition of the governor of the state concerned.

6. The decision of the United States Supreme Court in the Neagle case (*In re* Neagle, 135 U. S. 1, 1890), in which it defined "executive power" to embrace power not specifically granted by statute or expressly mentioned in the Constitution.

7. Theodore Roosevelt's dramatic intervention in the coal strike of 1902, and his assertion of the "stewardship" conception of the presidential office.

8. The Supreme Court's decision in the Myers case supporting the view that the president's removal power is unrestricted.

9. Movement of national troops into Little Rock by President Eisenhower to enforce a national court order against the wishes of Governor Faubus of Arkansas.

Precedents for the limited-power concepts

The Congress and the courts have provided precedents for the more limited view of presidential power. The Senate by resolution denounced Andrew Jackson's actions against the Bank of the United States as unconstitutional—a resolution which it later expunged. Lincoln's "dictatorship" was bitterly assailed from Capitol Hill and so were the actions of the Roosevelts and Wilson without, however, any official action. Andrew Johnson's attempt to assert Lincoln's powers without Lincoln's skill brought him within one vote of removal from office. The Supreme Court has declared against presidential assumption of power on several occasions. Lincoln's suspension of the writ of habeas corpus was held to be beyond the presidential power when the Court could find no "actual and present" necessity for its suspension in Indiana in 1864 (*Ex parte* Milligan, 4 Wallace 2, 1866). The most recent Court declaration on this weighty subject represents a rebuff to presidential claims. President Truman in 1952, in an effort to halt a threatened steel strike which he claimed would jeopardize our national defense effort, ordered the secretary of commerce to seize the steel factories and to operate them. The President based his order on his power as commander-in-chief of the armed forces and the "executive power" of the president, admitting that no congressional authority for such an action could be found. When the steel companies sought to prevent the seizing of their properties, the Court held (Youngstown Co. *v.* Sawyer, 343 U. S. 579, 1952) that in the absence of congressional authorization and in view of the fact that Congress had clearly intended not to grant such authority, the constitutional provisions governing executive power and power as commander-in-chief conferred no such power on the president. The lawmaking power, said the Court, is entrusted to the Congress alone in "both good and bad times."

Steel seizure case

From this cursory review it is clear that no precise delineation of presidential authority is possible. Periods of vigorous assertion of presidential power have been followed by periods of congressional or judicial enforcement of limitations on presidential ambitions. On the whole, however, the office has become stronger with the years and the broader view of presidential authority has been the more enduring one.

## POWER AND RESPONSIBILITY TO ENFORCE THE LAWS

. . . he shall take care that the laws be faithfully executed, . . .
—Art. II, Sec. 3

Law-enforcement power

The presidential oath of office obligates him to protect and defend the Constitution and the Constitution itself solemnly enjoins him to enforce all national laws (by implication this includes treaties and ordinances). A great many of the laws of Congress expressly confer upon the president or upon his subordinates in the executive branch specific powers of enforcement. Some laws confer powers which may be exercised at his discretion or at the discretion of his subordinates. The sum of these constitutional and statutory grants is the enforcement power of the presidency at any given time.

Presidential assistance in law enforcement

For discharging this lofty responsibility the president has virtually the entire facilities of the executive branch. One particular agency, the Department of Justice, is charged with general responsibility for law enforcement, notably of those criminal laws the enforcement of which is not specifically assigned by the Congress to some other national agency.

Suppression of disorder

The president has also under his command the armed forces of the nation and even those of the states if and when called into national service. The president's power to employ military force in the enforcement of national laws has steadily increased through the years as a result of congressional action and of presidential initiative. It now seems clear that such power is not wholly dependent on congressional authorization nor, in cases of internal disorder, on the invitation of the governor or legislature of any of the states. If the president can validly assert that the disorder threatens the performance of any national function, the safety of national property, or the flow of interstate commerce, he can intervene with force to restore order whether the governor or the state legislature wants him to do so or not. In its famous decision supporting this view, the Supreme Court said, "The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted to its care." (*In re* Debs, 158 U. S. 564, 1895) The use of national troops in Little Rock in 1957-58 is the most recent action illustrating the scope of presidential authority. In this case, a reluctant president felt compelled to intervene with force when the Governor of Arkansas called out the state militia to prevent compliance with a national court order to desegregate Central High School in accordance with a plan for admitting Negroes carefully worked out by the local school authorities. The President asserted that "the powers of a state governor may not be used to defeat a valid order" of a national court.

Limitations on enforcement power

As awesome as the president's responsibility for law enforcement may be and as broad as some presidents and courts have found his power to be, in practice there are numerous restraints, legal and political, upon his ability to fulfill such responsibilities or to exercise such powers. Whatever reservoir

of enforcement power may be found from time to time to exist in the constitutional mandates unsupported by specific statutory authorization, normally the president must look to Congress to prescribe his exact authority to enforce any given law, for the procedures by which such enforcement is to be achieved, and for the penalties which may be invoked against transgressors. Whether or not he is dependent upon Congress for the power, he is certainly dependent upon it for the personnel and supplies, that is, the money, to do the job. The president is also dependent upon the quality of the national public service, most members of which he did not hire and, in practice, cannot fire. The lieutenants upon whom the president must largely depend for the enforcement of any law are not, in every case, bound to him and to him alone by an unbroken chain either of authority or of communication. The president inherits not only most of the people upon whom he must depend, but the organization of these people into bureaus and departments with all the institutional traditions that these organizations have accumulated through the years. Most presidents have found that they are supporting these institutions and the men who occupy them much more often than these are supporting the president.

Executive rule-making powers and its limits

The power of enforcement necessarily entails large powers of discretion. In applying general laws to particular circumstances it is essential that enforcement agencies decide what the law means in these varying circumstances. From this necessity has flowed an increasingly broad stream of presidential direction in the form of executive orders, ordinances, rules, and regulations which are in plain fact laws made by the executive. Congress has repeatedly, especially in the last half-century, established national policy in very broad terms and assigned to the executive the power to achieve these broadly stated objectives by uttering detailed rules and regulations. This discretionary power, essential as it is to effective law enforcement, is limited by congressional power to recall the delegation or to spell out the details, contrary to presidential policy. On the other hand, the presidential directives frequently come under the scrutiny of the courts. Under these circumstances, the courts may confine presidential authority to the standards included in the statutes and by constitutional safeguards of personal liberty and fair play.

Law enforcement and public opinion

The effectiveness of law enforcement depends finally on the attitude of the public toward the law in question. The many futile attempts to enforce the Volstead Act of 1919 (the law designed to give effect to the Prohibition Amendment) illustrate the great difficulties in the path of presidential fulfillment of his constitutional duties in the face of a hostile or lethargic public opinion. Furthermore, a great and growing number of national policies set forth by Congress and president cannot really be achieved by enforcement in the sense of seeking out and punishing violators. They can be achieved only by methods that are essentially educational and noncoercive. The needy aged, for example, cannot be properly cared for by a program based mainly upon uncovering those wrongfully receiving public support. The "enforcement" responsibilities of the president in these types of programs can be fulfilled only with adequate public understanding and support.

## POWER TO APPOINT AND REMOVE PUBLIC OFFICERS

> . . . 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.—Art. II, Sec. 2, cl. 2

Scope of the president's appointing power

That the president is solely responsible in law and in the polling booth for the conduct of the far-flung national administrative machinery is a truism of American law and politics. His ability actually to direct the administration is dependent upon a variety of personal, political, and legal conditions. One of these is the scope of his power, legally and practically, to hire and fire the individuals who compose the national civil service and the cadre of national officers who guide them. The Constitution clearly circumscribes the president's appointing authority of individuals in the executive branch in several ways. Except for members of the diplomatic service and judges of the Supreme Court, the officers to which presidential appointment may extend must be created by the Congress. The authority to create an office carries with it the power to establish the duties of the office and the qualifications of any individual who may occupy it. Congress has, in practice, set forth qualifications of many kinds, geographical, political, personal, and professional. Congress, furthermore, may vest the appointment of "inferior" officers—and, by and large, the Congress has decided which are "inferior" offices—in department heads as well as in the president. In fact, the Congress has assigned the appointment of more than 85 per cent of the 2,300,000 civilian employees of the executive branch to department and agency heads and has limited the freedom of the department heads by the requirements of the merit system. The direct appointing power of the president now extends to about 25 thousand national officials. These 25 thousand, however, include virtually all of the top-ranking posts in the official hierarchy—secretaries, assistant secretaries, some bureau chiefs, commissioners, agency directors. The president's hand does, therefore, reach those who appoint the others and who give them their orders and assign them their duties. Many students of the American system, it is necessary to add, feel that the president's appointing power is still too extensive and that if he were confined to appointing only two or three hundred of the major executives this would be ample for the purpose of achieving the kind of directional authority that he ought to have.

One of the most important limitations of presidential authority is the prescription that the Senate must be consulted on his selections. Except in

Senate participation in appointments

those few cases where Congress has vested the power in the president alone (e.g., the officers of his own immediate staff), all presidential nominations must be confirmed by majority vote of the Senate before appointment may be made. In practice, the Senate has tended to divide presidential appointments into two classes with respect to the character of its participation. It has been customary for the Senate to approve, almost as a matter of course, the president's choices for the highest positions in the executive branch. It has come to be recognized that the heads of the great departments and agencies are the principal advisers of the president—and that he bears direct responsibility for all of their acts and relies upon them to direct the agencies in keeping with his policies. He should, therefore, have the widest range of freedom in selecting them. Although there has been serious opposition on several occasions to the president's choices, only eight nominees for cabinet posts have ever been rejected. The president's designees for subordinate executive posts, for Supreme Court judgeships, and for diplomatic posts are contested somewhat more frequently, but even these are normally not seriously challenged. In skirmishes with the Senate over appointments, the president is fortified by his power to make recess appointments without senatorial approval. A few presidents have used this procedure to keep men in office of whom the Senate disapproved.

Recess appointments

"Senatorial courtesy"

There is another class of presidential appointment, however, about which the Senate is not nearly so deferential. Several thousands of the posts filled by presidential appointment are not major executive posts but are for positions in the field service (regional offices outside Washington, D. C.). These include collectors of customs, certain positions in government corporations, U. S. district attorneys and marshals, judges and court functionaries of the lower national courts, and thousands of postmasters who, though technically under civil service merit regulations, must still be confirmed by the Senate. The appointment process for these positions is normally dominated by partisan considerations and the sum of these posts constitutes the job patronage of any given administration. Senatorial confirmation operates to enforce upon the president the nominees of his fellow partisans in Congress. For those posts located in states where at least one of the senators is of the same party as the president, that senator's approval of the appointment is almost mandatory. The Senate has a deeply-rooted tradition that it will rally to the support of any senator in the circumstances described and reject any nominee not acceptable to him. This tradition is called "senatorial courtesy" and is typically invoked by a senator declaring that the nominee is personally obnoxious to him. For posts which are located in congressional districts, the members of the House of Representatives of the president's party expect to be consulted and this practice too may be enforced upon the president by the senators. In states not represented by a senator of the president's party, the president is obliged for party reasons and by tradition to rely on suggestions from the state party leaders, typically the national committeemen. In sum, the president has not much real freedom in making appointments to the vast majority of

posts which he is entitled by law to fill. The actual selections are made by party supporters in the House and Senate and by party leaders in the state where the jobs are located. We have noted that the skillful use of this patronage aids the president in gaining support for his legislative program from the Congress.

The president's removal power

The ability of the president to get the vast national administrative service to march to his tune is also influenced by his power to dismiss those who disobey his orders, impair the efficiency of the service, resist his program, or neglect their responsibilities. Since the Constitution is otherwise silent on the dismissal of government officers, does the president have this power or does the Senate share responsibility for dismissal as it does for appointment? Can the Congress by law prescribe the procedure for firing employees and officers of the national government? This problem arose early in the life of the Constitution and while many of the framers were still alive. Madison persuaded his fellow statesmen of the time that the removal power, insofar as officials in the executive branch are concerned, was part of the executive power and of the power to enforce the laws which the Constitution entrusted to the president alone. On another occasion, however, Madison did say that Congress might create certain types of offices—not wholly executive in character—for which some different removal procedure might be established. Until 1867, the Madison doctrine of presidential removal authority was generally accepted in law and practice. In that year, however, and as an incident to the acrimonious contest between Congress and President Johnson, the Congress passed over his veto a Tenure of Office Act which provided that the president could not remove without the concurrence of the Senate any official whose appointment the Senate had confirmed. This measure was partially repealed in 1869 and wholly expunged in 1887, but another act passed in 1876 established the same rule for postmaster appointments. Several decades later, President Wilson, probably deliberately, violated the Postmaster Act and called the constitutionality of the limitations into question. The postmaster—later his estate—carried the matter to court and in 1926 the Supreme Court, through the mouth of Chief Justice (former President) Taft, declared in favor of the Madison doctrine that the removal power belonged to the president alone and could not validly be restricted by the Congress in the manner described (Myers *v.* United States, 272 U. S. 52).

The Myers case

The case of the independent commission

The decision of the Court in the Myer's case, because of its sweeping assertion of presidential power, caused immediate concern for the tenure of officials appointed to commissions, such as the Interstate Commerce Commission, which Congress has endeavored to exempt from direct presidential domination. This aspect of the problem was brought to the court for judgment about a decade later when, in 1933, President Roosevelt dismissed William S. Humphrey, a Republican member of the Federal Trade Commission, whose policies did not agree with those of the President. In doing so, the President made no pretence about adhering to the statutory requirements concerning

the tenure of members of the "independent commission." In this case (Rathburn *v.* United States, 295 U. S. 602, 1935), the Court went back and picked up the other part of the Madison doctrine and held that Congress had the power to establish agencies in the executive branch which were not exactly executive in function and that it could clothe these with a certain immunity from presidential direction. The independent regulatory commissions are of this type, said the Court, and Congress was acting within its power when it specified the terms ("inefficiency, neglect of duty, or malfeasance in office") upon which commissioners may be removed.[3]

Removal of "inferior officers"

The power of the Congress to prescribe dismissal procedures for the "inferior officers" has long been recognized. Since 1883, Congress has gradually extended the protections of merit system tenure to these offices, and for all practical purposes the president's power to dismiss merit system employees is sharply restricted. In the absence of legislative provision, however, the president may remove inferior officers at his discretion.

Congressional removal power

Congress has frequently and by a variety of methods attempted to remove or to force the president to remove officers of the executive establishment. These efforts suggest that the president's authority in removal must be viewed also from a different vantage point: the role of Congress in removals. In 1924, the Senate by resolution called upon President Coolidge to request the resignation of his secretary of the navy in consequence of his relation to the naval oil reserve scandal. The President strongly repelled the notion that this was any of the Senate's concern and took no official recognition of the request. Congressional investigations have frequently, however, forced the resignations of officials by exposing questionable policies or practices in their agencies. A good example of this was the resignation of Attorney General McGrath during the Truman era. By statutory provision, one officer of the government, the Comptroller General of the United States, may be removed from office before the end of his term only by joint resolution of the two houses of Congress. The rationale of this law, as set forth in an act of 1945, is that this officer is peculiarly a subordinate of the legislature. The easiest and least debatable procedure available to the Congress for ousting administrative officers is to abolish their positions. In 1952, for example, the Truman Wage Stabilization Board was abolished because of congressional disapproval of its findings in the steel-labor controversy and a new board with similar functions created. Another method tried by the Congress is to specify qualifications for positions which the incumbents do not possess. The Congress has also tried, unsuccessfully, to deny salaries to particular administrators of whom it disapproves. Finally, the Senate has sought, also unsuccessfully, to recall confirmations of appointments of officials.

[3] More recently, the Court has held that the president is not free to remove for personal or partisan reasons a member of a commission to which the Congress has assigned adjudicatory functions even though the Congress did not expressly protect the members of the commission against such removal. Wiener *v.* U. S., 2 L. ed. 2d 1377 (1958).

## POWER AS COMMANDER-IN-CHIEF OF THE ARMED FORCES

> The President shall be commander-in-chief of the Army and the Navy of the United States and of the militia of the several States, when called into the actual service of the United States. —Art. II, Sec. 2, cl. 1

Effect of military responsibilities on the office of president

Among the many factors which have contributed to the aggrandizement of the office of president, none is more important than his military and diplomatic responsibilities. The three presidents—Lincoln, Wilson, Franklin D. Roosevelt—who piloted this nation through its major wars extended the scope of presidential authority beyond any other holders of the office. In this century especially, wars both hot and cold have centered responsibility for the peace and safety of the nation more firmly in the presidency than has been true in any other era save that of the Civil War. The security of this nation depends in great measure upon the maintenance of a firm military posture of readiness at home and upon the skillful operation of our diplomacy abroad. In both of these areas of governmental activity, the president is uniquely in the focal position. The country looks to him rather than to Congress or courts to save the day.

"War powers" of the president

The constitutional basis for the president's military authority (his diplomatic responsibilities will be discussed later) is the assignment to him of the position of commander-in-chief of the forces. If to this is added his constitutional responsibility for law enforcement, we have virtually the entire legal framework upon which has been erected the towering structure of what Lincoln called the "war powers" of the president. Until Lincoln's day, it was quite generally assumed that the duty of commander-in-chief vested the president with purely military powers, such as to deploy the armed forces, to order their internal management, and to appoint and dismiss their officers. It was recognized that the president could, if he chose, take active, direct, and personal command of the troops in the field, but it was hoped by many that he would never be tempted to do this. Lincoln regarded his constitutional duties as including far more than this. He was obliged, he said, to save the nation and to suppress insurrection and as commander-in-chief he must do whatever was required to serve those ends. Lincoln did ask the Congress subsequently to ratify most of his acts, which the Congress did. The presidents charged with the conduct of the two world wars of this century have assumed that Lincoln's view of presidential power to deal with rebellion is also applicable when the country is fighting a foreign enemy. Franklin D. Roosevelt, for example, in a message to Congress in 1942 dealing with the Emergency Price Control Act, invited the Congress to take action to stabilize wages and prices but, he said, "in the event that the Congress should fail to act, and act adequately, I shall accept the responsibility and I will act." "The President," he went on to say, "has the powers, under the Constitution and under congressional acts, to take

measures necessary to avert a disaster which would interfere with the winning of the war." President Roosevelt also created numerous emergency agencies by executive order and without express congressional sanction. Under the color of his power as commander-in-chief he also ordered the wholesale detention and relocation of Japanese residents (citizens and aliens) of certain western states.

The "cold war" and presidential authority

The "cold war" of the present era has stimulated the application of the Lincolnian doctrines to hostile situations where no war has been formally declared, as in Korea. Our obligations under the United Nations charter can, of course, be cited as adequate legal grounds for assignment of American troops to Korea without express congressional approval. The deployment of American troops as "technical assistants" to the French-native forces in Indo-China was a presidential decision unsupported by United Nations resolution or specific congressional enactment. The Steel Seizure case described above represents a setback for the most sweeping assertion of the authority of the commander-in-chief, but the power of the commander to deploy American troops anywhere in the world is still widely accepted. President Eisenhower, however, has usually tried to associate Congress with any major decision to commit American troops abroad as in the Formosa crises in 1955 and in 1958 and the Mid-East crisis of 1957. In summary, the extent of the power of a president when acting as commander-in-chief is mainly undefined, but that it is considerable no one now doubts.

## THE PARDONING POWER OF THE PRESIDENT

> . . . and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.—Art. II, Sec. 2, cl. 1

Scope of the pardoning power

The power to exempt individuals from the punishment ordained for the offenses of which they have been convicted is one which has been associated with the chief executive in Anglo-American law for many centuries. The framers of our Constitution simply borrowed the practice from England. It should be noted that the president's power extends only to individuals convicted of national crimes and that it may not be used to veto congressional convictions resulting from impeachment. The pardoning power has come to embrace the power to diminish the punishment, for example, by commutation of sentence, or to delay its application by reprieve, as well as to cancel it entirely.

Amnesty

A special form of pardon, *amnesty,* is a sort of blanket pardon extended to numbers of persons who, without necessarily having been convicted individually, are widely believed to have violated national law. Amnesties may be declared under certain circumstances by act of Congress but the usual method is by presidential proclamation.

## INSTITUTIONS OF PRESIDENTIAL LEADERSHIP—THE CABINET

Need for presidential assistance

The sum total of the powers and responsibilities of the President of the United States is a crushing burden of work and care. It is almost too big a job for any mortal being. Two of the last seven presidents (Harding and Franklin D. Roosevelt) have succumbed under the tremendous strain while still in office, and a third (Wilson) was stricken with paralysis and emerged from the presidency broken in body and spirit. The life of a fourth (Coolidge) was undoubtedly shortened by his presidential anxieties. The present incumbent (Eisenhower) has been stricken twice with circulatory disorders. Strange as it may be that men willingly seek such an office, it is stranger still that they are able to bear up under the stresses and worries of it and to perform in it as well as they have done.

It should be obvious to any thoughtful student that the president cannot do all the things he is supposed to do or carry all the weight of affairs he is required to carry without help. However solitary and self-contained the office of president may seem to be in law and in the eyes of the throng, the president, himself, is quite dependent upon his assistants, high and low, for the effective discharge of his responsibilities. It is not too much to say that the quality of presidential assistance and the organizational arrangements through which it is brought to the aid of presidential decision are major determinants of presidential success. More than this, they make it possible for one human being somehow to fill the presidency.

Origin of the cabinet

Among the institutional arrangements for presidential assistance none is more interesting or less helpful than the cabinet. The office of president was designed by the fathers of the American Constitution with great misgiving that any man could be found to whom could safely be entrusted such power and responsibility. Many proposals were made to share presidential burdens with a council of some kind. In fact, there had been proposals for an executive council of the heads of the four national executive agencies during the confederation period. None of these proposals were ever adopted. The cabinet, as we know it, grew up outside the Constitution and unknown to the law. President Washington looked first to the Senate to share some of his burdens and to offer him timely advice and then to the Supreme Court. He was rebuffed by each of them in turn. And, finally, when the House of Representatives discouraged the appearance of his departmental heads in the midst of their deliberations, he was forced to turn in upon the resources of the executive branch. Washington came to rely entirely on his own subordinates, the heads of the four executive departments, for advice and assistance and thus the cabinet was born. Hamilton's effort to model the institution into an agency of collective responsibility somewhat like the later British model was unsuccessful. Throughout the decades the cabinet has remained a purely advisory body.

As the years have passed, the traditions and customs of the cabinet have

become more and more settled. These settled traditions, however, concern the membership, the relative rank of the members, and the formalities of the weekly meeting. Few decisive traditions have been established regarding the purpose of the cabinet, the subjects of its deliberations, or the regard that should be given to its decisions. Cabinets have been and are now whatever the president chooses to make of them. Some presidents, Pierce, Buchanan, and Harding, for example, consulted their cabinets at every turn and ordinarily acted upon their recommendations. Others have ignored their cabinets. Jackson, preferring to lean upon personal friends and political aids, discontinued cabinet meetings altogether. Lincoln is reported to have polled his cabinet on a critical issue of the day and finding all opposed to his own opinion, nevertheless decided in its favor. Wilson and Franklin D. Roosevelt leaned lightly on their cabinets; they rarely submitted any major policy questions to the meetings. The following passage from the most recent and most comprehensive study of the operation of the executive branch ever made states rather exactly the modern position—or lack of it—of the cabinet.[4]

The cabinet is what the president makes it

> The members of the cabinet are the primary advisers to the president. He is free to select them, to decide the subjects on which he wishes advice, and to follow their advice or not as he sees fit. The cabinet as a body, however, is not an effective council of advisers to the president and it does not have a collective responsibility for administration policies. That responsibility rests upon the president. The cabinet members, being chosen to direct great specialized operating departments, are not all fitted to advise him on every subject.

Influences on cabinet appointments

It might well be asked why the cabinet has developed the way it has. Surely a president could only strengthen his position and lighten his cares by sharing some of his responsibility with the cabinet, by leaning on them for advice and guidance, and by utilizing more fully the very considerable administrative and political talents which every cabinet contains. Furthermore, the senatorial power of confirmation provides no great barrier to cabinet unity and loyalty. The Senate has accorded unusual freedom to the president to make his own selections. The answer to the question appears to be that, although the Senate has left the president largely free to make his own appointments, the political traditions of the nation have not left him free to gather around him a group of advisers upon whom he can certainly depend for loyal support. When a modern president comes to choose his cabinet he is obliged to take account of many factors other than personal loyalty and dependability. Most presidents have felt that the cabinet must be an instrument of party harmony and that, therefore, the various factions and regions that are influential in party councils must be represented in it. The men and groups over whom the president climbed on his way to the nomination have got to be

[4] *Report to the Congress by the Commission on Organization of the Executive Branch of the Government,* "General Management of the Executive Branch" (Washington, D. C., 1949), 17-18. One cannot repress the notion that this passage was written by the chairman of the commission, former President Herbert Hoover.

placated in the interests of presenting a united front to the people and a strong claim upon the party's followers in Congress. In some instances, the managers of the successful candidate have even promised cabinet appointments to some men in order to win their support in the party convention.

Cabinet not fitted to share presidential burdens

Most presidents have tried to make their cabinets as broadly representative as they can, with some one from the West (usually to head the Department of the Interior); someone from the South; someone from the group they are trying to detach from the other party (Eisenhower's appointment of Martin Durkin, the Democrat leader of an A. F. L. union, for example); someone of the Catholic faith; someone from labor, from agriculture, and from industry. The aspirations of almost every major group in the body politic are recognized in some way by the cabinet selections. Under these circumstances, a president is surrounding himself with men and women whose loyalty to him and enthusiasm for his program are not always whole-hearted. Thus, when a president calls his cabinet together for the first time he will discover as he looks around the table, men whom he did not know at all until a few days or weeks ago, men whom he has every reason to distrust, men with whom he will never be able to agree on any matter of fundamental policy. Only here and there will a familiar face of a true friend and well-wisher appear. It is for these reasons that many presidents have preferred to seek advice elsewhere and to confine cabinet discussions to questions of party policy or to anecdotes and trivia.

Cabinet qualifications

It should not be supposed from what has been said that presidents are utterly indifferent to the competence, administrative or technical, of the individuals appointed to cabinet position. The attorney general is always a lawyer; the secretary of the treasury is frequently a financier; the secretary of agriculture is a member of some agricultural organization. Perhaps an increasing proportion of individuals are selected for their special knowledge and experience of the matters with which their departments deal. In the main, however, these qualifications are secondary in importance to the ones already discussed.

Efforts to improve the cabinet

The first modern effort to enhance the value of the cabinet was initiated in 1954 by President Eisenhower. He established in his own office a secretariat for the cabinet charged with preparing agenda for meetings and following-up on decisions taken. It is too soon to determine whether this effort will succeed.

## THE EXECUTIVE OFFICE OF THE PRESIDENT

The most effective institutional arrangement for lightening the president's load and helping him to get through his daily chores is a product of the last two decades. It is the staff assistance provided through the Executive Office of the President. This institution is a product of the first of the two great studies of this generation of the operation of the executive branch of the

national government: the Report of the President's Committee on Administrative Management (1937).[5]

The creation of the Executive Office of the President

Until well into this century, the president relied almost entirely on the departments for bringing to him timely reports, carefully conceived recommendations, answers to the questions propounded by his visitors, his correspondents, and his legislative colleagues, and estimations of the future. His own staff included only a private secretary to handle his visiting list, his mail, and his directions, some assistants to help in processing the mail, and an executive clerk to direct the various employees of the White House. Through personal contacts, cabinet meetings, and directives, the president tried desperately to co-ordinate and give direction to the movements of the growing complex of agencies which comprise the executive branch. This responsibility added to his other cares impelled him to labor far beyond the capacity of most persons. The first major device for equipping the president to take a broad, superdepartmental view of his responsibilities was the Bureau of the Budget, created in 1921. Although placed at first in the Treasury Department, this Bureau nevertheless became a tool of presidential direction and its director the major financial adviser to the president. In 1928, the number of secretaries to the president was increased to three and the work of his office compartmentalized into correspondence, reception of visitors, economic research, legislative matters, and press relations. His purely ceremonial military aides were replaced at this time by distinguished officers able to advise the president on grave military questions. The tremendous expansion of governmental services and staff incident to combatting the depression engulfed the president in a new flood of papers, people, and programs demanding his personal attention. "The President needs help," said the Committee on Administrative Management in 1937. The president should have at his command a staff of assistants who can be his eyes and ears and bring to him the data necessary to inform his judgment. This staff, said the Committee, should consist of men "in whom the president has personal confidence and whose character and attitude is such that they would not attempt to exercise power on their own account." Furthermore, the Bureau of the Budget should be brought directly into the presidential entourage and with it the major personnel agency of the government, the Civil Service Commission, and the major planning agency, the National Resources Board.

Components of the Executive Office:

1. The White House office

Pursuant to these recommendations and under the Reorganization Act of 1939, the modern Executive Office of the President was created by Executive Order (8248) in 1939. Under the roof of the Executive Office was established the White House office, embracing the personal secretaries and newly-created assistants to the president and their staffs. Under President Eisenhower, the White House office now consists of approximately 300 employees, the most

[5] The Report of this committee is entitled *Administrative Management in the Government of the United States* (Washington, D. C., 1937). The other study is that by the Hoover Commission and its recommendations may be found in *The Hoover Commission Report on Organization of the Executive Branch of the Government* (New York, 1949).

important of whom are a press secretary; a correspondence secretary; an appointment (calendar) secretary; a special legal counsel; military aides from the three armed services; an executive clerk; special assistants dealing with legislative relations, speech writing, "cold war" planning, national-state relations, and national defense; a secretary to the cabinet; and a chief-of-staff directing the activities of all of the others in the office. President Truman made a practice of holding daily conferences with his chief lieutenants in the White House office at which time the day's duties were reviewed. The President gave directions to each man and received from each advice on the upcoming matters of the day. President Eisenhower seems to rely heavily on his chief-of-staff to co-ordinate all of his aides of the White House staff.[6] These men, in both administrations, have been the presidents' own selections and have had a compelling influence on what and whom are brought to the attention of the "boss." All except the most influential men in national life who set out to capture the president's ear end up by seeing one of his assistants.

2. Bureau of the Budget

The Bureau of the Budget was transferred from the Treasury Department to the Executive Office by executive order and its functions expanded to embrace not only fiscal policy but general administrative management in the executive branch. Its function of screening all departmental and agency proposals for legislation was broadened and strengthened at the same time. The present Bureau, with its 1000 employees, is the key planning agency for the nation's finances, and because of its proximity to the chief executive himself is able to exercise a profound influence on all departmental programs and policies, as these must be supported by adequate financing.

In lieu of the reorganization of the Civil Service Commission into a single-headed personnel agency and its transfer to the Executive Office as proposed by the committee, a Liaison Office for Personnel Management was created in the Executive Office. This has never functioned effectively, however, and is now moribund. Instead, the chairman of the Civil Service Commission now also serves as presidential adviser on personnel matters. The National Resources Board, retitled the National Resources Planning Board, was also transferred to the Executive Office. After an energetic but controversial history it was killed by the Congress in 1946.

3. Council of Economic Advisers

The Full Employment Act of 1946 added a new unit to the president's office when it created the three-man Council of Economic Advisers. This agency was and is charged with keeping its fingers on the pulse of the American economy, advising the president on the state of the nation's economic health, and preparing periodic reports for him to submit to the Congress on

[6] For an "inside" account of the workings of the White House office under President Eisenhower see R. J. Donovan, *Eisenhower, The Inside Story* (New York, 1956).

The chief-of-staff system used by President Eisenhower has attracted a great deal of criticism (largely congressional) to the chief-of-staff, Sherman Adams, on the grounds that he was really a deputy president. Mr. Adams was finally forced to resign in 1958, when an investigation by a House Committee exposed certain questionable practices by him.

the subject. The Council represents national acceptance of the idea that the president is the chief manager of the nation's economy and is expected to keep us prosperous.

4. National Security Council

As an outgrowth of the struggle for unified direction of the defense forces and of the strategy of the nation, two important cabinet committees were created and practically, although not formally, made a part of the executive establishment. The National Security Council and the National Security Resources Board, established in 1947, were designed to improve the ability of the president to co-ordinate military and diplomatic policies and military mobilization policies and industrial and resources programs. The staff that services the National Security Council is, for all practical purposes, part of the Executive Office of the President. In a move to strengthen the Council and to make sure its decisions were really implemented by the various departments, a new unit was added in 1955, the Operations Co-ordinating Board. This Board consists of deputy or assistant secretaries of the departments and agencies on the Council and is also served by a secretariat operating from the Executive Office.

5. Office of Defense Mobilization

The chairman and staff of the National Security Resources Board were, in 1953, consolidated with the director of defense mobilization into the present Office of Defense Mobilization. The Board itself was abolished at the same time. The present office now serves as the principal planning agency for all matters relating to current and future efforts to prepare the American economy for war.

During World War II an office for Emergency Management created in the Executive Office proved an invaluable framework for the operation of the temporary civilian war agencies charged with control of production, manpower, prices, and wages.

Executive Office grows in usefulness

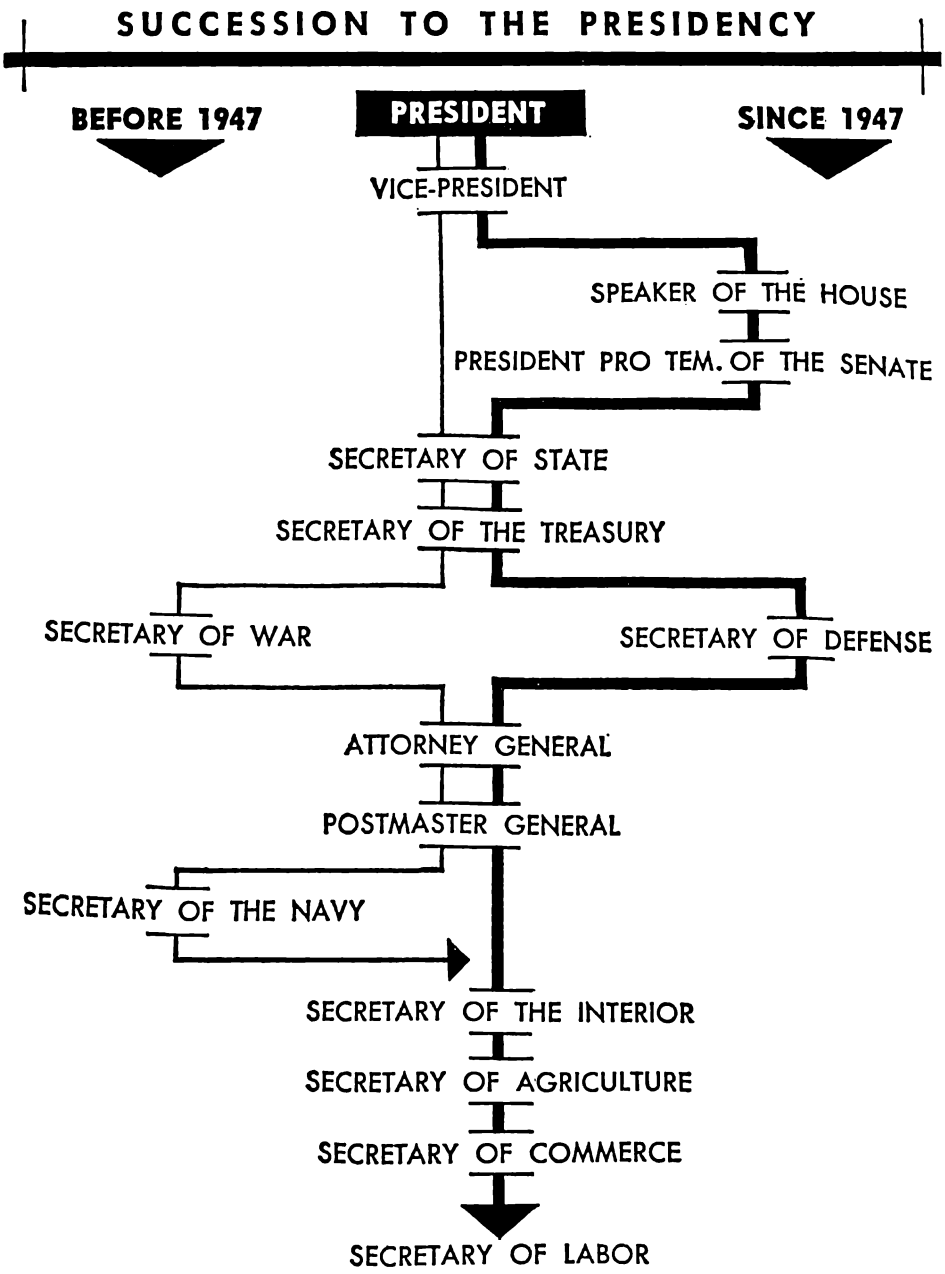
The new Executive Office has seemed so exactly to fit the needs of the times that it has grown steadily in importance and utility in the past decade and a half. Surrounding the president, as it does, with a "palace guard" of devoted servants and multiplying by several fold his ability to breast the waves of reports, orders, problems, and advice rising from the bureaus, offices, and agencies of the vast administrative sea, it provides the most effective support to the president of the United States. The Office rose to its greatest test when with President Eisenhower thrice stricken by disabling illness, it continued to function vigorously and without serious challenge as the President's effective deputy.

## THE VICE-PRESIDENCY AND PRESIDENTIAL SUCCESSION

Office of vice-president

The vice-president of the United States has no constitutional function except to preside over the Senate and to assume the office of president in the case of the death, resignation, removal, or disability of the incumbent. As presiding officer of the Senate he is not a member of that body, has no vote

except when a tie occurs, and participates in the deliberations only informally, if at all. As heir-apparent to the presidency, he is an executive officer of the government potentially rather than actually. Since 1836, the only occasions upon which the vice-president has succeeded to the office of president have been the result of the death of the president. Seven presidents have died in office and a like number of vice-presidents have assumed the presidency. No president has resigned; none has been removed. No president has been in-



capacitated to such an extent and for so long a period as to lead to the assumption of his duties by the vice-president. Such a transfer was, however, seriously discussed when Garfield lay dying for two months, stricken by an assassin's bullet, when Wilson suffered a paralytic stroke that held him in bed for weeks, and when Eisenhower had a heart attack in the fall of 1955, and a mild "stroke" in the fall of 1957. Eisenhower's illness, in fact, precipitated a long and manful effort to find some kind of statutory remedy for the situation in which the president alone is really the only judge of his own disability. No statutory formula to resolve this anomaly has as yet been found agreeable to both the White House and the majority in Congress. As of this moment (1960), the matter is regulated by a pact entered into by President Eisenhower and Vice-President Nixon and announced on March 3, 1958. By its terms, Mr. Nixon is to become Acting President in case of presidential inability until the inability is ended. If the President himself is unable to communicate his wishes to the Vice-President, that official may make the determination himself after "appropriate" consultations.

The role of the vice-president

The rise of the party system, the passage of the Twelfth Amendment providing separate voting for president and vice-president, and the rarity with which presidents have dropped the reins of power have combined to make the office of vice-president relatively insignificant. The result is that candidates for this office are not selected with the same care as presidential candidates. Many worthy and experienced statesmen have, in fact, refused to be considered for the nomination. The candidates are in practice selected by the presidential candidate himself to balance the ticket, that is, to appeal to regions and interests with whom the presidential candidate is not identified. The vice-president has, in consequence, proved hard to fit into the chain of command or the framework of responsibility in the executive branch. Although it would appear reasonable that the vice-president be kept informed of the policies and plans of the administration, Calvin Coolidge was the first vice-president regularly to attend cabinet meetings. This custom has by now become fairly well established. The cabinet meeting, however, is not the most effective institutional device for keeping the vice-president informed. A succession of vice-presidents, Garner, Truman, Barkley, and Nixon, selected from the Senate, have uncovered new uses for the office. These men proved valuable intermediaries between the president and the Congress. Furthermore, Nixon has been used with effectiveness as a deputy of the President in international affairs. He has travelled thousands of miles over the world presenting the policies of his superior to statesmen, diplomats, and "average" citizens. Perhaps the vice-presidency may come to share the legislative burdens of the president and aid in bridging the gulf between the two branches or to serve as a roving general ambassador of the United States.

Arrangements for presidential succession

There is no assurance at any given moment that there will be a vice-president to assume the presidential duties. Vice-presidents may also die, resign, be removed, or become incapacitated. The Constitution authorizes Congress to provide for this contingency by "declaring what officer shall then act

as president." The most recent legislation on this subject, the Presidential Succession Act of 1947, arranges the matter as indicated in the chart on page 276.

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See also the references at the end of Chapter 14.

# CHAPTER 16

# *The Organization and Procedures of the Executive Branch*

## THE NATURE AND IMPORTANCE OF ADMINISTRATION

Administration and the American system

Just as the characteristic activity of the Congress is legislation, that of the executive branch is administration. Governmental administration is the attempt to realize in practice the policies established by Congress and the president. The spirit of the American system of government is that public policies will be determined by elected representatives of the people, although it may be necessary to employ nonpolitical technicians to carry them out. However, the line which separates policy determination from policy execution is neither precise nor stable. Many laws and executive orders leave a great deal of discretion to the technicians; many technicians are able to exert powerful influence upon the formulation of the laws and orders. The chief of the national administration faces both ways—in collaboration with Congress he is policy determiner, and in collaboration with the executive agencies he is policy executer. The Congress on its part does not confine its attention to policy alone; it is constantly involved in administration. Thus, in practice, there is a large twilight zone between the two spheres of governmental activity in which administration and legislation are inseparably intertwined. That policy in our system of government should be determined by politically responsible officials who must account to the voters for their conduct represents, therefore, both an aspiration that must be earnestly sought and an achievement that has largely been realized.

Importance of administration

The importance of administration in the vitality of the American system of government has only recently thrust itself upon the awareness of the American people. As a people we have tended to assume that legislation is the prime corrective of all ills of the body politic. We have a greater penchant for passing laws about things than almost any other people on earth. Only in the past half-century have we been gradually brought to the realization that passing wise laws, as difficult as that is, is easier than having them economically and effectively administered. Many of us still do not appreciate that the laws are no better than their administration. What is more, there are many problems, foreign and domestic, that cannot be solved by legislation, and some type of administrative procedure is the only method available to the government to deal with them.

During much of the nineteenth century, administration was regarded as the legitimate booty of political party struggles. Almost any citizen of mature

age and average mentality could administer virtually any program decided upon by the policy determiners, it was thought. Woodrow Wilson pioneered in directing the attention of the American people and their leaders to the importance of good administration. Interest gradually increased, and since about 1920 administration at all levels of government has become the subject of extensive research, writing, and experimentation. The result of this interest has been increased understanding, and this, in turn, has produced a remarkable improvement in the administration of governments of all kinds.

Improvement in administration has not kept pace with the problem

As rapidly as administrative reform has followed administrative reform in the past decades, it is doubtful if improvement has kept pace with the problem. Like the swelling mushroom of an atomic explosion which soon dwarfs all other features of the horizon, national administration has burgeoned into a swelling cloud of money and employees by comparison with which Congress and the courts are but specks on the national landscape. None of the changes through the years in the government of the United States is quite so startling or quite so consequential as the tremendous growth of the executive branch. In point of cost, volume of activities, and numbers of people employed, the "big government" of which so much is heard these days is really "big administration." Can an enterprise of this magnitude be managed by ordinary human beings? Can it effectively deliver the services and solve the problems which are expected of it? Can it somehow be paid for without exhausting the resources and the economic health of the nation? Can its technical skills and organizational energies be harnessed to the cart of constitutional democracy? These are the more important of the problems raised by the growth of this young giant.

**GROWTH OF THE NATIONAL GOVERNMENT**

| *Date* | *No. of Civilian Employees* | *Expenditures* |
|---|---|---|
| 1790 | 350 | $4,269,027 |
| 1801 | 2,100 | 9,394,582 |
| 1816 | 6,327 | 30,586,691 |
| 1831 | 19,800 | 15,247,651 |
| 1861 | 49,200 | 66,546,645 |
| 1881 | 107,000 | 260,712,888 |
| 1901 | 256,000 | 524,616,925 |
| 1921 | 562,252 | 5,115,927,690 |
| 1941 | 1,370,110 | 12,710,629,824 |
| 1951 | 2,879,000 | 44,632,822,000 |
| 1957 | 2,393,292 | 68,900,000,000 |

## THE STRUCTURE OF THE EXECUTIVE BRANCH

Importance of proper organization

One of the determinants of whether the vast array of officials and employees who comprise the executive branch can, in fact, be brought under the directing will of the president and his aides and under the general super-

vision of the Congress is the way in which they are organized to perform the tasks assigned to them. The need for organization is a product of the size and complexity of the operation, and the importance of proper organization tends to increase directly with growth. Direction of the modern executive branch of the national government would be unthinkable unless the individuals who comprise it were grouped into units on the basis of some rational pattern. Skillful administrative organization aims at assigning duties to groups of employees in such a way that each group has a clear and consistent mission and that the group commander can be held for the performance of that mission. It seeks to bring all units into due subordination through an unbroken chain of command to the chief executive. It strives to relate the size of the unit and the resources at its command to the size of the task assigned to it. Failure to observe any one of these precepts of good organization may well frustrate the intention of president or Congress. However, faithful adherence to these precepts will not of itself produce good management, for an organization can be no better than the people who serve in it.

The department

The traditional organizational unit of the executive branch is a single-headed department to which has been assigned a more or less homogeneous group of programs aimed at a major section of national governmental responsibility. The directing head is commonly called secretary and is, typically, a member of the president's cabinet. This organizational pattern was established by the Confederation Congress and its continuance was assumed by the framers of the Constitution. Three such departments—State, War, Treasury—were established by the first Congress and additions and reorganizations since that time have brought the number to thirteen. Each of the departments created after the original three was built around organizational units already in existence at the time of its establishment. Prior to 1870, the Congress showed little disposition to assign new executive functions to any other type of agency; each new or enlarged responsibility was customarily assigned to one of the existing departments. This attitude has been modified since, but there is still a strong tendency to find a home for any newly established operation in one of the departments. Those charged with administering programs in nondepartmental agencies rather persistently strive for departmental status. There is an aura of permanence and maturity about the department form of organization which makes it the model in an ideal as well as in a historical sense of executive branch organization.

Characteristics of departmental organization:

1. Political direction

The 13 departments (10 of cabinet rank) of the contemporary executive branch exhibit numerous variations in structure and operation. There are, however, enough common characteristics to allow useful generalizations. In the first place, the top management of all of the departments consists largely of partisan politicians, appointed for political reasons ordinarily from the ranks of the president's party. This politically-oriented management staff includes the secretary, the under-secretary, the assistant secretaries, the legal counsel, the director of public relations, some of the bureau, office, or division chiefs and the more important aides of each. Experience has convinced most

presidents and members of Congress that the enforcement of responsibility to the voters upon the permanent staffs of the departments requires not only a politically responsible secretary but a cadre of political assistants commanding all of the main channels to him of information and authority. To some politicians, however, the chief virtue of this cadre is the opportunity it provides for patronage.

On the whole, authority and responsibility for departmental management are concentrated in the office of the department head.[1] Each department head is subject to the general direction of the president and holds most of his power subject to that direction. Within his domain, however, he is a miniature president. The authority of the department head typically includes:

2. Centralization of authority in the department head

1. the power to appoint subordinate officials and employees, virtually all of them in accordance with the practices of the civil service merit system;
2. the power to remove subordinates appointed by himself, again subject to the tenure provisions of the merit system;
3. the power to issue binding rules and regulations for the conduct of departmental business and, in many instances, for the purpose of supplementing legislation administered by the department;
4. the power to decide appeals from the decisions of departmental subordinates not only on departmental matters, but, in many instances, in matters affecting private citizens.

Together with this authority is complete responsibility to the president, the Congress, and the public for the conduct of the department. The department head is expected to represent the views and interests of the institution he directs before the president, the cabinet, and the Congress. He is also expected to represent to the department the policies and desires of the president. He is expected finally to support the president and his party on all occasions.

The component organizational units of each department are, typically, arranged in hierarchical pattern by virtue of which the authority of the department executive permeates throughout the organization in a more or less unbroken chain of command. Here too there are many deviations in practice. There is no standard nomenclature for designating the major organizational units in a department, but the most frequent title is bureau. To each bureau is assigned a more or less homogeneous group of department functions and services. The head of each bureau ranks next below the top-management staff already described. A substantial and increasing proportion of these bureau executives are career civil servants protected by the merit system. The bureaus, in their turn, are subdivided into divisions, branches, and sections, proceeding down the ladder of administrative authority.

3. Hierarchical arrangement of subordinate organizational units

4. Congressional control of departmental organization

The organization of the typical executive department, including the names, numbers, and functions of the bureaus is largely determined by statute. Department executives are not free to arrange the pieces to suit their own

[1] This concentration is not nearly so complete as many experts believe desirable. Congress has on many occasions assigned unreviewable authority directly to bureau chiefs and division heads. See "Department Management," *Report of the Commission on Organization of the Executive Branch of the Government* (Washington, D. C., 1949), Appendix E.

estimate of departmental needs. Many of the bureaus, in fact, had legal status and traditions long before the departments of which they now are parts were established. Some continue to maintain a great deal of autonomy today.

Outside the 13 executive departments are a number of single-headed organizations directly under the president called agencies or administrations. They possess every characteristic of departments save one: the head is not ordinarily a member of the president's cabinet. The precedent for this type of executive agency was set with the establishment by the first Congress of the Postmaster General's office in 1789. And from time to time since that date Congress has elected to house a new function in an agency of this kind because it has not wished to increase the size of the cabinet or because it has hoped that the function would not become a permanent one or because it has felt that it was not sufficiently important to justify departmental status. Contemporary examples of this type of agency are the Veterans Administration, the Housing and Home Finance Agency, and the General Services Administration. Everyone of these, curiously enough, is larger than the Department of Labor, and the Veterans Administration is larger than most of the regular departments.

Other single-headed agencies

The third type of executive agency, the "independent" regulatory commission, is a product of the last 70 years and is an incident of increased governmental intervention in the economy. The prototype of this form of organization is the Interstate Commerce Commission created in 1887. The typical commission is a plural body of from five to 11 members appointed by the president for overlapping terms of from five to nine years. Typically, no more than a majority may be members of one party and the members are not subject to the unrestrained removal power of the president. Subordinate to the commission itself is a staff of career civil servants who assist it in the performance of its duties. The commission is, therefore, the executive head of the agency directing by order and by regulation the work of numerous subordinates. It is also a rule-making agency. However, a large portion of its rules, much larger than those of the typical department, are binding upon the part of the public that comes under its regulatory authority. Finally, the commission is an appellate tribunal, hearing and determining a large number of cases arising from the decisions of referees or trial-examiners who are, at least nominally, its subordinates. These cases involve, typically, the application of commission-made rules to private firms.

The "independent" regulatory commission

To such an agency, typically, has been entrusted the regulation of some sector of the national economy that Congress has determined to bring under detailed government scrutiny. The power to regulate has ordinarily been entrusted to these commissions in the broadest possible terms and has extended, for many private economic institutions, to the prices charged the consumer and to the profits of the owners. Because of their singular power over these economic institutions, Congress deliberately sought to protect them from the kind of partisan political direction which the single-headed department or agency is designed to facilitate. The combination of legislative (rule-making),

executive, and judicial powers that the commissions possess also suggested that the powers should be exercised in a relatively nonpartisan environment. The procedures that Congress has directed to be used to accomplish the desired regulation, furthermore, tend to make these commissions more directly responsible to the courts than to either the president or to the Congress. The location of these agencies in the executive branch, however, has meant in practice that they have not wholly escaped the influence of presidential direction. It should also be observed that neither their powers nor procedures are unique—they can be found also in some departments. In other words, the Congress has not adhered to a consistent pattern in assigning responsibilities among the executive branch organizations. There are always many factors, personal as well as political, that color any legislative decision as to the proper agency to entrust with any particular function.

Nonregulatory commission

The executive branch also houses a number of boards and commissions which have no consequential regulatory responsibilities. There are numerous reasons, in addition to those discussed, for using multi-membered agency directorates to preside over national programs or services. In some cases, it is highly desirable to ensure representation of various sections, economic interests, or social groups in the composition of the directing body. This is particularly true where the functions are largely advisory, as in the case of the Tariff Commission. Another compelling reason for the use of boards is the desire to avoid one-man responsibility and to insure that decisions will be taken only after various views have been canvassed. The most important nonregulatory commission at present is the Atomic Energy Commission, and the principal purpose in creating this type of agency to develop atomic and thermonuclear weapons and power generators was to place this program on a nonpartisan footing as far as possible.

Corporation:

1. Development

The two world wars of this century, the expansion of American national interests in foreign countries, and the depression of the 1930's stimulated governmental programs essentially similar to those which had been or were being performed by privately owned business concerns. In order to provide a "businesslike" atmosphere for the administration of these programs and to provide somewhat greater flexibility in their fiscal administration than the traditional government bureau possessed, the corporate form of organization was established in the executive branch. Although a corporation was first used by the Congress in 1791 to provide a United States Bank, the modern government corporation is a product of the twentieth century. There are now more than 80 of these corporations in existence and their combined assets total more than $20 billion. Several of them are now in process of liquidation, including the largest and probably the most influential of all, the Reconstruction Finance Corporation. The principal government service now provided through the corporation device is the supply of credit to small businesses, farmers, and home owners. However, they are also used to manufacture and distribute electric power (Tennessee Valley Authority), operate railroads (Panama R. R. Co.), purchase farm surpluses (Commodity Credit Corpora-

tion), insure bank deposits (Federal Deposit Insurance Corporation), construct, purchase, and sell ships (Maritime Administration), and for scores of other purposes. Many government corporations are, at least nominally, attached to one of the departments or agencies. The extent of the control over their activities which the department head derives from this attachment is uncertain and ill-defined. A few of the corporations, notably the Tennessee Valley Authority, are independent establishments in name and in fact. Many of these corporations were created by presidential directive rather than congressional enactment, and all of them enjoyed for a time a great measure of real autonomy over the spending of the earnings arising from the sale of their services. All of them are, however, arms of the government. It owns them, supplies most of their capital, defines their functions, and regulates their procedures. Virtually all of the government corporations have boards of directors and under them general managers.

2. Control

Growing criticism of these agencies for their alleged independence of congressional and even of presidential direction led the Congress in 1945 to bring them under more systematic scrutiny. The Government Corporation Control Act of 1945 provides that only Congress may create them in the future, subjects their finances to scrutiny by the Bureau of the Budget and the General Accounting office, and requires them to administer their personnel more nearly in accordance with civil service merit system procedures.

## THE CONTINUING NEED FOR REORGANIZATION

The proper and effective organization of the executive branch is not something that can be achieved with finality. The public, through the Congress and the president, constantly demands new services or expansions in older ones. Emphasis shifts from one function to another as changes occur in domestic or international conditions. Presidents, department heads, commissioners, and bureau chiefs come and go and each subtly influences his organization. Like any other institution built of human hopes and fears, the organization of the executive branch is a dynamic, not a static, thing. It will be different tomorrow than it is today. The result is that the organization of the executive branch is in constant need of attention if the purposes of the government are to be realized and its principles observed.

Growing criticism of executive organization

As our nation became increasingly aware of the importance of administration, criticism began to be heard from congressmen, journalists, administrators, students, and taxpayers that the organization of the executive branch was not adequate to its tasks. Congress, which dictates the structure of the executive branch, could be brought to act but slowly despite the prodding of Presidents Taft, Wilson, and Hoover. It became clear that only the president had both the will and the information to achieve effective organization of the executive branch and to keep the organization in tune with changing circumstances. President Franklin D. Roosevelt was the first modern president entrusted by Congress with organizational authority over his own domain. This

was in 1933 under an act signed by Hoover. A few changes were made by executive order before the power expired in 1934 but the new president was unable to give the matter real attention for some years. Then in 1936, after dozens of new agencies had been created to combat depression and promote human welfare and the executive branch was more topsy-turvy than ever, and after the President had been firmly established in his second term by a tremendous popular plurality, he named a Committee on Administrative Management to survey the organization of his branch of the government. The report of this committee (*Administrative Management in the Government of the United States*), a landmark of its kind in the annals of government, unfortunately reached the Congress when it had been stirred to its foundation by the president's plan for reorganizing the Supreme Court and it was not until two years later that the Congress finally passed a major recommendation of the committee: that the president be assigned by law the power to achieve a reorganization of the executive branch. The power, was, however, granted only for two years and several agencies of the executive were exempted from its provision. The President used his authority to achieve several significant changes through plans submitted to Congress for review. The reconstruction of the president's own office as described in a previous chapter was the most important of these. A new grant of power was voted to the president in 1941 for the duration of the war emergency, but this grant was restricted to changes associated with the conduct of the war. Late in 1945 Congress responded to an urgent request by President Truman for new reorganization power to enable him to readjust the war-swollen executive branch to conditions of peace. Several plans were submitted under this act, most of which were allowed to become effective by the Congress. In spite of all these changes, many observers felt that there was much still to be accomplished.

Committee on Administrative Management

Hoover Commission

The triumph of the Republican party in the congressional election of 1946 ushered in a new era of administrative reform under the auspices of a party bent upon cutting the executive branch down to more "manageable" size. The Congress this time took the initiative and created and generously financed a Commission on Organization of the Executive Branch of the Government. This body, headed by ex-President Hoover, prepared and submitted to the Congress and to the President in 1949 the most comprehensive analysis and report on the subject in our history. It would be impossible even to summarize the 288 separate recommendations made by the Commission. Like its predecessor, this group insisted that authority to reorganize the executive branch must be vested in the president, and Hoover took the stand to support the broadest possible grant of such power to President Truman. With this impressive support the Congress in 1949 voted the most sweeping reorganizing power ever granted to a president. No agencies were exempted from the president's authority as had been the case in all previous acts. However, the Congress insisted that the power must be limited as to time and provided for the expiration of such power on April 1, 1953. Congress also insisted that it must retain a veto on all presidential proposals. In most previous acts, a presi-

The Reorganization Act of 1949

dential proposal could be killed by a concurrent resolution of disapproval passed by both houses within a specified time limit. In the act of 1949, a presidential plan could be nullified by a resolution of disapproval passed by a majority of the membership of either house within 60 days of its submission. President Truman during his term of office submitted plans to Congress and took other actions within his power to achieve perhaps half of the Commission's recommendations. It remained for President Eisenhower to take up where Truman had finished. He got Congress to extend the authority granted by the act of 1949 several times, most recently to 1959. He also sent to the Congress several reorganization plans, the most important of which was that in 1953 creating the Department of Health, Welfare, and Education. He successfully persuaded the Congress to establish another Commission on Organization of the Executive Branch and called upon Hoover once again to direct the survey. This second Commission reported in 1955 with another long list of suggested reforms. The new menu of reforms submitted to the president and Congress went beyond organizational rearrangements into questions of public policy and stirred up a great deal of opposition among the Democrats who have controlled the Congress since 1955. Not much of major importance has been done by the President or by Congress in the field of administrative reform since 1953 except in the Department of Defense in 1958.

## THE GROWTH OF MANAGEMENT SERVICES

The difference between line functions and management services

Another consequence of the tremendous growth in the size of the executive branch has been the growth of those parts that facilitate management and provide services for the rest of the organization. Students and administrators distinguish among the functions of an organization those that have directly to do with the purpose of the organization—called *line* functions—from those that serve purely internal needs—called variously *staff, overhead, auxiliary, housekeeping,* or *management service* functions. The men who work in the local post office sorting and delivering the mail, the soldiers in a combat division, the social workers calling upon the disabled, all of these are engaged in line functions. Those who keep the accounts of the Post Office Department, or administer the personnel procurement program, or handle the publicity of the department are engaged in management services. Some entire agencies and many bureaus are, in the modern executive branch, engaged in management service rather than line functions, and every agency has a substantial portion of its employees engaged in such functions.

Specialization and the growth of management services

Specialization of function and the development of techniques for each specialty are widely regarded as important keys to American industrial efficiency. Carried over into public administration, this conception has contributed to the growth of the managerial services. Fiscal administration, purchasing, personnel administration, legal advisement, public relations direction, space allocation, statistical analysis, procedures analysis, program planning, among others, are now considered the proper domain of technicians especially

skilled in these functions and are separately and centrally organized in many of the large organizational units of the executive branch. The top executive staff of each department, agency, or administration, and of many bureaus and divisions includes these specialists.

The control exercised through the service functions

Although most of the expert practitioners of these managerial service functions profess the conception that these functions and processes are subservient to the line responsibilities of the organization, in practice these management assistants frequently influence and occasionally dominate the agency. These service functions are almost universally practiced quite near the seat of authority, whereas the line functions are often largely discharged at some field station or office miles from headquarters. Although it is undoubtedly true that the effective management of the executive branch would be impossible without central controls over and standard procedures for accounting, personnel transactions, and supply procurement, the growth of these functions in size, importance, and influence has created new difficulties in communicating the aspirations of the Congress and the president for effective public service throughout a large and far-flung organization. This growth has also reduced the proportion of the tax dollar that goes directly into alleviating distress, defending the nation, protecting the lives and property of our citizens, and husbanding our natural resources.

The public demand for internal controls over administration

It is but just to add at this point that the American people are themselves partly responsible for the controls exercised by the administrators of management services. Through Congress and the president, they have insisted that line administrators should not be allowed to hire and fire freely but should be required to observe the rules of the civil service merit system. They have also sought to achieve a higher standard of honesty of public officials by requiring that certain procedures (public bidding, for example) be observed whenever supplies or equipment are purchased by government agencies. They have insisted that the most rigorous audit be made of fiscal transactions and that unrelenting vigilance be exercised by corps of accountants on the expenditure of public funds. All of these requirements and many others enacted into law by Congress or imposed by executive order have contributed to the growth in numbers and influence of those officials who administer these laws and orders in the executive branch. Nowhere in our system of government is the public distrust of officialdom so patent and its consequences so clear. A large portion of the executive branch is expected to spend a good deal of time and money checking up on the rest of the branch.

## ADMINISTRATIVE PROCEDURES

The procedures used by the executive branch to accomplish its objectives are as varied as the trees of the forest. They do not as readily lend themselves to classification and explication as those used by the courts or by the Congress. The success of any public program may well depend, however, on the procedure used to achieve it.

1. Detection and prosecution of law violators

It is convenient as well as instructive to regard executive branch methods from the vantage point of the amount of coercive authority or sanction associated with them. Throughout history government has been closely identified with coercive power. Traditionally, the method of public executives is arrest and the vehicle the police. The enforcement of law has had as its ultimate sanction fine, imprisonment, corporal punishment, death, or banishment. The detection and prosecution of law violators remains to this day one of the primary methods of executive government. Many governments, however, and particularly modern democratic ones, have tended to lay increasing stress on the prevention of antisocial behavior rather than the punishment of those found guilty of it. This objective requires far more complex and subtle methods of administration than does the traditional method of arrest. Furthermore, in the American system of government the state and local authorities, rather than the national executive, deal with most offenders against the traditional criminal laws. The Treasury Department's Secret Service and Coast Guard, the F. B. I. and the military police in the armed services, are almost the only real police forces in the national executive establishment. The Department of Justice through the district attorney in each judicial district is the chief prosecutor of offenders against national laws brought in by the various police officers of the executive branch.

2. Litigation

The offices of the courts are used extensively by the executive branch in civil litigation as well as criminal prosecution. The sanctions associated with litigation are impressive and include the assessment of costs, damages, and the expenses of the litigation itself. They are not so drastic, however, as those associated with criminal prosecution. Litigation is used by the government to collect money owed it by taxpayers or by contractors for or purchasers of its services. It has also been relied upon heavily, although with indifferent success, to curb the development of monopoly in industrial organization and to enforce administratively determined orders upon business or labor organizations. Most administrators avoid litigation like the plague because of the expense of and the time consumed in judicial processes.

3. Adjudication

A third coercive method widely used by the modern executive branch is adjudication. This is essentially a judicial procedure developed within the executive branch in order to achieve specialization of interest and greater flexibility than the regular court procedures provide. The independent regulatory commissions are the major, although not the exclusive, practitioners of adjudication. Typically, the process consists of advocates for the regulatory authority on the one hand and defenders of the regulatee on the other presenting their diverse views on the proper rates or services of the enterprises in question before a plural body that adjudges the case and issues appropriate orders. Most of the decisions thus reached by executive branch adjudicators are reviewable by the national courts. The process is similar but not identical to administrative legislation which is also practiced by these same agencies and consists in supplementing broad statutory policies by specific rules bind-

ing upon the regulated enterprises. Adjudication is applying these rules to specific individual situations.

4. Inspection and licensure

Inspection accompanied ordinarily by licensure is a fourth coercive method used extensively by the national executive. This is a genteel police method which frequently has as its purpose the achievement of proper conduct by the inspectee rather than his punishment for improper behavior. Government inspectors are used extensively to achieve proper working conditions in factories subject to national regulation, safety on board ship and in interstate transportation, safe and sanitary meat and food products moving in interstate commerce, safety in mines, and numerous other public purposes. The requirement of a license for the operation of or practice of some profession, vocation, or business enterprise adds the convenient sanction that, without criminal proceedings, the license may be revoked for violation of the laws governing the matter. In virtually all situations where licensure and inspection are used, the government has determined a minimum standard of conduct, cleanliness, health, or safety which it seeks to achieve throughout the nation. The inspectors attempt to make certain that the standard is observed.

5. Education

The change in the functions of the executive branch associated with the industrialization of the nation and with the attempt to insure a fairer distribution of the products of the national economy have accentuated those executive activities that are not coercive and that do not rely in the last analysis on the power of the government to punish transgressors. A high standard of public health, for example, can be achieved only if individuals voluntarily change their habits and customs. The improvement of agricultural production in which the government has played such a conspicuous role has been achieved largely without coercion of any kind. Education and exhortation rather than compulsion are coming more and more to be major methods of the national administration. They constitute its chief procedures as it seeks positively to improve the environment both physical and social for the welfare of its citizens. Education as here used is a broad term involving every type of persuasion from publishing brochures to operating demonstration farms and includes: official exhortation; visitation by expert consultants, such as public health nurses, county agricultural agents, or social workers; operation of experimental laboratories; development of voluntary codes of business or advertising practice; organization of scientific conferences, and thousands of other similar activities not excluding the instruction of young people in classrooms. The teacher must thus be placed beside the policeman as the great executive agent of modern American government. Not only are educational procedures the major reliance of agencies like the Department of Agriculture and the Public Health Service, they are also more and more widely used to supplement, if not to replace, the methods of prosecution, litigation, adjudication, and inspection. The railroads of the United States are directed almost as much by informal nonlitigious conferences between railroad operators and I.C.C. agents as by the formal procedures for which that commission is so well known. It is fair to add that the educational methods seem to work best

when accompanied by the power ultimately to invoke sanctions against those who do not respond to persuasion.

6. Research

The executive branch of the government is not only engaged in transmitting information and urging individuals to better practice; it is also heavily engaged in discovering information. Research has become a large concern of the national administration. The conquest of disease, the improvement of our military striking power, the expansion of agricultural productivity, the conquest of outer space are but a few of the continuing objects of research by scientists under the direction of the national executive. The national government is today one of the leading research institutions in our country and in the world.

7. Negotiation

War is the only compulsive method for conducting the foreign relations of any nation. Eschewing this, it must rely on the noncoercive method of negotiation to serve its interests beyond its shores. The practice of diplomacy accompanied the rise of the national state and has been a traditional function of states for several centuries. The method of negotiation, while practiced extensively by the Department of State, is by no means confined to it. The Departments of Defense, Commerce, Treasury, and Agriculture, for example, are extensively involved in our foreign relations. The processes of negotiation, which are essentially the dealing across the table of equals, are also used in internal matters, for example, to achieve peaceful settlement of labor disputes, to purchase land for public use, and to determine state-national responsibilities in connection with grant-in-aid programs.

This brief catalogue by no means exhausts the repertoire with which executive agencies attempt to realize public policies. It does, however, point up the fact that the executive is not only an enforcement agent and that new government functions require new methods for their successful administration.

## THE ENFORCEMENT OF RESPONSIBILITY

The American system of government is built upon an abiding hatred for bureaucracy and a deep-seated distrust of officialdom. It is not surprising, therefore, that the growth of the national executive has been viewed with concern in many quarters. Is it possible, the critics ask, for such an army of public officials with such a large share of the national income at their disposal to submit to direction from the voters and their representatives? Will they not rather seek to dominate the Congress by favors and the public by propaganda? How can the executive agencies, manned as they are largely by persons with permanent tenure, be made responsible to the elected officials and responsive to public opinion?

Presidential direction

The principal safeguard against the rise of an irresponsible bureaucracy is the position of the president. The elected presidency is essentially a political office responsible to the voters and vested by the Constitution with the executive power. By custom of long standing, presidential direction of the executive agencies is supported by a cadre of his political lieutenants at the helm of each

agency and in command of the major channels of authority and communication. The top management of each agency changes office with each change in the national administration and thus, fresh from an election triumph, can be said to enjoy the confidence of the public. Only the independent commissions are insulated against this kind of direction. The authority of the politician managers of the executive branch is weakened in practice by their inexperience and by their lack of technical competence. They must perforce rely upon the experienced technicians of their agencies for guidance. Traditionally, this guidance is supplied fully and freely regardless of the political views held by either individual. For this too is part of the American tradition, that the professional civil servant will serve any master placed over him by vote of the people.

Congressional oversight

The second great safeguard against government by technicians is the constitutional and customary powers of the Congress. Money may not be spent by executive agencies except on the basis of congressional appropriation. Each year the administration must pray Congress to grant the funds necessary for its programs and each year must, in consequence, account to the Congress for its conduct. This great power of Congress is weakened in practice by the enormous complexity of the financial structure of the national government and, in consequence, by the fact that few congressmen are familiar with more than a small portion of the total appropriations. It is nevertheless quite an impressive power in molding executive agency policy. The Congress prescribes not only the programs and policies that the administration will pursue but also the organizational structure and the procedures for pursuing them. The practices of Congress in exercising this power have tended to weaken presidential direction of his own branch and tend to diffuse responsibility for performance. They nevertheless represent a real brake upon agency expansion and agency indifference to public desires. The Senate, as we have seen, participates in the appointment of numerous offices in the executive branch. Through the power of investigation the Congress may review the conduct of any executive agency in which it is interested. No legislative process is held in such great fear by the executive branch as the investigating one. None has been so abused by the Congress nor been so effectual in cleaning out a corrupt or incompetent agency.

Judicial review

There is an impressive body of opinion in the United States, held mainly by members of the legal profession, that the principal safeguard against the rise of an irresponsible bureaucracy is the power of the national courts to review the acts and decisions of officials of the executive branch. Under the American system of jurisprudence most of the actions, threatened or accomplished, of administrators are reviewable by ordinary courts of law. This review customarily extends to the validity of the law on which the action is based as well as to the action itself. This type of control over administrative behavior is designed to assure conformity to constitutional prescriptions regarding personal and property rights and regarding the allocation of gov-

ernmental powers between the nation and the states and among the several branches of the government. Judicial review is a device for assuring not responsiveness to democratic processes but obedience to the Constitution. It is intended to make men subservient to laws, not necessarily to other men who happen to enjoy public confidence.

The practice of judicial review of administrative decisions is much less clear cut than the principle. Congress has from time to time endowed administrative agencies, notably the independent regulatory commissions, with powers of a judicial character (referred to by the lawyers as *quasi-judicial*). It has also attempted to limit the power of the courts to review certain types of administrative actions. It has conferred lawmaking power on many agencies confined only by the most general standards.

**The Administrative Procedure Act of 1946**

A swelling tide of criticism arose during the administration of Franklin D. Roosevelt of alleged usurpation of judicial functions by the executive branch and of widespread disregard by the executive of established legal conceptions of proper procedure. In general, it was felt, especially by lawyers, that private rights and interests received fairer consideration in the courts than in the executive branch. The American Bar Association sponsored a reform bill which was passed by the Congress in 1940 but vetoed by the president that would have greatly enlarged the scope of judicial review of executive decision. The return of the Republican party to power in the Congress in 1946 opened the way for a more sympathetic consideration of these criticisms of the executive branch and a bill worked out in conjunction with the attorney general was finally passed. This act, the Administrative Procedure Act of 1946, provides that every executive agency action for which no adequate court remedy is provided, shall be subject to review by an appropriate national court. The court may 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 based upon improper proceedings or unwarranted by the facts—insofar as the facts are reviewable by the court. What these provisions added to the existing law is still a matter of dispute among experts. More clearly, the act of 1946 attempts to provide more nearly uniform procedures in executive agencies by requiring: (1) that every executive agency give full publicity to its formal procedures so interested persons may know how to use its facilities; (2) that ample notice of the contemplated adoption of rules be given, personally or through the *Federal Register,* to interested individuals or corporations so that they may have time to protest; (3) that officials (trial examiners) holding preliminary hearing be given semi-independent status in the agencies with which they are identified; (4) that employees or officials engaged in investigating and presenting cases for adjudication have no part in deciding them; (5) that insofar as orderly procedure will permit, any interested person be allowed to appear before any agency for presentation of any issue, request, petition, or controversy; and (6) that persons compelled to appear be permitted counsel.

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# CHAPTER 17

# *Personnel Administration in the Executive Branch*

Importance of proper personnel selection

The quality of administration of the national government depends in the last analysis on the quality of its officers and employees. Effective organization, appropriate procedures, and suitable authority are secondary to the ability of the individuals who comprise this vast institution. No system of administrative audits, no amount of congressional investigation, no inspirational leadership from the president could quite compensate for mediocre, unimaginative, or time-serving public employees. Certainly a decisive determinant of the responsiveness of the executive department to the principles of the American system of constitutional democracy is the character and ability of the men and women who comprise it.

## THE RISE OF THE SPOILS SYSTEM

Appointment policy, 1789-1829

For a generation or more after the national government was organized under the Constitution, the selection of officers and employees tended to follow the pattern established by Washington who announced his intention to "nominate such persons alone to offices . . . as shall be the best qualified." The rise of political parties introduced new influences which began subtly to modify the process. Both Hamilton and Jefferson were able to introduce into their respective departments persons sympathetic to their separate views. Adams staffed an enlarged judiciary with Federalists; Jefferson, as president, tried to overcome the Federalist balance in the government service by replacing his subordinates as they retired or resigned with members of his own party. In 1820, the Congress passed a Tenure of Office Act which fixed an automatic termination of office after four years for district attorneys, collectors of customs, and other specified groups of executive employees. This act made it possible for a new president to appoint new persons to these posts without the awkward necessity for finding some reason for dismissing the incumbents. The development during this same period of the practice of partisan appointment (patronage) in several states and cities contributed to the institution of that system nationally.

The era of patronage, 1829-70

The inauguration of Andrew Jackson in 1829 marks the real turning point in national personnel policy. Jackson, representing the forces of frontier democracy, determined to sweep out every vestige of the "Virginia dynasty" in the executive branch. He held the conviction that any man of average ability and industry could master the duties of any public office and

that rotation in office is a good thing, since "more is lost by the long continuance of men in office than is generally to be gained by their experience." His supporters in large numbers were anxious to taste the benefits of public pay. The followers of Jackson were not of a leisured class that could afford to play at the game of politics. They had to be supported if they were to continue their electioneering. Under these circumstances, the policy of rewarding faithful party service by appointment to national office—the spoils system—became the announced policy of the executive branch. And to it the Congress readily subscribed. Jackson never carried his policy to the extremes that his supporters requested, but he removed 700 employees during his first year in office and virtually all of his appointments were of men of his party. Van Buren, his successor, was probably the most accomplished user of appointments for patronage purposes of any president up to that time. Polk, Fillmore, Pierce, and Buchanan made sweeping replacements in the executive departments and filled the posts with partisan sympathizers. Lincoln, heading a new party, indulged in patronage appointments to an unprecedented degree. In fact, Lincoln's first term might well be designated the high tide of the spoils system. From Grant's administration onward the system has been slowly but certainly losing ground.

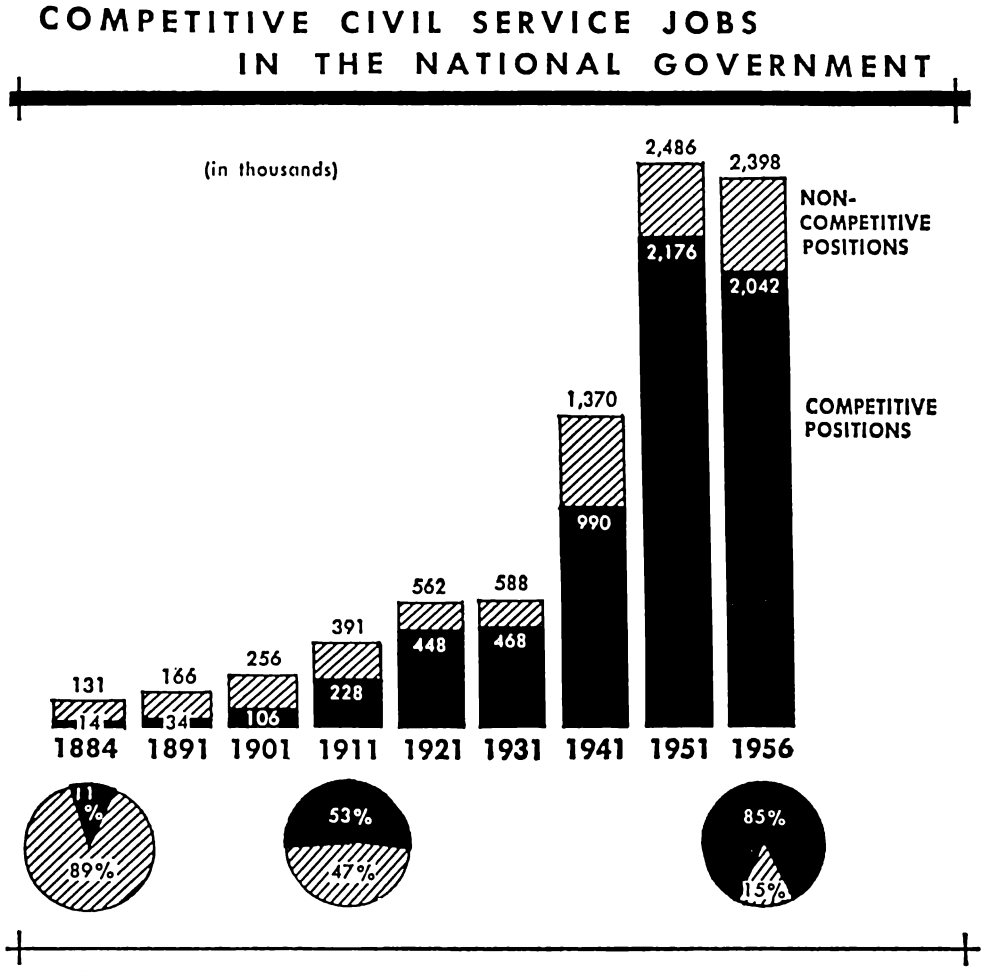
Defense of the spoils system

The spoils system of personnel administration, despite its palpable weakness in bringing into the executive department employees whose only qualifications for office were their political connections, has never lacked intelligent supporters. Spoils appointments, the defenders argue, are necessary to the party system. Few persons can afford to do the day-to-day work of electioneering, and the rewards of office are the best inducement to energetic party work. Parties are essential to our system of government to co-ordinate the legislative and executive powers and to join national, state, and local energies in a unified program. The second argument is that the president is elected to fulfill a popular mandate, and unless he can staff his branch with persons loyal to his party and his program he cannot successfully redeem his pledges. If his chief political lieutenants must work with unsympathetic or un-co-operative subordinates, his hold upon the executive branch is tenuous. Rotation in office, furthermore, guarantees periodic infusion of new blood and prevents administrative hardening of the arteries.

## THE DEVELOPMENT OF THE MERIT SYSTEM

Criticism of the spoils system

Despite a strong defense the spoils system fell increasingly into disrepute. The president was harassed beyond endurance by place-seekers and their friends. Every change in administration witnessed an almost complete breakdown of executive branch services as those familiar with their operations were replaced by men and women unlettered in the laws and practices of the departments. The lines of administrative authority were rudely shattered; employees gave their first loyalty to those party leaders who had gotten them the jobs. The executive branch became increasingly corroded with the loose morals of the political hack. Graft, favoritism, and influence-peddling were rife.




SOURCE: U. S. Civil Service Commission.

Civil service reform

Agitation to reform the system of appointment to government posts began about 1850 and continued with growing fervor throughout the century. One of the first victories for the reformers was an act during Grant's administration authorizing the establishment of an Advisory Board of the Civil Service, and this Board administered the first competitive examinations. The victory was short-lived, however, for Congress refused to support the Board's work with adequate appropriations. The assassination of President Garfield by a disappointed office-seeker paved the way for more lasting success and in 1883 the Congress passed the first comprehensive reform law (Pendleton Act). This act, as amended, is the basis of the present system of appointments throughout most of the executive branch.

Establishment of the merit system

The Civil Service Act of 1883 provided that appointments to certain positions would, thereafter, be solely on the basis of open, competitive examination of a practical character designed to test the abilities of applicants for the positions sought. It also created a three-member, bipartisan Civil Service Commission to design and administer the examinations and to enforce the

other provisions of the law aimed at halting partisan selection or removal and electioneering by employees admitted by the examination route. The nonpartisan, merit system of selection described by the law was applied to about 10 per cent of the posts in the executive branch of the period. Gradually over the years, partly as a result of continued pressure from the reformers, the provisions of this first act have been extended throughout the departments and agencies until now more than two million posts, 85 per cent of the total, are included in the system. In addition, another 100,000 posts are in agencies like the Tennessee Valley Authority, the F. B. I., the Atomic Energy Commission, and the State Department where independently-administered merit-selection procedures are used. About 240,000 positions have been exempted from competitive entrance requirements by the Civil Service Commission. Most of the remaining positions in the national service require senatorial confirmation of presidential nomination and these represent the last stronghold of the spoils system. Included in the patronage group are collectors of customs, U. S. marshals, district attorneys, postmasters of various classes, substitute rural mail carriers, and employees of certain government corporations.

## ATTRACTING ABLE PUBLIC EMPLOYEES

The primary object of the Act of 1883 and the later amendments, executive orders, and new statutes extending its provisions throughout the executive branch has been to promote appointment on the basis of tested capacity and to assure those thus appointed reasonable security of tenure during proper performance of their duties. During the long struggle against the spoils system, however, primary emphasis was placed by personnel administrators on the removal of partisan, political influences in appointment and removal. The triumph of the merit system in this century has created a more favorable climate for a searching analysis of its actual operation by friends of the merit principle. Keeping unqualified people out of office does not of itself attract well-qualified people into it, say the critics. There still remains the positive task of procuring the services of the best qualified. Is the present personnel system of the national government adequately performing its mission?

Recruitment procedures

For a great many years the standard procedure of the Civil Service Commission in announcing the availability of government employment has been to post placards in post offices and public buildings throughout the nation—occasionally next to the pictures of wanted criminals—on the expectation that the interested public would be thus stimulated to apply. This method, still widely used, has been tolerably effective during periods of widespread unemployment and for unskilled and semiskilled laborers and clerks. It has never been effective in enlisting the interest of successful executives, scientists, or professionally trained persons. In recent years, stimulated by manpower shortages and prodded by dissatisfied department heads, the Commission has undertaken a more aggressive program of searching out talented persons and inducing them to apply. This it has done by newspaper pub-

licity, radio talks, attendance at meetings of professional societies, advertisements in professional and scientific journals, participation in collegiate vocational guidance exercises, and by numerous other devices. Admittedly, the Commission still does not do as much in this respect as it would like to do and what it does do still falls far short of the mark.

Obstacles to effective recruitment

The most effective recruitment procedure that the Commission might devise would not itself remove all roadblocks to a more competent public service. In the first place, many years of spoils appointment brought the national service to a low level of public esteem. Many citizens regarded it as the last refuge for the incompetent. Ambitious youth was encouraged to seek satisfaction in other walks of life. The energetic attacks of the government on the depression of the 1930's and the satisfactions of those in service in two great wars have partially, but not completely, dispelled this attitude among the American people. The pay in government service, furthermore, is less than in private employment for professional, executive, and scientific skills. Many people continue to believe, further, that public employment is still largely controlled by partisan politics. More serious than any of these attitudes is the requirement that examinations be practical in their character and related to the positions for which applications are sought. Herein our American system differs sharply from the British on which otherwise it was modeled.

Contrast of American and British systems

In Great Britain, the competitive principle operates more consistently in the higher levels of the official hierarchy than with us. Public service is looked upon to a great extent as a profession and even a career. The main object of examinations is to recruit (especially in the middle and higher levels) 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 general attainments and capacity of candidates as yet without practical employment experience. Mathematics, history, philosophy, the classics, natural science—these and other branches of higher learning receive much emphasis. Even the examinations for positions of a clerical nature are framed similarly, although 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 immediate fitness for the kind of work that he seeks. And since there is a great variety of jobs, the Commission is under the necessity of providing an equally great variety of different examinations. In recent years we have been leaning a little toward the British system with a program (Federal Service Entrance Examination) aimed annually at graduating seniors in the colleges and designed to test academic achievement. The "registers" created by these tests provide agencies with applicants for junior level administrative, executive, and professional posts.

Examinations

The character of the examinations designed to test "merit" may thus be a strong deterrent to recruiting able men and women into the service. The

American system, it should be added, relies extensively, although not solely, on examinations for selecting the best qualified among those who apply. All of these examinations are not, however, pencil-and-paper tests. Many are designed to test manual skills in typing, machine operating, bricklaying, and so on. Some take the form of personal interviews. For a large number of positions in the competitive civil service, especially those for professional and scientific posts, no examinations are given. The experience and training of the applicants are rated competitively on the basis of oral interviews and references. The Commission supervises the preparation and administration of all tests for admission to the "competitive classified service." [1] A great deal of time and money has been spent by the Commission over the years developing valid and reliable testing devices for determining capacity for the thousands of different positions in the executive branch. None of the testing devices thus far developed, however, has proved a reliable guide to the honesty, industry, friendliness, or ambition of the applicants. This limitation of the examining process was recognized from the beginning by giving some discretion to the appointing officers and by requiring a probationary period before full tenure is acquired.

**Appointment**

On the registers of the Commission are kept the names of all persons who have passed the various examinations. When a clerk or stenographer or other employee in the classified service is needed by an agency, the Commission or now the departmental personnel office 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 at the top of the waiting list. If no one of the three is appointed, the officer must be prepared to assign some good reason when asking for more names. Every appointee is placed on probation typically for a period of one year. During this time, he can be removed by his superior summarily, with no reason assigned except that his work is unsatisfactory. If retained longer, however, he gains "civil service status," with all the protections and privileges provided by law. The probationary period has not proved an effective screening device, for removals at this stage are extremely few.

**Restrictions on eligibility for appointment:**

**1. Citizenship**

The opportunity to compete for appointment is circumscribed by law in several ways not necessarily related to merit. In the first place, only citizens of the United States are eligible to enter the competitive service. In the second place, "as nearly as the conditions of good administration warrant" appointments are to be apportioned among the states and territories on the basis of population. This requirement of the original Civil Service Act has been observed in practice largely by administering the examinations through the

[1] There is much popular confusion on the meaning of the various services fn the executive branch. The *civil service* includes every civilian position in the executive branch however filled. The *classified service* includes only those positions within the purview of the Civil Service Commission which have been classified for admission purposes. Even some of the classified positions are not filled by competition, however. The Commission may exempt some jobs from competitive appointment and thus the *competitive classified service* is that to which admission may be gained only by some form of competitive appraisal.

regional offices of the Commission located throughout the country. Honorably discharged veterans have, since the Civil War, been granted preferential treatment in competing for civil service positions and various Civil Service Acts have required that special treatment be continued even for positions in the competitive service. The matter is now controlled by the Veteran Preference Act of 1944 which grants to any persons who have served honorably in the armed services at any time a monopoly of certain specified minor civil service jobs (as guards, messengers, etc.). The act also provides for: (1) adding 10 points to the earned examination ratings of disabled honorably discharged ex-servicemen and unmarried widows of ex-servicemen; (2) placing all such persons whose earned rating plus preference is above 70 at the top of the appropriate registers ahead of all other eligibles, except in the case of professional and scientific positions with entrance salaries $3000 a year; (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; and (4) giving to all veteran incumbents preferential treatment when staff reductions must be made. 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 hardly debatable. 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 setting aside the merit principle in civil service selection in such a way that the non-veteran, however well qualified, is placed at a disadvantage in seeking public employment. The service promises in future, nevertheless, to be very heavily manned (actually 50 per cent in 1957) with veteran-preference appointees.

2. Apportionment according to population

3. Veteran preference

Within the last two decades a new requirement for public servants has been added to the list: "loyalty" to the American system of government. Mounting public apprehension over the activities of fascistic and communistic groups and the loyalty which they seemed to exhibit to foreign governments, and charges by certain congressional committees of executive indifference to the problem, induced the Congress in 1939 to forbid employees in the national government to belong to any organization that advocates the forceful overthrow of our constitutional government. Appropriation acts for various agencies began in the same year to carry provisions forbidding payment of salaries to persons who advocated or who belonged to organizations which advocated the overthrow of the government by force and violence. The beginning of the "cold war" with Russia stimulated renewed criticism by certain members of Congress of what they claimed was laxness in employing persons of questionable loyalty. In anticipation of more vigorous congressional attack on the executive branch, President Truman in 1947 established by executive order (9835) a new program for rooting "disloyalty" out of the government and preventing it from growing new roots. Pursuant to this order, as subsequently amended by President Eisenhower (10450), and to congressional enactment, every prospective employee of the national government must be investigated by the Civil

4. Loyalty requirement

Service Commission, and if any derogatory material is uncovered a full investigation must be made of his or her life history. Applicants for positions designated by the heads of agencies as "sensitive" must be fully investigated [2] in every case. Wide discretion is conferred on the Commission and on the employing department to reject any applicant believed "tainted" by subversive views or associations. The rejected applicant has little or no recourse from such decisions.

The net effect of all of these restrictions on admission to the civil service is sharply to reduce the field from which able applicants may be drawn.

## MAINTAINING EMPLOYEE EFFICIENCY AND POLITICAL NEUTRALITY

Importance of discipline

The attack upon the spoils system was concerned not only with the qualifications of those who gained admission to public jobs but also with protecting those already at work from dismissal for partisan reasons. Great and continuing emphasis has thus been placed in public personnel administration on security of tenure for employees of the government. Critics of the merit system have contended almost from the beginning that it has tended to protect careless, indifferent, and incompetent employees. Defenders of the system have usually responded that security against capricious or partisan disciplining is essential to competent and effective performance. The vigorous character of this continuing debate indicates that the practices of the national executive with regard to employee discipline are at least as important in maintaining a competent public service as its practices in regard to appointment.

Removal

Every member of the national civil service is liable to disciplinary action at the hands of some superior authority. Such action may include reprimand, reduction in pay or position, suspension (for not to exceed 70 days), or outright dismissal. In general, the power of removal or of administering any lesser punishment accompanies the power to appoint and is formally lodged in the head of the department or agency (although in practice ordinarily exercised by a subordinate). The freedom of the department head to deal with his employees as he sees fit is limited, however, by statutory requirement that "like penalties shall be imposed for like offenses and no discrimination shall be exercised for political or religious reasons" and that removal may be only for "such cause as will promote the efficiency of the service." Furthermore, the employee in virtually all disciplinary actions is entitled to a written statement of the charges against him and to an opportunity to answer them. The employee may, in a large number of cases, appeal from the departmental decision to the Civil Service Commission, but there is, typically, no general right to a public hearing nor to judicial review. Despite the apparent simplicity of the rules governing the matter and the latitude granted to appointing officers, disciplinary actions are relatively few. The reasons for this are:

[2] Some of the investigating is done by the F.B.I. and some by the staffs of the "sensitive" agencies.

(1) the process is distasteful, cumbersome, and time-consuming; (2) supervisors at all levels are reluctant to antagonize their subordinates or to embarass their superiors; (3) department heads are persuaded by the traditions of the service that the system is unusable; (4) the Civil Service Commission has tended to use other powers (such as its control over classification) to compel departmental adherence to more rigorous requirements than the law specifically provides.

Disloyalty as a grounds for dismissal

Until 1939, dismissal from the competitive service could not be based on political opinions. As we have already noted, in that year Congress began to require the dismissal of employees holding "disloyal" opinions. Dissatisfaction (largely congressional) with the progress made by the departments in discharging communists or communist-sympathizers led to the Truman Loyalty order of 1947. This order required the screening of all civil servants in the executive branch of the government and the dismissal of all those concerning whom "reasonable grounds exist for belief" [8] in their disloyalty. Each department and agency was directed to establish a board to review charges brought against any employee as a result of F. B. I. or departmental investigation. Each employee charged with disloyalty was granted the right to a hearing before the departmental board and to an appeal from that board to a Loyalty Review Board in the Civil Service Commission.

The attorney general was directed to prepare a list of subversive organizations association with any of which by an employee would bring his loyalty into question. The procedures used by the various agencies presented many problems and attracted much criticism. Chief of these was the difficulty, in many cases the impossibility, of confronting the employee with his detractors and with the evidence against him without disclosing the informants whose anonymity the F. B. I. was anxious to protect. The Supreme Court reviewed this question in 1951 (Bailey *v.* Richardson, 341 U. S. 918) and sustained the power of the government to dismiss an employee for disloyalty although she had not been allowed to confront her accuser.

The investigation and review procedure established by President Truman for purging the service of "disloyalty" did not satisfy several of the most critical congressmen, and the charge of tenderness to communist sympathizers on the part of the Truman administration played a substantial role in the 1952 campaign. The accession of President Eisenhower was soon followed by a new executive order (10450) based on the Internal Security Act of 1950 broadening still more the grounds for dismissal for "security" reasons, sweeping away the entire system of loyalty boards, and conferring complete responsibility upon the heads of the agencies for ridding them of questionable employees. The Civil Service Commission was granted, however, the primary responsibility for the investigation of persons in the competitive service.

[8] This provision was tightened by President Truman in 1951 to "reasonable doubt as to the loyalty" of the employee. It was changed completely by the Eisenhower order (10450). Administrative amendments of this type and congressional modifications of the type of the Internal Security Act of 1950 meant that the same cases have had to be reviewed again and again.

The broad grant of power contemplated by the Eisenhower order was sharply curtailed by the Supreme Court in 1956 (Cole v. Young, 351 U. S. 536) when it held that employees could be summarily dismissed as security risks only if they held "sensitive" positions directly related to national safety.

A Commission on Government Security was created by the Congress in 1955 to reconsider the whole matter of "loyalty" dismissals in view of the variations in practice among agencies and of the mounting criticism of the procedures for violating elementary standards of fair play. In its report delivered in 1957, the Commission recommended: (1) the creation of a new Central Security Office in the executive branch to conduct hearings on loyalty, to review agency procedures, and to advise agency heads in all security cases; (2) the confrontation of accused by accusers wherever this could be done without endangering national security; (3) a change in rules to allow transfer to nonsensitive positions of "security risks" who were not disloyal. Many agencies have been quietly modifying their loyalty programs in the directions suggested by the Commission but as yet there has been no executive or Congressional action on the Commission report.

Restrictions upon partisan activities

One of the objectives of the merit system from its inception has been to prevent civil servants from being required to engage in partisan political activity. The original Civil Service Act forbids the dismissal or disciplining of any classified employee because of his failure to make a contribution to a campaign chest. On the other hand, employees of the classified service are forbidden to engage in partisan politics. They may vote, attend rallies as spectators, and privately voice their opinions but they may not (since 1907) take any active part in political campaigns. To do so is grounds for dismissal. A Political Activities (Hatch) Act of 1939 forbids all officers and employees of the executive branch, except those in "policy-determining" positions, from taking part in the management of party affairs or in political campaigns. Nor may they use their official positions in any way to influence the election of any candidate to national office. Officials in the unclassified service, may, however, publicly voice their opinions on issues or candidates if they do not do so as "part of an organized campaign." In 1940 a new (Hatch) act extended similar but not identical restrictions to state and local government employees working in programs that are wholly or partially financed from the national treasury. The intention of these recent laws to reduce the influence of the executive branch in party matters has been only partially realized. Enforcement has never been especially vigorous and violations, especially among patronage appointees, are probably numerous.

Lobbying not restricted

It is ironic but understandable that national civil servants are forbidden to engage in the type of political activities that are generally approved by the public but are allowed to lobby in their own behalf, individually or through their organizations, before Congress. An attempt by President Theodore Roosevelt to prevent employees from appealing to Congress over the heads of their superiors was squelched by the Congress in an (Lloyd-LaFollette) Act of 1912

which guarantees the right of employees to petition Congress against impairment by executive order.

Promotion and transfer

Maintaining a competent staff is not solely, perhaps not even mainly, a problem of effective punishment. It is also one of appropriate reward. 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 on the basis of meritorious service. The same holds true in public administration. Few problems of our American civil service (national, state, and local) have proved more difficult. 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 someone'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? The existing regulations while urging the use of examinations recognize the possibility of promotions without examination. Until recently, 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 somewhat by such measures of efficiency as might be available. An executive order of President Franklin D. 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. Since that time the Commission itself has been conducting promotion examinations for positions common to more than one department or establishment. Individual departments and establishments, furthermore, have been more diligent in holding examinations for promotion within their respective jurisdictions. The Commission's own examinations open avenues not only for direct promotions but also for transfers (often amounting to promotion) from one branch of the service to another.

Efficiency ratings

One of the keys to a usable system of promotion and pay rises is the development of objective methods of measuring employee performance. A uniform system of efficiency ratings throughout the classified service was tried by the national executive beginning about 1942. This was replaced in 1950 by a system of departmentally-developed, commission-approved performance ratings which places more emphasis on the improvement of employee performance than upon the use of the ratings for promotion purposes. Neither the old nor the new procedure, however, has provided reliable data for informing the discretion of the appointing authority. The absence of widely accepted standards for measuring performance has meant, in practice, that heavy reliance is placed upon seniority.

In sum, the national civil service merit program has not completely achieved a system of personnel administration in which able and ambitious young people may enter upon a distinguished career certain of continuing advance and of increasing responsibility depending solely upon competent performance.

## MAINTAINING EMPLOYEE MORALE

Studies of human behavior in industry and government reveal that performance on the job is influenced by many other factors than the method of hiring, firing, and promoting. The conditions under which the work is performed, the attitudes of fellow employees, the treatment accorded grievances, the relative levels of pay, the amount of vacation, and many other factors are impressive determinants of employee morale and efficiency.

Pay

The pay of civil servants is determined very largely by the classification of the positions which they occupy. All positions in the classified service are now assigned by department executives to classes established by the Civil Service Commission for this purpose and the Commission periodically reviews departmental assignments to maintain reasonable uniformity throughout the executive branch. On the recommendation of the Commission, the Congress, traditionally, establishes a range of pay for each grade in each schedule of the classification system. For each grade a minimum and a maximum pay are established with steps between by which an individual may move from the beginning pay to the highest pay for that grade. Once the top pay for the grade is reached, however, the individual can earn no more unless he is promoted to another post or the post he holds is reclassified to a higher grade or the Congress grants a general pay increase. The executive branch, at present, holds a distinct edge in pay over private employment for most laboring and clerical positions. It suffers by comparison largely in the upper group of executive, professional, and scientific positions. It should be added here that, in general, the standard work week for civil servants is 40 hours with additional compensation for overtime.

"Fringe benefits"

Personnel practices in the national government have frequently been influenced by the theory that the government should be a "model employer" and should establish conditions of employment for its own employees which would tend to set a standard for the nation. Nowhere in the present personnel system has this policy been so influential as in the provision of what are now called "fringe benefits" for its employees. A retirement system provides retirement and disability benefits for employees on a cumpulsory basis, financed by employees contributions (deducted monthly from pay) to which the government adds interest compounded annually. Paid vacations have been a feature of executive branch employment under laws dating back at least to 1896. Vacation allowances are presently controlled by the Annual and Sick Leave Act of 1951, as amended, which authorizes paid vacations ranging from 13 days a year for persons with fewer than three years' service to 26 days for persons with 15 years' service. Paid absence during illness is also authorized at the rate of 13 days per year, and if unused this may be accumulated to take care of protracted absence due to ill-health. Employees of the national government also receive the benefit of a larger number of legal holidays than most private establishments observe. Since 1916, national em-

ployees have been protected against loss due to death or injury while on duty by a system of workmen's compensation. In 1954, a joint-contributory system of group life insurance was established by Congress for national employees which provides insurance protection approximately in the amount of annual compensation. In total, the fringe benefits associated with civil service employment are among the most generous in the country and go far toward making such employment attractive.

## ORGANIZATION OF PERSONNEL ADMINISTRATION

The Civil Service Commission

The main agency charged with the administration of the merit system throughout the executive branch is the Civil Service Commission. This agency of three members, appointed for indefinite terms by the president with the approval of the Senate, has been in existence since 1883. Administratively the Commission is directly under the president. From modest beginnings the Commission has grown to its present size and complexity. It now employs almost 4500 persons and spends $20 million annually through its central office and its regional offices in 14 major cities. The board form of organization for the central personnel agency in the executive branch has been sharply criticized in recent years on the grounds that it tends to emphasize its negative and reviewing function and that an energetic and positive program of attracting ability into the public service requires a single, forceful-executive-type organization. It has survived most of the attacks largely unchanged, except that in recent reorganizations more administrative authority has been concentrated in the hands of the chairman and he has been designated as chief personnel officer under the president.

Departmental personnel agencies

Serious criticisms of Commission operation have also come from the operating establishments which have pleaded for more and more authority to handle their own personnel transactions. The larger departments have for many years felt the necessity of having rather substantial personnel agencies of their own to handle pay, records, promotions, and other matters. In 1938 an executive order required all departments and all of the major independent agencies to establish such offices. Since that time, personnel work has been increasingly decentralized from the Commission to the departments with the result that the Commission has gradually become more of a policy and an auditing agency than one concerned in the day-to-day administration of personnel. We have noted, for example, how classification responsibilities have been decentralized. There is also much pressure to decentralize examination administration. The Hoover Commission in 1949 found that more than $76 million was being spent for personnel administration in the executive branch and that 23,430 employees were engaged in this work, indicating that the departmental agencies were in the aggregate far larger than the Commission itself.

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# CHAPTER 18

# *The National Judiciary*

> 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.—Art. III, Sec. 1.

A separate system of national courts

The crowning defect of the Articles of Confederation, declared Alexander Hamilton in *The Federalist* (No. XXII), was "the want of a judicial power"; and in planning a "more perfect union" the framers of the Constitution in Article III placed full judicial power alongside of executive and legislative power as one of the three main pillars of the national authority. In so doing they prepared the way for the establishment of a system of national courts, separate from the state courts, and deriving its existence and jurisdiction solely from the Constitution. When to these provisions the framers added (Art. VI) that this Constitution and the laws and treaties made under it were to be the "supreme law" of the land, binding judges in state courts, regardless of the provisions of state laws or constitutions, they laid the foundation for a national court system superior to all other courts and obliged to interpret and apply the supreme law in a uniform manner throughout the nation. The framers hoped to achieve not only uniformity of interpretation but escape from the local and sectional prejudices which would certainly influence the views of state judges, especially in controversies between states and between citizens of different states.

## SCOPE OF THE NATIONAL JUDICIAL POWER

Nature of "judicial power"

Judicial power has been defined as "the power to decide 'cases' and 'controversies' in conformity with law and by the methods established by the usages and principles of law." [1] The important words in this definition are *cases* and *controversies*. Unlike the president and the Congress, courts do not initiate actions; they dispose of matters brought before them on the initiative of outsiders. They are powerless to influence the conduct of government except as they rule for or against the executive branch when it is one of the parties to a contest or as they construe the laws and orders uttered by the other branches as an incident to determining the relative merits of the claims of the litigants. In a system of government based upon a written constitution,

[1] E. S. Corwin, *The Constitution and What It Means Today* (11th ed., Princeton, N. J., 1954), 130.

however, the ultimate power to declare what the constitution means in any given situation is a very important power indeed whether it is exercised incidentally to the discharge of some other function or not. The nature of the judicial function was determined early in our national history when the Supreme Court decided that it could not give legal advice either to the president or to Congress. Its only function was to decide lawsuits properly brought before it. In deciding lawsuits, the courts must say what the law is that must be applied to any controversy before them and this obligation requires that they interpret statutes, treaties, executive orders, constitutions, and judicial precedents. The other branches of the government are constitutionally obliged to defer to the views of the courts. Under our system, a court is entitled to have its decisions reviewed and perhaps reversed only by a *higher court*. Judicial power has also come to embrace the authority to support valid findings of administrative agencies with orders which can be ignored only at the peril of fine or imprisonment for "contempt of court." The national courts have, however, acquiesced in allowing what they regard as questions of "fact" to be determined in some situations by agencies of the executive branch and questions which are "political" to be determined with finality by either or both of the other two co-ordinate branches of the government.

Marginal judicial activities

It would be quite wrong to suppose on the basis of what has been said that national judges have no other function save presiding over legal contests. Our national courts have become increasingly the managers of important business enterprises through their power, in bankruptcy proceedings, for example, to appoint receivers responsible to them for the management of assets pending the outcome of litigation. Many judges thus find themselves engaged in the operation of railroads, mines, and factories and obliged to deal with the problems of these enterprises which harass business executives. The rehabilitation and correctional programs of the Federal Bureau of Prisons involve the judges in the affairs of prisoners sometimes for many years after trial and conviction. The national judges, like their counterparts in the states, marry and naturalize individuals as well as perform many other functions which are called judicial but are not necessarily litigious.

Basis of national jurisdiction:

The national courts like the legislature are assigned only specifically enumerated powers by the Constitution. Jurisdiction, the power to hear and to determine, is conferred upon the courts only over certain kinds of cases and controversies. The state courts have jurisdiction over all others and over some that the national courts may try. The national judicial authority is extended by the Constitution to certain classes of cases on the basis of the subject matter of the controversy. This class includes (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. Whenever in any law suit a legal right is asserted which is based upon some provision of the Constitution, laws, or treaties, the case may be tried in the courts of the United States. Admiralty and maritime jurisdiction has to do with offenses committed on shipboard and with contracts which must be executed on the high seas or

1. Nature of the controversy

on navigable waters of the United States. Prize cases are also included in the scope of national judicial power.

2. Status of the parties

A second category of cases is assigned to the courts of the United States because of the status of the parties: (1) all cases affecting ambassadors and other public ministers and consuls; (2) controversies to which the United States is a party; (3) controversies between two or more states; (4) controversies between citizens of different states; and (5) controversies between a state, or the citizens thereof, and foreign states, citizens, or subjects where the state is the party plaintiff.

Congressional power over jurisdiction

The assignment of certain classes of cases to the courts of the United States by the Constitution does not of itself confer power over all of these matters. Rather the Constitution specifies the limits beyond which power may not be conferred, and Congress may or may not endow the courts with all of the power within the constitutional limits. Congress thus possesses some authority to limit the jurisdiction of the courts. Congress originally conferred only a portion of the jurisdiction. Throughout the last century Congress gradually added to the jurisdiction until it had conferred all that the Constitution contemplated. In this century the jurisdiction has been somewhat contracted. In several types of cases, for example, Congress has prescribed that the amount in controversy must exceed a certain sum before the litigants may use the national courts.[2]

Jurisdiction shared with state courts

Much of the jurisdiction conferred by the Congress is shared with state courts. The national courts, in other words, do not have exclusive authority over it. In general, only in cases in which the United States or a state is a party (unless the action is between a state and one of its own citizens), or which involve the representatives of foreign governments, a crime against the United States, or admiralty, maritime, patent, copyright, or bankruptcy laws, do the courts of the United States have complete and exclusive jurisdiction. In virtually all other types of cases to which the judicial power extends, the plaintiff may begin his case in either a state or a national court.

How cases get into the courts of the United States

Cases get into the national courts in at least three different ways: (1) many begin and end there because no other court has any authority to deal with them; (2) a few cases that have been entered in state courts are transferred to a national court before trial; (3) some cases are carried from the highest state court to the Supreme Court of the United States on appeal or by *certiorari* proceedings. This latter procedure is one which requires the Supreme Court to consent to hear the case before it may be brought.

[2] The most recent contraction of jurisdiction by Congress occurred in 1958. In an Act passed on July 25, the minimum amount in controversies between citizens of different states entitling them to use the national courts was raised from $3,000 to $10,000 and the same change was made in the requirement for cases involving federal questions that are not covered by specific statutes. In the same Act, the Congress also declared that a corporation would henceforth be regarded as a citizen of the state in which it had its "principal place of business" as well as of the state in which it was incorporated. A concerted drive in the same session of Congress to curtail sharply the jurisdiction of the Supreme Court in cases of conflict of state and national law was narrowly defeated in the Senate

## KINDS OF CASES TRIED

The types of actions brought in the courts of the United States fall into two broad categories, civil and criminal. With a few unusual exceptions, the same courts and judges handle both types of cases.

1. Criminal actions in the courts of the United States

The criminal actions brought in the national courts represent a small proportion of the total number of criminal prosecutions in this country. The vast majority of all criminal offenses are state offenses and offenders are brought to the bar by state and local enforcement officers and are tried by state judges. The only concern of the national courts with these cases is to enforce upon state courts the guarantee of a fair trial which has been construed to be required by the Fourteenth Amendment. Authority to try criminal actions in the first instance is lodged in the courts of the United States only for offenses against the United States or against the laws of the United States as defined by Congress and the Constitution. The Constitution mentions piracy, counterfeiting, treason, violation of international law, and offenses in the territories and dependencies of the United States. Congress, however, prescribes penalties for violation of the laws it enacts and thus the United States Code includes, among others, such crimes as mail fraud, smuggling, sabotage, and election fraud. All of these are clearly incidental to its powers to establish post offices, regulate imports, wage war, and regulate national elections. To supplement alleged weaknesses in state law enforcement, Congress in the past quarter-century has extended national prosecuting and judicial authority to crimes such as kidnapping and bank robbery hitherto handled exclusively by the states.

2. Civil actions

The most numerous category of actions tried in the national courts are civil actions, usually between two private parties but frequently with the United States government as one of the parties. Civil actions ordinarily arise out of civil wrongs, called torts, and breaches of contract. Torts include such wrongful actions as trespass, property damage, negligence, libel, and assault.

a. At law

In settling civil disputes the national courts may apply state law as well as national law. Cases which get into the national courts because of the diversity of the citizenship of the parties, for example, frequently involve only the application of state law. This state law may be either statutory (enacted by a state or local legislative body) or common law (the system of judge-made law brought to America from England and modified here by the decisions of American judges and by legislation).

b. In equity

The national courts also have equity jurisdiction, the power to interpret and apply the law of equity to appropriate civil actions. Equity is a branch of Anglo-American jurisprudence that developed side by side with the common law and as a supplement to it. It is designed to provide substantial justice in a large number of situations to which the strict application of the forms of action and procedures of the common law would result in unnecessary hardship. The typical redress, for example, available under common and statutory law is money damages and it is granted only after the wrongful action has

transpired and the injured party can show his "wounds." Equity jurisdiction provides legal remedies for many situations in which money damages are not appropriate or come too late to be helpful. Thus the court of equity may issue orders (writs of injunction) to forbid certain actions that would cause immeasurable or irreparable damage if committed. The court of equity may issue decrees of "specific performance" requiring a party to a contract to live up to his bargain, for example, by delivering the race horse he promised when the other party is willing to pay the money and thus a damage award would be useless. To the ordinary citizen the distinction between law and equity is of no major consequence; both are administered in the same courtroom by the same judge, sometimes on the same day. Lawyers, however, frequently prefer equity to civil law procedures because there is no jury in equity and because the procedures are less hedged about by technical formalities.

c. In international law

We have noted that the national courts administer statutory law, the common law, and the law of equity. They also administer international law—the law among nations based upon treaties, agreements, and other types of international understandings—and admiralty law—the law of the high seas and navigable waters of the United States based upon the technical rules of an admiralty code developed over many centuries by English and American legislatures, courts, and administrative agencies.

d. In admiralty law

Legal procedure for trying cases

The procedure used by the national courts in trying all of these different types of cases is largely devised by the courts themselves. The Constitution, as we have seen, prescribes a number of requirements for criminal actions designed to protect individuals from unfair or unwarranted prosecution and conviction. The Congress has from time to time regulated the procedure by statute and many of the present rules are incorporated in the United States Code. The power to make rules governing civil procedure in the courts of the United States has repeatedly, however, been delegated to the Supreme Court, and in 1940 a similar power over criminal procedure was delegated to this body. In formulating its rules, the Court relies heavily on advisory committees representing both bench and bar.

## STRUCTURE OF THE NATIONAL JUDICIAL SYSTEM

The national judiciary comprises three levels of tribunals. All of these have been established by Congress and none except the Supreme Court is specifically mentioned in the Constitution.

1. District courts

The lowest level of courts is the district or trial courts. The 50 states are divided into 86 districts for the purpose of providing a trial court within easy reach of litigants.[3] Each state embraces at least one district. Each of these courts is manned by from one to 18 judges, depending mainly on the volume of litigation but also, of course, on the pleasure of Congress. Whatever the

[3] A trial court of comparable jurisdiction also exists in the territories of Puerto Rico and the District of Columbia. The statutes, therefore, refer to 88 District Courts of the United States. There are also similar but not identical courts in Guam, the Virgin Islands, and the Panama Canal Zone.

number of judges, each holds court separately, except for certain unusual occasions, and the chief justice of the United States may (since 1922) transfer judges temporarily from one district to another to assist in relieving accumulated backlogs of cases. Virtually every judge is aided by a law clerk in reviewing the legal problems presented for his consideration and the staff of the court also includes: clerks who preside over the records and calendars; reporters who take the proceedings; criers; and other functionaries. Attached to each district is a district attorney who, under the direction of the Department of Justice, conducts criminal prosecutions, a marshal who executes the orders and serves the papers of the court, a number of referees in bankruptcy and commissioners who hold preliminary hearings in criminal cases.

Jurisdiction

The volume of business brought to the district courts is large. All offenses against the laws of the United States are tried there. These criminal cases are given priority by the courts and the dockets are normally up-to-date. All civil actions arising under the Constitution, laws, or treaties of the United States ("federal questions") may originate in the district courts as may all cases based upon the "diversity of citizenship" of the parties, but in both types of cases the amount in controversy must ordinarily exceed $10,000 for the national courts to have jurisdiction. The original jurisdiction of the district courts extends also to a variety of civil actions regardless of the amount involved, for example, cases in admiralty, bankruptcy proceedings, patents, copyrights,

**CASES COMMENCED IN DISTRICT COURTS OF THE UNITED STATES**

**July 1, 1956—June 30, 1957**

| | | |
|---|---|---|
| *Civil Cases* | | |
| (1) | U. S. plaintiff (incl. land condemnation, denaturalization, recovery of overpayments, etc.) | 15,478 |
| (2) | U. S. defendant (incl. habeas corpus, tax suits, claims, and enjoining national agencies) | 4,436 |
| (3) | "Federal questions" (incl. patents, bankruptcy, trademarks, fair labor standards, anti-trust suits) | 8,220 |
| (4) | Diversity of citizenship (incl. insurance, automobile accident, contracts) | 23,223 |
| (5) | Admiralty | 2,786 |
| (6) | Others | 8,237 |
| | Total Civil | 62,380 |
| *Criminal Cases* | | |
| (1) | Immigration Law violations | 2,302 |
| (2) | Transportation of stolen vehicles | 3,534 |
| (3) | Fraud | 9,197 |
| (4) | Liquor and Internal Revenue | 4,131 |
| (5) | National Defense (draft, etc.) | 319 |
| (6) | Narcotics, Food & Drug, White slave, kidnapping (etc.) | 8,601 |
| | Total Criminal | 28,084 |

SOURCE: *Annual Report of the Director of the Administrative Office of the United States Courts, 195*

postal laws, and nationally protected civil rights. Despite the addition of a large number of new judges in 1949 and in 1953, the disposition of civil actions in the district courts is seriously delayed. For some time these courts have been about a year behind in their dockets. Most cases begun in the district court also end there. Appeals may be taken from their decisions to the courts of appeals and in a few cases, for example, where the district court has held an act of Congress unconstitutional, directly to the Supreme Court. The district courts, themselves, have no appellate jurisdiction. Cases appealed from the decisions of state high courts go directly to the Supreme Court; they do not start all over again at the bottom of the national hierarchy.

2. Courts of appeals

The courts of appeals handle the great bulk of appellate work in the national judicial system. For most of the past century, circuit courts shared original jurisdiction with the district courts and handled some appeals. The confusion of having two courts of original jurisdiction led the Congress finally in 1891 to create nine circuit courts of appeals to handle much of the appellate work and in 1911 the district courts were assigned virtually all of the original jurisdiction of the national judiciary. Since 1948, the intermediate courts created in 1891 have been designated simply "courts of appeals." There are now eleven judicial circuits, including one for the District of Columbia, with a court of appeals in each. Each court is composed of from three to nine judges and at least two are required to consider each case.

Functions

With every form of original hearing excluded, the work of the courts of appeals consists in hearing appeals from the decisions of the district courts within the respective circuits and of enforcing the determinations of national regulating agencies such as the Federal Trade Commission and the National Labor Relations Board. Appeals are carried to these courts from the district courts as a matter of right and the judges have little or no discretion in the matter. In keeping with the long-term trend of relieving the Supreme Court of much of the burden of appellate work, the decisions of the courts of appeals are final in the vast majority of the cases brought to them. Review of the decisions of courts of appeals by the Supreme Court is largely at the discretion of the latter and occurs in few cases. Only in cases in which the appeals court holds a state statute contrary to the Constitution, laws, or treaties of the United States does appeal lie to the Supreme Court as a matter of right.

3. The Supreme Court

At the top of the system stands our most august tribunal, the Supreme Court of the United States. In its infancy this tribunal showed little or no promise of becoming the powerful institution it now is. President Washington found it difficult to keep the six judgeships filled with able men. Under Chief Justice Marshall (1801-35), however, the power and prestige of the Court grew by giant strides. His great decisions establishing judicial review and enlarging the authority of the central government over the states provided the basis of the centralizing tendencies which have characterized our system ever since. Under his guiding hand the Court not only served notice on the states of its determination to strike down every local obstruction to the achievement of union but informed the other two branches of the national government of

a. Development

its intention to hold them to their proper functions. Through many periods of weakness as well as strength, the Court has developed into our most independent agency of power, the one most removed from popular influence and the most venerated of our institutions.

b. Membership

Originally, the Court was composed of a chief justice and five associate justices. The total number, as fixed by Congress, has since been as high as 10, although for about a century now it has been nine. The chief justice has no more legal weight or influence in deciding cases than any of his associates. He presides over the sessions of the Court, assigns to his associates the task of writing the Court's opinions, and writes many of them himself. He appoints members to serve on committees which revise the rules of procedure and has many administrative duties in connection with the whole judicial system. Altogether, 14 chief justices have presided over the Court since its creation. John Marshall towers above the others in significance. His decisions earned for him the title of "the second father of the Constitution." Of the more than 80 associate justices who have served since 1789, there have also been several whose influence upon our constitutional history has been impressive: James Wilson (1789-98), Joseph Story (1811-45), Stephen J. Field (1863-97), John M. Harlan (1879-1911), Oliver Wendell Holmes (1902-32), and Louis D. Brandeis (1916-1939).

c. How the Court works

Regular "terms," or sessions, of the Court are held annually in the new Supreme Court building adjacent to the Capitol, beginning on the first Monday in October and ending at the close of the following May or June. Six justices must be present at the argument of a case, and any decision must be concurred in by a majority of those hearing the matter—in other words, by at least four justices. If a majority cannot be obtained for a decision, a rehearing may be ordered, but an evenly divided court on a question of reversing a lower court has the effect of upholding the earlier decision. During a typical term of court, about 1200 cases are considered but only about 100 result in written opinions and another 100 in memorandum opinions. After hearing the arguments of the pleaders in a series of cases, the Court recesses for research and reflection. Typically, the judges meet on Saturdays to arrive at collective judgments on the pending cases. When a point of view is finally agreed to by the requisite majority, the Chief Justice designates some member of this group to write the opinion of the Court. After review by others, the opinion is read at an ensuing Monday sitting of the Court and becomes a part of the documentary history of the American system of government.

d. Concurring and dissenting opinions

The opinion of the Court ordinarily sets forth the line of reasoning by which the justices arrived at the conclusion. One or more members of the majority may have arrived at the same decision by a different line of argument and may be impelled to present a "concurring" opinion which supports the decision but offers different grounds. The minority, if any, has the privilege of presenting its views to the public in one or more "dissenting" opinions. All of the opinions are a part of the record and are published by the government in

a series of volumes called *United States Reports,* prepared under the supervision of a Court reporter.

e. Jurisdiction

Cases come before the Supreme Court in one of three ways: (1) by original suit; (2) by appeal from the decision of a lower court; and (3) by *certiorari* or discretionary review of a lower court decision. The three are of very unequal importance. By far the largest share of cases get before the Court by *certiorari.* The original jurisdiction of the Supreme Court is set forth in the Constitution and includes cases affecting the representatives of foreign governments and cases in which a state is a party. Its jurisdiction is exclusive, however, only in controversies between two or more states and in actions against representatives of foreign states. It also has original but not exclusive jurisdiction in actions brought by ministers of foreign states, in controversies between the United States and a state, and in actions by a state against aliens or against citizens of another state. This jurisdiction may be regulated and has been by Congress as to its exclusive character but it may not be validly enlarged except by constitutional amendment. The only part of this original jurisdiction that has proved significant is that involving suits by one state against another.

The right of appeal to the Supreme Court is sharply limited and extends only to those few categories of cases already mentioned that have been decided by the highest state courts, the courts of appeals, and the district courts of the United States. Even in these cases the right of appeal is not absolute, for the Court may dismiss an appeal if the question involved is "insubstantial." With increasing frequency the Court has been doing just that. Most cases are brought to the Court by *certiorari* procedure. The history of this aspect of the judicial system has been one of progressive expansion of the Court's *certiorari* or discretionary jurisdiction and contraction of its "obligatory" jurisdiction. The rules of the Supreme Court indicate that review of lower court decisions by *certiorari* procedures is to be granted only when there are special or important reasons for it. Some of the circumstances which induce the Court to review are: (1) that the case involves an important principle of constitutional or statutory construction; (2) that the case involves a conflict of interpretation of law among the courts of appeals; (3) that a state high court has decided a "federal question" of substance not before determined by the Supreme Court and probably contrary to the tenor of Supreme Court decisions. In general, the Supreme Court is thus relatively free to select from among all of the cases urged upon it only those cases upon which it wishes to pronounce. Typically, it now rejects from 70 to 85 per cent of all requests for review by *certiorari,* frequently without any explanation of its reasons.

Certiorari procedure

## JUDICIAL INDEPENDENCE AND ITS LIMITATIONS

Compensation and tenure

While deliberately interlocking the executive and legislative branches of the government by numerous checks and balances, the Constitution's framers designed the judicial branch to enjoy a high degree of independence. It is

most unlikely that our national courts could have successfully asserted the power to review the actions of the other branches had they not occupied a position from which they were hard to control. The constitutional cornerstones of judicial freedom are: (1) that all national judges "hold their offices during good behavior," and (2) that their compensation may "not be diminished during their continuance in office."

Courts gain independence also from the fact that the Congress has always had a large complement of lawyers among its members. Lawyers by training are accustomed to defer to the pronouncements of judges. Our people, too, have approved the freedom accorded our courts as is demonstrated by the strong disposition of the voters to return judges to office again and again when, as in most states, they have the opportunity of electing them. The successful assertion of the power authoritatively to construe the Constitution, and thus to prescribe the limits on the powers of the other branches of government, has provided the courts with a potent weapon to resist any aggressive thrusts in their direction by Congress or the president. At the same time, no valid power is lodged in any other branch to construe or limit the power of the courts. None of its decisions can be appealed; none of its members can be easily intimidated by threats of removal. The late Chief Justice Stone once remarked that the only check on the Supreme Court is the judges' own "sense of self-restraint."

Limitations:

The courts are not, however, perfectly free. There are some important limitations on the actual and potential power of the national judiciary. In the first place, it is possible to remove a judge from office. He may be impeached for and convicted of "treason, bribery, or other high crimes and misdemeanors." In other words, a national judge is subject to the same procedure as other national civil officers. Although the constitutional impeachment procedure is largely unworkable except for the most flagrant cases of official wrongdoing, nevertheless it has been used against judges more than against any other officials. In all, nine members of the judiciary have been impeached and four convicted.[4]

1. Impeachment

2. Congressional control over the structure of the courts

In the second place, Congress has relatively large powers to create courts, determine the number of judges, fix their salaries, and establish the range of their jurisdictions. This means that Congress can abolish courts (except the Supreme Court), reduce the number of judges, and curtail the number and kinds of cases they may hear. In practice, Congress has influenced or attempted to influence the Supreme Court by increasing the number of judges on that bench in order that enough "right-minded" new ones might be appointed to alter the anticipated decision. It has also deprived the Supreme

[4] The successful proceedings were those against John Pickering (1803-04); West H. Humphreys (1862); Robert W. Archbald (1912-13); and Halstead L. Ritter (1936). Unsuccessful actions were those against Samuel Chase (1804-05); James H. Peck (1830-31); Charles Swayne (1904-05); and Harold Louderback (1933). Judge George W. English probably escaped conviction in 1926 by resigning before trial after impeachment had been approved. A few other judges have escaped impeachment by resigning when proceedings seemed imminent.

Court of its appellate jurisdiction in a given class of cases because it anticipated a "bad" decision on an issue it regarded as vital. Both of these things occurred during the Civil War-Reconstruction period and, of course, are not typical of the relations between the two branches. They are illustrative, however, of what an aroused Congress, presumably supported by public opinion, can do. Congressional efforts to curtail the appellate jurisdiction of the courts in such controversial areas as "communist-control" laws were narrowly defeated in 1958. The attempt by President Roosevelt and his followers in Congress in 1937 to achieve a more "sympathetic" Supreme Court by legislative reconstruction was defeated by the Congress. The remarkable change in the outlook of the Supreme Court that accompanied the controversy has, however, usually been regarded as a victory for the President in the real war despite the loss of the battle in the Congress.

3. Partisan considerations in appointments

The major influence of the political and responsive branches of the government over the judiciary stems from the method of selection of judges. The Constitution provides that national judges are to be appointed by the president, by and with the advice and consent of the Senate. From the first development of factions in our government, presidents have been strongly motivated to select men of their own faction or party to serve on the national bench. Many of our chief executives have also been deeply concerned not only with the political affiliation of their nominees but with their constitutional philosophies. It should be clear to the student of our institutions that the Constitution does not always speak for itself in clear and unmistakable language and even our wisest statesmen have differed about what it means. Presidents appear to desire that their appointees to the bench agree with them on fundamentals. There have, of course, been exceptions and presidents have on occasion, willingly or unwillingly, elevated to judgeships illustrious men of the opposite party or of contrary constitutional views. There are two important considerations which mitigate the effectiveness of presidential influence over the judiciary. Once appointed, as many presidents have learned to their chagrin, the judge obtains life tenure and thus safe from presidential ire, may change his mind about some of the issues. Secondly, few presidents get an opportunity to appoint as many as a majority of the members of the Supreme Court. Furthermore, the Senate has got to be considered in the appointment process. The dominant party in the Senate is probably as interested as is the president in naming "right-thinking" judges to the bench. It occasionally happens that the president and the Senate do not agree. The president has to select an individual who will also be acceptable to the leaders of the Senate. In the lower courts of the United States, the president is narrowly confined in his appointing prerogatives by the practice of "senatorial courtesy." National judgeships are now customarily regarded as patronage for the senator or other state party leader in whose state the court is located. Under these conditions, new appointments to the lower and intermediate courts of the United States are invariably made from loyal supporters of the party in control in Washington.

4. Enforcement of court processes

We have already explained that the courts must rely on others to bring them the business that they get. This reliance is especially important on the executive branch which brings all criminal cases and a large number of civil actions. More important, however, is the fact that the courts have no substantial enforcing agency even for their own decisions. They must rely on the executive branch to back up their orders if the recipients are unwilling to respect the commands of the United States marshals who serve the courts' papers. An un-co-operative president has been able on a few occasions to frustrate the authority of the Court by refusing to be diligent in enforcing its decisions. The most famous example of this was the refusal of President Jackson to enforce against a recalcitrant officialdom of the State of Georgia (1831-32) a decision of the Supreme Court abrogating an attempt by the state to ignore its treaty obligations to the Cherokee Indians. More recently, the decision on racial integration in the public schools of the nation is being seriously challenged and may require more energetic executive support if it is to become effective.

## THE SUPREME COURT AND JUDICIAL REVIEW

In deciding cases and controversies, all American courts are obliged to consider whether the legal claims at issue are based upon laws which are consistent with relevant constitutional provisions. It thus becomes the most important and distinctive function of the Supreme Court of the United States to pass finally on the constitutional validity of state laws, state constitutions, laws of Congress, and executive actions. In performing this function it stands as the guardian of the boundaries which separate the legitimate powers of the three branches of the national government as well as those which separate the powers of the national government as a whole from those of the states and of the people. The origin and importance of this function of judicial review and its importance in strengthening the national government in relation to the state have already been discussed. We have noted that the Constitution itself does not expressly confer this power on the Court and there have always been those who regarded its exercise as sheer usurpation. But from John Marshall's day to this it has become a settled part of the American system of government and most statesmen throughout our history have regarded it as not only a desirable but a necessary concomitant of a written constitution and a scheme of limited government with divided powers. Our people have also largely accepted it and even have acclaimed it. It is one of the unique contributions of the people of the United States to the art of constitutional self-government.

Judicial review of state action

Since the jurisdiction of the Supreme Court has come to be largely discretionary, the great majority of cases which the Court now hears involve the constitutionality of some action by some branch of the national or a state government. The review of state action stands upon a somewhat different basis, insofar as its effect upon our constitutional system is concerned, than

the review of national actions. In earlier days this was the form which judicial review customarily took, and long lists of state laws and even some state constitutional provisions have been struck down by the Supreme Court as contrary to the Constitution of the United States. It is hard to imagine how any major principle of government could be uniformly applied throughout the United States unless some national agency performed this function. Furthermore, the fact that the Supreme Court is a national agency has meant that the states'-rights doctrine has never received consistent support from it. Finally, in exercising a review of state action, the Court has been able to thwart encroachment by the state legislatures and executives on the national authority. This was one of the major problems of the first half-century of our national life.

Review of national laws and acts

The review by the Supreme Court of congressional and presidential actions is of a different magnitude. In these cases, the Court is dealing with allegedly co-ordinate branches of government. Its determination to hold these as well as the states to their proper spheres of power may, and occasionally has, brought it into conflict with those who claim the right resulting from election to give effect to popular demands. The other branches, it may be added, can assert also the duty to interpret the Constitution themselves. The other two branches are equipped by the Constitution, as we have already seen, to influence considerably the character and methods of the Court. For these and other reasons, the Supreme Court has been much more reluctant to declare congressional statutes and presidential actions contrary to the Constitution than it has state actions. Until 1865, the Supreme Court declared only two acts of Congress unconstitutional; since that time it has upset several dozen more, but still a small number compared to the number of state laws it has overturned.

How judicial review operates:

Perhaps a more vivid conception of how judicial review operates can be gained by some concrete illustrations. In 1897, the legislature of New York passed a law limiting employment in bakeries to 60 hours a week and 10 hours a day, presumably on the theory that baking was a kind of industry in which longer employment was unhealthful and the products might be thus made more dangerous to the consumer. After several years, an employer, Lochner, was accused of and indicted for violating this law. He was convicted of the offense in the state trial court and his conviction was upheld by the highest state court, despite the pleas of his attorneys that the law in question violated the Constitution of the United States. He appealed his case to the Supreme Court of the United States on the basis of this plea and as a matter of right since the state court had found the law valid. Five of the nine justices of the Supreme Court held that this law deprived bakery employees of their freedom (to contract their labor as they pleased) guaranteed against state deprivation without "due process of law" by the Fourteenth Amendment. Four justices held that the state law was valid and that the "due process" clause contained no such guarantees as the majority inferred. Thus, Lochner was relieved of any penalty; the Court declared, in effect, that it would not punish anyone

1. Lochner v. New York, 198 U. S. 45 (1905)

brought before it for violation of this particular New York law, and the law thus became unenforceable. This was done on the basis of five justices finding something in the Constitution that the other four could not find.

In 1943, the Congress adopted as a provision in an appropriation act that no funds available under any act of Congress should be used to pay the salaries of three individuals named unless before November 15, 1943, the President should procure senatorial confirmation of their appointments. The three named men had been the subject of attack by the House Committee on Un-American Activities and had been accused of subversive activities against the United States. They were serving as "recess" appointees and the effect of the language of the act was to force their removal from office. The three men instituted action in the United States Court of Claims to recover salary they alleged was due them because of wrongful dismissal. The court ruled in their favor and the case was certified to the Supreme Court. A majority of the Court held that the section of the appropriation act in question constituted a bill of attainder, which they defined as a legislative act which inflicts punishment without trial, and therefore violated the constitutional prohibition of such bills (Art. I, Sec. 9). Two justices held that the men were entitled to back salary but that the congressional action was not a bill of attainder, since it did not adjudge the men guilty of any offense. In this decision, the three men won back pay and the Court, in effect, said to Congress, you cannot remove officials whom you dislike from national office by this procedure.

2. U. S. v. Lovett, 328 U. S. 303 (1946)

*Effect of a decision invalidating a law*

It will be noted in these examples that the Court did not veto or annul either the New York statute or the act of Congress. It declared, rather, that in situations like those which confronted it, it would not enforce the laws against persons who rightfully sought its protection. State and national authorities make their own inferences from these decisions as to how the Court might regard similar laws or actions. Furthermore, the Court's action may come many years after the law was originally passed. The legal doctrine in the matter of validity is that every law is presumed to be constitutional until otherwise declared by a court in a proper case and that the burden of proof is on those who question its constitutionality.

*Attacks on and defense of judicial review*

On numerous occasions the decisions of the Supreme Court have been unpopular and have attracted wide criticism. Abraham Lincoln campaigned for United States senator and, in part, for president on his assertion that a Supreme Court decision (Dred Scott's case) was unwise, illogical, politically motivated, and ought to be overturned. Critics of the Court have frequently asserted that the judges are deliberately frustrating popular will on the basis of their own personal and partisan views, that the judges are ignoring underlying technological, economic, and social changes in our society which have changed the meaning and importance of legal or political conceptions, and that despite the presumption of validity a majority of one on the Court can and does overturn laws which their colleagues believe to be reasonable. The judges themselves frequently disclaim any disposition to do anything but apply

impersonal and objective legal principles to the problems presented to them. Thus Mr. Justice Roberts in U. S. *v.* Butler, 297 U. S. 1 (1936) said:

> It is sometimes said that the Court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty—to lay the articles of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former. All the Court does, or can do, is to announce its considered judgment upon the question. . . . This Court neither approves nor condemns any legislative policy. Its difficult and delicate task is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution, and having done that its duty ends.

Few students of the activities of the national judiciary accept the Justice's statement as a complete explanation or defense. If the matter were so simple, they argue, few cases would ever be brought. The Constitution is ambiguous in many places and the judges necessarily bring to the task of clarifying the unclear a great many preconceptions as to the "real" nature of our political system. A large number of the constitutional controversies concern matters on which the Constitution is silent and toward which the framers could have had no intention since they could not possibly have foreseen the problem. In order to perceive an intention where none exists, it is necessary for the viewer to bring a great deal of mental and emotional equipment to the task. Many members of the Court itself have never subscribed to the Roberts' theory. Justice Holmes, in the Lochner case already described, said:

> This case is decided upon an *economic* theory which a large part of the country does not entertain. If it were a question of whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinion in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . A constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of *laissez faire.*

The modern Supreme Court is not too sympathetic with the Roberts' doctrine. Many of its more recent decisions contain references to social, economic, and even psychological facts and opinions which are outside the more traditional concern for precedents and legal authorities. Times change and so do justices. The Court is not infallible and its views of constitutional questions may be and have been altered. But that it is a maker of law and not merely a discoverer of it, and that it exercises a profound influence upon public policy few would now dispute. Through the years it has retained its hold upon the loyalty of the American people as a whole. They believe that it ought to exercise the powers that it does exercise and they, and their elected deputies, defer to its opinions and respect its detachment. Its critics of yesteryear, when it was smashing attempts to regulate business, are its friends of today when it is striking sledge-hammer blows against all forms of discrimination in defense of its conception of the civil liberties of the American people.

## SPECIAL AND LEGISLATIVE COURTS

"Constitutional" and "legislative" courts

The courts of the United States thus far described are the principal repositories of the judicial power conferred by the Constitution. They have been established by Congress under Article III of the Constitution and are the closest approximation which the national government has to courts of general jurisdiction. In establishing them Congress has been controlled by the provisions of the Constitution relating to judicial tenure and compensation. Congress has, however, created a number of other courts incidentally to the exercise of certain of its enumerated powers. These are special courts and most of them are referred to as "legislative" courts by virtue of the relative freedom of Congress in creating them to prescribe terms of office for the judges and to endow them with nonjudicial functions.

Court of Claims

At least two of these special courts have, however, been specifically designated as constitutional courts by the Congress. The Court of Claims was created in 1855 under the power to appropriate money to pay the debts of the United States. It was authorized to hear and adjudicate claims of private persons against the government and to report its findings to Congress or to the department concerned. Since 1887 it has also heard suits against the United States for breaches of contract and since 1946 (Federal Tort Claims Act) suits for injuries caused by negligent or wrongful behavior of a government employee. In order to clarify the confused status of this court, the Congress in 1953 declared it to be a court established under Article III of the Constitution. The Court of Customs and Patent Appeals was created in 1910 under the power to regulate commerce and to regulate patents and is authorized to decide questions arising under the customs, patent, and trade-mark laws largely through the review of decisions of the Customs Court, the Patent Office, and the Tariff Commission. It was declared a constitutional court in 1958.

Court of Customs and Patent Appeals

Customs Court

Court of Military Appeals

Territorial courts

The "legislative courts" now include: (1) the Customs Court, created in 1926 out of the Board of United States General Appraisers under the power to regulate commerce, and authorized to review decisions of customs collectors and appraisals of imported merchandise; (2) the Court of Military Appeals, created in 1950 under the power to make rules for the government of the armed forces and authorized to review decisions of courts martial; and (3) territorial courts, created on various occasions under the power to administer the territories of the United States and including district courts in Hawaii, Guam, Puerto Rico, the Virgin Islands, the Canal Zone, and the District of Columbia. All of these territorial district courts except those in Puerto Rico and Hawaii have, in addition to regular national jurisdiction, jurisdiction over all those matters which in the states belong to state courts.

Administrative courts

All of these legislative courts, except those in the territories, may be accurately labeled also as administrative courts, dealing as they do with questions between private persons and government agencies. In this sense they are

an exception to the general rule of Anglo-American jurisprudence that cases arising out of the administration of laws shall be adjudicated by the regular courts.

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# II. FUNCTIONS AND SERVICES

## CHAPTER 19

## *Government and Business*

The purpose of government in the American ideology is to serve the people over whom it presides. The state is not an end in itself with a purpose and a destiny distinct from that of the persons who comprise it, as many European thinkers have held and rulers have practiced. The American believes the state is an agency for fostering the safety and welfare of individuals and has no other object. It is fitting, therefore, that we now turn from how the government is organized to what it does. In its programs we find the justification for its existence and a basis for determining its effectiveness.

Government and the maintenance of economic prosperity

Among the vast array of national programs, past and present, none has commanded more widespread interest nor more persistent attention than maintaining a high level of economic well-being among our people. There has never been a time when the government was indifferent to the health of the economy. To be sure, opinions have differed widely through the years on how best to achieve prosperity. Policies appropriate to one stage of our economic development have not necessarily been useful or acceptable at other stages. For many years it was held that proper government policy in the face of an economic downturn was to introduce stringent economies in government spending. Today, the slightest sign of economic ill health and the government is pressed to increase expenditures for public works and poor relief. Various sectors of the national economy expect and receive different kinds of treatment and our statesmen are pulled and hauled about by the unremitting pressure of organized economic interests. Business, agriculture, and labor have each sought benevolent governmental attention to their problems. The result of these differences of view and of interest has been that the government has never followed a wholly consistent theory of political economy and it does not do so today. An appreciation of the scope and diversity of governmental economic policies and programs may best be obtained by considering in turn the relations between the government and business, agriculture, and labor.

### BUSINESS IN THE AMERICAN SCENE

Earlier attitudes

For a good while after our national government was founded, the climate of economic opinion in which it operated was distinctly Hamiltonian. A strong

government, it was considered, had been made possible by the influence of business in framing and adopting the Constitution. Its principal support in the future would be the business elements. Government, in turn, should foster private enterprise by providing facilities, removing impediments, even granting an occasional subsidy. From such alliance of government and business —with free competition among industries keeping the prices of products within the reach of consumers—would flow a prosperity spreading throughout the body politic. A corollary of this pattern of thought was that, in general, private enterprise in business should not be restricted by public authority. The national government during the first decade under the Constitution laid business under heavy obligation by putting the national credit on a secure basis, establishing a sound monetary system, chartering a United States Bank, providing uniform laws governing interstate and foreign commerce, and creating other favorable conditions lacking under the Articles of Confederation. That government, however, should undertake any general regulation or control of business interests, operations, and practices would have seemed, in the prevailing state of mind, quite undesirable. The country's development, it was believed, would be best served by allowing full scope for competitive private enterprise. Even in the earliest days, however, there was some dissenting opinion. Looking upon agriculture rather than business as the bulwark of national strength and well-being, Jefferson and people of his persuasion were not averse to seeing business placed under occasional restraint when the two interests clashed.

The different situation today

The Hamiltonian concept of the right of business to go its own way never wholly died out even when the Jeffersonians captured power. In fact it was vigorously reaffirmed by the triumphant Republicans of the post-Civil War era. Gradually, however, it was modified and in this century has been thoroughly revised. Not only does the national government nowadays encourage and promote business in a multitude of ways not conceived of in Hamilton's and Jefferson's time, but it has itself become heavily involved in business on its own account. In addition it has swept a mighty regulating arm over virtually the entire field of private or semiprivate commercial, industrial, and financial activity, fixing conditions of competition, forbidding practices held socially undesirable, and, under copious legislation associated initially at many points 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. During World War II, a peak was reached when industrial establishments were, in effect, told what they might manufacture, when access to necessary materials was scaled according to priorities, and when the prices at which products might be sold were placed under ceilings prescribed from Washington; and even though such wartime controls were later taken off, business continued under broader peacetime national regulation (not to mention much regulation also by the states) than in any earlier period of our history. The experience of the "Great Depression" convinced most statesmen of modern

America that the private enterprise system will not of itself maintain business prosperity and the national government must keep its hand on the economic pulse of the nation ready at any time to administer stimulating medicine.

Reasons for the change

Four related developments have contributed to this great change. (1) The first is the vast expansion of business entailed by the rise of modern industry. As late as the Civil War, American society still was predominantly agrarian. Only 16 per cent of the people lived in places of 8000 or more; industrial production was limited and largely of the household type; industrial units outside of the home were mostly small mills and factories, owned by individuals or small companies and independently operated; "business" consisted largely of trade, transportation (by turnpikes, canals, and later railroads), banking, land deals, and some mining. After the Civil War, however, the country moved rapidly into its present industrial era, characterized by the modern factory system with its power-driven machinery, its assembly lines and other mass-production techniques, its standardization of products, its wage system, its growth of cities; and business became predominantly the manufacturing and distribution of goods. (2) A second development, closely associated, was the rise of large—eventually huge—business corporations. Before 1870, the industrial corporation hardly existed outside of textile manufacturing in New England; after that date, as enterprise expanded and the economies and other advantages of the corporate way of doing business were more clearly perceived, corporations multiplied in a score of fields and mounted to amazing size and power—familiarly illustrated by the great structures associated with the names of Carnegie and Rockefeller in the domains of steel and oil. From days of small and isolated business enterprises serving largely local needs, with little or no pyramiding of managerial authority, the country moved into a period of vast concentrations of enterprise and capital, with corresponding consolidation of management and with all of the possibilities of manipulation and monopoly inherent in such a situation. (3) A third factor was the interstate and even international economic empires inevitably resulting. The great corporations (and indeed many lesser ones) drew their capital from investors over the entire country, shipped their products to every state and foreign land, maintained branches and plants in different states and territories, and over the years developed business undertakings and procedures of such scope and character that if they were to be regulated at all, it could be only by a government with nation-wide authority. (4) Finally, in some respects most important of all, has been the shift of public attitude and opinion from the laissez faire of a century or more ago to the present view of governmental responsibility as embracing the distribution of economic well-being by positive intervention in behalf of the "public" interest. Crowning this development, too, has been the Supreme Court's change of mind within the past decade and a half on the scope of national economic power. After long insisting upon a rigid line of separation between commerce and manufacturing, with the commerce clause denied any application to the latter, the justices have at last brought all manufacturing, mining, lumbering, and the like,

insofar as they have any interstate or international aspect, within the definition of commerce, thus sharply increasing the potential and actual scope of business regulation from Washington.

A general view of government-business relations

It is impossible today to characterize the entire field of government relations with business by any simple rubric like laissez faire or socialism. The picture is far too complex for that. Intermingled throughout our economy are four basic patterns: (1) private ownership and private operation, illustrated by the railroads and most other utilities, most banking, oil production, steel and textile manufacturing, and most life and fire insurance; (2) public ownership and public operation, illustrated by the postal service and by a long list of government corporations like the Reconstruction Finance Corporation, the Inland Waterways Corporation, and the Tennessee Valley Authority; (3) private ownership and government operation, as seen in the federal reserve system; and (4) public ownership and private operation, less common but illustrated by publicly built and owned munitions plants operated by private companies during World War II. While public ownership and operation have been on the increase sufficiently to cause many people to worry over a trend toward socialism, there is far more private and far less public economic enterprise than in any other major country. In particular, the American system contrasts with not only (*a*) the totalitarian U.S.S.R. with its collectivization of virtually all industry and business, but even with (*b*) democratic Great Britain, which under a socialist Labour government from 1945-51 has seen the coal, transportation, gas and electric, and other top industries "nationalized," and with (*c*) equally democratic Scandinavian countries with their mixed, "middle-way," economies in which the governments have a controlling interest in most major economic enterprises. Finally, our penchant for private ownership and management has stimulated our heavy reliance upon governmental regulation of privately owned and operated business organizations and procedures. Broadly, public ownership and operation is the European way, private ownership and operation, with public regulation, the American way. Government concern with business is by no means confined to regulation, however. Much of what the government does is intended to aid business. By subsidies, tariffs, scientific research, collection of marketing data, and by many other methods, governmental agencies assist business to make larger profits and to provide greater employment opportunities.

Unity of business interests

Because of the growing power of the national government to aid or to restrain business enterprise, the business community is powerfully involved in trying to influence the conduct of the government. While on many issues, business men are unable to co-ordinate their efforts—little stores fight large ones, oil rivals coal, etc.—in general, they are able to present a remarkably solid front supported by millions of votes.

Business in politics

While we hear less of the business vote than of the labor or farm vote, no one can fail to perceive that at every presidential and congressional election it is thrown heavily to some particular party—normally the Republican party—and presidential candidate, or to the congressional candidates of one party,

as against the rest—on some occasions impressively so, as in favor of the gold-standard McKinley in 1896 or against Franklin D. Roosevelt and his New Deal in 1936. But it is not alone through nominations and elections that business seeks to mold and guide national policy. There are also broad avenues for influence upon the president by advice and persuasion, upon department heads in their work of planning and administration, upon the great regulatory commissions, and upon Congress in connection with legislation. Here we enter, of course, the labyrinth of interest-group activities, including lobbying; and the fact already has been stressed that among the scores of groups and interests assiduously endeavoring to influence senators and representatives to support or oppose given tax, tariff, currency, labor, farm, and other proposals, a prominent place must always be given business organizations and groups.

## NATIONAL ASSISTANCE TO BUSINESS

Almost everything the national government does affects business, most of the time benevolently. The maintenance of friendly intercourse abroad fosters trade across national frontiers, the defense of the nation preserves the plants and facilities of the business world against destruction or capture and provides an immense market for the sale of privately manufactured armaments of all types. The preservation of law and order guarantees ownership against theft and depredation and facilitates the free movement of goods and services over a vast continental area. Assistance to the aged, the infirm, the sick, the veteran insures a market for many types of consumer goods; and granting of economic and military aid to friendly foreign powers in recent years has assured a market abroad for many types of American commodities. There are, however, many additional forms of assistance aimed particularly or exclusively at the business community or at segments of it.

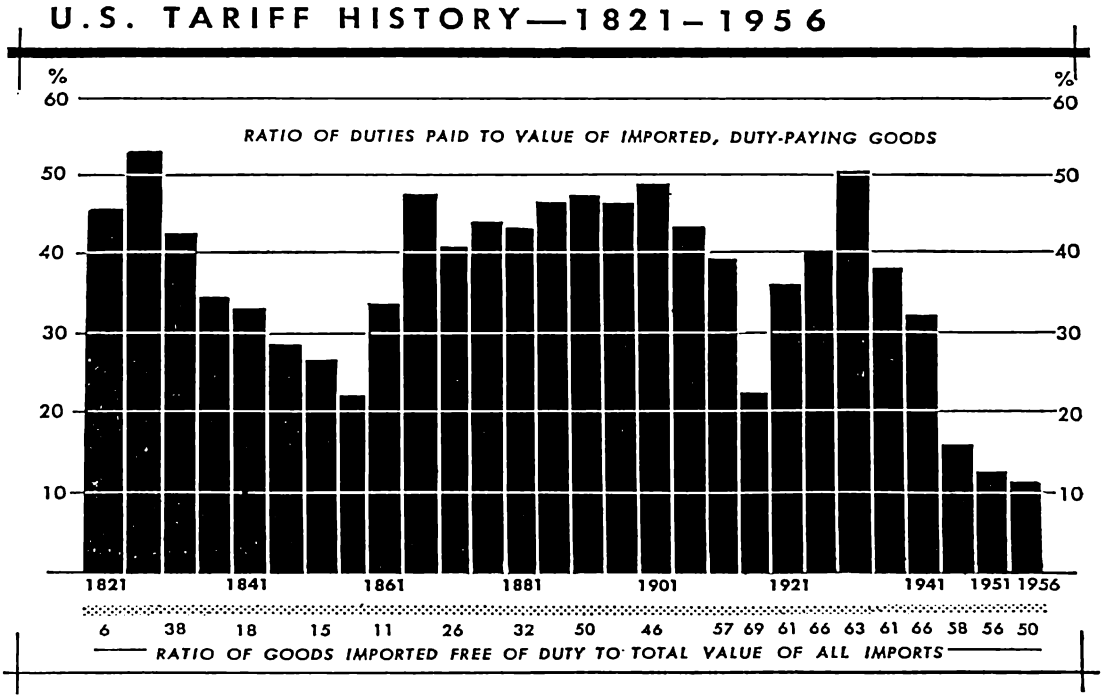
1. Subsidies

Throughout the country's history, business has profited immensely from subsidies from the national treasury; and some branches of it still do so. Most conspicuous among beneficiaries has been the railway industry, on which more than $1.25 billion, chiefly in public lands, has been bestowed. But road and waterway construction have also aided shippers, truckers, and bus companies; contracts with air carriers for transporting mail are frankly drawn to subsidize a young industry; the trucking industry has been subsidized by immense national, as well as state and local, expenditures on highways which are its roadbed; the newspaper, magazine, and book publishing industries are sustained by mail service charges which are admittedly below cost and the differential must be made up by appropriations from tax funds; during both world wars of this century armament manufacturers have been supported in plant expansions by direct grants, tax advantages, and public construction of facilities for private operation. One of the special recipients of treasury largesse has been the American shipping industry. The efforts of the government to stimulate trading in American vessels have included tonnage tax advantages and subsidies to private operators by lucrative mail contracts, by government

construction of vessels which are then leased to private operators, by payment of the difference in cost of operation between American-owned and foreign-owned vessels. The list of subsidies might be extended for several paragraphs. All told the business community has been the direct beneficiary of billions of dollars of national expenditure and a share of the national budget currently is allocated for this purpose. Contrary to some of the pronouncements of its associations, the business community has never opposed public subsidies as such. What it opposes are subsidies to other sectors of the national economy.

2. Tariff protection

A major indirect subsidy received by manufacturers throughout most of our history has been that arising from protective tariffs. A protective tariff is a duty on imports fixed high enough to offset any price advantage which foreign goods might enjoy in competition with home-produced articles. Every tariff act from 1789 to 1930 had as one of its purposes, and often the main one, to give American products (chiefly manufactures, until eventually agricultural products were added) a competitive advantage over foreign products in our markets. The peak of such favoritism was reached under the Tariff (Hawley-Smoot) Act of 1930. The pros and cons of this policy have been argued warmly for 160 years. Producers of raw materials have usually opposed tariffs on manufactured goods. Manufacturers have usually argued the benefits to be derived from fostering the development of home industry and the advantages accruing to American labor by being protected against lower European wage scales. The point is that business has been the beneficiary of what




SOURCE: *Statistical Abstract of the United States, 1957.*

amounts to a tax, in the form of higher prices, on the country's consumers. Since 1934 the nation has gradually retreated from the extreme protectionist position of 1930. More and more business interests feel able to survive foreign competition and are especially anxious to enlarge their export markets, expecting that tariff reduction at home will stimulate reciprocity abroad. There has also been a change since 1934 in the procedure by which tariffs are fixed. Dissatisfaction with congressional tariff-making increased steadily in this century. General tariff bills had by 1910 become such labyrinths of facts and figures that even the most conscientious legislator could inform himself on only a small portion of the duties. The influences of special interests in promoting high rates on particular goods were enormous. Fluctuations in economic conditions at home and abroad made any set of rates soon out of date.

The first reform efforts accompanied a desire to reduce tariffs generally and led to the creation in 1916 of the United States Tariff Commission. This agency, directed by six members appointed on a bipartisan basis, was charged with continuous review of the tariffs in relation to costs of manufacture at home and abroad and with keeping both the president and Congress fully informed. The Commission has never been authorized to make changes in the laws or their administration on its own. Originally it had no authority even to make recommendations except in very general terms. The Tariff (Fordney-McCumber) Act of 1922, however, charged it with the duty of investigating differences in the cost of production between any protected domestic commodity and its foreign counterpart and required it to recommend to the president specific increases or decreases in tariff rates based upon its studies. The president, in turn, was authorized to change rates by as much as 50 per cent up or down. The result was our first flexible tariff.

Flexible tariff introduced

The amount of tariff reduction accomplished by this procedure was more than offset by the new high rates of the Tariff Act of 1930. The Commission's procedures were slow and cumbersome and its recommendations could apply only to specific articles. A new Democratic administration, determined to stimulate international trade and to improve tariff procedure, persuaded Congress in 1934 to inaugurate a broad new tariff program. The Reciprocal Trade Agreement Act of 1934 empowered the president to bargain with foreign countries for mutually advantageous tariff concessions and to lower the tariffs as much as 50 per cent without further congressional approval. Articles on the dutiable list might not be transferred to the free list or vice versa, and the "most favored nation" [1] principle had to be preserved. The president's power was to expire after three years. Succeeding Congresses have renewed the grant of power to the president up to 1962. The most recent extension of four years was granted by the Congress in 1958 at the request of President Eisenhower. In recent years, however, the renewals have come grudgingly and in some cases for shorter periods, especially from Republican Congresses. In the last few

Trade agreement system

[1] This principle is that concessions extended to one country by agreement must be extended to all others with which we have treaties containing this provision

extensions, the role of the Tariff Commission has been enhanced so that the president must await their studies before concluding agreements and they are directed to lay before him and before Congress any evidence of injury to domestic interests from the extant duties. The 1958 Act provides for a Congressional veto by a two-thirds vote of any presidential tariff order in those cases where the president has rejected the advice of the Tariff Commission. The 1958 Act also limits presidential discretion to gradual reduction of not more than 20 per cent of the duties in effect in 1958. Furthermore, many of the agreements since 1948 have been negotiated on a multilateral basis through the General Agreement on Tariffs and Trade negotiated in that year and to which 35 countries now subscribe. GATT, as it is called, is an executive agreement which has not as yet been submitted to or approved by Congress. Legislation to implement it by providing for American participation in the Organization for Trade Co-operation was still pending in 1958.

The results of the program to date have been a general lowering of the high duties of 1930, so that goods now entering the country are taxed from one-third to one-half of what they were before the program began. Agreements are now in effect with 43 countries.[2] The tariff has largely been taken out of congressional politics; not entirely, however, since the Congress can, and occasionally does, revise some rates of the 1930 Act. Although each extension of the reciprocal trade program has been vigorously contested, it now commands wide public support and will probably remain for some years the "cornerstone and keystone of our foreign economic policy." It is necessary to add that since World War II the tariff has ceased to be largely a domestic issue. It is an important element in our foreign policy.

3. Lending operations

Until World War I, business commonly depended for credit upon banks and other private financial institutions. A War Finance Corporation was then set up, however, to make government loans mainly to industries requiring them for increased war production. While that agency eventually disappeared, its place was taken during the depression by the Reconstruction Finance Corporation (R.F.C.), charged with rescuing embarrassed railroads, banks, trust companies, insurance companies, and other businesses, both large and small. During World War II, through the R.F.C. and other agencies, the government again expanded its loan functions to stimulate the manufacture of war goods. By the end of World War II the national government had developed into the country's largest banker, with its lending operations extending to agriculture, housing, foreign trade (e.g., through the Export-Import Bank of Washington) as well as to business of almost every variety. In 1951 and 1952 the R.F.C. was sharply criticized in Congress. Investigation by a Senate committee revealed both partisan and personal favoritism in its operations. When the Eisenhower administration took office pledged to reduce governmental business operations, the R.F.C. was one of its prime targets and the

[2] All tariff concessions were withdrawn from Russia and her satellites beginning in 1951.

agency was liquidated by act of Congress.[3] The same Congress, however, created a new Small Business Administration (expanded and made a regular agency in 1958) and authorized it not only to assist small business to obtain government contracts but also to loan money to such businesses for plant expansion, modernization of equipment, and similar purposes. In 1958, more than $10 billion of loans were outstanding on the government's books for housing, rural electrification, air transport facilities, farm purchase and improvement, commodity support, and business development.

4. Provision of a monetary mechanism

One of the great defects of the Articles of Confederation from the point of view of the business community was the freedom it allowed to debtor-controlled state legislatures to multiply the amount of money in circulation by various kinds of "cheap money" expedients. The authors of the Constitution were virtually unanimous on the need for a sound and uniform system of "hard" currency. Congress was endowed with specific authority to "coin money [and] regulate the value thereof" and the states were forbidden to "coin money, emit bills of credit, or make anything but gold and silver coin legal tender in the payment of debts." From that day to this, one of the important functions of the national government in serving business has been to provide a monetary system which will facilitate domestic and foreign commerce and will remain fairly stable as a storehouse of economic values. Although occasionally the Congress has fallen under the influence of debtor —usually agricultural—interests and has sought to ease the plight of the "downtrodden" by multiplying the amount of currency in circulation, in general, national management of the currency has been in the interests of the business community.

The Monetary System

Most money, as we use it today, is paper, with gold and silver merely held in reserve as security and as a method of settling international trade balances. Paper currency was first issued by the Bank of the United States, then, when it was abolished, by state banks, and finally in 1863 by the national government. The difficulties of Civil War finance lead to the creation of a system of national banks with a monopoly of the power to issue paper money backed by United States bonds. The first national paper currency, known as "greenbacks," had some hard going before the courts before the right of Congress to make it legal tender was finally approved in 1871 (Knox *v.* Lee, Parker *v.* Davis, 12 Wallace 457). The institution of the federal reserve system in 1913 involved new national controls over paper money issuance and lead to the general substitution of federal reserve notes for the earlier treasury notes and national bank notes. Gold was abandoned as a circulating medium and as a major determinant of paper money issuance during the depression of the 30's. All domestic supplies of gold were nationalized, converted into bullion, and buried in vaults at Fort Knox, Kentucky. We now have what is frequently called a

[3] The Reconstruction Finance Corporation Liquidation Act of 1953. It is necessary to add that the R.F.C. loaned $13 billion during its lifetime with a loss of only 1.3% offset completely by a loan reserve and that it paid over $1 billion into the U. S. Treasury as a profit on its operations.

"managed" currency in which the amount of paper and coin in circulation is determined by such factors as the amount of commercial paper (notes, mortgages, etc.) available in banks for deposit in the federal reserve system. At no time, since we abandoned the gold standard in 1934, however, has the gold reserve been less than 60 per cent of the amount of currency in circulation.

Present forms of currency

As an outcome of its rather tortuous history, the modern American currency system is more complicated than some of those abroad. Nevertheless, with gold coins and gold certificates eliminated and national bank notes nearly all called in, it is simpler than it used to be. Since 1933 all forms have been legal tender and on a parity with one another, so that no one need hesitate to accept payment for goods or services in whatever type of lawful currency is offered. By far the most important type of paper currency now in circulation is *federal reserve notes*. These are issued by federal reserve banks and are secured by deposits with the government of discounted commercial paper, government bonds, and gold certificates. The commercial paper security tends to adjust the amount of such money in circulation to the volume of certain types of business transactions. A small volume of United States treasury notes (reissued Civil War greenbacks), silver certificates, national bank notes, and federal reserve bank notes still circulates but most of these issues are gradually being retired.

Currency management in the Treasury Department

The management of the American monetary system is largely vested in the Department of the Treasury with important regulatory power shared with the Federal Reserve Board. Coins are manufactured by the Bureau of the Mint; paper money (along with postage stamps, savings bonds, revenue stamps, etc.) is produced by the Bureau of Printing and Engraving. The comptroller of the currency controls the issuance of federal reserve notes and the Secret Service protects the currency against counterfeiting. The secretary, in addition to giving general direction to these subordinate agencies, controls the gold and silver purchase programs and the programs aimed at maintaining the value of the dollar in foreign exchange.

5. Provision of uniform standards of weights and measures

One of the most useful services performed by the national government in support of nation-wide markets for manufactured goods, foodstuffs, and fibers is the establishment of uniform standards of weights and measures. The authority given Congress to "fix the standard of weights and measures" is so broad that it can be, and has been, exercised in connection with all manner of measurements—length, weight, volume, temperature, strength, quality, and others. One of the great landmarks in this field and one of the numerous benefactions to this nation by the Adams family is the report in 1821 by John Quincy Adams on a system of uniform measures. To aid in determining such standards, the Bureau of Standards is now maintained in the Department of Commerce. Along with the familiar units taken over from old English usage—the pound, yard, gallon, bushel, and so on (with their derivatives), the metric system employed in Continental countries, and having conspicuous advantages, has been given official status, even though as yet but little actual use

is made of it outside of scientific circles. 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 to state and local governments, in the interest of honesty and regularity, to require compliance with the appropriate standards in business and other transactions. Congress might not only *fix* standards, but set up machinery for enforcing them nationally. This, however, it has never done.

6. Scientific research and the provision of useful data

The business community is under a heavy and growing obligation to the national government for the collection and dissemination of useful data on trade, markets, foreign exchange, labor supply, cost of living, consumer income, investment opportunities, and thousands of other subjects reflecting in great detail the condition of the economy of the nation and of the world. Monthly periodicals like the *Survey of Current Business* and *Economic Indicators* keep business supplied with timely information on the state of the economy. An elaborate network of observation posts and reporting installations supplies daily and weekly data on the weather. Less extensive but no less elaborate data is also developed on crops, water, and other resources. The government is, however, not solely a statistical collecting agency; it is also pushing the frontiers of scientific knowledge. Through such agencies as the Bureau of Standards, the Atomic Energy Commission, the National Science Foundation, and the Department of Defense, new data, much of it of great practical utility to industry, is being discovered and made available. If one includes the research program in agriculture and that in public health, it is not too much to say that the national government has become the greatest research institution in modern America.

7. Protection of copyrights and patents

From its inception the national government has sought to promote the progress of science and the useful arts "by securing to authors and inventors" the exclusive right to their respective writings and discoveries. The exclusive right conferred is by way of exception to the common-law rule against monopolies, the purpose being, of course, to reward talent and encourage 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. The period covered is 28 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 (after publication) to everyone seeking it and depositing two copies of his work, with payment of a 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, that is, unauthorized use, 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 national court.

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 or any botanical plant or improvement thereon, 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 are not granted to everyone 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 rights under some patent previously granted. The period for which a patent runs is 17 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 Patent Appeals or to a national district court. Moreover, while in general the monopolistic rights carried by a patent are not legally challengeable, the uses made of patents, especially by large industries, singly or in combination, sometimes bring the holders into conflict with the laws prohibiting contracts in restraint of trade. Such uses also raise the question of whether anything can or should be done to overcome the economic and social effects of concentration of sometimes hundreds, and even thousands, of patents in the hands of a single big business enterprise. Over 100 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 from 35,000 to 50,000 patents are granted every year.[4]

8. Provision of uniform bankruptcy procedures

The credit structure upon which so much of modern business enterprise depends is protected and strengthened by the provision of uniform procedures for discharging unpaid obligations through bankruptcy. Under the Constitution, bankruptcy is one of the matters over which the national and state governments have concurrent legislative power. For more than 100 years (except for three brief intervals) it was left entirely to state control. In 1898, however, Congress passed a general bankruptcy act; and thereupon former state laws on the subject either were repealed or fell into a condition of suspended animation. It still is permissible for a state to legislate on bankruptcy. The national law, however, takes precedence and this law is so comprehensive

[4] A simple explanation of the patent system will be found in W. R. Ballard, *There Is No Mystery About Patents* (New York, 1946). Charging each applicant a fee of $60, the Patent Office actually makes money for the government.

In addition to granting patents, the Patent Office registers trademarks and labels for use on goods distributed through channels of interstate and foreign commerce. Registration, formerly for 20 years but indefinitely renewable, is now without time limit and can be protected through appeal to the courts. A new and more adequate trademark law (the Lanham Act) was enacted in 1946. See H. Bennett, *Trade Marks* (New York, 1948).

that little need for state action survives. Proceedings in bankruptcy cases, started either by the bankrupt himself or by his creditors, fall under the equity jurisdiction of the 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.

During the depression the Congress provided similar but not identical judicial relief for debt-burdened farmers, municipalities, and other types of corporations. The whole system of bankruptcy and debtor relief was coordinated and unified in 1938 and 1946.

The Department of Commerce

Responsibility for assistance to the business community is spread through a large number of executive departments and agencies. One department, the Department of Commerce, however, has as its major assignment serving business and representing its needs in the cabinet and to the Congress. This department was organized in 1913 by splitting the Department of Commerce and Labor which had been established in 1903. In 1958, this Department employed more than 40,000 people and its annual expenditures were almost $1 billion. Its principal divisions include: the Weather Bureau; the Patent Office; the Bureau of the Census; the National Bureau of Standards; the Bureau of Public Roads which administers the national highway aid program; the Maritime Administration which administers subsidies to the shipping industry; the Bureau of Foreign Commerce which collects and disseminates data on foreign trade and promotes the interests of American business abroad; the Coast and Geodetic Survey which assists mariners by mapping coastlines, waterways, and currents; the Civil Aeronautics Administration which administers national aids to airport construction and otherwise fosters aviation.

## NATIONAL REGULATION OF BUSINESS—POWER

> The Congress shall have power to . . . regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.—Art. I, Sec. 8, cl. 3

The power to regulate

The power of Congress to promote business interests by subsidies, loans, and services is sufficiently broad to encompass almost any conceivable program of this type. Few limitations of consequence have ever been discovered or enunciated by the courts to the spending power of the national government. So long as Congress declares with some reason that the object of the expenditure lies within the broad conception of public welfare, the courts appear willing to accept its power to make outlays. Specifically, the courts have rejected the notion, once argued vigorously by Jefferson, that the spending power is confined to objects embraced by the other enumerated powers of the Congress. The power of Congress, however, to regulate business activities, that is,

to penalize certain types of conduct and forbid others and to place limits upon the freedom of decision of the owners, stands on a very different constitutional footing. It is subject to a number of constitutional restraints. The most important of these are: (1) that the regulatory authority of the Congress is largely confined to interstate and foreign commerce; and, (2) that the power must be exercised so as not to deprive any entrepreneur, partner, or corporation of "due process of law." The limitations on the power of Congress to regulate business based upon the "due process" clause of the Fifth Amendment have already been discussed in an earlier chapter. Suffice it to say here that the modern Court has found fewer limits in this clause than many of its predecessors.

Expansion of the meaning of "commerce"

The history of the constitutional meaning of interstate commerce is one of progressive expansion by statute and judicial interpretation so as to embrace not only the great technological changes in the fields of transportation and communication but also to embrace more and more forms of business activity. The floodgates for expansion were first opened in 1824, when, in delivering a Supreme Court opinion in the famous case of Gibbons *v.* Ogden (9 Wheaton 1), Chief Justice Marshall not only affirmed the full authority of Congress to maintain the free flow of interstate and foreign commerce within the individual states, but declared commerce to consist not only of *traffic* (buying, selling, and transporting commodities), but of *intercourse* as well, thereby giving it a very broad content. The name of Marshall is associated with many nationalizing decisions of this period, but hardly with any of greater potential significance than this. Immediately, the carrying of persons (not simply goods) from one state to another, or to a foreign country, became "commerce," subject to congressional regulation. As forms and methods of intercourse later multiplied, the field for control correspondingly expanded. In time came the steamboat; then the railroad; then the telegraph; then the telephone; then the motor vehicle; then "wireless"; then radio broadcasting; then the airplane; finally television (with doubtless other facilities yet to arise from the use of atomic energy). And to all of these the regulative authority of Congress was progressively extended, with the Supreme Court coming close behind with decisions validating most of the powers asserted and sometimes hinting at even broader ones that might be assumed.

Another change in the definition of congressional power over the business community comparable to that in 1824 was made by the Supreme Court in 1937 when, overturning concepts of an earlier era, it held that Congress could regulate anything that affects interstate commerce directly or indirectly (N.L.R.B. *v.* Jones and Laughlin Steel Corp., 301 U. S. 1). From this in successive steps, the Court held that all manufacturing, mining, lumbering, and productive enterprises in which raw materials or finished products or both are carried across state lines are within the scope of national regulating power. Even the insurance business which in 1869 had been specifically held to be beyond national authority was held in 1944 to be subject to national control (U. S. *v.* South-Eastern Underwriters Assoc., 322 U. S. 533).

Present scope of congressional power

Under the prevailing theories of the power of Congress over interstate and foreign commerce, therefore, only the most parochial of business activities are exempted from national authority. Such business transactions must begin and end within the confines of a single state and must have no demonstrable effect upon or relevance to transactions that go beyond the state borders. This does not mean, however, that the states are wholly denied the power to regulate business activities that come within the scope of national power. They may be authorized by Congress or by the Courts to exercise regulatory authority if not inconsistent with national policies or with judicially determined national needs. The states, therefore, continue to regulate many types of business transactions and institutions, even some that have interstate aspects. For the most part, however, their regulations must be consistent with national statutes or regulations or with judicial decisions on the scope of national power. The Congress, also, has not completely utilized its recently discovered powers. In the case of insurance, for instance, it allows the states to continue their regulatory practices.

Regulation includes prohibition

The power to regulate, it must be added, includes also the power to prohibit. Embargoes on foreign commerce, for example, have been imposed several times in our history (e.g., in 1794, in 1812, and in 1917-18) suspending trade completely with some countries or in some commodities. The slave trade was halted after the constitutional prohibition had expired. Congress has prohibited the transportation across state lines of lottery tickets, stolen goods, prostitutes, "filled" milk, switch-blade knives, liquor if being taken into "dry" states, and prison-made goods if in violation of state laws. The Supreme Court in 1925 (Brodes *v.* U. S. 432) declared that, "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin."

Authority over foreign commerce broader than over interstate commerce

Regulatory authority over foreign commerce is broader than over interstate. The exclusive and virtually unrestricted jurisdiction of the national government over our relations abroad applies to commerce no less than to everything else, and this adds materially to the regulative power conferred in the commerce clause. 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 ending. 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 130 years ago) when imports—the original package 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 (Brown *v.* Maryland, 12 Wheaton 419, 1827).

Exercise of power to regulate

Despite the broad sweep of authority now believed to reside in the Congress to regulate business, the Congress has not seen fit to bring the entire business community under detailed scrutiny of the national administration. The amount and character of national regulation vary widely from one type of business activity to another and from one epoch of time to another. In World War II, for example, the national government regulated businesses of all types in more minute detail than it had before or than it has since. In general, the regulatory power has been exercised more completely in those fields of business where monopolistic conditions actual or potential have threatened a weakening of the regulatory effect of competition in a free market. The Congress has also sought to safeguard the position of employees against exploitation by powerful corporate combinations. This type of restraint upon business we shall consider in the chapter on labor.

## REGULATION OF BUSINESS—TRANSPORTATION

A discussion of the practices of business regulation must necessarily begin with the railroads, for these were the first major enterprises brought under national scrutiny. In the long struggle to bring the owners and managers of these great instrumentalities of commerce under the control of the government there was established a pattern of regulatory theory and procedure which has been closely followed when other forms of business activity have been brought under public control.

Transportation development

It is hardly too much to say that the United States, as a nation of continental dimensions, has been made by transportation. Certainly growth in territory, population, wealth, and power not only has paralleled the sequence of horse and rider, stagecoach, steamboat, railroad, automobile, and airplane but would not have been possible without it. When the Erie Canal was opened in 1825 and the first railroad (a section of the Baltimore and Ohio) in 1829, the stage was set for a long rivalry of water and rail transportation, with waterways more important at the outset, railroads gaining dominance in the second half of the nineteenth century. In this century, the truck, the bus, the pipeline, and the airplane are all strongly challenging the once mighty railway system. While our railway system (a total of 396,000 miles) far surpasses any other in the world, the plight to which it has been reduced by the challenge of its new competitors and the spread between costs and revenues has become one of the nation's major problems. By and large, transportation development has been one of the great achievements of our boasted free private enterprise. At the same time, it never could have taken place without a great deal of government aid.

1. Railroads: Federal regulation becomes necessary

Until long after the Civil War—and after most of the great expansion in the West and Southwest had taken place—national policy toward railroads was one of encouragement and subsidy. Regulation was left almost entirely to the states. As roads extended their networks through many states, and vast country-wide systems were built up, the situation got out of hand. By the later seventies and the eighties, railroad management and operation had become

**RISE AND DECLINE OF THE AMERICAN RAILROAD SYSTEM**

| *Date* | *No. of Locomotives* | *No. of Freight Cars* | *No. of Miles of Track* |
|---|---|---|---|
| 1880 | 17,949 | 539,255 | 115,647 |
| 1890 | 31,812 | 1,061,952 | 208,152 |
| 1900 | 37,663 | 1,365,531 | 258,784 |
| 1910 | 60,019 | 2,148,478 | 351,767 |
| 1920 | 68,942 | 2,388,424 | 406,580 |
| 1930 | 60,189 | 2,322,267 | 429,883 |
| 1940 | 44,333 | 1,684,171 | 405,975 |
| 1950 | 42,951 | 1,745,778 | 396,380 |

SOURCE: *Statistical Abstract of the U.S., 1957.*

"big business," with formidable power at stake. Intense rivalries engendered ruthless policies, and fabulous profits. The railroad magnates took full advantage of the lack of effective competition. More than this, they used their great power by rebates and preferential rates to force monopoly into other segments of the business community. Abuses were many and glaring. Railroad stocks and bonds, often issued without adequate security, fluctuated wildly in the money markets; bankruptcies engineered by speculators involved honest investors in disaster; passenger and freight rates were pushed to the highest levels that the traffic would bear; and favorable rates for one shipper forced his competitors to the wall; altogether, the business was carried on with little responsibility to the public, and with plenty of dubious, if not definitely fraudulent, practices. The states attempted to correct matters insofar as they could. But their spheres were restricted; railroad magnates and lobbyists often dominated their legislatures. In several western states, however, agrarian revolt forced a round of "Granger" laws regulating rates and imposing other restrictions. These proved ineffectual in dealing with an interstate problem. In a series of decisions in the so-called Granger cases, the Supreme Court unequivocally affirmed the right of government to regulate railroads as economic enterprises "affected with a public interest." Eventually (in 1886), however, it denied any authority in a state to control fares and charges in interstate commerce (Wabash, St. Louis, and Pacific Ry. Co. *v.* Illinois, 118 U. S. 557). This left only one recourse: regulation by the national government.

*The Interstate Commerce Act (1887) and its expansion*

The upshot of all this experience and of continued popular dissatisfaction and protest among western farmers and eastern small businessmen, was the passage by Congress in 1887 of an Act to Regulate Commerce, forbidding excessive charges, discriminations, and other unfair practices, and creating a special agency—the Interstate Commerce Commission—to administer and enforce the principles and rules laid down. This was followed as new problems arose by the Elkins Act of 1903, Hepburn Act of 1906, Transportation (Esch-Cummins) Act of 1920, Motor Carrier Act of 1935, Transportation Act of 1940, and Interstate Commerce Act of 1942. Moreover, all of the laws underwent amendment and expansion; and of course much was added by administra-

tive and judicial interpretation. The heart of the vast regulatory system built up over three full generations remains, however, the pioneer act of 1887. Under it and the laws and decisions supplementing it is now regulated 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 freight forwarders, by motorbus companies, by motor freight carriers, and by pipelines 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. Until 1934, the act applied also to instrumentalities and facilities used for the transmission of intelligence by means of electricity, such as telegraph, telephone, cable, and wireless systems.

Restrictions imposed

Upon the railroads—and in many cases, other forms of transportation as well—the laws impose numerous restrictions each prompted by some earlier abuse. Thus, (1) rates for the transportation of persons and freight must be just and reasonable, and calculated to yield a "fair return" on the value of the property employed; (2) charging a higher rate for a short haul than for a long one over the same line in the same direction is forbidden, except when authorized in special instances by the Interstate Commerce Commission; (3) rebating, directly or indirectly, and undue discrimination or preference among persons, corporations, or localities are prohibited; (4) free transportation may be granted only to narrowly restricted classes of persons; (5) railroads are forbidden, except in a few special cases, to operate, own, or control, or to have any interest in, any competing carrier by water; (6) competing lines may combine, merge their receipts, apportion profits, or mutually agree on proposed rates only with the consent of the Interstate Commerce Commission; (7) carriers may not transport commodities (except timber and its products) in which they have a direct property interest; and (8) they may issue long-term securities, purchase or build additional lines, or abandon old lines, only with the Commission's consent.

Duties prescribed

In addition, numerous positive duties are prescribed. For example, (1) printed schedules of rates must be kept open for public inspection, and changes in them may be made only with consent of 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 may require; (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 while on duty, a carrier must grant pecuniary compensation, unless the accident was caused by willful 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 it 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.

In summary, a railroad may not change a single rate up or down, it may not add a line of track or take one out, it may not add or drop a station, it may not add or curtail service, it may not issue a single security, it may not merge with another railroad without the approval of the Commission.

The Interstate Commerce Commission

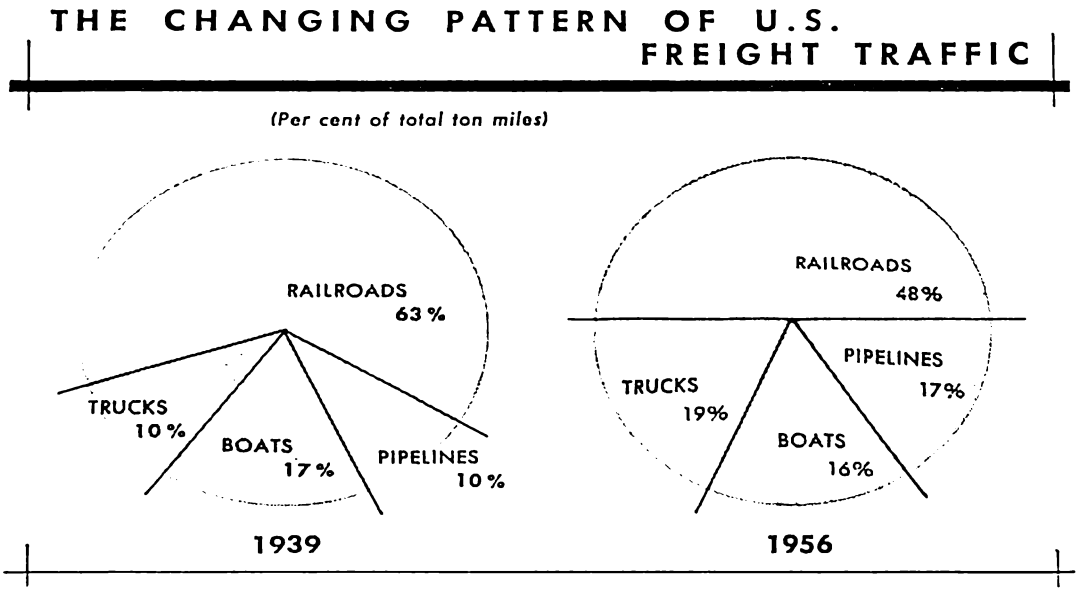
The Interstate Commerce Commission (I.C.C.)—charged with enforcing the regulations indicated and many lesser ones as well—consists of 11 persons appointed by the president and confirmed by the Senate for seven-year terms, and has a staff of some 1800 clerks, attorneys, examiners, statisticians, investigators, and technical experts, organized in 9 distinct bureaus, each with a director or chief reporting (since 1953) to a general manager. The commissioners themselves work almost entirely in panels or divisions of three members each; and a decision of a panel has the same force and effect as a decision of the Commission itself—subject to the entire Commission granting a rehearing. Any person, corporation, municipality, or other private or public group may lodge with the Commission a complaint concerning any alleged infraction of the interstate commerce laws. The Commission, acting ordinarily through one of its panels, must institute an inquiry. If preliminary investigation discloses that the complaint may be well founded, a hearing follows, of a sort not unlike those to be observed in a court of justice: plaintiff and defendant are represented by attorneys; books, papers, and other materials (which the Commission has full power to order produced) are placed in evidence; witnesses are examined; and at the end the Commission, that is, in most instances the appropriate panel, embodies its conclusion or finding in an order enforceable in the courts, although also with right of appeal to those courts by the party affected adversely. Orders may relate to rates, quality or conditions of service or any one of literally scores of other things falling within the scope of the laws; and disobedience renders the offender liable to prosecution.

Despite all of this careful and detailed supervision by an agency increasingly sympathetic to the railroad industry, the industry has been steadily declining in health and vigor. It is proving increasingly unable to face the competition of the motor car, truck, bus, and airplane. Each of which is also the recipient of subsidy and of benevolent supervision. Much of the elaborate structure of regulatory practice and policy built-up over 70 years is irrelevant to the plight of this once great giant of the American economy. For years, for example, the Commission and the courts struggled with the problem of rate-fixing with one group worrying about unconscionable profits and the other about allowing the investor a "fair" return. Today, the major consideration in fixing rates is likely to be either: (*a*) the wage demands of the railroad unions or (*b*) the competitive rates of airline, bus, or truck. In mid-1958, a Senate committee studying the problems of the railroads recommended that the government guarantee loans to railroads to modernize their equipment, that it allow them to develop a nontaxable construction reserve, that other tax advantages be granted to them, that competition become one of the main considerations in rate fixing, and that broader authority be granted the Interstate Commerce Commission to curtail unprofitable service—especially local com-

muter service.[5] The loan guarantee proposal was enacted into law and an excise tax on freight was repealed by the Congress in 1958. The Commission's authority was also expanded to consider proposed curtailments of commuter service.

The pattern of government regulation which emerges from the efforts to control the railroads is: (1) that the regulating agency shall be an independent commission removed by legislative intent from the direct oversight of the president and exercising its powers in a more or less judicial atmosphere; (2) that the regulatory authority is granted by Congress in the broadest terms —"just and reasonable rates"—with the agency authorized to specify in particular how the authority will be discharged; (3) that the actions of the

The pattern of regulation




SOURCE: *Statistical Abstract of the United States, 1957.*

agency will be carefully scrutinized by the courts on appeal and that such court scrutiny will emphasize the protection of property rights against administrative impairment; (4) that competition will be encouraged as a "natural" regulator until it is demonstrably obvious—as it has been since 1920 in the case of the railroads—that the effort to inject competition as among railroads is either impractical or unwise; (5) that, although the original grant of regulatory power may extend only to certain aspects of the business under consideration, the power is likely to be broadened subsequently to bring under scrutiny more and more facets of the enterprise.

The regulation of interstate commerce has, until this century, been largely a matter of regulating railroads. A good deal of such commerce, however, has always been water-borne—in vessels plying the coastal waters of the country

2. Inland and coastwise water transportation

[5] See *New York Times*, May 1, 1958, and also similar but not identical proposals made by the Eisenhower administration in *New York Times*, April 23, 1958.

or its rivers and lakes. The United States now has 27,000 miles of improved inland waterways. For most of our history, national attention to this type of commerce took the form almost entirely of expenditure for the improvement of rivers and harbors. Over the years billions of dollars have been spent for this purpose, sometimes legitimately and wisely, but often only on the basis of congressional log-rolling. River and harbor bills have traditionally been a favorite source of congressional "pork." Only when the railroads began to complain that they suffered unfairly from the competition of unregulated water traffic did the Congress attempt to bring such traffic under control. In the Transportation Act of 1940, Congress prescribed a system of regulation of rates, services, and management of water shipping under the purview of the I.C.C.[6]

3. Motor transportation

Meanwhile, however, the jurisdiction of the I.C.C. had been enormously extended in another direction. As truck and bus business developed on something approaching its present huge scale, serious difficulties and abuses arose—cut-throat competition between companies and especially between them and the regulated railroads, underpayment of employees, laxity about accident insurance, dubious financing. 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, bringing all interstate truck and bus lines under the regulating authority of the I.C.C. If it intends to operate as a common or contract carrier across state boundaries, a truck or bus company must initially secure a certificate of convenience and necessity from the Commission. Thereupon, its financing, rates, accounts, records, hours of labor, safety appliances, and general level of service become subject to that body's supervision substantially as in the case of railroads. Just as by improving waterways the government helped create for itself the problem of regulating water-borne commerce, so by co-operating with the states in developing a nation-wide system of arterial highways it helped bring upon itself the task of controlling motor transport. However, a very large portion of the interstate trucking business is by private carriers and these are exempted from virtually all I.C.C. regulations except those dealing with safety. Many contract carriers of agricultural produce are also exempted from Commission oversight.

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 brought forward a uniform state law for aeronautics. Numerous states adopted it. As time went on, however, much, if

[6] All commerce on inland waters, as well as all coastwise trade, is, by act of Congress, restricted to American vessels--except in occasional instances where such waters are used by foreign shipping merely in transit between foreign ports. In an effort to stimulate fuller use of facilities on which the nation had spent lavishly, the Inland Waterways Corporation in the Department of Commerce was created, as a fully-owned government corporation, in 1924. Until 1953, when its assets were sold, it operated a common carrier barge service on the Mississippi, Missouri, and Illinois rivers and along the coast of the Gulf of Mexico from the mouth of the Mississippi to Mobile.

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. A Civil Aeronautics Act passed in 1938 laid the basis for the present system. In 1958, a Federal Aviation Act completely reorganized the existing arrangements. Under it two main interrelated agencies now function in this field—a Federal Aviation Agency and a semi-independent Civil Aeronautics Board. The former concerns 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 is concerned principally with the regulatory functions of controlling rates for the interstate transportation of passengers, mail, and goods, promulgating safety regulations, investigating aircraft accidents, suspending or revoking licenses, and generally controlling aeronautics policy. 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 national regulations into their own aviation codes. It should be noted that as in rail, water, and road transportation, the government has also aided air transport by subsidies for mail carrying, and, since 1946, for state-local airport construction.

5. Pipelines

For a good while, crude oil and various petroleum products have been transported from the great southwestern oil fields to the North and East not only by rail and water but also by pipeline. World War II saw a considerable expansion of this form of interstate commerce. By its nature, natural gas definitely requires this method of transportation; and one of the most extraordinary developments in the transportation field since the recent war has been the multiplication and extension of transmission lines linking gas-producing areas from Kansas to Louisiana with principal cities and many smaller ones throughout more than half of the country. Under appropriate conditions, rates and services are now regulated, with the Interstate Commerce Commission functioning in the case of petroleum and the Federal Power Commission in that of gas. For the past several years there has been a sharp controversy in the nation's capital over the power of the Federal Power Commission to regulate the price of the gas at the time it enters the pipelines. The Supreme Court has said the Commission has the power; the Commission has denied it. The Congress has debated the matter fiercely and several bills have been considered that would specifically deny the Commission the power. One such bill actually passed both houses in 1956 only to be vetoed by President Eisenhower.

6. Foreign shipping

Just as the I.C.C. has been authorized to regulate the rates and services of inland water-borne transportation, so has oceanic shipping been brought under the regulation first of a shipping Board, then of the U. S. Maritime Commission, and now of a Federal Maritime Board in the Department of Commerce. This Board of three members appointed by the president and confirmed by the Senate controls rates, services, and practices of water carriers

engaged in oceanic commerce and of all agencies furnishing wharfage, dock, or warehouse facilities to such carriers.

## REGULATION OF BUSINESS—COMMUNICATION

As illustrated by motor and air transport and, indeed, by the steamship and the railroad, science and technology are responsible for many new modes of transportation, progressively expanding the scope of "commerce" and augmenting the task of regulation. In the field of communications, they have added, if possible, even more—through the techniques of producing and distributing newspapers, the methods of handling the mails, and especially the harnessing of electrical energy. In most European countries, facilities for electrical communication—telegraph, 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, on the other hand, have been developed and, speaking broadly, are owned and operated privately. Since all more important ones necessarily are interstate, and in some instances international, substantially all fall within the range of congressional control over commerce.

1. Telegraph, telephone, and cable

When first developed, intrastate wire communications were regulated, rather ineffectively, by the states, and interstate communications not at all. And this continued to be the situation even after Congress, in 1910, gave the Interstate Commerce Commission jurisdiction over telegraph, telephone, and cable companies operating in interstate and foreign commerce. Preoccupied with railway problems, the Commission paid but little attention to its new task. Partly on this account, and partly because of unsatisfactory experience with the first machinery set up for regulating radio, Congress in 1934 concentrated all responsibility for both wire and wireless communications in a new independent regulatory body, the present Federal Communications Commission (F.C.C.), consisting of seven members appointed by the president and confirmed by the Senate for seven-year terms. Here also the impetus to effective national regulation was the existence in practice of monopolistic conditions. It is neither wise nor practical to have competing telephone or cable systems. Over numerous small, local, independent telephone companies and local calls, state utility commissions continue to retain control as to rates and services. The American Telephone and Telegraph Company (actually confined to telephone service save for providing the wire circuits for Western Union), however, now covers the entire country with its facilities. Since the merger of the Postal Telegraph Company with the Western Union Company in 1943, there are no telegraph competitors of any importance. Therefore, virtually all long-distance telephone and all telegraph services are now under national regulation, as of course, for obvious reasons, are all cable lines. Submarine cables may be licensed only by the president, who also is responsible for seeing that reasonable rates and services are maintained. The F.C.C. controls the actual

transmission of messages. The lines are "common carriers"; their services must be adequate; their rates must be just and reasonable, authorized by the Commission, publicly advertised, and changed only with notice given the Commission and public; no discriminations may be practiced; new lines may be constructed and existing ones extended only with the Commission's consent; and full reports must be rendered, with access by the Commission to all records and accounts. Decisions, which are numerous, can be appealed to courts.

2. Radio

Radio broadcasting had its actual beginning in 1920, and seven years later Congress belatedly recognized a need for regulation. Nature imposed the monopoly here by making it impossible for listeners to hear two broadcasts on the same wave length. The first act assigned the function to a Federal Radio Commission of five members, and charged it with licensing stations, assigning wave lengths, and exercising other supervision. The arrangement did not work well, and in 1934 the Commission was abolished and its functions vested in the new Federal Communications Commission (F.C.C.). Radio broadcasting —on the theory that air waves may cross state boundaries—has been from the beginning under *exclusive* national control; and, subject to the ultimate authority of Congress, all power over it is in the F.C.C. The number of radio channels being limited by nature, the first and largest problem is that of choosing among large numbers of applicants for the privilege of operating a station those persons (citizens only) who shall be given licenses, and deciding what frequencies they shall be assigned. The criterion required by law is "public interest, convenience, and necessity." As in the other regulatory laws, this leaves wide discretion to the Commission.

Although engaged in interstate and foreign commerce, broadcasting stations are declared by law not to be "common carriers," and thus the Commission is without authority to regulate the rates which they charge the advertisers from whom they draw most of their revenue. Other forms of regulation are lacking also. On the other hand, the Commission is required to see that lotteries and other such enterprises are not advertised, that "obscene, indecent, and profane" language is not put on the air, and that all candidates for a given public office are allowed equal access to time. Expressly forbidden to exercise censorship, the commissioners nevertheless may indirectly do so; because (at lengthier intervals now than formerly, but commonly every three years) all broadcasting stations must come up for renewal of their licenses, and it is at least theoretically possible for them to have trouble if what they broadcast does not square with the commissioners' sense of propriety. Licenses may also be revoked. Bombarded as the commissioners are with far more demands for licenses than can possibly be met, and criticized (whatever they do) by political, religious, and all manner of other interest groups, it is doubtful whether any other body of officials in the government has so thankless a task. To their already great burdens have been recently added supervision over the rapidly growing television industry. In this area, the Commission has hardly made a distinguished record. Congressional investigations in 1958 revealed

3. Television

the scope and intensity of the pressures brought on the F.C.C. and the imprudence, if not favoritism, of some of the commissioners.

## REGULATION OF BUSINESS COMBINATIONS

Corporations, trusts, and holding companies

Business in this country attained its present immense proportions mainly through the growth of corporations and the pyramiding of such corporations, in turn, into combinations of still greater size and power. Public, or "government," corporations obtain their charters from Congress. Private corporations may do so likewise, but usually get them rather 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 extended to other states as well by simple formalities of registration. Their owners are the people who hold shares of stock; capital is obtained also from those who lend them money, receiving certificates of indebtedness in the form of bonds. The officers and directors who operate them are largely immune from personal responsibility, with the organizations, as such, also sustaining only limited liability at law. Sixty or seventy years ago, corporations began forming associations or alliances aimed at combinations based upon agreements fixing prices, dividing sales territory, limiting production, and sharing profits. Presently there appeared also "trusts," in which stocks of a group of corporate units were gathered largely or wholly into the hands of a single company acting as trustee, with of course control over all of the affiliates. In time, too, arose "holding companies," with assets consisting solely of stocks of operating companies whose affairs they controlled. These developed particularly in the field of gas, electric, and other public utilities. And on such a scale did these various developments take place that by 1933 our 100 largest industrial units (corporations, trusts, holding companies, and other combinations), with assets aggregating almost $100 billion controlled not only nearly half of the country's industrial wealth, but one-fifth of the entire national wealth.

The problem of monopoly

From such concentration of economic power, evils long ago began to flow—overcapitalization, "watered" stock, and the like, but chiefly monopoly, with its attendant strangulation of smaller competitive enterprises, its complete domination of an economic function or group of functions, its independent and irresponsible control over services and prices. Manifestly, in certain fields monopoly is hardly to be avoided. Speaking generally, it is not practicable for two or three gas or electric companies to operate in the same city; and in such cases monopolistic abuse has to be prevented by direct public regulation. 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 on equal terms. And this free scope for individual initiative and enterprise, leaving the way open for failure and disaster, but also for oppor-

tunity and achievement, and insuring the consuming public the benefits of quality and price flowing from a competitive quest for markets and profits, has always been highly prized by the American people. By the same token, the protection of this conception—in other words, the curbing of monopolistic abuses—has been, increasingly in these later days of "big business," a major public concern.

State regulation proves inadequate

For upwards of 100 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 and private citizens were left to deal with monopolistic and other practices interfering with the free flow of trade. The correctives they brought to bear rested either upon the old common-law principle that all combinations operating to restrain trade *unreasonably* were illegal, or upon statutes defining or modifying that principle's applications. In the era of big business state or private activities proved almost wholly ineffective.

National control introduced—the Sherman Act (1890)

In 1890, therefore, Congress, taking a novel view of its commerce power risked judicial disapproval by passing a vigorous measure—the Sherman Anti-trust Act—aimed at protecting trade and commerce "against unlawful 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. Enforcement was left to the Department of Justice, with no special machinery and hardly any funds provided; busy with other things that Department showed little zeal for action. When it did finally bring action against the Sugar Trust in 1895, a Supreme Court decision (U. S. *v.* E. C. Knight Co., 156 U. S. 1) severely narrowed the scope of the law by ruling that although the defendant produced all but 2 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. For another decade virtually nothing happened—with most of the really huge modern industrial combinations getting their start.

The "rule of reason"

"Trust-busting" was one of President Theodore Roosevelt's prime interests, and successful prosecution in 1904 of a prominent holding company charged with monopoly in the railway field (the Northern Securities case) gave him fresh impetus. Notwithstanding government victories in other cases, however, the Supreme Court again modified 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 (221 U. S. 106) and the Standard Oil Company (221 U. S. 1), 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 virtually to overrule not only the probable intent of Congress, but earlier decisions in which the Court had held

that *all* such combinations in restraint of interstate trade came within the limits of the statute.

Further legislation required

Experience of this sort suggested that if the law applied only to "unreasonable" combinations, some means should be provided by which well-intentioned combinations might know whether they would be regarded by the government as "reasonable," and therefore lawful, without first being subjected to a criminal prosecution to determine the matter. Demand arose, too, for clarification as to the kinds of arrangements that the government would look upon as unreasonable restraints of trade, and as to the corporate practices that it would regard as constituting unfair competitive methods. The outcome was (1) the passage, in 1914, of the Clayton Antitrust Act to reinforce and supplement the Sherman Act of 1890, and (2) the simultaneous creation of the Federal Trade Commission as an agency to co-operate with the Department of Justice in the enforcement of "antitrust" laws, new and old, and especially to curb unfair competitive practices in the conduct of business.

The Clayton Antitrust Act (1914)

Earnestly sponsored by President Wilson as a "new law" to meet "conditions that menace our civilization," though opposed with equal vigor 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 antitrust 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, however, it proved less effective than had been hoped. Congress failed to provide adequate funds for properly staffing the antitrust division of the Department of Justice. In interpreting "unfair methods of competition," the courts grew increasingly tolerant. To a deadweight of opposition from large business interests was added honest doubt of disinterested persons, including some officials, as to whether the entire program was practicable, or even desirable, and especially as to whether corrective regulation of trusts and other combinations was not preferable to attempts to break them up completely. Efforts, too, to make directors personally liable for the acts of corporations almost completely broke down. During World War I, the entire program was, to all intents and purposes, suspended; through ensuing Republican administrations, the legislation was seldom invoked. When the National Recovery Act of 1933 was placed on the statute book in an effort to rescue the country from a great depression those laws were expressly waived for as long as the emergency legislation 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, as the New Deal administration shifted its economic ground some new vigor was placed behind their enforcement. In 1938, a former professor of law at Yale University, Thurman W. Arnold, was placed in charge of the antitrust division of the Department of Justice and became the most assiduous "trust-buster" that the country had known, instituting in five years 44 per cent of all proceedings started under the antitrust laws between 1890 and his retirement in 1943. There was, however, some shift from the old idea of "trust-busting" as an object in itself to that of defending a free market in the necessities of modern life. With this broader social end in view, prosecutions were directed primarily against private groups that had established themselves in strategic positions of control—against "bottle-necks 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, at President Roosevelt's instigation, 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

World War II broke out in Europe just as the Committee was concluding its studies.[7] Soon the United States was involved and once more the anti-monopoly campaign was slowed down. The government sought more benevolent relations with the larger corporations in order to encourage armament production. President Roosevelt announced 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 they would tend to interfere with 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 antitrust activity, for in 1944 the "largest antitrust suit 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. This particular suit was abandoned when Congress, over President Truman's veto, placed authority for regulating such rate agreements in the I.C.C.

More recent developments

After the war President Truman showed concern, and indeed during the campaign of 1948 made a great deal of political capital out of attacks on "big business," special interests, trusts, and Wall Street. After the election, moreover, Administration forces launched a twofold program, on the one hand a vigorous drive for antitrust law enforcement, and on the other a more

[7] *Final Report and Recommendations of the Temporary National Economic Committee*, 77th Cong., 1st Sess. Sen. Doc. No. 35 (Washington, D. C., 1941). A full analysis of the testimony presented before the Committee will be found in D. Lynch, *The Concentration of Economic Power* (New York, 1946). More recent information on the same general subject is contained in a report of the Federal Trade Commission, "The Present Trends of Corporate Mergers and Acquisitions," 80th Cong., 1st Sess., Sen. Doc. No. 17 (1947).

co-operative approach aimed at clarifying for business the many ambiguities of existing law and drawing sharper lines between what the government considered legal and what illegal combinations and practices. The period from 1948-52 saw the most vigorous enforcement effort in the history of the anti-trust laws. In 1950 the Antitrust Division of the Attorney General's Office received the largest appropriation in its history, $3,800,000. In 1950 also the Clayton Act was amended (Anti-Merger Act of 1950) to prohibit not only the acquisition of stock of a competing corporation where the effect may be to tend to create a monopoly, but also of its assets where competition may be substantially lessened by such action. Suits were started or activated against some of the largest enterprises in the nation: the "Big Four" meat packers (Swift, Armour, Wilson, and Cudahy), Du Pont, American Telephone and Telegraph, the A & P grocery chain, Aluminum Company of America, the leading motion picture distributors, the three large farm machinery manufacturers (International Harvester, Deere, and Case), and many others. The Supreme Court, meanwhile, enunciated interpretations more friendly to the antimonopolists. It reversed an earlier position taken in the case of the U. S. Steel Corporation (251 U. S. 417), and held in the case of the Aluminum Company (322 U. S. 716) that size alone could be objectionable. In the American Tobacco Company case (328 U. S. 781), the Court held that the power to raise prices or to exclude competition is an abuse whether these things have been done or not.

The results of all of this activity of recent years are mixed. The Aluminum Company was ordered to divest itself of its Canadian properties. The A & P was fined $175,000 and ordered to divest itself of a wholesale subsidiary, the Atlantic Commission Co. It successfully resisted, however, the government effort to break it up into seven retail divisions. The Du Pont case, dismissed by the district court after months of argument, was carried to the Supreme Court and there the company was ordered to divest itself of its strong voice in the ownership and management of General Motors Co. The most drastic breaking-up was that of the motion picture distributors (The Paramount Case, 334 U. S. 131) who were ordered to divorce completely the production of motion pictures from their exhibition and five companies were reorganized into ten. Cases against the A.T. and T. Co. and I.B.M. were compromised and settled out of court. Several of the other large cases are still pending.

The Eisenhower administration taking office in 1952 appears to have abated the ferocity of the campaign against monopoly. Attorney General Brownell announced its policy as primarily one of promoting competition rather than attacking business and has stated that criminal prosecution would rarely be used. In general, the new administration has confined itself to cleaning up the cases started under Truman. It has, however, successfully halted a proposed merger of the Bethlehem Steel Co. and the Youngstown Sheet and Tube Co. On the other hand several important mergers in automobile manufacturing have been allowed to occur without objection.

A continuing dilemma

Over a 70 year stretch, frontal attack on monopoly through the Department of Justice has yielded mixed and not highly impressive results. A number of large concerns have been broken up; others have been brought to book and penalized; many minor punishments have been inflicted; and perhaps many actions have been deterred. Large obstacles, however, remain. Among them is the dependence of the laws for vigorous enforcement upon the economic predispositions, and personal inclinations of successive presidents, attorneys general, and other high officials concerned. A second impediment is recurring uncertainty, despite all the legislation and court decisions, as to what, in many situations, actually constitutes "unfair competition," "unreasonable" restraint of trade, and the like. A third is the sometimes wavering support given by courts and by Congress. Congress, for example, after passing the Anti-Merger Act in 1950, in 1952 exempted "fair trade agreements" between manufacturers and retailers from the Federal Trade Commission Act. A fourth is the objectionable processes used—the criminal provisions have virtually been ineffectual. And the most obstructive of all is divided opinion, with resultant hesitation, springing from the inexorable circumstance that large-scale production and merchandising, requiring large-scale organization, make for economies, and therefore often for more and cheaper goods and services for the consuming public. Big business it is argued is performing economic miracles for our society and now is acting more and more from a sense of social responsibility. It is also argued that bigness in industry is offset and held in check by bigness in labor organizations and bigness in government. There is, furthermore, some evidence that the era of concentration of corporate power may be passing. There has been a rapid increase in the number of firms during the postwar years and the huge corporations are not expanding as rapidly as the smaller ones. On the other hand, there have been many mergers in the postwar period.

## THE FEDERAL TRADE COMMISSION AND POLICING BUSINESS PRACTICES

1. Functions

The Sherman Act, as we have observed, depends for enforcement almost entirely upon the antitrust division of the Department of Justice. The Clayton and Federal Trade Commission Acts of 1914 directed at dishonest and unfair, as well as monopolistic, business practices provided a new independent establishment in the form of the Federal Trade Commission, consisting of five members appointed by the president and confirmed by the Senate for seven-year terms with not more than three drawn from any one party. No clear jurisdictional line between the two enforcing agencies was established at first; both were intended to curb the formation of trusts and the growth of monopolies. The entire development of the Federal Trade Commission, however, has been rather in the direction of defining fair and prosecuting unfair trade practices of whatever business organizations and establishments happened to exist at any given time. In other words the Commission has sought to maintain "fair"

competition rather than to attack monopolies. In pursuance of this purpose it enforces not only the Acts of 1914 as amended but also: (1) the Anti-Discrimination (Robinson-Patman) Act of 1938, designed to clarify price-discrimination provisions of the Clayton Act, and aimed at preventing sellers from arbitrarily giving advantages to some buyers as against others through disguises such as advertising allowances and brokerage fees; (2) a Truth-in-Advertising (Wheeler-Lea) Act of 1938, applying especially to the food, drug, and cosmetics businesses; (3) a Wool Products Labeling Act of 1940, which seeks to protect producers, manufacturers, and consumers against the presence of unrevealed substitutes and mixtures in wool products; (4) the Export Trade (Webb-Pomerene) Act of 1918, amending the Clayton Act by permitting exporters to form and operate associations more or less in the nature of cartels (which otherwise would be illegal), so long as approved by the Commission as not "substantially" lessening competition in the domestic market; (5) the Fur Products Labeling Act of 1951 which seeks to protect consumers and manufacturers against misleading labeling of furs and fur products; (6) the Flammable Fabrics Act of 1953 which seeks to prevent the marketing of dangerously flammable fabrics, or apparel; and (7) the Textile Products Identification Act of 1958 which seeks to prevent mislabeling of textiles.

2. Activities

In pursuance of its many duties, the Commission: (1) enforces the laws against unfair competitive practices on the part of corporate and other businesses participating in interstate commerce (except banks, common carriers, broadcasting companies, stockyards, meat packers, and other enterprises regulated through different channels); (2) works out lists of unfair practices and holds conferences in which representatives of industry are encouraged to agree to avoid such practices (although the line between lawful and unlawful agreements is not always easy to fix); (3) issues "cease-and-desist" orders when violations of law are discovered and the violators are not disposed to desist of their own accord; (4) requires corporations to submit reports covering aspects of their business on which the Commission desires information; (5) advises with corporations on organizational and other matters with a view to helping them avoid running afoul of the law; (6) guards against unlawful acquisitions of stock by corporations and against prohibited interlocking directorates; (7) investigates trade conditions and practices in and with foreign countries where combinations or practices may affect the foreign commerce of the United States; and (8) recommends to Congress new legislation calculated to uphold the principle of fair competition in the interest of both business itself and the public. All of these now require about 600 employees and cost $4 million a year.

3. Procedures

In enforcing the laws against unfair and fraudulent practices, the Commission may act in response to a complaint received, or by direction of the president or of Congress, or at the suggestion or request of the attorney general. As a rule, however, action starts with a complaint lodged by some individual, group, firm, or corporation having a grievance against a specified

business concern because of some practice which it is alleged to be pursuing. Hundreds of such complaints are filed every year. If, upon preliminary investigation, the Commission finds a complaint groundless or trivial, or relating to something over which the Commission has no jurisdiction, or not affecting the public interest (mere private controversies have no status under the law), nothing happens. If, however, the protest is believed to have merit, the offender is called upon to explain—often with the result (since 1925) that all parties consent amicably to a "stipulation," or agreement, that the practice complained of shall be abandoned. If, finally, the concern under attack is not prepared to yield so readily, and if after hearings the Commission finds it clearly in the wrong, a "cease-and-desist" order will command the offender to discontinue the objectionable practice or practices within 60 days. If there is failure to comply, the Commission may ask the appropriate court of appeals to affirm its order, which, if done, subjects the offender, in case of continued disobedience, to action for contempt of court or in some cases to fine for noncompliance.

4. Criticism

In spite of the high hopes of its sponsors, the Commission has a mixed but generally low record of achievement. It has rarely been effective in the field of monopoly and instead has concentrated its attack largely on small "fly-by-night" enterprises. Some of its difficulties grow out of the obscurities of the law. It has not always had adequate financial support from Congress; its members have been shifted rapidly, and often have been selected primarily on political grounds. Although supposed, too, to be final judge of the facts in a case, it frequently has found the courts insisting upon making their own inquiries, and many times has seen its cease-and-desist orders overthrown. While it has played an insignificant part in curbing monopoly, nevertheless, by preventing misleading advertising, deception, fraud, and misrepresentation, and by otherwise policing the business world, it may have made some contributions toward raising the standards of American business.[8]

## REGULATION OF FINANCIAL INSTITUTIONS

1. Banking

Because of its responsibility for the monetary system and because the credit structure of the economy is so intimately tied to the system of banking, the national government has long exercised special authority in this field. Under the leadership of the Federalists and over the strenuous objections of the Jeffersonians, the government first chartered a Bank of the United States to serve as the principal fiscal agent of the government and as the main regulator of private financial institutions. The Supreme Court in the celebrated case of McCulloch *v.* Maryland (1819) triumphantly affirmed the Federalist position and a government bank served the nation until 1836. When Andrew Jackson finally strangled this "monster," as he called it, the control of banking

[8] For a recent criticism of the Commission, see Commission on the Organization of the Executive Branch of the Government, *Task Force Report on Regulatory Commissions* (Washington, D. C., 1949), 119-25.

devolved entirely on the states. The chaotic situation which resulted with "wild cat" banks, unsupported currency, special charters, and many other abuses was not ended until 1863. The necessities of Civil War finance stimulated the Congress to find a better method of controlling currency and also of marketing its bonds. The result was a system of national banks and a confiscatory tax on state bank notes.

National banks

Under the national banking system, privately owned banking firms could be chartered by the national government as national banks with the right to issue paper money and with the obligation to accept regulation of their fiscal practices including audit of their accounts. State banks continued to exist, as they do today, but most of the large firms became and have remained national banks and are closely supervised by the comptroller of the currency in the Treasury Department.

Federal reserve system:

This system eased the problems of war finance but proved unequal to the task of mitigating the hardships associated with intermittent depressions during the era of great industrial expansion. It was overhauled in 1913 and a new federal reserve system established.

a. Organization

The country was divided into 12 federal reserve districts, in each of which was located a federal reserve bank, usually in the district's principal city. In each case, all or nearly all stock was to be subscribed by the member banks within the district, and control vested in a board of nine directors, three named by the general management of the reserve system in Washington, six by the member banks. A central board of governors was established (the Federal Reserve Board) made up of seven members appointed for 14-year terms by the president and confirmed by the Senate, with due regard for both geographical distribution and representation of financial, agricultural, industrial, and commercial interests. This board, endowed with broad supervisory and regulatory powers, bears full responsibility for formulating monetary policies and exercising general direction of the system. All national banks must belong to and hold stock in the federal reserve bank of their district; state banks may do so if they meet the requirements and find membership to their advantage—as most of them do.

b. Workings

The federal reserve banks—often referred to as "bankers' banks"—do not carry on a general banking business with individuals and corporations, but instead perform services, directly at least, for the national government and for the member banks of their respective districts. Proceeds of revenue collections are deposited with them, and in general they have custody of government funds which in earlier days were left idle in subtreasuries. For member banks, they act as clearing houses for the handling of checks and other financial instruments, serve as depositories for surplus funds, store gold and silver held as reserves, and, more important, provide facilities through which member banks can "rediscount" (i.e., borrow money upon) much of their "commercial paper" (mortgages, notes, etc.) and thus issue money or obtain credit to make new loans.

Through its operations the federal reserve system has an important, per-

haps, decisive influence on the credit structure of the nation and an important influence on the level of prosperity. It determines the reserves which member banks are required to maintain against their deposits. By changing the rediscount rate it can regulate the volume of credit available for loan in member banks. Finally, by entering the market and buying government securities ("open-market operations") it can influence the price of government bonds.

Despite the reforms of 1913, the banking system proved unable to weather the depression of the 30's. Banking was suspended entirely for a few months in 1933; many banks had to be aided by the R.F.C. and many others failed. The Federal reserve system was reshaped into the form described above by amending legislation in 1935. Commercial banks were required to abandon investment banking and a new insurance system to protect depositors was established under the Federal Deposit Insurance Corporation. The F.D.I.C. now insures accounts of all participating institutions up to $10,000 on the basis of small premiums paid by member banks on their deposits.

2. Securities

The stock-market crash of 1929 which signaled the beginning of the depression led not only to an overhauling of the government's system of controlling banking. It stimulated national concern with abuses in the management of stock exchanges and in the sale of stocks and bonds. State action having been tried for a generation in the form of "blue sky laws" regulating securities vendors was found inadequate to the task of protecting the interest of the millions of shareholders. Congress under the spur of President Roosevelt assumed regulatory authority in this field with the passage of a Securities Act in 1933 and a Securities Exchange Act in 1934.

The Securities Act of 1933

The primary purpose of these two interlocked pieces of legislation is to protect investors against fraudulent practice in the issuing and handling of securities offered for sale in interstate commerce. To this end, the act of 1933 requires all issues of stocks, bonds, or other securities (with certain exceptions indicated below), if to be offered in interstate commerce or by mail, to be registered with (originally the Federal Trade Commission) the Securities and Exchange Commission (S.E.C.) set up in 1934.[9] 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. 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

[9] This Commission consists of five members appointed by the president and confirmed by the Senate for staggered five-year terms, and operates through three divisions, or branches, with regional offices in about a dozen principal cities. Excepted from the provisions of the act are securities issued by the national, state, and local governments, by national and state banks, by religious, education, and other corporations not organized for profit, by railroads and other common carriers, and by building and loan associations. The constitutionality of the Securities Act was upheld by the Supreme Court in Electric Bond and Share Co. *v.* Sec. and Exch. Commission, 303 U. S. 419 (1938). It may be added that the states continue to maintain regulatory agencies in this field, but usually focus their attention upon issues of less than $100,000—the level at which national regulation begins.

officers, for any untrue or only partly true declaration of a material fact in a registration statement or prospectus. 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. No action by the Commission is to be construed as a recommendation of any security 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.

3. 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—doubtless the major part—of the securities registered with the Commission are bought and sold on stock exchanges found in 20 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. 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 fleeced. Speculation "on margin," too,—that is, 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.

To remedy this situation, the transactions of all exchanges engaged in interstate commerce (as every one is) 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 national 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 a given security from trading. Various provisions outlaw objectionable practices of the past, and, all in all, the measure sought to make the exchanges fair and open market-places for investors rather than mere rendezvous for conspiring speculators.

4. Public utility holding companies

In the depression years attention was also invited to the questionable character of certain corporations whose major function was to own the stock of operating utilities. The towering structure of the Insull empire, which pyramided these "holding companies" on top of each other until it had gained control over a major sector of the gas, light, and water supply businesses of the Midwest, came crashing down spreading injury to many innocent persons. The securities regulations did not quite get to the heart of this related problem. Congress, therefore, attempted to regulate these "holding corporations." It

passed in 1935 a Public Utility Holding Company Act giving the Securities and Exchange Commission jurisdiction over all holding companies concerned with the production of gas or electricity and either participating in interstate commerce or making use of the United States mails. Regulation of rates, services, and general business practices of such companies was vested in the same act in a Federal Power Commission already in existence since 1920. The same agency has control over security issues, mergers, and sales of property by *operating* gas and electric companies engaged in interstate commerce. But, aside from rates and services, practically all aspects of gas and electric *holding* companies fall under Securities and Exchange Commission regulation. Every such company (unless holding less than 10 per cent of the stock of any subsidiary) must register with the Commission, file full information concerning itself and its subsidiaries, and receive Commission approval, without which it has not even any right to exist. The issuance and sale of all such companies' securities, and all proposals for mergers and sales, must likewise have Commission endorsement. Loans of operating companies to holding companies are forbidden as also are the payment of "excessive" dividends. All accounts must be supervised by the S.E.C. and full financial reports made to it. Corporate members of holding companies may make no political contributions and if engaging in lobbying must report on all such activities.

If President Roosevelt could have had his way, all holding companies in the utility field, if not also in others, would have been doomed to extinction. Congress rejected the drastic "death sentence" clauses of the original bill and would go no farther than to specify that after the beginning of 1938 the operations of a utility holding company should be confined to a single integrated system. In pursuance of this provision, and under the vigilant oversight of the S.E.C., a number of large holding companies such as Associated Gas and Electric and Electric Bond and Share have in recent years been divesting themselves of operating companies.[10]

## DIRECT PARTICIPATION IN BUSINESS

Various forms taken

Although no government in this country, whether national, state, or local, has entered business directly like some governments abroad, most people would be surprised by a full account of how far our various governments nevertheless have gone. More or less incidental to its strictly governmental functions, 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 any private purveyor of such commodities. Numerous municipalities, too, own and operate waterworks, electric light plants, gas works, street rail-

[10] The Securities and Exchange Commission also administers three important statutes in addition to those hitherto mentioned: the Trust Indenture Act of 1939, the Investment Company Act of 1950, and the Investment Advisors Act of 1950. In addition, the Commission advises district courts under the bankruptcy laws in connection with reorganization proceedings for debtor corporations.

way or bus lines, airports, bridges, tunnels, and other utilities. From the earliest days, the national government also has been in business. A survey in 1949 revealed that it owned or was financially interested in no fewer than 100 important business enterprises, representing a direct investment of more than $20 billion.[11] The forms taken are various, and only a few can be mentioned here. (1) To begin with, through a recently created General Service Administration (superseding a former Bureau of Federal Supply in the Treasury Department), the government purchases general supplies in almost incredible quantities, and through the Commodity Credit Corporation in the Department of Agriculture equally amazing stocks of farm products in connection with the price-support program. (2) It also sells, e.g., electric power, fertilizers, farm products, and since 1945 industrial plants and great quantities of supplies representing surpluses left over from war. (3) It manufactures munitions, currency, fertilizers, and many other things, constructs ships, erects buildings, and operates the largest printing establishment in the world. (4) It owns and operates the Alaska Railroad, the Virgin Islands Corporation, and the Panama Canal. (5) On the list, too, are the largest hydroelectric enterprises in the country—Boulder Canyon (Hoover Dam), the Columbia River Power System (Bonneville Dam, Grand Coulee Dam), and the Tennessee Valley Authority, besides many lesser ones. (6) More than 30 different national establishments are engaged in lending, guaranteeing, or insuring money in fields as diverse as agriculture, banking, housing, veterans' aid, Indian affairs, and public health, not to mention the huge items of foreign loans. (7) In the postal system, taken over in 1789 from the old Confederation, and therefore representing the earliest venture in the field, the government today operates one of the largest business enterprises known. Some of these steadily multiplying undertakings are carried on directly by regular departments (like the Post Office), by branches thereof (like the Bureau of the Mint in the Treasury Department), or by independent establishments (like the Export-Import Bank of Washington). But an increasing proportion are managed by government-owned corporations, often competing with private business.

[11] (Hoover) Commission on the Organization of the Executive Branch of the Government, *Federal Business Enterprises* (Washington, D. C., 1949), 1. The second Hoover Commission in 1955 found more than 1000 additional government business enterprises. Commission on the Organization of the Executive Branch of the Government, *Business Enterprises* (Washington, D. C., 1955).

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# CHAPTER 20

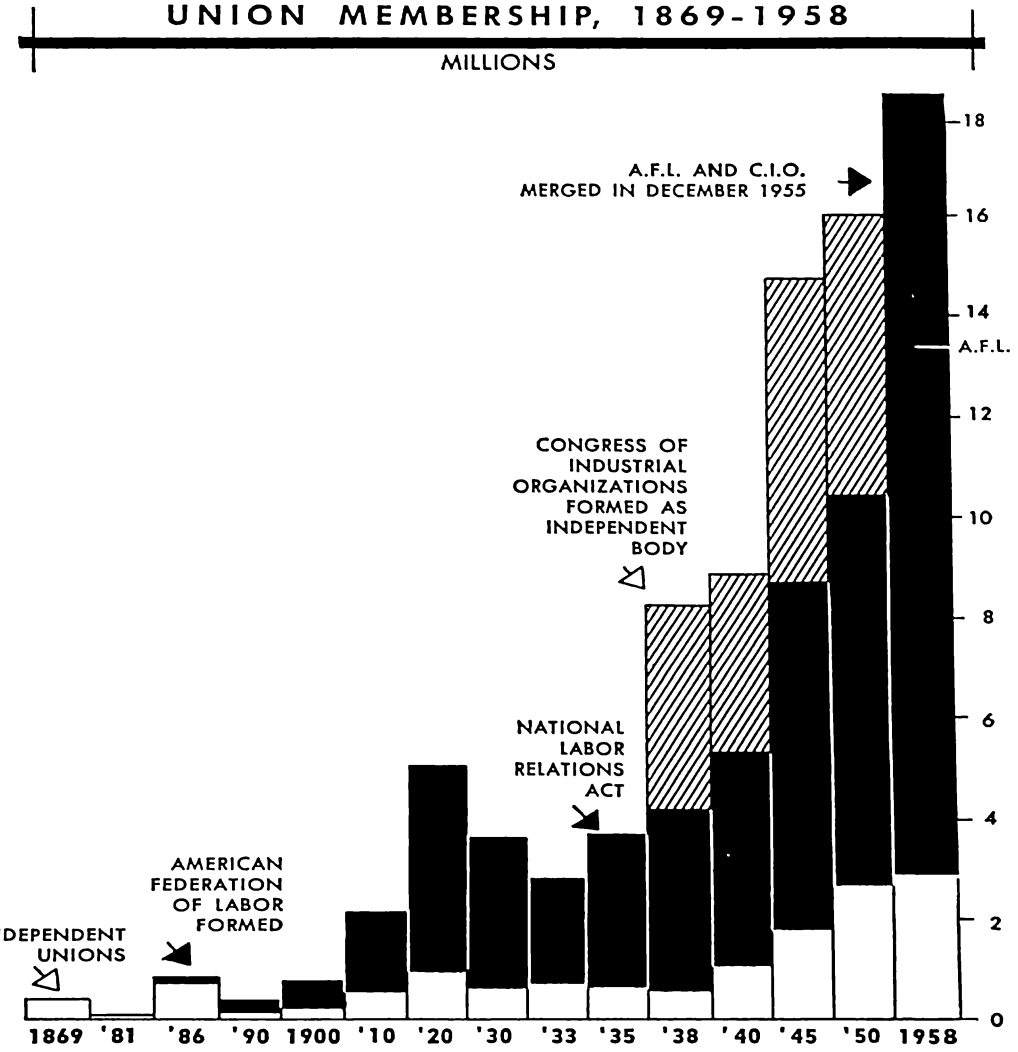
# *Government and Labor*

Labor in the national scene

The development of a labor interest in our society is a product of the Industrial Revolution in which small handicraft industries were replaced by large mass-production factories and in which management was separated from daily contacts with employees. In the early years of our history, the laboring men did not participate in political processes. Voting and officeholding were reserved for property owners. The democratization of the suffrage paved the way for labor interests to be represented. Before the rapid industrialization of the nation after the Civil War, however, the laboring multitudes seemed to accept the idea that cheap land and low taxes were the most useful public policies to serve their needs. Only after the victorious northern Republicans swung the full weight of the national government behind the rapid development of industry did the industrial worker emerge as a strong claimant for governmental protection. The emergence of labor as a powerful interest in modern politics, furthermore, has followed closely upon the organization of this interest in the economic sphere through unionization. At first, labor sought to achieve better conditions, higher pay, and shorter hours by purely economic procedures. Only as governmental power and prestige were repeatedly thrown into the struggle on the side of employers did labor come to appreciate that political power was also essential to its ambitions.

The development of unions

Even before 1800 mechanics and artisans in a few of the larger cities began drawing together in unions. As industry expanded and workers multiplied, consciousness of a weak bargaining position without organization, combined with growing desire for improvement of labor conditions in other respects, led to unionization on a steadily increasing scale. Employers did not like what was going on; public opinion was skeptical; and in pursuance of old common-law doctrine, the courts long looked askance at unions as constituting, or threatening, criminal conspiracy. In spite of numerous obstacles, the movement began to take root and after about 1870 went steadily forward. In time local unions began drawing together in regional, or even nation-wide, federations. In 1881, a Federation of Organized Trades and Labor Unions became the common voice of organized labor. In 1886, the present name of American Federation of Labor (A.F.L.) was adopted and for another half-century this organization held the field almost alone. In 1935, however, a militant rival, the Congress (until 1938 Committee) of Industrial Organizations (C.I.O.) was created by the secession of several unions from the parent body. Outside of these over the years grew the powerful Railroad Brotherhoods




SOURCE: U. S. Department of Labor.

and numerous minor independent organizations. In 1955, the C.I.O. and A.F.L. unions were reunited into one grand federation.

Hostility of business and the courts

Throughout the period 1880-1932, the growth of labor unions was stubbornly and bitterly, sometimes violently, contested by the business interests. "Freedom of contract" and "criminal conspiracy" doctrines were asserted by business and enunciated by courts to justify fine and imprisonment for the leaders of strikes and boycotts, labor's principal weapons in the economic sphere. The Sherman Antitrust Law of 1890, designed to halt the consolidation of corporate power, was applied with devastating effect to certain labor union activities. Congressional sympathy for the aims of organized labor, expressed in the Clayton Act's apparent exemption of labor from the anti-

trust laws, was overcome by judicial hostility and virtually all of the alleged protection was repealed by judicial interpretation.[1] The courts, furthermore, fell increasingly into the habit of granting injunctive relief to business concerns harassed by labor disputes, actual or threatened. In spite of this hostility the A.F.L. slowly grew in numbers and influence, but by 1932 it still counted only 3 million members and had little real strength in most of the large industries (steel, textiles, automobiles, rubber). It is only since 1932 that organized labor has deployed upon the national scene as one of the great organized economic interests of modern America. A drastic change in governmental attitude from a suspicious pseudo-neutrality to benevolent protection allowed labor unions to flourish as never before. Their membership has steadily advanced until they now speak for about 25 per cent of all persons gainfully employed in the United States and for a much higher proportion of industrial wage earners.

Labor in politics

Throughout most of its history organized labor in America has eschewed any attempt to build its own political party. Several nineteenth-century efforts to do so, beginning with the Working Men's party of 1828, were not conspicuously successful. Marxism, around which so many European labor parties were built, has never strongly appealed to the American laborer. Labor's political doctrine was largely supplied by Samuel Gompers, leader of the A.F.L. He preached abstention from independent party organization and participation in the American two-party system by supporting friendly candidates in either party and by appealing to both parties for favorable platform declarations and for benevolent legislation. Labor's main weapons, he felt, were economic, not political. Theoretically, the Gomper's policy is still supported, but the large federation of unions has swung more and more heavily toward active intervention in political campaigns, usually in behalf of northern Democrats and of Democratic presidential candidates. Through generously financed subsidiaries like the C.I.O. Political Action Committee and Labor's League for Political Education of the A.F.L.—and now the Committee on Political Education of the combined A.F.L.-C.I.O.—labor has sought to sway the electorate in behalf, usually, of Democratic candidates. In New York City a powerful independent labor party has been organized by local trade unions and their party (the Liberal Party) has held the balance of power in many municipal and state elections. Labor is in politics to stay and its influence, especially in the Democratic party, has been growing steadily in the large industrial cities of the North and Midwest.

## NATIONAL PROTECTION OF LABORERS

State regulation

As industrialization rapidly spread throughout the nation in the latter half of the nineteenth century, laboring men increasingly demanded protec-

[1] Under the Sherman Act, see Loewe *v.* Lawlor, 208 U. S. 275 (1908) and Gompers *v.* Buck Stove and Range Co., 221 U. S. 418 (1911). Under the Clayton Act, see Duplex Printing Co., 254 U. S. 443, 469 (1921).

tion from unhealthy and dangerous working conditions, from competition on the job market from children and immigrants, from long hours and low pay, and from many other abuses of mechanized manufacturing and corporate management. Much of their effort was directed to state legislatures in the belief that the national government had no power to regulate the conditions of mining and manufacturing. State action, and there was a great deal of sympathetic legislation in the period of 1880-1932, was always embarrassed by the fear that any particular state would place its own industry at a competitive disadvantage with that of other states if it imposed costly standards of safety, health, and welfare. Despite this difficulty, labor won important gains from state after state in the fields of industrial safety, child labor, improved factory conditions. In fact, much of the legislation protecting labor interests at present on the law books is still state law, and the states continue to play an important role in regulating industry benevolently toward working men and women.

Early efforts at national protection

Although national regulation of industry in behalf of workers is largely a product of the New Deal period, the national government had never been completely indifferent to labor interests. As far back as 1840, the government announced the policy of setting a standard for private employers in its treatment of its own employees. At that time, President Van Buren prescribed by executive order a 10-hour day for national civil servants. Congress in 1868 prescribed an 8-hour day for laborers on the government's payrolls and this privilege was gradually extended throughout the service. The movement to restrict immigration, especially of contract laborers, which began in 1882 and which has been described in an earlier chapter was largely motivated by a desire to protect the job security of American workers. Unlike workers in industry, those engaged in transportation early looked to the national government for protection and after prolonged agitation an Hours of Service Act in 1907 limited to 16 the hours of consecutive employment of train crews. In 1916, and at the behest of the by now strongly organized railway brotherhoods, the Congress passed an 8-hour-day law for all trainmen. Coincident with state action to protect workers against industrial accidents, the Congress in 1908 passed an Employers' Liability Act for the protection of workers in interstate commerce. This act drastically amended the old common-law doctrines of "contributory negligence" and "assumption of the risks of employment" which up to this time had substantially allowed employers to escape liability for the injury or death of workmen while performing their duties. The Seamen's (LaFollette) Act of 1915 surrounded employment in the merchant marine with guarantees of proper conditions, hours, food, and wages. In 1920, the benefits of the Employer's Liability Act were extended to sailors. So rapidly did national interest in the plight of the workingman unfold in this century that by 1913 the Congress was persuaded to establish a separate Department of Labor of cabinet rank by breaking up the Department of Commerce and Labor created in 1903. This new agency was designed "to foster, promote, and develop" the welfare of wage earners in the United States, to

improve their working conditions, and to advance their opportunities for profitable employment. It should be added, however, that the methods selected by Congress for the achievement of these goals were largely educational and noncoercive.

Unsuccessful efforts to expand national protection

Not all of the early national efforts in behalf of labor were successful. When, in 1916, Congress undertook to restrict child labor in factories and mines by excluding from interstate commerce the products of such labor, the Supreme Court held the law invalid as regulating manufacturing rather than commerce (Hammer *v.* Dagenhart, 247 U. S. 251). In 1919 an effort to achieve the same object by using the taxing power was also invalidated by the highest court (Bailey *v.* Drexel Furniture Co., 259 U. S. 20). An attempt in 1918 to fix minimum wages for women and children employed in the District of Columbia was also set aside on the grounds that women were being unconstitutionally denied freedom to contract for their employment at whatever wages they would accept (Adkins *v.* Children's Hospital, 261 U. S. 525).

As the nation entered the depression, the national government had already thrown its protective mantle around certain laboring groups (railroad workers) but was still largely restrained from interceding for the great mass of laborers by narrow judicial construction of its commerce and taxing powers. Impressed with the plea that the descending spiral of economic activity could only be reversed by placing more purchasing power in the hands of consumers, the New Deal early addressed itself to improving the wages and working conditions of the great mass of industrial wage earners. The first major effort in this direction was embodied in the National Recovery Act of 1933 which provided that codes of fair competition be drawn for similar industries by joint labor-industry-government teams and that these codes should set minimum wages levels, fix maximum hours, eliminate child labor, and spread available employment. These codes, which were also to include provisions governing competitive trade practices, would then be enforced upon the industries concerned by the national government. Codes were rapidly drafted and put into operation under the National Recovery Administration (N.R.A.) and minimal conditions of employment imposed upon a large sector of American industry. In 1935, however, the entire procedure was called into question by litigation and the Supreme Court invalidated the core of the Recovery Act, mainly on the grounds that the code procedure constituted an invalid delegation of legislative power to an administrative agency (Schecter *v.* U. S., 295 U. S. 495).

The National Recovery Administration

Establishment of labor standards for public contraction

Operating within the prevailing conception of constitutional power, Congress next sought to establish standards of employment for all those firms supplying the government by contract. The Public Contracts Labor (Walsh-Healey) Act of 1936 prescribed the payment of prevailing minimum wages, limited hours of employment to 40 per week, outlawed child and convict labor, and prescribed minimum standards of health and safety for the employees of all businesses holding government supply contracts in excess of $10,000. These prescriptions were made a part of every appropriate government contract.

In 1936 and 1937, the Court in a series of decisions indicated that it had revised its views on the extent of national power to regulate manufacturing and the Roosevelt administration moved quickly to occupy the new ground opened to it. In 1938, a Fair Labor Standards Act placed an important share of workingmen under the protection of the national government.

The establishment of labor standards for industry generally

As amended in 1949, 1950, and 1955, the Fair Labor Standards Act now extends to about 24 million wage earners of both sexes "engaged in interstate commerce, or in the production of goods for interstate commerce," including workers in occupations "directly essential" to this production, the benefits of minimum standards of employment. A minimum wage of $1.00 an hour (originally 25 cents) for all covered employees is established and a maximum work week of 40 hours (originally 44 hours). For all hours worked in excess of the maximum, overtime at the rate of one and one half times the base pay is required, except that by collective bargaining agreements in certain industries the work week may be extended. The employment of children under 16 is forbidden in manufacturing, mining, transportation, and commerce and under 18 in occupations declared by the Bureau of Labor Standards in the Department of Labor to be "particularly hazardous . . . or detrimental to their health and well being." In other occupations and businesses covered by the law, children of 14 or 15 may be employed in periods not interfering with their schooling and under beneficent working conditions. This general prohibition of child labor, incidentally, makes the passage of the pending child labor amendment largely an academic question. Challenged before the courts soon after its passage, this bold effort to provide a nation-wide floor below which the conditions of employment in industry might not sink was sustained unanimously by the Supreme Court (U. S. *v.* Darby Lumber Co., 312 U. S. 100).

Enforcement

The enforcement of labor standards on covered industries and governmental contractors is the responsibility of the Wage and Hour and Public Contracts Division of the Department of Labor. Violators may be subjected to injunctive proceedings, criminal prosecutions, and employee suits (to recover unpaid minimum wages). Different and less exacting standards are imposed by the same law on industry in Puerto Rico and the Virgin Islands.

## NATIONAL PROTECTION OF LABOR UNIONS

Throughout the period of developing governmental concern with the plight of labor, there had always been an impressive argument made by some that elaborate legislative and administrative efforts to protect labor from exploitation are both unnecessary and unwise. Let the government, it was argued, encourage the unionization of employees or at least do nothing judicially or otherwise to discourage such unionization and the unions will take care of wages, hours, and working conditions. It was not, however, until the depression of the thirties that this point of view won wide, although never universal, acceptance. As the national economy rapidly plummeted, the argu-

ments of the labor leaders and their friends gained increasing support. Here again was an opportunity to sustain consumer purchasing power and to spread employment by the actions of unions.

Anti-injunction Act of 1932

The first target of the labor unionists was their ancient enemy, the injunction. The broadening concept of corporate property rights which characterized the decisions of the national bench from 1875 to 1936 and which embraced as property such nebulous values as "good will" and "going-concern value" suggested to able members of the bar a device for thwarting the spread of unions. Strikes, picketing, and boycotts, the central weapons of the labor movement, could normally be shown to a sympathetic court as threatening irreparable damages to corporate property thus broadly defined. The writ of injunction, an old common-law process issued by courts of equity on proper plea and in circumstances in which only one side is normally heard, was designed, they said, exactly to ward off such damages. From about 1890 onward courts fell into the habit of granting injunctions against union leaders and members, ordering them to continue work or to refrain from actions which might threaten property loss. Violation of such an order placed a unionist in contempt of court and subjected him to summary (without jury trial) punishment. In the decade of the twenties these injunctions became more and more sweeping in their prohibition of all the traditional methods of union agitation. An effort to prohibit injunctions in labor controversies embodied in the Clayton Antitrust Act of 1914 met the same fate as the provision of that law ostensibly exempting labor from antitrust prosecution. It was interpreted out of existence by the courts. Thus many union leaders and sympathetic legislators felt, as we entered the depression, that the greatest service to the spread of labor unionism would be done by removing the injunction from among the employer's weapons. The Anti-Injunction (Norris-LaGuardia) Act of 1932 represents the first successful national effort to foster trade unionism in the United States and marks the turning point in the declared policy of the government. This act surrounded the injunction procedure in the national courts with so many safeguards to protect labor union interests that the injunction has become largely useless as a device by which employers could break existing unions or thwart their organizational efforts. This act also declared the "yellow-dog" [2] contract as contrary to public policy and unenforceable in national courts.

The N.R.A. and labor unions

The New Deal's National Recovery Act of 1933 carried governmental benevolence to unions one step farther. Bent upon leaving no stone unturned and no theory of depression-beating untried, the act, in addition to the labor standards already mentioned, required in Section 7(a) each industrial code to include a provision recognizing the right of employees "to organize and bargain collectively through representatives of their own choosing." It also required the codes to carry a prohibition against forcing membership in a company union or forcing anyone to agree not to join a union as a condition

[2] A "yellow-dog" contract is one in which a prospective employee binds himself as a condition of his employment never to join a labor organization.

of his employment. Thus the company-dominated unions of the twenties were outlawed. A National Labor Relations Board was set up within the N.R.A. to administer these provisions of the law and to conduct employee elections where the question of representation in collective bargaining arguments was at issue.

The National Labor Relations Act of 1935

The National Labor Relations (Wagner) Act of 1935 is the result of the effort of Congress and the President to salvage labor protection from the wreckage created by the destruction of the N.R.A. This act proclaims as the policy of the national government the fostering of collective bargaining between employees and employers through unions and surrounds the process with safeguards for unionization that substantially deprive the employer of most of his traditional weapons. Using the Federal Trade Commission Act as its guide, the act specifies a number of "unfair labor practices" and prohibits them to employers. Company-dominated unions are outlawed; employers are forbidden to coerce or restrain employees in the exercise of their rights to become members of a union and to bargain through such organization; employers may not hire or fire employees in such a way as to discriminate against union members or officers; employers are required to bargain with the proper representatives of their employees. A National Labor Relations Board (originally of three but now of five members) was established independently of any existing agency and authorized to enforce the new law upon employers engaged in industries "affecting" commerce. Through a network of regional offices the Board was empowered to discharge its responsibilities by: (1) ascertaining by election procedures or otherwise who are the bona fide representatives of the employees in covered industries or plants; and (2) determining on complaint of an employee or his representative if an employer is engaging in an "unfair practice". Should the Board, after proper hearing, find an employer to be violating the law, it may issue a "cease-and-desist" order against him which may be enforced by a proper national court.

The act's constitutionality upheld

This legislation, with its strong deterrents to employer interference in the unionization of his employees, has ever since been regarded as the Magna Charta of the labor union movement. It represents the greatest gain in governmental benevolence ever achieved by organized labor. And, by staying the hands of management, it contributed in no small way to the tremendous increase in union membership which followed upon its enactment. It was not to be expected that the business community would allow such a sweeping reinterpretation of national authority as this act entailed to go unchallenged. The major case reached the Supreme Court shortly after it had revised its position on minimum wage legislation and thus shortly after the bitter national contest over President Roosevelt's efforts to reconstitute the court. The Court by a five to four decision sustained the administration's argument that the national power to regulate interstate "commerce" embraced the power to regulate the labor relations of concerns whose raw materials or finished products were shipped across state lines even though the firms were not themselves directly engaged in commerce (N.L.R.B. *v.* Jones and Laughlin Steel

Co., 301 U. S. 1). More than any other decision of this period, this pronouncement celebrated the change in the Court's attitude toward national power to regulate business.

Attacks upon the act

From its inception, the National Labor Relations Act has been the target of a large segment of the business community. The theory of this act, the business interests argue, is that employers and employers alone are to blame for the plight of the working mass and for spreading industrial unrest. Only employers can commit unfair labor practices. Unions can coerce employees into becoming members without penalty under the law. Special safeguards are provided for "closed-shop" agreements (agreements which require an employee to belong to the union in order to be employed) and all forms of company unions are proscribed. Labor has responded that employers still have ample legal sanctions for dealing with unlawful behavior by union leaders and agents. Nothing in this law authorizes unions to commit violence or modifies existing limitations on picketing or boycotting. During World War II the controversy over national policy toward unions abated. It broke out with renewed vigor in the postwar era, however, and led finally to a new policy of governmental regulation of unions as well as of business.

Strike-Breakers Act of 1936

While the sentiment in favor of unions was running at high tide, the Congress added another important law favorable to them. In 1936, Congress, in the Strike-Breakers Act, forbade the transportation in interstate commerce of "any person with intent to employ such person to obstruct or interfere . . . with peaceful picketing during any labor controversy."

## THE PROMOTION OF INDUSTRIAL PEACE; REGULATION OF UNIONS

The public interest and industrial peace

Much as some groups have argued in behalf of a governmental policy of hands-off economic questions like the relations of labor and management, and much as the government has in the past few decades sought to relieve itself of some of the burden of regulating industry by strengthening the hands of the unions, the government has never been able wholly to turn its back upon the combats between labor and management. As unions have grown in size and power, their controversies with the great corporate combinations have threatened not only local and sporadic violence as of old but also national economic paralysis. The strike is the oldest and strongest bargaining device the unions have, and when they are able to shut down the entire steel industry or coal industry or railroad system the national economy must grind slowly to a complete halt. There has developed, in other words, a public interest different from that of either labor or management in a particular industry which demands that this paralysis never be allowed to creep through the whole of society. The government's interest in promoting industrial peace has grown steadily as unions and corporations have grown and is, perhaps, at the present time its paramount interest in the field of labor relations. In times of war or of war-emergency there has been no question of the transcendent necessity

for maintaining full production, but even in "peace" the government must prevent economic collapse.

National power to deal with disputes

Prior to the Anti-Injunction Act of 1932, the national policy toward labor disputes was that labor was largely to blame for them and that its leaders must be closely restrained whenever serious property damage or obstruction to the free flow of commerce was threatened. In prosecuting the leaders of the Pullman strike of 1894, the Cleveland administration invoked the national power to prevent interference with the mail to justify its actions in moving into Illinois against the wishes of Governor Altgeld of Illinois. Subsequently, the Sherman Antitrust Act was invoked time and again to punish the participants in strikes and boycotts and to re-establish peaceful relations in various industries. The injunctions granted by national courts were also widely used to stop strikes. From all of this it is plain that there has never been a serious question of the power of the national government to intervene in many types of labor disputes and its intervention until well into this century was largely repressive and punitive, especially in regard to labor. A very large share of the responsibility for fostering industrial peace was, nevertheless, left to the states so long as the disputes were largely local in their scope and effect.

Mediation procedures established for railroads

The shortcomings of these wholly negative procedures for dealing with labor disputes were first clearly realized by the national government in the field of transportation. In this field also the power of the government to experiment with other procedures was unquestioned. Starting with legislation dating from as early as 1888 and culminating in the Railway Labor Act of 1926 (strengthened in 1934), a scheme for handling disputes in that field was developed which has been hailed as the best achievement of its kind in our experience. The machinery employed is based on the principle of one mediating agency taking over when another fails. In event of a dispute between a railroad company (or an express or Pullman company, or an airline company—for the system applies also to these) and its employees, either party may invoke the services of a National Mediation Board of three members appointed by the president and confirmed by the Senate; or the Board may step into the picture by volunteering its good offices. In any case, it will endeavor to get the parties into conference and bring about a settlement. Unsuccessful in such effort, it normally will turn the conflict over to another agency, a quasi-judicial National Railroad Adjustment Board, consisting of 36 members working in four divisions or panels, each with equal representation of employers and employees, and each exercising jurisdiction over some particular branch of railway employment. If the appropriate panel also fails (with perhaps by this time a strike voted or actually going on), one final step remains: the president may at his discretion start negotiations afresh by referring the controversy to an "emergency board" of his own choosing, whose findings and recommendations, it is true, will have no binding effect, but may be received with such public approval as to leave the contenders little practical alternative to accepting them. Failure in all of these stages in connection with a threatened strike of trainmen and engineers in 1946 led the government,

acting under wartime powers, to take over the roads and operate them temporarily; and with different organizations of employees involved, the experience was repeated in the spring of 1948 and again in the late summer of 1950. Until these recent years, however, the machinery described always averted imminent threat of interrupted transportation service. For this reason the railroads have been exempted from recent national efforts to establish procedures for peaceful settlement of industrial disputes.

When the Department of Labor was separately organized in 1913, Congress authorized it to act as a mediator in labor disputes. Through a Conciliation Service thereafter established, agents of the government have offered their good offices in thousands of controversies and, without any coercive authority of any kind, have nevertheless contributed to the peaceful adjustment of a large number of them. The Service proved unable, however, to cope effectively with the great strikes of the past two decades. Its location in the Department of Labor lent some slight color to the charge of its critics that it was biased in favor of labor. In 1947, amidst the general reorienting of governmental policy toward unions and industrial peace, the mediation functions were withdrawn from the Department of Labor and independently organized into the Federal Mediation and Conciliation Service. This service, through its regional offices, continues to promote peaceful settlement of labor disputes by lending to the parties its trained conciliators. In a typical year it will be involved in 18-25 thousand disputes and is likely to contribute to the settlement of a very high percentage of them.

National mediation in disputes of all types

As governmental policy toward labor and labor unions was sharply changed in the thirties, great reliance came to be placed on first the N.R.A. and then the National Labor Relations Board for heading off industrial conflict. Under the theory that most violence and intransigence in labor disputes was employer directed rather than union stimulated, it was supposed that the protection of the bargaining rights of workers would contribute to industrial peace. The entrance of the United States in World War II brought a new dimension to the government's interest in industrial peace and a new urgency for finding more compelling procedures for dealing with strikes and strike threats in coal and steel and other "essential" industries. A determined Congress in 1943 passed over a presidential veto a War Labor Disputes (Smith-Connally) Act which imposed strong deterrents to work stoppages. The president was empowered to take possession of and operate any plant, mine, or facility in which a labor disturbance threatened the production of materials needed for the war effort. As long as governmental operation continued, any interference in production by strike, lockout, slowdown, or any other tactic was illegal. Labor disturbances were not completely halted by this act, but certainly they were markedly reduced for this and other reasons. Coincident with the expiration of this act a new rash of strikes swept the country and stimulated bitter debate over the proper method of dealing with them. In the absence of effective legal sanction, the president personally intervened on many occasions to bring the stoppage to a halt by the power of public opinion

World War II and industrial peace

and his own prestige. In those parts of the economy still under wartime price controls, wage settlement boards and committees threw their energies into peaceful amelioration of the swelling tide of unrest as unions sought desperately to keep wages up to the rising spiral of inflationary prices.

Changing attitudes toward unions

The election in 1946 of a Republican Congress brought to Washington a group of legislators (including also many Democrats) determined to remake the whole governmental policy and machinery for dealing with labor disputes and with labor-management relations. By this time a large segment of articulate opinion was convinced that the major fault for the dreaded paralysis of industry-wide strikes lay with the unions. Swollen by increased employment and governmental benevolence, it was argued, they had become too powerful and their leaders too arrogant. The public interest in resisting inflation and in stopping the hardships of prolonged strikes in key industries demanded that these new giants of economic power be brought under governmental control. Such was the setting for the passage of the Labor-Management Relations (Taft-Hartley) Act of 1947. Seldom has feeling on proposed legislation run as high as when this bill was pending; seldom has a piece of legislation, once on the statute book, evoked warmer attack and defense. President Truman thought the measure much too drastic and charged that if placed on the statute book it would encumber collective bargaining with "bureaucratic procedures," promote labor-management friction, and discriminate against workers "in a consistent pattern of inequality." Labor leaders pronounced the act "extreme," "vindictive," "a slave bill." In other quarters (mainly, although by no means exclusively, industrial and Republican), the measure as passed—while conceded to be imperfect and subject to amendment as experience with it was gained—was commended for making employees as well as employers answerable for unfair practices, for guaranteeing new and needed protection for union minorities, for giving workers assurance of being able to pursue their trades whether they join unions or not, for putting an end to alleged arbitrary and prejudiced procedures of the Labor Relations Board, and, in general, for imposing for the first time upon labor unions, with their swollen powers, responsibilities commensurate with those powers.

The Labor-Management Act of 1947:

In form, the Labor-Management Act of 1947 is an amendment to the National Labor Relations Act of 1935 and thus preserves for labor all of the basic guarantees of the earlier law. While unions are accepted the right of every worker to "refrain from . . . concerted activities," that is, to identify himself with no union, if he so prefers, is expressly recognized and protected. Every union desiring to be in a position to avail itself of the services of the Labor Relations Board in defense of its bargaining and other interests is required to keep on file with that agency full information on its membership, officers, finances, rules, and regulations.

1. Rights and duties of unions

2. "Closed" and "union" shops

When the act was passed, 30 per cent of all organized employees (notably in the printing industry and the building trades) worked under closed shop, that is, in establishments in which one must be a union member even to be hired; and more than that proportion were under "union shop" rules requiring

every worker in an establishment to become a union member, if not already such, within 30 days after taking employment. Under the Act of 1947, the closed shop is completely banned, and "union shop" may be maintained only if a majority of all workers in a plant eligible to vote on the question so demand, and only under other restrictions aimed at protecting employer interests.

3. Collective bargaining

The basic rights and procedures of collective bargaining guaranteed in the legislation of 1935 are reaffirmed with full freedom for both employers and employees to choose the agents who will represent them at the bargaining table. But whereas previously only employers were compelled to bargain, employees now are required to do so; and whereas formerly employers might not, in the course of bargaining or otherwise, make even noncoercive statements to their employees without risk of having what they said adduced as evidence of unfair practice, now they may do this with impunity. Also foremen, when organized into unions, are denied any bargaining rights.

4. Unfair practices

The new law adds to the unfair practices of employers several unfair practices sometimes engaged in by unions. Employees, for example, may not be coerced to join unions; members in a union shop may not be required to pay excessive initiation fees or dues; employers may not, under the practice popularly known as "featherbedding," be required to pay for services not rendered, for example, to pay a textile worker for operating a single machine when he could just as well operate four or five, or, in the case of a radio station using records, to hire "live" musicians. Secondary boycotts (in which one party refuses to deal with another unless the other will, in turn, refuse to deal with a third) and jurisdictional strikes (arising, for instance, out of conflicts between A.F.L. and C.I.O. unions, or between any such and independent unions) are forbidden. For all of the practices named, unions are now liable to suit.

5. Labor disputes

The act attempts to strengthen the traditional governmental procedures for dealing with strikes. In general, the right to strike when other measures fail is fully recognized. However, certain kinds of strikes, for example, jurisdictional strikes and strikes against the national government (for which the penalty is instant dismissal) are absolutely prohibited; and for situations threatening strikes in themselves legitimate, procedures are ordained in connection with the new Federal Mediation and Conciliation Service designed to give the parties a chance to "cool off" and mediation an opportunity to achieve its purpose before overt action occurs. A special procedure is established for dealing with industry-wide strikes or those threatening a serious economic breakdown. The president, when he finds such a strike or lockout threatens national health or safety, may appoint a board of inquiry to examine into the causes. On receipt of a report from this board, the executive may request an injunction to stop the strike or lockout. If the proper court finds such a dispute is industry-wide and if continued will threaten national health or safety, it may issue the injunction regardless of the provisions of the earlier act limiting such orders. The parties are then required to continue to seek

agreement with the aid of the conciliation service and the Inquiry Board for at least 60 days. Then the inquiry board's final report is made public and a secret ballot of the employees must be taken by the Labor Relations Board in 15 days to see if they will accept the board's terms. At the end of this process the injunction is lifted, and if no settlement has yet been reached the strike may proceed.

6. Political provisions

There also are provisions of political import. Benefit of National Labor Board procedures, for example, hearing and deciding complaints against employers, cannot be claimed by any union having any officer who refuses to declare under oath that he is not a member of the Communist party and that he does not favor the forceful or unconstitutional overthrow of the government. And the Federal Corrupt Practices Act of 1925 is amended to bracket labor unions with corporations by forbidding them to make any contributions or incur any expenditures from union funds in connection with any election to any national political office. No feature of the law stirred hotter controversy than the latter. Labor has strongly resented it and has vigorously challenged its constitutionality in the courts. At the same time means have been found through auxiliary organizations (like the C.I.O.'s Political Action Committee) of circumventing it.

7. Administrative arrangements

Finally, the National Labor Relations Board is increased from three to five members, with supervising bargaining and repressing unfair practices still its main fields of activity. To meet the criticism that formerly the Board was at the same time "investigator, prosecutor, judge, and jury," the agency is now turned into a purely quasi-judicial body, a "labor court," with all work of investigation and prosecution devolved upon a new official, the "general counsel," appointed by the president and confirmed by the Senate for four years, and with full supervision over 20 regional offices and their field staffs.

This act thus clearly marks a new phase in governmental policy toward labor and toward disputes. Labor unions are regulated nationally for the first time and peace is to be achieved by adjudicatory determination of the rights and grievances of both parties. Crippling strikes may be halted for a

**WORK STOPPAGES, 1947-56**

| | *Number* | *Workers Involved* | *Man-Days Idle* |
|---|---|---|---|
| 1946 | 4,985 | 4,600,000 | 116,000,000 |
| 1947 | 3,693 | 2,170,000 | 34,600,000 |
| 1948 | 3,419 | 1,960,000 | 34,100,000 |
| 1949 | 3,606 | 3,030,000 | 50,500,000 |
| 1950 | 4,843 | 2,410,000 | 38,800,000 |
| 1951 | 4,737 | 2,220,000 | 22,900,000 |
| 1952 | 5,117 | 3,540,000 | 59,100,000 |
| 1953 | 5,091 | 2,400,000 | 28,300,000 |
| 1954 | 3,468 | 1,530,000 | 22,600,000 |
| 1955 | 4,320 | 2,650,000 | 28,200,000 |
| 1956 | 3,825 | 1,900,000 | 33,100,000 |

time by injunction and executive intervention in disputes is supported by law.

Experience under the new policy

Almost a decade has now elapsed since the government sharply changed its policy toward labor unions and sought to promote industrial peace by a different approach. Has the new policy been successful? There is little agreement on this question. Labor has yielded little in its demand for outright repeal of the new policy, and business has steadfastly supported the act. In the campaigns of 1948, 1952, and 1956 the Democratic presidential candidates pledged their party to repeal while the Republican candidates, especially General Eisenhower, pledged only to seek modifications. Except for a few minor amendments in 1951, Congress has sternly refused to modify the law in any important respects despite the urging of Presidents Truman and Eisenhower. Experience thus far under the new law indicates that its effects were not wholly anticipated by either side. The unions have not grown appreciably in membership since 1947 despite an increase of 4 million in the labor force. Many factors may account for this, for the experience has not been different in earlier boom periods. Industrial peace has certainly not been completely achieved. While no year since 1946 has been as bad from the point of view of strikes, in both 1949 and 1952 more than 50 million man-days of idleness were created by labor disputes. Relatively few of the disputes since 1946 have been crippling. The inquiry board and injunction procedure have been used only ten or eleven times, and only two of these were conspicuously successful—those halting the longshoremen's strikes in 1953 and 1956. Two strikes in the coal industry were not stopped by the injunction and two others in other industries continued when the injunction was lifted. President Truman refused to use the procedure in the steel dispute of 1952. He referred the matter first to a Federal Wage Stabilization Board set up in connection with the national emergency arising out of the Korean struggle. When this failed to bring a settlement, he attempted unsuccessfully to take over the steel plants. The effort to outlaw the closed shop and place the union shop under rigid control has had mixed results. More plants now have some form of union security than before the act was passed but the unions have been less able than before to discipline their own members, since expulsion from the union no longer carries with it loss of the job.

Regulation of union corruption

While controversy over the accomplishments of the Act of 1947 continues, it is at present largely overshadowed by new issues of public policy raised by the revelations of corruption, abuses of union funds, racketeering, and association of union officials with known "crime" rings made in 1957-58 by a Senate Select Committee on Improper Activities in the Labor Management Field headed by Senator McClellan. The Committee investigations, especially of the Teamsters Union, have given the newly merged labor federation the severest jolt in a decade. As a result, the demand for national auditing of union finances and for closer scrutiny of union officials and elections led to the Labor-Management Reporting and Disclosure Act of 1959.

## PROMOTION OF EMPLOYMENT—MAINTENANCE OF PROSPERITY

Unemployment—a perennial problem

In enumerating the famous "four freedoms" to which he believed people everywhere entitled, President Roosevelt placed high in the list "freedom from want"—the best guarantee of which is, of course, remunerative employment. Under our American system of free competitive enterprise it has been axiomatic 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, not always easy to realize in practice. Regardless of how prosperous the times, the lag or collapse of particular industries, the shifting of others from one part of the country to another, changes in popular tastes and demands, the introduction of new labor-saving machinery and production techniques, and other developments constantly going on in the national economy throw people out of work; and at best—even in a period of stepped-up production like the recent war and postwar years—there is always a substantial margin of unemployment. In periods of economic recession 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 13 million or more; and it still was approximately 10 million in 1940 when the defense effort of that day began taking up the slack. During the final post-World War II prosperity there have typically been 2 million unemployed and in the winter and spring of 1958 the number rose sharply to 5 million. The problem of holding unemployment to a level not seriously damaging to the society is always with us.

Some devices for restricting it:

State and national governments have long concerned themselves with the matter, approaching it on four principal lines: (1) regulations calculated to reserve the labor market for adult American citizens; (2) employment agencies and other services for bringing workers and jobs together; (3) in times of special stress, programs of public works; and (4) long-range economic investigation and planning.

1. Widened access to the labor market

We have already noted efforts to curb child labor, restrict unionization, prevent aliens from labor on public works, and to protect American labor from European or Asiatic competition by tariffs. All of these are designed, in part, to reserve the labor market to adult American citizens.

2. Public employment agencies

Even when jobs are plentiful, 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 serious. For meeting it, a bewildering variety of employment agencies have made their appearance. Even under regulation, however, private agencies long ago showed serious defects, and as early as 1890 public agencies entered 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 United States Employment Service in the Department of Labor, and for a time local offices set up by this agency dotted the country. From 1919 to 1933 the service was

poorly supported; and one of the earliest measures of the New Deal was to strengthen public employment offices. In the Public Employment (Wagner-Peyser) Act of 1933, the Congress decided upon a state rather than a national system, to be supported, however, by matched grants-in-aid for all state services conforming to national standards. During World War II and to facilitate increased war production, all state offices were taken over by the national government. They were returned to the states in 1946 by Congress despite a veto by President Truman. Meanwhile, the United States Employment Service, reactivated by the 1937 Act to co-ordinate the state services, was moved about from agency to agency before it was finally returned to the Department of Labor. The Service not only co-ordinates the state services and the grants made to them but maintains special veterans' employment and farm placement services, operates a service for the District of Columbia, and assists the general program in various ways. The whole program is closely geared to unemployment compensation insurance discussed in a later chapter.

3. Programs of public works

In periods of heavy unemployment, state and national governments alike may come to the assistance of the working population by instituting programs of public works calculated to provide jobs. The most striking illustrations of this "pump-priming" method of dealing with a slump in industry are afforded by the well-known programs embarked upon by states, and especially by the national government, in battling the depression of the thirties. Even during the mild recessions experienced in 1949 and in 1958, however, effort was made to speed up national building and improvements, with concentration upon sections of the country where the largest numbers were out of work. Contracts for supplying defense materials to the government are also distributed nowadays with some regard for the employment situation in various localities.

4. Long-range study and planning

Finally may be mentioned a new role assigned economic investigation and planning. Fearful of unemployment on a disastrous scale after World War II, and hopeful that such a calamity could be staved off, both then and later, President Truman, members of Congress, various economists, labor leaders, and industrialists threw their support in 1945 to a "full employment" bill predicated on the national government's responsibility for preventing depression and unemployment and on the conviction that by promoting an "expanding economy" the government might be able to assure jobs permanently for substantially all people willing and able to work. The plan was much too complicated to be explained in full here, but the heart of it was national economic forecasting and presidential initiative in dealing with any signs of ill health in the national economy. Despite much urging from the White House, Congress eventually adopted a simpler plan, in the Employment Act of 1946. This Act provides for: (1) an "economic report" by the president each year to Congress, covering levels of employment, production, and purchasing power, current and foreseeable trends, the government's "economic program," and recommendations for legislation; (2) a council of three full-time economic

advisers to the president to maintain constant watch over the economic situation, keep in continuous touch with the president concerning it, and advise and assist in preparing the annual report; and (3) a joint congressional committee on the economic report, composed of seven members from each house, charged with planning ways and means of carrying out the recommendations made and reporting them for action. Set up as a unit in the Executive Office of the President, the Council of Economic Advisers has become a key agency in the Executive Office on matters affecting the health of the national economy. Its history reveals that the president, at least, is highly sensitive to any signs of a decline in economic activity and anxious to make timely efforts to re-establish a high level of prosperity. It is doubtful if the national government will ever again hesitate to take drastic action if a depression threatens.

## DEPARTMENT OF LABOR

Smallest executive department

Although many agencies of the executive branch are charged with functions relating to labor, the central agency for presenting the situation of labor to the Congress and to the president is the Department of Labor. Since its creation in 1913, the Department has experienced a checkered history. Its earliest responsibilities were largely fact-finding and hortatory. During the New Deal period of benevolent labor legislation few of the new functions were assigned to it and, in fact, it was gradually deprived of some of its traditional functions. President Truman attempted to strengthen it by reassigning some of its old functions and granting to it some new ones, and President Eisenhower has continued the effort. It is still, however, the smallest of the executive departments, employing about 5000 persons and spending about $300,000,000 annually.

Major divisions

The main divisions of the Department administer: (1) workmen's compensation for employees of the national government—Bureau of Employees' Compensation and the Employees Compensation Appeal Board; (2) apprentice training programs for skilled workers in industry, largely by co-operation with state labor agencies—Bureau of Apprenticeship; (3) public employment offices now in the various states and state unemployment insurance programs—Bureau of Employment Security; (4) labor union registration and reporting and standards of industrial safety and child labor, the latter functions largely by co-operation with state agencies—Bureau of Labor Standards; (5) the collection of timely data on the cost of living, manpower, cost trends and other data on labor economics—Bureau of Labor Statistics; (6) aid to veterans in obtaining re-employment rights guaranteed by law—Bureau of Veterans' Re-employment Rights; (7) fair labor standards—Wage and Hour and Public Contracts Division; and, (8) the promotion of standards for health and welfare of women in industry—Women's Bureau.

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# CHAPTER 21

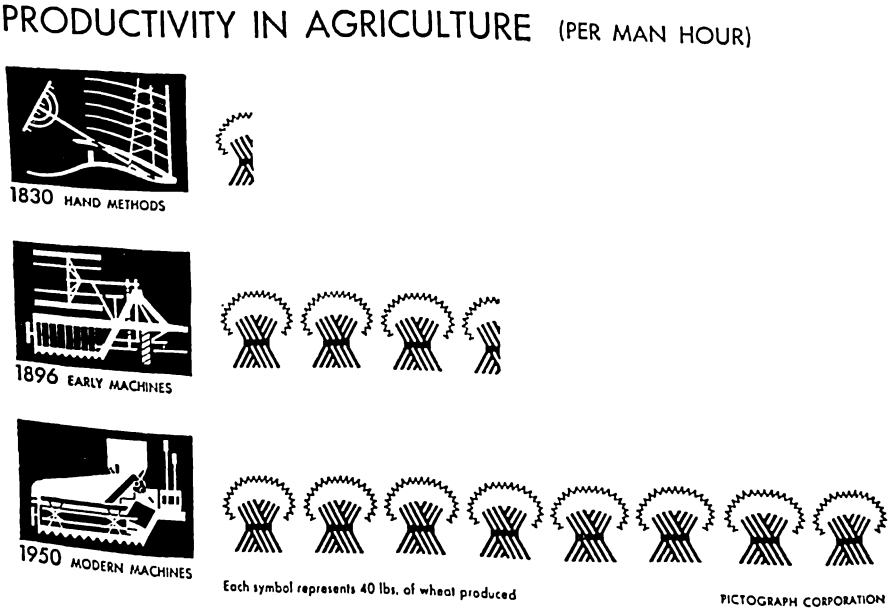
# *Government and Agriculture*

The seal of the United States Department of Agriculture declares, "Agriculture is the foundation of manufacturing and commerce." This motto expresses a view, widely held in the life of the American nation, that agriculture is the backbone of our society. Cities, industry, and commerce may all be swallowed up in the maw of war or pestilence and life would still be possible; if the soil or those skilled in making it yield its bounty were to be destroyed, all life would disappear. Furthermore, in this view, rural life is demonstrably superior to urban life on every significant count: it is healthier, better for raising the young, and spiritually stronger. It produces a self-reliant, independent, vigorous, and healthy people. Trade and manufacturing produce the urban swarm, dependent, frail, neurotic, materialistic, and fearful. These convictions are properly described as agricultural fundamentalism and have played an important part in shaping the policy of the government toward agriculture. That these views have not been decisive on all occasions of national controversy is due, in part, to the fact that they have been sharply contested by another view which holds that agriculture, like every other economic interest, should find its proper place in the national economy through competition. If the calculus of the market place decrees that manufacturing should rise and farming decline, so be it. Agricultural fundamentalism, however, has been sufficiently impressive in the national scene that the government has usually been disposed to grant to the agricultural interest whatever that interest was agreed upon. The rural interest has been bolstered also by the fact that our political institutions are not geared perfectly to represent majority opinion. Having once been a majority, the rural interest has steadfastly clung to institutional arrangements which give it political strength disproportionate to its numerical strength in the population. The United States Senate, to a lesser extent the House of Representatives, and dozens of state legislative chambers award to rural America many more representatives than a strict population accounting would require. Because of these arrangements and because of the appeal of the fundamentalists' creed, it would not be unfair to say that agriculture has been treated benevolently by the government more consistently than any of the other great economic interests. Despite the faith of the fundamentalists and the bounty of a sympathetic government, the place of agriculture in American life has slowly but certainly declined. This decline and the conflict of ideologies about it provide the setting for most of the modern controversies surrounding the determination of national agricultural policy.

Agriculture the favored interest

The position of agriculture in modern America has been determined largely by the tremendous revolution in agricultural technology which has been occurring since about 1850. This revolution, although obscured from the view of the city-dweller by the blinding light of the Industrial Revolution, has been just as sweeping in its impact. The continuing application of scientific methods and power-driven machinery have been pushing the output per farmer and per acre to unimagined heights. In 1830, for example, it took about three farm families to produce enough food and fiber beyond their own needs to feed and clothe one city family. In 1950, one farm family could feed and clothe more than four urban families and two more persons abroad. Production per worker has increased more than 250 per cent in 100 years. Stated another way, the revolution in agriculture has meant that a

The revolution in agriculture




constantly increasing share of agricultural produce is for sale rather than subsistence—90 per cent in 1951. Agriculture has become a great "business" venture and is no longer simply a way of life. Even so, more than half of the farms in 1957 produced little more than subsistence for their owners or operators. The tremendous outpouring of agricultural products thus comes from not many more than half of the farm population. In fact, the most productive 10 per cent of the farms produce more than half of the agricultural output measured in terms of dollars. Fewer and fewer farmers are producing more and more crops, and whereas in 1860 almost 60 per cent of the labor force of this country were engaged in agriculture, today about 10 per cent are so engaged. It is well known, further, that even the present reduced farm population can, with the aid of modern technology, produce of

many crops much more than the nation has been able to consume or to export and that this excess seems to be increasing. The American farmer has turned Malthus right around; in the United States, the food supply is pressing on the (farm) population.

**DECLINE IN NUMBER OF FARMS AND FARMERS IN UNITED STATES, 1920-1957**

| *Year* | *Total Farm Population* | *Per cent of U. S. Population* | *Number of Farms* |
|---|---|---|---|
| 1920 | 31,974,000 | 30.1 | 6,518,000 |
| 1930 | 30,529,000 | 24.9 | 6,546,000 |
| 1940 | 30,547,000 | 23.2 | 6,350,000 |
| 1950 | 25,058,000 | 16.6 | 5,648,000 |
| 1954 | 21,890,000 | 13.5 | 5,425,000 |
| 1957 | 20,400,000 | 12.0 | 4,800,000 |

The faith of the fundamentalists, sorely tested by these developments, is being challenged further by the persistence and spread of rural blight. The argument for the superiority of rural ways could, in the past, be bolstered by reference to the statistics of infant mortality, disease, death, crime and other symptoms of social ills. In all of these respects and with minimal governmental efforts, the rural areas were superior to the urban ones. In each year that passes, however, the difference is narrowing. In infant deaths and in many diseases, the urban areas are now ahead of the rural ones. Even the urban birth rate—one of the best indications of strong family life—is starting to catch up to the rural rate. There are some cities, in fact, that are superior in every one of these respects to the rural areas. Underlying these developments is not only aggressive urban governmental attack on the problem but also subsidence in the rural economy. More than one-fifth of all acreage now tilled is so eroded and its fertility so depleted that it ought not to be cultivated any longer. One-crop agriculture produces surpluses and eats up the soil. The operation of farms by tenants rose sharply from1880 to 1930—from 26 per cent of all farms to 42 per cent—and has only been declining during the recent war and postwar periods of farm prosperity. Among that half of the farm population which produces little above subsistence, living standards, real income, and per capita wealth are all quite low. In fact, much of the most desperate poverty in the United States is on the farm and rural slums rival the worst that our large cities can produce. If the national government were to withdraw its benevolent hand and capacious pocketbook from agriculture, it seems probable that the misery, disease, crime, and suffering in rural America would compare with the worst that our great cities have ever produced.

Rural blight

The farmers in politics

The farm interest, like those of business and of labor, relies heavily today on its great associations to press its claims before Congress, the executive branch, party committees, and state governments. The strongest of these, described in an earlier chapter, are well financed, competently led, and frequently effective. Unlike the business interest, the farmers are not so solidly dedicated to one party. They are influential in both parties and are more inclined to shift loyalty from one party to the other if harassed by economic distress or assuaged by promises of benevolence. The farm vote appeared to be influential, for example, in the victory of Truman in 1948 after having aided the Republicans to gain control of Congress in 1946. The farmers, furthermore, unlike business and labor, have historically provided the basis for several strong third parties: Republican, Greenback, Populist, and Non-Partisan League, for example. Farmer-supported minor parties have captured control at various times of several state governments. No labor party has ever achieved as much success. Economic distress in agriculture has produced as much home-grown radicalism in both economics and politics as has distress in any other segment of the economy. This has been articulated through party platforms and campaigns as frequently as for any other interest. The alleged conservatism of the farm interest cannot be supported historically.

Unity of farm interests?

Any discussion of the farm interest in American politics is predicated to some degree on a myth. Like the business interest, the farm interest is nothing like as homogeneous as it is frequently made to appear. Cash crop farming is frequently at odds with subsistence farming. Truck crop farming is not as dependent on world economic conditions as export crop farming. Southern cotton agriculture is usually at loggerheads with midwestern dairy farming. Tenant farmers oppose absentee landlord farmers. Small operators battle large operators. On few questions of public policy is the farming population agreed. Most farmers accept the tenets of agricultural fundamentalism, but beyond this there is little agreement. Even the fundamentalists are likely to export their children to the urban-industrial areas of America.

## THE IMPROVEMENT OF AGRICULTURAL PRODUCTION

Although by nature and tradition the most highly individualistic form of enterprise, agriculture long ago turned to government for encouragement and assistance. And from the earliest days, local governments have provided roads for the movement of farm products to market, have supported land title registration and surveys to insure the rights of ownership, have financed fairs and exhibitions to encourage better breeding of plants and animals, and in numerous other ways have aided the farmer in his struggle against nature. The states too have responded to the farmers' claims by providing programs of research and education designed to supplement local efforts. The farmers turned to the national government with some reluctance and only after they became convinced that state and local efforts were not ade-

quate to their needs. Out of its power to spend money, to regulate commerce, to provide post roads, the Congress has found constitutional authority to support an ever-widening array of programs for the benefit of American agriculture.

The distribution of the public domain

Virtually everything the national government does affects agriculture in one way or another: its tax policies, tariff program, international dealings, defense program, regulation of business, and all the other policies it has undertaken impinge on the farmer. We are concerned here, however, only with those programs which are of direct and immediate benefit to the farmer and are largely designed for him alone. Among these the oldest and perhaps the most persistently pursued through the years has been the improvement of production. Until about 1890, one of the major methods used by the national government to achieve greater output of food and fiber was its program for the distribution of the huge public domain. More and more land was thus brought under cultivation and the priceless heritage of the American people was distributed among those who undertook to cultivate it. Until the Civil War the policy for the distribution of land was determined by statesmen with one eye on the treasury, but the Republican party pledged itself to give away the national domain as quickly and as cheaply as possible. By 1890, the last usable land had been placed under cultivation and the frontier was gone.

Provision of scientific research

A more enduring method of national assistance to agricultural production has been the provision of scientific research. The first appropriation for agriculture was made by the Congress in 1839 in the amount of $1000 for seed collection and distribution and for agricultural investigations. The first full-time employee devoting himself to agricultural problems was a chemist. When the Department of Agriculture was created in 1862 as a separate agency under a commissioner one of the major functions assigned to it was the collection of information about agriculture by the conduct of "practical and scientific experiments." From these modest beginnings the research program of the Department of Agriculture has grown by mighty leaps until it is the most comprehensive of its kind in the world and the Department one of the greatest research establishments. Within the Department, the Agricultural Research Service co-ordinates the work of numerous bureaus, branches, and divisions, each of which specializes in some particular phase of agricultural production or distribution. From this service each year flow hundreds of bulletins describing the results of the experiments and investigations. Chemists, engineers, economists, bacteriologists, geneticists, management experts, nutritionists, horticulturists, and scores of other experts labor daily at the task of showing the American farmer how to wrest larger yields, larger profits, greater leisure, and higher standards of living from nature. This research is carried on not only in the departmental laboratories and at the great 12,000 acre Agricultural Research Center at Beltsville, Maryland, but also in hundreds of state and territorial experiment stations and state college laboratories. Beginning in 1887, the agricultural experiment station

program has been supported by national grants to state agricultural colleges. An Office of Experiment Stations within the Research Service supervises and co-ordinates the state and territorial programs. The states and territories, on their parts, appropriate matching and supplementary funds to the colleges and stations, altogether more than doubling the total annual investment in agricultural research. This comprehensive attack on farm problems has throughout the years contributed importantly to the revolution in agricultural technology which has done so much to shape the modern American economy.

Improvement of agricultural education

Underlying the great program of discovering new knowledge beneficial to agriculture has been a powerful national effort to improve agricultural education. Scientific farming requires scientific farmers and these require institutions dedicated to instruction in agricultural arts and science. It is not coincidence that the same Congress which created the first Department of Agriculture also created the first national-state program of agricultural colleges. The Land Grant College (Morrill) Act of 1862 granted millions of acres of the public domain to the states for the support of state colleges of agriculture, engineering, and home economics. Out of this program grew the great state universities and agricultural colleges of modern America. Since 1890, national money grants have replaced the land grants, and state appropriations have grown to exceed many times over the national gifts. Through the national grants, of course, the national government exercises a continuing influence over the programs of the agricultural colleges.

The development of Agricultural Extension Service

The colleges, however, can work directly with only a small portion of the agricultural population. A new program designed to carry the knowledge and skills of the colleges and the experiment stations to the farmers' backyards was inaugurated in 1914. The Co-operative Agricultural Extension (Smith-Kerr) Act of that year provided the basis for the modern extension service. Through county agricultural agents supported by national, state, and county governments, the accumulating knowledge about agriculture is today carried into the farmyard and there adapted to the needs of the individual farmer. The Extension Service unites the levels of government in a unique way to produce an itinerant encyclopedia of farm science at the beck of virtually every farmer in the land. With this triumvirate of college, experiment station, and extension agent under the mild, generous, and beneficent hand of the national department, the American farmer is the recipient of more solicitous concern, expert advice, and improving instruction than any other sizable group in the population.

## IMPROVING THE ECONOMIC POSITION OF THE FARMER

The problem of surpluses

Unlike factories, farms cannot close down when the supply of agricultural products produces a glut on the market. The only recourse to a farmer in a period of falling farm prices is to try to increase his output. This is especially true of highly specialized, one-crop, staple agriculture. The great

technological advance in agriculture, stimulated partly by the determined efforts of government scientists to improve productivity, has helped to produce in this century a new and unusual farm problem—surpluses. Two world wars added new urgency to the expansion of agricultural production as European cultivation was halted by the guns of opposing armies. The restoration of European production, the exhaustion of foreign purchasing power, and the growing restrictions on international trade combined in both postwar eras to reduce the export market for American staples and to leave the greatly expanded output of American farms without markets to absorb the yield. Furthermore, postwar prosperity has meant greatly increased American consumption of meats, milk, fruit, and fresh vegetables and corresponding reductions in the consumption of cereals and potatoes.

Early aids to marketing

The farmer's interest in improving the marketing and distribution of his crops is, of course, not new. The long battle of the midwestern, southern, and plains farmers in the 1870's and 1880's against the railroads and the grain elevators represented a determined effort to improve distribution and to gain for the farmers a larger share of the ultimate price to the consumer of their products. Until the New Deal era, however, the demands of agriculture for governmental aid in distribution were largely met by: (1) inaugurating an elaborate system of collecting and disseminating timely data on crop prospects and market prices; (2) establishing and maintaining by state co-operation uniform grades and standards for commodities shipped to out-of-state markets; (3) regulating bonded warehouses, stockyards, commission merchants, brokers, and commodity exchanges in the interests of fair play for the producers. All of these programs, directed for the most part by the Agricultural Marketing Service, have been strengthened with the years and are still key activities of the national department. However, they all fell short of striking decisively at the heart of the farmers' problem after World War I.

Industrial prosperity in the 20's masked real distress among the staple farmers and their leaders battled vainly against the White House in one Congress after another in their effort to rescue the farm economy. A mild program of improved marketing abroad and producers' co-operatives at home worked out with President Hoover disintegrated in the face of the depression of the 30's. The collapse of the industrial economy ruined most of the domestic market for farm goods and farm prices and income fell sharply.

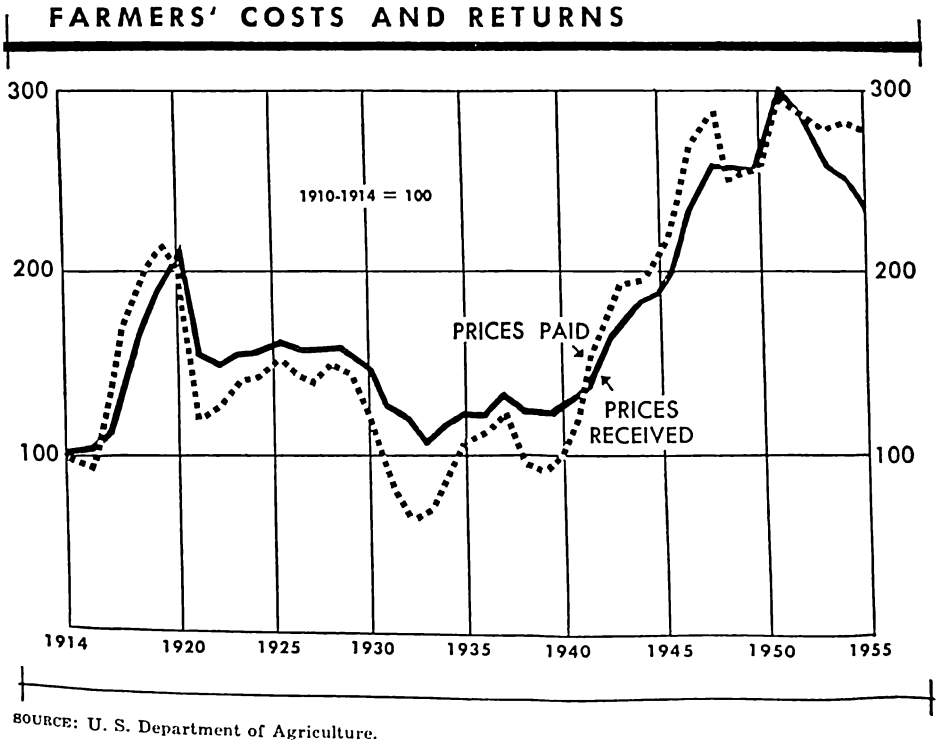
Efforts to solve farm problem

The first attack on the problem by the New Deal Administration was to raise farm income by raising farm prices through government subsidized reduction in production of staples. The farm price level aimed at was one that would restore the relation of farm to industrial prices as they stood in the period 1909-14. The Supreme Court halted this first program by declaring invalid the tax on processing of staples—levied to finance the production payments (U. S. *v.* Butler, 297 U. S. 1). A second effort in 1936—the Soil Conservation and Domestic Allotment Act—to tie curtailment of staple production to soil conservation by subsidizing shifts from staple planting (wheat,

cotton, corn, tobacco) to putting land in grasses and clovers failed to bolster the farm economy against the high crop yields of 1937-38 and the industrial recession of those years.

Beginning of price-support program

The modern farm price-support program was inaugurated formally in the Agricultural Adjustment Act of 1938. This Act provided, in the first place, a system of production controls for the staples operated through local referenda and locally-elected committees of producers under the general supervision of the national Department. Through this device limitations might be imposed on the acreage to be planted in the protected staple crops (wheat,




SOURCE: U. S. Department of Agriculture.

corn, cotton, rice, and tobacco). Reductions in acreage were to be accomplished by payments from the national treasury designed to make good the losses due to acreage controls. If in spite of reductions, the market prices of these crops fell below that which would guarantee parity of farm and industrial prices on the 1909-14 basis, the government by loans and purchases at the "parity" price kept up the price and the farmers income. Surpluses thus purchased or taken over to pay loans were stored in government facilities to be disposed of when and if prices rose above the support levels.

The new program found constitutional

To this system of an "ever-normal granary"—keeping part of the supply out of the market so that what remains will brings a "just" price—were added arrangements for crop insurance, starting tentatively with wheat in 1938 and later extended to cotton and flax. The idea of the insurance program was to

protect producers against losses from depleted yields caused by drouth, flood, hail, insect infestation, and plant diseases. Insurance costs (i.e., premiums) were made payable by the insured to the government either in cash or in surplus wheat (or other products), the latter becoming an additional reserve of the ever-normal granary. The revamped farm program was sustained as constitutional by a now reconstructed Supreme Court (Mulford *v.* Smith, 307 U. S. 38) and it has formed the basis of all subsequent legislation in this field.

Agriculture in World War II

As the nations of the world in 1939 gave up diplomacy for the battlefield, the main agricultural problem of the United States shifted once again to need for expanded production. In 1942, the Department of Agriculture announced its goal as "the largest production in the history of American agriculture." The farmers, with bitter memories of the twenties still alive, were, however, reluctant to expand their production facilities without governmental assurance of protection against the inevitable drop in exports at the close of the war. A sympathetic Congress promised (the Stabilization Act of 1942) that the government would support prices of the staple agricultural products (cotton, corn, wheat, rice, tobacco, and peanuts) at not less than 90 per cent of "parity" for the two years after the emergency ended. A benevolent government also made every effort to raise farm income during the difficult periods of wage and price controls and rationing. The result was that American agriculture entered the postwar period in what was probably the strongest financial position it had ever known.

Postwar price-support program

President Truman declared the war emergency at an end in December, 1946. The expected collapse of the farm economy did not occur immediately and when price and wage controls were removed, food prices leapt upward sharply. The expiration in 1948 of the price-support guarantee found farmers prosperous and yet fearful. A bitter wrangle between the advocates of rigid, 90 per cent parity price supports and the defenders of decreased subsidies through a new flexible support system produced a compromise Agricultural Act of 1948 that extended 90 per cent supports until 1950 when a long-term program of a more flexible type would be introduced. The old 1910-14 base period for computing parity prices was also abandoned in favor of the even more favorable period of World War II and the years immediately following. The support program, although aimed mainly at the staples, was also authorized for other crops at the discretion of the secretary of Agriculture.

The Act of 1949

The surprise Democratic victory in 1948 was interpreted by many as a mandate to abandon the "flexible" features of the Act of 1948. A new act in 1949 provided mainly for a continuation of the temporary high, rigid price-support system. The parity formula was also revised again to take account of the high postwar wages of farm laborers and the wartime subsidy payments.

The Act of 1954

The campaign of 1952 witnessed a good deal of equivocation by both parties on farm policies. Despite statements of the Republican candidate that were interpreted as favoring a 90 per cent parity program, the Republicans

generally seemed more sympathetic to the flexible system and the Eisenhower victory paved the way for a reconsideration of the whole price-support and subsidy system. When Eisenhower took office early in 1953, he was confronted with a growing gap between the industrial and the farm economy. World markets had fallen away as after World War I and government warehouses, bins, cribs, and refrigerators were bursting with protected commodities bought under the high-level, price-support program of the Act of 1949. The new administration's farm program was finally unveiled in 1954 after months of study and with some modifications was adopted by the Congress. Under it, (1) the Commodity Credit Corporation was ordered to "set aside" out of its stores a large reserve of surplus commodities to be used in cases of disaster and for school lunches, research, bartering with other nations, or for sale if and when the price rose above the support price; (2) flexible supports, at 82½ to 90 per cent of parity prices were provided for the basic staples and at 75 to 90 per cent for dairy products; (3) a vigorous campaign to recapture foreign markets was launched through provision of agricultural attachés to American diplomatic missions. To this was added in 1956, on the recommendation of the President, a "soil bank" program aimed at reducing, by voluntary but compensated action, the acreage planted to the protected staples. This was both a production control and a conservation measure. By the end of 1957, 21 million acres of cropland had been taken out of production under this program.

The Democrats recaptured control of Congress in 1954 and held on to it in 1956. Efforts of some of the party leaders to restore a high, rigid support program have thus far been turned back by Eisenhower opposition and by the inability of the Democratic farm leaders to hold urban and industrial Democratic members of Congress. In 1958, a presidential veto disposed of a closely fought farm bill drawn mainly by the defenders of high price supports. A compromise bill authorizing the Secretary of Agriculture to lower price supports on the major staples to 65 per cent of parity and at the same time increasing the authorized acreage for cotton, corn, and rice was rushed through Congress at the close of the 1958 session.

**The Commodity Credit Corporation**

The heart of the modern effort to sustain a relatively high level of farm prosperity is the purchase by the government of the excess yields of farm products. The chief instrument for its accomplishment is the Commodity Credit Corporation in the Department of Agriculture. This Corporation, created in 1933 and assigned to the Department of Agriculture in 1939, is governed, under the general supervision of the secretary, by a board of directors of six members appointed by the president with the consent of the Senate. It is authorized to borrow $14.5 billion to carry out its missions. The Corporation's typical method of operation is to loan the eligible farmers the full value of their harvest at the supported price with the harvest as security. If the farmer cannot dispose of his crop on more favorable terms, he simply allows the Corporation to possess the crop. Commodities are also purchased in the open market at the support price. During World War II,

the Corporation gradually disposed of its holdings, usually at a profit, but the modern era of falling exports has forced the Corporation to take on more and more commodities. Its inventories had grown to $3.5 billion by June, 1953, and were $5.2 billion by July of 1958.

Every effort by the experts of the Department of Agriculture to promote the diversification of agriculture in the great staple producing areas, to improve marketing practices, to find new uses for the staple crops, to reduce acreage devoted to price-supported commodities, to dispose of surpluses to needy children has thus far fallen short of bringing production into line with demand. The supporters of a "flexible" price program believe it offers the only feasible hope for gradually adjusting production to effective consumption. Those favoring "rigid" supports cite the distress of the twenties, the pledges of the government during World War II, and the importance of the great staple producing areas in the nation as justification for heavy and continuing annual subsidies to the producers. There is not on the horizon a politically acceptable program looking toward the return of a free market for agricultural production. In an imperfect world, it is, of course, better to be troubled by glut than by famine.

## PROVISION OF FARM CREDIT

A growing need

When, in earlier days of more diversified agriculture, a farmer wanted to acquire additional land, make improvements, or perhaps carry over a crop in the hope of a better market, he normally turned for funds to a commercial bank. And a considerable amount of such borrowing still goes on. Commercial banks, however, have always been interested primarily in serving the needs of industry and commerce, and, if loaning money at all to farmers and stock raisers (regarded as greater risks), have been likely to do so only on less favorable terms, including higher rates of interest. Moreover, in recent decades a steadily increasing proportion of agriculture has ceased to be diversified and become specialized. Cotton farmers there always were, but now we have, in addition, wheat farmers, corn and hog farmers, dairy farmers, fruit farmers, ranchers, and what not. While some of these, especially dairy farmers, may have proceeds coming in more or less all of the time, it is characteristic of most of them to have little income except at one or two periods of the year when cash crops or herds are ready for marketing. To normal farmer needs for credit on favorable terms are therefore added special demands arising from this new situation. Furthermore, the farmers complained persistently for several generations about the heavy exactions on farm income made by eastern financial institutions.

A farm loan system instituted

The result has been the building up, over the past 40 years, of a country-wide system of credit institutions—a network of banks and other agencies authorized, supported, and regulated by the national government, and operated exclusively for service to the farmer. The development started in 1916, when, after commissions appointed by Presidents Taft and Wilson had looked

into the needs existing even in that day, Congress passed the first piece of farm credit legislation in our history, a Federal Farm Loan Act. A Federal Farm Loan Board was set up in the Treasury Department as manager, and in a leading city of each of 12 districts was established a federal land bank, with capital originally subscribed mainly by the national government, and endowed with power to issue tax-exempt bonds to raise money with which to make long-term loans secured by first mortgages on landed property. These land banks lend money, however, not directly to individual farmers, but to groups of 10 or more organized voluntarily in what are known as national farm loan associations. An association receives applications from its members, approves or rejects them, takes and endorses mortgages on approved applicants' property, and, on the basis of these, secures from the appropriate bank funds which it passes out in the form of loans to its members. To broaden the service, the same act of 1916 also authorized the formation of joint-stock land banks, with capital stock subscribed 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 Agricultural Credits Act of 1923 instituted a series of 12 intermediate credit banks designed particularly 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 livestock, corn, wheat, or other commodities.

Depression-time developments

After the depression of the thirties harassed the country for some time, with little promise of abating, it became apparent that still ampler credit facilities would have to be provided. By 1933, a tenth of the country's farms had been sold at public auction to satisfy creditors, and the number of such sales was steadily rising. The act creating the Reconstruction Finance Corporation in 1932 empowered that agency to organize regional agricultural credit corporations in the 12 federal land-bank districts and loans made by these institutions had helped. New borrowing facilities were added by an Emergency Farm Mortgage Act of 1933 that opened up ways for the farmer to borrow directly from a fund of $200 million administered by a farm-loan commissioner in a Farm Credit Administration (superseding the Federal Farm Loan Board). A Farm Credit Act of the same year (*a*) set up 12 production credit corporations, one in each city having a federal land bank, to provide short-term credit for all types of farm and ranch operations; and (*b*) instituted a system of banks to serve 12,000 or more co-operative buying and selling associations among farmers of the country. And a Federal Farm Mortgage Corporation, created by Congress in 1934 in an act amplifying the Emergency Farm Mortgage Act of the previous year, was empowered to issue tax-exempt bonds (guaranteed by the government) which might be exchanged for others held or issued by federal land banks, thereby increasing the resources of those banks available for the refinancing of farm mortgages.

The present system summarized

Few changes have since been made and today there exists a gigantic credit structure with the following principal features: (1) a federal land bank in a principal city of each of 12 farm credit districts, such banks making mortgage-

secured 4 per cent loans through local farmer associations to individual members for purchasing land, equipment, or livestock, improving land, constructing buildings, or liquidating debt; (2) a federal intermediate credit bank in each district, making loans to production credit associations, banks for co-operatives, livestock loan companies, and similar financing institutions; (3) a production credit corporation in each district serving the farmer who wants not long-term credit but loans for a few months or a year, and secured not on land but on livestock, corn, wheat, or other commodities; and (4) a bank for co-operatives in each district, providing a permanent source of credit on a sound business basis for the multiplying farmers' co-operative associations.

In all cases, capital was supplied originally by the national government. Borrowers, however, were required to purchase stock, with a view to the banks eventually passing completely under co-operative ownership. As a result of wartime and postwar agricultural prosperity, most of the government's capital has now been retired. All of the different layers of credit institutions, too, are co-ordinated within a district by a farm credit board composed of the directors of the four banks, and nationally by a Farm Credit Administration —an establishment which in performing its functions has become one of the principal banking institutions of the country.

Farm Credit Administration

The Farm Credit Administration (F.C.A.) was created in 1939 by gathering together the various autonomous and Treasury-directed loan agencies of the time and placing them in the Department of Agriculture. A Republican Congress in 1953 finally responded to the wishes of the leading farm associations and detached the F.C.A. from the Department and gave it independent status in the executive branch. Under the Farm Credit Act of 1953, the governing body prescribed for F.C.A. is now a Federal Farm Credit Board of 13 members, one from each of the 12 credit districts, appointed by the president with the consent of the Senate and with the advice of the local farm loan association members, and one appointed by the secretary of agriculture. A governor appointed by the Board is the chief executive officer of the system. A Farmers Home Administration, which supplies credit for the purchase or repair of family-size farm units, remains in the Department as does the Federal Crop Insurance Corporation. Some conception of the magnitude of these credit operations may be gathered from the fact that in 1960 there were more than $4 billion of loans outstanding among these various agencies.

## IMPROVEMENT OF RURAL LIFE

Throughout the years but especially since 1933, the national government has supplemented its concern for production and distribution with programs aimed at improving the human, or social, aspects of farming. Impelled to do this by rural backwardness and distress brought sharply to view by the depression of the thirties, and by the continued exodus from farm to city, the Department of Agriculture, with a good deal of backing from Congress, now regards as part of its task the systematic promotion of better living conditions

on the farm and in rural communities. Only a few outstanding services of this nature can, however, be mentioned here.

1. Relief for farm tenants

Following a penetrating, and fairly startling, report in 1937 on the conditions and outlook of the most submerged of farm groups (the tenants, share croppers, and farm laborers) submitted by a committee on farm tenancy appointed by President Franklin D. Roosevelt, Congress passed the Farm Tenant (Bankhead-Jones) Act. Under it the government, operating through state and local machinery terminating in county committees of farmers, offers 40-year loans (at 5 per cent and up to $12,000) to farm tenants, farm laborers, and share croppers (with preference for veterans) to enable them to acquire homes and lands of their own; and likewise "rehabilitation loans" (at 5 per cent and to a maximum of $10,000) for the purchase of livestock, seed, fertilizers, and farm equipment, for refinancing indebtedness, and for family subsistence, including medical care. Mortgages on loans for similar purposes made by private lenders also are insured. Under the direction of a Farmers Home Administration set up in the Department of Agriculture in 1946 (and of a previous Farm Security Administration), more than $3 billion had been loaned directly or insured up to 1958. Loans (made through offices commonly located in county-seat towns) are not confined to the categories of persons mentioned, but are extended also to better situated "family type" farmers who for some reason cannot get the credit they need elsewhere, at all events on favorable terms.

2. Rural electrification

Until a decade or two ago, the United States lagged behind several other countries in bringing electrical energy within the reach of rural populations, and even today, some 5 per cent of the nation's more than 4.8 million farms still are without electric light and power. In 1936, however (when only 10 per cent of farms were electrified), Congress passed a Rural Electrification (Norris-Rayburn) Act launching a long-term program under which great 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 (R.E.A.), at first independent, but since 1939 a unit within the Department of Agriculture. Such management consists principally in making long-term, self-liquidating, 2 per cent loans up to 100 per cent of cost (1) to associations (usually farmer co-operatives organized for the purpose), corporations, 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. Down to 1958, funds to a total of $3.8 billion (usually borrowed by the R.E.A. from the Reconstruction Finance Corporation) were loaned to 1080 co-operative or corporate borrowers in 47 states and the Virgin Islands—making possible more than 1.4 million miles of line, serving

more than 4.5 million farms and rural dwellings. Private utility companies also have, of course, been expanding their services in rural areas. Fifty-seven per cent of all farms electrified since 1936, however, get their power through systems developed by R.E.A.

3. Rural telephone service

The government's task of rural electrification is expected to slow down and come to almost a complete halt sometime in the next year or two. In 1949, however, Congress decided to move also into the field of rural communications and passed an act authorizing R.E.A. to begin making 2 per cent loans to independent telephone companies (of which there are 5762 in the country), farm co-operatives, and nonprofit mutual associations to establish and extend telephone services for the 63 per cent of the nation's farms still without such convenience. Critics of the plan objected that it would inflict unfair competition upon private companies, that the telephone might become obsolete, leaving the government with a useless investment, and that the undertaking might prove an entering wedge for government control of all communications and for curtailment of freedom of speech. But such arguments did not prevail and by 1958 the R.E.A. had loaned $470 million for telephone service extensions and the portion of the nation's farms without service had fallen to 46 per cent.

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# CHAPTER 22

# *Conserving the Nation's Resources*

Earlier wastefulness

Perhaps it is inevitable that an energetic and growing people taking over a virgin continental expanse richly endowed by nature should be guilty of extravagance and waste. In the United States, for 100 years good land was so abundant and forest, mineral, and other resources so apparently inexhaustible that no generation felt much concern about economical use in its own time or possible shortages later on. On the theory that the quickest and surest way to develop the country was to get its resources into the hands of people who would settle new areas, promote new industries, and expand national production, the national government (state governments also within their more restricted spheres) prodigally sold or gave away agricultural land, mineral lands, forest lands, and whatever else was available to private individuals, corporations, or other interests desiring them. When good grass land was put to the plough and exposed to ruinous soil erosion, or noble forests were devastated by rapacious lumber companies, or petroleum, gas, coal, and other mineral deposits were wastefully used, there were few to protest.

The conservation movement

Toward the close of the nineteenth century, warnings began to be sounded that the supply of available public land was fast diminishing and that continued heedless exploitation of forests, minerals, and other natural wealth would one day leave the country impoverished. Sharing this apprehension were President Theodore Roosevelt and a group of close associates; and measures for protecting and developing the country's resources became one of that chief executive's principal concerns. A new gospel of conservation was preached with crusading zeal; a national commission was set to work surveying conditions and needs; the governors of the states were called into conference at the White House; and for the first time the nation became to some degree "conservation conscious." The entire idea, however, ran sharply counter to a century-old tradition, and not only did powerful interests resist it, but people generally had difficulty divesting themselves of the notion that there was plenty of everything and that future generations would take care of themselves. During the next half-century, the fact was gradually brought home that —with greater needs in prospect as population grew and standards of living improved—we already had used up half of our known petroleum supply, a large part of our natural gas, more than a third of our high-grade coal, most of our best iron, an alarming share of our copper, lead, and zinc, and an amazingly large proportion of our forest reserves (to say nothing of having exhausted millions of acres of our soil). During this half-century, laws were passed, agencies of enforcement and supervision set up, and land, forests,

minerals, water supply, and water-power sites here and there given moderately effective protection. The earliest efforts were directed almost exclusively at the resources of the publicly owned parts of the country. But gradually it became clear that if the nation was to benefit from the conservation on the scale required for its future well-being, controls would have to be extended, so far as constitutionally possible, to privately owned areas as well. Spurred by the depression of the thirties, by the recurring drouths, dust storms, floods, and other disasters of the same period, and eventually by the necessity for maximum utilization of our resources (the "sinews and muscles of our defense machinery") for national defense and war—such broadening of scope became one of the major themes of the thirties and forties.

**What conservation means**

In the course of this development, the concept of conservation has undergone significant expansion. At the outset, it was limited to maintaining in adequate supply resources like forests which, as used, could be renewed, and to eliminating avoidable waste of others, such as oil and gas, not capable of replenishment. To this somewhat negative emphasis on simple replacement or avoidable depletion has been added the idea of conservation as a positive policy of maximum utilization of resources for the satisfaction of maximum social needs. As the Department of the Interior put it in a report (*Why a Department of Conservation,* 1938), conservation means "the management and wise use of the natural assets to prevent their depletion and at the same time *to produce wealth.*" It has come to mean not only preventing existing farms from being ruined by soil erosion, but making new farms available through provision of water for irrigation; not only protecting existing forests from devastation, but developing means for their prudent use, with additions meanwhile from lands too worn out or otherwise marginal to be worth much for other purposes; not only keeping oil and gas from burning in the fields, but restricting general output in the interest of coming generations.

**National-state relations**

From every point of view, conservation is an appropriate field for governmental action, and indeed quite dependent upon it. The rugged individualists who developed the country in pioneering days proceeded on the principle of taking and using what they found. Left to themselves, their more sophisticated but hardly less acquisitive descendants probably would have had not much more regard for the interests of posterity. Moreover, the tasks involved are of such magnitude, geographically and otherwise, that only governments can undertake them. Like so many others of our public enterprises, however, the work of conservation is considerably complicated by our federal system. Up to a point the national government has free scope. More than one-fifth of the country (mainly but by no means exclusively west of the Mississippi) is owned outright by the nation as a whole; and on this "public domain" the national government, as proprietor, can lease grazing lands, restrict access to minerals, regulate the use of forests and plant new ones, control the exploitation of water power, protect wildlife, and, speaking broadly, do anything else that it likes, with no constitutional questions raised. Here is where conservation activities have 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; and in these it falls to the states and their subdivisions to do much of whatever is done. The results are very uneven. Some states have well-developed programs covering forest protection and extension, control over water resources, regulation of oil and gas production, promotion of drainage and irrigation projects, and protection of fish and other wildlife, according as such activities are appropriate to particular states. Other states are lax. In any event, national authorities must help out if there is to be any approach to effective conservation the country over. And through grants-in-aid, control of navigable streams, and other powers and practices, it is now engaged in stimulating conservation activities on a broad front.

## LAND AND LAND USE

Public land

National conservation activities have to do, first of all, with the most basic of natural resources (land) in two principal ways—safeguarding the public domain and protecting the soil of arable land wherever threatened by depletion through erosion. Of the total 1.9 billion acres contained in the continental United States today (exclusive of Alaska and the Canal Zone), upwards of 1.5 billion acres, or 80 per cent, have at one time or another been "public land," land nationally owned. Of this, more than a billion acres have been sold or given away, leaving a present national domain exclusive of Alaska and the territories of 412 million acres or about one-fifth of the total national area. Six states, Nevada, Idaho, Arizona, Oregon, Wyoming, and Utah, contain more public land than private land. Of lands disposed of, vast quantities were in earlier times granted to the states for sale 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 the Homestead Act of 1862—offering 160 acres to anyone who would pay a registration fee of $10 and perform a limited amount of work on his holding during a period of five years—millions upon millions of acres were parcelled out among pioneering home-seekers.

With the national domain shrinking, however, to something approaching its present proportions, and with the newer idea of conservation developing, the government 30 or 40 years ago grew less lavish. Restrictions were imposed on free entry; large areas were set off as permanent national holdings; and finally, after a decade of virtual suspension, allotments were entirely stopped in 1935. In 1946, President Truman, by executive order, reopened certain remaining lands to entry (except any containing deposits of thorium, uranium, or other "fissionable materials for the release of atomic energy") under carefully guarded conditions. With the government also acquiring land by purchase, condemnation, cession, or gift, from private (or sometimes even public) holders, and adding it to public forests or utilizing it for park develop-

ment, water-power development, or other purposes, the expectation is that henceforth there will be little net loss of acreage in the public domain.

Bureau of Land Management

A large part of the public domain—180 million acres in continental U. S. and 280 million acres in Alaska—is today administered by the Bureau of Land Management of the Department of Interior. This Bureau was created in 1946 by a consolidation of the General Land Office and the Grazing Service. The Bureau is responsible for leasing mineral rights on public lands, for granting permits to livestock growers for grazing privileges on the national ranges, and protecting the lands under its control. The Bureau is one of the few governmental agencies that regularly earns more income than it spends. The major areas in the western states administered by the Bureau comprise the Federal Range on which private owners may graze their sheep and cattle. Heavy overgrazing, especially during the two World Wars has greatly depleted these lands to the point that almost half of them are severely eroded.

Reclamation

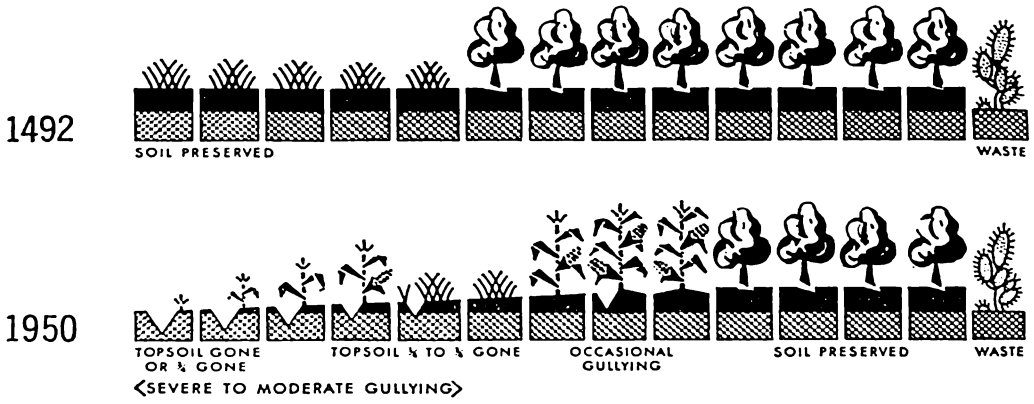
Large stretches of land, chiefly in the western states, are arid or semi-arid—much of the land fertile enough, but unproductive unless supplied with water. Since 1902, a Bureau of Reclamation in the Department of the Interior has been charged with conservation and distribution of limited water resources in 17 Rocky Mountain, southwestern, and Pacific Coast states—largely by construction of dams, reservoirs, aqueducts, pumping stations, and the like. By 1957, 75 completed projects or divisions of projects were serving with water more than 7 million acres, producing crops worth more than $800 million. The primary objective is, of course, the transformation of dry lands into permanently productive farms and the maintenance of production on lands threatened with drying up because of shortages of water supplies from other systems. Bracketed with these purposes are drainage, flood control, municipal water supply, sometimes navigation, and more and more frequently, the generation of hydroelectric power. The Bureau was in 1958 operating 24 power plants with 5.1 million kilowatts of installed capacity. The most spectacular of its reclamation projects is the Colorado River development featuring Hoover Dam. By irrigating lands and opening up farms, the government tends to aggravate its already serious problem of agricultural overproduction. It also meets a legitimate demand for cultivable land. Three-fourths or more of the national funds expended are recovered from water uses and power sales. In any case pressure of western sentiment for such improvements is too strong to be resisted. Throughout its history, in fact, reclamation has been a fruitful source of sectionalism in politics.

Soil conservation

For a good while before an unprecedented plague of devastating floods and dust storms prompted Congress, in 1935, to pass the Soil Conservation Act mentioned earlier, it had been realized by agricultural experts that the country's most precious resource, soil, was being depleted in almost every area where land was ploughed, and in great regions of the West and Southwest with startling rapidity. Yellowed rivulets and turbid major streams alike, after every rain, testified mutely—as did also clouds of powdery dust borne eastward across the country by air currents in periods of drouth—to the

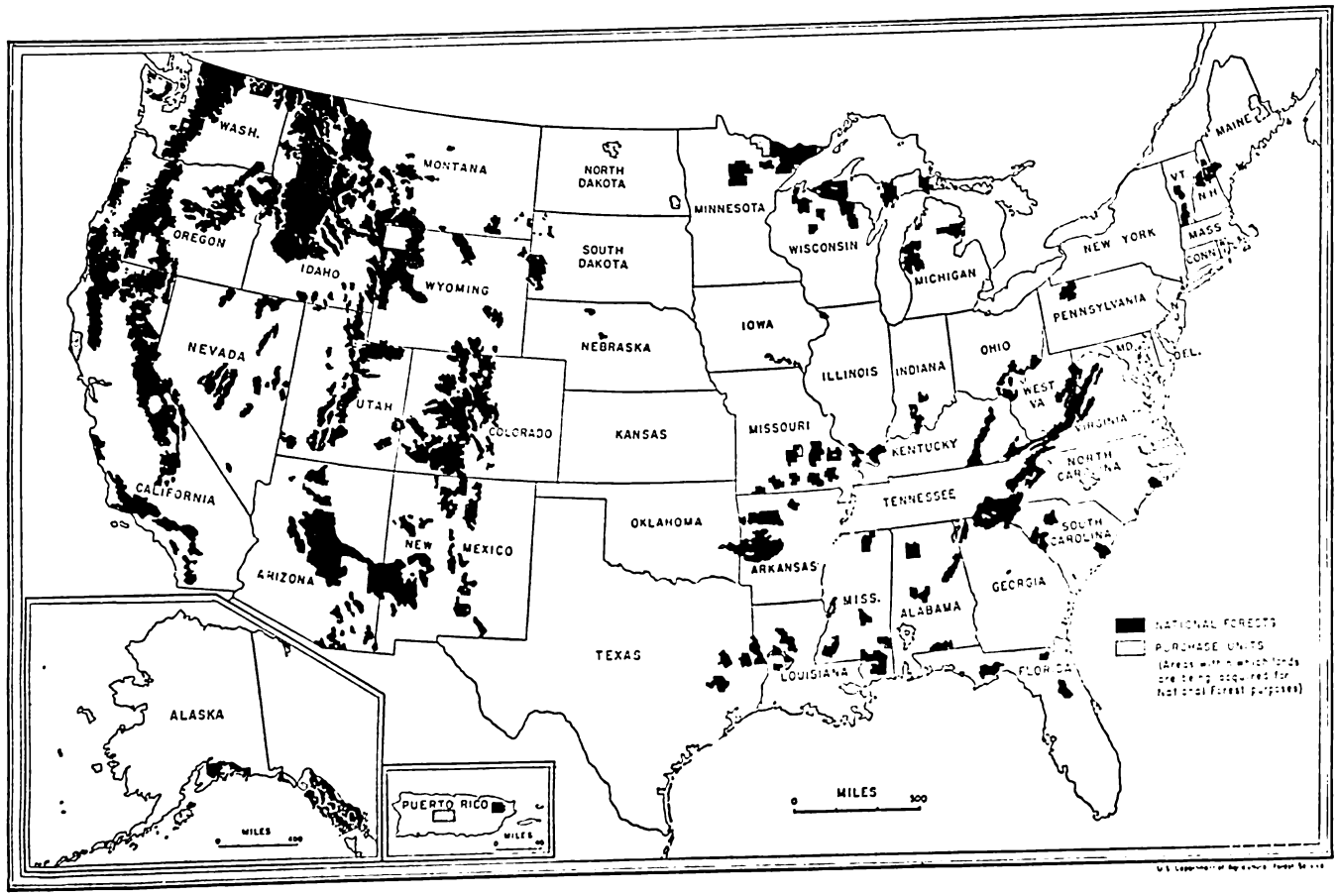
irrecoverable wealth that was being lost; fields once productive grew barren and useless; farm after farm went to ruin. Starting its work under the new legislation, a Soil Conservation Service in the Department of Agriculture reported in 1936 that, throughout the country as a whole, a total of 735 million acres of land (enough to make 20 states the size of Illinois), once well adapted to cultivation, grazing, or forest culture, had been seriously impaired or totally destroyed by either water or wind erosion, or both. Ten years later, the same authority still was obliged to say that 500,000 acres were being ruined by erosion every year, at a direct and indirect cost to the country of $3 billion. Even yet there is alarming wastage, 3 billion tons of top matter, we are told, being washed or blown annually from our fields, many of which ought never to have been ploughed.

## EXTENT OF EROSION IN THE UNITED STATES




EACH BLOCK REPRESENTS 135 MILLION ACRES PICTOGRAPH CORPORATION

The worst dust storms in recent history damaged about 13.2 million acres of crop land in the spring of 1954. The Soil Conservation Service now co-operates vigorously with states, localities, and individual farmers in bringing about physical adjustments in land and introducing soil-conservation methods (contouring, strip-cropping, terracing, crop rotation, farm drainage, and the like). The vehicle selected by the Congress to achieve soil conservation on farms was the specially created Soil Conservation district rather than the traditional Agricultural Extension system. Every state and major territory has now enacted laws under which soil-conservation districts (often coinciding with counties) may be set up for carrying out the program under direction of a state soil-conservation committee and of locally elected farmer committees. By 1958 a total of 2830 such districts, embracing more than two-thirds of all the farms in the country, had been organized. Individual landowners within any district have a right to help and guidance from field offices of the Conserva-



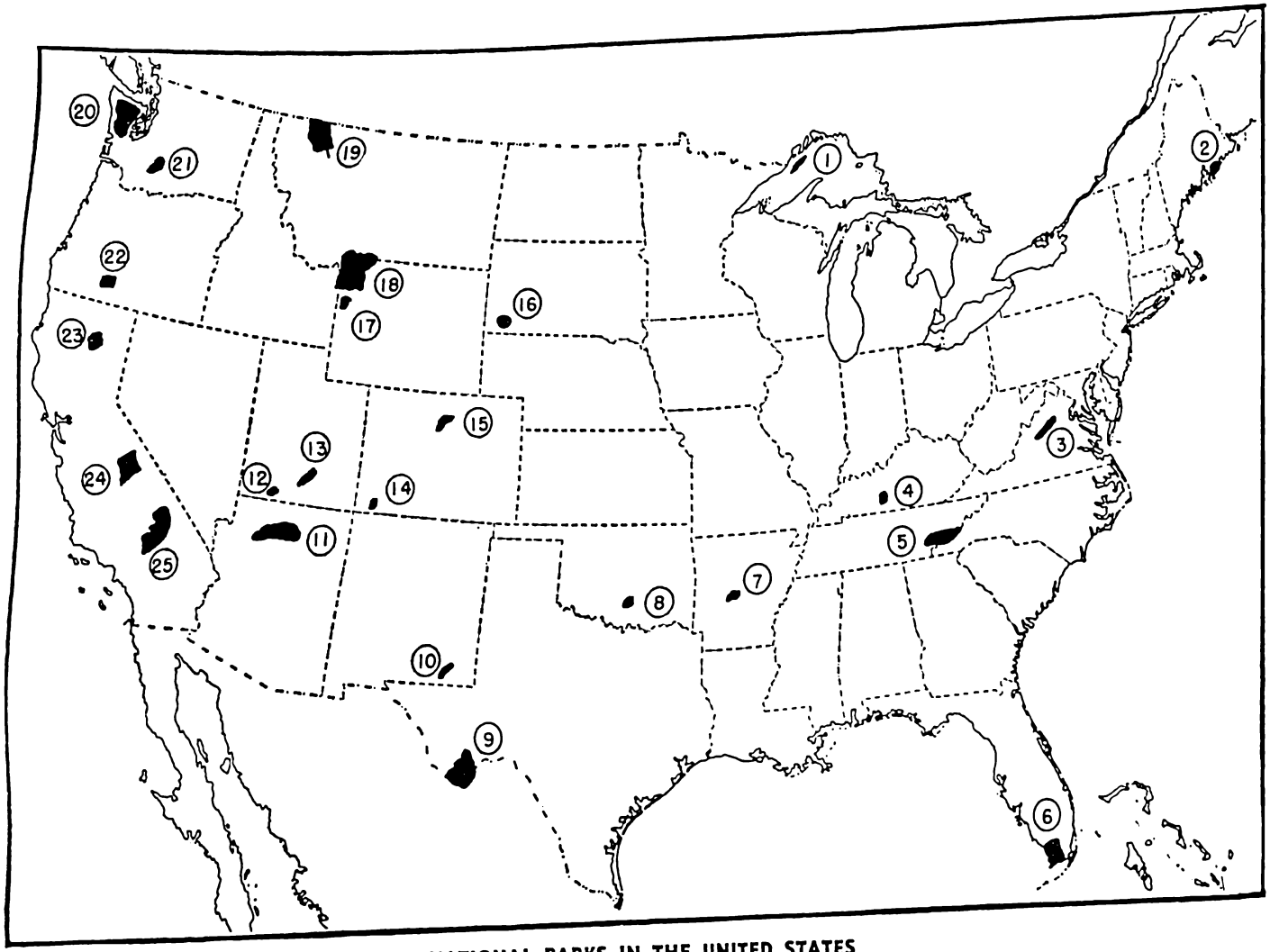

NATIONAL FORESTS OF THE UNITED STATES

tion Service, or from county agents, in planning "layouts" adapted to the particular needs and productive capacities of their farms or ranches. The Service undertakes to send technicians to advise and work directly with any one in need of them. A farmer may participate in the plan or not as he chooses; there is no compulsion, either national or state. A powerful incentive is supplied by the fact that under the legislation of 1936 subsidies are available only to those employing soil-conservation practices. The soil bank program inaugurated in 1956 and mentioned in the chapter on Agriculture has added a new stimulus to retirement of overworked, staple-producing cropland and its conversion to forest or pasture.

## FORESTS AND WILDLIFE

Forests

As a positive program deliberately adopted, conservation in this country really had its beginning 50 or 60 years ago in an effort to preserve and extend the nation's forests. Theodore Roosevelt not only perceived the immense value to the people of forests yielding lumber, stabilizing the distribution of moisture, preventing soil waste, fostering wildlife, and furnishing recreational facilities, but deplored the rapidity with which forest wealth was disappearing at the hands of lumber companies and other private exploiters. Under legislation dating from 1891, he and later presidents set aside generous portions of the public domain as national forests. Envisaging a forest program for the entire country, Congress in 1911 provided for extensive purchases for forest purposes on the watersheds of navigable streams, wherever situated. Purchases of other submarginal areas were later authorized. As a result, the United States has today, under custody of a Forest Service in the Department of Agriculture, a total of 149 national forests, situated in 42 states and territories, and with an aggregate area (180 million acres) considerably exceeding that of the state of Texas. In addition, the Bureau of Land Management has under its jurisdiction 40 million acres of forests in Alaska, and 5 million acres in the rest of the United States. Many states, too, have set apart forests or created parks of their own, and in reality not far from one-third of the country's total wooded territory (630 million acres) benefits from direct national or state protection. To be sure, the public forest areas are not simply walled off as reserves for the future. A forest benefits from judicious use, for example, removing fully matured trees in order to clear the way for younger growth. Accordingly, in the national forests (and usually in state forests as well), timber is cut and marketed by private companies, under government supervision. Selected tracts are also leased for grazing purposes; and nearly the entire expanse is open to campers and other recreation-seekers, under regulations permitting no damage to the wooded growth. The first consideration, however, is the preservation of the forests as *forests;* and to that end they are given all possible protection against fire, insects, disease, soil erosion, flood, and destructive cutting. In areas that require it, systematic planting of young trees is carried on, whether as reforestation of lands that have been denuded




**NATIONAL PARKS IN THE UNITED STATES**

(1) Isle Royale, (2) Acadia, (3) Shenandoah, (4) Mammoth Cave, (5) Great Smoky Mountains, (6) Everglades, (7) Hot Springs, (8) Platt, (9) Big Bend, (10) Carlsbad Caverns, (11) Grand Canyon, (12) Zion, (13) Bryce, (14) Mesa Verde, (15) Rocky Mountain, (16) Wind Cave, (17) Grand Teton, (18) Yellowstone, (19) Glacier, (20) Olympic, (21) Mount Rainier, (22) Crater Lake, (23) Lassen, (24) Yosemite, (25) Sequoia.

or as afforestation of lands not previously wooded but likely to be useful only if made so. Over two-thirds of the forest resources of the country remain in private hands, and states and nation are constantly encouraging sustained yield management of these precious resources. The governments also collaborate to protect these forests from fire and disease.

The national parks

Not all of this nation's precious resources are so closely identified with material well-being as are soil, timber, water power, and minerals. Conservation to many of our people embraces also the preservation of scenic beauty, of spectacular natural phenomena, of historic spots, of areas which may remind us of the land before the white man came. The enjoyment of these things should also be passed on to our children's children. Although this phase of the conservation has been the least adequately supported by "practical" statesmen, through the years the nation has set aside from its own lands or acquired from private owners 24 million acres in 40 states and four territories which have scenic or historic significance. Most of this acreage is embraced in 28 national parks and 152 historic areas. Yellowstone was the first of these areas, set aside by the Congress in 1871. A National Park Service, created in the Department of the Interior in 1916, now administers Yosemite, Grand Canyon, Smoky Mountains, Grand Teton, Yellowstone, Mount Rainier, Glacier, and the other parks and historic areas. More than 60 million visitors enjoy these places each year. Much of the cost is borne out of income from concession privileges and admission or other charges. Appropriations for maintenance, however, have fallen far behind the demands created by the millions of touring American who are now using the parks.

Fish and wildlife

Well before the close of the nineteenth century, Congress recognized the value of the country's fish and game, not only to the sportsman, but to the people generally as a source of food and an otherwise productive element in the national economy. An office of commissioner of fish and fisheries (becoming in 1903 a bureau of fisheries in the Department of Commerce and Labor) was created in 1871, with a biological survey established in 1885 in the Department of Agriculture becoming in 1905 a regular bureau. In 1940, these and other agencies entering the field as the conservation movement gained momentum were gathered into the present Fish and Wildlife Service in the Department of the Interior. Here again, as in the case of forests, there must be a division of labor with the states. Throughout the public domain, the national service is free to regulate fishing and hunting as it likes, to maintain fish hatcheries and stock streams and lakes, to correlate wildlife protection with forest control. It administers and enforces, too, the laws relating to marine fishing, and even operates the fur seal industry of the Pribilof Islands of Alaska, selling the product to private traders. Outside of the public domain, it co-operates with states and their subdivisions, and indeed with private agencies and organizations, in much that relates to the development, protection, rearing, and stocking of all desirable species of wildlife. It carries on research, helps plan useful regulations, provides wildlife refuges (more than 280 have been established), administers grants-in-aid, helps

enforce local game laws, and generally provides a spearhead for conservational work in this field. As long ago as 1900, it became a national offense to ship out of a state game of any sort taken in violation of state law. To meet a situation created by the passage back and forth every year of wild fowl between nesting places north of the border and winter refuges in the southern states, Mexico, and Caribbean countries, agreements for protection have been entered into under a Migratory Bird Treaty Act of 1918 with both Canada and Mexico. Our own states are forbidden to make or sanction any less rigorous rule concerning killing such birds than those laid down nationally.

## MINERALS—PETROLEUM

Minerals

When minerals disappear, they are irreplaceable—except in geological time. Originally, the United States was richly endowed with mineral wealth: and compared with many other countries, it still is so. Nevertheless, for 100 years there have been heavy use and wastage, and in the last 30 or 40 a machine civilization and mechanized warfare have taken terrific toll of supplies once lightly viewed as virtually inexhaustible. In 1950, the American economy consumed about 2.5 tons of ore per person. The list of minerals still abundant has grown surprisingly short. On the present scale of consumption, we are told we still have enough bituminous coal for 1000 years and enough anthracite for 175 years. With oil and gas already cutting sharply into demand, and civilian uses of atomic energy in the offing, not all of the underground stocks may ever be needed. We still have long-range supplies of iron (at any rate lower-grade ores), oil, gas, phosphate, and molybdenum. But unmined supplies of gold, copper, zinc, and bauxite (from which aluminum is extracted) are said to be good for only about 20 more years, and of lead, manganese, and vanadium for only 10; while stocks of platinum, antimony, mercury, tungsten, chromium, nickel, tin, mica, graphite, asbestos, diamonds, and quartz crystals are—in proportion to the uses we make of such materials—negligible. As we quickly discovered during the two world wars, we are, with respect to many strategic minerals indispensable to our economy, a "have-not" nation. Each year we are importing a larger proportion of our raw materials. Recognizing that new discoveries and inventions may improve the situation at various points, one nevertheless understands why, in the present-day conservation program, minerals hold a high place.

The task of identifying, locating, investigating, and mapping mineral resources falls principally to the Geological Survey in the Interior Department. Prolonged researches of this agency, with aid from the former General Land Office (now absorbed into the Bureau of Land Management), have resulted in detailed classifications and descriptions of all mineral-producing lands. The bulk of the country's minerals of primary concern to industry and defense—coal, iron, oil—are located in areas outside of the public domain; and governmental policies looking to preventing their wastage have to be more or less indirect. Mineral deposits on the public domain also

however, are important. Here systematic protection is afforded under a policy of the past 40 years by which (*a*) when such land is alienated to private persons or corporations, the government reserves all mineral wealth contained, to be kept intact or exploited only under such terms as the government may impose, and (*b*) when land remaining publicly owned is leased for any purpose, no mineral rights pass with it except such as the government specifies, and with royalties on any minerals extracted paid into the Treasury and in part passed on to the appropriate states.

Petroleum

Only 2 per cent of the oil produced in the United States today comes from the public domain. Although the amount produced on state-owned lands is larger, the great bulk of the annual output is yielded by lands that have passed into private ownership. Until within the last 30 years, not much was accomplished, and wastefulness ran riot. Under the "law of capture," any landowner in an oil-producing area was at liberty to drill as many wells on his property as he liked, tapping pools under it and drawing off oil from underneath neighboring properties as well. Many another dubious device calculated to speed up the flow of riches from "black gold" was freely used. Beginning with Oklahoma in 1915, some states sought to curb extravagance by regulating the distance between wells, forbidding oil and gas to be left flowing and burning in fields, and even assigning production quotas through some administrative agency. Results were inconclusive. Yet only after discovery of the rich eastern Texas fields in 1930-31, augmenting output and shattering prices, were two lines of action started which in time led to the restrictive system that we now have—(1) interstate agreement and (2) national control through the commerce power.

Present controls

The first of these did not begin auspiciously. In 1931-32, Texas, Oklahoma, and Kansas tried, by agreement, to discourage overproduction and price demoralization by forbidding shipments exceeding fixed quotas from the respective states. In spite of all that they could do, however, "hot oil" streamed into other parts of the country, production continued at extravagant levels, and chaos prevailed, especially after the Supreme Court held that governors of states might not resort to martial law in order to police production controls. The excess oil was shipped in interstate commerce and this gave the national government an opening. In the National Industrial Recovery Act of 1933, the president was authorized, with a view to helping the states out of their dilemma, to prohibit the transportation in interstate or foreign commerce of any petroleum or its products produced or withdrawn from storage in excess of amounts permitted by state law or regulation. A code for the oil industry, with the secretary of the interior as administrator, was duly put into operation. Here again, however, when tested in the courts, the arrangement collapsed. In "Hot Oil" cases (Panama Refining Co. *v.* Ryan, 293 U. S. 388) of 1935, the Supreme Court ruled that Congress had exceeded its constitutional authority by delegating to the chief executive power which by its nature was tantamount to making laws. The damage, nevertheless, was not irreparable. To begin with, the states returned with fresh vigor to the policy

of co-operative regulation; and, with authorization from Congress granted in advance, a group of them entered into a new compact prorating volume of production and of allowable interstate or foreign shipments. By 1945, 17 states (producing 80 per cent of the country's oil) were adhering to the plan. Congress followed the Court rebuff by passing the "Hot Oil" (Connally) Act of 1935 which directly forbids interstate and foreign commerce in petroleum in violation of state regulation. Twenty-three states now contract together to regulate oil production and are supported by national law.[1] The latest edition of the 23-state compact was approved by Congress in 1959 for four more years.

## WATER AND WATER POWER

Bases of national authority

In most parts of the country, water is something that people simply take for granted. But for city-dwellers at least, it is there only because government has provided for its capture, storage, purification, and distribution. For the nation as a whole, water raises problems as serious as does any other resource. From early times, towns and cities have been concerned with providing water for their inhabitants; and states, counties, and specially organized districts have had to do with protection against floods and with drainage projects, pollution abatement, power development, and irrigation. Almost from the beginning, the national government likewise has been involved. Important rivers commonly border or flow through a number of states; drainage basins cut widely across state lines; areas requiring water storage and irrigation know no state limits. Constitutional authority to operate in this field is ample. First of all, there is full power over the water resources of the public domain, in whatever states located. In the second place, there is authority to improve and regulate the use of navigable streams as avenues of interstate commerce; and the Supreme Court (U. S. *v.* Appalachian Electric Power Co., 211 U. S. 377) has said that "navigability . . . is but a part of this whole (authority). Flood protection, watershed development, recovery of the cost of improvement through utilization of power, are likewise parts of commerce control."

Flood control

Aside from the navigability of streams, entailing chiefly the removal of natural obstructions, the regulation of artificial ones such as bridges and dams, and the control of water-power development, the national government's role in connection with water resources presents itself in three main phases: (1) the adjustment of situations in which there is danger of too much water; (2) the conservation and use of meager supplies in areas naturally semiarid or especially subject to drouth; and (3) the development of hydroelectric power from installations designed to promote irrigation, navigation, or flood control. While looking to states and localities to bear primary responsibility for providing levees and other forms of local flood protection, the national

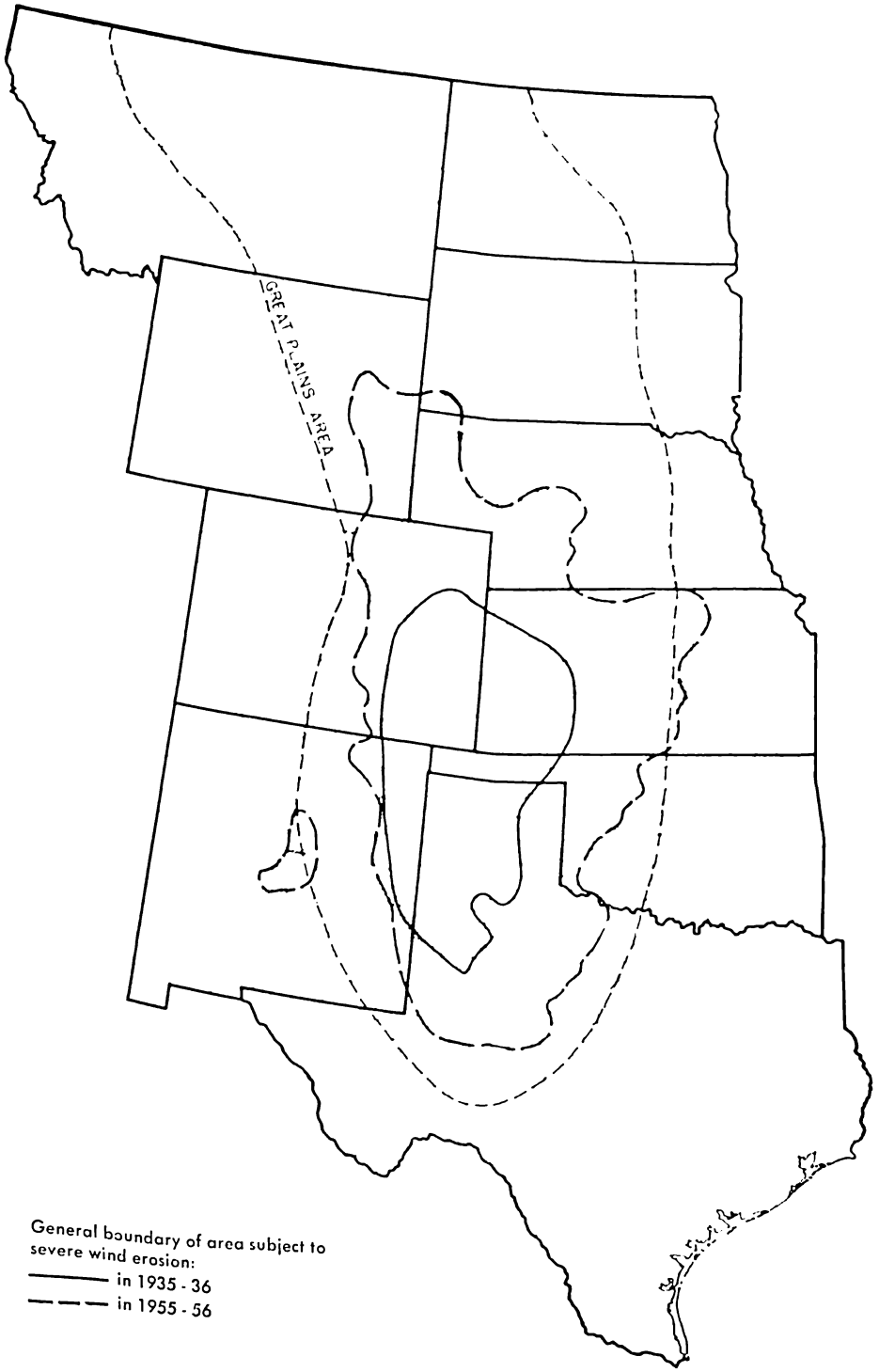
[1] Lack of space forbids treatment here of the more or less parallel problem of conserving natural gas. The main regulatory statute is the Natural Gas Act of 1938; and the subject will be found fully covered in F. F. Blachly and M. E. Oatman, *Natural Gas and the Public Interest* (Washington, D. C., 1947).

government has for three-quarters of a century stood ready to lend financial assistance, especially at times of unusual disaster. More significantly, however, as the concept of conservation has broadened, and as destructive floods have multiplied in the basins of the Mississippi, Ohio, Missouri, Colorado, Columbia, and other rivers, it has extended its activities to include permanent programs of flood prevention, in collaboration with state and local authorities. On public works connected with such programs it already has spent, since the serious Mississippi Valley flood of 1927, considerably more than $2 billion, with further liberal outlays authorized. The states, of course, are not absolved from continued responsibility for their own protection. Congress, in 1936, authorized any two or more of them to enter into flood-control compacts, and four New England states promptly signed an agreement for flood control in the valleys of the Connecticut and Merrimac; Minnesota and the Dakotas followed with a compact for similar control in the valley of the Red River of the North; and other compacts covering the Yellowstone River, Arkansas River, Pecos River, and many others have followed in recent years. The same comprehensive Flood Control Act, however, which authorized such interstate arrangements virtually accepted flood control as in general a national function, with states and localities obligated only to provide necessary land and rights of way and even this obligation has since been considerably relaxed.

New Flood Control Acts in 1944 and 1946 and a Watershed Protection and Flood Prevention Act in 1954 have considerably expanded the national program. The Soil Conservation Service, working through local soil-conservation or flood-control districts, has entered the field in an important way promoting watershed protection, small dams, and on-the-farm water control measures with loans, technical advice, surveys, and grants. The Corps of Engineers of the Department of the Army, long charged with planning and constructing public works on navigable rivers, has also enlarged its flood-prevention activities.

**Water scarcity**

Apart from the irrigation needs of portions of 17 western states met by the Bureau of Reclamation, scarcity of water, until a decade or two ago, presented no problems sufficiently serious to evoke wide public concern. Destructive drouths and devastating sandstorms occurring in the summers of 1934, 1936, and again in 1953 and 1954, however, dramatically stressed the need for conserving and enlarging the water resources of the so-called "Dust Bowl." Surveys of that stricken territory revealed that a chronically serious condition had been growing worse. Large stretches of once fertile land were being turned into desert by unscientific farming (overgrazing and ploughing of grass land); and ironically, good rainfall, far from being a blessing, might only add to the area's impoverishment by carrying away still more of the topsoil. Realization of the situation prompted co-operative efforts by state and national governments to minimize the effects of drouths, if not actually to prevent them. An act of Congress in 1937 authorized the Department of Agriculture to promote in arid areas the construction and maintenance of




THE DUST BOWL

reservoirs, ponds, wells, dams, and pumping facilities, while another in 1939 provided especially for water conservation in districts where farmers were too distressed to assume repayment obligations under the general reclamation laws. In 1954, the responsibilities of the Department of Agriculture for water conservation were extended by the Congress to all areas "arid" or not. Another large area presenting an especially acute problem of water conservation and redistribution is the interior of California, where the Sacramento and San Joaquin Valleys join to form the Great Central Valley, now benefiting from a tremendous "Central Valley Project" conserving and distributing run-off water from mountains to the north and east. In most parts of the country, however, water resources are so abundant, and so easily replenishable, that exhaustion is no source of concern. People accustomed to look a very long way ahead are however sometimes troubled by the fact that in many sections the "watertable" (i.e., the upper limit of ground completely saturated with water) is gradually receding, making it necessary to go to greater depths in quest of water flow. Water conservation, too, may properly be thought of as involving not merely quantity but also purity. This is a serious problem in many of the great metropolitan areas of the nation.

Hydroelectric power

The great river systems of the United States afford almost limitless opportunities for harnessing and utilizing water power. From the conservation standpoint, the use of this power of falling water to drive the wheels of industry and to ease the burdens of homemaking is vastly superior to the use of irreplaceable natural resources like coal and oil for these purposes. Industrial development is dependent in great measure on the availability of cheap sources of power. The South and West have lagged behind the East in industry partly because of the difficulty in extracting power profitably from their main resource, water. The extensive development by the national government of dams for flood control, irrigation, or navigation improvement has made it feasible to extract power from these same projects at favorable cost rates so long as the major installation costs are charged to the other uses of the project. Amidst fierce and continuing controversy over publicly-supplied versus privately-supplied power and over the proper allocation of costs in multi-purpose projects, the national government has moved, at first cautiously then strongly and now slowly, into the field of power generation and distribution.

National regulation of water power

Earlier in this century the main national interest in water power was the regulation of private exploitation of water resources in the public domain and on navigable rivers. Citing its constitutional authority over navigable rivers, over the public domain, and over the interstate transmission of electric energy, the Congress in 1920 created a Federal Power Commission of three cabinet members to license the construction of power plants in sites under national jurisdiction, to control interstate wholesale electricity rates, and to regulate the security issues of private utilities engaged in interstate commerce. Ten years later, a full-time Commission of five members replaced the cabinet committee. The Flood Control Act of 1936 extended the Commission's jurisdiction to include multi-purpose river-basin planning, and the

development of electric power at government-constructed dams. The Natural Gas Act of 1938 added further to the Commission's authority the power to regulate the interstate transportation and sale of natural gas.

The national development of power projects

In recent years, the major governmental concern in water power has been the development of power resources rather than the regulation of private developments. Beginning with the Tennessee Valley Authority (T.V.A.) and Hoover Dam on the Colorado River and largely under New Deal leadership, the Corps of Engineers, the Department of the Interior, and independent government corporations have steadily increased the amount of public power generated on government projects. In virtually all cases, power production has been bracketed with conservation, flood control, irrigation, navigation, or national defense in great multi-purpose dams. Opposition to these developments has also steadily mounted in intensity. Eastern industry, coal producers and unions, and private power interests have bitterly opposed using their tax payments to create competition in the South and West. The Republican administration elected in 1952 has slowed down, although not halted, the spread of public power and has attempted to stimulate more private development of water power.[2] In addition to the great dams of the Tennessee Valley Authority which now have a capacity of more than 6 million kilowatts, the government projects include: the Columbia River program begun in 1937, administered by the Bonneville Power Administration, with a capacity of 5.2 million kilowatts already installed (1958) and 1.0 million more contemplated; the Southeastern Power Administration created in 1950 operating throughout 10 southeastern states, with a capacity of 1.2 million kilowatts at 10 installations with one more project underway; the Southwestern Power Administration, created in 1943, operating in Arkansas, Louisiana, and parts of Kansas, Missouri, Oklahoma, and Texas, with a capacity of 500 kilowatts already installed and one project still to be completed; the Bureau of Reclamation with many installations including those in the Central Valley of California, on the Colorado River, and in the Missouri basin with a total installed capacity of 5 million kilowatts; the Corps of Engineers with dozens of installations and with a total capacity in 1958 of almost 4 million kilowatts.

## REGIONAL CONSERVATION—THE TENNESSEE VALLEY AUTHORITY

The regional approach

The pattern of conservation as practiced in this country is fixed largely by geography, both physical and political. Physically, the pattern follows the distribution of resources to be protected—land and water everywhere, forests in eastern and western wooded areas, power where the main rivers are, oil and gas in the richly endowed fields of the South and Southwest. Politically,

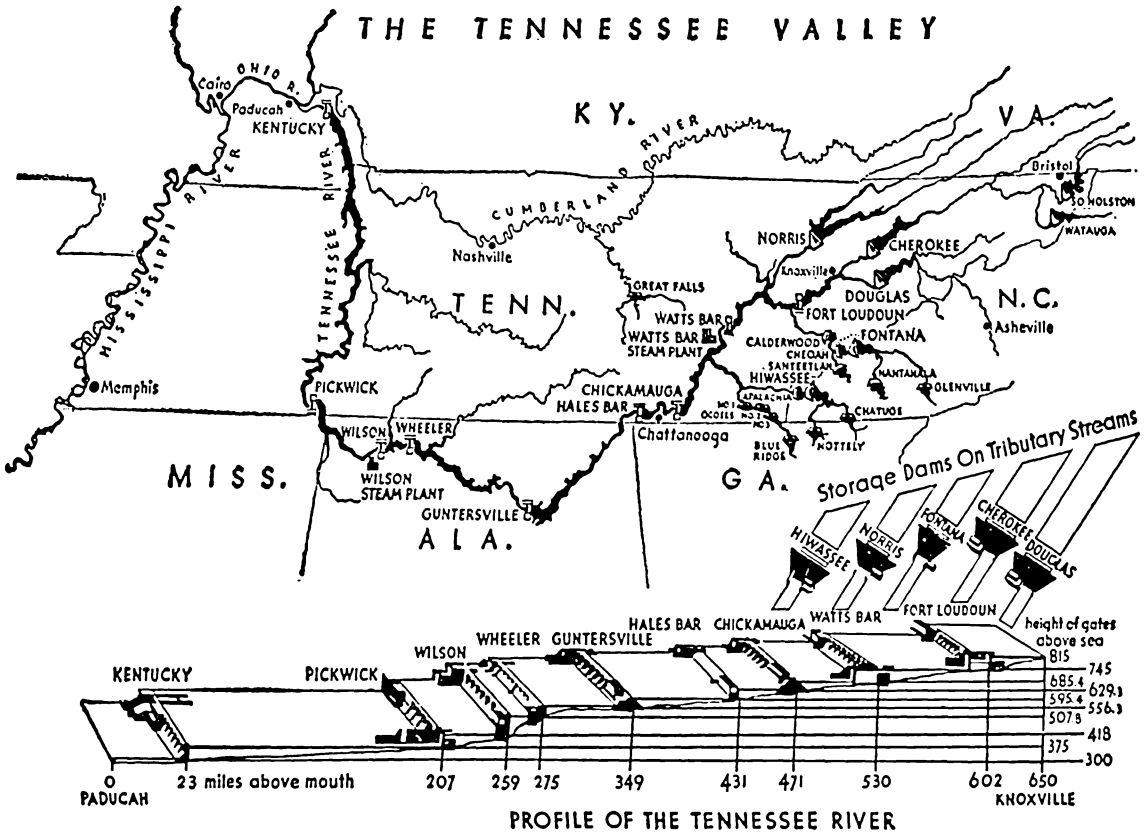
[2] The Dixon-Yates contract controversy of 1954-55 illustrates the attitude of the Eisenhower administration. This contract, sponsored by the Bureau of the Budget, was made by the Atomic Energy Commission with a private syndicate to construct power projects supplementary to those available to it from the Tennessee Valley Authority. The hold-over members of the T.V.A. opposed such a contract vigorously and the Democratic 84th Congress tried to block the Administration from proceeding. Ultimately the Administration gave in and cancelled the contract.

its planning and management are conditioned by the distinction between publicly and privately owned land, by the principle of federalism, by the allocation of constitutional powers, and by the framework of governmental and administrative units—states, counties, districts. Historically different forms of conservation, whether nation-wide like soil conservation or more localized like the maintenance of forests and parks, have been developed separately. Therefore, we now have largely independent land, forest, wildlife, mineral, oil, gas, water-power, and other laws, authorities, and services, with dispersion aggravated by allotment of administrative responsibilities to many different departments and regulatory agencies. Another approach is to bring together most or all of the various activities under a unified management functioning for a group of states or parts of states having common problems. We now have one outstanding example of this procedure in the Tennessee Valley Authority. As a regional area for such treatment, the valley of a large river is logical and convenient. Serving often as political boundaries, rivers commonly are thought of primarily as dividing lines. In reality they usually unite rather than divide; their watersheds, to right and left, generally are alike physically, homogeneous socially and economically, and in need of the same protection for soil and forests and the same power and other services.

The Tennessee Valley Authority:

1. Origin and purpose

Construction of works at Muscle Shoals on the middle Tennessee River during World War I for extraction of nitrogen from the air, to be used in manufacturing explosives, left the national government the possessor of 2300 acres of land, two nitrate plants, a power house, and Wilson Dam. Postwar years saw much controversy over the use, if any, to be made of this property. Senator George W. Norris of Nebraska, an ardent advocate of public power development, launched a tireless campaign for enlarging the property and basing upon it a broad program of public ownership and development throughout the river valley. Two measures looking in that direction were killed by vetoes of Presidents Coolidge and Hoover. But President Franklin D. Roosevelt became enamored of the idea. Spurred by him, Congress in 1933 passed a Tennessee Valley Authority Act 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, and assisting national defense by operating government-owned nitrate plants. Over a potentially rich and productive area of almost 41,000 square miles (four-fifths the size of England), embracing portions of seven states, and having a present population of 3.5 million, agriculture and industry were to be reconstructed, forests restored, soil erosion checked, mineral resources developed, cheap power and chemical fertilizers produced, and the inhabitants assured the benefits of a "more abundant life." To carry out the plan, the Tennessee Valley Authority was created as a government corporation under a board of three directors appointed by the president with the consent of the Senate and operating with funds supplied by Congress, supplemented by the proceeds of bonds which the Authority might issue in limited amounts and eventually by sales of sur-




PROFILE OF THE TENNESSEE RIVER

plus power. As envisaged by President Roosevelt and by the T.V.A. itself, the project was a significant undertaking in democratic management and in the relatively new art of regional planning, blazing the way, it was hoped, for enterprises of similar nature and scope in other suitable sections of the country. As viewed by people of contrary opinion, it constituted a venture in subsidized governmental competition with private utility and other business which would be unfair, uneconomical, and a flagrant abuse of national powers; and the two points of view still are encountered wherever T.V.A. affairs come up for discussion, in Congress or outside.

2. Activities and achievements

From its inception, T.V.A. was characteristically a multiple-purpose enterprise. Throughout its history it has been concerned with flood control, improvement of navigation, soil conservation, production of chemical fertilizers, reforestation, and development of power. It carries out directly enterprises like building dams, but, in the case of activities like soil conservation, it rather provides funds and centralizes planning, with administration decentralized, so that the area's people themselves and their governments may bear an active share in what is done. The Authority has (especially during its first 10 years) focused its efforts mainly upon taming the unruly Tennessee River, thereby promoting navigability, reducing flood hazards, and, in particular, providing great quantities of electric power. Twenty-seven major dams on the main stream or its larger tributaries have been built or acquired; others are contemplated. Arrangements have been made for selling surplus power to counties, cities, co-operative associations, and larger private industries (though not to individual consumers), with a view not only to recovering some portion of the huge expenses incurred, but also to providing a long-desired "yardstick" for measuring the fairness of rates charged consumers by private producers. Agreements entered into with leading private power companies, too, have enabled the Authority to extend its market considerably beyond its own immediate area. Several private utility properties have been purchased outright; and T.V.A. is now the largest producer of electric energy in the country. In meeting the urgent need for increased resources to vitalize our defense and war industries after 1940, the Authority proved an important asset, particularly helpful being the production of chemicals and fertilizers at Muscle Shoals and the stepping up of power production at the various dams. While an object of much continuing criticism and attack, partisan and otherwise, the experiment has justified itself, for purposes of peace as well as of war. In cases decided in 1936 (Ashwander *v.* T.V.A., 297 U. S. 288) and 1939 (Tenn. Elec. Power Co. *v.* T.V.A., 306 U. S. 118) the Supreme Court sustained all essential features of the underlying legislation.

Other proposed "valley authorities"

In President Roosevelt and others of like mind, T.V.A. inspired a vision of a country refurbished throughout its length and breadth by similar enterprises undertaken in suitable areas. Congress has for more than two decades received many proposals relating to particular valley regions. In 1937, President Roosevelt himself advocated T.V.A. types of undertakings in the Arkansas and Columbia basins; in 1944, he called for a Missouri Valley

Authority, to develop the water and other resources of parts or all of 10 or 11 western states comprising nearly one-fourth of the better cropland of the country; in 1949, President Truman urged both a Missouri Valley Authority and a Columbia Valley Authority. The valley authority system for resource development and conservation has gained increasing support also from the unseemly quarrels and frustrations growing out of the dispersion of authority among the Soil Conservation Service, Forest Service, Bureau of Reclamation, Bureau of Land Management, Power Administrations, and Corps of Engineers. Each of these, however, has managed to protect its present jurisdiction. Thus far, all efforts to achieve some logical allocation of functions among the departments or to achieve it regionally by valley authorities have been unsuccessful. The first Hoover Commission recommended that virtually all land management programs be consolidated in the Department of Agriculture and water resource programs in the Department of the Interior. It did not support the valley authority idea. The Bureau of Land Management resisted transfer from Interior and the Corps of Engineers from the Army and the recommendations got nowhere. Much of the present controversy centers around development of the Missouri Basin, with the Corps of Engineers and the Department of Interior and Agriculture each presenting a separate plan.

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# CHAPTER 23

# *Promoting Public Health and Welfare*

## GOVERNMENT AND WELFARE

The people of the United States undoubtedly enjoy the highest standard of living of any people in the history of the world. Amidst this plenty, however, we still have a great deal of suffering from poverty, ill health, and personal and economic insecurity. The care of the unfortunate has been a major responsibility of government for generations. Almost everything the government does, of course, has some effect on the plight of the underprivileged. Certainly every effort to maintain a high level of prosperity is aimed in part at preventing the distress associated with joblessness. When bad fortune or bad health or serious accident lead to misery, however, what has not been prevented must be endured and, if possible, alleviated. Modern governments, especially in the West, regard this task as one of their most significant duties and, in recent decades, the conceptions of what it is either wise or possible to do have undergone major revision and expansion.

Local and state welfare activities

The earliest welfare activity on record was care of the poor. In England, this responsibility, insofar as not discharged by relatives or other private benefactors, early fell to the church parish. Even before the American colonies were founded, however, parliamentary legislation authorized taxation for this purpose, and the colonies inherited the concept of poor relief as a public, tax-supported function. In New England and some of the middle colonies, the town became the relief agency; farther south, the parish—soon replaced, however, by the county. To this day, towns and counties throughout the country raise and spend much revenue for this purpose. More than 100 years ago, the states also entered the field—establishing hospitals and asylums for special classes of unfortunates such as the feeble-minded, the insane, hardened criminals, and the blind; setting up boards and other authorities to administer such institutions; organizing departments of welfare; and in some cases supervising local services. In times of stress, programs of public succor sometimes proved pitifully inadequate. On the other hand, deficiencies were met to some extent by the private charities for which our people have traditionally had a commendable record. Early in the present century, states began helping their local governments extend financial aid to persons outside of institutions, chiefly the aged, the blind, and needy mothers. Meanwhile, too, states and localities were contributing to welfare in the broader sense by developing health services, introducing safety requirements in transportation and industry, building up educational systems, providing highways, fostering agriculture, protecting natural resources, regulating working conditions for women and children,

fixing hours and minimum wages in industry, enacting workmen's compensation laws, encouraging good housing, and in many other ways.

Until this century, the role of the national government in looking after the nation's unfortunate was relatively minor. It looked to the states and their subdivisions to discharge whatever responsibilities government was believed to possess. It did, however, accept the duty of looking after the veterans of the nation's battles. It also maintained hospitals for seamen and a few other classes of persons for whom it had a peculiar responsibility. In 1912, a Children's Bureau was established in the then Department of Commerce and Labor to encourage states to regulate child labor and in 1918 small grants to the states to help combat the spread of venereal disease were inaugurated. In 1920, national aid for state programs for rehabilitating the victims of industrial accident was launched. For five years after 1921, also, national aid was provided to support state and local clinics and educational programs aimed at reducing mortality in childbirth and at improving the care of both mother and child. Until the depression of the 30's, little more was done.

## FROM RELIEF TO SOCIAL SECURITY, 1929-35

The shock of depression

The nation entered the depression firmly attached to a system of public care for the unfortunate which emphasized local responsibility and which was supported mainly by local taxes. In its main contours the American system of poor relief had been designed in Elizabethan England. The swelling tide of unemployment spreading want, fear, and despair over the face of the land soon engulfed the private charities and the town, parish, and county poorhouses and dole systems. The states attempted to bolster the local units with grants and loans and work programs but they too were soon swamped by falling income and inadequate machinery. Still unemployment mounted, to 10 then to 12 millions, and private charity, local units, and state government looked to the national government for help.

The first national efforts took the form of loans by the Reconstruction Finance Corporation to state and local governments for public works construction to give employment and for direct cash relief. These units soon exhausted their credit as the "natural" recovery hoped for by the Hoover administration failed to materialize. And to the ensuing Roosevelt administration it fell to attack the problem with fresh determination and a new philosophy. The policy of the new regime was to put vast new resources at the disposal of the states and local units and also to act directly, on many different fronts, to create employment and provide relief. Most of the major steps taken have been touched upon at various points in preceding chapters of this book, and need not be reviewed here. Suffice it to say that billions of dollars were appropriated, piling up a national debt considered extraordinary until dwarfed by that incurred during the later years of defense effort and war. Through a Federal Emergency Relief Administration, a Public Works Administration, a Civil Works Administration, a Works Progress Adminis-

tration, and other huge agencies that came and went, vast programs of employment and relief were carried forward by direct action of national agencies and through grants to states, counties, and cities. Novel measures like the National Industrial Recovery Act of 1933 and the Agricultural Adjustment Acts of 1933 and 1938 were placed on the statute book (even though in some instances judicially invalidated).

The Social Security Act (1935)

Down to 1934-35, thought and effort were centered largely upon breaking the back of the depression. Huge outlays for relief, for employment on public works and vast loans and gifts to states and localities, however, could not go on forever, even though the conditions currently requiring them easily 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 of both bad times and good. The interest of those having to do with making national policy now turned, therefore, to tapering off the national government's spending activities and devising ways by which the states, with the help of insurance systems and relatively modest grants-in-aid, could be brought back into the center of the social welfare picture. National spending on employment-making public works and on other forms of relief went on to some extent until after the economic situation was sharply reversed by the defense and war effort starting in 1940. In 1935, however, and after careful studies of the social insurance systems in Europe, and of the question of a permanent program for this country, Congress, by heavy majorities, passed an omnibus Social Security Act representing the first concerted nation-wide attack involving all levels of government on the problem of economic security for wage earners and their families. Conceding that the measure as enacted did not provide complete protection against "the hazards and vicissitudes of life," President Roosevelt, at all stages a vigorous sponsor, nevertheless characterized it as "the most useful and fundamental single piece of legislation ever enacted in the interest of the American wage earner." As now operating after several expansions of coverage, the program furnishes impressive testimony to the accepted responsibility of government on all levels for assuring all people in all parts of the country a reasonable degree of economic and social well-being.

## SOCIAL INSURANCE

1. Unemployment compensation:

Towering above all else in the general scheme provided by the Act of 1935 are two plans of social *insurance:* (1) unemployment; and (2) old age and survivors. These two insurance programs represent efforts to provide long-term solutions to the central problems of social security.

a. The national-state basis

Loss of their jobs by millions of workers during the great depression sharply emphasized the hazards of layoff and dismissal confronting industrial workers. A major objective of the legislation of 1935 was to encourage the states to soften the impact of such disasters by providing benefit payments from which employees, usually with meager reserves, could, when laid off or

dismissed, keep themselves and their families going for at least a limited period without turning to public relief. Virtually every state already had workmen's compensation laws under which employers were required to carry insurance to enable them to pay benefits to employees kept from work by industrial accidents or occupational disease. This had become an accepted part of the cost of production and was passed on to the consumer in the price of goods produced. To this was now added benefits for employees kept from work, not by accident or illness, but by lack of employment. The cost was to be part of the legitimate expense of doing business and passed on to consumers. Like the President's Committee on Economic Security, whose recommendations were largely followed, Congress weighed the desirability of a straight national system of unemployment insurance, uniformly compulsory and nationally administered. Fearing, however, that such a scheme would be held unconstitutional, and considering it desirable not to dictate any one of the many different forms that such insurance might take, the two houses agreed upon a plan offering the states substantial inducements (including subsidies to cover costs of administration) to devise and set up unemployment compensation systems of their own. If any state failed to do so, the minimum system prescribed in the law would be applied to the industries of that state by the national government. With this type of sanction, every state promptly established its own program. Speaking strictly, therefore, under existing law there is no national system of unemployment compensation, but only a variety of state systems operating under national standards and with national supervision.

b. Financial arrangements

The heart of the plan is the arrangement for financing the insurance from payroll taxes paid by employers. In the first place, the national government levies a 3 per cent tax upon the payrolls of all employers of as many as four persons during at least 20 weeks of a calendar year. The taxable payrolls are so computed, however, as not to include anything paid to any employee in excess of $3000 a year. In the second place, each state levies its own payroll tax, for support of its own unemployment compensation system, set up and operated under its own law. The state tax may apply only to those liable to the national tax or it may be, and in many states is, applied to more employers. In the third place, when an employer pays his national tax, he is allowed an offset of 90 per cent of it toward the amount he is paying his state; in other words, he actually pays the national government only one-tenth of his nominal obligation. A state therefore can tax an employer at the rate of 2.7 per cent without imposing any additional burden, because anything up to that amount (90 per cent of the national tax) will be deducted when the national tax is paid. In all states except one, 2.7 per cent is the maximum rate of state tax. However, most states have established systems of "merit" or "experience" rating by which employers with good records for steady employment may reduce their state tax liability without increasing their national taxes. The average rate of tax is, therefore, appreciably less than 2.7 per cent of covered payrolls. Should any state elect to remain out of the system, its employers still would be liable for the 3 per cent national tax, the proceeds of which in such a

case would be retained in full by the national government and used nationally. All funds collected by the states go into an unemployment trust fund in the national treasury (held, however, in separate state accounts), and are invested in national bonds, subject, of course, to requisition by the states as needed for benefit payments. The high levels of employment of the past decade have resulted in piling up a reserve of almost $9 billion by mid-1958 in the unemployment trust fund.

c. State patterns

To participate, a state must meet certain requirements. It must, of course, set up an unemployment compensation system, levy the necessary tax, and provide for administration through a regular industrial commission, a special unemployment commission, or some other suitable agency. It must arrange to have all benefits paid through public employment offices or other approved agencies. It must agree that funds withdrawn from its treasury account in Washington shall be used solely for payment of benefits. There are also restrictions upon its liberty to withhold benefits under special circumstances arising from industrial disputes. Apart from these restrictions, a state is free to adopt any particular type or scheme of compensation preferred, to determine the categories of unemployment to be covered, and to fix the scale of benefits to be paid. Under these conditions—with every state, and also Puerto Rico, the Virgin Islands, and the District of Columbia participating since 1939—there are many differences from state to state. The tendency has been for the various state systems to become more and more similar. Nine states started by taxing employees as well as employers, but now only New Jersey and Alabama do so. Nearly all states follow the national act in excluding from coverage self-employed persons, agricultural workers, domestic employees, and employees of nonprofit agencies and institutions.

Altogether about 36 million workers are covered by the system or somewhat more than half of the nation's labor force. The only major changes in coverage since 1935 have been: (1) the extension of coverage to employees of the national government in 1954; (2) extension to smaller firms beginning in 1956; (3) removal of railway employees in 1938 and provision for them by a separate system; and (4) addition of maritime workers in 1946.

Inflation in the postwar era has markedly reduced the real value of the benefit payments despite the fact that most states have been increasing their maximum weekly rates. The most recent tabulations (1956) show the average weekly payments for the entire United States is $27. Benefits are paid during any one year for not more than 16-20 weeks in most states. However, as an antirecession measure in 1958 the Congress authorized the states to grant an additional 13 weeks of benefits to those who had exhausted their rights and to award weekly payments as high as $45. Eligibility for benefits is computed according to somewhat varying wage-credit formulae in which length of employment and taxable wages received are principal factors. Many students of the subject consider that the maximum weekly payment ought in no case to be less than $25 nor the maximum period less than 26 weeks. Except, however, for the large number of workers not covered and the diminished value of

benefits resulting from inflated living costs, existing arrangements have yielded generally good results. The system, however, is designed only for short-run or seasonal unemployment. It is not geared to take care of prolonged economic depression. Finally, it should be understood that this system is designed to take care of those who are ready, willing, and able to work. It is not for the disabled, the sick, the infirm, or the aged. To receive benefits, a worker is obliged to register at the nearest public employment office, operated by the state in conjunction with the unemployment insurance program and he must accept "suitable" employment if offered to him.

National responsibility for unemployment compensation is now discharged by the Bureau of Employment Security in the Department of Labor (prior to 1953 in the Federal Security Agency). This Bureau administers grants to the states for administrative costs for unemployment insurance and for public employment offices. It also regulates payments to the states from the insurance reserve fund and inspects state systems for compliance with national standards.

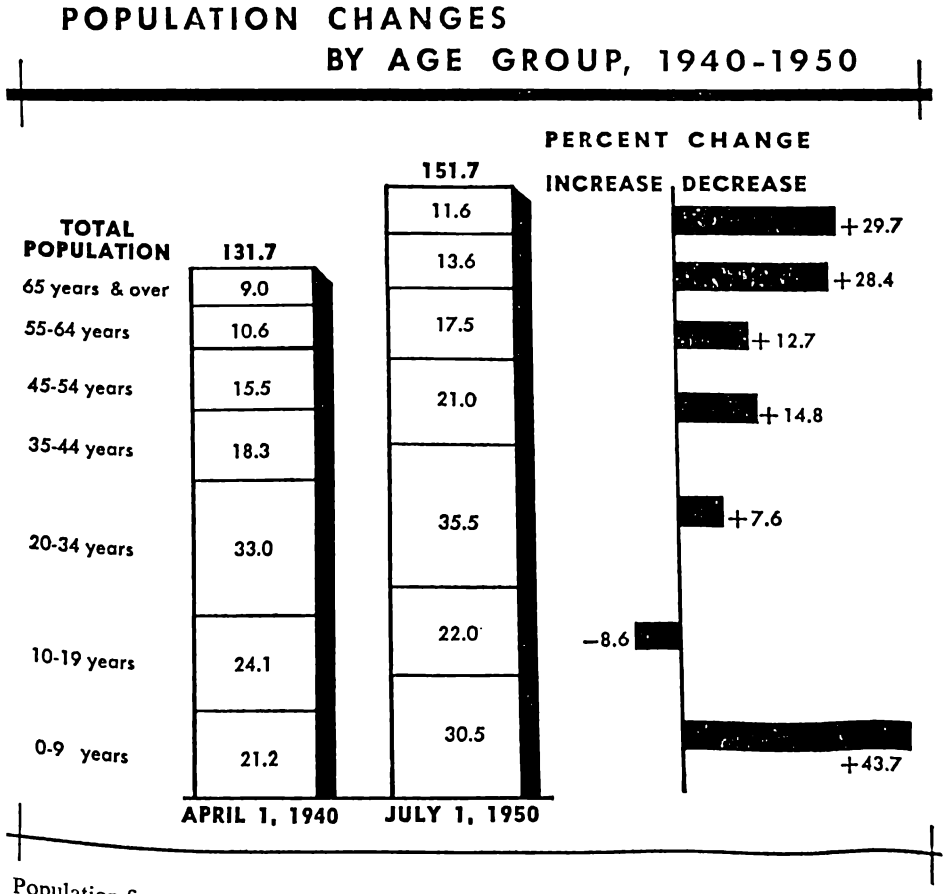
2. Old age and survviors insurance:

The other insurance plan provided by the Social Security Act of 1935 was designed especially for the aged. The problems of the nation's senior citizens were brought into sharp focus by the depression. Layoffs had been especially heavy among workers over 50. The mechanization of industrial production and the introduction of assembly-line techniques had made it difficult for the older workers to keep up with their younger rivals. The great improvements in this century in private and public health had produced a rapid increase in the percentage of our population over 60. The urban family unit, unlike the rural family, was not equipped by living space or income to take care of its over-aged dependents. The result: a disproportionate share of those in distress were in the older age group. Public works programs, the preferred method of the Roosevelt administration, did not greatly aid those who were past their prime and thus unable to do heavy labor. Everywhere in the nation the older citizens were demanding special attention—many of them through the Townsend movement for old-age pensions.

a. Outline of system

In essence, the system established in 1935 is a nation-wide contributory retirement system under which annuities or pensions, graduated in amount on the basis of earnings and duration of employment, are payable at age 65 from a fund built up from money paid in equally by employers and employees. The national government was intended to make no financial contribution beyond meeting the costs of administration. It does bear undivided responsibility for operating the system and plays the combined roles of collector, bookkeeper, and manager. The states and their subdivisions have no part in the undertaking. On the employee's side, the plan is one for compulsory savings—in other words, for spreading wages over his adult lifetime rather than over merely his wage-earning years, so that after retirement he may have a resource on which to draw for a living. And on the theory that the employer (not to mention the taxpaying public) has a stake in fostering employee frugality and in keeping his employees from eventually going on relief, he is required to

give his workers, in effect, a premium for their industry, and in so doing to share in creating and maintaining the fund. Under the system, almost 12 million retired workers or their beneficiaries already are drawing benefits, while other millions still on the job are building up potential rights to future old-age income.




Population figures are in millions.

b. Coverage

At the outset, old-age insurance applied to substantially the same workers as unemployment compensation, with approximately the same groups, for example, agricultural workers and domestic employees, excluded. Whereas, however, the coverage of unemployment insurance never has been expanded on any large scale, that of old-age insurance has been greatly broadened. In 1939, 1.5 million workers not previously reached were brought in, the name was changed to "old age and survivors" insurance, and coverage was further widened to include protection not only for the worker but for his family, through provision for monthly benefits for aged wives and young children of retired workers, and for widows, orphans, and aged parents of workers

dying before retirement. After prolonged agitation, an amending act of 1950 brought under the system, in addition, 4.7 million self-employed nonfarm workers, 1.45 million employees of state and local governments, a million household servants, 750 thousand regularly employed farm workers, and certain smaller groups—an aggregate of some 10 million. In 1954, another 10 million workers were potentially added to the system, including public employees in all jurisdictions desiring it, farmer laborers, and members of many professions. Approximately 90 per cent of the country's entire labor force is now covered.

c. Financing

Contributions made by employees and employers alike started at 1 per cent each of the wages received or paid in 1937, and under the original law would, by stages, have reached a maximum of 3 per cent each in 1949. Because, however, huge reserves were necessarily built up in anticipation of future claims Congress, from year to year, and usually over presidential objection, "froze" the tax at 1 per cent. In 1950, however, the levy was allowed to rise to 1.5 per cent where it remained through 1953. Under a new timetable, the rate rose to 2 per cent in 1954 and then to 2.25 per cent in 1957, to 2.5 per cent in 1959 and is to go gradually to 4.5 per cent by 1969. Whereas the tax formerly was payable on only the first $3000 of annual wages or equivalent income of an individual, the act of 1950 raised the amount to $3600, the act of 1954 raised it to $4200, and the act of 1958 to $4800.

d. Benefits

Accompanying the tax increases in the postwar years has been a general increase in the benefits paid out by the system. Under the original act, average monthly payments of $20-$25 were typical, with lower payments to surviving widows and higher payments to families with children. Increases granted by Acts of 1950, 1952, 1954, and 1958 have brought the average monthly payment to retired workers to $68 with more for families of deceased wage earners. More generous allowances have also been granted for retired workers or widows to earn additional income. Despite the increased benefits, the reserve funds had mounted to $22.5 billion by mid-1958. The failure of Congress, however, to increase the payroll tax rates as originally planned means to many analysts of the system that the reserve is not adequate to meet the anticipated claims and the whole system may well have to be subsidized from general receipts of the United States Treasury.

e. The system sustained by the Supreme Court (1937)

Inevitably, the Social Security Act of 1935 was attacked at many points on constitutional grounds. In a series of notable decisions handed down on May 24, 1937,[1] however, the Supreme Court—although by narrow margins of five to four—took a more liberal view than in earlier decisions and upheld every vital feature of the basic law. "It is too late today," said Justice Cardozo, "for the argument to be heard with tolerance that in a crisis so extreme the use of moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare"

[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.

—adding that what constitutes the general welfare is for Congress to determine.

f. Results

The result of the old-age-insurance system as now operated is a minimum guaranteed retirement income for virtually every employed person when he reaches age 65 or for his widow and family if he dies before that time. The adoption and expansion of this system brings this country into line with most advanced European nations. We have taken a long step toward eliminating the concern of many of our people about the declining years of their lives.

## PUBLIC ASSISTANCE

Categorical assistance:

The two insurance systems established in 1935 were designed to make long-range provision for the aged and the temporarily unemployed. Neither scheme was intended to relieve immediate distress. The Social Security Act of 1935, therefore, provided a program of immediate and continuing assistance to certain needy individuals. In examining the types and conditions of persons who needed help at that time and would be likely to need it in the foreseeable future, the Congress selected certain categories of such persons for whose welfare the national government ought to assume continuing responsibility. The sponsors of the *categorical assistance* program expected that responsibility for virtually all other classes of unfortunates would, henceforth, fall wholly on the states and local communities.

1. Old-age assistance

The first group for whom the act established a continuing program of succor were the needy aged. Obviously no insurance program would help those at or near retirement age at the time, and, as we have noted, thousands and thousands of such persons were destitute in the mid-thirties. The pattern selected for aiding those needy aged was one which had been tested in some of the states. A few states had experimented with old-age pensions as early as 1923 and 25 states had some kind of system in operation in 1935. In most cases, however, the state systems were inadequate as to both coverage and benefits. Using the familiar grant-in-aid technique, the Act of 1935 created a joint national-state program of old-age assistance. National money was appropriated to any state which qualified by meeting the following minimum national standards: (1) that aid be paid on the basis of need; (2) that aid be extended beginning at age 65; (3) that the program cover the entire state; (4) that a single state agency administer the state's part of the program; (5) that the state pay a portion of the costs of the assistance; and (6) that all personnel—state or local—engaged in administering the program be selected on a merit basis. To states with approved programs, the national government agreed to pay 50 per cent of all administrative costs and, originally, about 50 per cent of the assistance grants up to $50 per month for any single beneficiary. Most states quickly enacted laws qualifying them for participation and today every state and also Puerto Rico, the Virgin Islands, and the District of Columbia participate in the old-age-assistance program. There are, of course, many variations in practice from state to state. Since the amount of actual

benefit depends upon need and need is determined in each case by state or local public welfare workers, standards of assistance show wide regional variations. Eligibility for aid is also based upon varying requirements as to residence, responsibility of relatives, and citizenship. The state's programs vary also in the amounts they are willing to put into the program. Many states, for example, have higher maximum monthly grants than the national formula entails. The average monthly payments, in fact, vary from $7.94 in Puerto Rico to $95.26 in Colorado (1956). Modifications in the formula for national grants have been made in the ensuing years in the direction of increasing the national contribution. At present, the national government pays 60 per cent of the total cost of old-age assistance. During 1958, approximately 2.4 million persons (almost 20 per cent of all men and women over 65 in the United States) received an average of $61 a month under this program at a total cost of $1.7 billion, of which the national government paid $1.0 billion.

It might well be asked at this point why the old-age-insurance system has not after twenty years eliminated the need for old-age assistance. In the first place, the insurance program did not until 1950 include several million workers. As the coverage has been extended in 1950 and 1954 the need for old-age assistance has been declining, but it will be another decade before those newly brought into the system can be supported more or less adequately out of it. There are also some persons still not included in the insurance program. Secondly, the benefits paid under the insurance program are in some instances not adequate to maintain a decent level of subsistence and must be supplemented by grants of assistance. As insurance benefits have been enlarged and coverage extended, the need for old-age assistance is gradually diminishing.

2. Aid to the blind

The second category of needy persons selected by the Congress in 1935 for a continuing national-state program of assistance was the blind. In general, the standards required for state participation were the same as for the aged, except that payments were to be made beginning at age 16 or 18 to persons whose deficiencies of eyesight incapacitated them for normal work. All of the states and territories participating in old-age assistance now also participate in assistance to the blind. In 1958, 109 thousand persons (more than one-third of the blind population) received an average grant of $65 per month at a total cost of $86.5 million of which the national government paid $42 million.

3. Aid to dependent children

Many dependent children are cared for (in a fashion) in privately or publicly supported asylums, orphan's homes, and foster homes. With a view, however, to salvaging the advantages of home care wherever possible, numerous states, even before 1935, enacted laws providing pensions or other forms of aid for needy mothers having children in their charge. The Social Security Act undertook to generalize this type of beneficence by instituting grants-in-aid for its support. State-operated systems vary, but in virtually all instances assistance is available in behalf of children under 16 years of age (18 if in school) only if financial need is shown, and only if living with a parent or relative, although some provision is now made for children in foster

homes. All states now receive subsidies for the purpose. In 1958, aid went to upwards of 660,000 families in behalf of 1.8 million children at a total cost of some $783 million, of which the national government paid $472 million.

4. Aid to the totally and permanently disabled

A fourth category of needy beneficiary of national grant was added to the original three by the amendments of 1950: the totally and permanently disabled. National grants, thereafter, were made available to acceptable state programs which made provision for grants to persons 18 or over who were totally and permanently incapacitated and who were not mentally ill or tubercular. In 1958, 312 thousand persons received grants averaging $62 per month at a total cost of $232 million of which the national government paid half. Several states, however, have not yet put this program into operation.

Administration

The administration of the national aids, including supervision of state systems for compliance with standards, is now the responsibility of the Social Security Administration of the Department of Health, Education, and Welfare. This agency also administers the old age and survivors insurance program.

Under the categorical aids program the national government has undertaken a continuing indefinite commitment to pay a share of the costs of providing assistance to all persons found to be eligible by state and local agencies. In this respect, the assistance aids differ from all other types of grant-in-aid programs operated by the national government. With need and eligibility determined locally or by the state and with national, state, and, in some cases, local contributions to the total costs, a pattern of assistance has been worked out which unites all of the levels of government. Each level meets that portion of the responsibility for which it is best suited. Controversy continues mainly over the share of the cost which should be borne by each level and the amount and character of supervision which the national government should exercise over the states.[2]

## CHILD HEALTH AND WELFARE SERVICES

To the disappointment of many people, the Social Security Act of 1935 provided no general system of health insurance; and, despite earnest agitation for such a venture in recent years, both in and out of official circles, nothing of the kind has as yet been undertaken. To strengthen state health and welfare work, nevertheless, the legislation instituted three special health and welfare programs under which grants-in-aid now go to all states, the District of Columbia, and one territory, not for payments to any particular persons but for general support of appropriate state activities. As operated in 1958, $41 million is distributed annually among the states and territories for these

[2] A recent controversy, for example, occurred between the state legislature of Indiana and the national authorities over the provision of the Act of 1935 requiring that the confidential character of state and local assistance records be maintained. Indiana, in 1951, defied the rule and opened its assistance records to public inspection. The national administrators then ordered a withdrawal of national grants. The Congress, after some delay, amended the law so as to authorize the Indiana practice. Many state laws were, thereafter, amended to open the relief rolls to the public.

programs. The grants are made in proportion to demonstrated need and on condition that standards are met and matching funds appropriated by the state.

1. Maternal and child health services

To share in maternal and child health grants, a state must not only have a health department but within such department a maternal and child health division with a physician in charge. The function of the division must be principally to help county health departments develop and operate health services for children from birth through school age and for mothers before and after childbirth. With emphasis on prevention rather than treatment, prenatal clinics are held, child health conferences organized, school children given medical and dental examinations, immunization precautions taken against communicable child diseases, and nutritional information imparted. In both quantity and quality, national-state-county services of these kinds vary greatly from state to state, and even from community to community. That they have more than proved their worth is indicated by a decline of mothers' deaths in connection with childbirth from 58 to 7.5 per 10,000 during the first 16 years of the system's operation, and of infant deaths, on the same numerical basis, from 560 to 284.

2. Services for crippled children

Grants are also made, as provided by the law, to "extend and improve [especially in rural areas and in areas suffering from severe economic distress] . . . services for locating crippled children, and for providing medical, surgical, corrective, and other services and care, and facilities for diagnosis, hospitalization, and after care, for children who are crippled or who are suffering from conditions which lead to crippling." In 1958, more than 750 thousand crippled children were registered in the various states, many of them receiving help. Every state except Arizona participates in the program, but in few areas are the funds sufficient to finance an adequate state-wide service for all those suffering physical handicaps.

3. Child welfare services

Dependent children may stand in need of help beyond that of a financial nature; and many not classified as "dependent" require assistance also. They may suffer from neglect, abuse, physical or mental deficiency, the stigma of illegitimacy, or tendencies to delinquency. The national government's yearly grant in their behalf is designed to assist state child welfare departments in supervising and aiding local services in arranging for foster-home or institutional care, protecting against mistreatment, conducting clinics, encouraging neighborhood activities, tending to curb juvenile delinquency, assisting schools and courts in handling children's cases, and other such activities. In no state is this work all that it should be, but in 1958 more than 278 thousand children were receiving aid.

Administration

The maternal and child health and welfare programs established under the Act of 1935 and enlarged in recent years are administered by the Children's Bureau now lodged in the Social Security Administration of the Department of Health, Education, and Welfare. Regrettably, a keen rivalry continues between this Bureau and its program and the Bureau of Public Assistance with its program of aid to dependent children. In most states and

local units these two programs for children continue to be separately organized and administered.

## GENERAL PUBLIC HEALTH SERVICES

Early national health efforts

The Social Security Act of 1935, a landmark in the development of a co-ordinated national program for the care of the needy and the handicapped, also marked the beginning of a growing national-state public health program. Public health grants to the states, abandoned in the twenties, after a brief history, were re-established on a broader scale than ever before. The earlier grants for venereal disease control (1918-25) and child and maternal hygiene (1922-29) had been swept away by economy-minded statesmen. When the nation turned its attention to the enduring causes of widespread suffering, it found that illness was a major contributor to loss of job, family breakdown, and individual destitution. Concern for the health of our citizens was not wholly a new responsibility of the national government. A United States Public Health Service of trained scientists and physicians had been in operation in the Treasury Department almost since the founding of the nation. Founded for the care of ailing sailors by the Congress in 1798, a Marine Hospital Service had slowly acquired new functions—controlling epidemics, aiding states in the development and enforcement of quarantine regulations at ports of entry, investigating the causes, methods of transmission and cures of communicable diseases, regulating the interstate sale of biologics, loaning trained medical scientists to the armed services and to other agencies—and by 1912 it had become the modern Public Health Service. To this Service the Act of 1935 assigned responsibility for directing a new grant-in-aid program to assist states in improving their general public health services, including vital statistics gathering, communicable disease control, public nurse services, and many others. The original appropriation for these purposes of $2.5 million has now grown to $15 million.

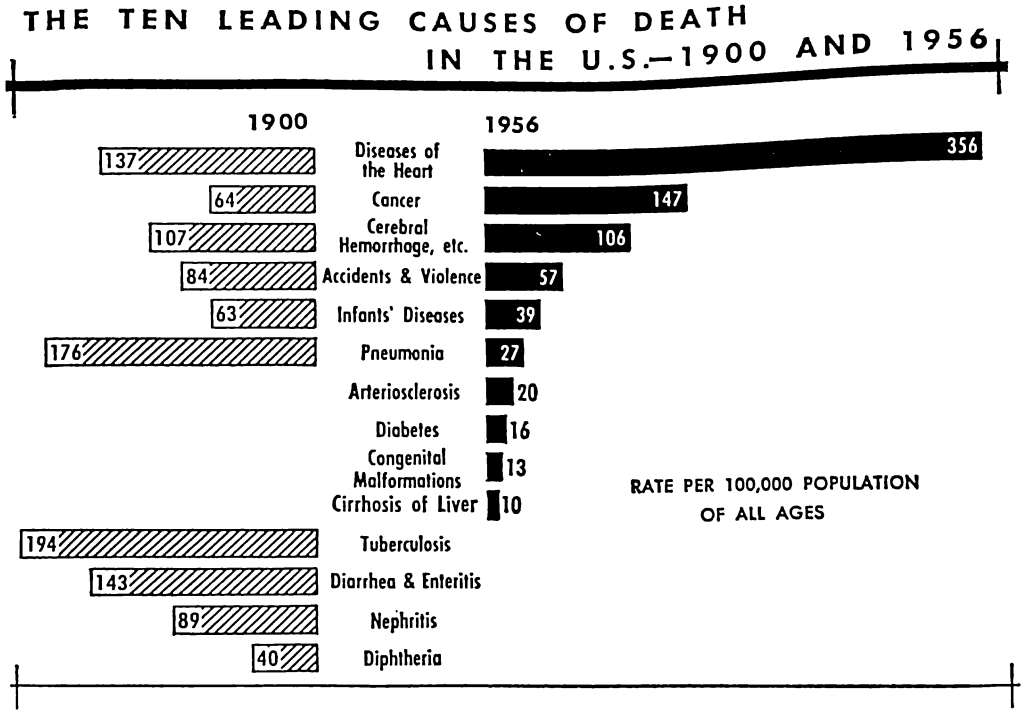
Venereal disease program

The thirties brought a new frankness to discussions of sex problems in American society and thus opened the way to a concerted drive on one of the nation's greatest health problems: venereal diseases. Led by Surgeon General Parran, a campaign against these dread scourges was launched. In 1938, Congress enacted the Venereal Disease Control Act which revived the grant-in-aid procedure of 1918 and made national funds available for approved state programs of education, treatment, and case-finding. Aided by the discovery of penicillin and other antibiotics during and after World War II, the national-state programs have helped markedly to reduce the incidence of venereal diseases. From a peak annual appropriation to the states of $3 million, the national program has now dropped to $1.7 million.

Success in the battle against venereal disease marked one of the last major episodes in the attack upon communicable disease that had begun with Pasteur's great discoveries in the late nineteenth century. To be sure, much suffering and death were and are caused by tuberculosis, and a new aid pro-

gram to assist states in case-finding and treatment was inaugurated in the Public Health Service Act of 1944. Also poliomyelitis, rheumatic fever, scarlet fever, and others continue to cause incapacitation. The mortality tables of the forties and fifties reveal, however, that cancer and heart and circulatory diseases are now the chief causes of death. The modern killers and disablers do not respond to the techniques developed to combat the contagious diseases. The emphasis in public health work has, therefore, been gradually shifting to: (1) research to discover causes and cures; (2) education on proper living; and (3) early diagnosis. Among the great disabling diseases of modern

Shift of emphasis to cancer, heart diseases, and mental disorders:




SOURCE: *Statistical Abstract of the United States, 1957.*

America, none produces as much distress as mental illness. About half of all the hospital beds in the United States today are occupied by mentally ill patients. During World War II, 12 per cent of all men 18-37 examined for induction into the armed services were rejected because of mental and personality disorders. The Metropolitan Life Insurance Company has estimated that one out of every twenty persons born alive in this country will at some time have to be hospitalized for mental disorders.[3] Responsibility for the care of the mentally ill has traditionally belonged to the states. The National Mental Health Act of 1946 marks the beginning of a national program in this field. Under this act grants of $4.0 million annually are now made to state mental

1. Grants to the states

[3] The figures in this paragraph on mental illness are from J. F. Dewhurst and Associates, *America's Needs and Resources: A New Survey* (New York, 1955), 304.

health agencies for community programs. Grants to the states for cancer control were instituted in 1947 and for heart disease programs in 1948.

2. Research

The major effort of the United States Public Health Service in the fields of chronic illness and death-causing disorders is research. The older National Institute (now Institutes) of Health has been greatly expanded and now includes a Cancer Institute dating from 1937, a Mental Health Institute created by the Act of 1946, a Heart Institute, a Dental Institute, and a Microbiology Institute created in 1948, an Institute for Arthritis and Metabolic Diseases and one for Neurological Diseases and Blindness created in 1950 and an Institute for Allergy and Infectious Diseases created in 1956. These institutes carry on their programs in a Clinical Center created in 1953 and in other facilities of the Service at Bethesda, Maryland. Grants are made to medical schools, universities, laboratories, and public and private hospitals for research projects. Fellowships for work in the national facilities are awarded and conferences of scientists and doctors are sponsored. The institutes now spend more than $200 million annually on these various programs.

Grants for hospital construction

One of the key problems in the postwar era in improving the health of the American people has been the shortage of hospital and clinical facilities. With a larger and larger portion of available beds occupied by sufferers from protracted and chronic illness, and with construction and operating costs climbing beyond the capacities of local private organizations, the national government moved in to give the states a lift. The Hospital Survey and Construction Act of 1946 inaugurated a new grant-in-aid program by which national funds—originally $75 million a year, increased to $150 million in 1949—are now made available to states to pay a portion of the construction costs for public and private hospitals, public health centers, and other health facilities. An additional $60 million annually to subsidize construction of nursing homes, diagnostic and treatment centers, and rehabilitation centers was made available beginning in 1955.

Other health services

The United States Public Health Service, now part of the Department of Health, Education, and Welfare, is one of the fastest growing executive agencies in the postwar period. In addition to the programs already mentioned, it administers 12 general hospitals, two hospitals for narcotic addicts, one hospital for lepers, one tuberculosis sanatorium. It also supervises and directs both a grant-in-aid and a research program in the field of water pollution control and participates in the World Health Organization.

## PUBLIC HOUSING

Beginnings of a major problem

The acute housing shortage experienced by the country during and after World War II focused attention upon a problem really as old as our present industrial society. Rural housing often is far from what it should be. But when our population dwelt almost entirely on farms or in villages and small towns, most people had reasonably good homes, even though frequently with primitive equipment; 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. Rising land values produced building congestion; detached houses gave way to drab tenements; high rents forced families into pitifully inadequate quarters; immigrant workers congregated in teeming ghettos, "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 structural safety, the first serious attention given to housing by public authorities was directed to ameliorating the condition of low-income groups in slum areas.

Slow development of local and state action

As early as the third quarter of the nineteenth century, a few cities bestirred themselves about the matter, enacting local codes prescribing building regulations and sanitary standards. The effects, nevertheless, were slight, and in time people concerned turned with more hope to the legislatures of the states. From this source in certain of the more highly industrialized sections came measures fixing standards. At best, however, the laws merely imposed regulations on private owners of existing housing or upon private construction, without directly bringing new and better housing into existence. New York, it is true, went farther by enacting 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 planning and promoting slum clearance in the crowded districts of the metropolis and with supervising the construction of "model tenements." But for a long time no other state emulated the example thus set. Principal ways in which states and localities eventually contributed to housing betterment included municipal building codes and zoning regulations, rent regulation, loans for home construction and repair, tax exemptions for newly-constructed dwellings, and redevelopment corporations for undertaking slum clearance and new building. In nearly all states these ameliorations came late and slowly.

The national government enters the field

Aside from some provision for the housing of war workers during World War I, the national government kept 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 bewilder almost any one except a professional student of the subject. The first form of national effort, undertaken at a time when large numbers of people were losing their homes through mortgage foreclosures, was aimed not particularly at increasing or improving housing but at enabling hard-pressed homeowners to avoid being dispossessed. The method consisted 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 and in addition a Home Owners' Loan Corporation (in 1933) to make direct long-term mortgage loans out of national funds and at low interest rates to distressed homeowners 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 run-down residential properties was undertaken through a Federal Housing Administration, authorized not only to insure lending institutions against possible losses on loans made for the purposes indicated, but itself to make 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, to say nothing of the financial saving in terms of fire hazards, disease, delinquency, and crime, was reflected in a United States Housing (Wagner-Steagall) Act of 1937, setting up in the Federal Works Agency a United States Housing Authority charged with making long-term loans (up to 80 per cent of the costs involved) to state or local housing authorities for the construction of low-rent housing and for slum-clearance. The national agency was not to engage directly in the work of construction or demolition, but merely to make construction loans and annual operating grants; municipal or other local authorities directly concerned were to plan projects, furnish such additional funds as might be needed, and execute the different enterprises. Within four years after the legislation was enacted, all but nine of the states qualified for aid by setting up the requisite authorities.

Housing and World War II

The plan outlined had only limited opportunity for operation before the national defense effort launched in 1940, together with the ensuing war, gave the housing problem a new slant and emphasis. With the rapid expansion of shipyards and of plants for manufacturing airplanes, explosives, 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. 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 national 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, nearly 1.5 million war-housing units were constructed or reconstructed, about half of the number publicly and about half privately.

The postwar problem

The housing situation for several years after World War II was 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 decade), an unexpected increase of population in the meantime, return from overseas of millions of servicemen looking for homes, and continued deterioration of a great deal of housing long obsolescent—these and other factors easily explain the severe shortage from which nearly every part of the country suffered. In the steady advance of our people toward material well-being, housing had lagged: working hours had been reduced by a third to a half; food consumption had increased; education and recreation had progressed; social security had been initiated; even the average span of

life had been lengthened. But millions in the low-income groups still lived in slums (both urban and rural), and other millions in homes more or less substandard. Only about one-half of the nation's families, too, owned the places in which they dwelt.

After the war, the record of achievement had its bright spots, yet hardly was one to stir enthusiasm. The program under the United States Housing Act of 1937 came back into operation and by 1950 some 192,000 new dwelling units in 268 localities had been provided under it. In a limited way, the program was extended to rural areas. A chaotic administrative situation was improved in 1947 by establishment of the Public Housing Administration under a new co-ordinating Housing Home Finance Agency.

The National Housing Act of 1949

What the situation seemed to require was a coherent long-term program under which the government would not merely *loan* but also *spend,* and with some liberality. As early as 1945, a means of this import known as the National Housing (Taft-Ellender-Wagner) Bill made its appearance in Congress and passed the Senate. It was not until 1949, however, that it was finally placed on the statute book. Under the new law—aimed particularly at urban and rural slum clearance and redevelopment—a total of 810,000 new housing units (separate houses or small apartments, but only for low-income families) was aimed at over a period of six years. All projects were to be developed, owned, and operated by local "housing authorities" (usually municipal) established under state statutes. While the national government was to expedite construction by loans in individual instances where needed (a total of $1 billion was made available for the purpose), local authorities were expected usually to provide for costs by sales of nationally-supported, tax-free bonds to private investors. To supplement contributions by local governments, the national government was to subsidize the system to a maximum of $100 million a year for five years to help make up the difference between the "economic rent" (based on annual operating costs and debt service) and the rent which families of the low-income group can afford to pay, estimated at not over $30 a month.

Developments in public housing since 1950

The Korean episode and the renewed emphasis on national defense resulted in redirecting national housing interest into housing for defense plants and military installations. The Defense Housing and Community Facilities and Services Act of 1951 reflects this shift in emphasis in the public housing program. The Eisenhower administration, although pledged to reduce national programs competing with private enterprise, revealed deep sympathy for the public housing program. In a message to the Congress early in 1954, the President called for a broadening of the objectives of the national public housing program to include urban redevelopment as well as slum clearance. In this way cities might salvage declining neighborhoods and stop others from deterioration and not have to await the appearance of the slum for national help. He also asked the Congress to extend the low-rent public housing program of the Act of 1949, although at a reduced rate of 35,000 new units per year for the next four years. The Housing Act of 1954 substantially met the President's

request except that it limited the commitment on public housing units to one year. The President again in 1955 asked for a broader program of public housing and finally wrested authority for 45,000 more units from a reluctant Congress. In 1956, a new Act authorized 35,000 more units for that year and the same number for 1957. No additional units were approved for 1958.

## THE NATIONAL GOVERNMENT AND EDUCATION

Aid to vocational education

The controversy in the last two decades over national aid to public education has in some minds obscured the fact that the national government is already deeply involved by subsidy and direct expenditures in this field. In earlier chapters we have described the programs of national assistance for agricultural education at the college level and through the Extension Service. In 1917, a broad new program of national grants to the states for vocational education, largely at the high school level, was inaugurated. Expanded greatly in the past three decades, this program now provides national funds for and national supervision over training for young men and women in skilled trades, distributive occupations, industrial techniques, home economics, and agriculture. Funds are also granted for preparing teachers in these subjects to staff the vocational schools. Many states have been stimulated by the national grants (some had them before the national grants began) to establish a system of vocational schools under the supervision of a state agency and to appropriate funds for the purpose of providing such education. More than $40 million is now granted annually through the Office of Education in the Department of Health, Education, and Welfare for the vocational school program. To this program of educational aids was added, beginning in 1920 and greatly expanded in 1954, aids for vocational rehabilitation to train the physically handicapped for useful employment. An additional $45 million is now granted to states and territories annually for this purpose.

Temporary grants during depression and war

During the depression numerous grants, loans, and direct national expenditures were made for school construction, remodeling, and equipment. Thousands of local school districts benefited from these temporary measures. In World War II additional grants were made for school construction in connection with defense areas and for the establishment of child-care centers, nursery schools, and other educational facilities. Grants were also made to aid school districts obliged suddenly to make provision for large numbers of children whose parents were stationed at military installations. A huge subsidy to education has been made by the national government in the past decade by means of the veteran's aid program inaugurated in the G.I. Bill of 1944 and later extended to veterans of Korea.

Aid for school construction

Through continuing grants for school lunches for needy children and for aid to school districts affected by national installations, the national government is making important contributions to public primary and secondary education in the United States. President Eisenhower early in 1955 asked Congress to inaugurate a new program of national assistance to local school

districts for building construction to help them meet the rising enrollment incident to the recent upsurge in the birth rate. He suggested: (1) that the national government buy local bonds for construction at a low interest rate; (2) that the states be aided in creating state school building authorities with power to borrow national funds and build schools which could be leased to local districts that have already exhausted their borrowing power; (3) that grants be made for construction to school units that are unable to finance needed construction. The Congress, however, did not act favorably on these suggestions.

Aid for teachers and gifted students

These suggestions somewhat modified and with more emphasis on grants to needy districts were repeated in 1956 and again in 1957 without significant result. The Russian space-satellite triumph of 1957 shifted the emphasis on the national scene from the need for school facilities for a greatly increased child population to the need for better performance in the school system—better teachers, better science instruction, better language training, and more encouragement to talented youngsters to move ahead rapidly. The President in 1958, therefore, recommended new aid programs to the states: (1) to strengthen the teaching of science, mathematics, and languages; (2) to identify gifted students in the schools. He also recommended grants to institutions of higher learning for fellowships for persons entering the teaching profession and federal scholarships for gifted and needy students to attend colleges. The Congress did adopt several of the Administration proposals but after considerable controversy refused to establish a national system of scholarships for the brilliant but needy high schools graduates. It voted instead a loan fund from which such persons might borrow at low interest the costs of their collegiate education.

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# CHAPTER 24

# *Conducting Foreign Affairs*

If the fathers and grandfathers of the statesmen of modern America were to revisit the scenes of their earthly endeavors, nothing, perhaps, would surprise them quite so much as the prominence now given to foreign affairs. For generations our people worked out their various destinies largely indifferent to the aspirations of the peoples of the rest of the world. In fact, they were determined not to allow the quarrels or feuds, the wretchedness or splendor, of other peoples or nations to entice their notice away from the main show of building a free and prosperous nation out of a wilderness. Separated by broad oceans from nations powerful enough to menace their national independence, selected by immigration from among those most dissatisfied with the societies from which they came, confident of the virtues of a political system built upon freedom, the American people felt they had little to fear and nothing to learn from Europe and Asia. Occasionally their idealism and their wealth might be enlisted in behalf of the starving Chinese or the struggling Armenians and then they would applaud the statesmen who lectured the "power hungry" and "cynical" politicians of Europe on their bad behavior. Mainly, however, America had few important ties abroad and wanted none. "Why," in the language of Washington's Farewell Address, "by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor, or caprice?"

The transcendent importance of foreign affairs in the modern world

Today it is quite different. The United States is tied to half of the world by military alliance, its troops march under the flag thousands of miles from this continent in fulfillment of commitments solemnly undertaken, its treasure has been exported in multiplied billions of dollars to bolster the defenses and the economies of friendly powers, its sons by the thousands have died in battles far away from home. Its newspapers and airways are filled daily with the comings and goings and sayings of diplomats and statesmen from the entire world, its legislative halls resound with the clash of tongues on the conduct of affairs in Seoul, in Viet Nam, in Geneva, Bandung, and Bonn—places the average American had never even heard of until the day before yesterday—and the utterances of its statesmen are awaited with fear or awe by the leaders of every nation on earth. The earth has shrunk; technology has annihilated space. Our distant neighbors of yesterday are just across the street today. What is more, science has at last handed to men the power to destroy themselves completely. Failure in the conduct of foreign policy can well mean destruction for us all. The conduct of American foreign policy has thus become the dominant concern of our government.

## THE CONSTITUTIONAL BASIS

Exclusive national control and its basis

We have the word of the Supreme Court for it (U. S. v. Curtiss Wright Export Corp., 299 U. S. 304) that, even if no authority could be found granted in the Constitution, nor indeed any clauses from which it 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." There is, however, no lack of expressly conferred power. Nowhere, it is true, is there a single blanket grant, or 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, national control in this field 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, or to engage in war unless actually invaded. By discriminating against alien residents in their land-ownership or other laws, or by failing to do justice when aliens suffer from mob violence, 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, as for example by the Bill of Rights) to act for us in the international field, with or without constitutional authorization, express or implied.

National responsibility nevertheless diffused

The conduct of foreign relations is an executive function in many countries. 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 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 we must allow him the center of the stage, it should be clearly understood that what we have in this area of our government is a responsibility shared by the executive and legislative (and, in matters of interpretation and enforcement, even the judicial) branches—a responsibility considerably more diffused than that prevailing in the corresponding field in any other important country. The president has clearly the major influence but as the conduct of foreign affairs has become uppermost in importance among the functions of the national government, the Congress has insisted that it be taken into full partnership in determining what our policy should be. If we must vote the funds and call up our manpower for military service, says the legislature, we should participate in the decisions that make these steps necessary.

The president's powers:

An appreciation of the complexities and difficulties in the way of conducting foreign affairs within the governmental structure prescribed by the

Constitution may best be obtained by a consideration of how particular powers and responsibilities are discharged by the president and Congress.

1. Carrying on foreign intercourse

Basic to everything else is the maintenance of day-to-day intercourse with foreign governments. For this the president (utilizing the facilities of the State Department) is the official channel. On the one hand, subject to the Senate's right of confirmation, he appoints all ambassadors and ministers to foreign countries, and all foreign service officers (including consuls) stationed therein, with of course the full power of direction and removal which the appointing power entails. Indeed, in the belief that more can be accomplished by informal contacts than can be achieved through the formal channels of diplomacy, he may and occasionally does employ "special," "secret," or "personal" agents abroad. Typically, these will require no senatorial confirmation, and will commonly receive their pay, if any, out of a presidential "contingent fund." 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 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. Any private citizen or corporation undertaking, "directly or indirectly, . . . to carry on verbal or written correspondence or intercourse with any foreign government or its officers or agents (without express authority from the president) designed to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States or to defeat the measures of the government of the United States," becomes liable to penalty. While normally using the State Department as his channel, to such a degree that even foreign governments must ordinarily address the White House 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 from his own desk, as did President Wilson during World War I and President Franklin D. Roosevelt at intervals during World War II. He may go abroad to lead in the negotiation of a great international settlement, as did Wilson when peace was to be made in 1919, or to meet with representatives of foreign governments at any places (in either hemisphere) selected for the purpose, as Roosevelt repeatedly met and conferred with Prime Minister Churchill and Marshal Stalin (and on one occasion with President Chiang Kai-shek) during World War II and as Eisenhower met with the leaders of Britain, France, and Russia in Geneva in 1955.

2. Recognition

From authority to speak for the nation in its dealings abroad springs a second significant presidential function, that of determining the attitude to be taken by our government toward newly risen states or newly risen political regimes in existing states. As to who is to decide whether we shall officially "recognize" and have dealings with such states and regimes, the Constitution is silent. At various times it has been argued that Congress is entitled to par-

ticipate along with the president. International usage recognizes the function as executive and the power to appoint and receive envoys would certainly make it such in the United States. Precedent, backed by judicial opinion,[1] places it wholly in the president's hands, subject only to the discretion of the Senate in confirming diplomatic appointments and assenting to treaties, and to that of both houses in voting 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 President Monroe, after 1817, recognized a number of newly risen Latin American republics, or as President Theodore Roosevelt in 1903 recognized the republic of Panama, thereby paving the way for the construction of the Panama Canal. The usual method in such instances is to send and receive diplomatic representatives. Or recognition may take the form of instituting official relations with a new political regime that has taken over in a given country, as when, in 1928, President Coolidge recognized the Nationalist government set up by the Kuomintang in China by concluding a treaty with it; or when after the U.S.S.R. had waited 16 years for American recognition, President Roosevelt, in 1933, invited President Kalinin, of the All-Union Central Executive Committee at Moscow, to send a representative to Washington for conference, and followed by concluding an agreement with the emissary, Foreign Commissar Litvinov. The power to recognize carries with it also the power to refuse to recognize. Students of our diplomatic history will recall how President Wilson, in 1915, became primarily responsible for the downfall of the revolutionary president Huerta in Mexico by declining to have dealings with the regime which he headed. Presidents Hoover and Roosevelt steadfastly refused to recognize the new "state" of Manchukuo established under Japanese auspices on Chinese soil in 1932. President Truman, in 1945-46, refused to recognize communist-dominated governments in Bulgaria, Romania, and Yugoslavia, established in defiance of decisions reached at the Yalta conference, even though later developments forced him to open diplomatic relations with them. The United States, too, has never recognized Russia's acquisition of the Baltic countries in 1940 and has not, in spite of the British example, recognized communist China.

*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." The president, as chief executive and director of our foreign relations, is expected to see that such protection is duly extended, whether on the basis of treaty provisions 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 that protection is extended to aliens

[1] See, for example, U. S. *v.* Belmont, 301 U. S. 324 (1937) and U. S. *v.* Pink, 315 U. S. 203 (1942).

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 guarantee equal treatment in matters, like land ownership, 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 itself is at war, however, the rights of aliens of enemy nationality resident in the country become merely such as international law recognizes in situations of the kind. The president is not obligated beyond that point.

## INTERNATIONAL AGREEMENTS

> He [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. . . .—Art. II, Sec. 2, cl. 2

The most sensitive aspect of foreign dealings with regard to the respective powers and duties of the president and Congress is the matter of international commitments. Who can and should commit this nation to a course of action by agreement with one or more foreign states?

One of the main instrumentalities for regulating and stabilizing international relations is treaties. 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 view 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 dispatch." Assent to treaties by two-thirds, rather than simple majority, of the Senate was specified, not primarily in deference to any general policy or theory, but mainly to protect important interests of certain sections of the country from being "sold out" by bare Senate majorities.

4. Making international commitments:

a. Treaties

So far as they went, these arrangements for treaty-making were simple and obvious enough. But they left open one fundamental question on which sharp differences of opinion soon arose: how far, under a system of limited powers, was the treaty power to be regarded as extending? Could treaties deal with matters outside of those constitutionally committed to the national government? Could a treaty open a way for Congress to exercise legislative powers not otherwise possessed? Approaching the matter from his strict-construction, states'-rights viewpoint, Thomas Jefferson sought to establish the view (1)

Scope of the treaty power

that the Constitution's provisions on treaty-making merely set forth a procedure for exercising granted powers and are not themselves a substantive grant; (2) that the president and Senate have no right to employ treaties as means of evading constitutional restrictions generally applicable to the government; and (3) that treaties entailing extraconstitutional legislation should not be negotiated. Throughout most of our history a different view has prevailed. The Supreme Court has recognized the treaty power as extending to "all proper subjects of negotiation between this government and those of other nations," regardless of the Constitution. President Theodore Roosevelt, in 1906-07, in effect invoked it to compel San Francisco to admit Oriental children to its public schools—certainly a matter ordinarily for state or local control. When, in 1918, Congress, in pursuance of a treaty with Great Britain authorizing agreements between the United States and Canada for the protection of migratory birds, enacted a stringent measure on the subject, the Supreme Court fully sustained the law (Missouri *v.* Holland, 225 U. S. 416), on the ground (1) that while control of bird-life is, of course, not a power which is expressly conferred upon Congress, it is a proper subject for treaty agreement, and (2) that treaty-making is one of the many powers which the "necessary and proper" clause authorizes Congress to implement by legislation. Significantly, in order to be supreme law of the land, acts of Congress must be "made in pursuance" of the Constitution, but treaties simply "under the authority of the United States."

**The Bricker amendment debate**

Jefferson's doubts about the validity and wisdom of a treaty power so broadly defined have found staunch modern advocates. In the period since World War II this issue has reappeared in national politics with an unexpected vigor. Participation by the United States in numerous international organizations has involved us in negotiations looking toward the conclusion of treaties or conventions on a wide variety of subjects. Among the subjects, human rights appears to have awakened the gravest concern that the treaty process might be used to confer power on the national government which has heretofore been regarded as reserved to the states. Led by Senator Bricker, Republican of Ohio, a nation-wide campaign was carried on for many months in favor of an amendment to the Constitution which would restrict the treaty power to those subjects on which the national government has express authority. This campaign, largely supported by Republicans, appears to have reached its peak in 1954 with a determined effort by the Bricker group to drive an amendment through the United States Senate. Numerous versions of an amendment which might achieve the stated purpose were fashioned in an effort to compromise disagreements. The Eisenhower administration gave little aid or comfort to the Bricker plan and Democratic Senators, in general, lined up against it. The Senate debated the matter for weeks early in 1954 but when the matter finally came to a vote the language had been so modified that little of the original proposal was left. The final vote was one short of the necessary two-thirds. The Democrats took control of the Senate in 1955 and have shown no interest in reviving the matter. The Bricker proposal, it should be

added, was aimed also at alleged abuse of the executive agreement, about which more will be said later. One result of the Bricker amendment debate was the declaration by Secretary of State Dulles that the administration had no intention of agreeing to the proposed international covenant on human rights and would, therefore, not submit it to the Senate. The Bricker amendment controversy also illustrates the strong determination by some groups in the Congress to strengthen the hands of the legislature in the field of foreign affairs. President Eisenhower, on his part, declared that as originally proposed the amendment would shackle the hands of the executive in the conduct of foreign policy.

Presidential initiative in treaty-making

The language of the Constitution seems to associate the Senate with the president throughout the entire process of concluding and ratifying a treaty. Passages in *The Federalist* indicate that this is what the framers had in mind, and President Washington actually began his treaty-making (with certain tribes of Southern Indians in 1789) on that assumption, several times visiting the Senate chamber for the purpose. A year or two of experience demonstrated, however, that it was more practical and expeditious for the president to negotiate the treaty and to seek the Senate's "advice and consent" only afterwards—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. 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 (or secretary of state acting for him) may, and usually will, in advance or during the course of a negotiation, consult with individual senators. 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 senators can then do by way of registering disapproval is to attach amendments making it necessary for the president to renew negotiations with a view to securing the foreign government's acceptance of the proposed changes; or, in the case of a great multilateral agreement on which negotiations could not well be reopened, to assent to ratification but attach reservations designating various features of the agreement as not to be held binding on the United States. When a treaty is completed under presidential direction, he 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. Indeed, even after the Senate has given its consent, a treaty still may be held up. It remains for the president to ratify it, and, upon being appraised of ratification by the other government (or governments), to promulgate it; and he has the option of refusing to take these last necessary steps, although naturally he will do so only under very unusual circumstances.

The role of the Senate

Until the last decade or so many of those most conversant with American dealings abroad had been generally critical of the role of the Senate in treaty-making. They regarded the typical senator as largely disinterested in world politics, and, therefore, not wholly suited to the participation in the treaty powers required by the two-thirds rule. They pointed especially to the refusal of the Senate to concur in the arbitration treaties negotiated by many secretaries of state in the period 1897 to 1912, the Senate's scuttling of American participation in the League of Nations in 1920, and its refusal to approve the protocol for adherence to the World Court in 1926 and again in 1935. Most of these critics proposed easing the two-thirds rule or expanding the president's authority to enter executive agreements on his own. On the other hand, the Senate has in fact approved more than 80 per cent of all treaties submitted to it since 1789 and has disapproved none since 1935. Furthermore, the ease with which the president obtained approval for our participation in the United Nations and for the tradition-shattering military alliances of the "stop Russia" epoch have largely abated these criticisms.

Execution and termination of treaties

Once duly ratified by the governments concerned and proclaimed by the president, a treaty becomes, from the international point of view, a contract between the United States and the nation (or nations) constituting the other party, and from the domestic point of view, an extension of the law of the land, supreme and enforceable like any other portion of the law. 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 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 the 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 such 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.

b. Executive agreements

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. In some instances, for example, postal conventions and trade agreements (the lend-lease agreements of the World War II period also), such agreements rest upon authority conferred in advance by blanket act of Congress. Others, however, are concluded by the president (directly or through agents) without such authorization—sometimes in pursuance of a treaty, sometimes as com-

mander-in-chief of the armed forces, and occasionally simply as chief executive and supreme representative of the country in its dealings with foreign states. If they are submitted on Capitol Hill at all (as some are) it is not to the Senate alone, as in the case of treaty, but to the two houses for approval by majority vote in each. Furthermore, such agreements may be upheld by the courts as "supreme law of the land" (U. S. *v.* Pink, 315 U. S. 203), and the limits to which the president may carry them are nowhere defined. Many agreements deal with minor matters that, by their nature, do not call for a treaty—for example, pecuniary claims of American citizens against foreign governments. Others relate to affairs of considerable importance, for example, the Hay "open door in China" notes of 1899, the armistice of 1918 with Germany, the Roosevelt agreement to turn over 50 overage destroyers to Britain in 1940 in return for leases on bases in British Caribbean territories. Such an agreement may be frankly a means of evading the necessity of going to the Senate with a treaty. In 1905, President Theodore Roosevelt worked out a treaty with Santo Domingo specifying that the United States should guarantee the security of that republic and take over the collection of its customs duties 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 the desired lines. For two years the protectorate was maintained on this basis. In 1907, a treaty making the arrangement regular was at last assented to and ratified. In 1911, President Taft entered into a similar agreement with Nicaragua, not replaced by a treaty until 1916.

Congress and executive agreements

The development of the executive agreement had gone so far that by 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.[2] 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 lease 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, the State Department, under presidential direction, began concluding agreements with 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 long-term obligations for the United States, the State

[2] W. McClure, *International Executive Agreements* (New York, 1941).

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 branches of Congress, in the year mentioned, passed resolutions asserting that American participation must be by such "constitutional processes," which, in Senate phraseology, were expressly defined as meaning Senate approval by regular two-thirds majority. In 1945, the Charter of the United Nations was duly submitted to and approved by that body—as were also the Marshall Plan for aid to Europe in 1947, the North Atlantic Pact in 1949, the agreements with West Germany re-establishing its independence in 1955, and the "Pacific Area" alliances. The understandings entered into by President Roosevelt with Stalin and Churchill at Teheran and Yalta have frequently been attacked on the grounds that the Senate was never asked to consent to them.

The rapid extension of the executive agreement procedure has in recent years been appreciably slowed down by opposition in the Senate. Pointed up again in the debate over the Bricker amendment, Congressional hostility to the procedure has made both the Truman and the Eisenhower administrations much more cautious. No important financial commitment or agreement affecting foreign policy directly in the past several years has been entered into by the executive alone without congressional or, at least, senatorial approval.

c. Joint resolutions

A third recognized method of achieving international settlements takes the form of a joint resolution passed by simple majorities in the two branches of Congress and approved by the president. When initiated by the chief executive to implement some international agreement which he favors, and duly enacted by Congress, the procedure of joint resolution is hardly distinguishable from that followed when an executive agreement is negotiated and submitted. In the case of a joint resolution, however, Congress itself may take the initiative—though in any event action at the White House, as in the case of a bill, is a necessary final step. More than once in our history, a joint resolution, requiring mere congressional majorities, has been resorted to when the treaty-making process, calling for two-thirds in the Senate, broke down. Under such circumstances, Texas was annexed in 1845 and Hawaii in 1898; probably the Philippines would have been annexed in 1898 in the same way if the Senate had not at the last, and by a narrow vote, decided not to reject the annexation clause of the Treaty of Paris. It was by joint resolution, too, that war with the Central Powers was terminated in 1921, after the Treaty of Versailles had failed of ratification, and that in 1934 President Roosevelt was authorized to accede to Part III of the Versailles Treaty establishing the International Labor Office. The warning to the Chinese Communists of the American position in the dispute over the offshore islands (Quemoy and

Matsu particularly) was declared by joint resolution in 1955 and the announcement of our policy in the Middle East in 1957 was also supported by Congressional resolution.

The extensive costs of and the large commitments undertaken in connection with our modern foreign policy have raised the problem of the proper roles of Congress and the president in its most acute form. Senatorial balking at the executive agreement system, the Bricker amendment, the demands of the House for a more important voice in foreign affairs, all are symptoms of the modern struggle over who is going to shape foreign policy. The President, meanwhile, has continued to assert his pre-eminence in this field and has given little, in any formal sense, away to his congressional critics. The very fact, however, that successful defense of the national interest abroad seems to demand huge expenditures has given Congress a new strength in the procedure that it did not possess to the same degree in earlier epochs.

## FORMULATING AND CONTROLLING FOREIGN POLICY

Has the United States a foreign policy?

The foreign policy of a nation has been defined as "the courses of action undertaken by authority of the United States in pursuit of national objectives beyond the span of jurisdiction of the United States." [3] Every action taken by our government in dealing with other governments presumably reflects a policy. The sum of these actions at any given time is our foreign policy. This definition distinguishes the policy from the *objectives* sought by the government and from the *principles* which may underlie the objectives and policies. Disturbed by the shifts and turns that have characterized the dealings of the United States with other nations over the years, some people have charged that the country really follows no consistent principles, but merely zigzags from position to position as the rough winds of international politics toss the ship of state about. Undoubtedly it is true that our physical isolation in times past, our traditional aloofness from European affairs, and our preference for avoiding long-term commitments seemed for generations to manifest a rather negative attitude on many matters of concern to other nations. Undoubtedly it is true, too, that officers and agencies engaged in managing our dealings with foreign governments have been prone to feel their way through situations as they arose, to make choices and decisions as they went, and to leave behind them records of performance not always remarkable for continuity and consistency. Even aloofness, however, and preference for meeting situations as they arise, constitute policies; and actually we have had not only various broad over-all objectives of our foreign policies in different periods in our national history, but plenty of generally recognized and often cogently asserted aims toward particular countries and situations.

Complicating factors

The entire matter of foreign policy is, indeed, one of the most perplexing that students of our government—to say nothing of our public officials—encounter. First of all, there is the extensive array of other nations, large and

[3] C. B. Marshall, *Department of State Bulletin*, Vol. 26 (1952), 915.

small, near and far, with which, singly and collectively, relations must be sustained. Then there are the bewilderingly numerous and complex factors—geographical, economic, technological, military, psychological, and ideological—that have to be taken into account. Further, there is the circumstance that, while certain primary axioms or principles may and do govern, there can be no single, all-embracing global policy, but instead must be actions and objectives of many sorts, on many different subjects—threads, perhaps, in a skein, but of different color and texture. Still further is the complicating fact that foreign and domestic affairs are not two separate and independent national concerns, but on the contrary are always intermingled. "External affairs" may sound like something remote and even isolated. Usually a little examination will reveal them to be closely connected with interests and objectives that we have at home, and attitudes and policies concerning them to be dictated, or at least colored, by such interests and objectives. The world scene, too, is constantly changing, at times very rapidly; far from remaining static, foreign policies must change with it; and this adds to the complexities which the student of the subject must be prepared to meet. Finally, from the time when the Federalists favored the quasi-war with France in 1798-1801 and the Jeffersonian Republicans opposed it, political parties more often than not have disagreed on the aims of foreign policy. The rather remarkable record for interparty co-operation in this field achieved at Washington since 1945 has been exceptional rather than typical.

*Who makes foreign policy?*

Under our American system, the determination of the objectives of our foreign policy is not the function of any single branch or department of government, or even exclusively of government at all, since public opinion has much to do with it. Within the government itself, the Department of State plays a major role. It provides much of the information and advice on which all policy-making in this field rests. The Defense Department has contributed actively, occasionally even fashioning policy in particular situations independently. The Treasury, Commerce, Agriculture, and Interior Departments—not to mention independent establishments like the United States Tariff Commission, the Maritime Board, the Export-Import Bank, and the Atomic Energy Commission—also make contributions. Congress, on its part, takes a hand—enacting legislation, voting appropriations, declaring war—not to mention, of course, the role of the Senate in connection with foreign service appointments and treaty-making. Indeed, it would be difficult to mention many agencies in Washington that do not, at some time or other, in one way or another, directly or indirectly, have at least some modest share in providing the information, supplying the incentives, or formulating the plans lying back of one phase or another of the foreign policies developed.

*The role of the president*

The supreme architect of foreign policy is, however, the president. Even when he is not the actual 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 swerved it. 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 economic opportunity in that country, he inaugurated a line of policy which, under the more familiar name of "open door," became, and long remained, the cornerstone of 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. This in turn gave way to the "good neighbor" policy instituted by President Hoover and amplified by his successors. 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 and actions in the Far East interfering with the territorial or administrative integrity of China or with equal opportunity for trade 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. 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. 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. Usually without consultation with Congress, policies were further determined and declared throughout the war, frequently as a sequel of conferences with spokesmen of allied states, as at Teheran, Cairo, and Yalta; and step by step, with the President leading, the way was prepared for emergence of the present United Nations. Early in 1947, President Truman enunciated the "Truman Doctrine" calling for aid to nations threatened by Soviet aggression. In 1948, he committed the United States to military assistance for Western European states; and in his 1949 inaugural he announced the "Point Four" program for technical help for underdeveloped areas. President Truman also, on his own responsibility, ordered American troops to aid the United Nations in resisting aggression in Korea in 1950. The policy of sharing atomic materials with other nations for peaceful purposes was announced by President Eisenhower on behalf of this nation in 1954. He also proposed the "open skies" armament inspection plan to the Russians at Geneva in 1955.

When a foreign complication arises, or a new international problem presents itself, it is the president (speaking directly or through his secretary of state) who has the first opportunity to say what the attitude of the nation shall be. 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 change the course that he has set. He may even lead the nation into war; for although he cannot declare war, he can adopt an attitude or create a situation that may make war unavoidable.

*Congressional limitations and controls*

Nevertheless, the president does not play a lone hand, or always have his own way. Rarely can the policies which he formulates or sponsors achieve their purposes unless accepted and perhaps financially implemented by Congress. They may be completely thwarted by lack of congressional support. 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 momentous 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 vigorous and important standing committees in each of the two branches is the committee on foreign relations. Other standing committees, too—appropriations, banking and currency, agriculture—touch foreign policy at various points; and special committees may be set up to investigate phases or consequences of presidential policy-making. From any of these directions may come criticisms or recommendations eventuating in decisions making it necessary for lines of policy to be abandoned or sharply altered. Finally, too, whatever funds may be required for carrying presidential policies into operation are obtainable only through appropriations voted by Congress. For example, in 1947 President Truman would have been unable even to start doing anything very tangible about fending off the spread of Russian domination in Europe and the Near East unless Congress had been willing to appropriate the $400 million requested for aid to Greece and Turkey as the first step in the program.

As we have noted, the energetic assertion of presidential leadership in the field of foreign affairs during most of this century has stimulated a vigorous reassertion of congressional rights. For fifteen years, said Senator George (Democrat of Georgia) in the debate in 1951, there has been a "notable drift toward the delegation of authority by Congress to the executive." The State Department and the president have both had to tread with greater caution in the last few years than for several decades. The congressional committees on foreign affairs have been called into consultation in advance of important international conferences or of important decisions in the foreign field more and more frequently.

*The role of public opinion*

Back of both president and Congress stand the people. Although the backward state of popular information on and interest in the affairs of distant

nations reflects an older, perhaps happier, era, in the last analysis no long-term program of foreign policy can be carried out that lacks the support of the voters. "No matter," ex-Secretary of State Hull once 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 and leaders in Congress must ascertain, study, and assess public opinion; failing to do so, they may easily be betrayed into embarking upon a course of action 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 often are bewilderingly intermingled, and economic, ethnic, or other interest groups, such as business, labor, and religious bodies, may pull in diametrically opposite directions. Nevertheless the successful president or secretary of state must somehow keep within the limits of public tolerance and understanding.

## AMERICAN FOREIGN POLICY

The development of our foreign policy

The objectives of American foreign policies have changed sharply through the years since independence. At first we were largely preoccupied with securing our continental domain from powerful assault from Europe. Then we enlarged our interest to embrace the entire Western Hemisphere, the independence of which we sought to protect against any European imperial ambition. After the Civil War, we gradually enlarged our horizons as our export trade became increasingly important to our fast growing industry. We were ultimately lead into imperial expansion and a "place in the sun," thus emerging onto the stage of world politics as a "power" to be reckoned with alongside of the Western empires. World War I ended in disillusionment and was followed by an unsuccessful effort to withdraw into our continental home. The crash of European democracies and the rise of German and Japanese warlords brought us again strongly into the international scene. The end of World War II saw us leading the way toward a new international order based on an organized effort to preserve the peace. Victory for the allied armies also ushered another new power onto the stage: Soviet Russia. And the postwar world has witnessed the division of the great powers and many smaller ones into two armed camps, Russia and her satellites and the United States and its allies. Between or outside of these two power centers several nations and peoples strive to maintain a precarious neutrality.

Contemporary American foreign policy is largely built around two major objectives: (1) to preserve a system of international collective security through the United Nations and its related agencies; and, (2) to contain Russia and communist influences within their present boundaries.

## PARTICIPATION IN INTERNATIONAL ORGANIZATION

Miscellaneous multilateral relationships

The foreign relations of the United States have never been entirely confined to direct and separate dealings with other nations individually. To begin with, they have been operated within a framework of international law, which, although often honored in the breach rather than the observance, is a matter of more or less general international acceptance and agreement. It clearly is not a creation of the United States or of any two or three nations alone. In the second place, many international agreements in the past have been multilateral, that is, shared by a considerable number of states: for example, the Versailles Treaty at the close of World War I (which we failed to ratify), the Washington treaties of 1922 relating to China, and the London Treaty of 1930 on the limitation of naval armaments. Such treaties or conventions have on several occasions been concluded at diplomatic meetings or conferences in which the United States was represented along with other states. As world affairs have grown more complex, the number and importance of such meetings have increased. There are also numerous international bureaus, commissions, councils, unions, and other establishments to which the United States has become a party, often in pursuance of some multilateral convention or agreement. Even before a new galaxy of such agencies sprang from World War II and the United Nations, official government manuals listed 70 such international bodies in which the United States was participating or to which it was giving financial support. These ranged from an International Hydrographic Bureau, an International Bureau of Weights and Measures, and a Universal Postal Union to the International Labor Organization created as an autonomous part of the League of Nations at the close of World War I and the Organization of American States (more commonly known by the name of its secretariat as the Pan-American Union), dating from 1890 and linking up 21 republics of the Western Hemisphere for purposes of friendly co-operation. Organizations of the kind come and go; but the United States still bears some responsibility for more than 70 international organizations of various types, many within the orbit of U.N. but others quite independent.

The League of Nations

Agencies of the sorts mentioned are specialized forms of international organization. Of a different order, however, is international organization as represented by the now defunct League of Nations and by the more recently established United Nations. With the relations of the United States to the ill-fated League, most people are now familiar. Conceived in the fertile brain of President Wilson and organized on a pattern which he largely devised, the intended universal association of states for the preservation of peace was probably foredoomed by the refusal of our Senate to assent to our membership. After a checkered career of 20 years it collapsed under the weight of global war which it had been powerless to prevent. Even though outside, the United States could never hold completely aloof from the League's activities. We employed observers at Geneva, 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 performing League functions, and eventually (1934) joined the League-sponsored International Labor Organization, although persistently refusing to adhere to the Permanent Court of International Justice ("World Court") which the League set up.

The United Nations:

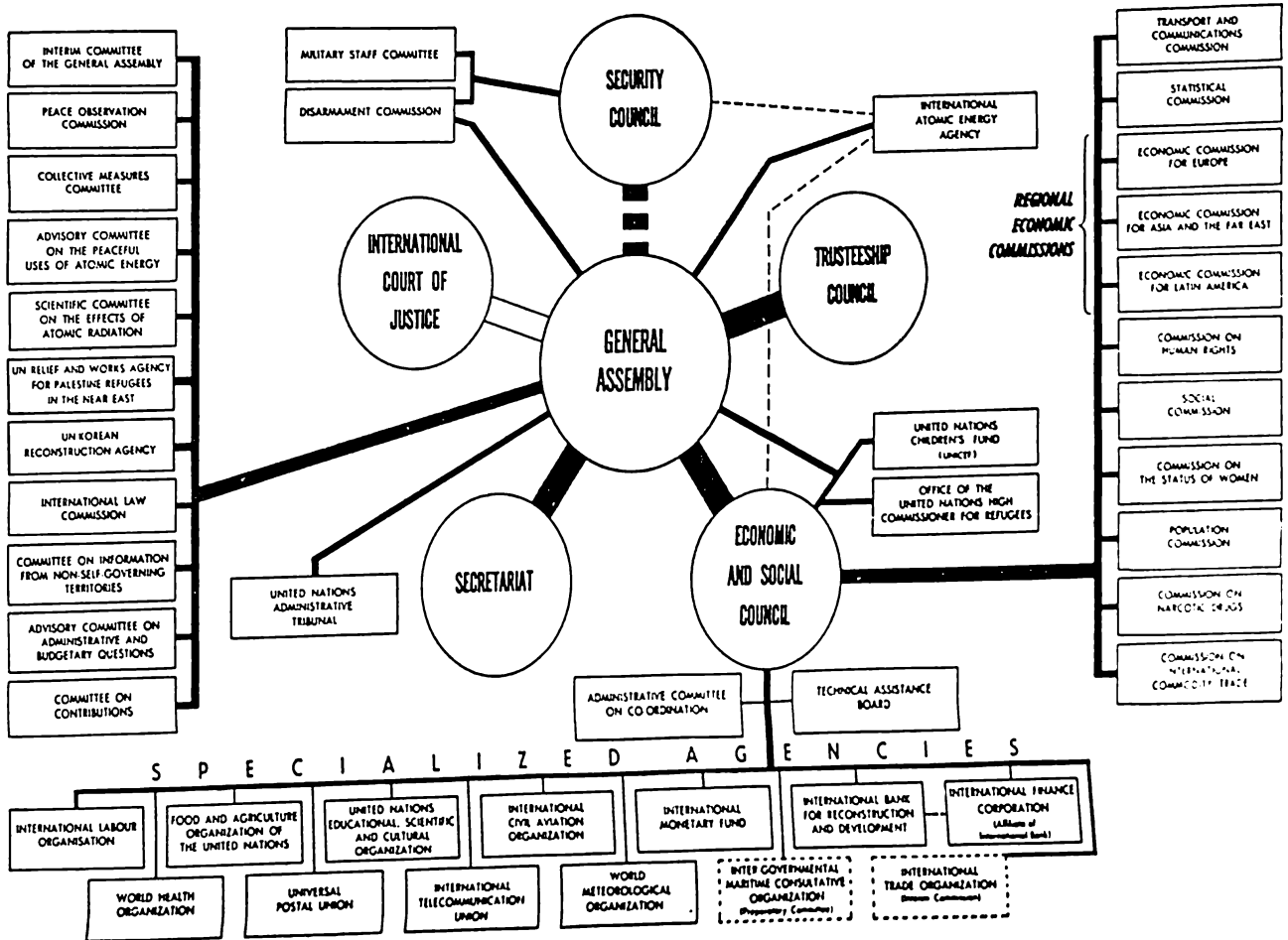
The most significant participation of the United States in international organization has come as a result of the challenging experiences since 1940. After one of the most extraordinary reversals of national attitude and policy on record, the country now finds itself in many respects the key member of the most imposing international association or union known to history, namely, the United Nations. With the idea of such an organization growing in sharpness of conception and in public interest and support, preparations went on quietly in government circles at Washington for almost two years before representatives of the four leading Allied powers were gathered in conference at Dumbarton Oaks (an historic Washington estate) in August, 1944, to draw up a plan. Two months of work resulted in proposals stirring wide and generally favorable discussion, but leaving difficult problems still to be settled. After some of the most thorny of these—relating especially to voting procedures—had been freshly canvassed by the leaders of the "Big Three" at the Yalta conference of February, 1945, responsibility for carrying the plan to completion was devolved upon a more general international conference convened at San Francisco on April 25, 1945. In this historic gathering, the Charter of the United Nations was written and signed by delegates of 50 different nations. There had been, in a sense, a "United Nations" from as far back as January, 1942, when representatives of 26 nations, meeting in Washington, adopted a "declaration" binding their states to co-operative military action against the Axis powers. Basically the United Nations subscribed to in the Charter by these same states and others was designed to perpetuate that association into times of peace and convert its function from waging war to preventing it. In any event, the new plan was quickly accepted and implemented. Transmitted by President Truman almost as soon as signed, the Charter swept through the Senate (July 25, 1945) by the extraordinary vote of 89 to 2. Other governments acted with such alacrity that upon adherence of the U.S.S.R. in October, the American secretary of state was able to announce the Charter adopted; and the first U.N. instrumentality brought into operation, the General Assembly, began functioning at London early in 1946. Doubts about the constitutional competence of the treaty-making authority to put the country into an organization that might require it to wage war had troubled many senators and other people in 1919. In 1945, constitutional problems did not seem very important.[4]

1. Origin and nature

[4] See E. S. Corwin, *The Constitution and World Organization* (Princeton, N. J., 1944), published while plans for U.N. were being formulated, and attributing full power to the national government in the matter and in the field of foreign relations generally.

The U.N. Participation Act of 1945 did, however, contemplate that Congress would share with the president the determination of when armed forces of the United States might be employed.

# ORGANS OF THE UNITED NATIONS



2. Organization

There were people, when the Charter was framed, who would have been glad to see the traditional national-state system discarded and some form of "world government" instituted. A step as revolutionary as that was not seriously considered. The new organization, like the League before it, became legally only a voluntary contractual arrangement among states retaining full sovereign equality and exempt from any international intervention in matters within their several separate jurisdictions. Originally, there were 51 such states; later admissions have brought the roll to a total of 82.

**MEMBER NATIONS OF THE UNITED NATIONS GENERAL ASSEMBLY**

**(as of Sept., 1958)**

| | | |
|---|---|---|
| Afghanistan | Ghana | Nicaragua |
| Albania | Greece | Norway |
| Argentina | Guatamala | Pakistan |
| Australia | Haiti | Panama |
| Austria | Honduras | Paraguay |
| Belgium | Hungary | Peru |
| Bolivia | Iceland | Philippines |
| Brazil | India | Poland |
| Bulgaria | Indonesia | Portugal |
| Burma | Iran | Rumania |
| Byelorussia | Iraq | Saudi Arabia |
| Cambodia | Ireland | Spain |
| Canada | Israel | Sudan |
| Ceylon | Italy | Sweden |
| Chile | Japan | Syria |
| China | Jordan | Thailand |
| Colombia | Laos | Tunisia |
| Costa Rica | Lebanon | Turkey |
| Cuba | Liberia | Ukraine |
| Czechoslovakia | Libya | Union of South Africa |
| Denmark | Luxembourg | U.S.S.R. |
| Dominican Republic | Malaya | United Kingdom |
| Ecuador | Mexico | United States |
| Egypt | Morocco | Uruguay |
| El Salvador | Nepal | Venezuela |
| Ethiopia | Netherlands | Yemen |
| Finland | New Zealand | Yugoslavia |
| France | | |

It is possible here merely to list the principal organs through which the U.N. operates: (1) a deliberative and advisory General Assembly—a "town meeting of the world"—embracing all of the member states each with from one to five delegates but only one vote, and meeting in regular session every September, with special sessions as needed; (2) a Security Council, more critically important because charged with primary responsibility for maintaining international peace and security, composed of five permanent members—

noncommunist China, France, the U.S.S.R., Great Britain, and the United States—and six nonpermanent members elected by the General Assembly for two-year terms, and in session almost continuously;[5] (3) an Economic and Social Council, reflecting the organization's concern with world-wide economic and social conditions and problems (especially as related, even potentially, to the causes of war), and composed of 18 member-states—now including the United States—chosen by the General Assembly for three-year terms; (4) a Trusteeship Council, charged with supervising the administration of trust territories (all formerly League mandates), and composed of six trustee member-states (including the United States) and six nontrustee states, either permanent or elective; (5) an International Court of Justice, similar to the now displaced League "World Court," composed of 15 judges elected by the General Assembly on recommendation of the Security Council, sitting in the Peace Palace at The Hague, and with all U.N. members (and other states so desiring) parties to the organizing "statute"; and (6) a Secretariat, servicing the principal organs (except the International Court) and the specialized agencies through some 4000 employees drawn from over the world, headed by a secretary general, and forming to all intents and purposes an international civil service.

3. U. S. agencies for U.N. participation:

a. A matter of foreign relations

What the United Nations does, essentially, is to provide a framework within which a nation carries on "foreign relations" with other nations through collective channels instead of in the traditionally nation-by-nation manner. Of course, direct and independent diplomatic relations between nation and nation on an individual basis continue—as do various unattached international commissions, bureaus, and the like. Although the theory is that virtually everything pertaining to the maintenance of world peace will be channeled through U.N., there still are quite independent international discussions and agreements of the highest importance. Indeed there not only is overlapping between two spheres of action—nation-by-nation and international organization—but possibility of confusion and conflict. The present point, however, is that a member-state's dealings within U.N. *are* foreign relations, to be carried on subject in general to the same constitutional checks and political limitations applying in the case of international dealings outside of the U.N. orbit.

b. Bureau of International Organization Affairs

This being the case, the agency within our government primarily responsible for U.N. relations is the Department of State. So broad, it is true, is the range of U.N. functions and activities that hardly a department or establishment in our government fails to have interests involved. Representatives of departments like Agriculture, Commerce, and Labor, and of establishments like the National Security Council and the United States Tariff Commission constantly advise State Department officers and representatives at U.N. meet-

[5] Here is where the famous "veto power" is encountered; on "substantive," as distinguished from "procedural," matters, no decision can be taken except with the concurrence of seven members, *including all five permanent members*. As one of the permanent members, the United States is no less in a position to block any U.N. policy or action considered objectionable than is the member whose vetoes have caused so much trouble, i.e., the U.S.S.R.

ings, with upwards of a dozen interdepartmental committees functioning similarly. It is on the State Department chiefly that responsibility falls; and there is where one must look for the machinery through which our U.N. relations are officially carried on. The first agency set up for the purpose was a rather casually created Office of Special Political Affairs. In 1948, however, this was replaced by a Bureau of United Nations Affairs (now called Bureau of International Organization Affairs), since developed into a main unit under its own assistant secretary of state and organized in five "offices" functioning on lines indicated by their names—(1) United Nations Political and Security Affairs (concerned broadly with affairs of the General Assembly); (2) International Economic and Social Affairs (having to do particularly with the interests of the Council of that name); (3) Dependent Area Affairs (concerned with the activities of the Trusteeship Council); (4) International Administration; and (5) International Conferences. As the Department's focal agency for U.N. relations, the Bureau of International Organization Affairs and its branches are expected to serve as the main channel between the Department of State and U.N. organs and agencies, to keep informed on all U.N. business and on the general state of international affairs, to make information available to all branches of the government concerned and to the general public, to review U.N. procedures and offer suggestions for improving them, and in general to promote the development of United States policies and programs pertaining to the peaceful settlement of international controversies. It is hardly necessary to add that, like all Department operations, these and other functions are performed in the name of, and subject to control by, the president.

c. Representation at U.N. headquarters

For purposes of representation at U.N. headquarters in New York City, there is—as in the case of most other member-nations—a "permanent mission," which with us consists chiefly of a "representative" or chief of mission and a deputy to him, a deputy representative to the Security Council, and representatives to the Economic and Social Council, the Trusteeship Council, and other organs and agencies, the whole staffed with a secretary general, certain advisers, and a secretariat equipped for year-round service. Delegations to the General Assembly, however, do not belong to the "mission," but are separately appointed (five delegates and five alternates, with the secretary of state serving as "senior representative") for each meeting. Under the terms of the United Nations Participation Act of 1945, the president reports in full to Congress every year on U.N. activities and on United States participation therein.

4. Official and popular attitude

Confronted with a world still in sad disorder, burdened with getting and keeping Western Europe on its feet, manifestly fated to spearhead the defense of the West against the spread of communist influence, and acutely aware of the new insecurity created by the atomic and hydrogen bombs, the people of the United States view the United Nations with mingled hope and disappointment: hope because within the limited period of its existence the organization has addressed itself earnestly to its great task and in certain situations has established a record of achievement; disappointment because of the blockages

interposed by Soviet vetoes, the palpable failures recorded at numerous points, and especially the lack of evidence that the fundamental objective of world security is being greatly advanced through U.N. operations. Our government continues to express faith in the organization, to take a leading part in it, and to give it loyal bipartisan support. As recently as June 1958, in reporting to the Congress President Eisenhower reaffirmed the dedication of this government to the U.N. and to the principles on which it was founded. On the other hand, the United States places less reliance than it ever did on U.N. as the sole hope for international peace and security. We do not hesitate to plan and carry out independent measures, or measures in concert with more limited international combinations, for attaining purposes which U.N. itself was created to attain. Whether because of preconceived ideas or of disgust with discords and weaknesses displayed, there still are plenty of skeptics who totally discount U.N. and any possible similar international device. At the other extreme are persons who, equally skeptical concerning U.N., believe that no genuine advance toward world security is possible until we have world government. Between are probably the majority of Americans, regarding isolation as dangerous if not impossible, world government as merely a "castle in the air," and U.N.—especially as now supplemented by regional organizations soon to be mentioned—as the best insurance against disaster that we have, or are likely to get, outside of our own independent defenses.

## RESISTANCE TO COMMUNIST AGGRESSION—"COLD WAR" WITH THE U.S.S.R.

*Not "one world," but three*

Amid the bitter experience of World War II, many thinking people, impressed with the technological annihilation of distance and the resulting close interrelation of activity, and even community of interest, of peoples everywhere, became enamored of the concept of a future in which there would be but "one world"—a world so knit together by moral, economic, and even political ties that thenceforth the follies and disasters of the past might be avoided. To a considerable extent, United Nations, as planned, reflected such aspirations. The unhappy outcome has instead, however, been a profound cleavage between *three* worlds—a sharp polarization of interests, policies, and power among a *bloc* of "free nations," mainly in Western Europe and the Americas, the U.S.S.R. and a group of satellite border states in Eastern and Central Europe and in Asia, and neutrals mainly in Asia. To United States foreign policy this situation has brought acute challenges and startling readjustments.

*U.S.S.R. aggression and intransigence*

When the U.S.S.R. absorbed the Baltic states in 1940, there were misgivings in this country; and, as indicated above, our government never has recognized those annexations. But for more than three years the Soviet Union fought as one of the allies against the Axis powers. It participated actively in planning and establishing U.N. and became a leading member. From Anglo-American-Russian agreements, notably at the Yalta conference of 1945, it

achieved recognition of its important status in the world and acceptance of many of its traditional ambitions. Hardly was the war over, however, before the former ally shifted to a policy of non-co-operation and aggression. Remaining in U.N., it repeatedly blocked needed action by use of the veto in the Security Council, and many times has "walked out" when displeased, as for example early in 1950 in protest against continued representation of Nationalist China. It has communized Poland, Hungary, Romania, Bulgaria, and Czechoslovakia, contrary in most instances to agreements made at Yalta, and has established satellite governments in all of these states. For a time it seriously threatened Greece, Iran, and other Near Eastern states by supporting uprisings against the established governments. It has brought border Asiatic areas under its control and supported the communizing of almost all of China. Unquestionably it encouraged and assisted the North Korean assault on the (South) Korean Republic in 1950. To many in the West it has seemed that the Soviet Union is bent upon the ideological if not physical conquest of Southeast Asia, India, all Western Europe, and perhaps, the world. Charging the United States, Great Britain, and other Western nations with "war hysteria" preparatory to attack on the Soviet Union, Moscow has isolated itself behind the "Iron Curtain" as a world apart. It has built huge armaments, and vetoed all proposals for bringing the strength of existing armaments into the open by a form of census. It has steadfastly opposed any type of effective international control of atomic weapons. Two worlds could not well be set over against each other more sharply and implacably than today's East and West.

**Significance for American foreign policy**

For the United States, as for many other nations, all this has forced a painful reorientation of policies. Our statesmen and people have come to the conclusion that American and Western security can be won only by strong methods, namely, by augmenting our own military might, by preparing for nuclear warfare if it cannot be averted, by developing U.N.'s hitherto latent military potentialities, by building supplementary regional defense systems—in short, by mobilizing the moral, economic, and military resources of the free world with sufficient vigor and effectiveness to "contain" Russian power, that is, to prevent it from overflowing its existing bounds and extinguishing Western institutions and culture. To this difficult and costly objective the over-all foreign (and much domestic) policy of our government in the past ten years has been directed.

**Expedients for containing Russian power:**

The turning point in American-Soviet relations came in 1947. The Moscow Conference of foreign ministers of the "Big Four" early in that year achieved not a single important agreement and ended all hope of the "friendly" co-operation for which we had been striving since 1945. Even while the conference was in progress, President Truman took the first large step to curb Russian expansion. In a message to Congress on March 12, 1947, he called attention to northern Greece, where protracted guerrilla operations under encouragement from Moscow were threatening a coup overthrowing the Greek government and delivering the country to communism. Such a coup if successful would put Russia on the Mediterranean and place Turkey and

1. Aid to Greece and Turkey

the strategic Dardanelles in an impossible position. To avert such a disaster, he proposed that the United States at once bolster local resistance by giving both Greece and Turkey liberal aid in the form of money, goods, military supplies, and military counsel. During vigorous and prolonged discussion in Congress and outside, it was objected that by such independent action the United States would be by-passing the organization ostensibly existing for dealing with such threats to world peace and order, the U.N. The President replied that the need was too urgent to permit of waiting for U.N. to organize measures, that the harassed countries had no place to turn except the United States, and that it was no disservice to U.N. for a powerful individual member to act unilaterally to maintain or create conditions favorable to the organization's ultimate mastery in the international field. Under an act approved May 22, 1947, the United States launched a program of assistance (an initial appropriation of $400 million was voted) to the two countries which has continued. Regimes friendly to the West were stabilized and the threatened subversion thwarted.

2. The Marshall Plan:

Hardly had the new idea of employing material aid to bolster war-torn nations against Soviet seduction gained the appellation of the "Truman Doctrine" before proposals were made to apply it to a vastly broader field. While Congress was still debating assistance to Greece and Turkey, the State Department published a significant study under the title of *The Development of the Foreign Reconstruction Policy of the United States*. A few weeks later (June 5, 1947) Secretary of State George C. Marshall dramatized the document in a commencement address at Harvard University, outlining an ambitious scheme for co-operative but mainly American assistance in a general rehabilitation of the sagging national economies of Western Europe. At the outset, the plan was not anti-Russian; on the contrary, the U.S.S.R. and its satellites were invited to participate in it. When, however, the invitation met with flat refusal, the project—promptly named by journalists the "Marshall Plan"—was fast reoriented as a phase of the Truman program for employing American resources and power to contain, or block, the Soviet Union's aspirations. The rationale of this program was that if tired, impoverished, and despondent Western peoples could be helped to their feet and given a vision of better things under a revived economy, the strong communist parties then operating in many nations would lose their appeal. In response to a request from Washington, 16 European governments conferred on the extent of their needs and on what they and their peoples could themselves do toward meeting them, arriving in the end at a four-year rehabilitation program under which the United States (mainly) was to be asked to supply goods, money, and credit to a total for the period of $22.44 billion. Warmly supporting the project, President Truman passed it on—under the name of the European Recovery Program (E.R.P.)—to Congress, convoked in special session. After debates carrying over into the following year, he was able, on April 3, 1948, to affix his signature to a Foreign Assistance Act, so named because embracing aid for countries outside of the 16 (e.g., China), but with the major part desig-

a. Origin and purpose

b. Adoption

nated as the Economic Co-operation Act. Congress was unwilling, however, to commit the Treasury for the full period of four years and the legislation was limited to a single year. To keep the project going, later continuing and amending measures have been necessary. To manage the enterprise, too, an independent establishment, the Economic Co-operation Administration (E.C.A.) was set up under an administrator appointed by the president and Senate, and with "economic missions" stationed in each co-operating country.

c. Results

Instead of four years, the program has now been going on for ten years. Something like $14 billion has been advanced to friendly European nations for economic reconstruction and rehabilitation and another $4 or $5 billion to nations in Asia, Africa, and South America. In the years after 1948, the program has been extended to other Asiatic nations and to Latin America. Since 1951, economic aid has been combined with military assistance and technical help both legislatively and administratively. E.C.A. was replaced by a Mutual Security Agency which in turn gave way—in 1953—to a Foreign Operations Administration. In 1955, the whole economic and technical aid program was placed in the State Department, where many had thought it should have been all along. There is no doubt that this vast outpouring of treasure greatly aided the economies of Italy, France, England, and the other allies and neutrals toward whom it has been directed. Each year, however, congressional criticism is vigorous and the economic aid program has been considerably reduced—in Europe it has been all but discontinued. The demands from abroad, however, continue. Some nations prefer trade to aid, but the American market continues to resist the introduction of European or Asiatic products.

3. "Point Four" and underdeveloped areas

In a notable "Point Four" of his inaugural address of January 20, 1949, President Truman called for "a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas." The areas in mind were those of more backward condition, largely in Asia and Africa—areas in which Western private enterprise (business, commercial, missionary, and the like) often has made scattered contributions, but which never before have been viewed as a field for concerted public undertakings. The President hoped that a program of timely assistance to such areas might diminish the appeal of communism. With its strident propaganda against Western "imperialism," the communist movement had been making striking gains in these areas. During 1948-49, the U.N. General Assembly discussed a long-range program of the kind, finally, in November, 1949, adopting resolutions inviting member-states to contribute to a co-operative budget for it. A congressional Act for International Development, in 1950, put the United States in the position of first to comply by authorizing a small appropriation ($30 million) for 1951. In recent years about $100 million annually has been authorized by Congress to support this program of technical aid.

Originally the administration of the technical assistance or "Point Four" program was entrusted to the State Department. It was transferred to the Mutual Security Agency in June of 1953 and then to the Foreign Operations

Administration later in 1953. In 1955, it was returned to the State Department. Under the program the United States has made available hundreds of trained technicians to assist the peoples of the world to raise their own standards of living. Some observers believe that this program, which is the least expensive of the aid programs, has produced proportionately greater results than any of the others.

4. The Atlantic Alliance

The communist coup in Czechoslovakia in 1948, transforming that unhappy country into a satellite of the U.S.S.R. solidified a growing conviction among the leading statesmen of Western Europe that Russia would not be content simply to consolidate its gains of World War II but was bent on continued expansion. Great Britain, France, the Netherlands, Belgium, and Luxembourg meeting at Brussels in March of 1948 joined together in a fifty-year mutual military alliance against aggression. American support was essential if the Western "bloc" was to constitute an effective barrier against Russian advance. President Truman spoke out bluntly to Congress calling for American support and enlarging on the Russian menace. Led by Senator Vandenberg (Republican of Michigan), the Senate adopted by a vote of 64 to 4 a resolution declaring that this country should by constitutional processes seek peace and security by the "progressive development of regional . . . arrangements for . . . collective self-defense." Early in 1949, the President submitted for Senate ratification a North Atlantic Pact uniting the five nations of the Brussels Pact with seven other nations of the "Atlantic community," in a defensive military alliance. Apart from the Inter-American Pact of 1947 uniting the nations of the Western Hemisphere in resisting aggression from outside, this was the first alliance of its kind seriously considered by the United States for more than a century. After extended hearings and debates the Senate approved American adherence by a vote of 82 to 13. The North Atlantic Treaty remains the cornerstone of contemporary American foreign policy in Europe. By this pact the twelve nations agreed that an armed attack on any one of them in Europe or North America is to be regarded as an armed attack against all; and if such an attack occurs, they will take action, including the use of armed force, necessary to maintain the security of the North Atlantic area. Greece and Turkey acceded to the treaty in 1952 and West Germany in 1955.

Strengthening the defense of Western Europe

The North Atlantic Treaty provides for continuing consultation among the signatories to develop ways and means, mainly military, for making the alliance formidable. A Council of Foreign Ministers of the participating nations and a Defense Committee of the Defense Ministers were specifically established in the treaty. In the fall of 1949, these organs formally began their work under the general title of North Atlantic Treaty Organization (N.A.T.O.). In 1951, General Eisenhower took command of headquarters established near Paris from which it was hoped to build a co-ordinated armed force of the units dedicated to N.A.T.O. by the various allies. The military forces which the United States might contribute to the joint endeavor became the subject of a lengthy debate in the Congress, largely over the question of the proper way in which the Congress ought to be involved in such a determina-

tion. The Senate, by resolution, in 1951 finally approved an increase of American divisions stationed in Western Europe from two to six, but suggested that congressional consent should be obtained by the president to the sending of any more.

All efforts to reunite Germany having failed, the most difficult problem confronting the Western allies was the role to be accorded friendly West Germany. The United States strongly urged the rearmament of the Germans and the inclusion of German divisions in the armed forces of the allies. The European victims of German aggression in World War II were, on the other hand, as frightened by a rearmed Germany as by an aggressive Russia. To America, the attempt to defend industrial Western Europe against a Russian advance with a hostile or possibly indifferent Germany seemed unthinkable. The leaders of N.A.T.O. finally in 1952 after months of negotiations worked out a series of treaties and agreements creating a European Defense Community (E.D.C.) of France, Italy, Belgium, Netherlands, Luxembourg, and West Germany under which would be organized a single European military force including German units. To this force would be added, under N.A.T.O., American and British armed forces as well as those of the other members not partners in E.D.C. At the same time the United States, Britain, and France (the occupying powers) agreed that virtually complete independence would be accorded West Germany as soon as E.D.C. came into existence. It was also agreed that the guarantees of the Atlantic Pact would in general be extended to West Germany. Most of the prospective members of E.D.C. ratified the treaties at once, but France and Italy postponed decisive action for months. Fully committed to E.D.C., the United States increased its pressure to the point that in 1953 Secretary of State Dulles threatened an "agonizing reappraisal" of our whole European policy unless France took action. The threat failed and the French parliament in August of 1954 rejected the treaties. The collapse of E.D.C. confronted the Western Allies with a critical situation and the leading statesmen at once set to work to repair the damage. In conferences in London and Paris in the fall of 1954 a new set of agreements was hammered out which it was hoped would obtain continental approval. These agreements: (1) invited West Germany to become a member of N.A.T.O.; (2) provided that Italy and West Germany would be invited to accede to the Brussels Treaty of 1948; (3) created a new organization of the Brussels pact states called a Western European Union and endowed this new organization with power to control the armaments dedicated to support of the Union; (4) provided for the restoration of full sovereignty to and an end of the occupation of West Germany; (5) provided for a substantial military contribution to N.A.T.O. by West Germany but with the size and character of this contribution carefully limited in deference to French anxiety over a rearmed Germany; (6) provided that West Germany renounce the right to manufacture atomic and nuclear weapons. Those agreements to which the United States was a party were submitted to the Senate late in 1954 and ratified by it April 2, 1955, by a vote of 76 to 2. The other nations, in their turn, also

The problem of Germany

ratified the pacts, France finally acceding after another set of agreements between it and West Germany over the Saar were fashioned. Although the completion of the network of agreements uniting the Atlantic states in a solid bloc did not of itself create the strong military forces ultimately contemplated by the Allies, the Russian attitude in Europe began to change perceptibly. A peace treaty was finally concluded with Austria in March, 1955, ending the occupation and restoring its sovereignty after years of frustrating negotiations. So conciliatory grew the tone of Russian diplomacy that a top-level meeting of the "Big Four" reminiscent of the late years of World War II was held in Geneva in mid-summer of 1955. President Eisenhower went so far in an effort to find a solution for the armaments race as to propose swapping blueprints and aerial photographs of defense installations with the Russians. No progress on any major issue—the status of Germany or disarmament—was made, however. Subsequent efforts to achieve disarmament agreements (1956), suspend nuclear and atomic weapons testing (1957), reduce military forces, and even, early in 1958, to have a new "summit" conference of the heads of state have all come to naught.

5. Military aid to friendly nations

Apart from an allusion to "mutual aid," the North Atlantic Pact obligates the United States to no program of military assistance. Such assistance, however, had been given Greece and Turkey since 1947 and Nationalist China over a longer period. No one ever doubted that American aid would be required by the more needy Atlantic Pact states if they were to rebuild their armies. No sooner, indeed, was the pact assured than a comprehensive and co-ordinated program of American assistance long in preparation was placed before Congress. President Truman was able to sign a Mutual Defense Assistance Act in October, 1949, carrying an appropriation of $1.314 billion mainly for the Atlantic Pact states, but also in relatively small amounts for Greece, Turkey, Iran, Korea, the Philippines, and the "general area" of China. Thus was launched the third great program of bolstering friendly nations against communist subversion or attack with American money. In the years since 1949, the program of military assistance has been expanded to include many other friendly nations. It now overshadows economic aid and technical assistance. To mid-1958 more than $16 billion had been advanced to rebuild armies all over the world. Several shifts in administrative responsibility for the program have occurred—similar to those characterizing the economic aid program. The Defense Department finally assumed virtually complete charge of it beginning in July 1955. Despite this great outpouring of treasure the N.A.T.O. armies had not by 1958 achieved the strength that many had hoped. France continued to be heavily involved in Algeria with the best part of its army and Britain had in 1957 launched an economy program aimed at reducing sharply her ground forces.

6. Armed resistance in Korea:

In one area thus far, namely Korea, Russian containment has involved the United States—as also the United Nations for the first time—in actual fighting. During World War II, the United States, Great Britain, China, and near the close the U.S.S.R., agreed that after the country's liberation from

Japanese rule. Korea should again become a free and independent nation. When Japan accepted defeat, it became a matter of convenience for Russian authorities to receive the surrender of Japanese forces in the Korean north and American authorities that of forces in the south; and for the purpose, an arbitrary dividing line was fixed at the 38th parallel. Before long, it became apparent that, quite contrary to American intention, the U.S.S.R. proposed to regard the division as permanent. Although Russian troops were alleged to have been withdrawn from the northern zone in 1948, every effort of the United States, supported by associates in the recent war, to bring about the creation of a free government for a united Korea was frustrated. In the north, a well-armed puppet communist regime—the "Democratic People's Republic of Korea"—arose under encouragement from Moscow. In the south, a Republic of Korea was established as an independent nation in 1948 after a free election held under the auspices of the United Nations—a republic promptly recognized by the United States and 31 other U.N. members, although barred by Soviet veto from membership on its own part. With the northern communist regime from the first claiming jurisdiction over the entire country, there always was danger that it would attempt by force to make its asserted authority good. On June 25, 1950, a military assault across the 38th parallel was launched with that end in view. A seven-man United Nations commission concluding investigations in the country at the time testified—as was well known from other sources—that the attack was entirely unprovoked and unjustified. At the request of the United States the U.N. Security Council instantly took notice of it, insisting upon an immediate cessation of hostilities, requesting all U.N. members to refrain from aiding the aggressors, and, as the situation grew worse, calling upon all to assist in repelling the invasion. Fifty-three of the 60 U.N. members joined in condemning the North Koreans' action, and in time more than 30 pledged material assistance in stopping it.

a. The U.N. moves to halt aggression

The military operations that ensued proved decidedly more prolonged, difficult, and costly than originally expected. With encouragement and assistance from both the U.S.S.R. and communist China, the invaders overran almost the whole of the South Korean territory. South Korea itself was not well organized or equipped for defense; the United States had withdrawn virtually all of its military forces from the country in 1949; American funds voted for Korean aid had not been fully or effectively used; for a time, poorly armed Koreans and handfuls of American occupation troops brought over from Japan could fight only delaying actions, with danger of being pushed into the sea. Calls of United Nations upon its members brought wide moral support and appreciable naval and air, with some ground, assistance. The bulk of the armed forces were supplied by the United States and with U.N. authorization were quickly thrown into action. By late autumn a successful conclusion of the operation seemed in sight—when suddenly the entire picture was changed by the entrance of communist China into the conflict; for a time gravely threatening total defeat for U.N. forces. The U.N. forces finally succeeded in driving the Chinese back north of the 38th parallel and there the

b. The role of the United States

battle lines were stabilized. Meanwhile, too, conviction that the Korean assault marked a new stage in the East-West tension of later years, a possible beginning of attempted systematic communist conquest of the free world, stirred the United States not only to new measures for seeing the Korean war to a successful conclusion, but, as described elsewhere, to a general and expensive program of rearmament.

*c.* The armistice

As the Korean struggle settled into a stalemate approximately along the 38th parallel a growing rift between the Truman administration and General MacArthur, the Commander of U.N. forces in Korea, burst into the open. The issue concerned the character and scope of American policy toward Red China. The General was anxious to push forward to complete victory in Korea by bringing military pressure on the Chinese in Manchuria and China if necessary even at the risk of an all-out war with China and perhaps with its ally, Russia. The administration, under grave pressure from its Atlantic Pact allies, was unwilling to push China too far. It feared that plunging our armies into a huge effort against the unlimited Chinese manpower would open Western Europe to the Russians. On April 11, 1951, President Truman relieved MacArthur of his commands in the Far East. The General returned somewhat in the style of a conquering hero, plunging the nation and the Congress into a violent debate over the administration's Korean policy. Truman held firm in the face of the bitter controversy and the congressional efforts of his critics ended inconclusively. Persuaded by a Russian hint and by an earnest desire to have done with the Korean "police action," the United States agreed to open armistice negotiations under the U.N. banner with the North Korean leaders in July of 1951. One train of patient negotiators after another debated over the table first at Kaesong and later at Panmunjom for month after weary month. By early 1952 agreement had been reached on all points save one—the repatriation of prisoners of war. There the truce talks bogged down for nearly a year. A new president, Eisenhower, in fulfillment of a campaign pledge visited Korea to try to end deadlock. In general, however, he gave support to the position of his predecessor. In April of 1953, the talks were resumed and, after a difficult period with the head of the South Korean Republic, Syngman Rhee, final agreements were concluded in July of 1953. A cease-fire accompanied by a withdrawal of the armies two kilometers from the battle-line and a voluntary repatriation of prisoners were the highlights of the settlement. A commission of "neutral" states was created to enforce the arrangements. A meeting of the South Koreans and their U.N. defenders with the North Koreans, Chinese, and Russians in Geneva in 1954 failed to find a more permanent solution and the armistice continues. Both Chinese and U.N. forces, however, have been withdrawn in large numbers from the war-torn peninsula.

*7.* Formation of Pacific alliances:

Korea turned American attention more forcefully than ever westward to the Pacific. The communist success in China had undone years of patient efforts by the United States in behalf of this strife-ridden and war-beset country. The Chinese communists immediately formed a close alliance with

their Russian sponsors and began to push their influence in Manchuria, Korea, and later Indo-China. The remnants of the defeated Chinese nationalists took refuge on the island of Formosa which with American help was transformed into a bastion against the advancing Reds. The Republicans seized on the loss of China to berate the Truman administration and every single act of omission or commission was scrutinized and analyzed to show ignorance and incompetence if not willful treachery by a group which had always been "soft," as the extremists put it, toward communism. No issue in recent years has lit such an emotional bonfire or produced such hysterical oratory as this. The MacArthur dismissal was, perhaps, the high point of the controversy, but the campaign of 1952 was filled with angry words. The election of President Eisenhower did not quiet the debate, for he soon felt obliged to part company with some of the staunchest critics of the Truman policies, including Senator Knowland, floor leader of the Republican party in the Senate. The issues in this controversy were and are complex but one of the major ones has been whether the gravest threat to American interests is in Europe, as the Truman administration seemed to believe, or in Asia as the Republican critics declared. In any event, no one thought Asia could be ignored or that the communist influence could be allowed to spread throughout the peoples of this area unchallenged.

The first major move in the Pacific, after the fighting began in Korea, was to strengthen Japan as a friendly fortress against the Soviet-Chinese advance. A peace treaty bringing to an end the enemy status of Japan was negotiated throughout much of 1950 and 1951 by John Foster Dulles, later to become Republican secretary of state, in collaboration with most of our Allies of World War II. At a conference in San Francisco in September, 1951, the treaty was formally approved by more than 40 nations invited to participate. Russia attended the conference but refused to sign the treaty when its proposals for amendments were rejected. The treaty imposed no penalties or disabilities on the Japanese except for loss of outlying possessions which had been anticipated. Sovereignty was restored to the nation but a Security Treaty signed with the United States at the same time permitted our armed forces to remain in Japan to help maintain the peace in the Far East and the security of Japan. This right was to continue as long as necessary. Both treaties were appropriately ratified and Japan attained formal sovereignty on April 28, 1952. The next major step in the build-up of the Japanese came in 1954 when the United States concluded a mutual defense agreement with Japan providing for the progressive rearmament of Japan with American aid. The Japanese promised in return to make the "full contribution" permitted by its resources to the defense of the free world. Economic and military aid began thereafter to flow from the United States to Japan.

a. Japan

Some of the victims of Japanese attacks in World War II were not anxious to build up this aggressive nation. To alleviate this anxiety the United States concluded with Australia and New Zealand a mutual defense pact. This pact, negotiated just prior to the Japanese Peace Treaty, provides (Article IV) that

b. Australia, New Zealand, Philippines, and Korea

"an armed attack in the Pacific area on any of the parties" would be regarded by each party as "dangerous to its own peace and safety" and each party promises to "act to meet the common danger in accordance with its constitutional processes." A similar treaty was also concluded with the Philippines at the same time. South Korea demanded similar guarantees as a price for accepting the armistice and early in 1954 such a treaty was ratified by the Senate.

c. Southeast Asia

The Red drive, stopped at the 38th parallel in Korea, now shifted to French Indo-China and after months of hostilities between communist-led northerners and French-supported southerners, this state, like Korea, was divided by international agreement at Geneva in the summer of 1954. The American secretary of state, Mr. Dulles, now sought to create in the whole Southern Pacific area a concert of powers and resources similar to N.A.T.O. Led by India, however, a major portion of the peoples of this area were determined to remain neutral in the communist-West conflict. The best that could be achieved was a union of Pakistan and Thailand with the Philippines, Britain, France, Australia, New Zealand, and the United States. A Southeast Asia Defense Treaty was worked out by these states at Manila in September, 1954. This treaty dealt with aggression against the territory of the signatories in about the same way as had the other Pacific mutual defense treaties. It extended the area of concern, however, to include the Indo-Chinese states of Laos, Cambodia, and South Viet Nam. It also attempted to deal with aggression by internal subversion. Threat of subversion from inside of any of the participating states is agreed to be a matter of concern for all and they promise in such a case to "consult together immediately" to agree on measures for common action. A Council and other appropriate implementing agencies are established to concert energies, resources, and policies. The United States Senate ratified the Southeast Asia Collective Defense Treaty in the spring of 1955.

d. Nationalist China

All of these defensive arrangements still left unsettled and undefended, except by the United States, the forlorn remnant of Nationalist China on Formosa and other islands nearby. The communists of China were clearly determined to conquer this last outpost of opposition on what they, and most of the world, regarded as Chinese territory. Britain did not recognize the Nationalist regime and, therefore, could not or would not agree to aid in its defense. During the Korean "police action," President Truman had ordered the United States Seventh Fleet to patrol the waters between Formosa and the mainland to prevent military action by either group of Chinese against the other. The Republicans in the campaign of 1952 vigorously assailed the Truman administration for its China policies. Many of the party's leaders demanded stronger measures in behalf of the Chinese Nationalists. President Eisenhower early directed the commander of the Seventh Fleet not to interfere with military action of the Nationalists aimed at the communists but to continue to protect the Nationalists. There was no indication, however, that nationalist leader Chiang Kai-shek was either willing or able to take the

offensive on his own behalf and with his own forces. With the conclusion of the Southeast Asia Treaty some kind of decision had to be taken about the Chinese Nationalist territories. Late in 1954, therefore, the Administration negotiated a mutual defense treaty with the Republic of China embodying the same type of guarantee as in the other Pacific treaties. The territories which were specifically recognized as within the scope of the commitments were the islands of Formosa and the Pescadores. Several Nationalist-held islands just off the mainland of China, including Quemoy and Matsu, were not expressly included. The United States was given the right to station its armed forces in and around the protected islands. The Chinese treaty was ratified by the Senate early in 1955.

The Formosa Resolution

During Senate consideration of the Chinese Treaty, the Chinese communists began making menacing gestures toward the offshore, Nationalist-held islands of Quemoy and Matsu. They also reaffirmed in belligerent tones their intentions of conquering Formosa. This was a bold stroke aimed at the territories whose situation was not covered by American guarantees. Unwilling to announce the intention of the government in advance, certain that we could not count on our European allies, especially Britain, uncertain of the real direction of the communist policy, and yet anxious to avoid a Korea which might be charged to him alone (the Republicans had designated Korea Truman's War), President Eisenhower went to Congress. He proposed a resolution by which Congress would authorize him to use armed forces in accordance with the pending treaty and to include the "protection of such related positions and territories" now in friendly hands as he felt the defense of Formosa and the Pescadores justified. Only three dissenting votes were cast in each house against the resolution. A sort of armed truce has been achieved in the Formosa Straits until late summer of 1958 at which time the communists on the mainland once again threatened Quemoy and Matsu. The President cited the resolution of 1955 as authority to defend these positions if necessary but at the same time accepted a Red-China offer to open negotiations in Warsaw.

To underwrite the effort to unite friendly Asiatic nations in an interlocking series of defensive alliances, the various programs of military and economic assistance already in existence have been extended to America's allies and to many of the neutrals in this area.

America in the Middle East

The critical theater of East-West struggle in the period 1955-58 was undoubtedly the Middle East. Here a resurgent Arab nationalism lead by Nasser, the dictator of Egypt, and aided by Russia had aimed its gathering strength against the remnants of European colonialism. France has been forced to pour out money and troops it could hardly spare to remain dominant in Algeria. The Suez canal was seized by Egypt in advance of the time the extant treaties called for its transfer. Syria and Iraq experienced internal upheavals which unseated governments friendly to the Western powers and Jordan and Lebanon were saved, perhaps only temporarily, by American and British troops landed in 1958 to bolster tottering regimes.

The Mid-East Resolution of 1957

American policy in this area was tentative and uncertain. We had encouraged but not joined mutual defense arrangements among Turkey, Iraq, Iran, Pakistan, and Great Britain concluded in 1955 at Baghdad. Despite our joining in the military planning of the Baghdad states in 1958, the *bloc* was torn in two by the pro-Nasser revolution in Iraq of that same year. We had turned against our European allies, France and Britain, when in 1956 they sought by force to recapture the Suez and then had to join them in 1958 by landing troops in Lebanon while Britain landed troops in Jordan.

As in Formosa, the Eisenhower administration sought advance approval from Congress for its movement of troops into this troubled area. Early in 1957, the President appeared before Congress and asked for a resolution authorizing him to furnish military or other aid to any nation in the general area of the Middle-East threatened by communist aggression. After several weeks of debate, the Congress approved by large majorities a resolution announcing that the "United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East." The President was authorized, on his own determination of necessity, to use armed force to assist any nation requesting it against armed aggression from any communist-controlled nation. However, the Congress insisted that it be allowed to terminate the commitment by concurrent (not subject to veto) resolution when it saw fit. In 1958, this resolution was cited together with the request of help from Lebanon in support of our moving troops into this troubled land.

Despite these various actions, we have rather consistently sought to strengthen the role of the U.N. in mediating the disputes in the Middle East. At the time of the troop movements, Eisenhower appeared before the General Assembly pleading for a U.N. protective force in this area and offering to withdraw our own forces when the U.N. might provide adequate guarantees against border raids and hostile infiltration from Nasser-dominated states into pro-Western states.

## ADMINISTRATION OF FOREIGN AFFAIRS—THE DEPARTMENT OF STATE

The policies and objectives just described can be achieved only through an effective administrative organization. It is appropriate, therefore, to conclude this chapter with a description of the executive agencies which handle our foreign affairs. Many departments and agencies are concerned but none is so clearly in the center as the Department of State.

1. Beginnings

After experimenting with first a "committee on secret correspondence" and afterwards a "committee of foreign affairs," the Continental Congress projected, and early in 1781 the Congress of the Confederation created, a "department of foreign affairs"; and in 1789 this establishment became the first of three to be taken over as a unit of the new government under the Constitution. Finding it useful to assign the department various duties having

little or no connection with foreign relations. Congress within two months reorganized it as the Department of State. This more general name it has ever since retained—although "home" functions have since, in virtually every instance, been reassigned elsewhere (the last surviving important ones to the newly established General Services Administration in 1949).

2. Functions

Subject always to presidential direction and control, the secretary of state and his subordinates perform tasks falling into four major categories. First comes the gathering of all information necessary to enable the president primarily, but also other officials, Congress, and even to some extent press and public, to keep abreast of national policies and international situations throughout the world. Means employed to this end are many and varied, but with heaviest reliance upon our diplomats abroad and foreign diplomats stationed in Washington. Second comes service as the principal executive agency, under the president, for formulating and implementing our own foreign policies, and for handling essential matters like extradition, passports and visas, and communications and records. A third is representing the United States abroad through the Foreign Service, carrying on negotiations with other governments individually, bilaterally, and in international organizations like the United Nations, negotiating treaties and trade agreements, and protecting the life, property, and asserted or established rights of American citizens beyond our borders. And fourth is the increasingly important function of interpreting American institutions, conditions, and policies to governments and peoples abroad. This function has been merged recently into broad programs of international cultural activities such as that sponsored by the United Nations Educational, Scientific, and Cultural Organization (UNESCO). At the very minimum, the State Department must stand ready at all times, in peace or war, to formulate (with the president) any policies which the protection or promotion of American rights and interests abroad requires, and to employ all of its resources in carrying them out. Foreign governments and their representatives normally communicate with our government, and in turn receive its communications, only through the Department of State—although the president, on his part, may and occasionally does communicate with them through conversations at the White House, through personal agents sent abroad, by transoceanic telephone, and in very unusual situations even in conferences on foreign soil.

3. The secretary of state

Although only one of the executive departments (Labor) is smaller, the Department of State is, in the geographical sweep of its activities, the most extensive of all. It is indeed the long arm by which the government reaches out to and deals with matters large and small, in countries far and near, in every quarter of the globe. So completely and uniquely, too, is it an agency of the White House that requests made of it by Congress are regarded as 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 first in line among the department heads in succession to the presidency. 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 have, like Jefferson and Hay, brought to the office actual experience in diplomacy. The roster of incumbents since 1789 has, however, been adorned with enough honored names—Jefferson, John Marshall, Madison, John Quincy Adams, Clay, Webster, Calhoun, Seward, Blaine, Hay, Root, Hughes, Stimson, Hull, George C. Marshall—to have invested the secretaryship, like the presidency itself, with a lofty tradition.

4. Departmental organization

Many circumstances combine to render the internal organization of the Department exceptionally fluid, and a detailed description probably would not long hold true. The most recent of numerous reorganizations in late years was started in 1949 in pursuance of recommendations offered by the Hoover Commission, and has since been going forward intermittently under wide discretionary authority granted the Department head. Principal features of the structure now (1958) to be observed are: (1) an under secretary of state (serving as acting secretary when his chief is absent or incapacitated, and likely to be, next to the secretary, the most influential member of the Department); (2) three deputy under secretaries for administration, political affairs, and economic affairs; (3) a number of upper-level specialized officers such as the counselor and the legal adviser; (4) a battery of 10 assistant secretaries heading main branches, in four instances of a geographical nature, that is, Inter-American Affairs, Near Eastern, South Asian, and African Affairs, European Affairs, and Far Eastern Affairs, and in other cases functional, that is, congressional relations, public affairs (international information, educational exchanges, and the like), economic affairs and International Organization affairs; (5) under each assistant secretary (where appropriate), varying numbers of "offices," sometimes geographical and sometimes otherwise; and (6) under each office of a geographical nature, varying numbers of "country desks" staffed with officials charged with matters pertaining to a particular country within a given area. At the top level, the secretary of state is advised by a policy-planning staff created in 1947 for the formulation of strategy in foreign relations. With the world situation as it has been in the last 20 years, one will not be surprised to learn that the State Department personnel have increased more than 500 per cent in the period.

5. The Foreign Service:

a. Status

Department machinery thus far outlined is localized in the national capital. Operations are carried on, however, over the entire world; and the agency through which this distant work is performed is the Foreign Service. Traditionally, and as regulated under a comprehensive Foreign Service Act of 1946, the Service—while auxiliary to the Department—was largely autonomous under its own director general, advised by a board representing four of the executive departments. As the Hoover Commission observed, however, relations between the Service and the Department suffered seriously from jealousies inspired by salary differentials, social distinctions, and other inequalities. Following the Commission's recommendation, the congressional act of

1949 providing for State Department reorganization made the Service an integral part of the Department, administered by the deputy under secretary for administration under direct responsibility to the secretary of state, and with the former director general now merely a staff member and adviser. In earlier times, too, the Service, instead of being a single establishment as it now is, was really two: diplomatic and consular. Each had not only its own functions but its own personnel, its own salary scales, and transfers between the two were rare. For many years the feeling grew that the wall separating the two ought to be broken down, and after numerous proposals had fallen by the wayside, the Rogers Act of 1924 accomplished the desired reform. 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; and provision was made for assignment of recruits to either branch of the Service in which they happened at the time to be needed. In later days, this integration has been maintained; and the new status in the Department further strengthens it.

b. Composition

Viewed broadly, the Foreign Service consists of (1) "chiefs of mission," that is, ambassadors and ministers, who, however, are in various ways on a rather different footing from the remainder; (2) foreign service officers, in six classes or grades and holding titles of counselor, first, second, or third secretary, consul general, consul, or vice-consul (in a few instances even minister), according to their rank and the post they occupy; (3) foreign service reserve officers (also in six classes), appointed from other government agencies or from private life, and assigned to duty, as attachés or otherwise, for nonconsecutive periods of not more than four years each; (4) foreign service staff officers and employees (in 22 classes), including all other American personnel, and consisting mainly of administrative assistants, accountants, clerks, stenographers, typists, receptionists, translators, couriers, and guards, and assigned and transferred to posts abroad as needed; (5) alien clerks and employees, including interpreters, custodians, chauffeurs, porters, and the like, and appointed in the field; and (6) consular agents, usually local businessmen (American or foreign), designated for consular duty at places where it is impractical to maintain regular posts.

c. Appointments

Ambassadors, ministers, and foreign service officers are appointed by the president with the consent of the Senate; foreign service reserve officers, foreign service staff officers and employees, and consular agents by the secretary of state; and alien clerks and employees are chosen in the field subject to the secretary's approval. Like other government establishments, the diplomatic and consular services of earlier days suffered from the spoils system. Men of ability and experience sometimes were carefully selected for given positions, especially more responsible ones, but by and large appointments were likely to reflect mere personal or political favoritism. This situation was gradually improved through a system of merit appointments which now cover virtually

the whole staff of the department. Only the very topmost positions in Washington and the heads of missions abroad are now filled by partisan appointment.

d. Foreign service officers

A very important place in the system is occupied by the foreign service officer; and a word may be added concerning the manner of his selection. To begin with, the examinations which he must take are of such a nature that only well-trained college graduates, or persons of equivalent attainments, can hope to pass them. As a rule, the written tests, covering four general and three special fields, and conducted by the Civil Service Commission for the Foreign Service's board of examiners, are held throughout the country, are taken by from 600 to 800 young men and women, and are successfully passed by from 60 to 100. Among the successful at this stage half may be eliminated by the rigorous orals held later in Washington by the board of examiners itself. Candidates must be between the ages of 21 and 30, citizens of the United States, and previously designated by the board of examiners for a particular examination. Women are eligible, and since 1922 a few not only have met the tests imposed but later have received appointment. All successful candidates are recommended by the examiners for appointment to the lowest class in the foreign-service-officer bracket, their names being placed on an eligible list from which the president makes nominations to the Senate as required. All examinations being designed to test intelligence and capacity as well as immediate knowledge, foreign service appointees are expected to demonstrate fitness to advance from grade to grade; and promotions are based upon merit, with minimum periods of service in each particular grade.

The problem outgrows the State Department

Conduct of the modern foreign relations of the United States has long since spilled out far beyond the organizational arrangements, traditions, and practices of the Department of State. The brief review earlier in this chapter of the modern policies and aims of the United States in international relations indicates that we are conducting affairs abroad with our money, our goods, our soldiers, our engineers, our technicians, and our publicists as well as with our diplomats. The Defense Department is as concerned with our international commitments as the State Department. The Treasury is involved in a vast array of international fiscal agencies and agreements. Commerce and Agriculture seek markets abroad, give technical counsel to friendly foreign states, and in many other ways implement our determined effort to build a strong free world. The Justice Department controls immigration. Various independent establishments have administered part or all of our postwar programs of economic, technical, and military assistance to Europe and Asia. The Hoover Commission in 1949 found no less than 46 executive agencies to be more or less concerned with foreign affairs. All of this development has raised grave problems of co-ordination, of multiple and thus confusing representations to foreign powers, of adjusting our policies to our military capabilities or vice versa, and of making the authority and responsibility of the president effective. Several new co-ordinating devices have been attempted in recent years—interdepartmental committees of many varieties, advisory councils, added staff

assistance for the president. The most important of the new devices is surely the National Security Council created by the National Security Act of 1949 in the Office of the President to integrate diplomatic and military strategy. This agency is essentially a cabinet committee to advise the president, aided by a small staff, and its operation will be described in the next chapter. None of the devices has been completely satisfactory and the search for improvement still continues.

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# CHAPTER 25

# *Defending the Nation Against Attack*

Once a casual interest

Early resolution to keep out of Europe's wars did not save us as a nation from a threatened conflict with France in 1800 or an actual one with Great Britain in 1812. Nevertheless, by acquiring Louisiana and Florida we soon eliminated France and Spain as potential trouble-makers on our borders. After the final defeat of Napoleon, affairs abroad took a more peaceful turn; and for over 100 years we enjoyed a comfortable sense of national isolation and security. Wars with Mexico and Spain carried no serious threat; and although in 1917 we were drawn into the greatest armed conflict that the world to that time had known, we came off still effectively sheltered, as we thought, by our geographical location. In days which middle-aged persons can well remember, our Army numbered only 150,000, our Navy was better developed but not top-flight, and the national temper so averse to military expenditures that impressive defenses hardly could be maintained at all.

Now a paramount concern

Then dawned a period of great change. International turmoil gripped the world; technological developments robbed us of the protection of broad oceans; mechanized global war advanced in our direction and finally in 1941 overtook us; by rapid stages, defense, long a matter of only sporadic interest, became our paramount national concern—and defense no longer confined to prudent preparedness, but actualized in deadly combat on land and sea and in the air in every quarter of the globe. And this time there was no lapsing back into an easy feeling of security after the fighting was over. As after World War I, new international machinery was set up to prevent such things happening again. But there had been failure before, and might be this time too. Besides, an ominous "cold" war with the world's other principal power, the U.S.S.R., might at any time grow "hot." The new "absolute weapon" of atomic power, although as yet used only by ourselves, might presently be turned against us. In wars of the future, distance would mean little or nothing. In short the country had never been in so exposed a position, or so much in need of measures for protecting itself. In this situation, defense remained a paramount concern. Swollen budgets of four "peacetime" years devoted one dollar out of every three (an annual total of $14 to $15 billion) to promoting it. When, in 1950, a communist assault upon the Korean Republic brought upon us undeclared but difficult and costly war, we soon found ourselves back in the atmosphere of 1940-41—tripling military appropriations, increasing taxes, conscripting troops, imposing economic controls, and otherwise girding for an all-out international conflict. Even after a truce was patched up in Korea, the government continued to devote 60 per cent ($34 billion) of its

budget to national security, the draft of young men for military service continued, and 3 million men stood under arms. Then in 1957, the Soviet Union launched an earth satellite indicating that in the new field of rocketry and intercontinental missiles it was well ahead of our own progress. Defense budgets once again took a sharp upward jump to more than $40 billion. All indications are that for a good while to come, defense, under a war or semiwar economy, will be a major concern of our national government.

## SOME CONSTITUTIONAL PRINCIPLES

During the Revolution and the ensuing Confederation period lack of power of Congress to mobilize the fighting strength and material resources of the country with full effectiveness, and to deal promptly and decisively with domestic disorders, gravely imperiled the beginnings of the nation. The experience put the makers of the Constitution in a frame of mind to apply strong remedies. Into the new fundamental law they therefore wrote upwards of a dozen provisions which, taken together, provided every power at that time deemed necessary for defending the country, whether against Indian depredations, domestic uprising, or foreign attack.

1. Defense a national responsibility

To start with, full responsibility for defense was placed where it remains today, in the national government. The states may and do 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." Even the state militia may be called into the service of the United States, thereupon passing under supreme command of the president; and, as explained presently, the military establishments of the states have in later times, as the National Guard, become an integral part of the war machine of the nation. 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 that effort rests with the government at Washington.

2. Civil authority supreme over military

A second principle is equally fundamental. While solicitous about providing for defense, the framers of the Constitution had no desire to open a way for an overweening military establishment, or for the rise of military dictatorship. True, 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 should in all matters be subject to civil control. But they achieved the same end by so defining the defense and war powers of Congress and the president (civil branches of the government) as to set up safeguards against 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. The principle has been buttressed by custom and by statutory elaboration. The secretary of defense

must by law be a civilian; and firmly established practice makes the same requirement of the heads of the now subordinate Army, Navy, and Air Force Departments.

3. Constitutional limitations fully applicable

Finally, defense, like every other national function, must be kept within bounds constitutionally determined. Powers granted the president and Congress are broad and under stress of war tend to be stretched to their limits, if not sometimes a bit beyond. Moreover, Presidents Lincoln, Franklin D. Roosevelt, and Truman plainly viewed the war power as something over and above any particular power conferred, or in fact all such powers combined. Despite occasional appearances to the contrary, however, the Constitution is not suspended in wartime. The president, as commander-in-chief, is no more entitled to disregard its restrictions then than in days of peace.

## DEFENSE POWERS AND FUNCTIONS OF CONGRESS

1. Providing for the armed services

To begin with, Congress has sole power to "raise and support armies" and to "provide and maintain a navy." These things it does by specifying the number and kinds of troops to be enlisted, prescribing the method of recruitment, fixing scales of pay, authorizing the building and manning of war craft, providing for auxiliary facilities such as forts, arsenals, and dockyards, and of course by raising and appropriating money for the maintenance of military, naval, and air establishments. All of this is subject to the constitutional restriction that no appropriation for raising and supporting armies may be made for a longer period than two years. There is no lack of power to take any steps considered necessary (including conscription) to safeguard the nation in time of peace and to insure vigorous and effective prosecution of hostilities in time of war.

2. Enacting military and naval regulations

In the second place, Congress has unrestricted authority to make "rules for the government and regulation of the land and naval forces," and also "rules concerning captures on land and water." Resulting "Articles of War" for the Army and "Articles for the Government of the Navy" long were separate and subject to criticism not only for their lack of uniformity but for harsh features of the system of military justice for which they provided. Experience during World War II led to a general revision by a special committee of experts. In 1949, Congress enacted a new consolidated code, uniform for all of the armed services, and entitled "Military Laws of the United States."

3. Regulating the National Guard

Congress may provide for as large a standing army as it sees fit. Nothing is more certain than that the world situation will in future require a considerably larger one than in the past. Our earlier traditions, however, in common with those of English-speaking peoples everywhere, were opposed to any formidable army in time of peace, inclining rather, as a safeguard of freedom, to a volunteer citizen militia in each state with only such modest training and equipment as would enable it to cope with domestic disorder and to meet other relatively minor needs. All states have such militia, even though nowadays linked up, in a manner that would have shocked our ances-

tors, with the national defense establishment as the National Guard. State contingents of the National Guard still are primarily state instrumentalities, with (so long as not drawn into national service) appointment of their officers and provision for their training expressly reserved to state authorities. Congress nevertheless is authorized to "provide for arming and disciplining the militia," to provide for calling into national service any and all portions of it required for executing the national laws, for suppressing insurrections, or for repelling invasions, and to make rules for governing such forces when "employed in the service of the United States." In pursuance of these broad powers, Congress in an Army Organization Act of 1920 gave the president permanent authority to make use of the National Guard for emergency purposes, and has enacted numerous regulations aimed at increasing the establishment's effectiveness and co-ordinating its organization, training, and equipment with that of the Regular Army—in addition, of course, to contributing heavily to its financial support. When, as a phase of the national defense program launched in 1940, the entire National Guard was drawn into national service and placed in cantonments for training, Congress specified that it might be used only in the Western Hemisphere and in United States territories and possessions, including the Philippines. After war came, however, the restriction was removed, and Guard units, or at any rate the men who had composed them, were sent to all overseas theaters of operation. National Guard units again were called into national overseas service in 1950 in connection with our military operations in Korea.

4. Declaring war

Constitutionally, Congress alone can declare war. Hostilities may, of course, begin without a formal declaration, as illustrated by the war with Japan, starting in December, 1941. Even in such situations 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 directly attacked, the question of going to war shall 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 anything would be gained from the suggested procedure. With events moving as rapidly as they usually do, a plebiscite might not be practical; and momentary passions might make it even dangerous. The discretion of Congress in declaring war often is more theoretical than actual, not only because war may be forced upon us in spite of anything we can do, but also because the president, in conducting foreign relations, may bring the country to a point where no honorable alternative to war remains. Indeed, he may independently take steps leading to actual combat, as when President Roosevelt in 1940-41 (before Pearl Harbor) supplied naval escorts for merchant ships carrying "lend-lease" materials to Great Britain and other countries, resulting in armed clashes between American destroyers and German submarines. On the other hand, if Congress can declare war, it also can take

measures designed to avert it, a good illustration being the Neutrality Act of 1935 (later renewed and expanded) making it unlawful, with war in progress between two or more foreign states, to ship arms and munitions to the belligerents, as entailing risk of the United States being drawn into the hostilities. Congressional power includes also the power to terminate a war.

New aspects from international commitments

From 1950 to 1953, the United States was engaged in an armed conflict in Korea of sufficient proportions to disturb the entire national economy, yet with no war "declared" by Congress. Both houses gave full support but we came into the operation entirely through: (1) the president bringing the communist invasion of South Korea officially to the attention of the U.N. Security Council, (2) the latter calling upon all U.N. members to assist in repelling the invaders, and (3) decision by our own executive branch to comply by military means on any necessary scale. Article 43 of the U.N. Charter, requiring U.N. members to place armed forces at the organization's disposal for maintaining peace, already had created the possibility that if such forces actually were raised and used, the United States might some day find itself in a war not declared by Congress. The Korean eruption produced precisely such a situation. To be sure, no U.N. forces had as yet been organized. But to stop a communist aggression, the U.N. Security Council asked member-states to join in military resistance. Recognizing both our interest and our moral, if not strictly legal, obligation, the president (as agent for implementing our U.N. relations) put us instantly into action. In doing so he consulted with congressional leaders but never formally asked the approval of Congress. This procedure allowed Republican statesmen, notably Senator Taft, to charge executive usurpation and to refer to Korea as "Truman's War." As long, moreover, as U.N. serves the purpose for which it was created, the experience is not unlikely to be repeated. To this extent, the control of Congress over war by "declaring" it has been greatly reduced. In general, however, congressmen are jealous of their constitutional prerogatives in the matter and, as we noted in the last chapter, all of the great regional defense pacts to which the United States is a party, while requiring signatories, in case of attack upon any of their number, to consult and to take individual or collective action, have been so drawn as to leave the United States (and every other signatory) free to follow the constitutional procedure.

5. Mobilizing the nation for war effort

There was a time when, except in case of invasion, war was of no great concern 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 vast scale on which the mechanized wars of today are waged, however, makes them of hardly less civilian than military concern. When war comes or is imminently threatened, it is, as President Wilson remarked in 1917, "not an army that we must shape and train; it is a nation." Experience gained during both world wars revealed in startling manner the lengths to which Congress may go in reorganizing and regimenting the national 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 possesses 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 mobilizing industry, commerce, transportation, and even science and education. The method commonly is that of legislation delegating specified powers for the duration of the war (or other designated period), either with or without creation by Congress of new machinery for exercising them. In each field covered, the resulting system of controls is organized and administered by the executive branch. The underlying authority comes from Congress. While the courts often have looked with disfavor upon delegations of power by one branch of the government to another, developments during the two world wars indicate that under wartime stress and excitement Congress can go almost as far as it likes with such grants. Sometimes grants are made with little hesitation; at other times, only over strong opposition and at urgent presidential request. Occasionally, indeed—as, for example, when in 1944 President Roosevelt asked for power to conscript labor—they are refused.

6. 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, civil service preferences, 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 always been given recognition. Persons actually incapacitated, together with their dependents, have usually been conceded to have an indisputable claim to the nation's care. However, powerful political pressure brought to bear upon congressmen by veterans' organizations often has led to grants where the obligation was considerably less clear. So generous, indeed, has been Congress where veterans are concerned that between 1792 and 1930 national outlays on money pensions alone, regardless of land allotments in earlier days and of later heavy costs of hospitalization and medical treatment, reached a total of $15 billion. Today (1958), as part of the aftercost of World War II, the annual expenditure in behalf of veterans exceeds $5 billion. Benefits bestowed on veterans of the recent war in addition to the regular pension, rehabilitation, and hospitalization systems, have included government aid in carrying protection originating in in-service war-risk insurance; opportunity to acquire on favorable terms surplus war property disposed of by the government; increased preferential eligibility for employment in the civil service; continued monthly payments for a period after honorable discharge; terminal leave pay for all wartime furlough periods not actually used; generous support for high school, collegiate, and professional education; and assistance in acquiring a home, business, or farm. The entire national program of veterans benefits is now administered by one of the largest independent establishments in the Executive branch, the Veterans Administration. This agency now em-

ploys more than 180,000 persons and operates 172 hospitals capable of bedding 122,000 patients.

## DEFENSE POWERS AND FUNCTIONS OF THE PRESIDENT

The president as the central figure

The authority of Congress manifestly underlies our entire system of national defense. Without it there would be no army or navy, no money, and only imperfect means of mobilizing the nation for a defense or war effort. The central figure in defense, and especially in the conduct of war, is nevertheless the president. During its three great wars of the last hundred years, the nation had in the White House chief executives—Lincoln, Wilson, and Franklin D. Roosevelt—who would have loomed large in history in any event. All gained stature, however, from guiding the country's destinies amid a supreme war effort. Each of these men also added something to the concept of the office of the presidency, partly in each case as an outgrowth of ideas of the defense powers.

Sources of his defense powers

Whether in peace or in war, every president, however, has significant defense powers and functions, accruing from (1) his constitutional status as chief executive, (2) his constitutional role as commander-in-chief, and (3) grants, or delegations, by Congress. In all that he does, even under stress of war, a president is presumed to keep within limits of authority coming to him from one or more of these sources. But he does not always have to be prepared to justify an action by citing any particular one of them. President Franklin D. Roosevelt rarely considered it necessary to indicate in other than very broad terms the basis of specific war powers as he exercised them, leaving it rather to others to speculate, if they chose, upon whether, in the case of any given act or order, he was relying principally upon his permanent peacetime powers as chief executive, or upon his status as commander-in-chief, or upon statutory grants.

The powers of the president as commander-in-chief were explored in an earlier chapter. There remains, however, the difficult and highly controversial subject of committing the nation to war to be elaborated here.

The president and the beginning of war

In his conduct of foreign relations the president may create a situation making war virtually inevitable. In the course of stormy negotiations with Mexico in 1846, President Polk ordered American troops to advance into territory then in dispute with that country. 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 blew 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 United States to a situation where the only alternative to a declaration of war upon Germany would have been national stultification. And later, 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. Congress could, if it liked, declare a war to which the president was opposed, and he could attempt to avert it by interposing a veto. With the possible exception of the War of 1812, however, all of our wars have been declared at presidential request.

The effect of our alliances and our U.N. membership

The extensive moral and legal obligations of the United States arising from its participation in the U.N. and from the numerous mutual defense treaties to which it is a party and the large armed forces constantly available for deployment around the world have added a new dimension to this problem of taking the nation into war. Congress, as we observed in the previous chapter, is demanding a larger share in presidential decision-making in the area of international military undertakings. The debate over the Korean police action and over the "Troops for Europe" Resolution in connection with N.A.T.O. revealed congressional discontent with what it called growing executive domination in these matters. Another recent effort to shape an appropriate relationship between Congress and the president in committing the United States to a position which might easily result in war was the Formosa Resolution of 1955, described in the previous chapter. In the course of the congressional debate over the resolution requested by President Eisenhower, a number of the Democratic leaders took the position that legally the resolution was unnecessary. The president, they said, already had the power to command the armed forces to defend Formosa or the offshore islands of Quemoy and Matsu. The resolution they regarded simply as a means of showing the Chinese communists that the nation was united in its determination to prevent their further expansion. Many other congressmen, mainly Republicans, took the position, however, that by requesting this resolution the President was acknowledging his obligation to consult Congress on such a momentous decision and was, thus, reversing the pattern of several decades. The President's message and the reports of the committees which considered the resolution evaded this explosive question. The fact that the President did ask for the resolution will certainly be cited in future situations to justify congressional participation. The resolution itself, however, left the President a free hand to use force or not to defend the Nationalist-held islands. Very much the same pattern was followed in 1957 in the Middle East Resolution. In this case, too, the president was left free to determine when or where troops might be used. In this case, however, the Congress reserved the right to terminate by its own action the commitment contained in the resolution.

The president in wartime

In time of peace, the president performs the normal functions of chief executive in connection with defense interests and activities substantially as in relation to other government services. It is when war comes that he rises to the full stature implicit in the sources and forms of authority above described. Subject to restrictions by Congress (which almost certainly would

not be imposed in the midst of conflict), he can send all branches of the armed forces anywhere that he chooses, and use them as he desires. 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 is he so desires. 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 appointed agents, exercise all executive powers there, and all legislative powers as well until Congress makes different arrangements. Meanwhile, availing himself of broad grants of emergency authority already on the statute book, or voted by Congress in response to White House requests unfailingly made, he can carry out sweeping programs of armed recruitment, civilian mobilization, and economic controls. Indeed, the object in modern war being to discover and make effective all national potentialities as speedily as possible, and at the same time to break down the enemy's power of resistance, control over the use of the armed forces inevitably broadens into the general function of taking whatever measures may be found necessary to those ends. As a former secretary of war phrased it, the commander-in-chief's duty is nothing less than to prosecute a war "to the fullest extent."

## ORGANIZATION FOR NATIONAL SECURITY

Former separate defense administrations and services

Until of late, defense organization in the United States was notoriously lacking in integration. At the top, the president as chief executive and commander-in-chief supplied a measure of unity. But the War (later Army) and Navy Departments were entirely separate; the armed services whose affairs they managed were not only separate but often un-co-operative and even antagonistic. In making appropriations and enacting defense legislation, Congress rarely considered Army and Navy needs at the same time or in much relation to each other. In earlier and simpler days, the disadvantages of such disunity often were apparent but usually not serious, and little was done toward overcoming them. We emerged from our wars successfully, and the country was satisfied. Even World War I brought no significant change. World War II, however, was different. In the first place, its magnitude and complexity were unprecedented. Secondly, it demonstrated that for the attainment of objectives in such a conflict there must be a wholly new type of collaboration between land, sea, and air forces. Finally, at its end we were confronted with a world situation making it indispensable that we permanently maintain an armed establishment far larger than ever before in peacetime and organized and integrated for a maximum of efficiency at a minimum of what must in any case be stupendous cost.

National Security Acts of 1947 and 1949

From far back, there had been intermittent proposals to merge the War and Navy Departments into some form of defense department. Later the rapid development of air warfare led some people to suggest moving in the opposite direction and setting up a separate department of military (and perhaps

civilian) aviation. World War II at last drove home the idea that basic reorganization must no longer be delayed and that it must be in the direction of all-around integration. After two or three years of lively bickering among the Army, the Air Force, and the Navy, each of which had a plan of its own, and with the Truman administration sturdily urging action, Congress eventually, in 1947, passed a comprehensive National Security Act following the Navy plan in broad outline and providing for a defense reorganization outstripping any in all our previous history. The defense set-up about to be outlined rests principally upon that piece of legislation as amended in the direction of further co-ordination by two enactments: (1) one, two years later, entitled National Security Act Amendments of 1949 stemming largely from recommendations of the Hoover Commission; and (2) the other, the Defense Reorganization Act of 1958. President Eisenhower also made some changes in the structure by a reorganization order in 1953.

1. The Department of Defense

In pursuance of the announced objective of "integrated policies and procedures for the departments, agencies, and functions of the government relating to the national security," the Act of 1947 undertook to gather substantially everything into an administrative and advisory structure known as the National Security Organization, with a National Military Establishment as its core and a National Security Council and a National Security Resources Board on the periphery. The National Military Establishment represented a major innovation, because its creation marked the first time that the previously separate War and Navy Departments were joined under any directive authority other than that of the president. Since, however, the Departments named (with the War Department rechristened Department of the Army, and with a new Department of the Air Force added) retained most of their previous autonomy, the change was more apparent than real. An entirely new official—a secretary of defense, appointed by the president and confirmed by the Senate, and with only civilians eligible—was introduced and charged with (1) establishing general policies and programs for the National Military Establishment and for all component departments and agencies, (2) exercising "general direction, authority, and control" over such departments and agencies, (3) discovering and eliminating unnecessary duplication or overlapping in their activities, and (4) advising with the departments and agencies in the preparation of their budgets and formulating a single, unified military budget for consideration by the Budget Bureau, the president, and eventually Congress. The "Establishment" (largely a paper affair) did not have the true character of an executive department and the secretary of defense, although seated in the cabinet—as the heads of the three service departments were not—found himself possessed of prestige but very little else. Combined with the service departments' characteristic love of autonomy, the old traditional fear lest one man be given too much power in military matters had operated to cause the secretary to be given too little. In practice, the "general" authority over the department given him very nearly evaporated. He could not appoint or dismiss (except within his own very limited staff); he could not enforce orders; he could not

reorganize: even his control over budgets proved to be merely nominal.

Changes in 1949

The principal objective of the amending act of 1949 was to remedy this unhappy situation. The ethereal National Military Establishment was discarded, and in its place was put a single executive department, the present Department of Defense, officially ranking second only to the Department of State. In line with this, the secretary was given powers commensurate with those of other department heads—his principal limitations being that he may not abolish any of the established functions of the Army, Navy, or Air Force or merge any portions of the armed services. Logically enough, the act also transferred the National Security Council and the National Security Resources Board to the Executive Office of the President.

Reorganization Act of 1958

Demand for even greater subordination of the three services to the Secretary of Defense was one of the off-shoots of general dissatisfaction with American progress in missiles, rockets, and space satellites. Failure to keep pace with the Russians was blamed, in part, on the continuing interservice rivalries and the lack of clear cut assignments of these new weapons to any service. President Eisenhower strongly urged Congress in 1958 to change our defense organization by entrusting greater authority to the Secretary of Defense. Congress responded half-heartedly with the Department of Defense Reorganization Act of 1958 which did give the Secretary power to transfer, abolish, and reassign defense functions but made his orders subject to Congressional veto. The Act also gave the Secretary the power to assign new weapons or weapons systems and created a new Director of Defense Research and Engineering under the Secretary. The Act, however, expressly withheld power to merge any of the military departments or services or to establish a single Chief of Staff for all the services.

The "military departments"

The legislation of 1949 reduced the Departments of the Army, Navy, and Air Force to their present status of so-called "military departments." The Department of the Army is charged with responsibility for organizing, training, maintaining, and equipping the United States Army, and with various subsidiary functions such as directing the Corps of Engineers in improving waterways, formulating and executing plans for flood control, constructing national monuments and memorials, and operating the Panama Canal. When it shall have divested itself (as now intended) of all insular administration, the Navy Department will have no functions not directly connected with the Navy itself. Taking over most aeronautical functions from the War Department, the relatively new Department of the Air Force already has developed extensive machinery concerned with substantially everything relating to not only the Regular Air Force, but to an Air Reserve, and Air National Guard, and an Air Reserve Officers Training Corps. All three departments undergo occasional organizational changes, but in general operate on lines not widely different from those familiar in the War and Navy establishments before 1947. All have the basic task of maintaining firm central and civilian control while promoting the military capacities and energies for which the respective—and still separate—armed forces under them exist.

Staff agencies

At the top level, the Defense Department is rounded out by two staff agencies designed for planning and policy determination: (1) the Armed Forces Policy Council (since 1949 replacing a former War Council), advising the secretary of defense on broad policy matters and regarded as the topmost policy group in the Department; (2) the Joint Chiefs of Staff, originating during World War II and having as its province all matters pertaining to military strategy. The Joint Chiefs of Staff have become more and more the principal military advisers of the president as well as of the secretary of defense.

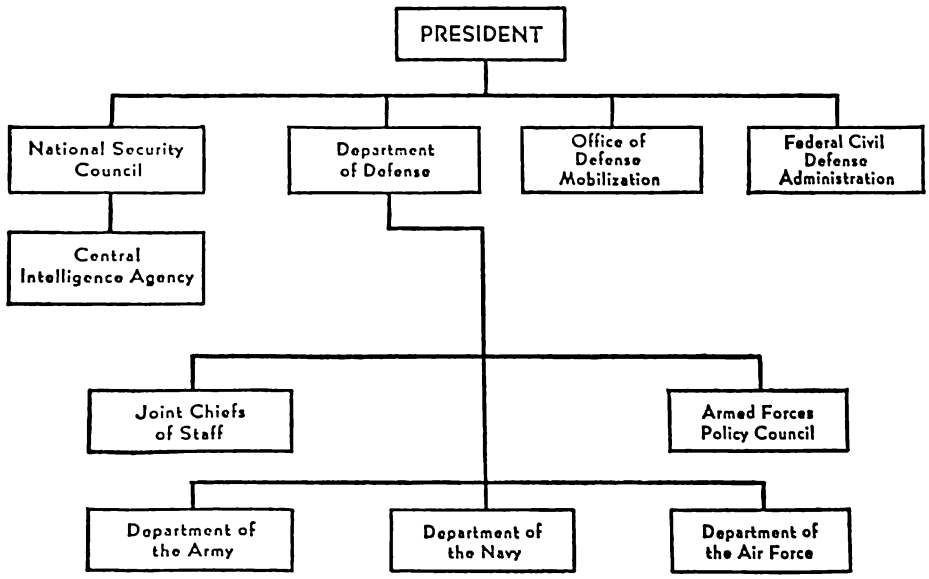
2. The National Security Council

With the secretary of defense supplying the principal point of contact, the Department of Defense is the arm of the president for purposes of national security in its military, naval, and aeronautical aspects. To provide broader basis for decisions involving defense the National Security Act of 1947 introduced two other major agencies already mentioned, the National Security Council and the National Security Resources Board, both placed in 1949 in the Executive Office of the President. Of the two, the first is the more important, because its task is nothing less than to formulate for the president the collective advice of all appropriate officers and agencies of the executive branch on the integration of domestic, foreign, and military policies in any manner touching the national security. In addition to the president as chairman, the members include the vice-president, the secretaries of state and defense, and the director of the Office of Defense Mobilization, who from their different official environments can bring together foreign-policy, military, and economic viewpoints, with indeed the financial also contributed by the secretary of the treasury sitting, not as a member, but as a regular participant by presidential invitation. Meeting normally twice a month (with the president usually absenting himself in the interest of freer discussion), the Council thrashes out large questions of national security and through its secretariat keeps the chief executive currently informed on all its discussions and decisions. Under the direction of the Council is a Central Intelligence Agency (C.I.A.) to co-ordinate the intelligence activities of the various defense agencies and to supply the Council and the president with information necessary to their decisions. In the reorganization of 1953 an Operations Co-ordinating Board—made up of the deputies to the leading cabinet participants—was added in the interest of more effective follow-up on decisions. The Council does not itself determine policy. That is for the president to do, on the basis of Council advice, which, however, he is free to accept or reject, in whole or in part. Here is the major instrumentality for achieving high-level correlation of the nation's foreign objectives, commitments, and risks with its military and economic capacities.

3. Office of Civil and Defense Mobilization

Success in war depends heavily upon a nation's economic preparedness, or at any rate upon the speed and effectiveness with which the economy can be converted to war production. Deeply impressed by World War II experience at this point, the authors of the Security Act of 1947 provided a National Security Resources Board to investigate into and plan for correlating foreign and military policy with natural resources and economic capacity. The Board was replaced in 1953 with an Office of Defense Mobilization (changed in 1958

## ORGANIZATION FOR NATIONAL SECURITY




to Office of Civil and Defense Mobilization). Into this new agency in the Executive Office of the President were gathered the functions of the Board and functions of a previous Office of Defense Mobilization created incidentally to the outbreak of war in Korea. This office now directs economic and manpower mobilization plans and programs. It also advises the president on all policy questions in these fields.

4. Federal Civil Defense Administration

The greatly increased possibilities of breaching American defenses from the air, combined with the perfection of weapons of awesome destructive power, encouraged the president and later the Congress to create a new agency of government to prepare our industrial areas for attack. The Federal Civil Defense Administration was established in 1950 first in the Office of Emergency Management in the Executive Office and later by Congress as an independent executive agency. This agency is charged with developing, in co-operation with state and local authorities, plans for the protection of our civilian population in case of enemy air attacks. Grants are made to states for equipment and materials for approved projects. Since 1953, this agency has also been assigned responsibilities for administering national disaster relief programs of certain types.

## THE ARMED FORCES

Problems of providing an adequate military force

Creating an effective military force has always been a troublesome problem for democratic countries and especially for the United States. A large standing army of professional soldiers has been particularly objectionable to our people. We have normally been unwilling to create a people's army of conscripts in peacetime by a system of universal military training such as the European democracies use. For much of our history we have not accorded

the military career the kind of prestige which would assure a continuing supply of able and ambitious men to serve in uniform. We have preferred to rely on the volunteer system to staff our peacetime forces and to use conscription to bring these forces to fighting strength when war threatens. The present-day military requirements of the nation have placed a severe strain on traditional ideas and practices. Technological changes in weapons and equipment have suggested longer training periods and highly specialized instruction. Volunteering has been able to staff relatively small military forces. The small cadre of professional soldiers is inadequate to lead and instruct the sizable forces now deemed necessary. Entering another great armed conflict with largely unprepared soldiers, as we have always done in the past, is almost unthinkable. Our statesmen are still wrestling with these problems. Few believe that the practices and policies now followed are wholly satisfactory.

**The Army:**

**Regular Army**

The heart of the modern Army of the United States is a relatively small cadre of professional soldiers—officers and men—designated as the Regular Army. This is the old "peacetime" Army of the pre-World War II period. Just prior to the outbreak of war in Europe its effective strength stood at about 188,000, of which 14,000 were officers. The officer corps is largely trained at West Point, although it includes many trained at other public and private military academies and colleges and men who have risen from the ranks. In any event, the elite of the corps are West Point graduates. West Pointers are selected by congressmen, usually on the basis of vigorous physical and mental examinations, under a system designed to insure wide geographic, economic, and social distribution of the appointees. The size of the officer corps was more than doubled shortly after World War II in an effort to accommodate the "peacetime" army more nearly to the international situation which has confronted the nation since that time. The Army and Air Force Authorization Act of 1949 fixes the officer corps of the Regular Army at 30,600 and provides for an additional 9000 warrant officers. Approximately 400,000 enlisted men of all grades recruited from volunteers and enlisting usually for three years at a time make up the rest of the strength of the Regular Army, the whole providing the most completely trained fighting force available for land duty. From among the officers are usually selected all of the key leaders in our military establishment, commanders of divisions, corps, and armies. The enlisted men's ranks provide trained noncommissioned officers to instruct and lead conscripts and also tested combat units for quick deployment to meet international emergencies.

**Reserves:**

Supporting the regular forces is a second line of reserve units staffed by persons who have received some military training. Included in these reserve components are the National Guard and the Army Reserves. The Guard embraces the organized military units of the various states recruited from volunteers at the state level. Liberally financed by national grants, the Guard is instructed, trained, and equipped under the supervision of national army officers. The Guard is composed of citizen soldiers whose military training and duties are supplementary to regular civilian occupations. The quality and

**1. National Guard**

scope of the training received varies somewhat from state to state but in any case is brief, intermittent, and quite limited by comparison with that of the full-time soldier. The Guard or any of its constituent units or personnel can be called into active national military service at any time by the president. Ordinarily, when called to national duty, the Guard units undergo a period of training before they are sent into battle or into menacing situations. This training is, of course, normally shorter than would be required for green recruits. The total authorized strength of the Guard was fixed in 1949 as 600,000 officers and men but it has never achieved peak strength and in 1958 numbered 400,000.

2. Army Reserve

The Army Reserve is composed of officers and men who have served on active duty with the armed forces and have thus, received training and, perhaps, battle experience. All commissioned officers of the Army are technically placed in a reserve status when they are separated from active service. Conscripts are also placed in the Reserve at the conclusion of their active service for periods up to six years. The Reserve also includes soldiers who volunteer to accept this status. The effective part of the Reserves is made up of those officers and men who continue to refresh their military knowledge and experience with some training either in Reserve units, or in short periods of active duty with the regular forces. Reorganized by the Armed Force Reserve Act of 1952, the Army Reserve is now divided into a Ready Reserve, a Standby Reserve, and a Retired Reserve. The Ready Reserve embraces men and units undergoing intermittent, if brief, refresher training. One of its greatest weaknesses has been, however, that a large portion of those assigned to it do not keep up their training and until 1955, as noted below, no sanctions existed to compel them to do so. It is liable to active service when called by the president under a proclamation of "national emergency." The National Guard is part of the Ready Reserve. The largest part of the Ready Reserve is made up of officers and men liable for military service under the present laws who have not completed five years of active duty. At the end of their active service they are placed involuntarily in the Ready Reserve to finish out the five-year requirement. Most of these are not participating in training. The Standby Reserve may not be called to duty except by congressional authorization or when the executive branch has exhausted the list of qualified members of the Ready Reserve. It consists of officers and men liable for military service who have served actively for five years or for shorter periods if the service occurred in World War II or in Korea and who do not wish to be in the first line of reserves. The Retired Reserve would be called up only in war. The total Army Reserve in 1958, excluding the Guard, was about 1.1 million, but those in the Ready Reserve getting some training numbered only 315,000.

Reorganization of the Reserve in 1955

The entire Reserve apparatus—excluding the Guard—was again overhauled in 1955 by Congress under strong pressure from the White House. A compromise between the demand of the President for a beginning on Universal Military Training and congressional hostility to increased compulsory service was embodied in a Military Reserve Act which provides: (1) voluntary induc-

tion of young men between the ages of 17 and 18½ for six months' active service followed by 7½ years in the Ready Reserve; (2) reduction from six years to five years of the service in the Ready Reserve required of regular conscripts who serve two years on active duty; (3) new sanctions for members of the Ready Reserve to participate in continued training—if those obligated to continue reserve training fail to participate they may be called into active service immediately and furthermore members of the Ready Reserve are made liable to courts-martial for dereliction of duty; and (4) an increase in the authorized strength of the Reserves from 1.5 million to 2.9 million.

Conscripts

The third major element of the modern army of the United States is the conscript. We have had to strengthen our armed forces by compulsory service in each war of this century and in the foreboding atmosphere of the cold war. The Selective Service Act of 1948 kept the wartime conscription system going on a nominal basis only. Outbreak of war in Korea led to a new law continuing the 1948 measure until 1951. A new Universal Military Training and Service Act in 1951, as amended subsequently, has extended conscription up to the present time. Under its terms young men are still being called into service, although at a rate considerably below that of the Korean period. As it now operates: (1) every young man between 18 and 26 must be registered with his local draft board; (2) those between 18½ and 26 inclusive are liable to call for training and service for periods up to 24 months, subject to regulations covering exemptions and deferments; and (3) the president is empowered to select and induct whatever numbers of registrants may be required for providing and maintaining the authorized strength of each armed force. As from the beginning, general management is vested in an independent establishment, the Selective Service System, under a director appointed by the president and confirmed by the Senate. Activities, however, are largely decentralized, with a headquarters under a nationally appointed director in every state and local "draft" boards of three or more civilians normally in every county. The addition of these conscripts brings the total Army on active duty in 1958 to 940,000.

The Air Force

The Air Force, split off from the Army only in the last decade, is organized for staffing along lines similar to its parent organization. There is a relatively small Regular Air Force of 27,500 officers, 4800 warrant officers, and 450,000 enlisted men. New additions to the officer corps will largely be trained henceforth at the Air Force Academy (counterpart of West Point) established at Colorado Springs in 1955. There is also an Air National Guard of 70,000 members organized like the National Guard of the Army and an Air Force Reserve of 250,000 divided into the same categories as the Army Reserve. By comparison with the army, the Air Force relies relatively little on conscript soldiers to fill out its active units to the 875,000 it had on duty in mid-1958. By mid-1958, the Air Force had 117 wings organized and 20,000 active aircraft.

The Navy

From the days of the Revolution, the United States has maintained a navy of lofty traditions but until this century of no great size. By the end of

World War I we were approaching naval supremacy but during the twenties and early thirties allowed our strength to decline, in part by agreements in 1921 and 1930 with other naval powers involving equivalent reductions by our chief rivals. World War II pushed construction rapidly forward and at its end we had the most powerful armada in the world, capable of deployment in superior strength on both oceans and against almost any likely combination of enemies. In 1958, the United States Navy included 400 combat ships and 500 auxiliary vessels with another 1250 vessels of all types in reserve status. The Navy also had 8700 operating aircraft and another 2000 supply-carrying craft. Manpower for the Navy is supplied by volunteers. The 70,000 officers and 580,000 enlisted men on duty in 1958 included in addition to the regular forces, reserves called up for active duty, officer candidates, cadets, and trainees in the naval air arm. The Naval Reserve is organized much like those of the Army and Air Force but there is, of course, nothing comparable to the National Guard. The total Naval Reserve in 1958 was 675,000.

The Marine Corps

Closely allied to the Navy and administered as a part of it, is the most aggressive, belligerent, and sharply disciplined fighting force of America, the United States Marine Corps. Fashioned by naval concepts, the Marine Corps is recruited entirely from volunteers. In 1958, it had 16,000 officers and 175,000 enlisted men on active duty, organized into three combat-ready divisions and three air wings with supporting forces. The Corps is intended for amphibious operations but is usually deployed for ground service in emergency whenever and wherever the need exists. The Marine Corps Reserve of about 27,000 officers and men who have had previous active service in the Corps serves as its second line of trained personnel.

Women in the armed forces

During and since World War II each of the fighting services has included a small contingent of women. In the Army, the women are organized in the Women's Army Corps (W.A.C.) The Navy, Air Force, and Marine Corps enlist women for particular and limited duties in their regular forces without special organization as Corps.

## UNIVERSAL MILITARY TRAINING

The question of universal military training

Early in 1790, President Washington transmitted to Congress a plan of national defense based upon the principle that in a self-governing republic every able-bodied young man should be trained to aid in defending his country. The proposal did not prevail; nor did an effort, warmly supported by President Wilson, to make universal military training a feature of the National Defense Act of 1920. World War II, however, brought the idea again to the fore, with bills making their appearance in Congress from 1942 onwards, favorable committee reports submitted, the War Department formulating and supporting proposals. In 1947, an able civilian Advisory Commission on Universal Training, appointed by President Truman, unanimously recommended a year of training for every physically and mentally normal boy reaching the age of 18 or completing (or leaving) high school, whichever was later—the first six

months to be devoted to basic military training in camp or on shipboard, the second six to further training in service schools or to imparting instruction to a succeeding class of basic trainees.[1]

Some arguments employed

The plan was strongly attacked in Congress and in the public press as savoring too much of the traditional and discredited conscription systems of European countries and Japan, tending to "militarize" and harden rather than to refine youth, and violating American concepts of freedom and democracy. In addition it was argued: (1) that it would not necessarily promote either domestic welfare or international peace; (2) that—and this troubled some military leaders—it would not produce a single man actually ready for service, at home or abroad; (3) that it was unnecessary so long as the draft was in effect; and (4) that its cost—estimated by President Truman's commission at $1.75 billion a year, and by the former War Department at $1 billion more than that—would prove a serious burden for a debt-ridden nation. Supporters replied: (1) that the training imparted would raise the level of vigorous and effective citizenship; (2) that the plan is "un-American" only in the sense that we have not hitherto tried it; (3) that, as argued by President Truman and by military authorities like General George C. Marshall, it offered the most effective method of maintaining military strength without incurring the incubus of a huge standing army; (4) that, under the scale of expenditures on which the United States now operates, the cost should be but a minor consideration; and (5) that in the world in which we live our country must, in any event, adjust itself to conditions and procedures not of its own choosing—among them the liability to swift disaster unless large forces, at least partly trained, stand ready to be mobilized instantly. In general, military and naval interests and all sorts of patriotic organizations were favorable; churches and educational organizations opposed; and organized labor divided, but predominantly opposed.

The Universal Military Training and Service Act of 1951

Under repeated urging by President Truman and his military advisers and in the midst of the Korean struggle, the Congress finally took a hesitant and tentative step in the direction of universal training in 1951. The Universal Military Training and Service Act of that year created, on paper at least, a National Security Training Corps into which might be inducted young men under 19 or at the end of their high school education. After induction they may receive at least six months' military training in the United States, at the conclusion of which they are to be transferred to the Reserves subject to emergency call for another 7½ years. A National Security Training Commission of five members was established to supervise the training program. Induction into the Corps were not to begin, however, until further legislative action had been taken. The Commission was instructed to report a plan for the operation of the system and submit it to the Congress. Although the Commission, promptly appointed by the president, submitted a plan early in 1952 providing for six months of training for 880,000 youths annually at a cost

[1] *A Program for National Security; Reports of the President's Advisory Commission on Universal Training* (Washington, D. C., 1947).

of $2 billion, no further affirmative action was taken. The Commission again reported a plan late in 1953 to President Eisenhower and to the Congress but legislative action has not as yet put the scheme in operation. As noted above, however, the Congress in 1955 did make it possible for young men prior to draft age to discharge their military service obligations by six months of active duty followed by 7½ years of duty in the Ready Reserve.

## NATIONAL CONTROLS IN WARTIME

Half a dozen clauses of the Constitution suggest that for carrying on a war Congress may tax, borrow, raise troops, and build ships practically without restraint, with the president exercising the broad and undefined functions accruing to him as chief executive and commander-in-chief. But they convey little idea of what this may mean either for the machinery and processes of government or for the national economy—industry, transportation, communications, labor, prices, manpower, and daily civilian life. To visualize these things, one has rather to recall what happened during two world wars, during the Korean struggle, and, in part at least, continuing right up to the present. No two wars are alike; certainly an atomic war would differ from any we have known. Up to now, however, war's impact on government and economy can best be apprehended in terms of World War II; and a word on that chapter of our experience will be in order.

Expansion of powers and agencies

Fundamentally, wartime controls are exercised by the regular peacetime authorities. Congress stays in session and broadens and deepens its regulations as needs require, with little, under the circumstances, to fear from the courts. As chief executive, and particularly as commander-in-chief, the president mounts from peak to peak of directing authority, reading more and more power into his constitutional prerogatives and drawing almost equally from delegations by Congress. The executive departments and independent establishments intensify their activities in all that relates to the war effort. With new and vast specialized tasks developing, however, need arises for additional machinery, created directly by Congress or more frequently by executive order implementing some broad congressional grant. Even before we entered World War I, a top-level Council of National Defense was set up; and during that conflict a War Industries Board furnished a nucleus for new regulatory and administrative agencies. Again, the defense effort of 1940 called into existence, a year and a half before Pearl Harbor, an Office of Emergency Management, lodged in the Executive Office of the President and becoming a framework under whose broad roof were later gathered 15 major establishments concerned with wartime control, administration, and research. These agencies and others, in turn, provided hooks from which were suspended, as time went on, a maze of additional offices, boards, commissions, and the like, so numerous and so frequently reshuffled as to bewilder even the near-at-hand observer in Washington. Under stress of war, a government already big inevitably grows bigger.

Some areas of control:

1. Military service

The principle is clear that the government may, insofar as it finds need, draft into its armed services able-bodied men of all ages and conditions, and women too for duties appropriate to them. Conscription was resorted to (for the first time) not only during the Civil War, but on a vast scale during World Wars I and II—in the latter instance, indeed, at a stage when war merely seemed probable. No war of any magnitude will in future be waged without it. When raising forces in this way, Congress fixes age limits for men liable to induction, specifies or authorizes classifications and priorities in terms of number of dependents and ocupational usefulness for war purposes, and determines exemptions. Room is left for volunteering, especially by women. But, within bounds of reason, expediency, and humanity, the government always can dig as deeply into the reservoir of potential combat and auxiliary forces as circumstances seem to it to require.

2. Industrial production

Aside from a steady stream of trained men, the prime necessity in present-day war is abundant munitions and supplies. With a view to assuring ample production of these, the government may build plants (operating them directly or more often through private corporations under contract), finance the establishment or expansion of others, require plants to be turned to war production, take over and operate establishments crippled or threatened by labor difficulties, curb or suspend production of nonessential consumer goods, build stockpiles of necessary raw materials, and establish priorities for funneling materials to war industries most in need of them. Largely through a major agency known as the War Production Board, all of these things actually were done during World War II. At the beginning of hostilities in 1941, some people considered that any and all industry producing articles likely to be needed should forthwith be taken over. Far from adopting this idea, the government held steadily to the policy of relying principally upon industry privately operated. There was no drawing back, however, from drastic controls; and undoubtedly more industrial potential would have been taken over if the results of private operation had proved less satisfactory.

3. Civilian

In line with the same objective of all-out effort in prosecuting a war, the government may take any needful measures for maximum utilization of the nation's civilian manpower and womanpower, even to the extent of registering all able-bodied personnel of both sexes, imposing a "work or fight" rule, and assigning people to jobs. Although urged in some quarters to do so, Congress did not go this far during World War II. But almost immediately after Pearl Harbor the draft as already operating was broadened to require all men up to the age of 64 to register for conscription in the armed forces or for noncombatant duty. Throughout the conflict a War Manpower Commission, although without authority actually to compel men and women to work at particular jobs in particular places, promoted maximum use of personnel by measures calculated to keep people employed in jobs and places where they were most needed and to discourage moving around in quest of more congenial and better-paying positions. Strikes in industry and transportation never were expressly outlawed, and many occurred. But the

conditions under which they could legally be declared and carried on were circumscribed, and heavy penalties were imposed upon labor leaders fomenting them.

4. Wages, prices, and distribution of goods

A war of any proportions instantly starts a chain of dislocations in the national economy. An upsurge of government expenditures, re-enforced by augmented employment, produces a rise of prices; higher prices push up wages; higher wages, more spending power, and increasing scarcity of consumer goods stimulate further price rises. Unless brakes are applied, the spiral ends in heavy inflation, particularly devastating for people of fixed incomes but eventually disastrous for the entire economy. Speaking broadly, whatever checks are imposed must come from government; and, with various wage and price controls during World War I as precedents, an Office of Economic Stabilization early in World War II fixed wage ceilings for different industries, while an Office of Price Administration placed and kept under some restraint prices of commodities (rents also) likely to be most affected by prevailing scarcities. In connection with price controls, the O.P.A. also rationed among consumers, the country over, long lists of commodities (automobiles, tires, gasoline, fuel oil, farm machinery, shoes, coffee, sugar, meats, and many other things), demand for which was out of proportion to supply. Proposals at the beginning of the war that wages and prices be "frozen" all around never were adopted. At the end, the country was left with a considerable heritage of inflation. Matters, however, would have been far worse without the wartime stabilizations achieved.

5. Transportation

Almost as vital as the production of war materials is the transportation of them (and of troops) to places where they are needed; and here the government with full power over interstate and foreign commerce has especially free scope. During World War I, the railroads were taken over and operated. During World War II, no need for such a course arose. But, within the framework of pre-existing transportation controls exercised by the Interstate Commerce Commission and allied agencies, an Office of Defense Transportation correlated the services of railways, inland waterways, air transport, motor transport, coastwise shipping, and pipe lines in the interest of maximum contribution to the war effort. When neighbors took to group-riding to relieve other carriers and save tires and gasoline, they were acting in the spirit of O.D.T. requests.

6. Communications

War is waged not only with men, munitions, and materials, but also with ideas. Every wartime government (at any rate in a democratic country) must concern itself not only with getting to the 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 useful to him and with preventing both the enemy and enemy sympathizers from damaging the national morale through open or secret propaganda. Both tasks present difficulties; and the second, raising complicated questions of free speech, free press, and the like, not only is difficult, but also delicate. The story of our government's efforts during World Wars I and II—in the first instance through

a Committee on Public Information and in the second through an Office of War Information—to keep the nation (and friendly peoples abroad) discreetly informed on war aims and developments would reveal a good deal of fumbling, yet reasonable attainment of the ends sought. During World War II, responsibility for guarding against dissemination of information or opinion in ways injurious to our cause was intrusted to an Office of Censorship set up almost as soon as hostilities started. Here, too, the record of achievement was generally good. On the one hand, there was literal and positive censorship, in the sense that 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 were minutely inspected, with objectionable passages deleted or even the entire message intercepted. In the case, on the other hand, of domestic publications and radio broadcasting, the milder method was employed of relying upon voluntary compliance of the press and the broadcasting companies with "codes of wartime practices," telling them what they must not print or put on the air—although, of course, with no lack of power to compel obedience where not otherwise forthcoming. Closely related in wartime are, of course, laws and enforcing agencies designed to repress espionage, sabotage, and sedition, and especially to protect the armed forces against subversive influences.

*7. 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. Civilian defense—aimed chiefly 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 rendered various voluntary services. National encouragement and supervision were supplied by an Office of Civilian Defense established in 1941, with power only to advise, suggest, and exhort, but not to compel local agencies.

*A new program of controls instituted in 1950*

Greatly amplified after war came, the system of controls described had its beginning in 1940-41, during days of nominal peace. Ten years later, with the country also technically at peace, although engaged in military action in Korea, a new precautionary defense effort brought such controls again into the picture. With resolution formed in government circles to embark upon a major program of military preparedness President Truman, in September, 1950, stressed as three great requisites: (1) production of the materials and equipment required, (2) new taxation to meet the costs involved, and (3) prevention of inflation. A special revenue act of September marked the first stage of the heavier taxation contemplated; and powers for pursuing the other objectives were supplied in a Defense Production Act conveying

authority to control wages and prices and to introduce rationing; and authority also (for a year longer) to requisition materials and plants necessary to rearmament, to allocate goods in short supply, and to advance money for encouraging output. Most of the controls were discontinued after 1953 as a result of armistice in Korea and of the election of an administration pledged to reduce restrictions on the private economy. Many of the powers, however, remain in the statute books ready to be invoked should a new "emergency" occur.

## ATOMIC WEAPONS

Efforts to achieve international control of atomic weapons

On August 6, 1945, the first atomic bomb was dropped upon Hiroshima, Japan, by the United States armed forces, killing 78,000 and wounding 150,000 more and introducing a new technique of destruction unparalleled in the history of the world. It is appropriate that we conclude this discussion of national defense with some notice of the consequences of this new and terrible threat to the continued existence of life on this planet.

As the result of a suggestion by Albert Einstein, President Roosevelt put scientists to work early in the war to discover if the power of the atom could be unlocked for military purposes. Thousands of scientists—American, Canadian, and British—worked on this secret project for more than four years and finally achieved an explosive with the force of 20,000 tons of TNT. A successful explosion was set off at Los Alamos, New Mexico, in the summer of 1945 and, when Japan rejected the surrender ultimatum issued by the Allies at Potsdam on July 26, President Truman decided to drop the bomb. The Japanese surrender came within a few hours of the dropping of the second bomb on Nagasaki on August 9. Guided by the group of scientists, statesmen, and soldiers who had directed the successful research, the government now faced the problem of the future use of this dread weapon. Certain that they could not keep the secrets of its composition and manufacture indefinitely, fearful of the holocaust which might result from widespread use of the bomb in war, confident that peaceful uses of atomic energy of great benefit to mankind might be discovered by energetic application of many scientists, the three nations concerned, Great Britain, Canada, and the United States, proposed that the U.N. establish a commission to study and recommend a program for the control of atomic weapons and for the peaceful exploitation of the energy potential unloosed for the first time in man's history.

The U.N. created such a commission and before it the United States submitted a plan for the international control of atomic energy with an international agency equipped with inspectorial authority to enforce such controls upon the nations of the world. When and if such an agency should be established, the manufacture of atomic weapons should be prohibited. The Russians countered with a proposal for the outlawing of such weapons immediately, the prohibition of their manufacture in the future, and the destruction of all those

in existence at the time. They would not agree to any procedure which involved inspection of their industrial operations by outsiders. Weeks and months of subsequent negotiations failed to move either major power from its central position.

Atomic Energy Act of 1946

Meanwhile, in the United States, President Truman, seeking a more permanent arrangement for the domestic control of atomic energy research and weapons manufacture, proposed to the Congress, in late 1945, that a civilian commission be created in the executive branch for this purpose. The Congress passed in 1946 an Atomic Energy Act creating an independent five-man commission to exercise complete control over the production of atomic energy and the research program associated with it. The Commission was assigned full ownership of all domestic uranium and other materials essential for the production of the bomb. The principal battle of civilian versus military control of atomic energy was thus largely resolved in favor of the civilians. A special Division of Military Application was created to handle military aspects and to deal with research agencies created in the Defense Department for experiments with various military uses of atomic power. To this was added in 1949 a Military Liaison Committee consisting of representatives of the armed services and headed by a chairman appointed by the president. Extremely rigid security regulations, since made even more rigid, were enacted to control virtually all phases of the Commission's operations. Many scientists have since contended that the "secrecy" requirements have inhibited effective private scientific inquiries and have thus limited the search for peaceful and constructive application of the scientific knowledge of the Commission's experts. The fact that the measure gave to a government agency complete ownership and control over a source of power which might some day replace other energy sources both at home and abroad did not at that time precipitate much controversy. Later, however, growing criticism of the atomic program on the grounds that private enterprise ought to have a larger share in the exploitation of the peaceful possibilities and that too much emphasis was placed on the military phases by the Commission paved the way for a new Atomic Energy Act of 1954. This act opened the way for private industry to construct atomic furnaces and to carry on experiments of many kinds, under Commission supervision. A Joint Committee of the Congress in Atomic Energy established by the Act of 1946 provides continuing legislative oversight of the Commission's program.

Atomic Energy Commission

The Atomic Energy Commission (A.E.C.) over the years has become one of the most expensive of the executive branch agencies. It now spends about $2 billion annually. The major production facilities of the A.E.C. are at Oak Ridge, Tennessee and Richland, Washington, the major research centers are the Argonne National Laboratory at Chicago, the Brookhaven National Laboratory at Upton, N. Y., and the laboratories at Schenectady, N. Y., Ames, Iowa, and Berkeley, Cal. The domestic proving grounds are at Los Alamos, N. M., and Las Vegas, Nev., and the testing areas at sea are

in the Eniwetok atoll in the Marshall Archipelago. The Commission carries on numerous research tests and studies by contract with college, university, and industrial scientists.

On the international scene, the problem of control of atomic weapons has become more and more acute in the years since 1946. The Soviet Union, through a clever spy ring and with the help of certain key allied scientists, acquired the secret of the bomb—an atomic explosion occurred in Russia in 1949—much sooner than the Anglo-American allies anticipated. The AEC scientists produced the hydrogen bomb, a weapon more deadly than the atom bomb and carried their researches to the very threshold of a bomb which would wipe out the entire human race. The Russians, on their part, probably have produced a hydrogen weapon also. Thus the very real possibility that a war between the two great powers would result in extermination of life over much of the earth's surface faces the nations of the world. Hoping to realize some of the constructive benefits of atomic power and turn attention away from its destructive possibilities, President Eisenhower in December, 1953, proposed to the U.N. an international pool of atomic energy resources and offered to make an American contribution to such a pool. An international conference on peaceful uses of atomic energy was finally held in mid-1955 after the lessening of international tensions at the Geneva conference. Subsequently, more active negotiations for the creation of an international pool lead in 1957 to the creation of an International Atomic Energy Agency supported by 80 nations. The Senate in 1957 ratified the agreement and Congress by statute provided for American participation on the terms outlined by the President.

The hydrogen bomb

The testing of nuclear weapons became a matter of considerable international concern. Many scientists and intellectuals, Albert Schweitzer, for example, voiced alarm at releasing radioactive particles to an extent that human life might be damaged. Disarmament negotiations achieved nothing substantial. Russia, early in 1958, announced unilaterally a suspension of its testing program just as the United States was about to begin a new series of tests. We announced that our tests would occur as scheduled but on their completion we would consider some agreement to suspend tests.

## SPACE SATELLITES

American complacency in the progress of its new weapons research and development and in our alleged scientific and technological superiority to our chief rival was rudely and suddenly shattered in October 1957 by the launching of the first artificial earth satellite by the Soviet Union. Scientists and military leaders appreciated, if the public did not, that the machine that could launch a 184 pound (later a 1120 pound and a 2925 pound) device into outer space in such a manner that it could orbit around the earth might also carry a thermonuclear warhead from Moscow to Pittsburgh with little chance of its being intercepted.

Sputnik

American efforts to catch up

The American missile program, it later appeared, had languished for years—a victim of budgetary economies, interservice rivalries, and undue dependence on bases abroad to discharge nuclear weapons upon the enemy. Congress assembled in 1958 in a mood to spare no pains to catch up scientifically and militarily to the Russians in the field of rocketry, intercontinental missiles, and the exploration of outer space. The Army finally thrust a 31 pound satellite into orbit in January 1958 and repeated the feat with a 39 pound satellite in July. This tended to abate some of the tension and concern although it had been preceded and has been followed by several failures. The President, on his part, secured a part of what he believed to be a necessary reorganization of our defense establishment aimed at mitigating rivalry in this field. He also appointed a new special advisor on science to serve in the White House Office and persuaded Congress to create a new Aeronautics and Space Administration to handle the nonmilitary aspects of outer-space research and exploration. Many of our leading statesmen and scientists believe that we are still dangerously far behind in this tremendously important area of national defense and scientific advance.

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# III. FINANCES

## CHAPTER 26

## *Financing the National Government*

The responsibilities of the national government, described in the preceding chapters, are heavy and the demands of the people for services are great. Sooner or later all discussions of public affairs must come to grips with the costs involved and the resources available to pay them. We, too, must turn now to the melancholy subject of paying the bills for the services the government performs. The complex structure of the national government, described in an earlier section, is obviously a costly one to sustain, and courts, Congress, and executive require millions of dollars for their effective functioning in the modern world. These costs are, however, but trifles compared with the billions required to equip and maintain our great military establishment, to sustain our allies, to uphold the economy of the farmers, to sustain the poor, the aged, and the unfortunate, to care for the veteran, to reclaim wasteland, and to harness the power of our great rivers. Measurable changes—up or down—in our national budget result largely from changes in the services rendered and all the structural tinkering conceivable would effect the costs of government but slightly.

### THE SPENDING POWER

> 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; . . .
> —Art. I, Sec. 8, cl. 1

**Constitutional basis**

The Constitution has rather more to say directly about raising revenue than about spending it. A government, however, that could not spend would be no government at all; and in the case of the national government, power to spend not only is expressly granted but is clearly implied in numerous provisions conferring authority to do things which could not possibly be done without spending money, for example, raise and support armies, provide and maintain a navy, establish post offices and post roads, and maintain a system of courts. If necessary, spending power could probably be deduced also from the granted powers to tax and borrow, since manifestly there would be no

point to raising money if it could not be used. 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."

Some broad interpretations

Nevertheless, throughout much of our national history the spending power of Congress has been a prolific source of constitutional controversy. Primarily, the question has been whether the power to spend is restricted to purposes connected with the exercise of *other* powers delegated in the Constitution, or whether it is a power independent of, and in addition to, other powers and properly to be exercised for *any* purpose so long as having to do with "common defense and general welfare." In early days, strict constructionists like Madison took the first view, loose constructionists like Hamilton the second. The more liberal interpretation eventually prevailed, with Congress falling into the habit of regarding its spending power as properly extending to any and all objectives rationally associated with defense or welfare. Nay, more: no appropriation made on this assumption was ever—simply as an act of spending—successfully challenged in the courts. In its memorable decision of 1936 (U. S. *v.* Butler, 297 U. S. 1, 66) invalidating the Agricultural Adjustment Act of 1933, the Supreme Court went out of its way to assert that "the power of Congress to authorize the expenditure of public moneys [or to tax] for public purposes is not limited by the direct grants of legislative power found in the Constitution," and further that such expenditure is constitutionally legitimate so long as the welfare at which it is aimed can be plausibly represented as national rather than local, with Congress the judge, subject only to judicial veto if discretion is exercised arbitrarily or unreasonably.

The matter of grants-in-aid

A good while before these principles were so securely established judicially, the spending power was brought into significant controversy by the rise of grants-in-aid. With Congress appropriating funds to states for promoting agricultural education, building roads, protecting natural resources, maintaining employment offices, and performing other functions traditionally regarded as state rather than national, taxpayers sometimes objected to diversion of their contributions to such purposes. In 1923 the Supreme Court was confronted with a case brought by a taxpayer, and also one brought by the state of Massachusetts, challenging the constitutionality of a measure of 1921 appropriating money to aid states in reducing maternal and infant mortality on the ground that the act was serving purposes not national but only local, and invading the sphere of self-government reserved to the states under the Tenth Amendment. In a consolidated decision of the two cases (Mass. *v.* Mellon and Frothingham *v.* Mellon, 262 U. S. 447) the Court (1) brushed aside the contention of Massachusetts by pointing out that under the law no state was obliged to accept the grant unless it chose, and (2) set aside the taxpayer's protest on the ground that her share of the funds granted under terms

of the legislation was too inconsequential to give her reasonable ground for suit. And from that day, the swelling stream of national funds flowing into the states and localities in the form of grants-in-aid has not been seriously challenged. For a good while, national officials were fearful lest such undertakings as slum clearance and other housing activities be regarded judicially as "out of bounds"; but a decision of 1945 allayed such apprehension. As for the regulatory power commonly going along with grants, the Supreme Court has said that it is natural and proper for the government "to regulate that which it subsidizes."

**EXPENDITURES OF THE NATIONAL GOVERNMENT**

**Fiscal 1959**

| *Function* | *Amount in Millions* |
|---|---|
| National Security | $46,496 |
| Labor, Education, and Welfare | 18,978 |
| Interest on the Public Debt | 7,630 |
| Veterans' Services and Benefits | 5,868 |
| Agriculture and Agricultural Resources | 6,678 |
| Commerce, Transportation, and Housing | 6,424 |
| General Government | 2,017 |
| Natural Resources | 1,744 |
| International Affairs and Finance | 3,721 |
| Reserve for Contingencies | 200 |
| *Total Estimated Expenditure* | 99,756 |

NOTE: Includes $18,884 million of transfers to social insurance, highways, veterans' insurance, and other trust funds. Excludes $8,099 million receipts from business enterprises such as post office, T.V.A., and others.

SOURCE: *Budget of the United States, 1960.*

## PLANNING AND CONTROLLING EXPENDITURES —THE BUDGET SYSTEM

The role of Congress

Not a dollar of money can be expended legally except in pursuance of authorization, direct or indirect, by Congress. Voting the great appropriations becomes one of the most laborious but important tasks of the two houses at every regular session. In appropriation acts, Congress in effect instructs the Treasury to supply the executive departments and other spending agencies with stipulated sums, according to specifications set forth in great detail. Indeed, one of the chief means by which Congress exercises control over administration is this minute and itemized allocation of money, cutting off an activity here by leaving it without funds, adding an activity or agency there by making the necessary financial provision, and in these and other ways predetermining the lines on which the government's work shall be carried on.

For many years before the adoption of a budget system in 1921, appro-

priation bills were drafted and introduced by no fewer than nine separate House committees and in the Senate were handled by as many as 15 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. Although the president might, if he chose, warn and admonish, he as a rule could do nothing in the end except affix his signature, since to do otherwise might mean halting essential government activities. Under such division of responsibility, log-rolling became a fine art, the "pork-barrel" an inexhaustible resource.

Loose methods of appropriation before 1921

In the days when expenditures were relatively modest and revenues usually adequate to meet them, criticism of such haphazard procedures had little or no effect. The startling upswing of national outlays during World War I, however, lent new force to a growing demand for reform; and in 1921 a national budget system, long talked about, was established. The essence of a sound budget system consists in careful planning of the expenditures of a given fiscal period (usually a year) in relation to anticipated income, by a single authority, which not only will correlate income and outgo, but see that all reasonable economies are practiced. While the plan introduced by the Budget and Accounting Act of 1921 left, and still leaves, a good deal to be desired, it in general meets this basic specification.

The Budget and Accounting Act of 1921

The planning and co-ordinating 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-raisings. 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 Reorganization Act of 1939, it was definitely placed in the new Executive Office of the President. It thereupon became the chief executive's largest and most important staff agency—his arm for all contacts and dealings with the financial side of the government.

The Bureau of the Budget

Moreover, with the passage of time there has been a remarkable expansion of functions. From an agency concerned with co-ordinating requests for funds in relation to anticipated 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

Its expanded role

methods. Resulting in part from the enlargement of governmental activities in fighting the depression of the thirties, the Bureau's new role has emerged even more from the defense effort and war.

The services of the Bureau are based on the power given the director to "assemble, correlate, revise, reduce, or increase" the estimates of the several departments and agencies—a power from which flows wide discretion over the substance of department programs, not only in the planning stage but also later. After the programs have received Bureau approval, and after Congress has voted the necessary appropriations, the departments and establishments still must obtain the Bureau's approval for their financial procedures in carrying out their programs, including the periodic (usually monthly) allotment of funds and the maintenance of reasonable reserves for contingencies. In addition, since 1939 a division of legislative reference in the Bureau has examined and reported upon all measures pending in Congress which, if enacted, would impose a charge upon the public treasury or otherwise affect the president's fiscal policy, the purpose being to determine the relation of such measures to the "financial program of the president." If the Bureau does not think well of a measure passed, it may, and sometimes does, prepare a veto and advise the president to use it. The legislative division also acts as a central clearing house for all legislative recommendations emanating from the executive branch. All bills proposed by anyone in the executive establishments must be checked by the Bureau to see if they conform to presidential policy.

**Preparing a budget**

Although the government's tax year, the year for which taxable income is computed and in which most taxes are paid, corresponds to the calendar year, and therefore starts on January 1, its "fiscal" year, the year for which expenditures are planned and accounts made up, opens on July 1. A fiscal year hardly begins before systematic work on the financial arrangements for the ensuing year is started. First of all, every spending agency is asked by the Budget Bureau to compile 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 ones by members of the staff detailed for the purpose. 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 requests regarded as extravagant or impracticable. On larger matters, the budget director is brought into the discussions; and, subject only to reversal 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 for data concerning interest charges on the national debt and for detailed estimates of the revenues that may be expected in the period, together with proposals for increasing such revenues in case they promise (as nowadays they

almost always do) 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 1200 pages or more—the "budget"—which, by the close of the calendar year, is placed on the desk of the president. The president is then free to revise or strike out items. Usually he has already assented to most of them. Congress comes into regular session normally on January 3, and his budget message is due within the first fifteen days. In this message, the president presents his fiscal plan covering not only appropriations but revenues and, if necessary, proposals for deficit financing or for new taxes.

A 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 appropriations committee to 35 (now 50) members, giving it jurisdiction over all appropriation proposals, and authorizing it to employ as many as 15 subcommittees (the present number is 21) for handling proposals relating to particular departments or agencies. 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. Formerly the two committees and their subcommittees worked independently from this point, with the corresponding Senate committees simply marking time until bills came over from the other branch. With a view to more coordination, the Legislative Reorganization Act of 1946 interposed a new procedural stage by requiring that, upon the president's proposals for a given fiscal year being received, the House committees on ways and means and appropriations and the corresponding Senate committees (on finance and appropriations), or duly authorized subcommittees thereof, should form themselves into a joint committee and, with the president's recommendations before them, work out a "legislative budget" fixing ceilings for expenditures and providing for any necessary borrowing, and report the results to the two houses by February 15 (or later date agreed upon) as recommendations for adoption. As tested in sessions of 1948 and 1949, however, this plan almost totally failed to yield the expected economies; "ceilings" tentatively established in legislative budgets were afterwards largely ignored; and in 1950 the experiment was abandoned.

Framing and adopting appropriation bills

Whether adhering to the president's recommendations or striking out on more or less independent lines, appropriations subcommittees in the House evolve 10 or 12 separate appropriation bills providing for departments and establishments, singly or in groups. After being approved by the main committee and passed by the House, these several measures are transmitted to the Senate and there put through the same routine (the Senate, typically, reviews only the changes made by the House), with conference committees usually getting them into agreed form, as a session nears its end, for final passage by the houses and submission to the president. In 1950, a "single package" plan was introduced under which, before appropriations finally were voted, all major ones were brought together in one bill, after the manner of

the single great annual appropriation bill in the British Parliament, and also of consolidated appropriation bills encountered in some of the American states. By decision of the House appropriations committee, however, the device—although warmly supported by many members of both branches as in the interest of unity and economy—was abandoned after one trial. In almost every session since 1950 supporters of the consolidated appropriation bill and of the joint committee on the budget have introduced legislation to reestablish, with some modifications, the procedures recommended in the Legislative Reorganization Act of 1946. While support for some or all of these innovations seems to be gaining, the two houses have failed thus far to agree on a new procedure.

**Some benefits realized**

During the 30 years since the budget system went into operation, it has abundantly proved its worth. Even though we have had many years of deficit financing, no one would dream of returning to the earlier procedure. The system has imparted unity and responsibility to the spending program which otherwise would have been lacking. It opens a way for thorough and impartial review of the estimates of all spending agencies, and for reduction of those found questionable, before they are sent to Capitol Hill, and enables Congress to act with fuller information concerning both pending proposals and the state of the country's finances generally, including recent and current trends and the outlook for at least a brief period to come. When the President's Committee on Administrative Management appraised the system in its report of 1937, it gave full credit for these and other gains.

**Possible further improvements**

There is, however, plenty of room for improvement. While general appropriation bills are no longer introduced except by the regular appropriations committee, representatives and senators freely exercise their privilege of presenting bills calling for the expenditure of money for particular projects—building a post office, constructing a dam, dredging a harbor, or "improving" a river—in which they (at any rate the voters back home) are interested. Some of these are usually approved and the expenditure totals thus increased without, in most instances, providing any additional revenues. Furthermore, the enactment of a dozen or more major appropriation bills each year at different times makes it very difficult to keep the Congressional eye on the revenues which might be needed. The "legislative budget" provided for by the Legislative Reorganization Act of 1946 was based on a good idea, but has proved abortive. Many experts believe that millions of dollars a year would be saved 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. In any case, if present usage is to continue, it might be helpful if the president were given power to veto separate items of appropriation bills as governors in all but nine states have been authorized to do.

**A "performance budget"**

In one of its 1949 reports (Budgeting and Accounting), the Hoover Commission sharply criticized the budget as "an inadequate document, poorly organized and improperly designed to serve its major purpose, which is to

present an understandable and workable financial plan for the expenditure of the government." Two main improvements were urged: (1) clear separation of capital outlays, for example, on public buildings, from current operating expenditures, and (2) presentation of the latter, not in terms simply of who is to get how much, department by department, bureau by bureau, but in terms rather of functions, services, and activities—in other words, of "performance." Congress at once passed a resolution requiring the new performance principle to be applied to budgeting for the military department. The president requested all other spending departments and agencies to follow the same pattern; and the general budget for fiscal 1951 represents the first effort at a "performance budget" in our history. Moreover, a Budget and Accounting Procedures Act of 1950 made the new type of budget a permanent statutory requirement. The second Hoover Commission reaffirmed the "performance" system for presenting budgetary data and urged continued experimentation to spread its use and to improve its effectiveness. The Congress, in 1958, accepted a suggestion originating with the Commission and modified its method of handling obligations arising under previous legislation.

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 task. The situation has now been measurably 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 establishment—the General Accounting Office. This office was created by the same act of 1921 which brought the Budget Bureau into existence, and by the Legislative Reorganization Act of 1946 is expressly declared a part of the legislative branch. In addition to auditing the accounts of spending agencies and prescribing their form, this large independent agency —particularly independent because its head, the comptroller general, is appointed by the president and confirmed by the Senate for a 15-year term and is removable only by impeachment or, for cause, by joint resolution of Congress—has as a main function the validation of payments for services, supplies, and so on, as a means of seeing that all such outlays fall within the purposes and limits of appropriations 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, personally hostile to the New Deal, held up numerous payments in connection with New Deal enterprises as lacking proper authorization in congressional appropriations. In 1937, the President's Committee made recommendations, warmly supported 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, and no action resulted. Reverting to the subject in 1949, the Hoover Commission proposed retention of the General Accounting Office (as an agent of Congress) for purposes of post-auditing, but urged the introduction of a chief accounting officer in the Treasury Department (as an agent of the executive) with the title of accountant general of the United States, to take over the administrative work of pre-auditing expenditures and of prescribing and enforcing day-by-day administrative accounting methods in all departments and agencies with a view to a single system of fiscal accounts, elimination of duplications, and a degree of uniformity then lacking. The Budget and Accounting Procedures Act of 1950, while it gave departments and agencies fuller accounting functions than before, nevertheless continued the system of dispersed responsibility. It directed the Treasury, Budget Bureau, and General Accounting Office to collaborate in prescribing accounting systems but left principal authority in the latter office. The Second Hoover Commission in 1955 suggested that the Budget Bureau ought to develop its accounting services for other agencies and did not grapple with the thorny problem of where ultimate authority ought to reside. The basic issue here is between the Congress and the president with the Congress reluctant to curtail the authority of its own agency.

## THE GROWTH AND PRESENT PATTERN OF NATIONAL EXPENDITURES

The tables and charts here and elsewhere in this volume tell better than words the astounding story of the growth of the expenditures of the national government since the founding of our nation. A few observations are justified. In the first place, the shift in public expenditures among the various levels of government has been decided. Prior to the depression of the thirties, the national government accounted for about 35 per cent of the total governmental expenditures in the United States, the states about 15 per cent, and the local units about 50 per cent. Today, the national government spends about 70 per cent, the states about 12, and the local units 18. In the second place, national governmental income has equaled or exceeded outgo only about half the time in our national history. Presidents Lincoln, Grant, Hayes, Garfield, Arthur, and Franklin Roosevelt never experienced one year of balanced budgets during their tenures of office; and Madison, Van Buren, Tyler, McKinley, Wilson, and Truman had more years of deficits than of balances. In only four years since 1930 has the government lived within its income. In the third place, the towering costs of modern government at the national level are attributable, as a noted senator has said, to the "warfare" world rather than to the "welfare" state. More than 75 per cent of our national expenditures have, since 1942, steadily gone into war, its aftermath, its conduct, or preparation for it. Finally, the mere size of the present national

**THE GROWTH OF NATIONAL EXPENDITURES**
**(in millions)**

| *Yearly Average* | *Total* |
|---|---|
| 1789-1800 | 5.7 |
| 1801-1810 | 9.1 |
| 1811-1820 | 23.9 |
| 1821-1830 | 16.2 |
| 1831-1840 | 24.5 |
| 1841-1850 | 34.1 |
| 1851-1860 | 60.2 |
| 1861-1865 | 683.8 |
| 1866-1870 | 377.6 |
| 1871-1875 | 287.5 |
| 1876-1880 | 255.6 |
| 1881-1885 | 257.7 |
| 1886-1890 | 279.1 |
| 1891-1895 | 363.6 |
| 1896-1900 | 457.5 |
| 1901-1905 | 535.6 |
| 1906-1910 | 639.2 |
| 1911-1915 | 720.3 |
| 1916-1920 | 8,065.3 |
| 1921-1925 | 3,579.0 |
| 1926-1930 | 3,182.8 |
| 1931-1935 | 5,214.9 |
| 1936-1940 | 8,267.2 |
| 1941-1945 | 64,242.5 |
| 1946-1950 | 42,801.4 |
| 1951-1955 | 63,003.2 |
| 1956-1958 (est.) | 70,790.5 |

Adapted from *Statistical Abstract of the United States, 1957,* and *The Budget of the United States Government, 1959.*

budget has overborne the laudable efforts described earlier to develop a rational procedure in the executive branch and in Congress for handling the annual tax and expenditure programs.

## SOURCES OF NATIONAL FUNDS

1. Loans

Governments on all levels habitually live partly on borrowed money. In a given year, they may take in as much as they spend and thus have the comfort of a "balanced budget." But hardly ever are they out of debt. Borrowings are not revenue. A man borrowing $1000 from a bank may have the money in his pocket, but he is not taxed on it as income; for of course it is *not* income. At some specified rate of interest, he may have the use of it for a while. But he will have to pay it back. Nevertheless, borrowing is a source from which for a good many years, even in peacetime, our national govern-

ment has been deriving a considerable part of its current operating funds.

2. Nontax revenue

Most of the actual revenue commonly comes from taxes. There is, however, a good deal of nontax revenue. To begin with, the government carries on business, or quasi-business, enterprises and pockets the receipts from them as any private business man or corporation would do. One thinks instantly of the postal service, from which in 1958 the government drew more than $2.6 billion—not *profit* certainly, but that is beside the present point. There are receipts also from the mints, the Government Printing Office, the Tennessee Valley Authority, the Alaska Railroad, the Panama Canal, the Inland Waterways Corporation, and other such diversified sources. In the second place, there is income from fees charged for services or privileges, as when a patent is applied for, a book copyrighted, or a lawyer admitted to practice before the Supreme Court. Third, there are fines levied in the courts, penalties for nonpayment of taxes, and forfeitures of property taken from transgressors, for example, liquor or tobacco on which the required excise taxes have not been paid, or liquor, jewelry, perfumes, and the like confiscated from smugglers or from importers and travelers making fraudulent declarations. There are sales of property, too—public land or surplus war equipment. There are rentals from grazing lands and irrigated areas. There is interest on loans to farmers and to homeowners. There are even gifts, as the National Gallery of Art in Washington (presented by the Mellon estate) eloquently testifies. Relatively, the national government enjoys less nontax revenue than do many of the states, especially with their heavy national subsidies in the form of grants-in-aid.

3. Taxes

Nevertheless, the national government lives principally from taxes. 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 (aside from borrowings) only by making requisitions upon more or less reluctant and negligent states, the latter can reach down past the state governments to the individual citizen, levy on his business transactions, income, inheritances, and the like, and enforce payment, if necessary, by seizing and selling his possessions. Very appropriately, the long list of powers given Congress in the eighth section of the Constitution's first articles starts off with the power "to lay and collect taxes, duties, imposts, and excises." Nor was it simply by chance that the Constitution's framers employed all of these different terms. To them, "taxes" meant primarily levies, like poll taxes and land taxes, falling *directly* on persons or property; "duties" and "imposts" denoted levies on imports and exports, respectively (what we commonly call tariff or customs duties); and "excises" were levies on the production, distribution, or use of commodities—"internal revenue," as we early fell into the habit of terming this form of tax in distinction from revenue derived from foreign trade and collected at the ports. It is customary to lump all of the different levies together under the general heading of "taxes"—which, indeed, we shall do in the present chapter.

A tax (in the broad sense indicated) is, of course, a levy or charge

imposed normally to raise money for public purposes—"an exaction," the Supreme Court has said, "for the support of the government." It may be assessed upon individuals or upon corporations or other groups. It may take any one of many forms (not all employed by the national government)—property taxes, income taxes, excise taxes, sales taxes, license taxes, inheritance taxes, poll taxes, tariff duties, and still others. It may be direct or indirect. Always, however, a tax is compulsory; one may choose whether to pay rent or wages or prices, but not whether to pay taxes. Furthermore, tax burdens necessarily are apportioned among payers according to their property, income, business transactions, and the like, and not at all on the basis of benefits individually received.

## THE TAXING POWER

Under the Constitution's taxing clause, Congress has general freedom to tax persons and objects within the national jurisdiction, and with nothing said about the rates that may be imposed. If the people at large think themselves taxed oppressively, they will find remedy, not in the courts, but in electing a Congress—perchance also a president—pledged, or at least predisposed, to a different tax policy. Comprehensive, however, as the taxing power is, it can be exercised only in accordance with certain express or implied restrictions. **Restrictions:**

To begin with, Congress is not free to levy taxes for any conceivable purpose whatsoever, but only (as the Constitution plainly says) "to pay the debts and provide for the common defense and general welfare of the United States." "Debts" and "defense" are sufficiently definite terms. "General welfare," however, is so broad that there always have been differences of opinion as to what activities and objectives may be read into it. It no longer, however, offers much of a hurdle for tax- and spending-planners to surmount. **1. Purpose**

Down to World War I, the largest part of the national revenue always came from indirect taxes; and, as we shall see, a large share is still derived from that source. In laying taxes of this kind, Congress, however, is bound by the constitutional provision that "all duties, imposts, and excises shall be uniform throughout the United States." The requirement does not prevent tobacco excises, for example, from falling more heavily upon regions where tobacco products are manufactured extensively than upon others where there is little industry of the kind; it means merely that, in general, all cigars or cigarettes of a given kind or condition must be taxed at the same rate in all parts of the country. A tax may fall with very different weight on different areas, on different businesses, or on different classes of people. But—save as qualified with respect to tariff duties—it must bear with the same weight on the same objects of taxation wherever found. **2. Uniformity of indirect taxes**

To reinforce this principle, the Constitution further enjoins that in regulating commerce Congress shall not authorize customs duties to be collected at one rate at one port and at a different rate at another, or to be computed at different ports according to different rules. At one time, this meant abso- **3. Uniformity among ports of entry**

lute uniformity at all ports for any given kind or class of imports, whatever their place of origin. 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 1934 there is much additional variation, according to the foreign country from which given commodities are received. The duty on a box of cigars from Puerto Rico may differ from that on a box from Brazil, but each will be uniform at all ports.

4. Other express restrictions

The taxing power is further limited (1) by a constitutional provision forbidding duties to be imposed on exports, although Congress is authorized to regulate export trade in every way other than by taxation; and (2) by a 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 land (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 to be excise, not direct, levies. When, however, the validity of a new income tax law was challenged in the last decade of the century, the Court ruled differently. Ultimately the obvious impossibility of taxing incomes in accordance with any mathematical 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 expressly authorizing Congress to "lay and collect taxes on incomes, from whatever source derived," without apportionment.

5. Implied restrictions

Finally may be mentioned restrictions nowhere specified but up to now regarded, with judicial support, as implicit in the nature of the federal union: restraints from taxing (*a*) the property or essential functions of state governments or their subdivisions, and (*b*) securities issued by such jurisdictions or incomes derived therefrom. As observed elsewhere, the restriction relating to securities probably will in time be abrogated by Congress, with Supreme Court sanction, as a similar one on the taxation of state and local salaries already has been.

Taxation not primarily for revenue

Most laws imposing taxation can readily be classed as revenue measures, that is, measures in which the primary, if not sole, purpose is to produce income for the government. As intimated above, some measures are tax laws in form but intended mainly or entirely for regulative purposes and, if yielding revenue at all, do so only incidentally. A good example is tariff schedules planned for the protection of American industries against foreign competition. Insofar as goods affected find their way to our ports notwithstanding heavy duties payable on them, revenue results. But government income is not expected. Indeed, Congress has at times gone so far as to impose taxes with the avowed purpose of destroying a business enterprise altogether—taxing it out of existence and thereby rendering it wholly unproductive. A case in point is the act of 1865 imposing so onerous a levy on notes issued by state banks that, as was the intention, it became unprofitable to issue them and their issuance

ceased. In general, measures of the kind have been sustained whenever the courts considered that the taxing power was being used in pursuit of a purpose expressly or impliedly within the scope of congressional authority. Protective tariffs, however, have commonly been upheld, quite apart from the taxing power, on the basis of power to regulate foreign commerce.

Taxation and "general welfare"

Is a tax constitutional when not clearly either a revenue measure or a device for rendering effective some delegated or implied power, but rather is aimed principally or solely at promoting the general welfare of which we have spoken? This question was raised pointedly by laws of 1886 and later laying burdensome excise taxes on wholesale and retail sales of oleomargarine colored to resemble butter (repealed in 1950); by an act of 1912 taxing the manufacture of poisonous white phosphorous matches (and almost completely ending the industry); by laws of 1914 and 1919 imposing taxes on registered dealers in narcotic drugs; by the child labor law of 1919 laying a special tax on the profits of industrial establishments employing children under the age of 16; and by the Agricultural Adjustment Act of 1933 imposing levies on processors of grains, meat, cotton, and other commodities as a means of raising money for a program of curtailing agricultural production. In cases coming before it at different times, the Supreme Court upheld the oleomargarine and narcotics laws as revenue measures, refusing to inquire into the legislative intent behind them. The constitutionality of the phosphorous match law has never been judicially tested. When, however, the child labor law was challenged, the Court fixed attention on the motive animating Congress and held the measure invalid for the reason that the tax imposed had as its sole purpose an objective—the regulation of child labor—regarded by the justices then sitting as a function reserved to the states (Bailey *v.* Drexel Furniture Co., 259 U. S. 20). Similarly, the Agricultural Adjustment Act was overthrown not only because, said the justices, the processing taxes for which it provided were not true taxes in the sense of levies for general support of the government, but also because these taxes, too, were being employed to extend the national regulating arm into a field—the control of agricultural production—belonging to the states. In other words, the taxing power might not properly be invoked, even for the sake of the general welfare, when the effect would be to project national authority beyond limits constitutionally fixed, and as understood by the judges.

A changed attitude

Since these decisions were rendered, however, there have been changes. A Court with different personnel and viewpoints has broadened its concept of national power (especially under the commerce clause) as illustrated by the justices' approval of the social security taxes introduced in 1935. General welfare now can be promoted by levies which once would hardly have escaped judicial condemnation. The presumption is that to the many occasions on which the national taxing power already has been used in advancing social and economic ends, with considerations of revenue wholly incidental, will in future be added still others of major significance. When the question is one of justifying taxing or spending on the basis of welfare, not only Congress itself but

the Supreme Court as now constituted is rather easily satisfied. In much of our pre-World War II income and inheritance taxation, indeed, the purpose of curbing "swollen fortunes" can be discerned almost as clearly as that of obtaining revenue. In messages to Congress in 1935 and on other occasions, President Franklin D. Roosevelt, pushing farther ideas advanced by Presidents Theodore Roosevelt, Wilson, and Hoover, warmly advocated such a policy, with a view to more equitable distribution of wealth and economic power. Since 1940, the problem of swollen fortunes has very nearly been taken care of automatically by tax schedules drawn to meet the heaviest demands for revenue in the country's history.

## THE ENACTMENT OF TAX MEASURES

Origins and frequency of tax legislation

Appropriations are usually made for some specified and limited period, most commonly a year, and consequently a sheaf of appropriation bills must be passed every 12 months, with deficiency measures interspersed as needed. Measures imposing or readjusting taxation, on the other hand, are usually without time limits; a given tax once levied, or a given rate once established, continues operative as long as not repealed or amended. It is true, however, that in recent years Congress has exhibited a tendency to enact temporary or "emergency" taxes.

Every annual budget transmitted to Congress by the president contains estimates of the revenue to be anticipated from existing sources. Along with these commonly will be submitted proposals for increasing the inflow by new or amended taxation if the yield does not promise to be sufficient, or for decreasing it if it promises to exceed needs, or perchance for maintaining the yield but redistributing tax burdens. On its part, Congress, too, may—as in the case of two tax-reduction bills killed by presidential veto in 1947 and one passed over a veto in 1948—initiate revenue measures wholly outside of the executive's budget plans and even conflicting with them. Accordingly, tax legislation is enacted with substantially the same yearly regularity as appropriation acts.

The handling of revenue bills

All measures for raising national revenue are required by the Constitution to originate in the House of Representatives. All portions of the president's annual budget message relating to the subject are immediately referred to the ways and means committee of that body. To this group it 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. Working for weeks, through subcommittees when necessary, and with help from conferences with the chief executive, budget director, Treasury officials, bankers, businessmen, 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 most revenue measures are more or less drastically altered. 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 in both branches, will certainly have to "go to conference." Commonly it is in the form in which it emerges 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 PATTERN OF TAXATION

Earlier situation

On the basis of "incidence," that is, the point where the actual burden falls, taxes may be classified as direct and indirect—the former assessed upon and paid (as in the case of land taxes and poll taxes) by persons who cannot shift the impact to other shoulders; the latter imposed and collected commonly at some stage of production or distribution, and afterwards passed on (in the form of higher prices for commodities) to consumers. Back in the eighteenth century, the national government relied almost entirely on indirect levies, principally duties on imports designed to shelter the country's developing industries as well as to yield revenue. So satisfactorily were tax needs met in this way that until the Civil War direct taxes were invoked only three times, and even excise taxes (indirect) only in two brief early periods. The exigencies of that conflict, however, not only forced a temporary reversion to direct taxation, but brought excise taxes once more into use; and from then on these have had a place in the tax structure. Tariff duties were, however, dominant for a good many years.

Later changes

Throughout a long period of our history, the country's tax structure was thus relatively stable: state and local governments lived principally from the proceeds of the general property tax, the national government principally from the yield of customs duties. The past 40 years, however, have brought changes greatly complicating the tax picture. Mounting expenditures, increasing inadequacy of the general property tax, tempting new resources for revenue like motor cars and gasoline, and newer tax ideas and objectives have attracted the states to numerous forms of taxation rarely or never employed before. On its part, the national government has revolutionized its tax pattern, with customs duties relegated to an insignificant position and reliance now placed mainly upon levies on incomes, the production and consumption of goods, and inheritances. The shift in national policy came shortly before World War I, when, with the idea growing that the nation's principal tax should be based on ability to pay, the Sixteenth Amendment established the income tax promptly and firmly in our system. One of the advantages of income taxation is its flexibility—the ease with which, by juggling a few rates and brackets, it can be made to yield vastly more or vastly less as desired. Under the impact of the

then unparalleled wartime expenditures of 1917-18, the national revenue from this source rose to first place—a position which it consistently maintained until 1933. With depression conditions deepening in the early thirties, taxes on personal and corporate incomes yielded steadily diminishing returns. Once more the bulk of national revenue began to come from customs duties and excises, even though languishing commerce and slackened business caused these also to produce less than formerly. Some measure of prosperity, however, having been regained, the income tax stream began rising again and under war and postwar tax legislation it became a torrent, quite transcending all other tax sources.

**RECEIPTS OF THE NATIONAL GOVERNMENT**

**Fiscal 1959**
**(in millions)**

| | | |
|---|---|---|
| Individual Income Taxes | | $36,900 |
| Corporate Income Taxes | | 17,000 |
| Excise Taxes | | 10,686 |
| Alcoholic Beverages | 3,046 | |
| Tobacco | 1,802 | |
| Gasoline, Oil | 1,761 | |
| Manufacturers (autos, tires, appliances, radios, cameras, etc.) | 2,146 | |
| Miscellaneous (jewelry, betting, admissions, documents, etc.) | 1,931 | |
| Employment Taxes | | 9,112 |
| Estate and Gift Taxes | | 1,365 |
| Customs | | 840 |
| Misc. Receipts | | 3,091 |
| Receipts from Gov't. Enterprises (Post Office, power sales, etc.) | | 8,099 |
| *Total* | | $87,093 |

SOURCE: *Budget of the United States Government, 1960.*

1. Income taxes:

The largest single source of revenue of the national government today is the individual income tax. As enacted in 1913, this tax fell upon only 2 or 3 million persons and at a graduated rate beginning at 4 per cent on net taxable income in excess of $5000 for a married man. Under the pressure of war emergencies the rates have been revised upward quite sharply and the deductions and exemptions downward, so that 50 million persons now file returns on which almost 40 million pay some tax. In other words, the great majority of the wage earners of the United States today pay a tax on their incomes to the national government. A large proportion of modern income tax payers pay their taxes "painlessly" through a scheme introduced in 1943 of employer withholding of a portion of their wages each pay period and transmitting the deducted portion to the government. A reckoning, of course, still

a. Individual

occurs on April 15 when each taxpayer computes his tax liability for the previous year and pays any amount still owing or, perchance, files a claim for a refund from the total already paid for him by his employer.

The modern income tax is a tax on "net" income rather than on total receipts. From the total earnings from all taxable sources, there may be subtracted: (1) personal allowance of $600 for each person dependent on the taxpayer including the taxpayer himself; (2) expenses incurred by self-employed, professional, and wage-earning taxpayers in earning the income; (3) privileged personal expenses, for example, donations for religious, charitable, or educational purposes, abnormal medical expenses, interest paid on loans, and taxes of many kinds paid to other governmental units. On the balance of the income after these allowances and deductions are taken, a graduated tax is imposed. The rate of this tax in 1958 was 20 per cent on the first $2000, advancing by steps to 91 per cent on net income in excess of $200,000. The graduation or "progressivity" in the tax rates is designed to make larger incomes pay a proportionately larger tax on the theory that the higher the income the greater the ability of the taxpayer to support his government.

b. Corporate

A tax is also imposed on the annual net income of corporations and this ranks next to the individual income tax in the size and importance of its yield to the national government. This is undoubtedly the most complex tax used by the national government. Most of its complexities arise from an earnest effort of lawmakers to have the tax fall on the "net" income of corporations after allowances are made for legitimate expenses in earning the income. The rate of tax on corporate net income (1958) is 25 per cent on the first $25,000 and 47 per cent on the remainder. During World War II and from 1951 to 1953, the corporation income tax was supplemented by an "excess" profits tax designed, in theory at least, to levy on the swollen corporate earnings of wartime so as to recapture as much of the abnormal profit as possible. In general and with numerous exceptions, the tax fell on the difference between "normal" earnings, and those of the years in which the tax was imposed. The most recent "excess" profits tax, associated with the Korean combat and rearmament was fixed at 30 per cent of the abnormal earnings, but the combined corporate income and "excess" profits taxes could not exceed 70 per cent of the net income.

2. Estate and gift taxes

On a number of occasions from the Civil War onwards, the national government imposed some form of tax on estates of deceased persons or on inheritances of portions thereof. Since 1916, an estate tax has been a regular feature of the national tax pattern. Formerly, exemptions ran as high as $100,000, and rates in lower brackets were relatively moderate, although high in upper ones. Naturally, under wartime taxation, exemptions were reduced (to $60,000) and rates stiffened. In order to reach wealth that might escape estate taxation by being given away by the possessor with that end in view, a gift tax (on a graduated scale approximately three-fourths as heavy as estate taxation) was introduced in 1924, repealed in 1926, and reimposed in 1932.

In order to protect existing state inheritance taxes, a credit of 25 per cent against national tax liability for taxes paid to a state was inaugurated in 1924. It was increased to 80 per cent in 1926. The Revenue Act of 1954 substantially reduced this credit. Estate tax rates were increased during World War II. In 1958, the rate was 3 per cent on the first $5000 above the $60,000 exemption, graduated to 77 per cent on estates of more than $10 million. Combined with "progressive" income taxes, estate and gift taxes now operate powerfully to check the growth and transmission of large fortunes.

3. Excise taxes

Everybody pays national taxes, although many people do so without realizing it. Even persons of means too modest to be reached by the income tax make their contributions when they buy articles like a package of cigarettes, priced so as to cover the excise tax due the government from the manufacturer or distributor. Traditionally, excise, or "consumption," taxes have been planned to fall principally on luxury goods, and therefore to be paid chiefly by the comparatively well-to-do. The theory, however, never was completely adhered to in practice; and excises were progressively broadened during and shortly after World War II until long lists of articles were covered which, for many people at all events, were everyday necessities. By 1950, however, popular demand for relief reached a point where both President and Congress became agreeable to a readjustment (the President on condition that lost revenue be made up in some other way). The Korean crisis, however, quickly turned the government's concern from remitting taxes to increasing them. It was not until 1954 that a Republican Congress was able to make a general reduction in excise taxes. This was followed more recently by special reductions in taxes on theater admissions and railroad freight.

4. Payroll taxes

A special form of excise is a tax imposed upon employers for support of state systems of unemployment insurance under the social security program. Levied by the national government, the tax differs from others in that its proceeds are not for general government purposes; only about 10 per cent of the yield actually accrues to the national government at all, the remainder being simply held by the Treasury for requisitions by the states for paying benefits. Even the 10 per cent is employed in meeting administrative costs of the system. Of similar nature (although without the states involved) are payroll taxes on both employers and employees for support of the old age and survivors insurance system.

## SOME QUESTIONS OF TAX POLICY

The heavy tax burdens of the war years and of the "cold war" period since have caused a great deal of concern about the share of the national income appropriated for public purposes. No one, however, pretending to any understanding of the current world situation and of America's relation to it, or of the financial implications entailed, looks forward to any very significant curtailment of taxes in the foreseeable future. "Cold war" with the U.S.S.R., preparations for eventualities if cold war should suddenly break

into armed conflict, assistance to nations we hoped to have on our side in such a situation, a huge debt largely incurred in past war, to say nothing of mounting costs of social security and other domestic services—indicate a continuance of high levels of taxation.

1. Readjustment of national taxation

Long before World War II, however, criticisms of our tax methods, policies, and objectives suggested need for general reconsideration and overhauling of our system. A few of the older long-term issues may at least be called to mind. For example: Should any new forms of taxation be introduced, for example, taxation of income from state and local securities, or fees for licenses, certificates, and other papers now issued gratis? Should the income tax base be broadened by terminating exemptions now enjoyed by a lengthy list of interests and enterprises, such as farm and consumer co-operatives, mutual insurance companies, rural electrification undertakings, surplus funds of labor unions, and even philanthropic and educational organizations in so far as engaged in business enterprises? Should the taxation of incomes be deliberately kept at levels, in the higher brackets, making accumulation of wealth difficult or impossible? How can adequate revenue be raised without unduly impairing the volume of production and the general level of national income? And what about the time-honored issue of duplicating, or "double," taxation?

2. "Double taxation"

With both nation and states reaching out in recent decades for new sources of revenue, it has come about that frequently they are found taxing the same objects. In recent years, indeed, no less than 90 per cent of national and state receipts came from the same sources. To be sure, the national government leaves the general property tax entirely to the states (principally for local use) and, as we have seen, relies for the major part of its revenue upon personal and corporate income taxes, estate and inheritance taxes, and consumption taxes of different kinds. But nearly all of the objects affected are taxed by some or all of the states as well. There are few if any important forms of taxation not claimed by both national and state governments, each without much regard to the other. Invariably 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. Persons finding their salaries or the gasoline they buy taxed twice sometimes harbor an idea that such double imposition is unconstitutional. In this, they are wrong. The Constitution has nothing to say against double taxation; it in effect presupposes it by leaving broad and general taxing powers to two largely independent governments, both resting directly upon the people. Even though not unconstitutional, however, the existing situation arouses a great deal of criticism. Sometimes it is suggested that the national government withdraw from gasoline taxation (a field which it entered only in 1932), while the states give up taxing tobacco and its products; or that, in return for a monopoly of taxing liquor, the states give up taxing incomes. Often it is urged that the national government stop competing with states and localities by taxing amusements, local telephone calls, retail electrical energy, and other things. The issue is further entangled in the com-

plexities of the grant-in-aid controversy. Those who propose the abandonment of some national aids to states, of course, expect the national government to abandon some taxes so the states can take up the burden more easily. A recent extensive staff study in the Treasury Department, however, stops short of any definite recommendations on these or related lines, as does the study of President Eisenhower's Commission on Intergovernmental Relations. In a period when all governments instinctively shy away from proposals looking to drying up sources of revenue, solutions are not in sight.

## BORROWING MONEY—THE NATIONAL DEBT

The borrowing power

When expenditures and revenues are approximately equal, a 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 purposes, income derived from taxation, supplemented by receipts from nontax sources, ought to be, and much of the time has been, sufficient to meet the government's needs. In time of war or threat of war, however, or other unusual strain, for example, a depression, or to meet the cost of some special undertaking like the Panama Canal or a Marshall Plan, the government must borrow. The accumulated obligations thus incurred give rise to the national debt. Power to borrow not only is expressly conferred in the Constitution, but is one of the very few powers entirely unencumbered by restrictions—with the result that Congress may borrow from any lenders, for any purposes, in any amounts, on any terms, and with or without provision for the repayment of loans, with or without interest.

Methods of borrowing

Borrowing may take any one of several forms. By authority of Congress, the Treasury may sell notes or certificates attractive to banks and other institutions; and this is constantly done. To accelerate tax receipts, it may issue "tax anticipation" notes to large taxpayers, to be turned in by the corporation or individual at tax time at face value plus interest received on what has been in effect a loan. It may and does, in effect, borrow from itself; that is to say, it may arrange for interest-bearing loans out of funds accumulated and held for specific purposes by national agencies, for example, old-age, unemployment, veterans, and bank deposit insurance funds and postal savings deposits. Of far greater importance, however, is the sale of long-term interest-bearing bonds in large denominations to banks, insurance companies, administrators of trust funds, and the like, and in smaller denominations (down to $25 savings bonds) to individual savers and investors. Such securities rate high in the money markets, not only because they usually pay attractive interest as conservative investments go, but because the national government (unlike some of the states) has never repudiated a debt. The position of banks is such that they can virtually be compelled to purchase. In the case of private individuals, if in time of special need the investment motive, reinforced by patriotic appeals and high-pressure salesmanship, fails to bring about volun-

tary purchases in sufficient amounts, the government may force them by "deferred-savings" devices of one kind or another.

During the past half-century, the United States has been added to the long list of countries laboring under a huge national debt. The national government, after two decades of deficit financing, now owes more than $1600 for each man, woman, and child in the United States. People who think seriously about such matters are by no means of one mind on how a debt of such proportions might be expected to affect the country's future. Some, comforted by the circumstance that we "owed the debt to ourselves" and not to

The problem of liquidation

**THE NATIONAL DEBT**
**SELECTED YEARS, 1791-1958**

| *Year* | *Gross Debt in Millions* |
|---|---|
| 1791 | 75 |
| 1801 | 83 |
| 1816 | 127 |
| 1821 | 90 |
| 1831 | 39 |
| 1840 | 3.5 |
| 1851 | 68 |
| 1861 | 91 |
| 1866 | 2,755 |
| 1871 | 2,322 |
| 1881 | 2,019 |
| 1891 | 1,005 |
| 1901 | 1,221 |
| 1911 | 1,154 |
| 1919 | 25,482 |
| 1931 | 16,801 |
| 1941 | 48,961 |
| 1946 | 269,422 |
| 1951 | 255,222 |
| 1958 (Oct.) | 280,851 |

foreign lenders, thought that, with moderate national prosperity, the burden could be carried and the debt itself gradually reduced with no perceptible lowering of living standards. Others could not see how owing the debt to ourselves made any great amount of difference (we still *owed* it), or how the dead weight of so stupendous an obligation could fail to retard economic and social progress over a long period of years. Certain it was that generations as yet unborn would feel the impact of debt burdens which we in our time had improvidently piled up. Certain it was also that the least that this generation could decently do, for its own good as well as that of succeeding ones, was to whittle down the burden as rapidly as possible by scrupulously meeting all interest charges as they fell due and paying off principal whenever the national

income permitted. Favored by a very high level of national prosperity, as well as by a combination of fiscal circumstances too complicated to be explained here, the government actually did contrive to shave off about $25 billion from the peak debt at the end of World War II. Rearmament, Korea, and the "cold" war, however, renewed deficit spending and the debt is now climbing past the height reached in 1946. If the nation cannot tax itself sufficiently to pay the going expenses of the government—and it has not done so most of the time since 1946—during a period of unprecedented prosperity and high standards of living, the outlook for any significant lowering of the debt is dark indeed.

There is a school of opinion holding that we ought not to expect in our day to do much more than simply "maintain" the debt, paying interest scrupulously, but not making much effort to reduce principal, with the country meanwhile "growing up" to the debt by attaining such population and wealth that, proportionally, the burden would in time be materially reduced. Such rationalization of our current lack of progress with debt reduction certainly does not appeal to many thoughtful people.

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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.

### SECTION III

The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof,[4] for six years; and each Senator shall have one vote.

[1] Altered by the Fourteenth Amendment.
[2] Rescinded by the Fourteenth Amendment.
[3] Temporary provision.
[4] Modified by the Seventeenth Amendment.

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.[5]

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.[6]

### 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.

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.

[5] Modified by the Seventeenth Amendment.
[6] Superseded by the Twentieth Amendment.

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 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.[7]

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.

[7] Temporary provision.

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 1

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,[8] 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.

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.[8a]

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

[8] Modified by the Twenty-second Amendment.

[8a] Superseded by the Twelfth Amendment.

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."

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,[9]—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.[9]

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.[10]

[9] Restricted by the Eleventh Amendment.
[10] Made more explicit by the Fourteenth Amendment.

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.[11]

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,[12] 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.[13]

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

[11] Superseded by the Thirteenth Amendment in so far as pertaining to slaves.
[12] Temporary clause.
[13] Extended by the Fourteenth Amendment.

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.

## 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] [14]

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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 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.

[14] The signatures are omitted here.

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.[15] 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.[16] 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.[17] 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 persons 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 upon them, before the fourth day of March[18] 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.[19] *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

[15] The first ten amendments took effect December 15, 1791.
[16] Proclaimed January 8, 1798.
[17] Proclaimed September 25, 1804.
[18] Superseded by the Twentieth Amendment.
[19] Proclaimed December 18, 1865.

*Section* 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.[20] *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 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.[21] *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.[22] 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.[23] 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.

20 Proclaimed July 28, 1868.
21 Proclaimed March 30, 1870.
22 Proclaimed February 25, 1913.
23 Proclaimed May 31, 1913.

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.[24] *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.[25]

Article XIX.[26] *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.

Article XX.[27] *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.

[24] Proclaimed January 29, 1919.
[25] Rescinded by the Twenty-first Amendment.
[26] Proclaimed August 26, 1920.
[27] Proclaimed February 6, 1933.

*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.[28] *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.

Article XXII.[29] *Section* 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

*Section* 2. 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 to the States by the Congress.

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Department of State, *Documentary History of the Constitution of the United States of America, 1786-1870* (3 vols., Washington, D. C., 1894-1900).

*The Constitution of the United States of America, Annotated to June 30, 1952,* 82d Cong., 2nd Sess., Sen. Doc. No. 170.

[28] Proclaimed December 5, 1933.
[29] Proclaimed March 3, 1951.

## AMENDMENT AT PRESENT BEFORE THE STATES FOR ADOPTION

*Child Labor*

*Section* 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

*Section* 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.[1]

[1] Proposed to the legislatures of the several states June 2, 1924.

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