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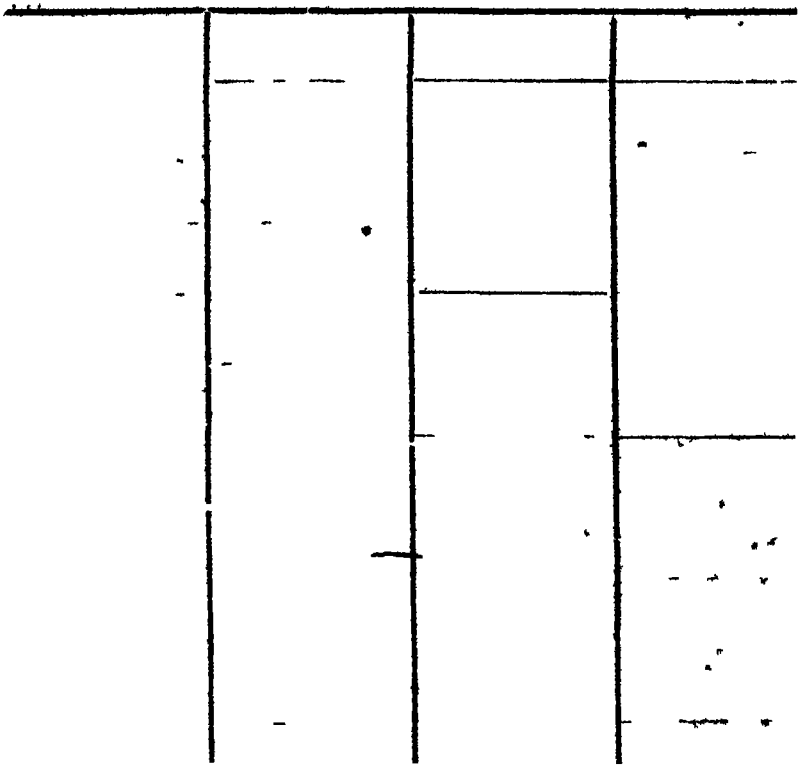
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OUTSIDE READINGS IN AMERICAN GOVERNMENT

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Preface

For college teachers and students of political science one of the most serious postwar problems has been the inability of most college and departmental libraries to meet the need for supplementary reading material, particularly at the underclass level. To be sure, this situation prevailed even before the war, but present conditions have brought it into much sharper focus. Whereas the importance of collateral readings as a teaching aid has never been greater than it is today, realistic teachers recognize that their libraries are even less able than in the past to handle more than a fraction of the theoretical load created by the library assignments given out by the "wishful thinkers" alone. The editors sincerely hope that this book will help to solve the problem by providing carefully selected outside readings at so moderate a cost that there need be no further excuse either to forego collateral readings or to insist upon extensive (and costly) use of the library to supplement the basic text.

The primary objective of the editors in making their selections has been to quicken student interest in lively issues of the past and present. Thus, the emphasis is on material that dramatizes special problems and stimulates thinking rather than on an exhaustive documentation in American government. This plan undoubtedly gives an added sense of vitality to different facets of the subject beyond the necessarily brief treatment of a textbook. In keeping with this plan of selection, many of the articles on modern issues are strongly slanted, but, to avoid biased conclusions, conflicting viewpoints have been juxtaposed wherever feasible. The editors do not, of course, necessarily espouse any of the doctrines or viewpoints presented.

In order to provide reading material that will have the maximum usefulness for students and teachers, the present edition includes three features that did not appear in the first printing. These are (1) a brief introductory statement for each selection, setting the material of that article in its proper context, (2) brief biographical sketches of the contributors, arranged alphabetically, after the last selection, and (3) an index in which the topics, as far as practicable, parallel those found in the indexes of standard textbooks on the subject.

The materials included here have been selected primarily for use in the basic American government course at The University of Texas.

However, the editors feel that this anthology should be equally valuable in other institutions faced with substantially similar problems.

The editors owe a heavy debt of gratitude to their secretary, Mrs. Dorothy Cawthon. Likewise, they are deeply indebted to the publishers and the authors who have so generously permitted them to reprint the materials which are, after all, the entire substance of the book.

H. M. M.
W. D. W.
E. G. L.
W. L. S.

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CHAPTER I

The Foundation of American Government

1. MAYFLOWER COMPACT [1]

THE Mayflower Compact, one of the first documents of American political history, was drawn up and signed by the Pilgrim Fathers while anchored off the coast of New England on the eleventh of November, 1620. In it appear examples of both the contract theory of government and the concept of Divine Right of Kings. Its purpose was, in its own words, to create "a civil body politick" for the governance of the settlers in the New World.

IN THE name of God, Amen. We whose names are under-writen, the loyall subjects of our dread soveraigne Lord, King James, by the grace of God, of Great Britaine, Franc, and Ireland king, defender of the faith, etc., haveing undertaken, for the glorie of God, and advancemente of the Christian faith, and honour of our king and countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly and mutualy in the presence of God, and one of another, covenant and combine our selves togeather into a civill body politick, for our better ordering and preservation and furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just and equall lawes, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meete and convenient for the generall good of the Colonie, unto which we promise all due submission and obedience. In witnes wherof we have hereunder subscribed our names at Cap-Codd the 11. of November, in the year of the raigne of our soveraigne lord, King

[1] Reprinted from *Bradford's History of Plymouth Plantation*, edited by William T. Davis (New York: Charles Scribner's Sons, 1908), p. 107.

James, of England, France, and Ireland the eighteenth, and of Scotland the fiftie fourth. Anº: Dom. 1620.

2. THE DECLARATION OF INDEPENDENCE—1776 [1]

In Congress, July 4, 1776

The Unanimous Declaration of the Thirteen United States of America

ON JULY 2, 1776, the Second Continental Congress adopted Richard Henry Lee's motion that the Colonies "are and of right ought to be free and independent states," and formally proclaimed this decision in the Declaration of Independence of July 4. The appearance of the Declaration terminated whatever hope was still entertained of a peaceful reconciliation with England. The document, which is basically the work of Jefferson, affirms the political theory of the revolution. Intended, in part, as a propaganda document to rally the common people of the colonies and the liberal groups abroad to the support of the revolutionary movement, the Declaration embodies the political and social theories advanced by the more extreme revolutionary leaders. Eventual tempering of its liberal implications as the result of the conservative reaction culminated in the states in the Massachusetts Constitution of 1780 and on the national level in the Philadelphia Constitution of 1787.

WHEN in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.—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,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 22–26.

abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. —He has refused his Assent to Laws, the most wholesome and necessary for the public good.—He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.—He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.—He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.—He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.—He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.—He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.—He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.—He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.—He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.—He has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures.—He has affected to render the

Military independent of and superior to the Civil power.—He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:—For quartering large bodies of armed troops among us:—For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:—For cutting off our Trade with all parts of the world:—For imposing Taxes on us without our Consent:—For depriving us in many cases, of the benefits of Trial by Jury:—For transporting us beyond Seas to be tried for pretended offences:—For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:—For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:—For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.—He has abdicated Government here, by declaring us out of his Protection and waging War against us.—He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.—He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.—He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.—He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes, and conditions. In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people. Nor have We been wanting in attentions to our Brittish brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the neces-

sity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.—

We, Therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved, and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.—And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

3. ARTICLES OF CONFEDERATION, MARCH 1, 1781 [1]

THE Articles of Confederation, ratified by the Congress on November 15, 1777, and finally approved by the thirteenth state, Maryland, in January, 1781, became formally effective on March 1 of that year. The legal basis of the central government during the Revolution, they continued in force until the ratification of the federal Constitution in 1787. Representing the initial organization of American government on the national level, they were designed to create only enough power to enable the Congress to carry on the Revolution and conclude the peace. After the termination of the Revolution their inadequacy to meet the problems of national integration and economic stabilization occasioned the calling of the Philadelphia Convention.

To all to whom these Presents shall come, we the under signed Delegates of the States affixed to our Names, send greeting.

WHEREAS the Delegates of the United States of America, in Congress assembled, did, on the 15th day of November, in the Year of Our Lord

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 27–37.

One thousand Seven Hundred and Seventy seven, and in the Second Year of the Independence of America, agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the words following, viz. "Articles of Confederation and perpetual Union between the states of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. The Stile of this confederacy shall be "The United States of America."

ARTICLE II. Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall, upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. For the more convenient management of the general interests of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the united states in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No state, without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state, nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence

of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled, shall determine otherwise.

ARTICLE VII. When land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

ARTICLE IX. The united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities, whatsoever—of establishing rules for deciding in all cases, what captures on land

or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according

to the best of his judgment, without favour, affection or hope of reward:" provided also, that no state shall be deprived of territory for the benefit of the united states.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states—fixing the standard of weights and measures throughout the united states—regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated—establishing or regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office—appointing all officers of the land forces, in the service of the united states, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expences—to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states; and the officers and men so cloathed, armed and equipped shall

march to the place appointed, and within the time agreed on by the united states in congress assembled: But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

The united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

The congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six Months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the

measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. All bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

* ARTICLE XIII. Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know Ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. And that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. In Witness whereof we have hereunto set our hands in Congress. Done at Philadelphia in the state of Pennsylvania the ninth day of July, in the Year of our Lord one Thousand seven Hundred and Seventy-eight, and in the third year of the independence of America.

4. MASSACHUSETTS CONSTITUTION OF 1780[1]

A CONSTITUTION OR FRAME OF GOVERNMENT, Agreed upon by the Delegates of the People of the STATE OF MASSACHUSETTS-BAY, —*In Convention*,—Begun and held at *Cambridge*, on the First of *September*, 1779, and continued by Adjournments to the Second of *March*, 1780.

THE Massachusetts Constitution of 1780 embodies the victory of the conservative forces over the radical tendencies that had developed in certain of the states during the Revolution. Returning to the model of organization set up for a Royal Colony, the constitution provides for a separation of powers, checks and balances, and a restricted franchise. Drawn up and ratified by a popularly elected constitutional convention, the document is truly a "fundamental law" and not the mere creation of the state legislature. The basic governmental framework thus established remains in general effect in Massachusetts today. The constitution as a whole had a profound effect upon subsequent constitutional developments in other states. The sections reproduced below convey the general tone and structure of the document.

PREAMBLE

THE end of the institution, maintenance and administration of government, is to secure the existence of the body-politic; to protect it; and to furnish the individuals who compose it, with the power of enjoying, in safety and tranquillity, their natural rights, and the blessings of life: And whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording

[1] Reprinted from *Journal of the Convention for Framing A Constitution of Government for the State of Massachusetts Bay, From the Commencement of Their First Session, September 1, 1779, To the Close of Their Last Session, June 16, 1780* (Boston: Dutton and Wentworth, Printers to the State, 1832), pp. 222–225; 227–240; 242–244.

us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new Constitution of Civil Government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, DO agree upon, ordain and establish, the following *Declaration of Rights, and Frame of Government,* as the CONSTITUTION of the COMMONWEALTH of MASSACHUSETTS.

PART THE FIRST

A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

ART. I.—All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

II.—It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

III.—As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community, but by the institution of the public worship of GOD, and of public instructions in piety, religion and morality: Therefore, to promote their happiness and to secure the good order and preservation of their government, the people of this Commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public protestant teachers of piety, religion and morality, in all cases where such provision shall not be made voluntarily.

And the people of this Commonwealth have also a right to, and do, invest their legislature with authority to enjoin upon all the subjects an attendance upon the instructions of the public teachers aforesaid, at stated times and seasons, if there be any on whose instructions they can conscientiously and conveniently attend.

Provided notwithstanding, that the several towns, parishes, precincts,

and other bodies-politic, or religious societies, shall, at all times, have the exclusive right of electing their public teachers, and of contracting with them for their support and maintenance.

And all monies paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the public teacher or teachers of his own religious sect or denomination, provided there be any on whose instructions he attends: otherwise it may be paid towards the support of the teacher or teachers of the parish or precinct in which the said monies are raised.

And every denomination of christians, demeaning themselves peaceably, and as good subjects of the Commonwealth, shall be equally under the protection of the law: And no subordination of any one sect or denomination to another shall ever be established by law.

IV.—The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter, be by them expressly delegated to the United States of America, in Congress assembled.

V.—All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them.

VI.—No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.

VII.—Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men: Therefore the people alone have an incontestible, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it.

VIII.—In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments.

IX.—All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their

frame of government, have an equal right to elect officers, and to be elected, for public employments. . . .

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XXX.—In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them:, The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

PART THE SECOND

The Frame of Government

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CHAPTER I

The Legislative Power

Section I

The General Court

ART. I.—The department of legislation shall be formed by two branches, *a Senate* and *House of Representatives:* each of which shall have a negative on the other.

The legislative body shall assemble every year, on the last Wednesday in May, and at such other times as they shall judge necessary; and shall dissolve and be dissolved on the day next preceding the said last Wednesday in May; and shall be styled, THE GENERAL COURT OF MASSACHUSETTS.

II.—No bill or resolve of the Senate or House of Representatives shall become a law, and have force as such, until it shall have been laid before the Governor for his revisal: And if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the Senate or House of Representatives, in which soever the same shall have originated; who shall enter the objections sent down by the Governor, at large, on their records, and proceed to reconsider the said bill or resolve: But if, after such reconsideration, two thirds of the said Senate or House of Representatives, shall, notwithstanding the said objections, agree to pass the same, it shall, together with the objections, be sent to the other branch of the legislature, where it shall also be reconsidered, and if approved by two thirds of the members present, shall have the force of 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, or against, the said bill or resolve, shall be entered upon the public records of the Commonwealth.

And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the Governor within five days after it shall have been presented, the same shall have the force of a law.

III.—The General Court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, to be held in the name of the Commonwealth, for the hearing, trying, and determining of all manner of crimes, offences, pleas, processes, plaints, actions, matters, causes and things, whatsoever, arising or happening within the Commonwealth, or between or concerning persons inhabiting, or residing, or brought within the same; whether the same be criminal or civil, or whether the said crimes be capital or not capital, and whether the said pleas be real, personal, or mixt; and for the awarding and making out of execution thereupon: To which courts and judicatories are hereby given and granted full power and authority, from time to time, to administer oaths or affirmations, for the better discovery of truth in any matter in controversy or depending before them.

IV.—And further, full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defence of the government thereof; and to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said Commonwealth, the election and constitution of whom are not hereafter in this Form of Government otherwise provided for; and to set forth the several duties, powers and limits, of the several civil and military officers of this Commonwealth, and the forms of such oaths or affirmations as shall be respectively administered unto them for the execution of their several offices and places, so as the same be not repugnant or contrary to this Constitution; and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said Commonwealth; and also to impose, and levy reasonable duties and excises, upon any produce, goods, wares, merchandize, and commodities whatsoever, brought into, produced, manufactured, or being within the same; to be issued and disposed of by warrant, under the hand of the Governor of this Commonwealth for the time being, with the advice and consent of the Council, for the public service, in the necessary defence and support of the government of the said Commonwealth, and the protection and preser-

vation of the subjects thereof, according to such acts as are or shall be in force within the same. . . .

CHAPTER I

Section II

Senate

ART. I—There shall be annually elected by the freeholders and other inhabitants of this Commonwealth, qualified as in this Constitution is provided, forty persons to be Counsellors and Senators for the year ensuing their election; to be chosen by the inhabitants of the districts, into which the Commonwealth may from time to time be divided by the General Court for that purpose: And the General Court, in assigning the numbers to be elected by the respective districts, shall govern themselves by the proportion of the public taxes paid by the said districts; and timely make known to the inhabitants of the Commonwealth, the limits of each district, and the number of Counsellors and Senators to be chosen therein; provided, that the number of such districts shall never be less than thirteen; and that no district be so large as to entitle the same to choose more than six Senators. . . .

II.—The Senate shall be the first branch of the legislature; and the Senators shall be chosen in the following manner, viz: There shall be a meeting on the first Monday in April annually, forever, of the inhabitants of each town in the several counties of this Commonwealth; to be called by the Selectmen, and warned in due course of law, at least seven days before the first Monday in April, for the purpose of electing persons to be Senators and Counsellors: And at such meetings every male inhabitant of twenty-one years of age and upwards, having a freehold estate within the Commonwealth, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to give in his vote for the Senators for the district of which he is an inhabitant. And to remove all doubts concerning the meaning of the word "inhabitant" in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office, or place within this State, in that town, district, or plantation, where he dwelleth, or hath his home. . . .

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V.—Provided nevertheless, that no person shall be capable of being elected as a Senator, who is not seized in his own right of a freehold within this Commonwealth, of the value of three hundred pounds at least, or possessed of personal estate to the value of six hundred pounds at least, or of both to the amount of the same sum, and who has not been an inhabitant of this Commonwealth for the space of five years immediately

preceding his election, and, at the time of his election, he shall be an inhabitant in the district, for which he shall be chosen. . . .

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CHAPTER I

Section III

House of Representatives

ART. I.—There shall be in the Legislature of this Commonwealth, a representation of the people, annually elected, and founded upon the principle of equality.

II.—And in order to provide for a representation of the citizens of this Commonwealth, founded upon the principle of equality, every corporate town, containing one hundred and fifty rateable polls, may elect one Representative: Every corporate town, containing three hundred and seventy-five rateable polls, may elect two Representatives: Every corporate town, containing six hundred rateable polls, may elect three Representatives; and proceeding in that manner, making two hundred and twenty-five rateable polls the mean increasing number for every additional Representative. . . .

III.—Every member of the House of Representatives shall be chosen by written votes; and for one year at least next preceding his election shall have been an inhabitant of, and have been seized in his own right of a freehold of the value of one hundred pounds within the town he shall be chosen to represent, or any rateable estate to the value of two hundred pounds; and he shall cease to represent the said town immediately on his ceasing to be qualified as aforesaid.

IV.—Every male person, being twenty-one years of age, and resident in any particular town in this Commonwealth for the space of one year next preceding, having a freehold estate within the same town, of the annual income of three pounds, or any estate of the value of sixty pounds, shall have a right to vote in the choice of a Representative or Representatives for the said town. . . .

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CHAPTER II

Executive Power

Section I

Governor

ART. I.—There shall be a Supreme Executive Magistrate, who shall be styled, THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS; and whose title shall be—HIS EXCELLENCY.

II.—The Governor shall be chosen annually: And no person shall be eligible to this office, unless at the time of his election, he shall have been an inhabitant of this Commonwealth for seven years next preceding; and unless he shall, at the same time, be seized in his own right, of a freehold within the Commonwealth, of the value of one thousand pounds; and unless he shall declare himself to be of the christian religion. . . .

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IV.—The Governor shall have authority, from time to time, at his discretion, to assemble and call together the Counsellors of this Commonwealth for the time being: and the Governor, with the said Counsellors, or five of them at least, shall, and may, from time to time, hold and keep a Council, for the ordering and directing the affairs of the Commonwealth, agreeably to the Constitution and the laws of the land.

V.—The Governor, with advice of Council, shall have full power and authority, during the session of the General Court, to adjourn or prorogue the same to any time the two Houses shall desire; and to dissolve the same on the day next preceding the last Wednesday in May; and, in the recess of the said Court, to prorogue the same from time to time, not exceeding ninety days in any one recess; and to call it together sooner than the time to which it may be adjourned or prorogued, if the welfare of the Commonwealth shall require the same: And in case of any infectious distemper prevailing in the place where the said Court is next at any time to convene, or any other cause happening whereby danger may arise to the health or lives of the members from their attendance, he may direct the session to be held at some other the most convenient place within the State.

And the Governor shall dissolve the said General Court on the day next preceding the last Wednesday in May.

VI.—In cases of disagreement between the two Houses, with regard to the necessity, expediency or time of adjournment, or prorogation, the Governor, with advice of the Council, shall have a right to adjourn or prorogue the General Court, not exceeding ninety days, as he shall determine the public good shall require.

VII.—The Governor of this Commonwealth, for the time being, shall be the commander-in-chief of the army and navy, and of all the military forces of the State, by sea and land; . . . and that the Governor be intrusted with all these and other powers, incident to the offices of Captain-General and Commander-in-Chief, and Admiral, to be exercised agreeably to the rules and regulations of the Constitution, and the laws of the land, and not otherwise. . . .

VIII.—The power of pardoning offences, except such as persons may be convicted of before the Senate by an impeachment of the House, shall be in the Governor, by and with the advice of Council .

IX.—All judicial officers, the Attorney-General, the Solicitor-General, all Sheriffs, Coroners, and Registers of Probate, shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made by the Governor, and made at least seven days prior to such appointment. . . .

XIII.—As the public good requires that the Governor should not be under the undue influence of any of the members of the General Court, by a dependence on them for his support—that he should, in all cases, act with freedom for the benefit of the public—that he should not have his attention necessarily diverted from that object to his private concerns—and that he should maintain the dignity of the Commonwealth in the character of its chief magistrate—it is necessary that he should have an honorable stated salary, of a fixed and permanent value, amply sufficient for those purposes, and established by standing laws: And it shall be among the first acts of the General Court, after the Commencement of this Constitution, to establish such salary by law accordingly.

Permanent and honorable salaries shall also be established by law for the Justices of the Supreme Judicial Court.

And if it shall be found, that any of the salaries aforesaid, so established, are insufficient, they shall, from time to time, be enlarged, as the General Court shall judge proper.

CHAPTER II

Section II

Lieutenant-Governor

ART. I.—There shall be annually elected a Lieutenant-Governor of the Commonwealth of Massachusetts, whose title shall be HIS HONOR—and who shall be qualified, in point of religion, property, and residence in the Commonwealth, in the same manner with the Governor: And the day and manner of his election, and the qualifications of the electors, shall be the same as are required in the election of a Governor. . . .

CHAPTER II

Section III

Council, and the Manner of Settling Elections by the Legislature

ART. I.—There shall be a Council for advising the Governor in the executive part of government, to consist of nine persons besides the Lieutenant-Governor, whom the Governor, for the time being, shall have full power and authority, from time to time, at his discretion, to assemble and call

together. And the Governor, with the said Counsellors, or five of them at least, shall and may, from time to time, hold and keep a council, for the ordering and directing the affairs of the Commonwealth, according to the laws of the land. . . .

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CHAPTER III

Judiciary Power

II.—Each branch of the Legislature, as well as the Governor and Council, shall have authority to require the opinions of the Justices of the Supreme Judicial Court, upon important questions of law, and upon solemn occasions. . . .

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CHAPTER V

The University at Cambridge, and Encouragement of Literature, &c.

Section I

The University

ART. I.—Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty six, laid the foundation of Harvard-College, in which University many persons of great eminence have, by the blessing of GOD, been initiated in those arts and sciences, which qualified them for public employments, both in Church and State: And whereas the encouragement of Arts and Sciences, and all good literature, tends to the honor of GOD, the advantage of the christian religion, and the great benefit of this, and the other United States of America—It is declared, That the PRESIDENT and FELLOWS OF HARVARD-COLLEGE, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have, or are entitled to have, hold, use, exercise and enjoy: And the same are hereby ratified and confirmed unto them, the said President and Fellows of Harvard-College, and to their successors, and to their officers and servants, respectively, forever. . . .

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CHAPTER V

Section II

The Encouragement of Literature, &c.

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CHAPTER VI

Oaths and Subscriptions; Incompatibility of and Exclusion from Offices; Pecuniary Qualifications; Commissions; Writs; Confirmation of Laws; Habeas Corpus; The Enacting Style; Continuance of Officers; Provision for a future Revisal of the Constitution, &c.

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5. PROCEEDINGS OF COMMISSIONERS TO REMEDY DEFECTS OF THE FEDERAL GOVERNMENT [1]

Annapolis in the State of Maryland Thursday Sept. 14th 1786

THE Annapolis Convention was an outgrowth of the Mt. Vernon (Alexandria) Convention of 1785. In both these gatherings the propertied and commercial classes, alarmed at the weaknesses of the central government under the Articles of Confederation, were feeling their way toward the creation of a new and stronger central authority. The importance of the Annapolis Convention lies in the fact that it precipitated the calling of the Philadelphia Convention and the drawing up of the federal Constitution.

MET agreeable to Adjournment.

The meeting resumed the consideration of the draft of the Report, and after some time spent therein, and amendments made, the same was unanimously agreed to, and is as follows, to wit.

To the Honorable, the Legislatures of Virginia, Delaware, Pennsylvania, New Jersey, and New York—

The Commissioners from the said States, respectively assembled at Annapolis, humbly beg leave to report.

That, pursuant to their several appointments, they met, at Annapolis in the State of Maryland, on the eleventh day of September Instant, and having proceeded to a Communication of their powers; they found that the States of New York, Pennsylvania, and Virginia, had, in substance, and

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 39-43.

nearly in the same terms, authorised their respective Commissioners "to meet such Commissioners as were, or might be, appointed by the other States in the Union, at such time and place, as should be agreed upon by the said Commissioners to take into consideration the trade and Commerce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object, as when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same."

That the State of Delaware, had given similar powers to their Commissioners, with this difference only, that the Act to be framed in virtue of those powers, is required to be reported "to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State."

That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners, "to consider how far an uniform system in their commercial regulations and *other important matters*, might be necessary to the common interest and permanent harmony of the several States," and to report such an Act on the subject, as when ratified by them "would enable the United States in Congress assembled, effectually to provide for the exigencies of the Union."

That appointments of Commissioners have also been made by the States of New Hampshire, Massachusetts, Rhode Island, and North Carolina, none of whom however have attended: but that no information has been received by your Commissioners, of any appointment having been made by the States of Connecticut, Maryland, South Carolina or Georgia.

That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.

Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs, may be found to require.

If in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.

In this persuasion, your Commissioners submit an opinion, that the Idea of extending the powers of their Deputies, to other objects, than those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention; they are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the foederal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Foederal System.

That there are important defects in the system of the Foederal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; That the defects, upon a closer examination, may be found greater and more numerous, than even these acts imply, is at least so far probable, from the embarrassments which characterise the present State of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Councils of all the States. In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur, without being particularised.

Your Commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future Convention, with more enlarged powers, is founded; as it would be an useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are however of a nature so serious, as, in the view of your Commissioners to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the Confederacy.

Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Foederal Government adequate to the

exigencies of the Union; and to report such an Act for that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.

Though your Commissioners could not with propriety address these observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States.

BY ORDER OF THE COMMISSIONERS

6. REPORT OF PROCEEDINGS IN CONGRESS WEDNESDAY FEB. 21, 1787 [1]

IN PURSUANCE of the request of the Annapolis Convention, Congress passed a resolution calling for a convention to meet in Philadelphia "for the sole and expressed purpose of revising the Articles of Confederation." Congress was influenced in its action by the dire condition of the Confederation finances and the hope that the Philadelphia meeting would provide relief in this regard. The emergence of an entirely new governmental structure as a result of the Philadelphia deliberations was more than Congress had bargained for. As a result, Congress forwarded the proposed Constitution to the states for their action only with considerable reluctance.

A MOTION was then made by the delegates for Massachusetts to postpone the farther consideration of the report in order to take into consideration a motion which they read in their place, this being agreed to, the motion of the delegates for Massachusetts was taken up and being amended was agreed to as follows:

Whereas there is provision in the Articles of Confederation & perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several States; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention for the purposes expressed in the following

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 45–46.

resolution and such convention appearing to be the most probable mean of establishing in these states a firm national government.

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.



CHAPTER II

The Federal Constitution

7. THE VIRGINIA PLAN, PRESENTED BY EDMUND RANDOLPH TO THE FEDERAL CONVENTION, MAY 29, 1787 [1]

SEVERAL plans of government were placed before the Philadelphia Convention of 1787 for the consideration of the delegates. The chief ones were the Virginia and New Jersey plans and those of Alexander Hamilton (New York) and of Charles Pinckney (South Carolina). The Virginia Plan was drafted by the Virginia delegation under the leadership of James Madison during the period of waiting in Philadelphia for a quorum of the Convention delegates to assemble. It was presented to the Convention by Governor Edmund Randolph of Virginia on May 29. In general the plan represented the views of the large-state group and those who favored a complete revision of the Articles and the creation of a strong national government. The plan, presented as a series of resolutions, is important because it served as the chief basis for discussion and the eventual construction of the new Constitution.

1. Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, "common defence, security of liberty and general welfare."

2. Res^{d} therefore that the rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. Res^{d} that the National Legislature ought to consist of two branches.

4. Res^{d} that the members of the first branch of the National Legislature

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 955–956.

ought to be elected by the people of the several States every for the terms of ; to be of the age of years at least, to receive liberal stipends by which they may be compensated for the devotion of their time to public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those beculiarly [*sic*] belonging to the functions of the first branch, during the term of service, and for the space of after its expiration; to be incapable of reelection for the space of after the expiration of their term of service, and to be subject to recall.

5. Resol^{d} that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term of service, and for the space of after the expiration thereof.

6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation, to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst any member of the Union failing to fulfill its duty under the articles thereof.

7. Res^{d} that a National Executive be instituted; to be chosen by the National Legislature for the term of years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so to as affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.

8. Res^{d} that the Executive and a convenient number of the National Judiciary, ought to compose a Council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by of the members of each branch.

9. Resd that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

10. Resolvd that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of Government & Territory or otherwise, with the consent of a number of voices in the National legislature less than the whole.

11. Resd that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guarantied by the United States to each State.

12. Resd that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the articles of Union shall be adopted, and for the completion of all their engagements.

13. Resd that provision ought to be made for the amendment of the Articles of Union whensoever it shall seem necessary, and that the assent of the National Legislature ought not to be required thereto.

14. Resd that the Legislative Executive & Judiciary powers within the several States ought to be bound by oath to support the articles of Union.

15. Resd that the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.

8. THE PLAN PRESENTED BY WILLIAM PATTERSON (N.J.) TO THE FEDERAL CONVENTION, JUNE 15, 1787 [1]

THE New Jersey Plan, laid before the Philadelphia Convention of 1787 on June 15 by William Paterson of New Jersey, is commonly regarded as representative of the views of the small-state group and those delegates who were particularly concerned about the preservation of the "rights" of the states. The plan did not propose, however, a continuation of the weak national government of the Articles but accorded with the general sentiment of the Convention for strengthening and expanding the organs and powers of the central government. Nevertheless, the plan indicated more concern for the organization and operation of national powers with respect to the states than did the Virginia Plan. Although the Convention voted its endorsement of the Virginia Plan on June 19, the nine resolutions of the New Jersey Plan contributed significantly to the final product of the Convention.

1. Res^{d} that the articles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union.

2. Res^{d} that in addition to the powers vested in the U. States in Congress, by the present existing articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandizes of foreign growth or manufacture, imported into any part of the U. States, by Stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general post-office, to be applied to such federal purposes as they shall deem proper & expedient; to make rules & regulations for the collection thereof; and the same from time to time, to alter & amend in such manner as they shall think proper: to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other: provided that all punishments, fines, forfeitures & penalties to be incurred for contravening such acts rules and regulations shall be adjudged by the Common law Judiciaries of the State in which any offence contrary to the true intent & meaning of such Acts rules & regulations shall have been committed or perpetrated, with liberty of commencing in the first instance all suits & prosecutions for that purpose in the superior common law Judiciary in such State, subject nevertheless, for the correction of all errors, both in law & fact in rendering Judgment, to an appeal to the Judiciary of the U. States.

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 967–970.

3. Resd that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the articles of Confederation, the United States in Congs be authorized to make such requisitions in proportion to the whole number of white & other free citizens & inhabitants of every age sex and condition including those bound to servitude for a term of years & three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non complying States & for that purpose to devise and pass acts directing & authorizing the same; provided that none of the powers hereby vested in the U. States in Congs shall be exercised without the consent of at least States, and in that proportion if the number of Confederated States should hereafter be increased or diminished.

4. Resd that the U. States in Congs be authorized to elect a federal Executive to consist of persons, to continue in office for the term of years, to receive punctually at stated times a fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons composing the Executive at the time of such increase or diminution, to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service and for years thereafter; to be ineligible a second time, & removeable by Congs on application by a majority of the Executives of the several States; that the Executives besides their general authority to execute the federal acts ought to appoint all federal officers not otherwise provided for, & to direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General or in other capacity.

5. Resd that a federal Judiciary be established to consist of a supreme Tribunal the Judges of which to be appointed by the Executive, & to hold their offices during good behaviour, to receive punctually at stated times a fixed compensation for their services in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution; that the Judiciary so established shall have authority to hear & determine in the first instance on all impeachments of federal officers, & by way of appeal in the dernier resort in all cases touching the rights of Ambassadors, in all cases of captures from an enemy, in all cases of piracies & felonies on the high Seas, in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any of the Acts for regulation of trade, or the collection of the federal Revenue: that none of the Judiciary shall during the time they remain in office be capable of receiving or holding any other office or appointment during their time of service, or for thereafter.

6. Resd that all Acts of the U. States in Congs made by virtue & in pursuance of the powers hereby & by the articles of Confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an observance of such Treaties.

7. Resd that provision be made for the admission of new States into the Union.

8. Resd the rule for naturalization ought to be the same in every State.

9. Resd that a Citizen of one State committing an offence in another State of the Union, shall be deemed guilty of the same offence as if it had been committed by a Citizen of the State in which the offence was committed.



9. NOTES OF MAJOR WILLIAM PIERCE (GA.) IN THE FEDERAL CONVENTION OF 1787 [1]

Characters in the Convention of the States Held at Philadelphia, May 1787

THE delegates attending the Philadelphia Convention have been regarded by later generations as men high in the esteem of their countrymen and possessed of an abundance of political talent and sound practical experience. The character sketches of his fellow-delegates by William Pierce of Georgia—evidently made at the Convention or shortly thereafter—support this view. Several of the sketches are reproduced here. With regard to his own character, Major Pierce left it for "those who may choose to speculate on it, to consider it in any light that their fancy or imagination may depict."

MR. GORHAM is a Merchant in Boston, high in reputation, and much in the esteem of his Country-men. He is a Man of very good sense, but not much improved in his education. He is eloquent and easy in public de-

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 96–98; 100–102; 104–105.

bate, but has nothing fashionable or elegant in his style;—all he aims at is to convince, and where he fails it never is from his auditory not understanding him, for no Man is more perspicuous and full. He has been President of Congress, and three years a Member of that Body. Mr. Gorham is about 46 years of age, rather lusty, and has an agreeable and pleasing manner.

Mr. Sherman exhibits the oddest shaped character I ever remember to have met with. He is awkward, un-meaning, and unaccountably strange in his manner. But in his train of thinking there is something regular, deep, and comprehensive; yet the oddity of his address, the vulgarisms that accompany his public speaking, and that strange new England cant which runs through his public as well as his private speaking make everything that is connected with him grotesque and laughable;—and yet he deserves infinite praise,—no Man has a better Heart or a clearer Head. If he cannot embellish he can furnish thoughts that are wise and useful. He is an able politician, and extremely artful in accomplishing any particular object;—it is remarked that he seldom fails. I am told he sits on the Bench in Connecticut, and is very correct in the discharge of his Judicial functions. In the early part of his life he was a Shoemaker,—but despising the lowness of his condition, he turned Almanack maker, and so progressed upwards to a Judge. He has been several years a Member of Congress, and discharged the duties of his Office with honor and credit to himself, and advantage to the State he represented. He is about 60.

Colº Hamilton is deservedly celebrated for his talents. He is a practitioner of the Law, and reputed to be a finished Scholar. To a clear and strong judgment he unites the ornaments of fancy, and whilst he is able, convincing, and engaging in his eloquence the Heart and Head sympathize in approving him. Yet there is something too feeble in his voice to be equal to the strains of oratory;—it is my opinion that he is rather a convincing Speaker, that [than] a blazing Orator. Colº Hamilton requires time to think,—he enquires into every part of his subject with the searchings of phylosophy, and when he comes forward he comes highly charged with interesting matter, there is no skimming over the surface of a subject with him, he must sink to the bottom to see what foundation it rests on.—His language is not always equal, sometimes didactic like Bolingbroke's, at others light and tripping like Stern's. His eloquence is not so defusive as to trifle with the senses, but he rambles just enough to strike and keep up the attention. He is about 33 years old, of small stature, and lean.

His manners are tinctured with stiffness, and sometimes with a degree of vanity that is highly disagreeable.

Dr. Franklin is well known to be the greatest phylosopher of the present age;—all the operations of nature he seems to understand,—the very heavens obey him, and the Clouds yield up their Lightning to be imprisoned in his rod. But what claim he has to the politician, posterity must determine. It is certain that he does not shine much in public Council,—he is no Speaker, nor does he seem to let politics engage his attention. He is, however, a most extraordinary Man, and tells a story in a style more engaging than anything I ever heard. Let his Biographer finish his character. He is 82 years old, and possesses an activity of mind equal to a youth of 25 years of age.

Mr. Governeur Morris is one of those Genius's in whom every species of talents combine to render him conspicuous and flourishing in public debate:—He winds through all the mazes of rhetoric, and throws around him such a glare that he charms, captivates, and leads away the senses of all who hear him. With an infinite streach of fancy he brings to view things when he is engaged in deep argumentation, that render all the labor of reasoning easy and pleasing. But with all these powers he is fickle and inconstant,—never pursuing one train of thinking,—nor ever regular. He has gone through a very extensive course of reading, and is acquainted with all the sciences. No Man has more wit,—nor can any one engage the attention more than Mr. Morris. He was bred to the Law, but I am told he disliked the profession, and turned Merchant. He is engaged in some great mercantile matters with his namesake Mr. Robt Morris. This Gentleman is about 38 years old, he has been unfortunate in losing one of his Legs, and getting all the flesh taken off his right arm by a scald, when a youth.

Genl Washington is well known as the Commander in chief of the late American Army. Having conducted these States to independence and peace, he now appears to assist in framing a Government to make the People happy. Like Gustavus Vasa, he may be said to be the deliverer of his Country;—like Peter the great he appears as the politician and the States-man; and like Cincinnatus he returned to his farm perfectly contented with being only a plain Citizen, after enjoying the highest honor of the Confederacy,—and now only seeks for the approbation of his Country-men by being virtuous and useful. The General was conducted

to the Chair as President of the Convention by the unanimous voice of its Members. He is in the 52d year of his age.

Mr. Maddison is a character who has long been in public life; and what is very remarkable every Person seems to acknowledge his greatness. He blends together the profound politician, with the Scholar. In the management of every great question he evidently took the lead in the Convention, and tho' he cannot be called an Orator, he is a most agreable, eloquent, and convincing Speaker. From a spirit of industry and application which he possesses in a most eminent degree, he always comes forward the best informed Man of any point in debate. The affairs of the United States, he perhaps, has the most correct knowledge of, of any Man in the Union. He has been twice a Member of Congress, and was always thought one of the ablest Members that ever sat in that Council. Mr. Maddison is about 37 years of age, a Gentleman of great modesty,—with a remarkable sweet temper. He is easy and unreserved among his acquaintance, and has a most agreable style of conversation.

10. RESOLUTION OF THE FEDERAL CONVENTION SUBMITTING THE CONSTITUTION TO CONGRESS, SEPTEMBER 17, 1787 [1]

In Convention Monday September 17th 1787

THE Philadelphia Convention finally approved the completed constitutional document on September 17, 1787. The Convention had gone beyond the scope of instructions given to most of its members and instead of preparing a revision of the Articles had written a complete constitution that provided for a new form of government. In transmitting the proposed constitution to Congress, the Convention recommended a procedure of ratification that differed from the plan laid down in the Articles and repeated in the resolution of Congress calling the Philadelphia Convention (see selections 3 and 6). In most textbooks the student will find a brief statement of the probable reasons that influenced the Convention to recommend an unauthorized

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington D.C.: Government Printing Office, 1927), pp. 1005–1006.

procedure, one that was certainly bold and, in the light of later events, politically practical.

PRESENT

The States of

New Hampshire, Massachusetts, Connecticut, Mr Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification: and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

G° WASHINGTON Presid[t]

W. JACKSON Secretary

11. RESOLUTION OF CONGRESS OF SEPTEMBER 28, 1787, SUBMITTING THE CONSTITUTION TO THE SEVERAL STATES [1]

Friday Sept. 28, 1787

UPON receipt of the proposed constitution and the resolution of the Convention, the Congress after some discussion adopted a resolution providing for transmission of the document to the states. The Congress made no comment or recommendation other than that contained in this resolution.

CONGRESS assembled present Newhampshire Massachusetts Connecticut New York New Jersey Pennsylvania Delaware Virginia North Carolina South Carolina and Georgia and from Maryland M^r^ Ross

Congress having received the report of the Convention lately assembled in Philadelphia

Resolved Unanimously that the said Report with the resolutions and letter accompanying the same be transmitted to the several legislatures in Order to be submitted to a convention of Delegates chosen in each state by the people thereof in conformity to the resolves of the Convention made and provided in that case.

12. THE FEDERALIST: No. X [2]

(Madison)

RATIFICATION of the new Constitution was easily and promptly accomplished in a few states; the process was marked by bitter controversy and a veritable war of words in others. Throughout the fall and winter of 1787 and the spring and summer of 1788 the debate was sustained through newspaper articles, pamphlets, and letters. Opposition to the Constitution was well organized in New York. As a contribution to the campaign for ratification in that state, the papers collectively known as *The Federalist* were printed anonymously in New York City newspapers in the winter of 1787–1788. The chief

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), p. 1007.

[2] Reprinted from the *New York Packet*, Friday, November, 23, 1787.

authors of the eighty-five articles were Alexander Hamilton and James Madison, with some help from John Jay. These papers probably did not exert great immediate influence; nonetheless, they are regarded today as the classic exposition and defense of the American Constitution. The following paper deals with the problem of controlling factions, the most common and durable source of which "has been the various and unequal distribution of property." It is an able and penetrating statement of the economic basis of politics.

To the People of the State of New York:

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished; as they continue to be the favourite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side, as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labour have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

By a faction, I understand a number of citizens, whether amounting to a

majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment of different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property.

Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilised 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.

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay, with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufacturers be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

The inference to which we are brought is, that the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views

by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long laboured, and be recommended to the esteem and adoption of mankind.

By what means is this object obtainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of goernment itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronised this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalised and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic

are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people. The question resulting is, whether small or extensive republics are more favourable to the election of proper guardians of the public weal; and it is clearly decided in favour of the latter by two obvious considerations:

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greater in the small republic, it follows that, if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established character.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

The other point of difference is, the greater number of citizens and ex-

tent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonourable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increased variety of parties comprised within the Union increase this security? Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold

a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists.

PUBLIUS



13. RATIFICATION OF THE CONSTITUTION BY NEW YORK [1]

ON JUNE 21, 1788, the ninth state (New Hampshire) ratified the Constitution. Presumably the approval of these nine states was sufficient to make the Constitution effective. However, neither New York nor Virginia was among them; and it was widely recognized that their participation in the new government would be essential to its success. In both states there was strong opposition to the Constitution and it was not at all certain that approval would be given. On June 25, 1788, Virginia ratified by a vote of eighty-nine to seventy-nine; and on July 26, 1788, the New York Convention also voted its approval, thirty to twenty-seven. The decision was not easily won in either state, however. The two resolutions that follow indicate the nature of conciliatory gestures made toward the opposition in New York. The first resolution contains the formal statement of ratification by New York but precedes it with a list of rights that "cannot be abridged or violated." The second resolution calls upon the New York Representatives in Congress to secure the ratification of certain amendments to the Constitution "in the manner prescribed therein."

WE THE Delegates of the People of the State of New York, duly elected and Met in Convention, having maturely considered the Constitution for the United States of America, agreed to on the seventeenth day of September, in the year One thousand Seven hundred and Eighty seven, by the Convention then assembled at Philadelphia in the Common-wealth of Pennsylvania (a Copy whereof precedes these presents) and having also seriously and deliberately considered the present situation of the United States, Do declare and make known.

That all Power is originally vested in and consequently derived from the People, and that Government is instituted by them for their common Interest Protection and Security.

[1] Quoted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 1034–1044.

That the enjoyment of Life, Liberty and the pursuit of Happiness are essential rights which every Government ought to respect and preserve.

That the Powers of Government may be reassumed by the People, whensoever it shall become necessary to their Happiness; that every Power, Jurisdiction and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; And that those Clauses in the said Constitution, which declare, that Congress shall not have or exercise certain Powers, do not imply that Congress is entitled to any Powers not given by the said Constitution; but such Clauses are to be construed either as exceptions to certain specified Powers, or as inserted merely for greater Caution.

That the People have an equal, natural an unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others.

That the People have a right to keep and bear Arms; that a well regulated Militia, including the body of the People *capable of bearing Arms*, is the proper, natural and safe defence of a free State;

That the Militia should not be subject to Martial Law except in time of War, Rebellion or Insurrection.

That standing Armies in time of Peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times, the Military should be under strict Subordination to the civil Power.

That in time of Peace no Soldier ought to be quartered in any House without the consent of the Owner, and in time of War only by the Civil Magistrate in such manner as the Laws may direct.

That no Person ought to be taken imprisoned or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.

That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence.

That every Person restrained of his Liberty is entitled to an enquiry into the lawfulness of such restraint, and to a removal thereof if unlawful, and that such enquiry and removal ought not to be denied or delayed, except when on account of Public Danger the Congress shall suspend the privilege of the Writ of Habeas Corpus.

That excessive Bail ought not to be required; nor excessive Fines imposed; nor Cruel or unusual Punishments inflicted.

That (except in the Government of the Land and Naval Forces, and

of the Militia when in actual Service, and in cases of Impeachment) a Presentment or Indictment by a Grand Jury ought to be observed as a necessary preliminary to the trial of all Crimes cognizable by the Judiciary of the United States, and such Trial should be speedy, public, and by an impartial Jury of the County where the Crime was committed; and that no person can be found Guilty without the unanimous consent of such Jury. But in cases of Crimes not committed within any County of any of the United States, and in Cases of Crimes committed within any County in which a general Insurrection may prevail, or which may be in the possession of a foreign Enemy, the enquiry and trial may be in such County as the Congress shall by Law direct; which County in the two Cases last mentioned should be as near as conveniently may be to that County in which the Crime may have been committed. And that in all Criminal Prosecutions, the Accused ought to be informed of the cause and nature of his Accusation, to be confronted with his accusers and the Witnesses against him, to have the means of producing his Witnesses, and the assistance of Council for his defense, and should not be compelled to give Evidence against himself.

That the trial by Jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate.

That every Freeman has a right to be secure from all unreasonable searches and seizures of his person his papers or his property, and therefore, that all Warrants to search suspected places or seize any Freeman his papers or property, without information upon Oath or Affirmation of sufficient cause, are grievous and oppressive; and that all general Warrants (or such in which the place or person suspected are not particularly designated) are dangerous and ought not to be granted.

That the People have a right peaceably to assemble together to consult for their common good, or to instruct their Representatives; and that every person has a right to Petition or apply to the Legislature for redress of Grievances.—That the Freedom of the Press ought not to be violated or restrained.

That there should be once in four years an Election of the President and Vice President, so that no Officer who may be appointed by the Congress to act as President in case of the removal, death, resignation or inability of the President and Vice President can in any case continue to act beyond the termination of the period for which the last President and Vice President were elected.

That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing Laws at its discretion from time to time to divide such State into convenient Districts, and to apportion its Representatives to and amongst such Districts.

That the Prohibition contained in the said Constitution against *ex post facto* Laws, extends only to Laws concerning Crimes.

That all Appeals in Causes determineable according to the course of the common Law, ought to be by Writ of Error and not otherwise.

That the Judicial Power of the United States in cases in which a State may be a party, does not extend to criminal Prosecutions, or to authorize any Suit by any Person against a State.

That the Judicial Power of the United States as to Controversies between Citizens of the same State claiming Lands under Grants of different States is not to be construed to extend to any other Controversies between them except those which relate to such Lands, so claimed under Grants of different States.

That the Jurisdiction of the Supreme Court of the United States, or of any other Court to be instituted by the Congress, is not in any case to be encreased enlarged or extended by any Fiction Collusion or mere suggestion; —And That no Treaty is to be construed so to operate as to alter the Constitution of any State.

Under these impressions and declaring that the rights aforesaid cannot be abridged or violated, and that the Explanations aforesaid are consistent with the said Constitution, And in confidence that the Amendments which shall have been proposed to the said Constitution will receive an early and mature Consideration: We the said Delegates, in the Name and in behalf of the People of the State of New York Do by these presents Assent to and Ratify the said Constitution. In full Confidence nevertheless that until a Convention shall be called and convened for proposing Amendments to the said Constitution, the Militia of this State will not be continued in Service out of this State for a longer term than six weeks without the Consent of the Legislature thereof;—that the Congress will not make or alter any Regulation in this State respecting the times places and manner of holding Elections for Senators or Representatives unless the Legislature of this State shall neglect or refuse to make Laws or regulations for the purpose, or from any circumstance be incapable of making the same, and that in those cases such power will only be exercised until the Legislature of this State shall make provision in the Premises;—that no Excise will be imposed on any Article of the Growth production or Manufacture of the United States, or any of them within this State, Ardent Spirits excepted; And that the Congress will not lay direct Taxes within this State, but when the Monies arising from the Impost and Excise shall be insufficient for the public Exigencies, nor then, until Congress shall first have made a Requisition upon this State to assess levy and pay the Amount of such Requisition made agreably to the Census fixed in the said Constitution in such way and manner as the Legislature of this State shall judge best, but that in such case, if the State shall neglect or refuse to pay its

proportion pursuant to such Requisition, then the Congress may assess and levy this States proportion together with Interest at the Rate of six per Centum per Annum from the time at which the same was required to be paid.

Done in Convention at Poughkeepsie in the County of Dutchess in the State of New York the twenty sixth day of July in the year of our Lord One thousand Seven hundred and Eighty eight.

By Order of the Convention.

GEO: CLINTON President

Attested

JOHN MCKESSON
ABM. B. BANCKER } Secretaries—

And the Convention do in the Name and Behalf of the People of the State of New York enjoin it upon their Representatives in the Congress, to Exert all their Influence, and use all reasonable means to Obtain a Ratification of the following Amendments to the said Constitution in the manner prescribed therein; and in all Laws to be passed by the Congress in the meantime to conform to the spirit of the said Amendments as far as the Constitution will admit.

That there shall be one Representative for every thirty thousand Inhabitants, according to the enumeration or Census mentioned in the Constitution, until the whole number of Representatives amounts to two hundred; after which that number shall be continued or encreased but not diminished, as Congress shall direct, and according to such ratio as the Congress shall fix, in conformity to the rule prescribed for the Apportionment of Representatives and direct Taxes.

That the Congress do not impose any Excise on any Article (except Ardent Spirits) of the Growth Production or Manufacture of the United States, or any of them.

That Congress do not lay direct Taxes but when the Monies arising from the Impost and Excise shall be insufficient for the Public Exigencies, nor then until Congress shall first have made a Requisition upon the States to assess levy and pay their respective proportions of such Requisition, agreably to the Census fixed in the said Constitution, in such way and manner as the Legislatures of the respective States shall judge best; and in such Case, if any State shall neglect or refuse to pay its proportion pursuant to such Requisition, then Congress may assess and levy such States proportion, together with Interest at the rate of six per Centum per Annum, from the time of Payment prescribed in such Requisition.

That the Congress shall not make or alter any Regulation in any State respecting the times places and manner of holding Elections for Senators or

Representatives, unless the Legislature of such State shall neglect or refuse to make Laws or Regulations for the purpose, or from any circumstance be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises; provided that Congress may prescribe the time for the Election of Representatives.

That no Persons except natural born Citizens, or such as were Citizens on or before the fourth day of July one thousand seven hundred and seventy six, or such as held Commissions under the United States during the War, and have at any time since the fourth day of July one thousand seven hundred and seventy six become Citizens of one or other of the United States, and who shall be Freeholders, shall be eligible to the Places of President, Vice President, or Members of either House of the Congress of the United States.

That the Congress do not grant Monopolies or erect any Company with exclusive Advantages of Commerce.

That no standing Army or regular Troops shall be raised or kept up in time of peace, without the consent of two-thirds of the Senators and Representatives present, in each House.

That no Money be borrowed on the Credit of the United States without the Assent of two-thirds of the Senators and Representatives present in each House.

That the Congress shall not declare War without the concurrence of two-thirds of the Senators and Representatives present in each House.

That the Privilege of the *Habeas Corpus* shall not by any Law be suspended for a longer term than six Months, or until twenty days after the Meeting of the Congress next following the passing of the Act for such suspension.

That the Right of the Congress to exercise exclusive Legislation over such District, not exceeding ten Miles square, as may by cession of a particular State, and the acceptance of Congress, become the Seat of the Government of the United States, shall not be so exercised, as to exempt the Inhabitants of such District from paying the like Taxes Imposts Duties and Excises, as shall be imposed on the other Inhabitants of the State in which such District may be; and that no person shall be privileged within the said District from Arrest for Crimes committed, or Debts contracted out of the said District.

That the Right of exclusive Legislation with respect to such places as may be purchased for the Erection of Forts, Magazines, Arsenals, Dockyards and other needful Buildings, shall not authorize the Congress to make any Law to prevent the Laws of the States respectively in which they may be, from extending to such places in all civil and Criminal Matters except as to such Persons as shall be in the Service of the United States; nor to them with respect to Crimes committed without such Places.

That the Compensation for the Senators and Representatives be ascertained by standing Laws; and that no alteration of the existing rate of Compensation shall operate for the Benefit of the Representatives, until after a subsequent Election shall have been had.

That the Journals of the Congress shall be published at least once a year, with the exception of such parts relating to Treaties or Military operations, as in the Judgment of either House shall require Secrecy; and that both Houses of Congress shall always keep their Doors open during their Sessions, unless the Business may in their Opinion requires Secrecy. That the yeas & nays shall be entered on the Journals whenever two Members in either House may require it.

That no Capitation Tax shall ever be laid by the Congress.

That no Person be eligible as a Senator for more than six years in any term of twelve years; and that the Legislatures of the respective States may recal their Senators or either of them, and elect others in their stead, to serve the remainder of the time for which the Senators so recalled were appointed.

That no Senator or Representative shall during the time for which he was elected be appointed to any Office under the Authority of the United States.

That the Authority given to the Executives of the States to fill the vacancies of Senators be abolished, and that such vacancies be filled by the respective Legislatures.

That the Power of Congress to pass uniform Laws concerning Bankruptcy shall only extend to Merchants and other Traders; and that the States respectively may pass Laws for the relief of other Insolvent Debtors.

That no Person shall be eligible to the Office of President of the United States a third time.

That the Executive shall not grant Pardons for Treason, unless with the Consent of the Congress; but may at his discretion grant Reprieves to persons convicted of Treason, until their cases, can be laid before the Congress.

That the President or person exercising his Powers for the time being, shall not command an Army in the Field in person, without the previous desire of the Congress.

That all Letters Patent, Commissions, Pardons, Writs and Process of the United States, shall run in the Name of *the People of the United States,* and be tested in the Name of the President of the United States, or the person exercising his powers for the time being, or the first Judge of the Court out of which the same shall issue, as the case may be.

That the Congress shall not constitute ordain or establish any Tribunals or Inferior Courts, with any other than Appellate Jurisdiction, except such as may be necessary for the Tryal of Causes of Admiralty and Maritime

Jurisdiction, and for the Trial of Piracies and Felonies committed on the High Seas; and in all other Cases to which the Judicial Power of the United States extends, and in which the Supreme Court of the United States has not original Jurisdiction, the Causes shall be heard tried, and determined in some one of the State Courts, with the right of Appeal to the Supreme Court of the United States, or other proper Tribunal to be established for that purpose by the Congress, with such exceptions, and under such regulations as the Congress shall make.

That the Court for the Trial of Impeachments shall consist of the Senate, the Judges of the Supreme Court of the United States, and the first or Senior Judge for the time being, of the highest Court of general and ordinary common Law Jurisdiction in each State;— that the Congress shall by standing Laws designate the Courts in the respective States answering this Description, and in States having no Courts exactly answering this Description, shall designate some other Court, preferring such if any there be, whose Judge or Judges may hold their places during good Behaviour— Provided that no more than one Judge, other than Judges of the Supreme Court of the United States, shall come from one State— That the Congress be authorized to pass Laws for compensating the said Judges for such Services and for compelling their Attendance—and that a Majority at least of the said Judges shall be requisite to constitute the said Court—that no person impeached shall sit as a Member thereof. That each Member shall previous to the entering upon any Trial take an Oath or Affirmation, honestly and impartially to hear and determine the Cause —and that a Majority of the Members present shall be necessary to a Conviction.

That persons aggrieved by any Judgment, Sentence or Decree of the Supreme Court of the United States, in any Cause in which that Court has original Jurisdiction, with such exceptions and under such Regulations as the Congress shall make concerning the same, shall upon application, have a Commission to be issued by the President of the United States, to such Men learned in the Law as he shall nominate, and by and with the Advice and consent of the Senate appoint, not less than seven, authorizing such Commissioners, or any seven or more of them, to correct the Errors in such Judgment or to review such Sentence and Decree, as the case may be, and to do Justice to the parties in the Premises.

That no Judge of the Supreme Court of the United States shall hold any other Office under the United States, or any of them.

That the Judicial Power of the United States shall extend to no Controversies respecting Land, unless it relate to Claims of Territory or Jurisdiction between States, or to Claims of Land between Individuals, or between States and Individuals under the Grants of different States.

That the Militia of any State shall not be compelled to serve without

the limits of the State for a longer term than six weeks, without the Consent of the Legislature thereof.

That the words *without the Consent of the Congress* in the seventh Clause of the ninth Section of the first Article of the Constitution, be expunged.

That the Senators and Representatives and all Executive and Judicial Officers of the United States shall be bound by Oath or Affirmation not to infringe or violate the Constitutions or Rights of the respective States.

That the Legislatures of the respective States may make Provision by Law, that the Electors of the Election Districts to be by them appointed shall chuse a Citizen of the United States who shall have been an Inhabitant of such District for the Term of one year immediately preceeding the time of his Election, for one of the Representatives of such State.

Done in Convention at Poughkeepsie in the County of Dutchess in the State of New York the twenty sixth day of July in the year of our Lord One thousand seven hundred and Eighty eight.

By Order of the Convention.

GEO: CLINTON President

Attested—
JOHN MCKESSON
ABM B. BANCKER } Secretaries—



14. THE MOVEMENT FOR THE CONSTITUTION [1]

ONE of the continuing debates of American political history has involved the question: To what extent did the framers of the federal Constitution, during the process of writing that document, subordinate the general welfare to the particular economic advantage of the interest groups to which they belonged? Although the excerpt here from the writings of Charles A. Beard does not answer this question, it does reveal clearly the economic status and interests of the delegates. It may be said that the delegates were fully aware of the importance of conflicting economic interests in the American society and the necessity of erecting the new government on a firm economic foundation.

DID the system of government prevailing in the United States 1787 affect adversely any of the economic interests enumerated in the preceding chapter? Furthermore, were the leaders in the movement which led to

[1] Quoted from Charles A. Beard: *An Economic Interpretation of the Constitution of the United States* (New York, The Macmillan Company), pp. 52–63; 149–151; 237–238; 290–291; 324–325.

the adoption of the Constitution representatives of the interests so affected?

Fortunately, it is not necessary to devote any considerable attention to the first of these questions. It is answered in part above, and all of the standard treatises show conclusively that the legal system prevailing at the opening of 1787 was unfavorable to the property rights of four powerful groups above enumerated. That system was, in brief, as follows. There was a loose union of thirteen sovereign states under the Articles of Confederation. The national government consisted of a legislature of one house in which the states had an equal voting power. There was no executive department and no general judiciary. The central government had no power to regulate commerce or to tax directly; and in the absence of these powers all branches of the government were rendered helpless. Particularly, money could not be secured to pay the holders of public securities, either their interest or principal. Under this system, the state legislatures were substantially without restrictions or judicial control; private rights in property were continually attacked by stay laws, legal tender laws, and a whole range of measures framed in behalf of debtors; and in New England open rebellion had broken out.

That the economic groups in question looked to a new national government as the one source of relief and advantage, is shown in a hundred contemporary pamphlets and newspaper articles. It was in fact the topic of the times.

For example, a letter from Philadelphia, under date of August 29, 1787, sums up concisely the interests which were turning to the new Constitution: "The states neglect their roads and canals, till they see whether those necessary improvements will not become the objects of a national government. Trading and manufacturing companies suspend their voyages and manufactures till they see how far their commerce will be protected and promoted by a national system of commercial regulations. The lawful usurer locks up or buries his specie till he sees whether the new frame of government will deliver him from the curse or fear of paper money and the tender laws. . . . The public creditor, who, from the deranged state of finances in every state and their total inability to support their partial funding systems, has reason to fear that his certificates will perish in his hands, now places all his hopes of justice in an enlightened and stable national government. The embarrassed farmer and the oppressed tenant, who wishes to become free . . . by emigrating to a frontier country, wait to see whether they shall be protected by a national force from the Indians."

A final answer to the second question propounded above would require an exhaustive analysis of the "movement for the Constitution," in the following form:

1. A study of the economic forces in the Revolution and particularly in the Continental Congress that drafted the Articles of Confederation.

2. An inquiry into the first signs of discontent with the prevailing system, their geographic distribution, and their economic sources.

3. An examination of the several attempts in the Congress under the Articles of Confederation to secure the power to regulate commerce and establish a revenue for discharging the debt.

4. A description of the economic interests of all the members who were most active in these attempts.

5. A description of the economic forces in the communities whose representatives in Congress were zealous in securing a revision of the Articles.

6. A study of the nature and distribution of the several legislative attacks on private rights in property between 1783 and 1787.

7. A minute study of the personnel of the movement for revision and the economic interests of the leading spirits in Congress and the state legislatures and outside of legislative chambers.

Any one superficially acquainted with the sources of American history will see at once the nature of the work which must be done to secure the raw materials for such a study. The enormous mass of unprinted papers of the Continental Congress in the Library at Washington would have to be thoroughly searched; proceedings in state legislatures during the years under consideration would have to be scrutinized; local archives and newspapers would have to be examined.

In the present state of our historical materials, therefore, all that can be attempted here is a superficial commentary on some of the outward aspects of the movement for the Constitution which are described in the conventional works on the subject. Many of the eminent men prominently identified with the events which led up to the Convention of 1787 were themselves members of that Assembly, and their economic interests are considered below in Chapter V. But it is not without significance to discover that some of the leading men outside of the Convention who labored for an overthrow of the old system were also directly interested in the results of their labors.

As early as January, 1781, General Philip Schuyler moved in the senate of New York "to request the eastern states to join in an early convention, which should form a perpetual league of incorporation, subservient, however, to the common interest of all the states; invite others to accede to it; erect Vermont into a state; devise a fund for the redemption of the common debts; substitute a permanent and uniform system for temporary expedients; and invest the confederacy with powers of coercion." General Schuyler was a large holder of depreciated securities.

In February, 1781, Congress recommended to the states that they vest in the national legislature a power to levy a duty to pay the principal

and interest of the debt. In April, 1783, Congress again appealed to the states for authority to lay duties for the purpose of supplying a revenue with which to discharge the debt. Among the leaders in Congress who favored this increase in power were Gorham, Higginson, Ellsworth, Dyer, Boudinot, Fitzsimons, Williamson, Izard, Johnson, and King, all of whom held securities which were daily depreciating under the failure of the government to meet its just obligations.

In 1785, Governor Bowdoin, of Massachusetts, in his inaugural address urged the necessity of a stronger union with larger powers, and recommended a convention to deliberate upon the whole matter. Governor Bowdoin was a large holder of public securities. The legislature of the commonwealth, thereupon, resolved that the Articles of Confederation were inadequate, and directed the representatives in Congress to take steps looking toward a strengthening of the union; but they failed to act.

Men less eminent than Bowdoin and Schuyler were being educated in Federalism by the march of events. In Boston merchants were petitioning Congress for relief from British discriminations; in the Virginia legislature the representatives of the commercial interests were learning their lessons; the demands for positive action were increasing daily in number. Every failure to find a remedy under the Articles of Confederation only served to augment the ranks of those who were ready for a complete reconstruction of the prevailing system.

A few illustrations will serve to show how the demand for reform was being fostered and also the connection between the leaders in the agitation and the personnel of the public bodies which later achieved the great work of framing and ratifying the Constitution. Even before the war was over and the Articles of Confederation tested in a time of peace, the inability of the government under it to afford defence to commerce on the high seas was deplored by merchants whose vessels were falling prey to the British. In April, 1782, a number of prominent merchants presented a petition to Congress in which they lamented the British depredations on American trade and the want of adequate naval protection at sea. Among the signers of this petition were several men who were later known as warm supporters of a strong federal government. One of them, Thomas Fitzsimons, was a member of the Convention which drafted the Constitution; another, John Barclay, was a member of the Pennsylvania convention and voted in favor of the ratification of the new system of government.

Six years before the Convention met in Philadelphia, the disordered financial system under the Confederation was the subject of protest by interested parties. In 1781, "divers inhabitants of the state of Pennsylvania," were petitioning Congress to take some action designed to put the credit of the country on a sound basis. Thus runs the petition: "Hum-

bly sheweth that whereas you thought fit heretofore in the course of your wisdom to emit bills of credit for good and great purposes, but the same depreciating to such an amazing degree beyond the expectation of all living did therefore lay open wide door for the most monstrous and absurd injustices by fraudulent payments which we conclude is directly contrary to your good and great purposes in emitting the same, we therefore, not only firmly relying on the extraordinary clearness of the circumstances of our agrievances, but likewise on the uprightness of your understandings, Do therefore presume to pray your honors would be pleased to recommend to the several states to adopt such measures as they may think most likely to afford a safe and effectual redress to all such agrievances. . . ." Among the signers of this petition are Thomas Bull, John Hannum, and Thomas Cheyney, who six years later as members of the Pennsylvania convention had the pleasure of voting for the ratification of an instrument of government that put an end to the evils against which they had so earnestly protested.

The failure of repeated attempts in Congress to secure an amendment authorizing the laying of impost duties, the refusal of the states to pay the requisitions made by Congress, and the obvious impossibility of gaining their ends through the ordinary channels of ratification by state legislatures, drove the advocates of these measures to desperation. Republican government, as it had been tried out, had failed to secure for personality that protection and opportunity for advancement which it enjoyed under monarchy. The despair of the representatives of the property interests thus jeopardized and their readiness for some heroic measures were fully manifest in the correspondence of the time.

Washington, who was not given to undue alarms, wrote to John Jay from Mount Vernon, on August 1, 1786, to the effect that men of leadership were ready for drastic action: "What astonishing changes," he said, "a few years are capable of producing. I am told that even respectable characters speak of a monarchical form of Government without horror. From thinking proceeds speaking, thence to acting is often but a single step. But how irrevocable and tremendous! What a triumph for our enemies to verify their predictions—what a triumph for the advocates of despotism to find that we are incapable of governing ourselves, & that systems founded on the basis of equal liberty are merely ideal & fallacious! Would to God that wise measures may be taken in time to avert the consequences we have but too much reason to apprehend."

Later in that year, General Knox, who was a holder of public securities, wrote to Washington in the following strain: "The people who are the insurgents [Shaysites] have never paid any, or but very little taxes—But they see the weakness of government; They feel at once their own poverty, compared with the opulent, and their own force, and they are determined

to make use of the latter, in order to remedy the former. Their creed is 'That the property of the United States has been protected from the confiscations of Britain by the joint exertions of all, and therefore ought to be the common property of all. And he that attempts opposition to this creed is an enemy to equity and justice, and ought to be swept from off the face of the earth.' In a word they are determined to annihilate all debts public and private and have agrarian Laws, which are easily effected by means of unfunded paper money which shall be a tender in all cases whatever—

"The numbers of these people may amount in Massachusetts to about one fifth part of several populous counties, and to them may be collected, people of similar sentiments, from the states of Rhode Island, Connecticut, and New Hampshire so as to constitute a body of 12 or 15000 desperate & unprincipled men—They are chiefly of the young and active part of the community, more easily collected than perhaps kept together afterwards—But they will probably commit overt acts of treason which will compel them to embody for their own safety—once embodied they will be constrained to submit to discipline for the same reason. Having proceeded to this length for which they are now ripe, we shall have a formidable rebellion against reason, the principle of all government, and the very name of liberty. This dreadful situation has alarmed every man of principle and property in New England. They start as from a dream, and ask what has been the cause of our delusion? what is to afford us security against the violence of lawless men? Our government must be braced, changed, or altered to secure our lives and property. We imagined that the mildness of our government and *the virtue* of the people were so correspondent, that we were not as other nations requiring brutal force to support the laws—But we find that we are men, actual men, possessing all the turbulent passions belonging to that anim[al] and that we must have a government proper and adequate for him. The people of Massachuse[tts] for instance, are far advanced in this doctrine, and the men of reflection, & principle, are determined to endev[or] to establish a government which shall have the power to protect them in their lawful pursuits, and which will be efficient in all cases of internal commotions or foreign invasions—They mean that liberty shall be the basis, a liberty resulting from the equal and firm administration of the laws. They wish for a general government of unity as they see the local legislatures must naturally and necessarily tend to retard and frustrate all general government."

A few months later, Madison, writing to Edmund Pendleton from New York, the seat of the government, corroborated the views expressed by Washington and Knox and set forth what he conceived to be the desperate state of republican government. His letter, dated February 24, 1787, three days after Congress had issued the call for a national Convention,

ran as follows: "In general I find men of reflection much less sanguine as to a new than despondent as to the present System. Indeed the Present System neither has nor deserves advocates; and if some very strong props are not applied will quickly tumble to the ground. . . . If the approaching Convention should not agree on some remedy, I am persuaded that some very different arrangement will ensue. The late turbulent scenes in Massachusetts & infamous ones in Rhode Island, have done inexpressible injury to the republican character in that part of the U. States; and a propensity towards Monarchy is said to have been produced by it in some leading minds. The bulk of the people will probably prefer the lesser evil of a partition of the Union into three more practicable and energetic Governments. The latter idea I find after long confinement to individual speculations & private circles, is beginning to show itself in the Newspapers."

A few days after this letter was written by Madison, John Armstrong wrote to Washington from Carlisle that the suppression of the insurrection in Massachusetts had not allayed the fears of leading men in his state. "The alarming flame in Massachusetts," he says, "seems nearly extinguished, but if the subsequent measures of that State respecting the insurgents should be severe, amounting to *death*, Confiscation, or disfranchisement, the consequence may be bad, as tending to reinkindle the flame. Shall I tell you in *confidence*, I have now twice heard, nor from low authority (some principal men of that State) begin to talk of wishing one general *Head* to the Union, in the room of Congress!"

By correspondence such as this just cited, by an increasing recognition of the desperate straights in which they were placed, a remarkable fusion of interested forces was effected. The wealth, the influence, and a major portion of the educated men of the country were drawn together in a compact group, "informed by a conscious solidarity of interests," as President Wilson has so tersely put it.

Having failed to obtain relief through the regular channels of amendment by Congress ratified by the state legislatures, the leaders struck out on a new path. Operating through the Virginia legislature, they secured a resolution inviting the sister commonwealths to send delegates to a convention at Annapolis to take into consideration the trade and commercial system of the United States. The convention duly met, but the attendance was so slim that, as Professor Burgess has put it, "a coup d'état attempted by so small a body could not but fail."

Although the Annapolis convention was ostensibly concerned with commercial regulation primarily, there is no doubt that it was the creation of the men who had been working in Congress and out for a general revision of the whole system. There is no doubt also that it was not regarded as of much significance in itself, but rather as a preliminary to a national

convention which would afford an opportunity for reconstructing the government. For this view we have a witness of high authority, James Madison, who in a letter of August 12, 1786, to Jefferson, written a month before the Annapolis conference, said: "Many gentlemen, both within and without Congress, wish to make this meeting subservient to a plenipotentiary Convention for amending the Confederation. Tho' my wishes are in favor of such an event, yet I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a commercial Reform."

Under the influence of Hamilton, the conference at Annapolis contented itself with merely recommending that another convention be called "to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union." Acting on this modest suggestion, Congress, in February, 1787, invited the states to send delegates to a Convention at Philadelphia for "the sole and express purpose of revising the Articles of Confederation."

Certain tentative conclusions emerge at this point.

Large and important groups of economic interests were adversely affected by the system of government under the Articles of Confederation, namely, those of public securities, shipping and manufacturing, money at interest; in short, capital as opposed to land.

The representatives of these important interests attempted through the regular legal channels to secure amendments to the Articles of Confederation which would safeguard their rights in the future, particularly those of the public creditors.

Having failed to realize their great purposes through the regular means, the leaders in the movement set to work to secure by a circuitous route the assemblying of a Convention to "revise" the Articles of Confederation with the hope of obtaining, outside of the existing legal framework, the adoption of a revolutionary programme.

Ostensibly, however, the formal plan of approval by Congress and the state legislatures was to be preserved.

A SURVEY OF THE ECONOMIC INTERESTS OF THE MEMBERS OF THE CONSTITUTIONAL CONVENTION

A majority of the members were lawyers by profession.

Most of the members came from towns, on or near the coast, that is, from the regions in which personalty was largely concentrated.

Not one member represented in his immediate personal economic interests the small farming or mechanic classes.

The overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.

1. Public security interests were extensively represented in the Convention. Of the fifty-five members who attended no less than forty appear on the Records of the Treasury Department for sums varying from a few dollars up to more than one hundred thousand dollars. Among the minor holders were Bassett, Blount, Brearley, Broom, Butler, Carroll, Few, Hamilton, L. Martin, Mason, Mercer, Mifflin, Read, Spaight, Wilson, and Wythe. Among the larger holders (taking the sum of about $5000 as the criterion) were Baldwin, Blair, Clymer, Dayton, Ellsworth, Fitzsimons, Gilman, Gerry, Gorham, Jenifer, Johnson, King, Langdon, Lansing, Livingston, McClurg, R. Morris, C. C. Pinckney, C. Pinckney, Randolph, Sherman, Strong, Washington, and Williamson.

It is interesting to note that, with the exception of New York, and possibly Delaware, each state had one or more prominent representatives in the Convention who held more than a negligible amount of securities, and who could therefore speak with feeling and authority on the question of providing in the new Constitution for the full discharge of the public debt:

Langdon and Gilman, of New Hampshire.

Gerry, Strong, and King, of Massachusetts.

Ellsworth, Sherman, and Johnson, of Connecticut.

Hamilton, of New York. Although he held no large amount personally, he was the special pleader for the holders of public securities and the maintenance of public faith.

Dayton, of New Jersey.

Robert Morris, Clymer, and Fitzsimons, of Pennsylvania.

Mercer and Carroll, of Maryland.

Blair, McClurg, and Randolph, of Virginia.

Williamson, of North Carolina.

The two Pinckneys, of South Carolina.

Few and Baldwin, of Georgia.

2. Personalty invested in lands for speculation was represented by at least fourteen members: Blount, Dayton, Few, Fitzsimons, Franklin, Gilman, Gerry, Gorham, Hamilton, Mason, R. Morris, Washington, Williamson, and Wilson.

3. Personalty in the form of money loaned at interest was represented by at least twenty-four members: Bassett, Broom, Butler, Carroll, Clymer, Davie, Dickinson, Ellsworth, Few, Fitzsimons, Franklin, Gilman, Ingersoll, Johnson, King, Langdon, Mason, McHenry, C. C. Pinckney, C. Pinckney, Randolph, Read, Washington, and Williamson.

4. Personalty in mercantile, manufacturing, and shipping lines was represented by at least eleven members: Broom, Clymer, Ellsworth, Fitzsimons, Gerry, King, Langdon, McHenry, Mifflin, G. Morris, and R. Morris.

5. Personalty in slaves was represented by at least fifteen members: Butler, Davie, Jenifer, A. Martin, L. Martin, Mason, Mercer, C. C. Pinckney, C. Pinckney, Randolph, Read, Rutledge, Spaight, Washington, and Wythe.

It cannot be said, therefore, that the members of the Convention were "disinterested." On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain. As a group of doctrinaires, like the Frankfort assembly of 1848, they would have failed miserably; but as practical men they were able to build the new government upon the only foundations which could be stable: fundamental economic interests.

. . . . . .

CONCLUSIONS ON THE PROCESS OF RATIFICATION

Two states, Rhode Island and North Carolina refused to ratify the Constitution until after the establishment of the new government which set in train powerful economic forces against them in their isolation.

In three states, New Hampshire, New York, and Massachusetts, the popular vote as measured by the election of delegates to the conventions was adverse to the Constitution; and ratification was secured by the conversion of opponents and often the repudiation of their tacit (and in some cases express) instructions.

In Virginia the popular vote was doubtful.

In the four states which ratified the constitution with facility, Connecticut, New Jersey, Georgia, and Delaware, only four or five weeks were allowed to elapse before the legislatures acted, and four or five weeks more before the elections to the conventions were called; and about an equal period between the elections and the meeting of the conventions. This facility of action may have been due to the general sentiment in favor of the Constitution; or the rapidity of action may account for the slight development of the opposition.

In two commonwealths, Maryland and South Carolina, deliberation and delays in the election and the assembling of the conventions resulted in an undoubted majority in favor of the new instrument; but for the latter state the popular vote has never been figured out.

In one of the states, Pennsylvania, the proceedings connected with the ratification of the Constitution were conducted with unseemly haste.

. . . . . .

CONCLUSIONS WITH RESPECT TO THE ECONOMICS OF THE VOTE ON THE CONSTITUTION IN THE STATE RATIFYING CONVENTIONS

Inasmuch as the movement for the ratification of the Constitution centred particularly in the regions in which mercantile, manufacturing, security, and personalty interests generally had their greatest strength, it is impossible to escape the conclusion that holders of personalty saw in the new government a strength and defence to their advantage.

Inasmuch as so many leaders in the movement for ratification were large security holders, and inasmuch as securities constituted such a large proportion of personalty, this economic interest must have formed a very considerable dynamic element, if not the preponderating element, in bringing about the adoption of the new system.

The state conventions do not seem to have been more "disinterested" than the Philadelphia convention; but in fact the leading champions of the new government appear to have been, for the most part, men of the same practical type, with actual economic advantages at stake.

The opposition to the Constitution almost uniformly came from the agricultural regions, and from the areas in which debtors had been formulating paper money and other depreciatory schemes.

GENERAL CONCLUSIONS ON THE ECONOMIC NATURE OF THE MOVEMENT FOR A NEW CONSTITUTION

The movement for the Constitution of the United States was originated and carried through principally by four groups of personalty interests which had been adversely affected under the Articles of Confederation: money, public securities, manufactures, and trade and shipping.

The first firm steps toward the formation of the Constitution were taken by a small and active group of men immediately interested through their personal possessions in the outcome of their labors.

No popular vote was taken directly or indirectly on the proposition to call the Convention which drafted the Constitution.

A large propertyless mass was, under the prevailing suffrage qualifications, excluded at the outset from participation (through representatives) in the work of framing the Constitution.

The members of the Philadelphia Convention which drafted the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system.

The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.

The major portion of the members of the Convention are on record as recognizing the claim of property to a special and defensive position in the Constitution.

In the ratification of the Constitution, about three-fourths of the adult males failed to vote on the question, having abstained from the elections at which delegates to the state conventions were chosen, either on account of their indifference or their disfranchisement by property qualifications.

The Constitution was ratified by a vote of probably not more than one-sixth of the adult males.

It is questionable whether a majority of the voters participating in the elections for the state conventions in New York, Massachusetts, New Hampshire, Virginia, and South Carolina, actually approved the ratification of the Constitution.

The leaders who supported the Constitution in the ratifying conventions represented the same economic groups as the members of the Philadelphia Convention; and in a large number of instances they were also directly and personally interested in the outcome of their efforts.

In the ratification, it became manifest that the line of cleavage for and against the Constitution was between substantial personalty interests on the one hand and the small farming and debtor interests on the other.

The Constitution was not created by "the whole people" as the jurists have said; neither was it created by "the states" as Southern nullifiers long contended; but it was the work of a consolidated group whose interests knew no state boundaries and were truly national in their scope.



15. MARBURY v. MADISON

Supreme Court of the United States, 1803 (Original)
1 Cranch 137

THIS is one of the basic cases in the development of the American constitutional system, in which Chief Justice Marshall established the principle now known as the American doctrine of judicial review. The case should be read against the background of the Federalist-Jeffersonian conflict. Unless this struggle is kept in mind, it is not possible to appreciate the skill with which Marshall escaped from the political dilemma in which Marbury's request had placed the Court.

Although Marshall's refusal to issue the writ appeared on the surface to be a Jeffersonian victory, the establishment of the principle of judicial review was to prove to be a formidable instrument for the imposition of federalist ideas upon the new national government.

The facts of the case are that Marbury, a "midnight" judicial appointee of the outgoing Federalist administration, having been refused delivery of his commission by the new Secretary of State Madison, petitioned the Supreme Court for a writ of mandamus to compel Madison to deliver. Marbury based his petition on Section 13 of the Judiciary Act of 1789, which purported to authorize the Supreme Court to issue such writs. Chief Justice Marshall decided the issue by holding Section 13 unconstitutional on the grounds that it constituted an improper augmentation of the original jurisdiction of the Supreme Court as laid down in Article III of the Constitution. By thus refusing to issue the writ on jurisdictional grounds, Marshall escaped from the dilemma of either issuing a writ that the Jeffersonian administration would probably have ignored, or seeming to dismiss the petition out of fear of the new administration. At the same time Marshall enunciated the principle of the independence of the judiciary from improper interference by other branches of government.

Aside from the immediate decision on the issuance of the writ, the importance of the case lies in this: that the Court for the first time invalidated a federal statute, thus establishing the power of judicial review as a proper function of the Court and a permanent feature of our Federal system.

Opinion of the Court.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court:

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2d. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?

3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

It is then the opinion of the Court,

1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that

the appointment conferred on him a legal right to the office for the space of five years.

2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3d. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2d. The power of this court. . . .

[The appropriate remedy was a writ of mandamus, and the question was, "Whether it can issue from this court."]

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description, and if this court is not authorized to issue a write of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and, consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." . . .

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court, then, to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act of establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with

limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like others acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of

maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical an real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the

courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.



CHAPTER III

Intergovernmental Relations

16. FEDERALISM—THEN AND NOW [1]

Our thinking on federalism is largely conditioned by our study of the early development of the concept in this country. The usual discussion of this topic is limited to a consideration of the division of power between the national and state governments, with emphasis on a supposed conflict between these two areas. Professor Anderson reviews the developments of the past seventy-five years and argues that, if the problems confronting us are to be solved, a constructive approach to contemporary federalism must stress cooperation between the national and state governments.

American federalism as it is today cannot be understood without a complete revision of our ordinary thinking about it. Most of us have learned what we know about it through historical studies. Starting with the 17th century if not farther back our courses and books in American history filled our minds with a mass of facts about Massachusetts and New York, Pennsylvania, Virginia and other colonies that became States and declared their independence. As the story was developed, the stage was so filled with a multiplicity of characters and "props" and there were so many minor and incidental themes and actions that we could not fully master the grand plot or sense the completeness of its culmination in our own day. When we try now to visualize the actual relations between national and state governments as they are today, we find that we have acquired a certain "set" or orientation of mind about them that is still largely 18th century. We know that there have been numerous changes in governmental organization and policies since independence was declared but we find it hard to view them all at once in their relationships one to another.

[1] William Anderson, *State Government* (journal of The Council of State Governments), May, 1943, Vol. XVI, No. 5, pp. 107–112.

It is the thesis of what I am about to say that as a result of many changes American federalism today is different not only in degree but in kind from what it was in the beginning. There has been a virtual revolution in our system of government, an about-face almost as complete as can be imagined. The words we use, and the concepts that lie behind them, are still much the same as they were one hundred and fifty years ago, but the facts have been so drastically altered that nothing short of a complete reorientation will bring us up to date.

This revolution in American federalism is not the only drastic about-face that is crowded into the years since American independence was established. We have had one reversal after another in laws and in policies. From having been dependencies of a foreign land, the thirteen British colonies in America became States, a union of States, and soon a world power with its own dependencies. At one time this union opened its arms to the peoples of all lands. It was the promised land of freedom for the poor and oppressed in every clime. Today it has immigration laws and quota regulations so strict that as a rule the outward flow of people almost or quite exceeds the inward movement. Then, too, there was a period when it was public policy to open nearly all public lands to private settlement and exploitation on very easy terms. In recent years the government's policy has been to discourage unwise settlement, to re-acquire lands for forest and conservation purposes, and to move many settlers off the very land that they and their forefathers acquired from the government. Need we mention other revolutionary changes—the about-face on slavery, the enfranchisement of women, the changed attitude of government toward labor unions, the complete nationalization of our armed forces, the drastic revision of the American tax system within a generation? Some of these and a number of others will inevitably be mentioned in the pages that follow. They appear to be cognate with the changes in federalism that are to be discussed. They are necessary results of the same forces that have been operating to change drastically our whole American way of life.

But it is unfortunate to use the past tense in describing these crucial modifications. "The revolution continues." Even now in this critical time of our direct involvement in the Second World War, one can dimly foresee further changes in policy as being unavoidable. Our foreign policy, for example, once so negative, timid, and isolationist, obviously must become one of positive and bold participation in international control. What impacts such a program in foreign policy will have, in turn, upon our federal system, still remain to be seen.

The failure of a people, and even of trained scholars and statesmen, to see and to comprehend the changes that have gone on around them is nothing unusual. Such a lag in the comprehension of changes has been

noted many times. It has been observed that even third and fourth generation colonists, far removed from the mother country, often continue to use an archaic language that came over with our forefathers, and to think of the home country in greatly outmoded terms. But this is not so surprising as the lag where a people fail to see and to comprehend the very changes that have taken place among themselves. We are linked to and dominated by the past. We remember and apply today as mature men what we learned in childhood. The more conservative our profession the farther back in time we go for our mental hitching posts.

CONCEPTION OF FEDERAL SYSTEM

It was not only Montesquieu, a foreign scholar, who in the mid-eighteenth century failed to understand the British governmental system. Many Americans, even some of the leaders in the federal convention of 1787 misunderstood it, and so no doubt did many Englishmen at the same time. George Washington continued to the end to misunderstand the nature of a party system; his denunciation of faction and party cannot be explained in any other way. Calvin Coolidge when retiring from the Presidency is said to have sensed vaguely that great changes had taken place that he could not comprehend. He is reported to have said, "I have lived beyond my time."

This essay is an attempt to bring the American conception of its own federal system up to date. That it will not succeed perfectly is just as certain as that many men, well informed men, will disagree with its conclusions. It is the writer's prediction that he is more likely to be found to have understated than to have exaggerated the changes that have occurred.

By "federalism" and "the federal system" I mean especially the relations between the National Government and the States. In general the situation faced by the framers of the Constitution in 1787 will be considered as "Then," but in fact the description of Then will be applicable in part to a period of nearly a generation thereafter while the Founding Fathers remained in power. The adoption of the Constitution changed the legal status, but did not at once undo all factors in the previous situation. "Now" will be taken to include the late 1930's and the early 1940's, down to this date. The many events between 1787 and 1942 that brought about the striking contrasts between the two periods can hardly be mentioned in this sketch. My interest is primarily in results. How is our situation today different from what it was then? Omitting details, the changes are as follows:

Then a small area, with a small and sparse population, mainly agricultural and poor. *Now* one of the world's great nations in both area and

population, largely urban and highly industrial, with tremendous national wealth.

Then largely a debtor people and an exporter of raw materials. *Now* a great creditor nation and large exporter of manufactured as well as agricultural goods.

Then meager and slow transportation facilities, and even poorer provisions for communication. *Now* an equipment of railroads, steamship lines, highways, trucks and buses, air transport, and communications of all kinds unexcelled by any other nation and undreamed of in the past.

Then state citizenship, state and local loyalties, interstate suspicions and tariffs, localized business, and considerable internal disunity. *Now* a nation, with national citizenship, primarily national loyalties, a nationwide free market, and nationally-organized business, agriculture, labor, professions, press, and political parties.

Then an upstart and divided people, an international weakling, threatened from north and south, with very poor defense arrangements, and looking out over the Atlantic at an essentially hostile world. *Now* a great world power, an international leader, with a powerful army and navy, and with strong friends and interests (as well as enemies) across both the Atlantic and Pacific.

GROWTH OF FEDERAL ACTIVITY

Then, inactive, negative, laissez-faire government with very few functions, and with only business leaders favoring a national government, and they desiring only to give it enough vigor to protect commerce, provide a nationwide free home market, and a sound currency and banking system. *Now* active, positive, collectivist government, especially at the national level, rendering many services with the support of powerful labor and agricultural elements, while many business leaders have reversed their position.

Then local law enforcement with state protection of the liberties guaranteed in bills of rights. *Now* increasing national law enforcement and national protection of civil liberties even against state and local action.

Then practically no employees of the National Government and very few state and local employees. *Now* a national civil service of normally over a million persons reaching into every county of the country, plus extensive state and local civil services.

Then, small public budgets at all levels. *Now* public budgets and expenditures, especially for the National Government, that reach astronomical figures.

Then (before 1789) no national taxes at all and for decades after 1789

only customs and excise taxes on a very limited scale, with state and local governments relying almost entirely on direct property taxes. *Now* tremendously increased and diversified taxes at both national and state levels, with the National Government rising swiftly to a dominating position with respect to all taxes except those directly on property.

Then (before 1788) state grants to the Congress of the United States for defense and debt purposes. *Now* grants-in-aid by the National Government to the States in increasing amounts and with steadily tightening national controls over state action.

SUPPORTERS OF FEDERAL STRENGTH

Permit me to select a few of these profound changes for special emphasis. Those who planned and carried through the unification of the original States under the Constitution were for all practical purposes the business leaders of the time and their professional advisers. It is generally accepted that most farmers and laborers were either indifferent or hostile to the formation of a stronger union. But labor and agriculture, having learned that the States were incapable of satisfying their demands, also turned to the central government to increase their welfare and security and to enlarge their share of the national income. Today organized laborers and organized farmers are among the strongest supporters of the National Government. They have become truly nationalist in their thinking. At the same time many business leaders, resentful of the new national regulations and taxes imposed upon them in the interests of labor and agriculture, preach a return to states' rights.

This partial reversal of positions is closely connected with the recent unparalleled increase in the activities of government, especially at the national level. An inactive government is necessarily a weak one. During the first century under the Constitution national government activities increased but little and the same was true of the States. For the nation the turning point came fifty years ago with the Interstate Commerce and Anti-Trust acts as the first important national regulations of business. Since the days of the Progressive Movement the increase has gone forward at an accelerated pace, and with each increase has come the further tendency toward centralization at the national level. Today, even discounting the fact of war, the National Government is the strongest and most active it has ever been. Wartime controls only accentuate an established fact.

FEDERAL EMPLOYEES

To these we add one more consideration—the existence today of a nationwide and national bureaucracy. • In civilian employments alone the

National Government now has over a million servants scattered throughout the length and breadth of the land. It has more employees than the forty-eight States combined. These men and women are engaged in rendering a host of services to the people everywhere. Their functions have become an indispensable part of the life of the nation, essential to the welfare of the people. It is almost unthinkable that any national administration, any Congress, or any Supreme Court for many decades to come would dare to undo or even seriously to threaten these national services to the whole population.

One other point. Since the adoption of the first national income tax a generation ago there has been what amounts to a revolution in American public finance. The revenues now available to the National Government under new and old forms of taxation are incalculably greater than anything in the past. While the States have also increased their revenues, they grow increasingly dependent upon the National Government for aid. Even now while state budgets are mostly in balance, state legislatures, under pressure from taxpayers, are proceeding to reduce existing state taxes. This act of retreat, however laudable its motives, is but a recognition by the States of the overwhelming superiority of National Government in the fiscal field.

For nearly one hundred and fifty years the emphasis in discussions of American federalism was on the division of powers between national and state governments. All readers of our history are familiar with the struggles of the States against the seemingly inexorable advance of the National Government. The theory of states' rights was discussed in the press and on the platform, debated in legislative bodies, pleaded in courts, and fought over on the battle field. In spite of all these contrary efforts, the trend toward national control was never really checked. Today it can be said that to debate national *versus* state powers is to raise one of the least important issues in American public life. For all practical purposes that issue has been settled. Numerous and influential sections of the American people—farmers, laborers, transportation interests, and others—have found that only through national action can their claims be satisfied. A nation has arisen that demands national action to meet national needs. Congress and the President have found that in one way or another they can satisfy most of these demands. The National Government is today regulating, promoting, and aiding agriculture, labor, and industry (which are not mentioned in the Constitution) as well as commerce (which is mentioned) in ways and to an extent obviously never visualized by the founders.

NATURE OF UNION MISUNDERSTOOD

And I might add parenthetically that the term "Federal Government" as applied to our central government is today more clearly a misnomer than it was even in the beginning. The Constitution nowhere uses the term "federation" or "Federal Government." It was a *union* that the people created through the Constitution, and as the people have now become fully a nation, their union government has become their National Government.

The way in which the Supreme Court has been brought to the acceptance of the inevitable is indeed a curious history. Even while asserting a right to declare acts of Congress unconstitutional, in its first fifty years the court tended to be strongly nationalist. Meanwhile a theory had been developed that the Supreme Court existed in large part to police the boundaries between state and national powers and to prevent encroachments by either upon the other. The antagonism of national and state governments was assumed. Their interests were supposed to be always in conflict. Someone had to stand watch to prevent even the slightest trespass by either one upon the area marked out for the other.

Domestic as well as foreign publicists developed this idea. "Federalism is legalism," said Dicey. The Supreme Court was the great defender of the Constitution and of the federal system. By its legal decisions it would stop every leak in the dikes. No matter how high the waters of nationalism might rise, by its words it would turn them back.

RELATION OF STATES AND NATION

Then followed that period in the history of the court when it really tried to hold back a nation that was seeking means of national expression. Hamilton had said that "a nation without a national government is an awful spectacle" and so at times it was as the court again and again struck down important acts of Congress. Various theories of the relations of the nation and the States were developed in the court, including that defined by Professor Corwin as the theory of "dual federalism." But the trend of events was inexorable. Acts of Congress once struck down rose up again in new form. It became evident that some of these acts were needed in the public interest. The court began to yield a little, to distinguish one case from another, and finally to overrule its own prior decisions. In the early years of the "Great Depression" the court temporarily stiffened its opposition to new national regulations. It was hard to tell whether it was more interested in upholding states' rights or in protecting the sphere of anarchy that had been left to private business.

In 1937 this period came to an abrupt end. Recent volumes of Supreme

Court reports are filled with debris of old decisions that have been overruled by new. To many persons it seems a significant fact that the court has not since 1937 declared unconstitutional a single act of Congress. More important it appears to me are the battlefields from which the court has retreated. It no longer contends that Congress may regulate only commerce and not industry, agriculture, and labor. Quite the contrary is true. Without considering its war powers, the National Government is today in position to control all that is important in the whole economic life of the nation. In addition it may now tax the salaries and wages of state and local employees, may provide for the adjustment of local government debts, and may cooperate with state and local authorities in extensive programs of social legislation. These are but the most important of the national powers recently sustained. As the court says, the National Government is still one of delegated powers, but the delegations are so broadly construed that in effect Congress is now very much like the British Parliament in the extent of its legislative authority.

To speak of the recent reversal of the court's position as a retreat is in a sense to do injustice to its members. It would be more nearly correct to say that the new court since 1937 has had the statesmanship and the broad intelligence to recognize the facts of nationalism to which the old court had closed its eyes. It sees that many of the economic and social issues that confront the whole people cannot be dealt with successfully without national action. Of necessity this means also that the court accepts the need for collective or governmental action in many cases where that need was once denied. It is even willing to go far beyond the old court in upholding the actions of administrative bodies set up by Congress, because its members realize that a government engaged in many activities cannot do everything through the single channel of Congress.

INTERESTS OF STATE AND NATION IDENTICAL

The decisions of this court also reveal a new and constructive approach to the question of state and national relations. It rejects the theory of a necessary antagonism or conflict of interests between the States and the National Government. Peering through the fog of words thrown up by the endless and futile debate over states' rights *versus* centralization, it sees that the real interests of the nation and the States are common interests and that they call for cooperation, not conflict. Along with students and practitioners in the field of public administration, they visualize a new type of functional federalism, a relationship between the nation and the States in which the real issue is how best to perform the necessary public services. The old federalism that was legalism is dead. The old assumption that national and state governments are necessarily antagonistic

and in perpetual conflict is dead. The old theory of two mutually exclusive spheres of action, one reserved for the States, the other delegated to the national government ("and never the twain shall meet") is also dead. Yes, and the old judicial theory of laissez-faire, that government should be merely negative and inactive, is dead.

The former constitutional barriers to cooperation between the national and state governments exist now only as memories. Both national and state governments have been freed to carry on jointly or separately, as they choose, their essential public functions. Acts of Congress are not struck down, if within the present broad range of express or implied powers, merely because they might conceivably impinge upon some state interest. Likewise the acts of state legislatures are in general not declared invalid merely because they occupy an area that might be, but has not been, covered by some act of Congress. The effort is usually made to sustain both state and national legislation.

This new approach to federalism that is coming to dominate our thinking does not eliminate all difficulties from our system of government. What it does is to change our focus, our point of view, and from this new vantage point we see new questions arising. If federalism is no longer legalism, as I believe to be the case, what about the future role of the Supreme Court? What importance will it have as compared with legislative and administrative authorities? Having in large measure renounced all pretensions to the right to overrule the economic legislation of Congress, can it continue to be, what once it seemed, a sort of continuous constitutional convention?

What about Congress and the state legislatures? Are they so constituted, so organized, and so implemented with procedures and internal restraints as to enable them to perform wisely the enlarged responsibilities that fall upon them in an era of active government and large scale administration? If they are not, must there be a still further shift toward executive leadership in both national and state affairs? Up to now it has been found easier for the President and Governors and administrative officers to cooperate than for Congress and the state legislatures.

FUTURE OF STATES

And finally, what is to be the real future of the States? An increasing dominance of the National Government in matters of policy cannot be seriously questioned. Furthermore, as to its major functions the National Government is free, if it so desires, to ignore the States and to set up its own administration, complete from top to bottom. Its regulations can be made to override those of the States. By its control in the field of taxation and to satisfy its own tremendous needs it might force the States into

progressive diminution of their own revenues and a reduction of their activities. That way lies a rapid strangulation or at best a slow atrophy of the States.

It has been suggested that the National Government should lay down general policies and standards in each major field of service, that the state governments should set up the needed administrative organizations, and that the counties or other local governments should perform the necessary services. In times of great emergency like the present war the cooperation of the States in such an unequal partnership can be expected, but hardly so in times of peace and prosperity. State administrations that are not in sympathy with the National Government will cause considerable difficulty; and it is doubtful whether United States Senators will favor administrative methods that give their potential or actual rivals, the state Governors, the power of patronage over national programs in their States.

In short it is one of the tasks of political scientists and statesmen for the next generation to work out a constructive and autonomous role for the States in the work of the nation. The right formula has not yet been discovered. The value to the whole nation of preserving the States can hardly be questioned and need not be elaborated. To keep them alive and strong they must be kept active in the performance of functions over which they have their own control. They should not be allowed to die of sheer inactivity, or to become mere administrative districts of the National Government. The problem is not simply one of maximum dollars and cents efficiency in performing particular services; that might be attained by complete centralization of functions in Washington. The question is: how, without impairing the power of the National Government to achieve all national purposes promptly and effectively, can the essential public services be rendered on a national scale, without undue waste, and in such a way as to preserve the advantages of state and local self-government?

To prove their value in the future in the face of a powerful national sentiment that has grown impatient with them, the States must show beyond a doubt that they can be effective and economical in their operations. More than this they must also demonstrate that they can be quickly responsive to local needs and sensitive to regional as well as national opinion. In short they must in the face of great odds win back again some of that great public favor that they once had, and recreate in their peoples that sense of regional loyalty that the States once represented. This will not be achieved by heated oratory about states' rights, or by legalistic attempts to obstruct the nation's actions. It is too late for that. What is needed is a deliberate reappraisal and demonstration of the role of the States in the national social order that now exists, and an attempt to re-educate the people to the values of self-government in state and local communities.

As de Tocqueville once said: "A democratic people tends toward centralization, as it were by instinct. It arrives at provincial institutions only by reflection."



17. McCULLOCH v. MARYLAND

Supreme Court of the United States, 1819 (Error)
4 Wheaton 316

THIS case illustrates Chief Justice Marshall's molding of our constitutional system in the direction of increased federal power and independence at the expense of the states. The questions before the court were: (1) Can the federal government, in the absence of delegated power, charter a bank: and (2), if so, can the State of Maryland tax such a federal agency? In answering the first question in the affirmative, Marshall developed the doctrine of federal implied power based on the "necessary and proper clause" as a supplement to the delegated power formally conferred by the Constitution. In answering the second question in the negative, Marshall laid the foundation of the principle of intergovernmental immunity from taxation, a doctrine subject to subsequent modification by the court. In both holdings the independent authority of the central government was affirmed as against the states, thus serving to define the respective spheres of federal and state authority during the formative period of our federal system.

Opinion of the Court.

Mr. CHIEF JUSTICE MARSHALL delivered the opinion of the Court:

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the Supreme Court of the

United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? . . .

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

. . . The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its

powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle 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. . . .

If any one proposition could command the universal assent of mankind, we might expect it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate

detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . .

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. . . .

But the constitution of the United States has not left the right of congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "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 thereof." . . .

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is gen-

erally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. . . .

We admit, as all must admit, that the powers of the government are limited, and that its limits 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 the 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. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. . . .

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

Whether the State of Maryland may, without violating the constitution, tax that branch? . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. . . .

If the States may tax one Instrument, employed by the government in the execution of its powers, they may tax any and every other Instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be dis-

played. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. . . .

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

Reversed



18. UNITED STATES v. CURTISS-WRIGHT EXPORT CORP. et al.

Supreme Court of the United States, 1936 (Appeal) 299 U.S. 304

THE importance of this case lies in the fact that the decision constituted an expansion of the constitutional doctrine as to the nature and extent of the foreign affairs power of the President. By distinguishing federal power over internal affairs from federal power over external relations, the court reached the conclusion that the President's authority in foreign relations is not dependent on any affirmative grant of power in the Constitution but arises from the sovereign power of the United States as a member of the international community. This leads to the development of the doctrine of "inherent" power in the federal government, at least as far as foreign relations are concerned. The case is likewise significant in its discussion of the nature of the sovereignty possessed by the states in the federal union and the legitimacy of delegation of legislative authority to the President in the conduct of foreign affairs. The implications of the case for American government are further developed in *U.S.* v. *Belmont* (301 U.S. 324), which deals with the validity of executive agreements, and *U.S.* v. *California* (No. 12 Original, October Term 1946, decided June 23, 1947), which relates to the question of control over "tidelands."

Opinion of the Court.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court:

On January 27, 1936, an indictment was returned in the court below, the first count of which charges that appellees, beginning with 29th day of May, 1934, conspired to sell in the United States certain arms of war, namely fifteen machine guns, to Bolivia, a country then engaged in armed conflict in the Chaco, in violation of the Joint Resolution of Congress approved May 28, 1934, and the provisions of a proclamation issued on the same day by the President of the United States pursuant to authority conferred by § 1 of the resolution. In pursuance of the conspiracy, the commission of certain overt acts was alleged, details of which need not be stated. . . .

Appellees severally demurred to the first count of the indictment. . . .

It is contended that by the Joint Resolution, the going into effect and continued operation of the resolution was conditioned (a) upon the President's judgment as to its beneficial effect upon the reestablishment of peace between the countries engaged in armed conflict in the Chaco; (b) upon the making of a proclamation, which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress; (c) upon the making of a proclamation putting an end to the operation of the resolution, which again was left to the President's unfettered discretion; and (d) further, that the extent of its operation in particular cases was subject to limitation and exception by the President, controlled by no standard. In each of these particulars, appellees urge that Congress abdicated its essential functions and delegated them to the Executive.

Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 294. That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period, those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence, "the Representatives of the United States of America" declared the United [not the several] Colonies to be free and independent states, and as such to have "full Power to levy War, conclude Peace, contract Alliances, establish Commerce and to do all other Acts and Things which Independent States may of right do."

As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments end and forms of government change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . .

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356); and operations of the

nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones* v. *United States*, 137 U.S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting* v. *United States*, 149 U.S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co.* v. *United States*, 224 U.S. 583, 600–601; Crandall, Treaties, Their Making and Enforcement, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

In *Burnet* v. *Brooks*, 288 U.S. 378, 396, we said, "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." *Cf. Carter* v. *Carter Coal Co.*, *supra*, p. 295.

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the Presi-

dent a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. . . .

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day. . . .

The judgment of the court below must be reversed and the cause remanded for further proceedings in accordance with the foregoing opinion.

Reversed



19. ORDINANCE OF 1787 (JULY 13, 1787) [1]

An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio

WHILE the Philadelphia Convention was in session, the Congress under authority of the Articles of Confederation passed the Ordinance of 1787, which established a policy for the governance of the territory of the United States not yet incorporated as states. That this policy was continued by the government under the new Constitution for all territory acquired on the continent is sufficient proof of the high order of statesmanship that produced this document.

SECTION 1. *Be it ordained by the United States in Congress assembled,* That the said Territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

SEC. 2. *Be it ordained by the authority aforesaid,* That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the

[1] Reprinted from *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, 1927), pp. 47–54.

descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

SEC. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction and reside in the district, and have each therein a freehold estate, in five hun-

dred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes, and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided also*, That

a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the Council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Con-

gress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus,* and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishment shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide,* and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall

forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona-fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the ter-

ritorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States, in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

20. WHY ALASKA NEEDS STATEHOOD [1]

THE territories of Hawaii and Alaska are asking—even demanding—that Congress admit them to the rights and privileges of states. Generally speaking, the American public has given little heed to their requests. Ernest Gruening, Governor of Alaska, ably presents the case for statehood as it appears to the residents of that territory.

AT THE general election in October, 1946 the people of Alaska voted for statehood. The question had been placed on the ballot by an act of the preceding, 1945, territorial legislature. This was the first opportunity Alaskans had had officially to record their desire. So a statehood bill was introduced in the first session of the present Congress, and hearings have been held both in Washington and throughout Alaska.

The reasons for statehood are ample.

First: Alaskans, being good Americans and therefore believing that American citizenship is the most precious possession in the world, desire that citizenship in full measure. They do not have it now. They cannot vote for President or Vice President. They cannot elect Senators or a Representative with a vote. The Alaska legislature's powers are limited by obsolete restrictions imposed by Congress thirty-five years ago, many of which Alaskans have sought repeatedly and vainly to have changed.

Second: Statehood is indispensable for the progress and development of Alaska, for a populated, thriving, strong Alaska as our northern and western rampart. That objective has not been, cannot be and will not be achieved under territoriality.

Alaska has been under the American flag for eighty years; it was on October 18, 1867, that the flag of imperial Russia was lowered at Sitka and the Stars and Stripes hoisted in its place.

In those fourscore years, the aboriginal population—Indians, Eskimos and Aleuts—has grown slightly, if at all, and numbers some thirty thousand. The white population, those who went to Alaska from the forty-eight states, today numbers sixty thousand. That sixty thousand is the total increase in four-fifths of a century of territorialism. In contrast, during that same period, the population of the United States increased by a hundred million.

In other words, Alaska, with an area one-fifth as large as the United States, vast resources, and a climate and physical conditions corresponding to Scandinavia and Finland with their thirteen million people, has developed very little. It is my conviction, shared by the majority of

[1] Ernest Gruening, *State Government* (journal of The Council of State Governments), February, 1948, Vol. XXI, pp. 31 ff.

Alaskans, that territoriality is the major factor in retarding growth and development.

Alaska's history makes clear that the federal government's policies for eighty years have been marked by indifference and lack of knowledge. This indictment does not apply to any individual member of either the legislative or executive branches in Washington, or to either political party. The failure in Alaska arises from lack of continuity among the remote rulers of Alaska's destinies and in the circumstances inevitably surrounding faraway control. Alaska suffers from and is throttled by every variety of absenteeism: absentee industry control, absentee labor control, absentee government control.

During the first seventeen years that Alaska was under the flag, from 1867 to 1884, Congress passed just two laws dealing directly with Alaska. One made Alaska a customs district and the other gave the rich seal fisheries of the Pribilof Islands as a monopoly to a San Francisco company. This period has been rightfully termed "the era of neglect." During this generation, it was not possible to punish crime, to get married legally, to transfer or to deed property. Finally Congress adopted the Organic Act of 1884. But this Act was a misfit. It provided that the Code of the state of Oregon should apply to Alaska. But Oregon had a county system and Alaska had none, and all reference to county officials and county functions were therefore wholly inapplicable to Alaska. The Oregon Code provided that to be a member of a jury one had to be a taxpayer, and as Congress had provided no taxes from Alaska, there could be no juries in Alaska. The 1884 Act, however, did provide a Governor who had neither means nor appropriate law to establish a government, and for the next fourteen years, until practically the turn of the century, the annual reports of four consecutive Governors contained earnest pleas that Congress do something about it. Their pleas went unheeded. They went totally unheeded until the discovery of gold in the Klondike in the late nineties.

When those gold prospectors, coming from every state of the Union, found Alaska without any suitable body of law to make their livelihood secure, they began writing their Representatives and Senators, and Alaska experienced the beginnings of legislation. Not until 1912, however, fourteen years later, did Congress adopt a revised Organic Act which established a legislature and confirmed the representation of Alaska in Washington by a voteless delegate.

This Act of 1912 was likewise unsatisfactory. It was notable chiefly for what it forbade Alaskans to do. It is under that Act, adopted thirty-five years ago, that the Territory of Alaska has struggled to this day.

Since that time, for half a century the economy of Alaska has rested

chiefly on two industries, salmon fisheries and gold mining, both at present languishing, partly as a result of federal policies. Alaska's other vast potentialities have remained undeveloped, chiefly owing to inappropriate laws imposed by Congress, conservation measures which have often *not* conserved but often *have* paralyzed, and an economy dominated by absentees whose chief purpose was to extract the wealth of Alaska as rapidly as possible, take it away with them and leave little or nothing within the Territory. During this eighty-year period, Alaska has poured close to $3 billion into the national economy in the form of fisheries, minerals and furs, thus repaying Seward's original investment some four hundred-fold; and in addition, it has paid contemporaneously several times the purchase price annually into the Treasury in federal income taxes. But little of that wealth has been plowed back for the development of Alaska.

Eighty years' experience—a period of colonialism longer than that of all but five states—has shown Alaskans conclusively that our Territory is a stepchild in the American family. Its voteless delegate can only plead, hat in hand, for the crumbs left on the national banquet table. Far from being, as is often mistakenly assumed, the object of special solicitude by the entire Congress whose ward the Territory is, Alaska has been and continues to be the victim of gross discriminations. Alaska, alone among the states and territories, has been excluded from the Federal Highway Act. The share of road funds during the last quarter of a century denied Alaska has been estimated at $300 million.

Only fifty-four miles away, across Bering Straits, the Soviets are pushing the limits of agriculture farther and farther north, producing new strains of grains and new crops, with agricultural experiment stations every hundred miles, and establishing a permanent farm population to support a new industrial, mining and military development; in Alaska, on the contrary, Congress has for years withheld the agricultural funds which, under its own acts, Alaska was and is entitled to. Under one of these acts alone Alaska's share should have been $3 million.

Alaska is handicapped by excessive maritime transportation rates—the highest in the world, in fact—imposed by what has become virtually a one-man owned absentee shipping monopoly, a monopoly fostered and permitted by unseen men in distant federal agencies.

This monopoly is intensified by the Maritime Act of 1920, authorized by Senator Jones of Seattle, which specifically discriminates against Alaska. No other part of the Union suffers similar discrimination. The Supreme Court of the United States, when appealed to, found that Congress had the right to discriminate against a territory.

Alaska's air rates from the States are double those which the same carriers

charge elsewhere. Our protests go unheeded. The list of these discriminations is long. But what is highly pertinent is that the situation grows worse, not better, and that right now, when Alaska's development is more imperative than ever before, we are being deprived of basic necessities in fields beyond our territorial jurisdiction and control.

With 15,000 miles of coast line, over seven thousand miles longer than that of the entire United States, a coast not yet completely charted or buoyed, a coast subject to more weather than any other under the flag, with a population chiefly deriving its livelihood from the sea and depending upon and cherishing the service of its Coast Guard, Alaska lost, following the retrenchments of the last Congress, its Coast Guard District, whose headquarters have been removed to and consolidated with the Seattle district seven hundred miles south of our southernmost point.

One year before Pearl Harbor, the Army, Navy and Coast Guard requested the Carnegie Institute to conduct some important research dealing with terrestrial magnetism, radio transmission through the ionosphere, and other problems deemed of vital and pressing import. A location in northern latitudes was considered essential. Thereupon the University of Alaska offered a building and its servicing. Without this aid the start of the project would have been seriously delayed. To establish this research, valuable both in war and in peace, on a permanent basis, the 79th Congress authorized an appropriation of $975,000 for a geophysical observatory and laboratory on the compus of the University, the University having been deprived of the normal uses of the building it had made available for this research, and with the return of the student body plus the G.I. enrollees needing the accommodations sorely. But the 80th Congress refused to make the appropriation, although the project is a national one and is located in Alaska for scientific reasons.

For twenty-five years, Territorial legislatures have memorialized the Congress to turn over the control and conservation of the fisheries to Alaska. Congress has turned a deaf ear. Presumably this great national asset, the Pacific salmon, was too valuable to be turned over to Territorial management. Yet despite every plea, reiterated annually, Congress has never appropriated enough to safeguard this valuable resource which has now, after over a quarter of a century of federal control, become so depleted that in the fall of '47 Alaskans were warned that commercial fishing may have to be suspended in southeastern Alaska next year.

An overshadowing problem is that of tuberculosis. Its incidence in Alaska is shocking—nine times that of the United States. Five persons die every week in Alaska and perhaps 5 per cent of the population is affected by it. The greater proportion of the cases is among the so-called

"native" population, Indians and Eskimos who received the disease originally from the whites. Now it is spreading among both "natives" and whites, the incidence among the latter being twice what it is among the white population in the States.

Apart from the personal tragedies—and they strike fatally two hundred and fifty times a year in Alaska—the economic damage is terrific. A tuberculosis person is a charge on the community. He has no earning power and requires care. Moreover, a tuberculosis person is a menace. Tuberculosis is a contagious disease. It is also a curable disease. Taken in time and given rest, isolation, and adequate nourishment—in short, hospitalization—the patient recovers.

Here is another example of flagrant neglect by the federal government. Tuberculosis has increased to its present dreadful proportions in Alaska because next to nothing has been done about it. The Indians' and Eskimos' education, health and welfare have for a generation been entrusted to the Office of Indian Affairs, an agency of the Department of the Interior. But the Congress has never appropriated adequately to meet this menace, which is becoming steadily aggravated by neglect.

What is needed is a sufficient number of hospital beds to give the victims of tuberculosis the required care. Likewise, the isolation of the patients, their prompt removal from their homes, prevents their infecting other members of the family.

The Territorial Legislature at a special session called in 1946 raised the annual appropriation for tuberculosis alone from $30,000 to $250,000 and has maintained that figure for the subsequent years. But the federal government that has had a specific responsibility in this field has made no corresponding effort. (It might be pointed out in contrast that Uncle Sam has just spent some $35 million in an effort to eliminate hoof and mouth disease in Mexico. While offering no criticism whatsoever of that expenditure, which was designed to prevent the spread of that destructive disease to cattle on our side of the border, it is somewhat ironic to contemplate the millions spent in a foreign country to cure cattle and next to nothing spent under our flag to cure human beings who are American citizens.)

Similarly, the federal funds for education have been so cut that an increasing number of Indian and Eskimo children have been denied the basic American right to schooling, while hundreds of others have been turned over to the Territorial school system without the financial assistance to the Territory which Congress in similar situations invariably has furnished the States.

One final illustration, the administration of justice—keystone of a democratic system. For over half a century, Alaska has sought to get the federal government, which has retained control of the judiciary in Alaska,

to abolish its disgraceful system of unpaid U.S. Commissioners, who dispense justice in some sixty-odd smaller communities throughout Alaska. The issue is not even controversial. In 1914, Hudson Stuck, Archdeacon of the Yukon, second ranking Episcopalian churchman in Alaska, called it "vicious" and a "crying evil," and wrote that for twenty years—which takes us back to 1894—every federal administration had been urged to reform it. Bills sponsored by the responsible executive agencies have been hopefully introduced into Congress again and again, but always die before enactment. Do we require better evidence of Alaska's need for the sovereignty of statehood?

That conclusion has been greatly hastened by the rediscovery of Alaska which took place incidental to World War II. At its outbreak Alaska was defenseless. The famous warning of General Billy Mitchell that "he who holds Alaska holds the world" has gone unheeded. As late as 1939, the only military or naval installation in Alaska was an infantry post manned by two hundred men, dating from the gold rush days. For years, our Delegate in Congress had been pleading for an adequate military and naval program in Alaska, but little attention is paid to the warnings of a voteless delegate. In consequence, Alaska was the only part of the American continent to suffer invasion, which required a vast campaign, costly in the expenditure of men, ships and matériel to expel it. There is little question that had Alaska been a sovereign State at that time, and its defense need presented with the cogency which two United States Senators could have given it, the Aleutian campaign would never have taken place and American lives would have been saved. Today, Alaska is even more important strategically than during the second World War. And it is as little defended against future eventualities as it was then.

Consider that Alaska is the only part of the American continent which stretches westward into the Eastern Hemisphere, and that its Pacific coast line is longer than that of our three Pacific Coast states. Consider that it is the only part of the continent which is not separated from the rest of the world by an ocean rampart and that Siberia is visible to the naked eye from the shore of Alaska! Moreover, Alaska is the only part of the continent under the American flag which fronts on the Arctic Ocean, one of the great airways of the future. Alaskans are familiar with these facts and their implications, which to most Americans are remote and unknown. From the defense standpoint alone, the nation would be immeasurably strengthened by having in the halls of Congress two United States Senators and a Representative with a vote, intimately familiar with Alaska's vast terrain and its immediate potentialities.

But apart from that, Alaskans have another vital contribution to make. Alaska is known as "our last frontier." To it, from the States, have been

attracted the pioneering breed of Americans, who throughout our history have pushed westward in search of greater freedom and greater opportunity. The Alaskan is the robust type of individualist who is not afraid of hard work and is independent in thought and deed. Alaskans represent the vigorous survival of a spirit, an attitude, and a way of life that once was everywhere in America. They will contribute to the councils of the nation the initiative, the hardihood and the character which have built our great country.

The President of the United States has declared himself in favor of statehood for Alaska. So has the able Secretary of the Interior, Julius A. Krug. The Governors of the States unanimously, at their 39th Annual Conference last July, endorsed statehood for Alaska.

It is for Congress now to materialize our democratic principles, to speed the long overdue development of Alaska, to make fully available its resources, human as well as material, and, for the welfare of its people as well as for the safety of our Western Hemisphere, to grant Alaska statehood NOW.

CHAPTER IV

State Constitutions

21. MYSTICISM, REALISM, AND THE TEXAS CONSTITUTION OF 1876 [1]

Most of the states are governed under constitutions that were designed to limit state action. For this reason many limitations not included in the United States Constitution were put into the state constitutions. The Texas Constitution of 1876 is an outstanding example of the inflexible, detailed type. Mr. Myres describes several reasons why the movement to modernize the constitution has little popular support. Yet the rural, post-carpetbagger society for which the constitution was designed has disappeared. The Texas Constitution needs to be rewritten to fit it to modern industrial society.

THE Texas Bar Association at its meeting June 1, 1928, adopted a resolution favoring the calling of a constitutional convention to "provide the people of Texas with a new Constitution," and instructed its board of directors and officers to "take such action as will conduce to that end." In urging the approval of the resolution, President A. H. Britain of the Association declared:

> We have exercised hard, common sense in all lines of business. We have been progressive and intelligent in all walks of life save and except one, and that one more important to our happiness and welfare than all others—our government. We need a "new model"; the "old model" is obsolete. It has served its purpose.
>
> As public-spirited men and lawyers, let us now make an intelligent appraisal of the situation and sponsor a movement to give Texas a new Constitution commensurate with her present-day greatness, and to take care of her wonderful future. Let us set ourselves to the task, arduous as it may be, fearlessly; let it be no makeshift.

[1] S. D. Myres, Jr., *The Southwestern Political and Social Science Quarterly* (September, 1928), Vol. IX, No. 2, pp. 166 ff. All foothotes omitted.

Let us call to the task the best minds of the State, minds richest in experience, knowledge and statesmanship, practical, forward-looking men. Let ample time be given to the task; let them not be hampered with unnecessary restrictions; let them have our wholehearted support, and we shall not fail.

The initial step thus taken by the lawyers of Texas must be regarded as significant, because it brings to the movement for a new Constitution—a movement advocated perennially by individual reformers but never gaining headway—the support of a strong organization capable of exerting great influence throughout the State and able to contribute much to a solution of the legal and political problems which confront us.

Experience, however, indicates that the task of getting a new Constitution written and adopted will not be easy of accomplishment. The rejection during August of last year of the four constructive constitutional amendments by overwhelming majorities merely repeated results with which the people of the State are fully acquainted. Of the ninety-nine amendments submitted to popular referendum since the present Constitution was adopted, only forty-three have been approved. On the proposal to call a constitutional convention in 1919 only 9 per cent of the voters were sufficiently interested to express an opinion. What is the reason for this disinterest in, or opposition to, changing the fundamental law of the State? It can be shown that the governmental system of Texas requires complete reorganization if sound principles of administration are ever to be followed. The Constitution bristles with limitations which handicap legitimate business enterprise, stunt the normal growth of our educational system, and hamper the development of the enormous resources of the State. The present instrument confines Texas within a tight political strait-jacket—binds it down to the simple rural economy of the post-Civil War period. Why, then, has nothing been done about it?

The reluctance of the people to alter the existing Constitution is rather clearly explained by comments on the subject found in the press of the State during the past ten or fifteen years. One very common statement has been that, while changes in the Constitution are doubtless needed, the time is not yet at hand to make them. Thus in 1923 a citizen of Fort Worth said that, although the Constitution "contains many provisions not suited to the time or age," in his opinion, a convention to revise it should not be called for years to come. "The public mind," he declared, "is too disturbed and conditions are too unsettled as an aftermath of the war. There are too many 'isms' in the air and too many conflicting views. If we are ever to have a new Constitution, we should wait until such time as things return to normal, and even then proceed with the utmost caution." Although conditions in 1928 or 1929 may be less "unsettled" than they were when this opinion was expressed, or during the Reconstruction

Period when the present Constitution was framed, and, although it is hardly possible for "things to return to normal," one may expect to find this argument advanced many times in the future as a good reason for refusing to take action.

Further, it has been frequently said that the people do not desire a revision of the Constitution. A member of the House of Representatives, who in 1913 voted against the calling of a convention, said, "I am absolutely sure that 90 per cent of the Democrats of my district who supported me for the nomination, as well as a large number of those who did not support me, are opposed to the calling of a constitutional convention; otherwise I would vote 'yea.'" The public men of the State, for the most part, have been content to assume a passive attitude on the question. As *The Houston Post* remarked some time ago:

> The stock answer to the argument for a new Constitution is that the people don't "demand" it. Occasionally the answer varies to "the farmers don't demand it." The average politician waits for a demand. The time seems to have passed for the initiation of reform except in response to popular outcry. There was a day when public men proposed and the people disposed. Nowadays the people, it seems, must both propose and dispose—for the legislators are too timid to lead or even to take a few steps in advance. The need for a new Constitution is plainly manifest to the discerning, but since it is a matter that does not come home to the average citizen in any annoying or oppressive way, it does not occur to him to speak out, and his indifferent silence is construed as ominous.

Accounting for the manner in which the electorate has reacted to the question, one observer has said, "The people are suspicious of change. They feel that they are getting along very nicely now, and they have no disposition to let down the bars for the possible admission of greater evils than are endured at present." Another person has remarked that amendments are generally obnoxious to the voters. "Half of them do not understand what the amendment is, and vote against it for that reason, being content to endure present ills rather than to jump to those they know not of." In other words, willingness to plod along as in the past rather than to risk an innovation is one of the basic causes for failure to modify the existing political system of Texas.

Again, fear has been expressed that tampering with the Constitution might destroy the limitations and guarantees which it contains. There is the homestead provision, for example. As one citizen has remarked, "The people of Texas are rather tender on the subject of the homestead law, and I don't blame them, God bless them!" The homestead law has become a sort of shibboleth in Texas, a stereotype or symbol with a decided emotional overtone. The money-lender must not be allowed to cast his nefarious shadow across the Texas hearthstone. The owner of a house, no matter how urgent his need for ready money, must not be permitted to

commit the supreme act of apostasy by mortgaging the roof over his family's head. This would violate the honor of the State and the sanctity of our institutions! Likewise, there is the Bill of Rights, a most liberal feature of the present Constitution. Anxiety that a convention would abolish the provisions protecting life, liberty, and property has always existed in some quarters. A Texas Senator declared in 1922, "If a constitutional convention is called, I fear the first thing that will be attempted is the changing of our Bill of Rights so that officers may search and seize persons and property without warrants." There is little doubt in the minds of many that any convention would be dominated by the enemies of the State. Two Senators warned us in 1927 that the "special interests" would surely win control of a convention if it were called, would secure the inclusion of "joker" clauses in the new Constitution, and would thus override the rights of the people.

One of the most convincing arguments advanced is that a change in the Constitution, either by amendment or revision, would increase taxes. During the election of 1927 a lawyer of Dallas, who opposed the tax amendment, declared, ". . . it will, in a large degree, destroy the local features of our taxing systems and will convert Austin into an imperial city, sitting on the seven hills like Rome, and levying tribute on every locality and business in the State subject to the State taxing system, as Rome did when it was the metropolis of the Roman Empire." The following very commendable verse was written by another opponent of the amendments in 1927:

Did our pioneers struggle with their guns and axes
That this State might be a land of high taxes?
Did our martyrs at the Alamo expire
That taxes might go higher and higher?

If Jim Hogg could speak he'd say with a sigh,
"By Gatlins, taxes are already too high,"
And Governor Roberts would say: "Go slow!
My policy was, 'Pay as you go.' "

If you're against the amendments and a higher tax,
Give them a lick where the chicken got the axe.
On August 1, let's swat them good and fine,
Like the American boys swatted the Hindenburg line.

It has also been pointed out that there is really no need for adopting a new Constitution. Thus a citizen of Tyler, who was against all amendments in 1927, said:

Our laws have been lived under and understood by the people and even by the courts for a long time and to tear them up and make new ones with a bunch of new fat-salaried judges et al. appointed by a Governor under greater authority than was

ever given a powerful monarch would mean chaos, strife and trouble and increase in taxes.

True, there are many things to be complained of in the administration of our laws, but it is not so much the fault of the laws as it is the fault of those who administer the laws. . . . I believe that humanity is getting better and that our laws are as good as the best and being enforced better as time goes on and that we have the best people, the best courts and the best laws and the best country that ever before existed in all the world.

In 1922 a State Representative said that it would cost $300,000 to hold a convention and, even then, there could be no assurance that the people would adopt the Constitution which was framed. He said further that of the 293 sections of the present instrument, the most radical proponent of a new one could not name over twenty-five sections which should be stricken out. "'Why burn the barn to destroy the rats?' Because our present Constitution is old is no reason why it should be laid aside. The Constitution of the United States is more than a century old and you never hear of any one advocating a new Constitution of the United States."

But the most remarkable argument of all is that the Constitution should not be changed because of its venerable and sacred character. Several individuals have expressed the belief that the instrument was produced by super-men duly inspired for their task, and that it has become inviolable with the passing of time. A Houston attorney assigned as a reason for opposing the amendments in 1927: "The Constitution of 1876 has been in force more than fifty years. Texas produced no greater or wiser group of men in any age than those who framed and signed that instrument." One of the members of the convention of 1875 recently declared: "That was a great body of men at that convention. It would be hard to find their like today. I don't think the public men of the present time 'stack up' with the old-timers either in patriotism or in learning. The good men, for the most part, got sick of politics long ago and quit the game." A Congressman from Texas also remarked: "Our Federal Constitution is the people's only safeguard against unwise, and sometimes even foolish legislation their Congress otherwise might enact. And our State Constitution, wisely framed by our incomparable forefathers, is our bulwark and last defense against the unwisdom, the spasmodic extravagances, and the uncertain action of some of our Legislatures." The most extravagant tribute, however, came from the pen of a Dallas attorney, who declared of the Texas Constitution: ". . . it will be found that there is no greater necessity for a change in the Constitution than there is for a change in the Decalogue or the announcements made in the Sermon on the Mount. Of course, there are persons who believe that the Decalogue should be revised and the Sermon on the Mount should be rewritten, but the majority of our people, I conclude, are satisfied with the time-honored wisdom an-

nounced in those declarations, and I bespeak for the principles announced in the present Constitution a similar consideration."

Such is the idea of the political mystics of Texas—that the Constitution is a work of infallibility, like the Decalogue handed down from on high with all its eternal verities, while the hills about Austin quaked, and the smoke ascended, and the people stood afar off filled with awe! Are the people of the State called upon to accept anything approaching this extreme view? While a deep respect for the past and a genuine appreciation of the men who bequeathed to the present generation a rich political and social heritage are greatly to be desired, certainly this does not call for a type of blind ancestor worship which enslaves us to illusions and makes us unwilling to view conditions and events in their true relations. As so much has been said, and will be said, about the Constitution of 1876, is it not desirable to consider for a moment the actual circumstances under which the Constitution was formed, the practical limitations under which the framers labored, and what was thought at the time of the instrument which has been placed in the same category with the Decalogue and the Sermon on the Mount? Obviously this might have the advantage of adding some realism to a discussion which has been sorely wanting in perspective and almost devoid of any factual basis. An examination of the files of several representative newspapers of the period should throw some light on a subject which has been allowed to remain too much in darkness.

The Constitution of 1876 is an extremely human document, reflecting unmistakably the spirit of the times which produced it. Established at the end of the Reconstruction Period, it clearly evidences the determination of the people to overhaul the government completely and to make impossible in the future the abuses which they had suffered at the hands of an autocratic Governor, a carpetbag Legislature, and a corrupt Judiciary. The prevailing opinion throughout the State was expressed by the *Houston Daily Telegraph* the day before convention assembled:

> Owing to peculiar circumstances [this paper declared] Texas has had in her brief existence as Republic and State several Constitutions, but the one which is about to be abrogated was foisted upon her by despotic power, her citizens being disfranchised, and the armies of the Federal Government standing ready to enforce obedience to the dictates of those who were the willing tools of an administration usurping imperial powers. . . . The horrid nightmare that has afflicted the State so long is passing away, and the light of day is driving before it the dreadful spectres of misrule, oppression and usurpation that for so many years have oppressed our people. . . .
>
> The convention will be composed of men, the majority of whom have been chosen for their ability and sterling worth. There are many of the first minds of the State among the delegates, and perhaps a more fair representation could not

have been had. We hope for harmony, forbearance, and brevity in the convention, and we look for wisdom to guide the councils of the most important representative assembly that Texas has ever called. . . . Our faith is strong in the wisdom, conservatism, and firmness of the delegates elected. We look for a comprehensive, yet simple instrument, to be drawn up for submission to the people, which, when approved, will be our State Constitution.

With the notorious extravagances of the E. J. Davis administration fresh in mind, a general reaction had set in against all public expenditures. A few days before the convention met the San Antonio *Daily Herald* stated:

Under the corrupt and infamous rule of the radical, E. J. Davis, the people were taxed to the utmost, so that the office-holder could squander millions in riotous living, and debt was heaped upon debt, Ossa on Pelion high, that the people of Texas could be kept in abject submission to the behests of the besotted fools. As soon as the foot of the Federal Government was lifted from our necks, the people of Texas arose once more in their might, and drove the guilty wretches from the Capitol, and placed in their stead, men of their own choice, a Democratic administration. Has the State Government under the present administration been restored to its pristine purity and economy? Have our expenses been reduced in amount, or our taxes placed upon a more equitable basis for assessment? On the contrary, have not the State offices been multiplied, accompanied with salaries, that promise to the people no abatement? . . . Nor is the Governor [Coke] wholly without blame in our opinion: He should long, ere this, have pressed upon the Legislature the urgent necessity of a general reduction of expenditures of the State Government, commencing with his own high salary and their eight dollars a day, and extending down through all the ramifications of the State's disbursements. We desire . . . in behalf of West Texas, that there shall be a thorough and severe reduction of the State expenditures and that taxation in West Texas shall be made to quadrate with the legitimate demands required to meet the accruing interests on the debt of the State, and the salaries and fees of office of *ante-bellum* days. This is imperative, and in the opinion of our people—they will stand no further humbuggery.

The grangers over the State, by adopting a program of "retrenchment and reform" to be followed by the convention, were in harmony with the demands of the majority of voters. They were able to secure the election of something like half of the delegates who attended. Of the seventy-five members of the convention, forty-one were farmers, twenty-nine lawyers, and the remaining few were merchants, editors, physicians, and stockmen. The *Daily Herald* evaluated this personnel the day after the initial meeting of the convention, as follows:

We know that the convention has relatively but a few able men in its composition, but those we deem very able, with sound clear judgments. We doubt, however, whether worth and mental strength will find a legitimate field for their influence with men without name, drawn from the different sections of the State, most of them never having been heard of beyond their local habitation and district.

Under the circumstances it is logical to infer that this condition of things has been brought about by an unnatural and, politically considered, an unhealthy condition of things. May not such a result have been brought about by the active operations of a secret political organization, which may have combined to bring under its control the whole machinery of the State Government for their own peculiar ends and objects. While we do not aver that these things are so, we would caution our reader to be on the alert. The times are out of joint; our rights are insecure. . . .

Whatever direct influence the Granger party, as such, may or may not have had in the convention, there can be no doubt that its policy of "retrenchment and reform" was carried through with success. In the first meeting, the members showed their determination to reduce the costs of government by setting their per diem at $5 and mileage at 20 cents rather than accepting the $8 and 25 cents fixed for the Legislature by the Constitution of 1869. Further, the convention at a subsequent meeting decided not to employ a stenographer to record the proceedings. *The Daily State Gazette* pointed out that in its zeal for economy, the convention wasted $900 in per diem debating the question of employing a stenographer, which was $300 or $400 more than his services would have cost. In keeping with the reactionary program thus launched, the debt which the State might incur to supply deficiencies was limited to $200,000, and provision was made that no debt should be created except to supply casual deficiencies of revenue, repel invasion, suppress insurrection, defend the State in war, or pay the existing debt. Salaries of State officers were generally reduced—that of the Governor being lowered from $5,000 to $4,000; that of the Comptroller, of the Treasury, and of the Commissioner of the General Land Office being fixed at $2,500; that of the Secretary of State being set at $2,000. The Lieutenant Governor, who had previously received twice that of Senators, was now to receive the same compensation and mileage as members of the Senate. The Legislature was forbidden in each case to raise the amounts thus rigidly provided in the Constitution. The convention also dealt in a parsimonious manner with the problem of education. A well-organized group opposed maintaining any public school system whatever. After considerable debate a compromise was finally effected which led to the provision that the Legislature might appropriate *not more than* one-fourth of the general revenue and might levy a poll tax of $1 for the support of the public free schools. The office of Superintendent of Public Instruction under the Constitution of 1869 was abolished, and a Board of Education, composed of the Governor, the Comptroller, and the Secretary of State, was substituted. Undeveloped lands of uncertain value in the Panhandle were exchanged for the rich University holdings in East Texas; the provision of the law of 1858 giving the University one section in each ten of State land was repealed; and the

new Constitution provided that no tax should be levied and no appropriation made from the general revenue to erect buildings for the University, which, however, should be one "of the first class."

How did the press of the State react to such policies? It was practically unanimous in its condemnation. The *Houston Daily Telegraph* during the early sessions of the convention noted that something was wrong.

> Texas [it remarked] has had an extravagant Legislature and her treasury has been emptied by Radical usurpers and homemade corruptionists; she has suffered from prodigality, and today rests under the burden of debt that was the creation of a loose and corrupt administration of the State Government; but the very thing we predicted likely to occur, before the convention met, seems to exist. To prevent the recurrence of what has impoverished us, and to fence in legislation so that it may not run away with the revenues of the State, we are likely to go to the other extreme. The anxiety to prevent any further financial hemorrage may induce the Constitutional Convention to draw the ligature too tight, and while stopping the flow, partially paralyze the whole system, and in a short while render the organic law more onerous than beneficial.

And a few days later the same paper declared:

> The narrowness of the policy adopted in doling out miserable pittances to public servants, is neither satisfactory to the people nor creditable to their delegates, and the parsimony which characterizes the proposed educational system is to be regretted, though more emphatic language might be used to express the real opinion of those who believe a most liberal policy should be adopted in regard to the education of the rising generation. Democracy don't (*sic*) mean contractedness, nor economy niggardliness, and while the Democratic State of Texas wants an economical administration of the State Government, and her Constitution so framed as to prevent the drains upon her treasury for illegitimate purposes, which have hitherto been made because not prohibited, she does not desire to see her educational system so meanly supported as to be out at knees and elbows, or her public servants so rewarded as to make it necessary for them to seek service elsewhere to insure a liberal maintenance for themselves and their families. It almost looks like there was a combination in the Convention to make the Constitution which is to be submitted to the people odious, that it may be defeated, and we sympathize with those who have fought against an illiberal and parsimonious majority, who seem to have no broad, comprehensive statesmanship, but are tied down by prejudices and contracted views of what constitutes economy in the administration of a State government.

Commenting on the personnel of the convention by their work at this juncture, the paper was obliged to revise its previous favorable opinion.

> The Constitutional Convention [it said] is composed of men who, in the aggregate, have not to our mind made it a representative body. There are, as is the case in all representative bodies, inexperienced men and wordy fellows, who retard

business and lumber the committees with unimportant and impracticable resolutions, and there is also a class who can never emerge from the swamps and thickets of prejudice to place their feet upon the elevated ground of true statesmanship.

The *Waco Reporter* declared:

> The Convention, so far, as a body, has not shown its ability to cope with the Constitution difficulty—to solve the problem of wise organic law. We write this more in regret than in condemnation.
>
> It is not too late yet to repair the results of negligence and incompetence if a few capable men who are in the Convention can wield the influence to which their ability entitles them, and be allowed to push the work to completion. This is the only hope, and it is but a slender one. . . .

This general chorus of condemnation was joined in by other papers. The Austin *Democratic Statesman* ironically remarked, "Great numbers of people, having heard of the marvels done by the Constitutional Convention will attend the Capital State Fair in order to see and hear the illustrious body in grave debate. It is worth seeing, and Texas should come." Respecting the work of the convention at this point, the *Galveston News* declared that salaries had been lowered almost to the starving point. It regretted that the convention, after decreeing universal suffrage, had, by its educational policy, now decreed universal ignorance. The *Waco Examiner* said that the State could not recover for a century from the action taken by the convention respecting education.

Besides carrying out its program of "retrenchment," the convention also put into effect its policy of "reform." It determined to weaken the State Government so that official excesses, fresh in the memories of the membership, would be impossible in the future. Where short terms of office end, tyranny begins. Whereas under the Constitution of 1869, Senators served six years, they should now serve only four. The Governor's term was reduced from four to two years. The Attorney General, who had been appointed by the Governor, was made elective by the people. Judges of the Supreme and District Courts, formerly appointed by the Governor, were likewise subjected to direct election. The most striking changes, however, were those concerning the Legislature. Of the fifty-eight sections of the chapter dealing with this branch of the Government, over half of them placed limitations upon its authority. Minute provision was made for the procedure to be followed by the Legislature in its work. The time of meeting, the size of the quorum, the amount of mileage and per diem were definitely determined. The manner of framing, passing, and amending bills was carefully prescribed. The power to levy taxes was limited; the pledging of the State's credit was forbidden; local and special laws on a long list of subjects were prohibited.

Such drastic restrictions seemed to the press of the State to be unwise and

unjustified. Reviewing the legislative article, the *Houston Daily Telegraph* said:

There are some improvements, in some minor particulars, made upon the present law relative to the legislative department, but as a whole, it is a shackle put upon the State which will retard its progress. It is an insult to the integrity of those who may hereafter be elected to represent their localities in the Legislatures, and take into consideration the interests of the State at large. And as we had occasion to say sometime since, the harness is so small, the straps drawn so tight, the check rein pulled up to the last buckle hole, and the load to draw so heavy, that the legislative horse will be galled from collar to crupper in the attempt to work, and the State wagon will go creaking along the highway of progress, in the rear of the procession, because the constitutional convention was too *economical* to grease the wheels.

Commenting on the executive branch of the Government thus provided for, the same organ declared:

The misfortune with the Constitutional Convention has generally been that a large proportion of the members have been impressed with the idea that they were obliged to legislate for the State for all time to come, and that it was their bounden duty to frame such an organic law as should take away from the Legislature all discretionary power, and by the wisdom of the law paramount, the Executive would in fact be rendered as incapable of doing wrong as in theory the king is supposed to be immaculate and beyond the peradventure of a mistake.

Toward the end of the convention, the San Antonio *Daily Herald* remarked:

The desire of the people was so generally expressed in favor of the Constitution of the Fathers of Texas, that of 1845, should be made the basis of the new Constitution, limited strictly to such changes as the exigencies of the times rendered imperatively necessary, that it was supposed a short session would suffice. But the conventioners being put astride the horse seem determined, like the beggar, to ride it to the devil. The Constitution of 1845 they unceremoniously kicked out of doors. Eighty days have they been a convention—twice as long as the deluge lasted, and they yet remain barnacles upon the State Treasury.

The *Galveston News* summarized its opinion of the convention and its work as follows:

The convention has caused disappointment and displeasure, not by the fact of presuming to exercise supreme legislative functions, but by the objectionable quality of the fundamental legislation on which it seemed to be predetermined. It appears thus far to have been greatly influenced by an arrogant and headstrong element which is inimical to the immigration and educational interests of the State, which would beggar, in the name of economy, every important department of government, and, in the name of represented sovereignty of the people, would chain the will of the people from expression hereafter through legislative representatives of their choice. In its insufferable presumption, this element forgets

that sovereignty is a continuous, perpetual force, of which the convention in its proper character, is at most a transient reflection, a temporary medium, a provisional agent.

In the campaign for ratification, considerable opposition developed. The *Houston Daily Telegraph* and the Austin *Democratic Statesman* were vigorous in their criticism. They were joined by the *Panola Watchman*, the *San Saba News*, the *Rockdale Transcript*, the *Comanche Chief*, the *Jefferson Jimplecute*, the *Jasper Newsboy*, the *Bremond Sentinel*, and other papers. Colonel Ashbel Smith was perhaps the most outspoken of the Democrats who sought to defeat the new Constitution. He was especially dissatisfied with the educational provisions and those dealing with internal improvements. Arguments advanced by opponents were met by the advocates of ratification, not by declaring that the Constitution was inspired or perfect, but by the very practical claim that it was better than the existing obnoxious instrument, which had been forced upon the State, and that its acknowledged defects could be cured by amendment. This was the opinion of Governor Coke, who urged approval of the new document. It was the view of Senator S. B. Maxey and Mr. F. S. Stockdale, members of the convention, who said that the real issue was the relative merits of the existing Constitution and the one which was submitted to take its place. Both of them pointed out that the latter instrument was preferable. Most of the newspapers of the State shared this opinion. The *San Antonio Express* declared that the new Constitution should be judged fairly and on its merits. The San Antonio *Daily Herald* and the *Waco Examiner* believed that it should be adopted as submitted. The *Waco Reporter* criticized the judiciary article but said that this could be remedied by amendment later. The *Bryan Appeal* thought that the new Constitution was a worthy one. The *Navasota Tablet*, the *Athens Courier*, the *Calvert Texan*, the *Bryan Post*, the *Sherman Courier*, the *Rockdale Messenger*, the *Belton Review*, the *Giddings Tribune*, the *Nacogdoches News*, and other papers favored ratification of the new instrument because it was the choice of two evils and could be easily changed to rectify its shortcomings. After a lively campaign the Constitution was adopted by a vote of 136,606 to 56,652.

From this brief review of contemporary conditions and opinions a few conclusions may reasonably be drawn. In the first place, it is clear that the Constitution of 1876 was drafted during a period of reaction when the Government of the State was held in low esteem—in fact, in distrust—and that the fears and prejudices of the day found expression in the instrument itself. This has resulted in perpetuating a régime of fiscal penuriousness and imposing permanent limitations of a very serious character upon the powers of public organs and officials. The resolution to reduce the prerogatives of the Legislature to a minimum and to emasculate

the discretionary authority of civil servants was carried through so effectively that the system thus established became practically a Government of negation, perhaps adequate for the individualistic age which it was designed to serve, but almost impossible in the present collectivistic era when governmental activities have multiplied so greatly and when public services have become indispensable to the rank and file of the community. Secondly, with all deference to the memories of those who wrote the Constitution, they were merely an average group of men, with no marked aptitude for determining for all time how Texas should be governed. They were not possessed of any particular prescience; they were more interested in the present and the immediate past than in the future. They confronted a difficult task and performed it as best they could under the circumstances. The result was, at best, a very poor compromise. There is no reason to believe that it is impossible at the present time for Texas to find men just as competent and willing to undertake the work of drafting a Constitution when the people are aroused to the necessity for it. Thirdly, the majority of the people living in Texas in 1876 realized that the Constitution which they adopted did not completely meet the needs of the State even them. Certainly at no time were they led to believe that it was particularly meritorious. They agreed to ratify it because they thought that it was preferable to the obnoxious instrument of 1869 and that its admitted defects could be overcome by amendment. It has only been in later years, as the mists have gathered about the past and the shadow of the unknown has been cast upon the present, that the idea has gained currency that there is something intrinsically sacred about the Constitution.

When such a notion is advanced, one is reminded of the attitude of Thomas Jefferson, whose opinion regarding matters in general seems to be highly respected in these parts. He declared that each generation had a right to establish its own law. "The earth," he said, "belongs in usufruct to the living; the dead have neither powers nor rights over it." He reasoned that, since one-half of the population over twenty-one years of age passed away in eighteen years and eight months, there should be a revision of the fundamental law, or at least an opportunity for revision, every nineteen years. When will Texas be prepared to accept such a practical doctrine? When will the people be willing to admit that the State should be rescued from the doldrums in which it is floundering? When will they acknowledge that their Government, like their great business enterprises, should be well managed? Of course, this cannot be predicted. One is safe in saying, however, that the answer depends to no small degree on whether the people follow the leadership of the political mystics of the State, who play on apprehensions, prejudices, and illusions, or the leadership of the political realists, who insist that common sense can be, and

should be, utilized in government as well as in other undertakings. It is a hopeful sign at this moment that the latter group seem to be gaining strength.



22. THE NEW MISSOURI STATE CONSTITUTION [1]

Missouri is one of the few states to have recently adopted a new Constitution. In his review of this document Professor Sparlin indicates the major changes in the government of Missouri. His analysis shows that a new constitution does not necessarily mean drastic revision although—in this instance—it means considerable improvement.

ON FEBRUARY 27, 1945, the voters of Missouri adopted a new State Constitution. The document was drafted by a constitutional convention which sat from mid-1943 until September, 1944.

Complete revision of the fundamental law of a State is something which happens infrequently. Sixteen of the 48 states and the Federal Government have had only one constitutional convention and one constitution. These sixteen include Oklahoma and New Mexico in the Southwest. Only four states have revised their constitutions in the 45 years of this century: Louisiana adopted a new constitution in 1921; Michigan, in 1909; Virginia, in 1902; and Alabama in 1901.

Many of the changes in the new Missouri constitution are minor in nature and none is revolutionary. Some of the more important changes should be of interest to students of the social sciences in the Southwest.

LEGISLATIVE ARTICLE

In the legislative article, the bicameral General Assembly is continued with 34 members of the Senate as in the past and with a system of apportionment which will immediately increase the 150-member House to 154 and allow additions with increases in population.

Senatorial redistricting has been a bugaboo for many years, the last reapportionment in Missouri being in 1901. The smallest senatorial district now has a population of 45,718 while the largest has 320,512. The new Constitution provides that the Governor shall appoint a commission of 10 to be selected from lists of ten names each submitted by the two

[1] Estal E. Sparlin, *Southwestern Social Science Quarterly* (June, 1943), Vol. 26, No. 1, pp. 68–75.

major political parties. If the commission fails to agree all senators are to be elected at large at the next election. This should assure reapportionment.

A record vote is required of each legislative committee on measures reported out. This is an attempt to bring committee action into the open. Furthermore, one-third of the members of a house may relieve a committee of a measure referred to it and place the bill on the calendar for consideration.

These and several other items considered by political scientists as legislative in nature and not properly belonging in a constitution are provided in an attempt to improve legislation. This is done in spite of the clearly demonstrated fact that such provisions are merely palliatives and that real improvement can be secured only through fundamental reorganization. It is interesting that there is already a movement in the legislature to circumvent the requirement that votes in committee be recorded. The Constitution says, "the recorded vote of the members of the committee shall be filed with all reports on bills." Some members maintain that this means that the vote on the measure, such as 5 to 2 or 9 to 3, need be filed and not the vote of each member. Could the reorganization point be better illustrated?

JUDICIARY AND BILL OF RIGHTS

The Supreme Court, appellate courts, and circuit courts are continued substantially as in the past. Justice of the Peace Courts are abolished and will be superseded by magistrate courts. There is to be only one magistrate court in counties of less than 70,000 and in counties of less than 30,000 the magistrate court and probate court are combined under one judge. The judge of a magistrate court must be a member of the bar and is to be paid a salary. The elimination of the J.P. courts alone makes the new constitution worth the effort.

The so-called Missouri non-partisan court plan which has received wide attention during the last five years is continued. Under this plan, the judges of the principal courts of the state are appointed by the Governor from a list of three submitted by a non-partisan commission. At the next general election following the expiration of the first year in office, the appointee's name is placed on the ballot and the people vote to retain or reject him. In other words, he runs against his own record. The system is in some ways ludicrous because of the devious maze set up to circumvent appointments for political reasons and also give lip-service at least to Jacksonian Democracy—but it works.

The Supreme Court has finally been given authority to establish rules of practice and procedure for the courts. As 22 other states have already

made this progressive step and taken judicial procedure out of the hands of the legislature, Missouri is just now catching up with them, but since 25 other states have not made this move Missouri is ahead of this group. The Supreme Court is also authorized to make temporary transfers of judges from one court to another as the administration of justice requires.

Jury service is extended to include women but is not compulsory for them.

The only changes in the Bill of Rights are those specifically recognizing the right of labor unions to bargain collectively and the extension of freedom of speech to the radio. Both are more in the nature of gestures than truly significant because it is generally conceded that the old constitution was broad enough to cover them.

One provision concerning negroes in the education article is in the nature of a bill of rights matter. Though the Jim Crow law has not extended to other things in Missouri, separate schools were rigidly required under the old constitution. Under the new one the General Assembly is to provide separate schools for white and colored children "except in cases otherwise provided by law." This resulted in a paradoxical alignment of voters in the vote on the constitution in that the plantation counties of southeastern Missouri voted solidly against the constitution because it allows a foot-in-the-door for the negro in education while the negro wards of St. Louis voted just as solidly against the constitution because it didn't go far enough.

THE EXECUTIVE ARTICLE

The Governor is still the "supreme" executive and not "the" executive. The executive department is composed of the Governor, Lieutenant-Governor, Auditor, Secretary of State, Attorney General and State Treasurer, all elective. The elective Superintendent of Education was abolished. Provision is made for a Board of Education to be appointed by the Governor and a State Commissioner of Education to be selected by the Board.

The elective officials, however, will be handicapped in their grasping for additional power and functions before the legislature, as has been the custom, for the new constitution names the functions of each and forbids the assignment of non-germane duties.

There are at the present time 72 official administrative agencies in the executive department in addition to the Governor and Lieutenant-Governor. Obviously it is a hodgepodge. The new constitution names six departments in addition to the four headed by elective officials and states that not more than four other departments may be established by

law. The six named are as follows: Revenue, Education, Highways, Conservation, Agriculture, and Public Health and Welfare. The constitution provides further that the Governor is to reassign the 72 agencies to the 14 departments if the General Assembly fails to act.

Four of the departments, Education, Highways, Conservation and Agriculture, are already in existence and will probably be changed little except for the addition of certain functions in the reshuffling of the miscellaneous agencies. The other two—Revenue and Public Health and Welfare—are new and interesting. The former is the culmination of a long fight to consolidate the tax collection agencies in Missouri. The latter is the result of an eleventh-hour compromise and now that its implications are being fully realized everyone is disclaiming responsibility for it.

Missouri has had the largest number of agencies collecting major state taxes of any state in the Union. These agencies and the taxes for collection of which they have been responsible are: Income and sales taxes, State Auditor; motor vehicle license tax, Secretary of State; death tax, State Treasurer; gasoline tax, Department of Oil Inspection; liquor tax, Department of Liquor Control; and state functions in connection with the property tax, State Tax Commission. The deficiencies of the deployment of this one function among so many agencies are obvious and Missouri has exemplified all of them. Missouri has had likewise an inept budget agency, the chairman of the Tax Commission as exofficio Budget Director with a staff consisting of one person. Still further, there has been no bookkeeping or account checking within the departments under the Governor, this all having been performed by the independent State Auditor and State Treasurer. The Department of Revenue which the General Assembly is required by the new constitution to create is to have a Division of Collection, a Division of Budget and Comptroller, and such other divisions as may be created by law. The Division of Collection "shall collect all taxes, licenses and fees payable to the state, except that county and township collectors shall collect the state tax on tangible property until otherwise provided by law." Proponents of the consolidated collection agency maintain it will mean a saving of half-a-million dollars annually through more efficient administration and elimination of duplication. The Division of Budget and Comptroller is also given ample powers to perform desirable functions in the fields of budgeting and accounting provided the General Assembly implements the constitutional provisions with an adequate law and ample funds. However, it is generally recognized among students of administration that budgeting and accounting should be separated. Furthermore both the Division of Budget and Comptroller and the elective State Auditor are given what amounts

to preaudit authority which will at least cause duplication and may lead to conflicts.

The constitutional convention wanted to name nine departments and allow the General Assembly to create not more than five additional departments. At the last minute representatives of the various welfare and health groups put pressure on the convention to name their respective departments specifically. The convention delegates were reluctant to increase the number of departments and also did not want to reduce to three the number of unnamed departments. In the heat of the closing hours—literally—of the convention, it was agreed that a "Public Health and Welfare Department" would be named. There could have been a less-unhappy union: The doctors don't like the welfare people because of their public-medicine leanings and the stigma which will be placed on health by being associated with "relief" functions and the welfare people look askance at the doctors. No other state places all welfare, social security, penal and eleemosynary institutions, and public health in one department. It will be interesting to see what comes out of this session of the General Assembly.

A merit system is required for the penal and elemosynary institutions and may be extended by law.

The legislature is required also to establish a Tax Commission which will equalize assessments and supervise the general property taxation process. The provision for this agency is found in the taxation article and no method is set forth for integrating its work with the Revenue Department established in the Executive article.

THE TAXATION SYSTEM

The only major change in the taxation system of the state is the provision for a classified property tax. Heretofore Missouri has been one of the few states retaining the archaic provision that all property must be assessed and taxed at the same rate.

Under the new constitution, property is classified into three groups: (1) real property, (2) tangible personal property, (3) and intangible personal property. The latter two groups may be further classified into sub-groups by law. Taxes levied on intangible personal property must be based on the annual yield of income and cannot exceed 8 percent of such income. All taxes on intangibles are to be assessed and collected by the state and returned to the counties and other political subdivisions of their origin. This will facilitate the use of income tax returns in ferreting out taxable property.

The property tax calendar, now 18 months long, must be reduced to 12

months. This change will facilitate budgetary planning by the various units of government and should reduce delinquency, particularly on personal property of itinerants.

In the property tax limitations only minor changes are made. The limitations may be exceeded by a two-thirds vote in the area affected. In some cases this will legalize rates already being levied above the constitutional limit and in others it will allow more flexibility in areas where the people wish added governmental services.

The General Assembly may also provide partial relief from taxes for property in blighted and obsolete areas, both rural and urban, when it will encourage rejuvenation of the area.

LOCAL GOVERNMENT

No substantial change was made in municipal government except that home rule, which had its beginnings in this country in Missouri in 1875 when cities of 100,000 population and over were given home rule, was extended downward to all cities of over 10,000 population.

Counties of over 85,000 population are also given the right to frame charters setting up their own governments. The counties in this group are Jackson (Kansas City), Buchanan (St. Joseph), Greene (Springfield), and St. Louis which adjoins the city-county of St. Louis.

For the remaining 100 rural and less-urban counties, the General Assembly is authorized to create not more than four classes and provide alternative forms of government. Heretofore laws governing counties had to be uniform for all counties including at one extreme Carter with a population of 6,226 and an assessed valuation of $3 million and at the other extreme Jackson with a population of 477,828 and an assessed valuation of $647 million.

County consolidation is at least authorized although it is not expected there will be a rush to take advantage of this provision.

The provision which allows two to ten counties to join in performing any common function or service is promising and may produce some interesting experiments.

All counties, cities and other subdivisions of the state are required to prepare annual budgets, file annual reports of their financial condition, and be audited.

CONCLUSIONS

Appraising Missouri's new constitution is a difficult task. If a refusal to experiment is commendable, the constitutional convention was par excellence for one looks in vain for some of the new-fangled governmental

gadgets such as the unified executive, the unicameral legislature, and proportional representation.

A very poor job of drafting was done in several of the articles. For example, justices of peace are abolished in one section but mentioned in another. Other ambiguities occur in various places, which makes certain that it will be many years before the people of Missouri really know what they adopted on February 27. Perhaps the most serious factor is that the Supreme Court's judgment is substituted for that of the people.

On the other hand, the constitution is loaded with improvements over the old Missouri constitution and is truly a significant step forward.



23. A NEW CONSTITUTION FOR NEW JERSEY [1]

NEW JERSEY followed Missouri and Georgia in rewriting its constitution. The new document went into effect January 1, 1948. In addition to explaining the superiority of the constitution of 1948 to the one of 1844 that it replaced, Professor Rich summarizes the process followed in calling the constitution convention and the convention procedure.

NEW JERSEY's new constitution will become effective January 1, 1948. By the overwhelming vote of 653,096 to 184,632 (official figures), the people signified their approval, November 4, of the work of the constitutional convention held at Rutgers University, June 12 to September 10, 1947.

Revision became a live issue when Governor Alfred E. Driscoll, in his inaugural address, emphasized the need for modernizing the state's outmoded 1844 constitution. Quickly a bill was passed calling for popular endorsement of a limited convention—limited in that the question of legislative representation was barred from discussion. At the regular election for county officials on June 3, the voters were given an additional ballot to express their preference for or against the proposed convention. On this ballot they voted also for delegates.

Each county was entitled to as many delegates as it had senators and representatives. In 13 of the 21 counties, delegates were selected by the party organizations on a bipartisan basis, and the final party distribution was: Republicans 54, Democrats 23, and Independents 4. Of the 81 dele-

[1] Bennett M. Rich, *American Political Science Review* (December, 1947), Vol. 41, No. 6, pp. 1126–1129.

gates, 50 were lawyers, and of these 21 were either active or retired judges. Twenty-five delegates were serving or had served in the legislature. Sixteen had teaching experience. Eight were women.

The referendum on the question of holding a convention was carried by a ratio of five to one. On June 12, just nine days later, Governor Driscoll formally opened the sessions. Dr. Robert C. Clothier, president of Rutgers University and a delegate from Middlesex county, was elected president. His first major act was the appointment of nine committees, five to consider the substantive provisions of the constitution and four to conduct the business of the convention. During July and August, extensive hearings were held. Committee proposals were then drafted for consideration by the delegates in general debate. The convention adjourned on September 10.

Significant changes in the constitution follow:

Bill of Rights: The right of collective bargaining is recognized for persons in private employment; those in public employment may organize and present their grievances through representatives of their own choosing. Persons may not be limited in their rights nor segregated in the militia or the public schools because of race, religion, or national origin.

Elections and Suffrage: A new clause authorizes the legislature to provide for absentee voting by members of the armed forces in time of peace. This is intended to limit the legislature to providing absentee voting for the military only.

The Legislature and Its Powers: A two-year term is provided for assemblymen, with senators serving four rather than three years. The $500 annual salary is eliminated in favor of legislative determination. A full calendar day must elapse between the second and third readings of a bill unless the house, by a three-fourths vote, determines that the bill is an emergency measure.

A clause concerning control of gambling proved especially troublesome. Gambling in any form was prohibited by constitutional amendment in 1897, but in 1939, a second gambling amendment authorized pari-mutuel betting at horse races. This left the state in the anomalous position of legalizing big-time betting on horse-racing while making illegal church, firemen, and veterans bingo games. According to the new provision, gambling may be authorized by the legislature providing the "specific kind, restrictions, and control" have been accepted by popular referendum.

The new constitution calls for a liberal construction of laws relating to municipalities and counties. A greater measure of home rule seems assured through a clause authorizing local governments to petition for special legislation. To become effective, a special law must be approved by two-thirds of each house and adopted in the municipality or county either by action of the governing body or by popular referendum.

Executive: The governor's constitutional position, heretofore among the country's weakest, is strengthened considerably. His term is extended from three years to four and he may succeed himself once. The election will be in odd-numbered years. In order to override the governor's veto, a two-thirds vote is required instead of a majority. The period for gubernatorial consideration of bills at the end of a legislative session is increased from five to forty-five days. The legislature will automatically reconvene to consider vetoed measures, thus eliminating the pocket veto.

Important changes were made in the realm of state administrative organization. All state agencies except temporary commissions are to be allocated among not more than 20 principal departments, which are to be headed by single executives "unless otherwise provided by law." Although the politically powerful commission-governed agencies will thus retain their status, the governor must approve, and he may remove, executive heads selected by commissions. Single executives, appointed with the senate's consent, serve at the governor's pleasure. Exceptions are the secretary of state and the attorney-general, whose terms are to be concurrent with that of the chief executive. The initial allocation of agencies is to be made by the legislature prior to July 1, 1919, and if the legislature does not complete it by that time, the governor "shall" call a special session of the legislature to consider exclusively his plans for effecting the reorganization.

In order to put teeth into the customary assertion that the governor shall "take care that the laws be faithfully executed," he is empowered to take court action to enforce compliance with the law or to restrain violation of the law by any officer or agency of the state. The legislature is instructed to provide for the publication of rules and regulations promulgated by the administrative departments.

Judicial: Far-reaching reforms were made in the state's antiquated and top-heavy judicial system. The highest judicial body, the sixteen-man court of errors and appeals, was eliminated. So also was the supreme court, whose nine judges have sat on the court of errors and appeals. The equity court as a separate system was abolished.

The new court structure consists of a supreme court of seven justices; a superior court with appellate, law, and chancery divisions; county courts; and inferior courts of limited jurisdiction. The supreme court is made responsible for rules governing the administration of all courts and "subject to law, the practice and procedure in all such courts." An administrative director is to be appointed by the chief justice to serve at his pleasure.

Members of the supreme and superior courts will be appointed initially for seven years and, upon reappointment, during good behavior with retirement at seventy. Upon certification by the supreme court, the governor may appoint a commission of three to investigate any question of

incapacity and, upon their recommendation, may retire any member of the court. Supreme and superior court members are prohibited from "engaging in the practice of law or other gainful pursuit."

Public Officers and Employees: Constitutional status is given the merit system for state employees. The state auditor, whose duty is specified as "post auditing," is to be selected at a joint meeting of the legislature. County prosecutors will continue to be appointed by the governor. County reform may be impeded by the fact that county clerks, surrogates, and sheriffs are given constitutional status.

Taxation and Finance: The success or failure of the convention swayed in the balance during the period of the debates on the tax clause. Party leaders arrived at a compromise designed to eliminate the loss of revenue sustained by cities having second-class railroad property (stations, yards, and terminals). Such railroad property, sixty per cent of which is located in Jersey City, is taxed by state law at a rate much below the average city rate. The new constitution requires all real property to be assessed according to the same standard of value and to be taxed at the "general tax rate of the taxing district in which the property is situated."

Veterans are given a five-hundred-dollar exemption from taxation on real and personal property. The constitutional debt limitation of $100,000 is increased to one per cent of the general appropriation. Improvements resulting from the redevelopment of blighted areas by municipal, public, or private corporations may be exempted from taxation for a limited period. The legislature is authorized to provide for the transportation of children "to and from any school."

Amendments: The amending clause is liberalized slightly. In contrast to the old requirement of action by successive legislatures prior to popular referendum, a three-fifths vote of both houses now places the proposed amendment before the people. Failing the three-fifths vote, a majority in succeeding legislative years is needed before a referendum may be held.

CHAPTER V

Civil Rights

24. GITLOW v. NEW YORK

Supreme Court of the United States, 1925 (Error)
268 U.S. 652

GITLOW was convicted in a New York court for violating the state Criminal Anarchy Act. His specific offenses were the writing of the "Left Wing Manifesto" and the printing, publishing, and distribution of the "Revolutionary Age," both publications allegedly advocating the overthrow of government by force. Following his conviction in the state courts, Gitlow appealed to the Supreme Court, challenging the Act as contrary to the due process of law clause of the Fourteenth Amendment.

Although the Court upheld the conviction of Gitlow, the case has significance because, in agreeing to pass on the constitutionality of the state law, the Court established for the first time that freedom of speech and the press, protected against federal action by the First Amendment, were also "fundamental liberties," protected against state attack by the Fourteenth Amendment. The effect of this precedent was to begin the "nationalization" of Civil Rights, previously resisted by the Supreme Court in *Barron* v. *Baltimore*, (7 Peters 243) and *The Slaughterhouse Cases* (16 Wallace 36). This nationalization, however, has been extended by the Court to include only "substantive" rights and not "procedural" (see *Palko* v. *Connecticut*, 302 U.S. 319, which begins on page 131 of this book).

Opinion of the Court

MR. JUSTICE SANFORD delivered the opinion of the Court:

. . . . . .

The indictment was in two counts. The first charged that the defendants had advocated, advised, and taught the duty, necessity, and

propriety of overthrowing and overturning organized government by force, violence, and unlawful means, by certain writings therein set forth, entitled, "The Left Wing Manifesto"; the second, that the defendants had printed, published, and knowingly circulated and distributed a certain paper called "The Revolutionary Age," containing the writings set forth in the first count, advocating, advising, and teaching the doctrine that organized government should be overthrown by force, violence, and unlawful means.

. . . It was admitted that the defendant signed a card subscribing to the Manifesto and Program of the Left Wing, which all applicants were required to sign before being admitted to membership; that he went to different parts of the state to speak to branches of the Socialist party about the principles of the Left Wing, and advocated their adoption; and that he was responsible for the Manifesto as it appeared, that "he knew of the publication, in a general way, and he knew of its publication afterwards, and is responsible for its circulation." . . .

There was no evidence of any effect resulting from the publication and circulation of the Manifesto.

The precise question presented, and the only question which we can consider under this writ of error, then, is whether the statute, as construed and applied in this case by the state courts, deprived the defendant of his liberty of expression, in violation of the due process clause of the Fourteenth Amendment.

The statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising, or teaching the overthrow of organized government by unlawful means. These words imply urging to action. . . .

The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances, and, through political mass strikes and revolutionary mass action, overthrow and destroy organized parliamentary government. It concludes with a call to action in these words: "The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. . . . The Communist International calls the proletariat of the world to the final struggle!" This is not the expression of philosophical abstraction, the mere prediction of future events: it is the language of direct incitement.

. . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overwhelming organized government by force, violence, and unlawful means, but action to that end, is clear.

For the present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the states. . . .

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom. 2 Story, Const. 5th ed. section 1580, p. 634. . . . Reasonably limited, it was said by Story in the passage cited, this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

That a state, in the exercise of its police power, may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . .

. . . And a state may penalize utterances which openly advocate the overthrow of the representative and constitutional form of government of the United States and the several states, by violence or other unlawful means. . . . In short, this freedom does not deprive a state of the primary and essential right of self-preservation, which, so long as human governments endure, they cannot be denied. . . .

By enacting the present statute the state has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence, and unlawful means, are so inimical to the general welfare, and involve such danger of substantive evil, that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute. . . . That utterances inciting to the overthrow of organized government by unlawful means present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice

balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency . . .

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the state, unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality. . . .

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant of its natural tendency and probable effect were to bring about the substantive evil which the legislative body might prevent. Schenck v. United States, 249 U.S. 51; Debs v. United States, 249 U.S. 215. . . .

And finding, for the reasons stated, that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right, the judgment of the court of appeals is affirmed.



25. PALKO v. CONNECTICUT

Supreme Court of the United States, 1937 (Appeal)
302 U.S. 319

THIS case involves double jeopardy and the extent to which the federal Bill of Rights protects citizens from state action in this regard. The Court noted in its decision that the double jeopardy clause of the Fifth Amendment is applicable only to the federal government. Accordingly, a state statute allowing appeal in criminal cases by the state, under certain conditions and for the correction of error, is constitutional and does not constitute a denial of due process by the state under the Fourteenth Amendment. The Court viewed the Fourteenth Amendment as extending protection to "substantive rights" endangered by state action but not to "procedural rights," such as protection against double jeopardy. The importance of the case lies in its clearer delineation of the character of the "nationalization" concept developed in *Gitlow* v. *New York* (268 U.S. 652).

Opinion of the Court

MR. JUSTICE CARDOZO delivered the opinion of the Court:

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin. Public Acts, 1886, p. 560; now § 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. *State* v. *Palko*, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing

to violate the Fourteenth Amendment of the Constitution of the United States. Upon the over-ruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction. . . .

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. . . .

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. *Hurtado* v. *California*, 110 U.S. 516; *Gaines* v. *Washington*, 277 U.S. 81, 86. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. *Twining* v. *New Jersey*, 211 U.S. 78, 106, 111, 112. . . . The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the value in controversy shall exceed twenty dollars. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether. . . .

On the other hand, the due process clause of the Fourteenth Amend-

ment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress. . . . In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, [291 U.S. 97] . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination. *Twining* v. *New Jersey, supra.* This too might be lost, and justice still be done. . . .

Our survey of the cases serves, we think, to justify the statement that the dividing line between them, if not unfaltering throughout its course, has been true for the most part to a unifying principle. On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? *Hebert* v. *Louisiana*, [272 U.S. 312]. The answer surely must be "no." What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State* v. *Felch*, 92 Vt. 477; 105 Atl. 23; . . . This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege, subject at all times to the discretion of the presiding

judge, *State* v. *Carabetta,* 106 Conn. 114; 127 Atl. 394, has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.

2. The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States. . . .

The judgment is

Affirmed



26. WEST VIRGINIA STATE BOARD OF EDUCATION et al. v. BARNETTE et al.

Supreme Court of the United States, 1943 (Appeal) 319 U.S. 624

THIS is the second of the flag salute cases growing out of the refusal of members of Jehovah's Witnesses to allow their children to salute the flag as part of the regular class procedure in public schools. In deciding this case, the court specifically overruled a previous decision in *Minersville School District* v. *Gobitis* (310 U.S. 586) on the same subject. The Court held that the state statute making it compulsory for school children to salute and pledge allegiance to the flag violated the First and Fourteenth Amendments to the Constitution and was therefore unconstitutional. An incidental result of the issue raised in this and similar cases was the passage of Public Law No. 623, 77th Congress, which dealt with the display, use, and treatment of the national flag.

Opinion of the Court

MR. JUSTICE JACKSON delivered the opinion of the Court:

Following the decision by this Court on June 3, 1940, in *Minersville School District* v. *Gobitis,* 310 U.S. 586, the West Virginia legislature amended its statutes to require all schools therein to conduct courses of instruction in history, civics, and in the Constitutions of the United States and of the State "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government." Appellant Board of Education was directed, with advice of the State Superintendent of Schools, to "prescribe the courses of study covering these subjects" for public schools. The Act made it the duty of private, parochial and denominational schools to prescribe courses of study "similar to those required for the public schools."

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's *Gobitis* opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

. . . What is now required is the "stiff-arm" salute, the saluter to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is "unlawfully absent" and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it. . . .

The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual. The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

As the present CHIEF JUSTICE said in dissent in the *Gobitis* case, the State

may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U.S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan. This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton* v. *Regents*, 293 U.S. 245. In the present case attendance is not optional. That case is also to be distinguished from the present one because, independently of college privileges or requirements, the State has power to raise militia and impose the duties of service therein upon its citizens. . . .

Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. . . .

Lastly, and this is the very heart of the *Gobitis* opinion, it reasons that "National unity is the basis of national security," that the authorities have "the right to select appropriate means for its attainment," and hence reaches the conclusion that such compulsory measures toward "national unity" are constitutional. *Id.* at 595. Upon the verity of this assumption depends our answer in this case.

National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.

Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian

exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The decision of this Court in *Minersville School District* v. *Gobitis* and the holdings of those few *per curiam* decisions which preceded and foreshadowed it are overruled, and the judgment enjoining enforcement of the West Virginia Regulation is

Affirmed

27. NORRIS v. ALABAMA

Supreme Court of the United States, 1935 (Certiorari) 294 U.S. 587

THE administration of justice to the Negro in the South has long presented a serious problem. In this case the Supreme Court reviewed a state conviction of a Negro on the charge of rape. The point at issue was the lawfulness of the procedure in the state court, in view of the fact that no Negro had been seated on the trial jury. The court held that the systematic and arbitrary exclusion of Negroes from a jury list in a case in which a Negro was on trial constituted a denial by the state to the Negro of equal protection of the laws under the Fourteenth Amendment. The case is an instructive example of the use of the equal protection of the laws clause by the Supreme Court to protect the civil liberties of a minority group. In practice the court decision has resulted in many Southern states deliberately including at least one Negro on a jury panel when one of that race is on trial. In order to invoke the ruling of the court the exclusion of Negroes must be shown to have been "systematic and deliberate."

Opinion of the Court

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court:

Petitioner, Clarence Norris, is one of nine Negro boys who were indicted in March, 1931, in Jackson County, Alabama, for the crime of rape. On being brought to trial in that county, eight were convicted. The Supreme Court of Alabama reversed the conviction of one of these and affirmed that of seven, including Norris. This Court reversed the judgments of conviction upon the ground that the defendants had been denied due process of law in that the trial court had failed in the light of the circumstances disclosed, and of the inability of the defendants at that time to obtain counsel, to make an effective appointment of counsel to aid them in preparing and presenting their defense. *Powell* v. *Alabama*, 287 U.S. 45.

After the remand, a motion for change of venue was granted and the cases were transferred to Morgan County. Norris was brought to trial in November, 1933. At the outset, a motion was made on his behalf to quash the indictment upon the ground of the exclusion of Negroes from juries in Jackson County where the indictment was found. A motion was also made to quash the trial *venire* in Morgan County upon the ground of the exclusion of Negroes from juries in that county. In relation to each county, the charge was of long continued, systematic and arbitrary exclusion of qualified Negro citizens from service on juries, solely because of their race and color, in violation of the Constitution of the

United States. The State joined issue on this charge and after hearing the evidence, which we shall presently review, the trial judge denied both motions, and exception was taken. The trial then proceeded and resulted in the conviction of Norris, who was sentenced to death. On appeal, the Supreme Court of the State considered and decided the federal question which Norris had raised, and affirmed the judgment. 229 Ala. 226; 156 So. 556. We granted a writ of certiorari. 293 U.S. 552.

First. There is no controversy as to the constitutional principle involved. That principle, long since declared, was not challenged, but was expressly recognized, by the Supreme Court of the State. Summing up precisely the effect of earlier decisions, this Court thus stated the principle in *Carter* v. *Texas*, 177 U.S. 442, 447, in relation to exclusion from service on grand juries: "Whenever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States. . . .

The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured. . . .

Second. The evidence on the motion to quash the indictment. In 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2688 were Negroes. The male population over twenty-one years of age numbered 8801, and of these 666 were Negroes.

The qualifications of jurors were thus prescribed by the state statute (Alabama Code, 1923, § 8603): "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over

sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box." See Gen. Acts, Alabama, 1931, No. 47, p. 59.

Defendant adduced evidence to support the charge of unconstitutional discrimination in the actual administration of the statute in Jackson County. The testimony, as the state court said, tended to show that "in a long number of years no Negro had been called for jury service in that county." It appeared that no Negro had served on any grand or petit jury in that county within the memory of witnesses who had lived there all their lives. Testimony to that effect was given by men whose ages ran from fifty to seventy-six years. Their testimony was uncontradicted. It was supported by the testimony of officials. . . .

That testimony in itself made out a *prima facie* case of the denial of the equal protection which the Constitution guarantees. . . . The case thus made was supplemented by direct testimony that specified Negroes, thirty or more in number, were qualified for jury service. Among these were Negroes who were members of school boards, or trustees, of colored schools, and property owners and householders. It also appeared that Negroes from that county had been called for jury service in the federal court. Several of those who were thus described as qualified were witnesses. . . .

The question arose whether names of Negroes were in fact on the jury roll. The books containing the jury roll for Jackson County for the year 1930–31 were produced. . . . On the pages of this roll appeared the names of six Negroes. They were entered, respectively, at the end of the precinct lists which were alphabetically arranged. The genuineness of these entries was disputed. It appeared that after the jury roll in question had been made up, and after the new jury commission had taken office, one of the new commissioners directed the new clerk to draw lines after the names which had been placed on the roll by the preceding commission. These lines, on the pages under consideration, were red lines, and the clerk of the old commission testified that they were not put in by him. The entries made by the new clerk, for the new jury roll, were below these lines.

The names of the six Negroes were in each instance written immediately above the red lines. An expert of long experience testified that these names were superimposed upon the red lines, that is, that they were written after the lines had been drawn. The expert was not cross-examined and no testimony was introduced to contradict him. In denying the motion to quash, the trial judge expressed the view that he would not "be

authorized to presume that somebody had committed a crime" or to presume that the jury board "had been unfaithful to their duties and allowed the books to be tampered with." His conclusion was that names of Negroes were on the jury roll.

We think that the evidence did not justify that conclusion. The Supreme Court of the State did not sustain it. . . .

As we have seen, there was testimony, not overborne or discredited, that there were in fact Negroes in the county qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons, fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside. There is no ground for an assumption that the names of these Negroes were not on the preliminary list. The inference to be drawn from the testimony is that they were on that preliminary list, and were designated on that list as the names of Negroes, and that they were not placed on the jury roll. There was thus presented a test of the practice of the commissioners. Something more than mere general asseverations was required. Why were these names excluded from the jury roll? Was it because of the lack of statutory qualifications? Were the qualifications of Negroes actually and properly considered?

The testimony of the commissioner on this crucial question puts the case in a strong light. That testimony leads to the conclusion that these or other Negroes were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or want of any other qualification. The commissioner's answer to specific inquiry upon this point was that Negroes were "never discussed." . . .

We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted. . . .

In *Neal v. Delaware*, [103 U.S. 370], decided over fifty years ago, this Court observed that it was a "violent presumption," in which the state court had there indulged, that the uniform exclusion of Negroes from juries, during a period of many years, was solely because, in the judgment of the officers, charged with the selection of grand and petit jurors, fairly exer-

cised, "the black race in Delaware were utterly disqualified by want of intelligence, experience, and moral integrity, to sit on juries." Such a presumption at the present time would be no less violent with respect to the exclusion of the Negroes of Morgan County. And, upon the proof contained in the record now before us, a conclusion that their continuous and total exclusion from juries was because there were none possessing the requisite qualifications, cannot be sustained.

We are concerned only with the federal question which we have discussed, and in view of the denial of the federal right suitably asserted, the judgment must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed



28. MISSOURI ex rel. GAINES v. CANADA, REGISTRAR OF THE UNIVERSITY OF MISSOURI, et al.

Supreme Court of the United States, 1938 (Certiorari) 305 U.S. 337

THIS case is fundamental for an understanding of the Court's attitude towards racial segregation in schools. Gaines, a Negro, was refused admission to the University of Missouri Law School and was subsequently denied a mandamus by the State Courts. He sought relief from the Supreme Court on the grounds that the state action denied him equal protection of the laws under the Fourteenth Amendment. The Supreme Court sustained Gaines' contention and in the course of its ruling established the following principles: (1) Under the Fourteenth Amendment a state is bound to furnish equal facilities to white and colored citizens; (2) such facilities must be substantially equal but need not be in the same schools; (3) failure of the state to provide equal facilities violates the "equal protection of the laws clause" of the Fourteenth Amendment; (4) the state does not escape from its obligations by offering to pay the tuition of the Negro in law schools outside the state.

In essence the Supreme Court accepts the principle of segregation provided it is accompanied by "substantially equal facilities" for both white and colored citizens. Such facilities must, however, be provided at the same time for both groups (Cf. *Sipuel* v. *Oklahoma*, 68 S.C. 299, 1948). The doctrine of segregation is still under attack by

the N.A.A.C.P. The general approach of the Court will also have an important bearing on the proposed establishment of regional Negro schools in the South.

Opinion of the Court

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court:

Petitioner Lloyd Gaines, a Negro, was refused admission to the School of Law at the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S.W. 2d 783. We granted certiorari, October 10, 1938.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of Negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri. . . .

Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted during the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible." He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a Negro as a student in the University of Missouri." It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa, and Illinois, where nonresident Negroes are admitted. . . .

While there is no express constitutional provision requiring that the white and Negro races be separated for the purpose of higher education, the state court on a comprehensive review of the state statutes held that it was intended to separate the white and Negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and Negroes an equal opportunity for higher education—the whites at the University of Missouri, and the Negroes at Lincoln University." Further, the court concluded that the provisions of § 9622 . . . to the effect that Negro residents "may attend the university of any adjacent State with their

tuition paid, pending the full development of Lincoln University," made it evident "that the Legislature did not intend that Negroes and whites should attend the same university in this State." In that view it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide Negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. . . .

The state court stresses the advantages that are afforded by the law schools of the adjacent States,—Kansas, Nebraska, Iowa and Illinois,—which admit nonresident Negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practice in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts, and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State

upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination. . . .

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate if the asserted federal right had been sustained. In that situation the remedy by mandamus was found to be a proper one in *University of Maryland* v. *Murray*, [169 Md. 478]. In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but on the contrary took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and in its stead to provide for petitioner's tuition in an adjacent State. That conclusion presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that in so doing the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

The judgment of the Supreme Court of Missouri is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed

29. THE TEXT OF PRESIDENT TRUMAN'S MESSAGE ON CIVIL RIGHTS [1]

THE recommendations in this message to Congress by President Truman on civil rights were based mainly on the Report of the President's Committee on Civil Rights. The message underlined the concrete measures yet to be taken to obtain civil rights for American citizens. Underlying it was the conception that the national government has a positive duty to protect the civil rights guaranteed to individuals by the federal Constitution. The message had its political setting. On the one hand was the incipient left-wing presidential candidacy of Mr. Henry A. Wallace, who was making political capital out of the denial of civil rights. On the other hand was the political revolt of some Southern states, which held that the states were constitutionally entitled to control the problems dealt with in the President's message. Out of this revolt came a convention of rebellious Democrats from 13 Southern states, calling themselves "Dixiecrats," who nominated a states' rights candidate for the presidency. After the 80th Congress failed to enact the recommendations, they became a major plank in Mr. Truman's presidential campaign in 1948, and were incorporated in his State of the Union message to the 81st Congress.

WASHINGTON, *Feb.* 2 (UP)—*The text of President Truman's message to Congress on civil rights today follows:*

To the Congress of the United States:

In the state of the Union message on Jan. 7, 1948, I spoke of five great goals toward which we should strive in our constant effort to strengthen our democracy and improve the welfare of our people. The first of these is to secure fully our essential human rights. I am now presenting to the Congress my recommendations for legislation to carry us forward toward that goal.

This nation was founded by men and women who sought these shores that they might enjoy greater freedom and greater opportunity than they had known before. The founders of the United States proclaimed to the world the American belief that all men are created equal, and that Governments are instituted to secure the inalienable rights with which all men are endowed. In the Declaration of Independence and the Constitution of the United States, they eloquently expressed the aspirations of all mankind for equality and freedom.

These ideals inspired the peoples of other lands and their practical fulfillment made the United States the hope of the oppressed everywhere. Throughout our history men and women of all colors and creeds, of all

[1] *The New York Times*, February 3, 1948.

races and religions, have come to this country to escape tyranny and discrimination. Millions strong, they have helped build this democratic nation and have constantly reinforced our devotion to the great ideals of liberty and equality.

AMERICAN FAITH SIMPLY STATED

With those who preceded them, they have helped to fashion and strengthen our American faith—a faith that can be simply stated:

We believe that all men are created equal and that they have the right to equal justice under law.

We believe that all men have the right to freedom of thought and of expression and the right to worship as they please.

We believe that all men are entitled to equal opportunities for jobs, for homes, for good health and for education.

We believe that all men should have a voice in their government and that government should protect, not usurp, the rights of the people.

These are the basic civil rights which are the source and the support of our democracy.

Today, the American people enjoy more freedom and opportunity than ever before. Never in our history has there been better reason to hope for the complete realization of the ideals of liberty and equality.

We shall not, however, finally achieve the ideals for which this nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers.

FLAGRANT VIOLATIONS STILL SEEN

Unfortunately, there still are examples—flagrant examples—of discrimination which are utterly contrary to our ideals. Not all groups of our population are free from the fear of violence. Not all groups are free to live and work where they please or to improve their conditions of life by their own efforts. Not all groups enjoy the full privileges of citizenship and participation in the government under which they live.

We cannot be satisfied until all our people have equal opportunities for jobs, for homes, for education, for health and for political expression, and until all our people have equal protection under the law.

One year ago I appointed a committee of fifteen distinguished Americans and asked them to appraise the condition of our civil rights and to recommend appropriate action by Federal, State and local governments.

The committee's appraisal has resulted in a frank and revealing report. This report emphasizes that our basic human freedoms are better cared for

and more vigilantly defended than ever before. But it also makes clear that there is a serious gap between our ideals and some of our practices. This gap must be closed.

This will take the strong efforts of each of us individually, and all of us acting together through voluntary organizations and our governments.

RIGHTS BASED ON MUTUAL RESPECT

The protection of civil rights begins with the mutual respect for the rights of others which all of us should practice in our daily lives. Through organizations in every community in all parts of the country—we must continue to develop practical, workable arrangements for achieving greater tolerance and brotherhood.

The protection of civil rights is the duty of every government which derives its powers from the consent of the people. This is equally true of local, state and national governments. There is much that the states can and should do at this time to extend their protection of civil rights. Wherever the law enforcement measures of State and local governments are inadequate to discharge this primary function of government, these measures should be strengthened and improved.

The Federal Government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union. That duty is shared by all three branches of the Government, but it can be fulfilled only if the Congress enacts modern, comprehensive civil rights laws, adequate to the needs of the day, and demonstrating our continuing faith in the free way of life.

PROGRAM SET FOR CONGRESS

I recommend, therefore, that the Congress enact legislation at this session directed toward the following specific objectives:

1. Establishing a permanent Commission on Civil Rights, a Joint Congressional Committee on Civil Rights, and a Civil Rights Division in the Department of Justice.
2. Strengthening existing civil rights statutes.
3. Providing Federal protection against lynching.
4. Protecting more adequately the right to vote.
5. Establishing a Fair Employment Practice Commission to prevent unfair discrimination in employment.
6. Prohibiting discrimination in interstate transportation facilities.
7. Providing home rule and suffrage in Presidential elections for the residents of the District of Columbia.

8. Providing statehood for Hawaii and Alaska and a greater measure of self-government for our island possessions.

9. Equalizing the opportunities for residents of the United States to become naturalized citizens.

10. Settling the evacuation claims of Japanese-Americans.

FOR BETTER FEDERAL SET-UP

As a first step, we must strengthen the organization of the Federal Government in order to enforce civil rights legislation more adequately and to watch over the state of our traditional liberties.

I recommend that the Congress establish a permanent Commission on Civil Rights, reporting to the President. The Commission should continuously review our civil rights policies and practices, study specific problems and make recommendations to the President at frequent intervals. It should work with other agencies of the Federal Government, with state and local governments and with private organizations.

I also suggest that the Congress establish a Joint Congressional Committee on Civil Rights. This committee should make a continuing study of legislative matters relating to civil rights and should consider means of improving respect for and enforcement of those rights.

These two bodies together should keep all of us continuously aware of the condition of civil rights in the United States and keep us alert to opportunities to improve their protection.

To provide for better enforcement of Federal civil rights laws, there will be established a Division of Civil Rights in the Department of Justice. I recommend that the Congress provide for an additional assistant Attorney General to supervise this division.

I recommend that the Congress amend and strengthen the existing provisions of Federal law which safeguard the right to vote and the right to safety and security of person and property. These provisions are the basis for our present civil rights enforcement program.

Section 51 of Title 18 of the United States Code, which now gives protection to citizens in the enjoyment of rights secured by the Constitution or Federal laws, needs to be strengthened in two respects. In its present form, this section protects persons only if they are citizens, and it affords protection only against conspiracies by two or more persons.

This protection should be extended to all inhabitants of the United States. Whether or not they are citizens and should be afforded against infringement by persons acting individually, as well as in conspiracy.

Section 52 of Title 18 of the United States Code, which now gives general protection to individuals against the deprivation of Federally secured rights by public officers, has proved to be inadequate in some cases because

of the generality of its language. An enumeration of the principal rights protected under this section is needed to make more definite and certain the protection which the section affords.

PROTECTION AGAINST LYNCHING

A specific Federal measure is needed to deal with the crime of lynching —against which I cannot speak too strongly.

It is a principle of our democracy, written into our Constitution, that every person accused of an offense against the law shall have a fair, orderly trial in an impartial court. We have made great progress towards this end, but I regret to say that lynching has not yet finally disappeared from our land. So long as one person walks in fear of lynching, we shall not have achieved equal justice under law.

I call upon the Congress to take decisive action against this crime.

PROTECTING RIGHT TO VOTE

Under the Constitution, the right of all properly qualified citizens to vote is beyond question.

Yet the exercise of this right is still subject to interference. Some individuals are prevented from voting by isolated acts of intimidation. Some whole groups are prevented by outmoded policies prevailing in certain states or communities.

We need stronger statutory protection of the right to vote. I urge the Congress to enact legislation forbidding interference by public officers or private persons with the right of qualified citizens to participate in primary, special and general elections in which Federal officers are to be chosen. This legislation should extend to elections for state as well as Federal officers in so far as interference with the right to vote results from discriminatory action by public officers based on race, color, or other unreasonable classification.

Requirements for the payment of poll taxes also interfere with the right to vote. There are still seven states which, by their Constitutions, place this barrier between their citizens and the ballot box. The American people would welcome voluntary action on the part of these states to remove this barrier.

Nevertheless, I believe the Congress should enact measures insuring that the right to vote in elections for Federal officers shall not be contingent upon the payment of taxes.

I wish to make it clear that the enactment of the measures I have recommended will in no sense result in Federal conduct of elections. They are designed to give qualified citizens Federal protection of their right to

vote. The actual conduct of elections, as always, will remain the responsibility of state governments.

FAIR EMPLOYMENT PRACTICE BODY

We in the United States believe that all men are entitled to equality of opportunity. Racial, religious and other invidious forms of discrimination deprive the individual of an equal chance to develop and utilize his talents and to enjoy the rewards of his efforts.

Once more I repeat my request that the Congress enact fair employment practice legislation prohibiting discrimination in employment based on race, color, religion or national origin. The legislation should create a Fair Employment Practice Commission with authority to prevent discrimination by employers and labor unions, trade and professional associations and Government agencies and employment bureaus.

The degree of effectiveness which the wartime Fair Employment Practice Committee attained shows that it is possible to equalize job opportunity by Government action, and thus to eliminate the influence of prejudice in employment.

The channels of interstate commerce should be open to all Americans on a basis of complete equality. The Supreme Court has recently declared unconstitutional state laws requiring segregation on public carriers in interstate travel. Company regulations must not be allowed to replace institutional state laws. I urge the Congress to prohibit discrimination and segregation, in the use of interstate transportation facilities, by both public officers and the employes of private companies.

THE DISTRICT OF COLUMBIA

I am in full accord with the principle of local self-government for residents of the District of Columbia. In addition, I believe that the Constitution should be amended to extend suffrage in Presidential elections to the residents of the district.

The District of Columbia should be a true symbol of American freedom and democracy for our own people and for the people of the world. It is my earnest hope that the Congress will promptly give the citizens of the District of Columbia their own local, elective government.

They themselves can then deal with the inequalities arising from segregation in the schools and other public facilities and from racial barriers to places of public accommodation which now exist for one-third of the district's population.

The present inequalities in essential services are primarily a problem for the District itself, but they are also of great concern to the whole na-

tion. Failing local corrective action in the near future, the Congress should enact a model civil rights law for the nation's capital.

TERRITORIES AND POSSESSIONS

The present political status of our territories and possessions impairs the enjoyment of civil rights by their residents.

I have in the past recommended legislation granting statehood to Alaska and Hawaii, and organic acts for Guam and American Samoa, including a grant of citizenship to the people of these Pacific islands. I repeat these recommendations.

Furthermore, the residents of the Virgin Islands should be granted an increasing measure of self-government and the people of Puerto Rico should be allowed to choose their form of government and their ultimate status with respect to the United States.

EQUALITY IN NATURALIZATION

All properly qualified legal residents of the United States should be allowed to become citizens without regard to race, color, religion or national origin.

The Congress has recently removed the bars which formerly prevented persons from China, India and the Philippines from becoming naturalized citizens. I urge the Congress to remove the remaining racial or nationality barriers which stand in the way of citizenship for some residents of our country.

During the last war more than 100,000 Japanese-Americans were evacuated from their homes in the Pacific States solely because of their racial origin. Many of these people suffered property and business losses as a result of this forced evacuation and through no fault of their own.

The Congress has before it legislation establishing a procedure by which claims based upon these losses can be promptly considered and settled. I trust that favorable action on this legislation will soon be taken.

The legislation I have recommended for enactment by the Congress at the present session is a minimum program if the Federal Government is to fulfill its obligation of insuring the Constitutional guarantees of individual liberties and of equal protection under the law.

Under the authority of existing law, the Executive Branch is taking every possible action to improve the enforcement of the Civil Rights Statutes and to eliminate discrimination in Federal employment, in providing Federal services and facilities, and in the Armed Forces.

I have already referred to the establishment of the Civil Rights Division of the Department of Justice. The Federal Bureau of Investigation will

work closely with this new division in the investigation of Federal Civil Rights Cases. Specialized training is being given to the Bureau's agents so that they may render more effective service in this difficult field of law enforcement.

FOR EQUALITY IN ARMED FORCES

It is the settled policy of the United States Government that there shall be no discrimination in Federal employment or in providing Federal services and facilities. Steady progress has been made toward this objective in recent years. I shall shortly issue an Executive Order containing a comprehensive restatement of the Federal non-discrimination policy, together with appropriate measures to ensure compliance.

During the recent war and in the years since its close we have made much progress toward equality of opportunity in our Armed Services without regard to race, color, religion or national origin. I have instructed the Secretary of Defense to take steps to have the remaining instances of discrimination in the Armed Services eliminated as rapidly as possible. The personnel policies and practices of all the Services in this regard will be made consistent.

I have instructed the Secretary of the Army to investigate the status of civil rights in the Panama Canal Zone with a view to eliminating such discrimination as may exist there. If legislation is necessary, I shall make appropriate recommendations to the Congress.

The position of the United States in the world today makes it especially urgent that we adopt these measures to secure for all our people their essential rights.

The peoples of the world are faced with the choice of freedom or enslavement, a choice between a form of government which harnesses the State in the service of the individual and a form of government which chains the individual to the needs of the State.

WORKING FOR A FREE WORLD

We in the United States are working in company with other nations who share our desire for enduring world peace and who believe with us that, above all else, men must be free. We are striving to build a world family of nations—a world where men may live under governments of their own choosing and under laws of their own making.

As part of that endeavor, the Commission on Human Rights of the United Nations is now engaging in preparing an international bill of human rights by which the nations of the world may bind themselves by international covenant to give effect to basic human rights and funda-

mental freedoms. We have played a leading role in this undertaking designed to create a world order of law and justice fully protective of the rights and the dignity of the individual.

To be effective in these efforts, we must protect our civil rights so that by providing all our people with the maximum enjoyment of personal freedom and personal opportunity we shall be a stronger nation—stronger in our leadership, stronger in our moral position, stronger in the deeper satisfactions of a united citizenry.

We know that our democracy is not perfect. But we do know that it offers a fuller, freer, happier life to our people than any totalitarian nation has ever offered.

If we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.

We know the way. We need only the will.

HARRY S. TRUMAN



30. OUR WORST WARTIME MISTAKE [1]

PRESIDENT Truman's civil rights message (see selection 29) emphasizes the general problem of safeguarding individual liberties. The relocation of over 100,000 Japanese and Japanese-Americans shortly after the Pearl Harbor disaster strikingly raised the concrete problem of the civil rights of a group of United States citizens. In the hectic first months of the war a combination of military judgment and latent West coast racial prejudice resulted in the hurried transporting of these people into camps in the interior of the country. In this article Rostow raises the vital issues of the relationship of the military authorities to the civilian, and of the breaking of the American tradition of individual judgment and punishment for criminal acts instead of the mass action taken against Japanese-Americans. Incidentally, some months after the writing of this article, the Supreme Court reaffirmed the principle of *Ex Parte Milligan* in the case of *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), invalidating the suspension of the writ of habeas corpus in Hawaii after Pearl Harbor.

TIME is often needed for us to recognize the great miscarriages of justice. The Dreyfus case had lasted four years before public opinion was fully aroused. The trials of Sacco and Vanzetti endured six years. As time

[1] Eugene V. Rostow, *Harper's Magazine* (September, 1945), Vol. 191, pp. 193 ff.

passes, it become more and more plain that our wartime treatment of the Japanese and the Japanese-Americans on the West Coast was a tragic and dangerous mistake. That mistake is a threat to society, and to all men. Its motivation and its impact on our system of law deny every value of democracy.

In the perspective of our legal tradition, the facts are almost incredible.

During the bleak spring of 1942, the Japanese and the Japanese-Americans who lived on the West Coast of the United States were taken into custody and removed to camps in the interior. More than one hundred thousand men, women, and children were thus exiled and imprisoned. More than two-thirds of them were American citizens.

These people were taken into custody as a military measure on the ground that espionage and sabotage were especially to be feared from persons of Japanese blood. The whole group was removed from the West Coast because the military authorities thought it would take too long to conduct individual investigations on the spot. They were arrested without warrants and were held without indictment or a statement of charges, although the courts were open and freely functioning. They were transported to camps far from their homes, and kept there under prison conditions, pending investigations of their "loyalty." Despite the good intentions of the chief relocation officers, the centers were little better than concentration camps.

If the evacuees were found "loyal," they were released only if they could find a job and a place to live, in a community where no hoodlums would come out at night to chalk up anti-Japanese slogans, break windows, or threaten riot. If found "disloyal" in their attitude to the war, they were kept in the camps indefinitely—although sympathy with the enemy is no crime in the United States (for white people at least) so long as it is not translated into deeds or the visible threat of deeds. On May 1, 1945, three years after the program was begun, about 70,000 persons were still in camps. While it is hoped to have all these people either free, or in more orthodox confinement, by January 1, 1946, what is euphemistically called the Japanese "relocation" program will not be a closed book for many years.

The original program of "relocation" was an injustice, in no way required or justified by the circumstances of the war. But the Supreme Court, in three extraordinary decisions, has upheld its main features as constitutional. This fact converts a piece of wartime folly into national policy—a permanent part of the law—a doctrine enlarging the power of the military in relation to civil authority. It is having a sinister impact on the minority problem in every part of the country. It is giving aid to reactionary politicians who use social division and racial prejudice as their tools. The precedent is being used to encourage attacks on the civil

rights of both citizens and aliens. As Mr. Justice Jackson has said, the principle of these decisions "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." All in all, the case of the Japanese-Americans is the worst blow our liberties have sustained in many years. Unless repudiated, it may support devastating and unforeseen social and political conflicts.

II

What was done in the name of military precaution on the West Coast was quite different from the security measures taken in Hawaii or on the East Coast, although both places were active theaters of war in 1942.

On the East Coast enemy aliens were controlled without mass arrests or evacuations, despite their heavy concentration in and near shipping and manufacturing centers. Aliens had been registered, and the police had compiled information about fascist sympathizers, both aliens and citizens. "On the night of December 7, 1941," Attorney General Biddle reported, "the most dangerous of the persons in this group were taken into custody; in the following weeks a number of others were apprehended. Each arrest was made on the basis of information concerning the specific alien taken into custody. We have used no dragnet techniques and have conducted no indiscriminate, large-scale raids." General regulations were issued, somewhat restricting the freedom of all enemy aliens over fourteen years of age. They were forbidden to enter military areas; they had to get the District Attorney's permission before traveling, they were forbidden to own or use firearms, cameras, short-wave radio sets, codes, ciphers, or invisible ink. This control plan kept security officers informed, but otherwise allowed the aliens almost their normal share in the work and life of the community.

Enemy aliens under suspicion, and those who violated the regulations, were subject to summary arrest, and were then promptly examined by one of the special Alien Enemy Hearing Boards. These boards could recommend that the individual alien be interned, paroled, or released unconditionally. The examinations were smoothly conducted, and they did nothing to lower prevailing standards of justice. Of the 1,100,000 enemy aliens in the country, 9,080 had been examined by the end of June 1943, about 4,000 of them being then interned. By June 30, 1944, the number interned had been reduced to approximately 2,500.

In Hawaii a different procedure was followed, but one less drastic than the evacuation program pursued on the West Coast, although Hawaii was certainly a more active theater of war. Immediately after Pearl Harbor, martial law was installed in Hawaii, and the commanding general assumed the role of military governor. Yet, although about one-third the popula-

tion of Hawaii is of Japanese descent, and although the tension was great after the Pearl Harbor raid, there was no mass roundup on the islands. Fewer than 800 Japanese aliens were sent to the mainland for internment, and fewer than 1,000 persons of Japanese ancestry, 912 of them being citizens, were sent to relocation centers on the mainland. Many of the latter group were families of interned aliens, transferred voluntarily. Those arrested in Hawaii were taken into custody on the basis of individual suspicion, resting on previous examination or observed behavior. Even under a regime of martial law, men were arrested as individuals, and not because of the color of their skins. Safety was assured without mass arrests, or needless hardship.

On the West Coast the security program was something else again. Immediately after Pearl Harbor there were no special regulations for persons of Japanese extraction. Known enemy sympathizers among the Japanese, like white traitors and enemy agents, were arrested. There was no sabotage by persons of Japanese ancestry. There was no reason to suppose that the 112,000 persons of Japanese descent on the West Coast, less than 2 per cent of the population, constituted a greater menace than such persons in Hawaii, where they were 32 per cent of the population.

After a month's silence, the organized minority whose business it has been to exploit racial tensions on the West Coast went to work. They had strong support in the Hearst press and its equivalents. Politicians, fearful of an unknown public opinion, spoke out for white supremacy. West Coast Congressional delegations led by Senator Hiram Johnson, urged the administration to exclude all persons of Japanese blood from the coast states. Anti-Oriental spokesmen appeared before special hearings of the Tolan Committee, and explained the situation as they conceived it to Lieutenant General J. L. DeWitt, commanding the Western Defense Command. Tension was intensified, and doubters, worried about the risks of another Pearl Harbor, remained silent, preferring too much caution to too little. An opinion crystallized in favor of evacuating the Japanese.

After some hesitation, General DeWitt proposed the policy of exclusion on grounds of military need. The War Department backed him up. No one in the government took the responsibility for opposing or overruling him.

Despite the nature of the emergency, the Army's lawyers wanted more legal authority before action was taken. The President issued an Executive Order in February 1942, and in March Congress passed a statute, authorizing military commanders to designate "military areas" and to prescribe the terms on which any persons could enter, leave, or remain in such areas. A policy of encouraging the Japanese to move away individually had shown signs of producing confusion. It was therefore

decided to establish a compulsory system of detention in camps, to simplify the process of resettlement, and to afford the fullest measure of security.

III

The history of law affords nothing more fantastic than the evidence which is supposed to justify this program. General DeWitt's final recommendation to the Secretary of War, dated February 14, 1942, but not made public until early in 1944, explains the basis of his decision.

"In the war in which we are now engaged," he said, "racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." From the premise of a war of "races," the general had no difficulty reaching his conclusion. There is "no ground for assuming," he said, that Japanese-Americans will not turn against the United States. So much for the idea that men are presumed innocent until proved guilty, and that American citizens stand on an equal footing before the law without regard for race, color, or previous condition of servitude! "It therefore allows," the general added, "that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are disturbing indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

There was somewhat more evidence than the absence of sabotage to prove its special danger. The Japanese lived closely together, often concentrated around harbors and other strategic areas. Japanese clubs and religious institutions played an important part in their segregated social life. Japanese language schools existed, to preserve for the American born something of the cultural heritage of Japan. The Japanese government, like that of many other countries, asserted a doctrine of nationality different from our own, which gave rise to possible claims of dual citizenship. Thus a long-standing conflict in international law, involving many countries other than Japan, was invoked to cast special doubt on the loyalty of American citizens of Japanese descent.

Much of the suspicion inferentially based on these statements disappears on closer examination. In many instances the concentration of Japanese homes around strategic areas had come about years before, and for entirely innocent reasons. Japanese cannery workers, for example, had had to live on the waterfront in order to be near the plants in which they worked. Japanese truck gardeners had rented land in the industrial outskirts of large cities to be close to their markets. They had rented land for gar-

dening under high tension lines—regarded as a very suspicious circumstance—because the company could not use the land for other purposes; the initiative in starting this practice had come from the utility companies, not from the Japanese.

Despite discrimination against the Japanese, many had done well in America. They were substantial property owners. Their children participated normally and actively in the schools and universities of the West Coast. Their unions and social organizations had passed resolutions of loyalty in great number, before and after Pearl Harbor. It is difficult to find real evidence that either religious or social institutions among the Japanese had successfully fostered Japanese militarism or other dangerous sentiments. The Japanese language schools, which the Japanese-Americans themselves had long sought to put under state control, seem to represent little more than the familiar desire of many immigrant groups to keep alive the language and tradition of the "old country"; in the case of Japanese-Americans, knowledge of the Japanese language was of particular economic importance, since so much of their working life was spent with other Japanese on the West Coast.

Some elements among the Japanese were, of course, suspect. They were known to the authorities, who had for several years been checking on the Japanese-American population. Many had been individually arrested immediately after Pearl Harbor, and the others were under constant surveillance.

It is also true that a considerable percentage of the evacuees later gave negative answers to loyalty questions in the questionnaires they were asked to fill out while in camps. Many of those answers were expressly based upon the treatment the individuals had received; the same shock of evacuation and confinement undoubtedly was responsible indirectly for many more. Basically, however, the issue of abstract loyalty is irrelevant. Disloyalty, even in the aggravated form of enthusiastic verbal support for the Axis cause, is not a crime in the United States. At most, it is a possible ground for interning enemy aliens. Citizens must do more than talk or think disloyal thoughts before being arrested and jailed.

Apart from the members of the group known to be under suspicion, there was no evidence beyond the vaguest fear to connect the Japanese on the West Coast with the unfavorable military events of 1941 and 1942. Both at Pearl Harbor and in sporadic attacks on the West Coast the enemy had shown that he had knowledge of our dispositions. There was some signaling to enemy ships at sea, both by radio and by lights, along the West Coast. There were several episodes of shelling the coast by submarine—although two of the three such cases mentioned by General DeWitt as tending to create suspicion of the Japanese-Americans took place after their removal from the coast. (These were the only such items

in his report which were not identified by date.) And those subsequently arrested as Japanese agents in the Pearl Harbor area were all white men.

The most striking comment on the quality of the evidence produced by General DeWitt to support his proposal was made by Solicitor General Fahy, whose job it was to defend the general's plan before the Supreme Court. He relied upon the general's report "only to the extent that it relates" statistics and other details concerning the actual evacuation and the events which took place after it. But briefs that he himself presented were identical in the substance of their argument. The Japanese-Americans were an unknown, unknowable, foreign group, living together, and moving in mysterious ways, inscrutable to puzzled white men. Therefore, let them be imprisoned; let their property be taken into custody, sold off at bargain prices, dissipated, and lost; let their roots be torn up, let their children suffer the irreparable shock of life in a concentration camp; let their relation to society be distorted by searing memory of humiliation, rejection, and punishment.

The evidence supports one conclusion only: the dominant element in the development of our relocation policy was race prejudice, not a military estimate of a military problem.

IV

By the time the issues raised by this program reached the Supreme Court, the crisis which was supposed to justify it had passed. The first cases came up in June 1943, the second and third in December 1944. The course of the war had changed completely; the Japanese were no longer prowling off California, but fighting defensively among the islands of the Western Pacific.

The problem presented to the Supreme Court was thus completely different from that which confronted worried soldiers, legislators, and executive officials in the melancholy months after Pearl Harbor. Invalidation of the relocation scheme would do no possible harm to the prosecution of the war. The Supreme Court could afford to view the issues in perspective, giving full weight to its own special responsibilities for the development of constitutional law as a whole.

Moreover, the issue for the court was infinitely more complex than that which faced General DeWitt in 1942. The court had to decide not only whether General DeWitt had acted within the scope of his permissible authority, but whether it should validate what had been done. As many episodes in our constitutional history attest, those are different issues. The court could not escape the fact that it was the Supreme Court, arbiter of a vast system of customs, rules, habits, and relationships. Its decision inevitably would have far-reaching effects—on the power of the military,

on our developing law of emergencies, on the future of those demagogues and political groups which live by attacking minorities, and on the future decision of cases in lower courts and police stations, involving the rights of citizens and aliens, the availability of habeas corpus, and like questions.

The question of how and on what grounds the Supreme Court should dispose of the cases also was one of broad political policy. Would a repudiation of Congress, the President, and the military in one aspect of their conduct of the war affect the people's will to fight? Would it create a campaign issue for 1944? Would it affect the power and prestige of the Supreme Court as a political institution?

In a bewildering and unimpressive series of opinions, relieved only by the dissents of Justice Roberts and Justice Murphy in one of the three cases—*Korematsu* v. *United States*—the court chose to assume that the main issues did not exist. In avoiding the risks of overruling the government on an issue of war policy, it weakened society's control over military power—one of the controls on which the whole organization of our society depends. It failed to uphold the most ordinary rights of citizenship, making Japanese-Americans into second-class citizens, who stand before the courts on a different legal footing from other Americans. It accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can easily be applied to any other minority in our society.

The reasoning of the court was simple and direct. The problem was the scope of the war power of the national government. Both Congress and the executive seemed to have decided that special measures were required because espionage and sabotage were especially to be feared from persons of Japanese descent on the West Coast in the spring of 1942. It was not the job of the Supreme Court to decide such questions for itself. Its task was that of judicial review—to uphold the judgment of the officers directly responsible for fighting the war if, the court said, there was "any substantial basis" in fact for the conclusion that protective measures were necessary.

Two propositions which the court accepted as "facts" were held to afford a sufficiently "rational basis" for military decision. The first was that in time of war "residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of different ancestry"—a doctrine which belongs with the race theories of the Nazis and, moreover, is contrary to the experience of American society in both our World Wars. (The weight of scientific evidence is that the most important driving urge of such minority groups is to conform, not to rebel.) The second was that on the West Coast in 1942 there was no time to isolate and examine the suspected Japanese on an individual basis—although of the [illegible] persons subject to the exclusion orders, 43 per cent were over

fifty or under fifteen years old; they had lived in California without committing sabotage for five months after Pearl Harbor; in the country as a whole, thousands of aliens were examined individually without substantial delay; and in Britain 74,000 enemy aliens were checked in a few months.

By accepting the military judgment on these two points, without any evidence in the record to back it up, without requiring any testimony from the military, and even without adequate discussion by the court itself, the court has taken "judicial notice" of doubtful and controversial propositions of fact, as if they were as well-established as the census statistics or the tide tables. The court could have sent the cases back for a full trial on the justification for General DeWitt's decision. Instead, it upheld his ruling. Thus it created a profound question as to the position of the military power in our public life.

V

The conception of the war power under the American Constitution rests on the experience of the Revolution and the Civil War. It rests on basic political principles which men who had endured those times of trouble had fully discussed and carefully set forth. The chief architects of the conception were men of affairs who had participated in war, and had definite and well-founded ideas about the role of the professional military mind in the conduct of war.

The first and dominating principle of the war power under the Constitution is that the Commander-in-Chief of the armed forces must be a civilian, elected and not promoted to his office. In no other way can the subordination of the military to the civil power be assured. And in every democracy, the relationship between civil and military power is the crucial issue—the issue on which its capacity to survive in time of crisis ultimately depends.

The second principle governing the war power in a democracy is that of responsibility. Like every other officer of government, soldiers must answer for their decisions to the nation's system of law, and not to the Chief of Staff alone. Where military decisions lead to conflicts between individuals and authority—as in the Japanese exclusion program—the courts must adjudicate them. It is essential to every democratic value in society that official action, taken in the name of the war power, should be held to standards of responsibility under such circumstances. The courts have not in the past, and should not now, declare such problems to be beyond the reach of judicial review. The present Supreme Court is dominated by the conviction that in the past judicial review has unduly limited the freedom of administrative action. But surely the right answer to bad law is good law, rather than no law at all. The court must review the

exercise of military power in a way which permits ample freedom to the executive, yet assures society as a whole that appropriate standards of responsibility have been met.

The issue for judicial decision in these cases is not lessened or changed by saying that the war power includes any steps required to win the war. The problem is still one of judgment as to what helps win a war. Who is to decide whether there was a sensible reason for doing what was done? Is it enough for the general to say that when he acted, he honestly thought it was a good idea to do what he did?

Unless the courts require a showing, in cases like these, of an intelligible relationship between means and ends, society has lost its basic protection against the abuse of military power. The general's good intentions must be irrelevant. There should be evidence in court that his military judgment had a suitable basis in fact.

The history of this question in the Supreme Court is unmistakable. The earlier decisions of the court had vigorously asserted that "what are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions"; and that there must be evidence enough to satisfy the court as to the need for the action taken. They had made it clear that the law is not neutral in such issues, but has a positive preference for protecting civil rights where possible, and a long-standing suspicion of the military mind when acting outside its own sphere.

Yet in the Japanese-American cases there was literally no evidence whatever by which the court might test the responsibility of General DeWitt's action. Dozens of Supreme Court decisions had said that the court would not pass on serious constitutional questions without a record before it, establishing the essential facts. Those cases were all ignored. One hundred thousand persons were sent to concentration camps on a record which wouldn't support a conviction for stealing a dog.

The earlier cases not only established the rule that there must be an independent judicial examination of the justification for a military act. They went much further. They declared a simple rule-of-thumb as a guide in handling cases involving military discretion, in which the military undertook to arrest, hold, or try people. So long as the civil courts were open and functioning, the Supreme Court had previously held, there could be no military necessity for allowing generals to hold, try, or punish people. The safety of the country could be thoroughly protected against treason, sabotage, and like crimes by ordinary arrest and trial in the civil courts, unless the courts were shut by riot, invasion, or insurrection.

That was the moral of the great case of *Ex Parte Milligan*, decided in 1866. *Ex Parte Milligan* is a monument in the democratic tradition, and until now it has been the animating force in this branch of our law. To

be sure, there is a tendency nowadays to treat *Ex Parte Milligan* as outmoded, as if new methods of "total" warfare made the case an anachronism; but those who take this view have forgotten the circumstances of the Civil War, when fifth columns, propaganda, sabotage, and espionage were rife.

Ex Parte Milligan illustrates the point. Milligan was convincingly charged with active participation in a fifth column plot worthy of Hitler. A group of armed and determined men planned to seize federal arsenals at Columbus, Indianapolis, and at three points in Illinois, and then to release Confederate prisoners of war held in those states. Thus they would create a Confederate army behind the Union lines in Tennessee. Milligan and his alleged co-conspirators acted in Indiana, Missouri, Illinois, and in other border states. Their strategy had a political arm. The Union was to be split politically, and a Northwest Confederation was to be declared, friendly to the South, and embracing six states. This was not an idle dream. It was sponsored by a well-financed society, the Sons of Liberty, thought to have 300,000 members, many of them rich and respectable, and the planned uprising would coincide with the Chicago convention of the Democratic Party, which was then sympathetic to abandoning the war and recognizing the Confederacy.

The unanimous court which freed Milligan for civil trial was a court of fire-eating Unionists. Mr. Justice Davis, who wrote for the majority, was one of President Lincoln's closest friends. The Chief Justice, who wrote for the concurring minority, was a valiant supporter of the war, whatever his shortcomings in other respects. Yet the court had no difficulty in freeing Milligan, and facing down the outcry provoked by the decision.

The court held in Milligan's case that it was unconstitutional to try him before a military commission, rather than a court of law. There was little doubt of his guilt. But it was beyond the powers of the military to measure or punish it.

The court's vigorous peroration is worth recalling:

> It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of the armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.
>
> If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force

for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" —the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

Yet in the cases of the Japanese-Americans the Supreme Court held the precedent of *Ex Parte Milligan* inapplicable. The reasoning is extraordinarily dangerous. The Japanese-Americans, the court said, were detained by a civilian agency, not by the Army. The program was not exclusively a matter for military administration, and it was enforceable under a statute by ordinary criminal remedies. Therefore, it did not present the question of the power of military tribunals to conduct trials under the laws of war.

But the Japanese-Americans were ordered detained by a general, purporting to act on military grounds. The military order was enforceable, on pain of imprisonment. While a United States marshal, rather than a military policeman, assured obedience to the order, the ultimate sanction behind the marshal's writ is the same as that of the military police: the bayonets of United States troops. It is hardly a ground for distinction that the general's command was backed by the penalty of civil imprisonment, or that he obtained civilian aid in running the relocation camps. The starting point for the entire program was a military order, which had to be obeyed.

In *Ex Parte Milligan* the Supreme Court had said that the military could not constitutionally arrest, nor could a military tribunal constitutionally try, civilians charged with treason and conspiracy to destroy the state by force, at a time when the civil courts were open and functioning. Yet under the plan considered in the Japanese-American cases, people not charged with crime are imprisoned without even a military trial, on the ground that they have the taint of Japanese blood. It would seem clear that if it is illegal to arrest and confine people after an unwarranted military trial, it is surely even more illegal to arrest and confine them without any trial at all. But the Supreme Court says that the issues of the *Milligan* case were not involved in this case because the evacuees were committed to camps by military orders, not by military tribunals, and because their jailers did not wear uniforms!

There are, then, two basic constitutional problems concealed in the

court's easy dismissal of *Ex Parte Milligan:* the arrest, removal, and confinement of persons without trial, pending examination of their loyalty; and the indefinite confinement of persons found to be disloyal. On both counts, at least as to citizens, the moral of *Ex Parte Milligan* is plain.

As for the Japanese *aliens* involved in the evacuation program, the constitutional problem is different. In time of war, the government possesses great powers over enemy aliens, which are to be exercised, the courts say, for the "single purpose" of preventing enemy aliens from aiding the enemy. They may be interned if dangerous and their property in the United States may be taken into custody. Yet they are entitled to our general constitutional protections of individual liberty—to trial by jury, the writ of habeas corpus, and the other basic rights of the person. Is it permissible to intern all the Japanese who live on the West Coast, but to allow German and Italian aliens, and Japanese who live elsewhere, general freedom? Surely the control and custody of enemy aliens in wartime should be reasonably equal and even-handed.

The Japanese exclusion program rests on five propositions of the utmost potential menace

1. Protective custody, extending over three or four years, is a permitted form of imprisonment in the United States.

2. Political opinions, not criminal acts, may contain enough danger to justify such imprisonment.

3. Men, women, and children of a given racial group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment.

4. In time of war or emergency the military—perhaps without even the concurrence of the legislature—can decide what political opinions require imprisonment, and which groups are infected with them.

5. The decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.

The idea of punishment only for individual criminal behavior is basic to all systems of civilized law. A great principle was never lost so casually. Mr. Justice Black's comment was weak to the point of impotence: "Hardships are a part of war, and war is an aggregation of hardships." It was an answer in the spirit of cliché: "Don't you know there's a war going on?" It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty.

We believe that the German people bear a common political responsibility for outrages secretly committed by the Gestapo and the SS. What are we to think of our own part in a program which violates every principle

of our common life, yet has been approved by the President, Congress, and the Supreme Court?

Three chief forms of reparation are available, and should be pursued. The first is the inescapable obligation of the federal government to protect the civil rights of Japanese-Americans against organized and unorganized hooliganism. If local law enforcement fails, federal prosecutions under the national Civil Rights Act should be undertaken.

Secondly, generous financial indemnity should be sought. Apart from the sufferings of their imprisonment, the Japanese-Americans have sustained heavy property losses from their evacuation.

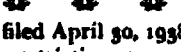
Finally, the basic issues should be presented to the Supreme Court again, in an effort to obtain a prompt reversal of these wartime cases. The Supreme Court has often corrected its own errors in the past, especially when that error was occasioned by the excitement of a tense moment. After the end of the Civil War, several earlier decisions were reversed by *Ex Parte Milligan*. The famous flag-salute case of 1940 has recently been overruled in the decision of *West Virginia* v. *Barnett*. Similar public expiation in the case of the Japanese-Americans would be good for the court, and for the country.



31. A RESTRICTIVE COVENANT CLAUSE [1]

IN ORDER to keep Negroes and other minority groups from purchasing land in certain areas, restricted covenants, such as the one reproduced here, have been incorporated in deeds to real estate. The justification given for their inclusion was that they were private arrangements and not matters of governmental concern. The United States Supreme Court, in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), ruled that the enforcement by state courts of restrictive covenant clauses against Negroes was in effect state action that discriminated against them, and hence a violation of the equal protection of the laws clause of the Fourteenth Amendment. The resulting situation was that the covenants might be made, but the state courts could not enforce them. Mr. Mayer's article (selection 32) deals with the practice of including restrictive covenant clauses in real estate deals.

NO PERSON of African descent shall ever be allowed to buy or hold in any way title or control of any lot in this subdivision.



[1] Restriction dated April 26, 1938, filed April 30, 1938. Recorded Vol. 586, pages 365–6, Travis County Deed Records. This restrictive covenant clause applies to all property in the Rosedale section of Austin, Texas.

32. "BY THEIR WORKS . . ." [1]

For an introductory statement to this selection, see the headnote for selection 31 on page 168.

When I was a lad—Lord, Lord, when I was a lad!—things were different. When I was a lad, lads went in for racoon coats, Chrysler roadsters, and gin. (Sterno would do, in a pinch.) They went in for dolls, too, but of course they did that even when *you* were a lad. There were said to be lads, in my time, whose parents did not have enough of the long green, or folding money, to provide their young with these bare necessities of life, but if there were I never saw any of them.

Now the only way to go in for racoon coats, Chrysler roadsters, and gin was, of course, to join a fraternity. And the only way to join a fraternity was to go to college. And the only way to stay in the fraternity and pursue coats and skirts for four uninterrupted years was to stay in college. So I went to college and stayed there until, in the middle of my third year, the college authorities interrupted my pursuits and threw me out for violating a local ordinance against pitching beer bottles in the dark.

But while I lasted I want to tell you that I had a time for myself. I wish now that I had got an education instead, but the college I went to, while it did not actually prohibit education, offered a large selection of time-passers, for which credit was given and no effort demanded, and into these time-passers I piled, accompanied by the football team and the rest of the fraternity boys.

ARTIE IS STILL ALIVE

Among the time-passers, "pipes," or "cinches" offered by the college I attended, none was so popular as the European History courses given (or, rather, thrown away) by Artie Scott. Artie was an extremely pleasant, sandy sort of fellow, whose voice, when he read his lectures, had the soporific timbre of a Summer day. You came out of Artie Scott's courses exactly as you went in except, perhaps, a little better rested, and I went into every course he offered.

I have a distinct recollection (by which I mean an indistinct notion that somebody once told me this) that Artie was standing down there in the bull-pit one day reading his lecture, as usual, from his lecture notes, and had reached the middle of a joke when he came to the bottom of a page of his notes. The next page, it seems, was missing, but Artie went right on reading, and none of the students who happened to be awake ever learned

[1] Milton Mayer, *The Progressive* (Madison, Wisconsin, August 23, 1943), p. 4.

how the joke came out. Now that I mention it, I am sure that I got that story secondhand, as I would not have been among those awake at the beginning of the joke.

All this recollection of mine may be false and unjust to Artie, but, before God, I tell you that that is the way I remember him. And he is still alive, still hale and hearty, pleasant, and sandy, and if my recollection is false and I am doing him dirt, I can only suggest that you enroll in his courses in European History and find out for yourselves.

Well, to make a long story, I returned to college, many years later, and I am still there, and so, as I say, is Artie. We came to know each other in a passing way, and he always addressed me, when we crossed paths, as "Brother Mayer." I came to regard him as something of a quaint fellow, probably awfully decent if you got to know him, but I never got to know him. All I knew was that he was said to be amusing, congenial, accommodating, and not especially aware of what was going on in the world.

A RESTRICTIVE COVENANT

The years passed, and Artie Scott's baldness spread some, while my own crop of sofa-stuffing began to recede, but he was still Artie Scott to me, and in a large, loose community I never thought much about him. If, prior to a week ago, you had asked me how Artie Scott voted, I'd have said Republican; what paper he read, I'd have said the Chicago *Tribune;* what he thought about the New Deal, I'd have said socialistic; and what he thought about most of the time, I'd have said his rheumatism.

But as it happened our paths crossed intimately, a week ago. I was moving out of the house I rented, and the owner, a nice old gentleman, was trying to sell the house. The sale was sure to be easy because of the terrible dearth of houses in the college community. One day I was told that Artie Scott had got the house, and I was glad because I knew how badly Artie wanted a house in the college community.

But a week ago Mr. Theodore Holland of the Parker-Holsman Real Estate Co. on Fifty-Seventh Street called me. Mr. Holland is a very nice guy himself, and I was, as I always am, glad to hear his voice. "Mr. Mayer," he said, "the Scott deal is off."

"Get out," said I. "What do you mean?"

"I mean," said Mr. Holland, "that everything was settled, and then Mr. and Mrs. Scott read over the contract and discovered that they could not get a clear title to the property without signing the restrictive covenant, and they said they wouldn't sign it. So the deal is off."

Now a restrictive covenant, folks, is an agreement among property owners in a given neighborhood not to sell or rent to, say, Holy Rollers, syphilitics, or Jews. In this instance, as in most such, the covenant was

directed against the Negroes, who, in the town I am speaking of, are living six in a room in the worst slum area in America, completely hemmed in by restrictive covenants.

"And you know," said Mr. Holland, "it's perfectly all right with me if people have their principles, but the Scotts will never get a house in this neighborhood if they feel that way, because," he added, "ninety-seven per cent of the residences in the neighborhood are protected by the covenant."

"You don't tell me," I murmured.

"Indeed I do," said Mr. Holland, "and I'm sorry for the Scotts, because they seemed to want the house so badly."

THE MORAL

And that is how my path crossed Artie Scott's intimately, a week ago.

And that is not the end of my story, as my story has a moral. The moral may be obvious to you, but it isn't to me. So if you don't mind, I'll just work it out while we sit here.

This much is clear, for a starter:

If the world is to be saved, it will be saved by the Artie Scotts, who love justice more than they love a nice house in the University of Chicago community.

This much is clear, in the next place:

Artie Scott never, so far as I know, joined the Civil Liberties Union, or signed a petition for the admission of Negroes to somebody's else's church or school, or made a speech about race equality, or beat his breast about the Four Freedoms. Nobody ever called Artie Scott a liberal, and he never called himself anything.

So maybe this is the moral *By their works shall ye know them.*



33. WHO IS LOYAL TO AMERICA? [1]

THIS article by Professor Commager could have been titled "What Is Americanism?" True Americanism, he thinks, is something more than unquestioning acceptance of things as they are. It includes a faith in progress; and progress necessarily involves changes in the existing order. The setting of the article is the highly publicized actions of the House Committee on Un-American Activities. That committee acted as if enthusiastic agreement with the free enterprise theory of capitalism were Americanism; any liberal criticism of that theory in-

1 Henry Steele Commager, *Harper's Magazine* (September, 1947), Vol. 195, pp. 193 ff.

dicated disloyalty. Those whom the committee regarded as disloyal were put on the public pillory, with scant respect paid to the spirit of the civil liberties clauses of the United States Constitution. Professor Commager underlines anew the importance of safeguarding civil rights. Those rights protect the vital liberty of the individual to advocate peaceful change; peaceful change may be the path to progress.

ON MAY 6 a Russian-born girl, Mrs. Shura Lewis, gave a talk to the students of the Western High School of Washington, D C. She talked about Russia—its school system, its public health program, the position of women, of the aged, of the workers, the farmers, and the professional classes—and compared, superficially and uncritically, some American and Russian social institutions. The most careful examination of the speech—happily reprinted for us in the *Congressional Record*—does not disclose a single disparagement of anything American unless it is a quasi-humorous reference to the cost of having a baby and of dental treatment in this country. Mrs. Lewis said nothing that had not been said a thousand times, in speeches, in newspapers, magazines, and books. She said nothing that any normal person could find objectionable.

Her speech, however, created a sensation. A few students walked out on it. Others improvised placards proclaiming their devotion to Americanism. Indignant mothers telephoned their protests. Newspapers took a strong stand against the outrage. Congress, rarely concerned for the political or economic welfare of the citizens of the capital city, reacted sharply when its intellectual welfare was at stake. Congressmen Rankin and Dirksen thundered and lightened; the District of Columbia Committee went into a huddle; there were demands for housecleaning in the whole school system, which was obviously shot through and through with Communism.

All this might be ignored, for we have learned not to expect either intelligence or understanding of Americanism from this element in our Congress. More ominous was the reaction of the educators entrusted with the high responsibility of guiding and guarding the intellectual welfare of our boys and girls. Did they stand up for intellectual freedom? Did they insist that high-school children had the right and the duty to learn about other countries? Did they protest that students were to be trusted to use intelligence and common sense? Did they affirm that the Americanism of their students was staunch enough to resist propaganda? Did they perform even the elementary task, expected of educators above all, of analyzing the much-criticized speech?

Not at all. The District Superintendent of Schools, Dr. Hobart Corning, hastened to agree with the animadversions of Representatives Rankin and Dirksen. The whole thing was, he confessed, "a very unfortunate occurrence," and had "shocked the whole school system." What Mrs.

Lewis said, he added gratuitously, was "repugnant to all who are working with youth in the Washington schools," and "the entire affair contrary to the philosophy of education under which we operate." Mr. Danowsky, the hapless principal of the Western High School, was "the most shocked and regretful of all." The District of Columbia Committee would be happy to know that though he was innocent in the matter, he had been properly reprimanded!

It is the reaction of the educators that makes this episode more than a tempest in a teapot. We expect hysteria from Mr. Rankin and some newspapers; we are shocked when we see educators, timid before criticism and confused about first principles, betray their trust. And we wonder what can be that "philosophy of education" which believes that young people can be trained to the duties of citizenship by wrapping their minds in cotton-wool.

Merely by talking about Russia Mrs. Lewis was thought to be attacking Americanism. It is indicative of the seriousness of the situation that during this same week the House found it necessary to take time out from the discussion of the labor bill, the tax bill, the International Trade Organization, and the world famine, to meet assaults upon Americanism from a new quarter. This time it was the artists who were undermining the American system, and members of the House spent some hours passing around reproductions of the paintings which the State Department had sent abroad as part of its program for advertising American culture. We need not pause over the exquisite humor which congressmen displayed in their comments on modern art weary statesmen must have their fun. But we may profitably remark the major criticism which was directed against this unfortunate collection of paintings. What was wrong with these paintings, it shortly appeared, was that they were un-American. "No American drew those crazy pictures," said Mr. Rankin. Perhaps he was right. The copious files of the Committee on Un-American Activities were levied upon to prove that of the forty-five artists represented "no less than twenty were definitely New Deal in various shades of Communism." The damning facts are specified for each of the pernicious twenty; we can content ourselves with the first of them, Ben-Zion. What is the evidence here? "Ben-Zion was one of the signers of a letter sent to President Roosevelt by the United American Artists which urged help to the USSR and Britain after Hitler attacked Russia." He was, in short, a fellow-traveler of Churchill and Roosevelt.

The same day that Mr. Dirksen was denouncing the Washington school authorities for allowing students to hear about Russia ("In Russia equal right is granted to each nationality. There is no discrimination. Nobody says, you are a Negro, you are a Jew") Representative Williams of

Mississippi rose to denounce the *Survey-Graphic* magazine and to add further to our understanding of Americanism. The *Survey-Graphic*, he said, "contained 129 pages of outrageously vile and nauseating anti-Southern, anti-Christian, un-American, and pro-Communist tripe, ostensibly directed toward the elimination of the custom of racial segregation in the South." It was written by "meddling un-American purveyors of hate and indecency."

All in all, a busy week for the House. Yet those who make a practice of reading their *Record* will agree that it was a typical week. For increasingly Congress is concerned with the eradication of disloyalty and the defense of Americanism, and scarcely a day passes that some congressman does not treat us to exhortations and admonitions, impassioned appeals and eloquent declamations, similar to those inspired by Mrs. Lewis, Mr. Ben-Zion, and the editors of the *Survey-Graphic*. And scarcely a day passes that the outlines of the new loyalty and the new Americanism are not etched more sharply in public policy.

And this is what is significant—the emergence of new patterns of Americanism and of loyalty, patterns radically different from those which have long been traditional. It is not only the Congress that is busy designing the new patterns. They are outlined in President Truman's recent disloyalty order; in similar orders formulated by the New York City Council and by state and local authorities throughout the country; in the programs of the D.A.R., the American Legion, and similar patriotic organizations; in the editorials of the Hearst and the McCormick-Patterson papers; and in an elaborate series of advertisements sponsored by large corporations and business organizations. In the making is a revival of the red hysteria of the early 1920's, one of the shabbiest chapters in the history of American democracy; and more than a revival, for the new crusade is designed not merely to frustrate Communism but to formulate a positive definition of Americanism, and a positive concept of loyalty.

What is the new loyalty? It is, above all, conformity. It is the uncritical and unquestioning acceptance of America as it is—the political institutions, the social relationships, the economic practices. It rejects inquiry into the race question or socialized medicine, or public housing, or into the wisdom or validity of our foreign policy. It regards as particularly heinous any challenge to what is called "the system of private enterprise," identifying that system with Americanism. It abandons evolution, repudiates the once popular concept of progress, and regards America as a finished product, perfect and complete.

It is, it must be added, easily satisfied. For it wants not intellectual conviction nor spiritual conquest, but mere outward conformity. In

matters of loyalty it takes the word for the deed, the gesture for the principle. It is content with the flag salute, and does not pause to consider the warning of our Supreme Court that "a person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." It is satisfied with membership in respectable organizations and, as it assumes that every member of a liberal organization is a Communist, concludes that every member of a conservative one is a true American. It has not yet learned that not everyone who saith Lord, Lord, shall enter into the kingdom of Heaven. It is designed neither to discover real disloyalty nor to foster true loyalty.

II

What is wrong with this new concept of loyalty? What, fundamentally, is wrong with the pusillanimous retreat of the Washington educators, the barbarous antics of Washington legislators, the hysterical outbursts of the D.A.R., the gross and vulgar appeals of business corporations? It is not merely that these things are offensive. It is rather that they are wrong —morally, socially, and politically.

The concept of loyalty as conformity is a false one. It is narrow and restrictive, denies freedom of thought and of conscience, and is irremediably stained by private and selfish considerations. "Enlightened loyalty," wrote Josiah Royce, who made loyalty the very core of his philosophy,

> means harm to no man's loyalty. It is at war only with disloyalty, and its warfare, unless necessity constrains, is only a spiritual warfare. It does not foster class hatreds; it knows of nothing reasonable about race prejudices; and it regards all races of men as one in their need of loyalty. It ignores mutual misunderstandings It loves its own wherever upon earth its own, namely loyalty itself, is to be found.

Justice, charity, wisdom, spirituality, he added, were all definable in terms of loyalty, and we may properly ask which of these qualities our contemporary champions of loyalty display.

Above all, loyalty must be to something larger than oneself, untainted by private purposes or selfish ends. But what are we to say of the attempts by the NAM and by individual corporations to identify loyalty with the system of private enterprise? Is it not as if officeholders should attempt to identify loyalty with their own party, their own political careers? Do not those corporations which pay for full-page advertisements associating Americanism with the competitive system expect, ultimately, to profit from that association? Do not those organizations that deplore, in the name of patriotism, the extension of government operation of hydro-electric power expect to profit from their campaign?

Certainly it is a gross perversion not only of the concept of loyalty but of

the concept of Americanism to identify it with a particular economic system. This precise question, interestingly enough, came before the Supreme Court in the Schneiderman case not so long ago—and it was Wendell Willkie who was counsel for Schneiderman. Said the Court:

> Throughout our history many sincere people whose attachment to the general Constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of governmental ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden. Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution?

There is, it should be added, a further danger in the willful identification of Americanism with a particular body of economic practices. Many learned economists predict for the near future an economic crash similar to that of 1929. If Americanism is equated with competitive capitalism, what happens to it if competitive capitalism comes a cropper? If loyalty and private enterprise are inextricably associated, what is to preserve loyalty if private enterprise fails? Those who associate Americanism with a particular program of economic practices have a grave responsibility, for if their program should fail, they expose Americanism itself to disrepute.

The effort to equate loyalty with conformity is misguided because it assumes that there is a fixed content to loyalty and that this can be determined and defined. But loyalty is a principle, and eludes definition except in its own terms. It is devotion to the best interests of the commonwealth, and may require hostility to the particular policies which the government pursues, the particular practices which the economy undertakes, the particular institutions which society maintains. "If there is any fixed star in our Constitutional constellation," said the Supreme Court in the Barnette case, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception they do not now occur to us."

True loyalty may require, in fact, what appears to the naïve to be disloyalty. It may require hostility to certain provisions of the Constitution itself, and historians have not concluded that those who subscribed to the "Higher Law" were lacking in patriotism. We should not forget that our tradition is one of protest and revolt, and it is stultifying to celebrate the rebels of the past—Jefferson and Paine, Emerson and Thoreau—while we silence the rebels of the present. "We are a rebellious nation," said

Theodore Parker, known in his day as the Great American Preacher, and went on:

> Our whole history is treason; our blood was attainted before we were born; our creeds are infidelity to the mother church; our constitution, treason to our fatherland. What of that? Though all the governors in the world bid us commit treason against man, and set the example, let us never submit.

Those who would impose upon us a new concept of loyalty not only assume that this is possible, but have the presumption to believe that they are competent to write the definition. We are reminded of Whitman's defiance of the "never-ending audacity of elected persons." Who are those who would set the standards of loyalty? They are Rankins and Bilbos, officials of the D.A.R. and the Legion and the NAM, Hearsts and McCormicks. May we not say of Rankin's harangues on loyalty what Emerson said of Webster at the time of the Seventh of March speech: "The word honor in the mouth of Mr. Webster is like the word love in the mouth of a whore."

What do men know of loyalty who make a mockery of the Declaration of Independence and the Bill of Rights, whose energies are dedicated to stirring up race and class hatreds, who would straitjacket the American spirit? What indeed do they know of America—the America of Sam Adams and Tom Paine, of Jackson's defiance of the Court and Lincoln's celebration of labor, of Thoreau's essay on Civil Disobedience and Emerson's championship of John Brown, of the America of the Fourierists and the Come-Outers, of cranks and fanatics, of socialists and anarchists? Who among American heroes could meet their tests, who would be cleared by their committees? Not Washington, who was a rebel. Not Jefferson, who wrote that all men are created equal and whose motto was "rebellion to tyrants is obedience to God." Not Garrison, who publicly burned the Constitution; or Wendell Phillips, who spoke for the underprivileged everywhere and counted himself a philosophical anarchist; not Seward of the Higher Law or Sumner of racial equality. Not Lincoln, who admonished us to have malice toward none, charity for all; or Wilson, who warned that our flag was "a flag of liberty of opinion as well as of political liberty"; or Justice Holmes, who said that our Constitution is an experiment and that while that experiment is being made "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death."

III

There are further and more practical objections against the imposition of fixed concepts of loyalty or tests of disloyalty. The effort is itself a confession of fear, a declaration of insolvency. Those who are sure of

themselves do not need reassurance, and those who have confidence in the strength and the virtue of America do not need to fear either criticism or competition. The effort is bound to miscarry. It will not apprehend those who are really disloyal, it will not even frighten them; it will affect only those who can be labeled "radical." It is sobering to recall that though the Japanese relocation program, carried through at such incalculable cost in misery and tragedy, was justified to us on the ground that the Japanese were potentially disloyal, the record does not disclose a single case of Japanese disloyalty or sabotage during the whole war. The warning sounded by the Supreme Court in the Barnette flag-salute case is a timely one:

> Ultimate futility of such attempts to compel obedience is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast-failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Nor are we left to idle conjecture in this matter; we have had experience enough. Let us limit ourselves to a single example, one that is wonderfully relevant. Back in 1943 the House Un-American Activities Committee, deeply disturbed by alleged disloyalty among government employees, wrote a definition of subversive activities and proceeded to apply it. The definition was admirable, and no one could challenge its logic or its symmetry:

> Subversive activity derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all.

Surely anyone guilty of activities so defined deserved not only dismissal but punishment. But how was the test applied? It was applied to two distinguished scholars, Robert Morss Lovett and Goodwin Watson, and to one able young historian, William E. Dodd, Jr., son of our former Ambassador to Germany. Of almost three million persons employed by the government, these were the three whose subversive activities were deemed the most pernicious, and the House cut them off the payroll. The sequel is familiar. The Senate concurred only to save a wartime appropriation; the President signed the bill under protest for the same reason. The Supreme Court declared the whole business a "bill of attainder" and therefore unconstitutional. Who was it, in the end, who engaged in "subversive activities"—Lovett, Dodd, and Watson, or the Congress which flagrantly violated Article One of the Constitution?

Finally, disloyalty tests are not only futile in application, they are pernicious in their consequences. They distract attention from activities that are really disloyal, and silence criticism inspired by true loyalty. That there are disloyal elements in America will not be denied, but there is no reason to suppose that any of the tests now formulated will ever be applied to them. It is relevant to remember that when Rankin was asked why his Committee did not investigate the Ku Klux Klan he replied that the Klan was not un-American, it was American!

Who are those who are really disloyal? Those who inflame racial hatreds, who sow religious and class dissensions. Those who subvert the Constitution by violating the freedom of the ballot box. Those who make a mockery of majority rule by the use of the filibuster. Those who impair democracy by denying equal educational facilities. Those who frustrate justice by lynch law or by making a farce of jury trials. Those who deny freedom of speech and of the press and of assembly. Those who press for special favors against the interest of the commonwealth. Those who regard public office as a source of private gain. Those who would exalt the military over the civil. Those who for selfish and private purposes stir up national antagonisms and expose the world to the ruin of war.

Will the House Committee on Un-American Activities interfere with the activities of these? Will Mr. Truman's disloyalty proclamation reach these? Will the current campaigns for Americanism convert these? If past experience is any guide, they will not. What they will do, if they are successful, is to silence criticism, stamp out dissent—or drive it underground. But if our democracy is to flourish it must have criticism, if our government is to function it must have dissent. Only totalitarian governments insist upon conformity and they—as we know—do so at their peril. Without criticism abuses will go unrebuked; without dissent our dynamic system will become static. The American people have a stake in the maintenance of the most thorough-going inquisition into American institutions. They have a stake in nonconformity, for they know that the American genius is nonconformist. They have a stake in experimentation of the most radical character, for they know that only those who prove all things can hold fast that which is good.

IV

It is easier to say what loyalty is not than to say what it is. It is not conformity. It is not passive acquiescence in the status quo. It is not preference for everything American over everything foreign. It is not an ostrich-like ignorance of other countries and other institutions. It is not the indulgence in ceremony—a flag salute, an oath of allegiance, a

fervid verbal declaration. It is not a particular creed, a particular version of history, a particular body of economic practices, a particular philosophy.

It is a tradition, an ideal, and a principle. It is a willingness to subordinate every private advantage for the larger good. It is an appreciation of the rich and diverse contributions that can come from the most varied sources. It is allegiance to the traditions that have guided our greatest statesmen and inspired our most eloquent poets—the traditions of freedom, equality, democracy, tolerance, the tradition of the higher law, of experimentation, co-operation, and pluralism. It is a realization that America was born of revolt, flourished on dissent, became great through experimentation.

Independence was an act of revolution; republicanism was something new under the sun; the federal system was a vast experimental laboratory. Physically Americans were pioneers; in the realm of social and economic institutions, too, their tradition has been one of pioneering. From the beginning, intellectual and spiritual diversity have been as characteristic of America as racial and linguistic. The most distinctively American philosophies have been transcendentalism—which is the philosophy of the Higher Law—and pragmatism—which is the philosophy of experimentation and pluralism. These two principles are the very core of Americanism: the principle of the Higher Law, or of obedience to the dictates of conscience rather than of statutes, and the principle of pragmatism, or the rejection of a single good and of the notion of a finished universe. From the beginning Americans have known that there were new worlds to conquer, new truths to be discovered. Every effort to confine Americanism to a single pattern, to constrain it to a single formula, is disloyalty to everything that is valid in Americanism.



34. WHAT IS A COMMUNIST? HOW CAN YOU SPOT HIM? [1]

PROFESSOR Commager's article (selection 33) emphasizes the dangers of attacks on civil liberties arising out of the fear of communism. This article by Dr. Nevins is complementary and a part of the same context. Nevins reminds us that the spread of communism as it is practiced in the U.S.S.R. constitutes a genuine threat to the United States. The Communist uses the civil liberties of democratic countries as one means

[1] Allan Nevins, *New York Times*, May 2, 1948, pp. 9 ff.

of getting power; once in power civil liberties are ruthlessly suppressed. This article presents one more facet of the problem of preserving both the freedom of the individual to disagree and the very form and order of government.

AS CHARGES of disloyalty are brought against such prominent Americans as the head of the Bureau of Standards, and as unnaturalized aliens accused of subversive Communist activities are seized for deportations, many thoughtful citizens wonder if the country is entering upon another "Red scare." Their memories hark back to the days when a New York mob wrecked the office of The Call, when veterans and "wobblies" clashed in the Northwest and when the Buford sailed for Russia with 249 radicals aboard.

We want no recurrence of such events. Yet as we look at the headlines, certain difficult questions are forced upon us. Just what is a dangerous Communist, and how can he be identified? How can precautionary measures be taken without imperiling liberals?

A salient difference between the anti-Red movement after World War I and that taking shape today needs to be pointed out. The principal root of all such movements is fear; fear usually mixed with prejudice, and heightened by hysteria. But the fear that had such baleful results in 1918–21 took a very different shape from whatever apprehensions are cropping out in this country today.

In the earlier period fear sprang chiefly from a sense of national disunity. Americans realized uneasily in 1918 that they had not yet created a closely welded nation. The war had revealed, indeed, a decided lack of homogeneity. The conflict had therefore been accompanied by a harsh intolerance of dissent. Ex-President Theodore Roosevelt and others had carried on a crusade against "hyphenates"; the Government had condemned Socialists for their opposition to the war, and put Debs in prison. Peace brought an irresistible demand for laws to restrict immigration. It brought, too, a pronounced fear that economic and political radicalism would produce violent internal cleavages in the United States. Nobody worried about an external attack, but millions were apprehensive that the "Reds" (all bogies are given vague names) would foment class divisions so as to endanger orderly government and the economic structure.

Today few are troubled by ideas of domestic disruption. It is the external rather than internal peril that takes first place in men's apprehensions. National unity, as the second World War showed, has grown steadily in recent decades. The "hyphenates" almost disappeared between the two conflicts. The New Deal did much to satisfy discontented elements of society. Socialists strongly supported the war effort. Nowadays the groups which wish a really violent new swing to the Left are

small, and the party which would like to subvert our governmental system can hardly muster a corporal's guard. But to our dismay and anguish, we are faced with an external threat. We are engaged in a cold war with Russia, we are pouring out billions to sustain Western Europe and China against her aggressions, and we are maintaining large armaments to meet possible attack. The threat may be exaggerated, but it exists.

The result is that we fear the Communist and "Red" not as possible agents of an internal explosion, as in 1918–20, but rather as agents to aid a foreign attack. We fear the agitator much less, and the accomplice much more. This fact gives new form to the question, What is a dangerous Communist? It renders an answer to that question somewhat easier, and makes attack on liberalism inexcusable.

It is extremely difficult to answer the broad question, What is communism? Communism may refer to a political party, which in this country is tiny and despised. It may refer to a set of principles, which have had a thousand different exponents from the days of the Essenes to those of the Cominform. It may refer to a general movement, which at various times has embraced very diverse sects. It may refer to an anticipated state of society, which differs from practical communism of 1948 as light differs from darkness. But there is no such difficulty in answering the question, What is a *dangerous* Communist? The last twenty years have helped greatly in that matter.

In 1918–1920 Russian communism was a new force in the world, and being new, plastic, and largely untested by realities, it had a natural appeal to considerable bodies of aspiring men. Since it had replaced Czarist Russia, it might be represented as a liberating force. To be sure, much was heard even then of the crimes and oppressions of the Bolsheviks. They might be excused or palliated, however, as a natural reaction against the old autocracy or as precautionary in character.

For some years after 1918, communism naturally made a strong appeal to young idealists in particular; to youths who believed that the world could be regenerated in happier form. A wide spectrum of radicalism appeared, ranging from the fiery red of convinced revolutionists to the light pink of fuzzy-minded social reformers.

But today the situation is completely different. A believer in Russian communism can take no shelter behind hazy idealism. He is a believer in a police state of the most ruthless character, with a system of secret arrests, dictated convictions, purges and concentration camps. He believes in a system which has killed, imprisoned and exiled many millions where czarism killed and jailed thousands. He believes in an imperialist type of aggression which has destroyed the freedom of a dozen nations; converting them, as with the Baltic states, into mere provinces, or into vassal lands

where minorities rule by terror. The appeal of Russian communism to the aspiring is gone.

A quarter-century ago, in short, the believer in Russian communism and Utopian communism might be identical. Any optimistic young reformer might fancy that he embraced Lenin and Sir Thomas More together; he might believe that the communism of Plato and that of Trotsky had much in common. A multitude of people all over the world, including laborers, students, intellectuals and social workers, did to some extent confound the two faiths.

In our time, however, a clear line can be drawn between the disciple of Russian communism and the disciple of Utopian communism. Anyone who admires the iron regime of Stalin has bidden farewell to the dreams of Robert Owen and William Morris, and to the moderate Marxianism of Kautsky and the Fabians. Russian communism is at the opposite pole from all true liberalism.

It is vital in the present situation for us to understand this. And to understand it we must have a clear perception of the great difference between the theories held by the liberal on the one side, and the Communist on the other.

True liberals of all shades of opinion, including orthodox Socialists, agree to the fundamental principle that majority rule shall be loyally accepted so long as it respects the basic rights of minorities. No matter how much the Wilsonian liberal detested Harding's type of reaction, no matter how deeply Norman Thomas' followers abhorred Coolidge's policies, they yielded full obedience to the Government.

The Communist, however, rejects this principle. His party doctrine is Communist rule or general ruin. To him an opposition victory at the polls is simply the signal for conspiracy, sabotage and secret subversion. As a minority, the Communists give no deference to any majority; they reject all the rules of the democratic game; they concoct plots, infiltrate at all weak points, cripple every machine they can touch and stand ready at any moment to seize power by force.

The problem of coping with such elements is therefore simplified. We are not concerned with a movement; we are concerned with a militant minority, alien in allegiance. Unceasing vigilance is essential and in certain areas of government activity it is necessary to insist on a security check. We cannot let the armed services, our State Department personnel, or the agencies concerned with atomic energy, be invaded by men who may become secret agents of a foreign power. We have the example of Canada's spying to show what may be the penalties of laxity. But precautions regarding these limited sectors of national activity are not difficult to take; the records, associations and expressed ideas of employes or prospective employes can readily be tested.

It is also true that certain precautions are necessary elsewhere. We have said that the general national unity in this year of 1948 stands at a high level. It must not be forgotten, however, that the Communist is not now greatly concerned with the general national unity of this country. He is seeking for the weak spots. He strives to enter the labor union, the discontented slum area, the groups of impressionable youth. Here he can be combated in two ways: by exposure of his aims and methods, and by the counter-encouragement of true liberalism. It is ironic nowadays to recall that in 1918–20 the groups most fiercely attacked were our Socialists. Today these Socialists, accepting the fundamental democratic premises, are among our stanchest opponents of communism. As we fight the Communist, we need to cherish the liberals of all schools and views.

In short, no real basis exists for such a "Red scare" as appeared just after the first World War; a scare which soon left our country heartily ashamed. Our worries about the internal situation then were greatly exaggerated; today such worries do not exist. The number of really dangerous Communists capable of betraying the United States to benefit the Soviet Union is small; their intelligence is open to question, for they certainly include a large proportion of mere crackpots; while their general influence is slight. Once certain areas of government are thoroughly protected, we may feel safe about the national situation in general. Such bodies as the Thomas Committee on Un-American Activities can be useful if they help guard these areas; they can be utterly pernicious if they follow the Mitchell Palmer Red-hunt tradition.

If we are to have a careful policing of governmental agencies—and it is certain that those offices and departments which deal with national security must be policed—we should at least have the work done with a careful regard to all parts of our Bill of Rights. It is the fundamental charge against the Thomas Committee, not that it has acted clumsily, but that it has shown inadequate respect for the basic liberties written into our Constitution. Today even Great Britain, normally so slow to act in such matters, is purging her governmental services of Communists and their tools among the fellow-travelers. But it is noteworthy that Britain has set up no body similar to our Committee on Un-American Activities.

If we grasp these facts, it is easier to approach the question, How can we deal with the dangerous Communists without hurting useful radicals and liberals? It is easier to answer because we can approach it without any sense of panic. One reason why our internal situation is so healthy is that radicals and liberals have been allowed free scope for expressing their opinions; another reason is that from 1929 onward many of their more valuable ideas were adopted and applied.

Repressive activities always defeat their own end. They arouse widespread antagonism, father the extremist doctrines at which they are

aimed, and create martyrs and a martyrology—the most powerful agencies of propagandism known to history. We need not worry about the Socialists; they are the fiercest opponents of Soviet ideas. We need not worry about the Utopian Communists; they can't but detest the Russian perversion of their ideals. We need not worry about liberals, who are the bulwark of our own system.

The more freedom of opinion and discussion we have the better, for it will drive home to everyone some truths which still need enforcement. Fifteen years ago Harold J. Laski, declaring that capitalism and communism were running a race for the allegiance of the masses, stated that each had certain tests to meet. Capitalism had to remove the fear of insecurity which haunted the worker's life. It had to abolish competing imperialisms. Above all, it had to cut away the jungle growth of vested interests which impaired its efficiency and its social equity. As for communism, wrote Laski, it had to put an end to the perpetual postponement of consumption for the sake of a future which never arrived. It had to terminate the dominating grip of one party and its small cabal of leaders, introduce truly representative institutions and permit of political freedom.

While Mr. Laski thought that communism had the better prospects, we can now see that in this competitive rivalry the capitalist states have made by far the better showing. In one Western democracy after another, and particularly in Britain and the United States, effective measures have been taken to remove the fear of insecurity. The power of the vested interests has been healthfully diminished. Imperialism has been almost completely abolished, and where it exists, it has taken on a greatly improved character. Meanwhile, in Russia the era of consumptional plenty still recedes, while the tyrannical grip of a small oligarchy of rulers has been tightened, not relaxed. In nearly every respect in which it is possible to compare the recent development of capitalistic democracy with that of Russian communism, the advantage lies manifestly with the former. These are facts which free discussion, and only free discussion, can bring forth.

Repression is an indispensable part of the Soviet regime; it is not needed in the United States, and is hostile to every American tradition. Precautions against treason we may well take, and we can always punish individual violations of our statutes; but beyond that no arm of the Government can afford to go. We may well recall the words of Charles E. Hughes at a time when a sweeping attempt to deny radicals their rights simply because they were radical had carried away the New York Assembly: "I count it a most serious mistake to proceed, not against individuals charged with violation of the law, but against masses of our citizens combined for political action, by denying them the only resource of

peaceful government; that is, action by the ballot box and through duly elected representatives in legislative bodies." If we restrict the security check to its proper and very narrow areas, and elsewhere guarantee free opinion, free speech and a free vote, we are safe.



CHAPTER VI

Citizenship and the Suffrage

35. GIROUARD v. UNITED STATES

Supreme Court of the United States, 1946 (Certiorari) 328 U.S. 61

IN THIS case the Supreme Court by a five to three decision reversed a long-standing precedent established in the Macintosh (U.S. v. Macintosh 283 U.S. 605), the Schwimmer (U.S. v. Schwimmer 279 U.S. 644), and other cases; it held that an applicant for naturalization, while required to take an oath to support and defend the Constitution and laws of the United States, need not agree to bear arms in its defense when such an action is contrary to his religious beliefs. Although the petitioner, a Canadian Seventh Day Adventist, who had filed a petition for naturalization in the district court, was willing to serve in a non-combatant status, he refused to agree to bear arms in the defense of the United States. The district court's decision admitting him to citizenship was reversed by the Circuit Court and went by certiorari to the Supreme Court. In its holding the Supreme Court reversed the Circuit Court, as well as its own precedents, and admitted Girouard to citizenship. In addition to certain technicalities relating to statutory interpretation this case is also notable in that it once again underscores the role played by the Court as the protector and champion of our civil liberties.

Opinion of the Court

MR. JUSTICE DOUGLAS delivered the opinion of the Court:

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application that he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance. . . . To the question in the application "If necessary, are you

willing to take up arms in defense of this country?" he replied, "No. (Non-combatant) Seventh Day Adventist." He explained that answer before the examiner by saying "It is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed, one judge dissenting. . . .

While there are some factual distinctions between this case and the *Schwimmer* and *Macintosh* cases, the *Bland* case on its facts is indistinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in *In re Summers*, 325 U.S. 561, 572, 577, they stand for the same general rule—that an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think, demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.

The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seamen on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. . . . One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose

special traits or handicaps result in their assignment to duties far behind the fighting front. . . .

Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, "shall be bound by Oath or Affirmation, to support this Constitution," it significantly adds that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The oath required is in no material respect different from that prescribed for aliens under the Nationality Act. . . .

We conclude that the *Schwimmer, Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that, even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, when the Nationality Act of 1940 was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer, Macintosh* and *Bland* cases. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 488–489.

We stated in *Helvering* v. *Hallock,* 309 U.S. 106, 119, that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer, Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But, for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another.

Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed



36. THE POLL TAX: THE CASE OF TEXAS [1]

FEW discriminating studies of the poll tax as a prerequisite for voting have been made. In this selection Professor Strong presents a definitive exposition of the uses to which the tax has been put, the arguments for and against the tax, and the disfranchising effect of the tax. He also comments on the constitutional aspects of federal anti-poll tax legislation.

THE bitter controversy in Congress over anti-poll-tax legislation has revealed the need for a careful study of this subject. But rather little discriminating material has appeared. The case for poll-tax retention rests on folklore; the case for its abolition rests on propaganda, which is often more impassioned than exact. Belief in the poll tax is socially correct in the South. Logical argument is only a minor bulwark of the tax. Its main defense is the raised eyebrows that follow any questioning of the wisdom of this voting requirement. The opposition to the tax relies more on logic, but the statistics marshalled to support its case often will not stand up under close scrutiny. This article attempts to tell the story of the poll tax, with particular reference to Texas.

The difference between the poll tax as a voting requirement and merely as a revenue measure must be emphasized. Many states levy a poll tax which has nothing to do with suffrage. Maine, Vermont, Massachusetts, and Indiana—to mention only four—have this tax. Although various means of enforcing payment are used, failure to pay does not disfranchise anyone. The poll tax as a prerequisite to voting is now found in only eight states, *viz.*, Virginia, South Carolina, Georgia, Alabama, Mississippi, Texas, Arkansas, and Tennessee. North Carolina, Louisiana, and Florida formerly employed the tax as a voting qualification, but they abandoned the practice in 1920, 1934, and 1937, respectively. The distinction between a fiscal and a political poll tax is emphasized by the history of the tax in Texas. The Texas constitution of 1876—that is, the present constitution—said in Art. VIII, Sec. 1: "The legislature may impose a poll tax." Nothing was said about the tax as a requirement for voting. When

[1] Donald S. Strong, *American Political Science Review* (August, 1944), Vol. 28, No. 4, pp. 638 ff.

the first legislature under this constitution met, in 1877, it levied a poll tax as a purely financial measure having nothing to do with suffrage. Not until 1902 was there adopted an amendment to Art. VI, Sec. 2, which reads: ". . . any voter who is subject to pay a poll tax under the laws of the State of Texas shall have paid said tax before offering to vote at any election in this State and hold a receipt showing that said poll tax was paid before the first day of February next preceding such election. . . ."

The quarter-century gap between the constitution of 1876 and the adoption of the poll tax as a voting requirement is significant for two reasons. First, it shows that the suffrage aspect of the poll tax does not date back to the end of Reconstruction, as is commonly supposed, but has a much more recent origin. Secondly, it begs the question of the motives for passing the amendment. The standard explanation is that you have a poll tax to "keep the nigger from voting." Did the backers of the 1902 amendment intend to disfranchise white men as well? That certainly has been the result—whether intentional or not. It is easy to show that Negro-disfranchisement was not the sole motive. By 1902, the Negro section of the Republican party, the traditional Negro party, was clearly on the wane. The logical time to have taken action against Negro political activity would have been when it was at its zenith some years earlier. A far more serious contender for political power than the Negro was the Populist party. This poor farmers' party spread like wildfire throughout the Western and Southern states during the 1890's. Between 1890 and 1892 the movement was organized, drawing its leaders and members partly from earlier agrarian groups. In 1892, the Populists won the electoral college vote of six Western states and sent eight congressmen to Washington. The party made great headway in the South and in 1892 gave the Democratic party a run for its life in Georgia and Alabama. In Texas, too, the Populists became a real threat to the Democrats—the first serious threat to their dominance since the end of Reconstruction. In 1892, the Texas Populists polled a sizable vote, and in 1894 and 1896 they ran close enough a gubernatorial race to cause more uncertainty as to the outcome of the election. Thus, in 1894 they garnered some 152,000 votes to the Democrats' 207,000; in 1896, the vote was 238,000 to 298,000. In 1894, Populists held twenty-two out of 126 seats in the lower house of the Texas legislature, and throughout the 1890's they succeeded in winning a large number of county elective offices.

In Texas, as elsewhere, the Populist party was clearly a party of low-income, white farmers. Its supporters lived in the less fertile agricultural areas of the state, which are referred to locally as the "post-oak strips." Here was a movement of discontented small farmers who had not known prosperity for a long time. They were well organized and ably led, and they constituted a distinct threat to the entrenched Democratic party.

The Negro vote was by this time declining toward insignificance, but there had arisen a threatening poor-white vote that could be discouraged by putting a price on the ballot. It seems unlikely that the dominant groups in the Democratic party whose power was challenged by the low-income Populists could have failed to see the value of the poll tax to discourage future agrarian radicalism.

Other Southern states adopted poll taxes at dates suggesting a relationship to the Populist movement. Florida started with the poll-tax requirement in 1889, followed by Mississippi and Tennessee in 1890, Arkansas in 1892, South Carolina in 1895, Louisiana in 1898, North Carolina in 1900, Alabama and Virginia in 1901, and Georgia in 1908. Further investigation would be required to uncover the whole story of the origin of the poll-tax requirement. However, enough facts are available to show that Negro disfranchisement was not the sole motive—or even the most impelling motive—for making the poll tax a prerequisite for voting.

Three standard and time-honored arguments support the retention of the poll tax as a voting prerequisite. They are: that it is necessary to maintain "white supremacy," that it is essential to the support of the schools, and, finally, that it is useful in keeping government in the hands of "the better class of people." Much more rarely there occurs the distinctively Texan argument that the poll tax is a method of registering voters.

Let us take up these arguments one at a time and subject each to a critical evaluation. The one relating to registration requires least comment. Texas is one of the three states that have no system of personal registration. Poll tax payment is the closest approximation to such registration or listing of the qualified voters. As a substitute for a system of registration, the tax serves in a fashion; but it has some obvious weaknesses. Persons over sixty are not required to pay a poll tax. Such persons living in cities of 10,000 or more are required to secure an "exemption certificate," but those residing in smaller communities need not secure this document. Persons who lose their poll-tax receipts before election may swear an affidavit at the voting booth that they have paid the tax but mislaid their receipts; then they are permitted to vote. Poll taxes must be paid by January 31. Texas primaries occur in July and August; general elections, of course, are in November. Thus, the period of time between qualifying one's self to vote and voting is considerably longer than under the average registration system. The Texas poll tax is a crude equivalent of a registration system. However, it utilizes none of the improved procedures developed by the states that have had the longest experience with registration systems. It is no argument for the poll tax to hold that repeal would necessitate a registration system. Texas needs a good registration system whether the poll tax is abolished or retained.

"The poll tax keeps Negroes from voting"—here is another standard justification of the tax. The belief that the poll tax is essential to "white supremacy" constitutes the unspoken major premise of many defenders of the tax. It follows, then, that a foe of the poll tax disbelieves in "white supremacy" and is a "nigger lover." A brief answer to this type of confused thinking is to point out, first, that if one is out cold-bloodedly to disfranchise the Negro, the poll tax is an ineffective way of doing it, and, second, that the poll tax disfranchises many more whites than Negroes in Texas. In Texas, at least, the poll tax is primarily a "white man's issue."

According to the 1940 census, only 14.4 per cent of the population of the state is Negro, as compared with 14.7 per cent in 1930. One has to go back to 1880 to find a Negro population of as much as 25 per cent, and the Negro percentage has declined with each census since 1880. Although these facts seem obvious, one hears among the uninformed many whispered justifications of the poll tax on the ground that "the niggers outnumber the whites in Texas."

"The poll tax keeps the nigger from voting and preserves white supremacy," says folklore. But the assertion ascribes to the tax a magic effectiveness that it does not have. For years, many Texas Negroes have voted in elections other than the Democratic primaries. If a Negro pays his poll tax, he may legally vote in the November general election or in a municipal election, restrained only by possible frowns of white election officials or other forms of social control apart from law. It is the "white primary" rule that has excluded the Negro from the politics of Texas. The Democratic primary is the only Texas election that counts; and until April, 1944, the federal Supreme Court had upheld the right of a political party to exclude Negroes from its primary. A poll tax receipt had no bearing on the situation.

On April 3, 1944, the Supreme Court, in *Smith v. Allwright*, held the Texas white primary unconstitutional. One may have conceded all of the foregoing, yet feel that with the white primary gone, the poll tax is now truly "essential to white supremacy." A reply to this type of reaction calls for a clearer definition of "white supremacy." Unless the Negro is restrained from the primaries by violence, we shall have the interesting situation of Negroes who have paid their poll taxes voting in the Democratic primary while two-thirds of Texas' white electorate fail to participate in this election—to a large extent because of failure to pay the poll tax. Is this white supremacy?

Definite figures on voting may be useful. In 1940, Texas had some 3,168,000 potential white voters, i.e., white citizens twenty-one or over, and about 540,000 potential Negro voters. The largest vote ever cast in any Texas election was in the Democratic primary of 1940, when 1,189,290 white Texans cast ballots for gubernatorial candidates—about 37.5 per

cent of the potential white electorate. The average participation in Democratic primaries is usually nearer 33 per cent of the white electorate.

The foregoing figures raise the intriguing question whether you have "white supremacy" when a poll-tax-paying Negro can vote and two-thirds of the white population do not. Would not "white supremacy" be better served by repealing the poll tax and encouraging the non-voting two-thirds of the white population to rise to the level of the Negro voter?

That the poll tax is not essential to "white supremacy" is further demonstrated by the experiences of the three Southern states that have repealed it, *viz.*, North Carolina, Louisiana, and Florida. Needless to say, the Negroes have not taken over the governments of these states; nor has there been an appreciable increase in Negro political power. Incidentally, Negroes constitute a larger percentage of the population in all three of these states than in Texas—in 1940, 27.5 per cent in North Carolina, 36 per cent in Louisiana, and 27 per cent in Florida. Special note should be taken of North Carolina, where the Negro percentage is twice that of Texas, and where the poll tax prerequisite has been out for twenty-four years. "White supremacy" still prevails in North Carolina.

Another standard defense of the poll tax as a prerequisite for voting is that it is "essential to the support of the schools." The worthy purpose for which part of each $1.75 poll tax is spent is the justification. This type of argument confuses the poll tax as a source of revenue with the poll tax as a suffrage qualification. North Carolina abolished poll-tax payment as a voting prerequisite, but has retained the tax as a source of revenue for education. Several of the Northern states that levy this tax use its revenues for educational purposes. In Texas, repeal of the 1902 amendment to the constitution—the amendment which made the tax a voting prerequisite—would leave the poll tax intact as a revenue measure. Hence, discussion of the poll tax as essential to school income is beside the point.

In yet another sense, the defense of the poll tax as a revenue measure has a hollow ring. Few taxes are as poorly enforced as the poll tax. The tax is actually enforced only against real estate owners who are delinquent in the payment of their general property taxes. The law requires that when settlement is finally made on these late taxes all back poll taxes shall be paid also. In all other cases, the tax is purely optional. No penalties are assessed against those who fail to pay; no policeman comes to the door to collect from delinquents. There is no doubt that considerably more revenue could be secured from the poll tax by enforcing it. If one is really concerned about money for the Texas schools, the answer is that a more vigorous effort should be made to collect the tax. But no one wants to see the tax enforced. The poll tax is essentially a "cover charge on the right to vote." Its main purpose is to limit the electorate; the money it brings

in is a by-product. The fiscal aspect of the tax is subordinated to the political.

The last of the classic defenses of the poll tax is the claim that it "keeps government in the hands of the better class of people." More frequently, the idea is stated negatively: the tax excludes from the polls "the corrupt, the illiterate, the ignorant, the disinterested, and the trifling." This contention assumes three things: that there are those who are worthy of possessing political power and those who are not, that in principle the poll tax is an effective test to distinguish between the two groups, and that in practice it avails to exclude the unworthy.

To the contention that the poll tax excludes the corrupt and the purchasable voter from the polls, the most direct answer is: it doesn't—unfortunately. Poll taxes can be paid by political machines for the "ignorant and corrupt." Such persons then go to the polls armed with receipts that have been given them. All evidence points to the fact that such practices are common throughout the poll-tax section of the country all the way from Alexandria, Virginia, to El Paso, Texas. Obviously, this is a matter on which no complete statistical information is available; we cannot state positively that a certain per cent of all poll taxes paid in the South were paid by persons other than those to whom the receipt was made out. However, national poll-tax hearings abound with testimony about poll-tax corruption in Tennessee. In Virginia, a discrepancy was found between the number of tax receipts issued by several county treasurers and the funds turned into the state comptroller for poll-tax payments. Obviously, the treasurers had been too generous in issuing blocks of tax receipts to their friends on promises to pay and then had been left "holding the bag" when their friends failed to pay up. In Arkansas, a legislative investigating committee discovered that block-buying of poll-tax receipts and their distribution to the faithful was a standard practice in and around Little Rock. South Texas and the Rio Grande Valley are the sections of Texas where these practices seem most prevalent. The story of this type of corruption was aired by a Texas senatorial investigating committee and, on another occasion, by a committee of the U.S. House of Representatives. However, there is no evidence to indicate that either investigation resulted in any lessening of the practices in question. In short, local political machines see to it that enough of the "corrupt and ignorant" are permitted to vote to ensure a machine victory. Incidentally, in Texas the payment of other people's poll taxes is safer than in most states because one can be sure that the purchased voter will vote as paid. Each Texas ballot bears a number, and this same number appears opposite the voter's name in the poll-book. Since the number remains on the ballot after casting, election officials may easily check and see that a purchased voter "delivered the goods."

If one continues to assume that the poll tax excludes from politics the ignorant and those unfitted to vote, it should follow that with this hand-picked, blue-ribbon electorate the poll-tax states would have sent to Washington considerable numbers of outstandingly able congressmen. Unhappily, this has not been the case. On the contrary, the poll-tax states have produced precious few outstanding public servants, and they have been responsible for more than their share of demagogues. Alabama's Tom Heflin and Mississippi's "the man Bilbo" are two examples of demagogues that have come up via the poll-tax route. It was Louisiana that perpetrated Huey Long on the U.S. Senate before repealing its poll tax. Tact and the wartime paper shortage prevent a considerable lengthening of this list.

"The poll tax keeps out the disinterested," and "a man who isn't interested enough in his government to pay his poll tax shouldn't be allowed to vote," are two variations of this aristocratic theory of the suffrage. The first statement carries its own refutation; if a man is not interested in voting, no poll tax is necessary to keep him from voting. A device to disfranchise those who do not want to vote is an absurdity. The second statement is often made in ringing tones as if it were the last word on the subject. Let us state the idea in reverse. "If a man is interested enough in his democratic government to want to vote, he should not be made to pay for the privilege." After this statement has been repeated a few times, it, too, develops an impressive ring.

At times, it is "the illiterate and the ignorant" that are said to be kept from the ballot-box by the poll tax. Two-thirds of the adult whites in Texas do not vote. It might be inferred that all of these persons are in the "illiterate and ignorant" group. No champions of the poll tax ever draw this thoroughly reasonable inference. "Illiteracy"—inability to read—is a more specific term than "ignorance." If one were really interested in excluding the illiterate, a test of literacy could readily be given. Some non-political agency, such as the schools, could administer a simple test, or a sixth grade education could be substituted for the test. Non-payment of a poll tax is no more a measure of ignorance than it is of illiteracy. To give a Wassermann test and to permit only those who have a negative reaction to vote would be little more far-fetched. The exclusion of the illiterate and the ignorant may be desirable, but there is no demonstrable relationship between poll-tax payment and wisdom or education. Even if one clings insistently to the idea that there is such a relationship, he must justify $1.75 as the dividing line. If $1.75 keeps government in the hands of the illiterate and the educated, a tax of ten dollars or one hundred dollars would keep power in the hands of a still choicer electorate. Any argument that justifies a $1.75 tax on the right to vote can be used to justify any higher amount.

Much less frequently, a friend of the poll tax comes out and defends it on the ground that "it keeps government in the hands of the better class of people." Such frankness clarifies the position of the champions of the poll tax. This reference to the "better class of people" hardly squares with democracy. One is reminded of the "new French State" as envisaged by Marshal Henri Pétain. As reported in the *New York Times* of July 9, 1941: "He [Pétain] rejected at the outset the idea of arbitrary equality and universal suffrage which had been the basis of the French Republic . . . in their place he proposes to establish liberty founded upon the selection of the élite in each of the main groups of the community."

Even when the friends of the poll tax are not so frank about the "better class of people," one may still question the staunchness of their faith in democracy. The frequent references to large classes of Americans as "vicious," "irresponsible," "corrupt," "illiterate," "ignorant," "uneducated," "uninterested," "trifling" seem to reveal a basic distrust of the common man and his motives. One is impelled to wonder whether many people who "reject at the outset the idea of arbitrary equality and universal suffrage" are not fellow-travelers of Marshal Pétain. One is left with the vague feeling that many of the friends of the poll tax hold with Alexander Hamilton that: "All communities divide themselves into the few and the many. The first are the rich and well-born, the other the mass of the people. . . . The people are turbulent and changing; they seldom judge or determine right."

The case of the opponents of the poll tax is simple. They hold that it disfranchises large numbers of American citizens for an arbitrary reason that has nothing to do with ability to participate in government. A few incidental arguments can be thrown in. In Texas (as well as five other states), it discriminates in favor of the aged. Texans over sixty need not pay the tax. With such issues as eligibility to old age pensions and the amount to be paid as hot issues of Texas politics, the recipients of pensions are in a fine position to demand bigger and better ones. "Pappy" O'Daniel, campaigning on bigger pensions for the old folks, never lost any votes because of this provision of the law.

Far from the poll tax "keeping government in the hands of the better class of people," it probably facilitates the control of the purchasable vote. It is not that the poll-tax states have any monopoly on political corruption; it is merely that the poll tax makes corrupt control more absolute. In every state there is a certain number of persons whose votes are for sale; where the total vote is small, as under a poll-tax régime, the relative influence of this venal group is greater. In Texas, the requirement that the tax be paid six months before an election contributes to the same end. The independent voter may forget to pay the tax by January 31, but the corrupt political machine never forgets. It makes it its business to re-

member to purchase some spare poll-tax receipts before the January 31 deadline.

The poll tax discourages voting by the lower-income groups. The tax is a trifle for the well-to-do; to the poor man, it may represent the price of a pair of shoes. In the years 1935–36, the median cash income of American families and single wage-earners was $1,070 a year—that is, half had incomes above and half had incomes below that amount. Although no comparable figures are available for Texas alone, we know that it is not one of the wealthier states. A reasonable guess would put the median family income in Texas at $800 a year. Poll taxes for husband and wife total $3.50—nearly one-half of one per cent of the median family income. Having to pay this "cover charge" on the right to vote six months before the right may be used makes the position of the low-income family more difficult still. The poor family must decide between spending $3.50 for groceries now or using it for an abstract right to be exercised six months later. The wealthier are spared making this painful decision. They can have their vote and eat too. Since wealth is no test of ability to participate in government, the tax is undemocratic.

Admitting that the poll tax makes it hard for the poor man to vote, how many people does it actually disfranchise? If only one-third of Texas's potential white electorate votes, is the non-voting two-thirds restrained by the poll tax alone? Clearly not. The extensive non-voting in other than poll-tax states shows that there are other causes. It is sometimes argued that the poll tax actually disfranchises no one since the amount is so small that anyone *could* pay it. Yes, if one's annual cash income were only $1.75, he could pay his poll tax and buy the right to vote. This contention is logically sound, but it rests on an overly strict use of the word *disfranchise.* The poll tax *disfranchises* people in the sense that among lower-income groups the marginal utility of each $1.75 is too great to permit its use for anything other than food, clothing, or shelter.

There are several bases for estimating the disfranchising effect of the poll tax. One method is a before-and-after study of voting participation in those states that have abolished the tax as a qualification. These states are, it will be recalled, North Carolina, Louisiana, and Florida. North Carolina is not useful for these purposes because it abolished the tax the same year women were enfranchised. Hence it is not possible to distinguish how much of the increased vote stems from the repeal of the tax and how much from the removal of the ban on women voting. However, if we take before-and-after participation figures for Louisiana and try to eliminate irrelevant factors, we may be in a position to conclude that any increased participation following repeal is caused by repeal.

In dealing with election statistics, it is generally more meaningful and accurate to use the returns of the Democratic primary. The use of general

election figures to estimate the effect of the poll tax in the South is often highly misleading. Thus it is sometimes argued that because only 17 per cent of the adult population of poll-taxed Alabama participated in the 1940 presidential election, compared with a 73 per cent average for the non-poll-taxed states, the poll tax is the cause of Alabama's poor showing. Two other obvious causes are overlooked, *viz.*, absence of a serious contest for the state's electoral college vote and the disfranchisement of the Negro by means other than the poll tax. Since it was a foregone conclusion that Alabama's electoral vote would go Democratic, there was no incentive for Alabama voters to flock to the polls to perform the superfluous task of voting Democratic. Alabama's sizable (over one-third) Negro population is disfranchised by educational tests (applied in baldly anti-Negro manner), by an environment hostile to Negro assertiveness, and by other methods. An Alabama Negro could pay his poll tax and still be disfranchised. Use of Democratic primary figures eliminates these weaknesses. Since the primary is the South's one election that really counts, there is no question about the absence of a contest. The complete exclusion of Negroes from the primary in accordance with the "white primary" rule eliminates the other misleading factor.

With these preliminaries out of the way, let us turn to a before-and-after study of Louisiana. The *potential white electorate,* it will be recalled, is the total number of white citizens twenty-one years old or over. Since it changes continually, the figures must be corrected for population growth. Repeal occurred in 1934 (see Table 1).

TABLE 1

PARTICIPATION IN LOUISIANA PRIMARIES

Year	*Potential white electorate*	*Participation senator*	*Per cent participation senator*	*Participation governor*	*Per cent participation governor*
1930	704,327	261,091	37.0		
1932	743,032	306,399	41.2	379,949	51.0
1934	777,990				
1936	815,649	536,579	65.7	540,370	66.2
1938	851,953	uncontested			
1940	891,601			553,723	62.1

Prior to repeal, the participation in the Democratic senatorial primary was 37 per cent and 41 per cent in 1930 and 1932, respectively. In 1936, the first primary after repeal, the participation was 65.7 per cent—an increase of between half and two-thirds. In the primary race for governor, the increase from 51 per cent to 66 per cent and 62 per cent is somewhat less dramatic. However, a one-quarter increase in participation is significant. Figures for the years 1942 and 1944 are omitted. Wholesale ab-

Kentucky—(Cont.)

1896	
Democrat	223,004
Republican	218,171
Other	4,781
	445,956
1900	
Democrat	234,899
Republican	226,801
Other	3,584
	465,284
1904	
Democrat	217,170
Republican	205,277
Other	10,211
	432,658
1908	
Democrat	244,092
Republican	235,711
Other	9,947
	489,750
1912	
Democrat	219,584
Republican	115,512
Other	102,766
	437,862
1916	
Democrat	269,990
Republican	241,854
Other	7,770
	519,614
1920	
Democrat	456,497
Republican	452,480
Other	10,734
	918,711
1924	
Democrat	374,855
Republican	398,966
Progressive	38,465
Other	3,046
	815,332

Tennessee—(Cont.)

1896	
Democrat	170,953
Republican	149,705
Other	3,140
	323,798
1900	
Democrat	145,356
Republican	123,180
Other	4,295
	272,831
1904	
Democrat	131,653
Republican	105,369
Other	3,260
	240,282
1908	
Democrat	135,608
Republican	118,324
Other	2,170
	256,102
1912	
Democrat	130,335
Republican	59,444
Other	57,217
	246,996
1916	
Democrat	153,282
Republican	116,223
Other	2,689
	272,194
1920	
Democrat	206,558
Republican	219,829
Other	2,239
	428,626
1924	
Democrat	158,404
Republican	130,882
Other	10,771
	299,957

Kentucky—(Cont.)		*Tennessee*—(Cont.)	
1928		1928	
Democrat	558,064	Democrat	167,343
Republican	381,070	Republican	195,388
Other	1,470	Other	742
	940,604		363,473
1932		1932	
Democrat	589,574	Democrat	259,817
Republican	394,719	Republican	126,806
Other	7,773	Other	2,020
	983,066		387,643
1936		1936	
Democrat	541,944	Democrat	327,083
Republican	369,702	Republican	146,516
Other	14,555	Other	1,955
	926,211		475,554
1940		1940	
Democrat	555,678	Democrat	348,267
Republican	411,145	Republican	167,564
	966,823	Other	1,955
			517,786

If it is not possible to compute exactly how many Texans the poll tax disfranchises, the foregoing statistics at least give considerable insight into the disfranchising effect of the tax. They show clearly that the poll tax does keep people from voting, and they make possible an intelligent estimate of the number of persons thus disfranchised. We may reasonably assume that repeal of the Texas poll tax would be followed by increases in voting participation similar to those in Louisiana and Florida—that is, an increase of one-quarter to two-thirds over the usual rate of participation.

Efforts to repeal the poll tax are being made on both a state and a federal basis. Ignoring the question of which approach is more politically feasible, it is clear that action on a state level would be more thorough. State action could eliminate the tax as a prerequisite for voting for either state or national officers; federal action could hope to do no more than give a free vote for national officers—as will be explained below.

An amendment to the Texas constitution would be necessary to rid the state of the poll tax. Mere legislative action to repeal the act of the legislature which levied the tax would not be sufficient. The Texas constitution makes one reference to the poll tax which we have not yet examined. The original 1876 version read (Art. VII, Sec. 3): "There shall be set apart annually not more than one-fourth of the general revenue of the

state, and a poll tax of one dollar on all male inhabitants of this state between the ages of twenty-one and sixty years, for the benefit of the free public schools." An amendment changed the phrasing to one-fourth of the "state occupation taxes," and woman suffrage necessitated a change to "every inhabitant"—not merely *male* inhabitants. Hence, the present version reads: "One-fourth of the revenue derived from the state occupation taxes and poll tax of one dollar on every inhabitant of the state between the ages of twenty-one and sixty years, shall be set apart annually for the benefit of the free public schools. . . .

On the face of it, this latter clause seems merely to allocate one dollar of each poll tax for educational purposes. However, the Texas courts have ruled that this clause actually levies one dollar of the poll tax. The case that makes this ruling is an old one, but it has not been reversed, and it is referred to by attorney-general's rulings as a settled matter of Texas law. Solon v. State, the case in question, is a decision of the Court of Criminal Appeals in 1907. The judges give no lengthy reasoning to support their decision; they merely state very emphatically that the constitution does levy the poll tax. The relevant part of the decision reads: "Under the provision of Section 3, Article 7, of the constitution there is, in express terms, levied in this state a poll tax on every male inhabitant thereof between the ages named therein . . . such poll tax is fixed without the necessity of legislative action. The provision standing alone is definite, fixed, and as certain as any legislative action can make it . . . this provision of the Constitution is self-executing and in terms levies a poll tax on all persons between the ages named. . . ."

If less convincing than some of the opinions of Marshall and Holmes, the case is certainly the prevailing law. Fifty cents of the poll tax is levied by mere statute, but the remaining dollar is "in the constitution." The best procedure of constitutional amendment would probably be to repeal Art. VI, Sec. 2—the 1902 amendment that makes poll-tax payment a prerequisite for voting. Then the tax could remain as a fiscal measure and as a source of revenue for the schools. Of course, it would be theoretically possible to secure a reversal of the Solon case and then to repeal the poll-tax levy by simple legislative act. Under this procedure, the 1902 amendment would presumably be meaningless, for a non-existent poll tax could hardly be made a voting prerequisite. However, this method would be roundabout and probably more difficult to carry to a successful conclusion than an open attack on the 1902 amendment.

The hope for federal action is embodied in an anti-poll-tax bill already passed by the House, but still pending in the Senate. This measure would prohibit states to make poll-tax payment a prerequisite for voting for federal officers—president, vice-president, senators, and representatives. The constitutional peg on which the backers of the legislation hope to

hang it is Art. I, Sec. 4, which permits the national government to regulate "the times, places, and *manner*" of electing senators and representatives. Poll-tax elimination, the federal bill avers, would lessen electoral corruptions; therefore, since safeguarding the honesty of federal elections—that is, seeing that they are conducted in an honest *manner*—is clearly within the power of Congress, poll tax elimination would be a legitimate exercise of federal power. The House of Representatives was apparently convinced by this line of constitutional reasoning, for it approved the bill by a majority of 265 to 110. Although the constitutional clause involved refers only to the election of senators and representatives, the Supreme Court has ruled on several occassions (notably Burroughs v. U.S., in 1934) that Congress has the power to regulate the selection of presidential electors and to protect the process against corruption. Furthermore, the champions of federal anti-poll-tax legislation received aid and comfort from the recent (1941) Supreme Court decision in U.S. v. Classic, in which the Court made the startling ruling that the election of congressmen is a right given to the people by the United States Constitution (Art. I, Sec. 2).

Admittedly, the constitutionality of federal action is debatable. However, many of the changed meanings that have been read into the Constitution throughout American history are much less plausible than this one would be. For those who feel strongly enough about the unconstitutionality of federal anti-poll-tax legislation to pound the table, U.S. v. Classic is required reading.



37. THE NON-VOTER—WHO HE IS, WHAT HE THINKS [1]

IN THE November, 1948 election approximately 45,000,000 persons 21 years of age or over did not vote. Of that number over 20,000,000 were legally registered voters. The figures indicate the magnitude of the problem of non-voting. Those who believe that this number ought to be reduced need to know who the non-voters are and what they think. The analysis of the problem presented in this selection should serve as a background study for those who are seeking ways and means to reduce non-voting.

IN A YEAR [1944] when politicians, both Democratic and Republican, would give their eyeteeth for even a handful of extra votes, about thirty

[1] Gordon M. Connelly in collaboration with Harry H. Field, *Public Opinion Quarterly*, Vol. 8, No. 2, 1944. All tables omitted.

million eligible voters in America will sit this November out, unperturbed about the pros and cons of major issues which will rend the ether.

Who holds the balance of power in this great decision? A third of our own people, who seem to care so little that they will not bother either to consider the issues or to go a few blocks or miles to the polls on November 7.

But who are these people who do not vote; who in this crisis will forget that democracy is government not only of and for the people, but also *by* the people?

Along with other data collected on surveys during the past two years, the National Opinion Research Center, University of Denver, has secured some information about these people. In the hope that the light of publicity may awaken some of these "citizens," the present article will draw from the Center's findings to show you who these people are.

In 1940, . . . no state above the Mason-Dixon line had less than a 65 per-cent turnout of voters. On the other hand, the average turnout for the sixteen states in the South was only 34 per cent, and only 10 per cent voted in South Carolina. The Southern percentage was aided substantially by the 83 per-cent vote in West Virginia and the 79 per-cent vote in Delaware. Oddly enough, the greatest percentage turnout by any state in the last three Presidential elections was the 85 per cent recorded by West Virginia in 1936.

But, lest the percentages give the erroneous impression that light voting is almost exclusively a Southern problem, the situation deserves numerical consideration. While sixteen of America's thirty million non-voters in 1940 were in the South, the crucial Northern states had more than enough apathetic eligibles around to disturb the delicate balance between Roosevelt and Willkie.

For instance, over two million citizens in New York state alone were not sufficiently interested in their privilege or imbued with their duty to vote. Roosevelt's margin of victory in the state was only 224,440. In fact, *seven large states (New York, Pennsylvania, Illinois, Ohio, Massachusetts, New Jersey, and Missouri) with a total of 209 electoral votes—which could have tipped the scales in Willkie's favor—just got into the Roosevelt* column by such slim margins as 51.2 per cent and by no greater margin [illegible]-5. These seven states accounted for almost nine million of [illegible]'s thirty million non-voters. A mere 1,050,316 of these non-voters [illegible]ve made Willkie victor in the electoral college. Five million ad[illegible]ites would have given Willkie a majority of the popular vote as

New Deal Democrats, on the other hand, can comfort themselves with the thought that the Third Term could have been unanimous in the electoral college had only 410,731 of the non-voters turned out in the right proportions in each of the ten Willkie states.

According to the Associated Press, 60,576,979 persons registered or otherwise qualified to vote. Eighty-two per cent of this number cast their ballots, but 18 per cent, who cannot plead "Poll tax!" or some other restriction, failed to show in their precincts. Most of these did not have sufficient concern to outweigh the little excuses they call reasons for not voting. If they had had adequate interest, they would have chosen to vote rather than to go out of town, rather than to stay home to keep dry or warm, rather than to arrive too late at the polls, rather than to believe their own vetoes ineffective.

It is noteworthy in passing that, although the District of Columbia does not grant them suffrage, an estimated 150,000 residents there chose not to be easily disfranchised, but voted in states where they maintained legal residence.

WHO ARE THE PEOPLE WHO DO NOT VOTE?

Because opinion questionnaires are "ballots with the social characteristics of the voters attached," the forms of the National Opinion Research Center reveal in addition to the geographical distribution of non-voters the types of people who are less inclined to vote.

Of all the groups observed in the NORC findings, other races than white reveal the lowest percentage of voters. Because this ethnic group is composed almost entirely of disfranchised Negroes, however, such a fact is hardly surprising. Compared to the 34 per cent of this group who claimed to have voted, 71 out of every 100 Caucasians voted.

The groups of citizens who fulfilled their voting obligations to the greatest extent are the upper fourth of the population economically and the people of Jewish faith, both of which sent 84 per cent of their number to the polls. Comparably, 68 per cent of the middle economic group, comprising about half the population, and 53 per cent of the poor fourth voted. Among religious groups, Catholics, with 72 per cent voting, were second to the Jews; non-members and Protestants trailed with 67 and 66 per cent, respectively.

Eighty-one per cent of persons who have gone to college cast their ballots, compared to 67 per cent whose education ended in or with the completion of high school, and to 61 per cent who did not go beyond grade school.

From the foregoing it is obvious that the more economic security and education a person has, the more likely he is to participate in elections. In order to analyze the relative effectiveness of the two factors, one large

sample of 12,526 cases was compounded out of the smaller samples of five national surveys. The percentage of voters and non-voters within each of the nine "education-economic" combinations thus created was then computed.

Note . . . that the college-educated in every economic group showed the greatest percentage of voters and, further, that in every instance the higher the economic group the greater the percentage of voters. Persons with a maximum of economic security and education showed an 87 per-cent vote, and those with a minimum of both a 54 per-cent vote.

Economic security seems a more influential factor in civic participation than education. Persons with a maximum of economic security (upper fourth) but a minimum of education (grade school) outscore by 83 to 70 per cent those persons with a minimum of economic security (lower fourth) but a maximum of education (college).

Although America's women have been gifted with a complete franchise for the past five Presidential elections, they still have not reached the point where as many of them vote as men. Figures show that while 75 men in every 100 took their turn in the booths, only 61 in every 100 women did so.

Even more influential in voting, however, is a person's age. Whereas 76 per cent of persons forty years or over respond to their voting obligation, only 59 per cent of those between twenty-one and thirty-nine do.

White-collar workers, who have more familiarity with "paper work," reveal a turnout of 78 per cent. In spite of greater inconveniences to get to the polls, farmers rate next on the vocation scale, with 61 per cent. Sixty per cent of manual workers, including both skilled and unskilled, voted for Roosevelt, Willkie, or one of the lesser candidates. Fewer service workers (domestics, firemen, policemen, waitresses, barbers, etc.) than any others voted—56 per cent.

A further fact of considerable significance emerges. One is led to suspect that possibly too many native Americans take their citizenship for granted, for in the nationality breakdown respondents with both parents born in the United States showed a smaller percentage of voters (64 per cent) than any others. Those with either or both parents born in a neutral country score highest (78 per cent); with one parent born in a United Nations country and one in an enemy country 76 per cent. Observe, however, that those with both parents born in an Axis country are 75 per cent of them voters. And, finally, those with both parents born in a United Nations country (other than the U.S.A.) vote 73 per cent. Even with the colored groups omitted, the third (or higher) generation Americans still lag behind all other nationality groups.

Among people living in metropolitan districts of over a million population, three out of every four (75 per cent) registered their political preferences in 1940. Sixty-five per cent voted in metropolitan districts having between 50,000 and a million dwellers; 68 per cent voted in communities from the smallest to those of 50,000 persons; and 61 out of every 100 persons living on farms voted.

Having thus studied some of the characteristics of these people who do not participate in elections, we turn now to some of the things they think. Are they conservatives, liberals, or radicals? Are they chronic cranks or the easily pleased? Are they informed but disgusted, or uninformed and lackadaisical? Or are they so much like the rest of us who vote that their bench-warming doesn't matter?

To answer these questions fully, a large bill of particulars would be required. The best that can be done in this limited space is to reveal the reactions of voters and non-voters to just a few questions which we arbitrarily and temporarily consider indices to the mental temperatures of those who fail to vote.

In interpreting the 1942 election results, Dr. T. V. Smith, Professor of Philosophy at the University of Chicago and former Illinois Congressman, said:

> We've always made our political changes largely by revulsion, because our faith in politics is essentially romantic. . . . We tolerate one group about so long, and then we cannot stomach them any longer . . . I see . . . deeper and vaguer causes at work—namely, fatigue and revulsion. These have been long-standing causes of political overturns, and they are watched by every student of government and respected by every participant in politics. We Americans normally expect more from politics than any politicians can deliver, and as a result of this romanticism somebody must intermittently be scapegoat.

Although Dr. Smith does not exactly say so, he seems to imply that people are more inclined to cast a ballot when they are disgusted or tired of something than when they are generally satisfied. It would be possible to draw such an inference from some of the results below. For instance, note that more non-voters than voters are satisfied with the politicians in their state. Also, contrary to what might be expected, a greater proportion of non-voters with opinions than voters disagree that politics makes men dishonest.

A greater degree of general satisfaction with politicians is implied in the endorsement of politics as a career by proportionally more non-voters than voters. Without these figures, it might have been assumed that most of the persons who do not vote are those who became so disgusted with politics that they decided to wash their hands of it. On the contrary, it seems possible that those who fail to vote are those who do not see anything particularly wrong with the calibre or conduct of politicians.

There are other evidences to indicate that there are fewer non-voters than voters willing to see the *status quo* molested. Fewer non-voters are willing for newspapers to criticize the American form of government, for such talk implies either change or a disposition to change. Fewer stay-at-homes think the Constitution should ever be changed in any way.

In addition, more voters than non-voters are willing for the United States to change its present status by joining some kind of union of nations after the war. Although a majority of both voters and non-voters agree that now is the time to be planning the peace, the non-voters show a higher proportion of those who would prefer to wait until the conclusion of the war.

Is the non-voter reluctant to participate politically because of his ignorance, and ignorant because of his lack of participation? From the evidence on hand such would seem to be the case. In most instances, the percentage of non-voters *without opinions* is roughly double that of voters.

. . . . . .

Ever since the 1924 Presidential election, which provided the first opportunity for *all* women to vote following ratification of the Nineteenth Amendment, there has been a gradual increase in the percentage of eligible citizens voting for chief executive. Two decades ago 48.8 per cent of all native-born or naturalized men and women voted. In 1928 voting increased to 57 per cent of the adult citizen population. The 1932 popular vote was again 57 per cent, but a fraction above that of 1928. The 1936 landslide, buried and burying, included 61 per cent of all potential voters. In 1940, 62 per cent voted.

The increases from 1932 to 1936 to 1940 were general in nature, occurring in forty states between '32 and '36, and in thirty-four states between '36 and '40. Conversely, six of the eight South Atlantic states experienced no increase between '36 and '40.

. . . . . .

If we agree with Thomas Jefferson that that government is strongest "of which every man feels himself a part," we must see the incomplete citizenship of thirty million non-voters as a serious threat to popular government.

But, as this article demonstrates, it is quite simple for democracy to learn the opinions even of those who lack the interest to vote. As long as surveys are such a functional arm of democracy, the non-voter is less of a problem than he would otherwise be. And as a branch of education, surveys can show educators the areas of ignorance which must be eliminated before the non-voter can see his political responsibilities clearly.

38. SMITH v. ALLWRIGHT, ELECTION JUDGE, et al.

Supreme Court of the United States, 1944 (Certiorari) 321 U.S. 649

BECAUSE of the one-party system in the Southern states the exclusion of Negroes from participation in the Democratic party primary in effect eliminates them from participation in the nomination and election processes in those areas. As long as the Supreme Court was content to view the primary election as a private "party" matter, the exclusion of Negroes therefrom by party action could not be challenged under the federal Constitution. Commencing with *United States* v. *Classic* 313 U.S. 299, however, the Court began to move from this position and to tie the party primary into the official election structure. In the present case the Court held that primary elections can no longer be viewed as private affairs but have become so intermingled with state activities as to bring them under the protection of the Fifteenth Amendment. Having thus brought the primary within the scope of the federal power, the Court then ruled that the Democratic party, in its character as an agency of the state, could not exclude citizens from participation in the primary election because of their race or color. The doctrine in this case has been further expanded in *Elmore* v. *Rice*, 72 F. Supp. 516, 68 S. Ct. 905, and would seem now effectively to close the door to the revival of the "White Primary," although the possibility of discrimination against the Negro by other means still remains.

Opinion of the Court

MR. JUSTICE REED delivered the opinion of the Court:

This writ of certiorari brings here for review a claim for damages in the sum of $5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges respectively of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter. . . .

The Democratic party of Texas is held by the Supreme Court of that State to be a "voluntary association," *Bell* v. *Hill*, 123 Tex. 531, 534, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the State except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." p. 545. . . .

The Democratic party on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

> Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations.

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a State from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a State of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment as officers of government cannot be chosen at primaries and the Amendments are applicable only to general elections where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. . . .

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon* v. *Herndon*, 273 U.S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev. Stat. 1925) declared "in no event shall a Negro be eligible to participate in a Democratic Party primary election in the State of Texas." Nixon was refused the right to vote in a Democratic primary and brought a suit for damages against the election officers under R.S. §§ 1979 and 2004, the present §§ 43 and 31 of Title 8, U.S.C., respectively. It was argued to this Court that the denial of the franchise to Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of

Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment and reversed the dismissal of the suit.

The legislature of Texas reenacted the article but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary and again brought suit for damages by virtue of § 31, Title 8, U.S.C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be state action and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon* v. *Condon,* 286 U.S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open.

In *Grovey* v. *Townsend,* 295 U.S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon* v. *Condon, supra,* in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the State. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership with which "the State need have no concern," *loc. cit.* at 55, while for a State to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendment.

Since *Grovey* v. *Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States* v. *Classic,* 313 U.S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary as well as general elections, 313 U.S. at 316, 317, "where the

primary is by law made an integral part of the election machinery." 313 U.S. at 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of federal suffrage secured by the Constitution in primary as in general elections. 313 U.S. at 323. This decision depended, too, on the determination that under the Louisiana statutes the primary was a part of the procedure for choice of federal officials. By this decision the doubt as to whether or not such primaries were a part of "elections" subject to federal control, which had remained unanswered since *Newberry* v. *United States*, 256 U.S. 232, was erased. The *Nixon Cases* were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey* v. *Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey* v. *Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State. When *Grovey* v. *Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U.S. at 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey* v. *Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey* v. *Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before, this

Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. . . .

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States* v. *Classic*, 313 U.S. at 314; *Myers* v. *Anderson*, 238 U.S 368; *Ex parte Yarbrough*, 110 U.S. 651, 663 *et seq.* By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race. Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, . . . federal courts must for themselves appraise the facts leading to that conclusion. . . .

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substantially that of Louisiana, with the exception that in Louisiana

the State pays the cost of the primary while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the State or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, pratically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U.S. 347, 362.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson,* 307 U.S. 268, 275. . . .

Here we are applying, contrary to the recent decision in *Grovey* v. *Townsend,* the well-established principle of the Fifteenth Amendment, forbidding the abridgement by a State of a citizen's right to vote. *Grovey* v. *Townsend* is overruled.

Judgment reversed



39. THE WHITE PRIMARY: 1944–1948 [1]

IN *Smith* v. *Allwright* (selection 38) the Supreme Court of the United States declared the "white primary" in Texas unconstitutional. Professor Weeks here summarizes the efforts of the Southern states to circumvent this decision. Although these attempts proved unsuccessful, Professor Weeks indicates that other effective means of disfranchising the Negro still exist.

[1] Douglas Weeks, *American Political Science Review* (June, 1948). All footnotes

I

THE closing chapter in the history of the white primary in the South has seemed since 1944 to be in process of being written. In that year, the United States Supreme Court, by invalidating in *Smith* v. *Allwright* the white primary rule of the Texas state Democratic convention, dealt a stunning, if not immediately mortal, blow to this most significant political custom or practice of the Southern states. The refusal of this court on April 19, 1948, to review a federal circuit court decision invalidating the white primary arrangements of South Carolina, created in 1944 to circumvent the effect of the Allwright decision, seems to have administered the judicial *coup de grâce*. It would, however, be unsafe to predict when "finis" may be set down for all states, political areas, counties, and voting precincts where by one means or another the Negro has long been barred from participation in the all-important primaries of the Democratic party. The remaining suffrage requirements, registration restrictions, and election provisions, and the political and administrative methods of applying them which still are employed in some Southern states and in parts of others in order to render it difficult for Negroes to vote will not be immediately eliminated. Moreover, the effects of political action have not been fully tested by the Democratic leaders of the South. At the present moment, plans for united efforts on their part are under consideration; and these could have far-reaching results before the end of the current presidential election year. Whatever the abstract justice of the situation, traditional attitudes and customs cannot be uprooted easily and have a way of resisting judicial or legislative fiat, particularly when it is honestly felt by many that such fiat has been imposed from the outside and by people unaware of the difficulties and adjustments involved.

Be that as it may, remarkable changes have taken place both in the practical voting arrangements and in the viewpoints of many people within the South, and, as a result, large numbers of Negroes were admitted to the Democratic primaries of 1944 and 1946. The primary campaigns of those years, none the less, were seriously affected by the racial issue, and it may assume even greater importance during the present election year. Since 1944, most "liberal" politicians of the South have been more or less "guarded" in taking too advanced a stand. Ultra-conservative leaders, like Talmadge and Bilbo, have gone to extremes in defending "white supremacy." Many persons, however, while apprehensive about the effects of precipitate reform, have sought to "soft pedal" the issue, with the attitude either of accepting the inevitable or of relying more or less on passive resistance. Officially, the active opposition to admitting Negroes to the Democratic primaries has assumed the forms of Democratic party action, legislative devices, adjudication,[1] and constitutional amendment.

Local administration of registration and election laws has also played its part, and various types of practical political pressure have been noteworthy in states and areas with large Negro populations. These efforts have been fought step by step by the National Association for the Advancement of Colored People and by a considerable number of other Negro organizations, as well as by various bi-racial and white associations sympathetic toward their cause. The national Administration and the national Democratic party have lent aid and comfort in various ways. Of recent importance in this connection have been the Report of the President's Committee on Civil Rights and the President's so-called "Ten-Point Charter of Human Rights." Mention might be made also of the persistent efforts in Congress over the past several years to pass the federal Anti-Poll Tax Bill, the civil rights plank in the Democratic platform of 1944, and various reported activities of the Department of Justice in an effort to enforce Sections 19 and 20 of the U.S. Criminal Code.

It is with the efforts to resist the full impact of the Allwright decision, however, that we are here concerned. The entire story is complex and only the most significant developments can be summarized. With the situation in each state having its peculiar factors, it seems best to give separate consideration to each.

II

It is not necessary here to define the meaning of the term "white primary," to explain the white primary's origin and elaborate its variations from one Southern state to another, or to trace the evolution of its constitutional and legal status prior to the beginning of the present decade. Suffice it to say that after a series of federal Supreme Court decisions beginning in 1927 and terminating with *Grovey* v. *Townsend* in 1935, the barring of Negroes from Democratic primaries by party rule was apparently established on firm constitutional grounds, at least in states where the conditions surrounding it were similar to those in Texas, to which the decision applied—that is to say, where, as in Texas, the primary election was financed and administered by the party, even though minutely regulated by law, where the state supreme court had held either that the primary was not a public election or an integral part of the general election system or that the party holding it was a voluntary organization free to determine its own membership, and where the state party convention as the highest authority of the party had laid down the white primary rule. These were the conditions incident to the white primary's validity as set forth in the Grovey decision, and they obtained in whole or in part in half of the Southern states.

Thus far, the federal Supreme Court had not held a primary to be an

integral part of an election. However, in the *United States* v. *Classic*, decided in 1941, this tribunal asserted that a primary in which candidates for Congress were nominated was a component part of an election process in which the general election was only the final step, and that Congress might regulate primaries for federal offices as a part of its power to legislate in regard to general elections for such offices. This case did not involve the white primary, but it prepared the way for *Smith* v. *Allwright*, which reversed *Grovey* v. *Townsend*. Essentially the same facts were involved in both of the latter cases. The white primary rule of the Texas state Democratic convention was now declared to be an act of the state, since the primary statutes of Texas created the convention which made the rule and provided in detail for its powers and procedures, as well as prescribing minutely the conduct of the primary elections. Needless to say, this reversal produced dismay and led to a wide variety of actions in the Southern states.

Resistance to the Allwright decision in Texas took the immediate form of an unsuccessful attempt on the part of the state attorney-general to secure a rehearsing of the case. While the state-wide white primary rule was abandoned for the 1944 Democratic primaries, the decision produced repercussions in the politics of the state. The Democratic convention, held in May, 1944, and controlled by the "regular" Democrats, condemned the decision and chose a national convention delegation and an electoral slate opposed to President Roosevelt. A bolting convention at the same time selected pro-Roosevelt delegates and electoral candidates. Later in 1944, after the September state Democratic convention had nominated a pro-Roosevelt electoral ticket which was upheld by the state supreme court as the official Democratic electoral list, the "regular" Democrats became the "Texas Regulars." Antagonisms thus created continued into the primary elections of 1946. It may be added that the only suffrage restriction in Texas directed in part against the Negro is the poll-tax requirement, and Negroes have long been otherwise free to vote in general, municipal, and school elections in many localities. Since 1944, Negroes have been paying their poll taxes in greater numbers and have been admitted to Democratic primaries more or less freely in many counties.

Less direct resistance seems to have obtained in Louisiana, North Carolina, and Virginia. The Democratic party of Louisiana early repealed its white primary rule. North Carolina is reported to have had only local rules in some counties. Negroes have voted heavily in Democratic primaries in Virginia, at least recently. All three states, however, have the literacy test, which has probably operated, particularly in Louisiana, to prevent the registration of many Negroes. Louisiana also conditions registration upon "good character," capacity to "understand the duties and

obligations of citizenship," and ability "to fill out and sign the blank application for registration . . . without assistance or suggestions from any person or any memorandum whatever. . . ." Illiterates may be registered if they can "understand and give a reasonable interpretation of any section of either constitution (federal or state)."

III

In Florida, action in the state courts was necessary to open the Democratic primaries to Negroes. On July 24, 1945, the supreme court decided that a Negro, otherwise qualified to vote under state law, was entitled to be registered as a Democratic elector notwithstanding the resolution of the state Democratic executive committee to the effect that only white persons "should be declared and taken as proper members of the Democratic party of the state." *Smith* v. *Allwright* was relied on as controlling authority.

Practical obstruction to Negro voting in primaries was reported as taking place in 1944 in various parts of Alabama. In 1946, the state Democratic executive committee voted to open the party primaries to Negroes. Meanwhile, however, the legislature had initiated, in 1945, the so-called Boswell amendment to the constitution of the state, which was ratified in November, 1946. This amendment added the words "understand and explain" to the literacy requirement for registration, and also appended the provision that "no person shall be entitled to register as electors except those who are of good character and who understand the duties and obligations of good citizenship under a republican form of government." In addition, property qualifications as alternatives to the literacy test were repealed.

In a case involving failure to register a Negro citizen in Alabama, decided early in 1947 by a federal district court, it was held that, while registration cannot be denied because of race, racial discrimination is not established by showing mere irregularities or inefficiency on the part of a board of registrars. That Macon county, from which the case arose, was 82.1 per cent Negro was not regarded as proof *per se* of racial discrimination. The Alabama statutes permit the board of registrars to "make such rules and regulations as it deems proper for the receipt of applications for registration." In a previous case involving the same facts, the federal Supreme Court had denied *certiorari*.

In Arkansas, the state Democratic committee responded to the Allwright decision in July, 1944, by amending the party rules so as to permit primary election officials to challenge Negroes on grounds of "party loyalty." Later in that year, the committee acted to admit Negroes to the primaries "if they meet party loyalty requirements," but still excluded

them from party membership. In 1945, however, the General Assembly provided for separate primaries for federal offices at which "no citizen shall be denied the right to vote . . . on any ground prohibited by the Fifteenth Amendment to the Federal Constitution." It was further provided that the costs of the federal primary should be borne by the counties, whereas those of the state and local primaries continued to be a charge on the party. After being applied in one election, the act was repealed in 1947, and nominations for Congress are again to be made in the regular primary. While the separate primary was in effect, its validity was upheld by the supreme court of Arkansas under the proper provisions of the federal and state constitutions. In the course of its opinion, the court called attention to the optional character of the primary in Arkansas in contrast to the mandatory primary in Texas, but stated that "however revolutionary this decision [*Smith v. Allwright*] may be, it stands as the law of the land, and is as binding upon us as it is upon the state whose primary election law was there invalidated." The governor of Arkansas stated, however, before the primaries of 1946 that Negroes were not to be permitted to vote in the separate state and local primaries, and the state attorney-general so announced. Registration of Negroes for 1946 was reported as heavy, although attempts were made, it is alleged, to dissuade many from voting.

IV

Efforts to maintain the white primary were more extended and complex in Georgia, Mississippi, and South Carolina. It is true that in 1944 Georgia repealed her constitutional poll-tax requirement for voting and otherwise liberalized her suffrage provisions; but at the same time all constitutional provisions pertaining to primaries were deleted, the latter as a first step to removing primaries from state control. Meanwhile, the state Democratic committee, assuming that the Allwright decision did not apply to Georgia, in its call for the Democratic primary of 1944 enacted the rule that "all white electors who are Democrats and qualified to vote in the general election, and who in good faith pledge themselves to support the Democratic candidates for all the offices to be voted on this year, are hereby qualified to vote in such primary." As a result, Negroes were generally refused primary ballots.

A Negro—a qualified and registered voter—who has denied participation in this primary was sustained by a federal district court in his right to vote for congressional candidates. Upon appeal, the Fifth U.S. Circuit Court advanced the doctrine that, while parties may limit their membership, the state of Georgia has not left party primaries wholly to the various parties, but has recognized the "great importance to the public of the results of a primary held by a numerous party, and has protected

and regulated such primaries almost exactly in the same way it has regulated elections by the people." "The state," the opinion continues, "does not require a primary in any case, nor itself choose the primary managers, nor bear any of the expenses of the primary," and hence is in a different position from Texas and Louisiana where the primary is mandatory. Therefore, the Allwright and Classic cases, it was held, applied, respectively, to the conditions in those states and did not fit the facts in Georgia where the primary is optional. "But," adds the court, "there are features of the Georgia laws which seem to us to show that the state, when any party calls a primary, associates itself with the party holding it, and adopts the result as authenticating the successful candidate to be the nominee of the party for the official election ballot." Thus the state "adopts the primary as a part of the public election machinery. The exclusion of voters made by the party in its primary rules becomes the exclusion enforced by the state, and when such exclusions are prohibited by the Fifteenth Amendment because based on race or color, the persons making them effective violate, under color of state law, a right secured by the constitution and laws of the United States. . . ." Thus the court accepted the authority of the Allwright decision, but left the way open to the state to repeal all primary laws (as the state constitution now permitted, and as South Carolina had done in 1944) and thereby relinquish the whole matter of nominations to the party, whose right to control its own membership was left intact. Soon afterwards, the federal Supreme Court refused to review this decision by denying *certiorari*.

The state Democratic executive committee let down the bars for the primary of 1946, and nearly 125,000 Negroes were registered (100,000 are supposed to have voted). Many attempts were made to dissuade Negroes from voting, and they were challenged in a wholesale fashion. While the Negro vote helped elect a congresswoman from the fifth Congressional district whose opponent had declared for "white supremacy," the bitterness of the gubernatorial campaign is well known. Eugene Talmadge proclaimed the doctrine of "white supremacy" and promised that "no Negro will vote in Georgia for the next four years." In a post-primary meeting of the state Democratic convention on October 9, 1946, a white primary rule was enacted. Following this, a bill was passed in 1947 by both houses of the General Assembly "to revise the election laws and to repeal all laws or parts of laws providing the method and manner of holding primary elections by a political party, organization, or association for the purpose of choosing or selecting candidates for office"; but it was vetoed by the governor on the ground that it would "allow fraud and stolen elections to run rampant in Georgia." Subsequently, the state Democratic rules committee adopted a "white primary" under which Negroes will vote in separate buildings from white voters.

V

The Allwright decision had practically no effect in the Mississippi primary election of 1944. By 1946, however, the situation had changed. As explained by the Special Committee to Investigate Senatorial Campaign Expenditures in its majority report on the primary campaign of Senator Bilbo, several factors were responsible. The report stated that "due to the influence and intervention of certain out-of-the-state organizations, attempts were made to organize the Negroes and urge them to go to the polls and participate in the July 2 Democratic primary. These attempts were further facilitated by the passage in April, 1946, by the Mississippi state legislature of an act exempting all veterans, without reference to whether they were colored or white, from the payment of a poll tax for the 1944–45 period if they were in the armed services. The combination of these elements, together with agitation by certain radio commentators and correspondents from outside the state, and the return to Mississippi of large numbers of Negro veterans, contributed to a situation . . . in which great interest in this primary was exhibited on the part of both whites and Negroes."

The vituperative campaigning of Senator Bilbo and his supporters in behalf of white supremacy, the suffrage and election laws of the state, and the habitual methods of administering them, however, operated in 1946 to prevent the registration and primary participation of an overwhelming majority of Negroes. Since the adoption of the constitution of 1890, the literacy and other suffrage restrictions therein provided had served to bar the few Negroes who may have attempted to register; for the rest, "common knowledge" and "custom" were sufficient. The primary election law afforded another obstruction, if needed. It restricted participation in a party primary to the voter who intends to support all nominations made thereat, who has been in accord with the party holding such primary within the two preceding years, and who "is not excluded by any regulation of the state executive committee of the party holding such primary." Any party member or any primary election officer could challenge any person offering to vote, and cause him to answer, under oath, questions relating to his qualification. The state Democratic executive committee, however, had promulgated no white primary rule, and after the Allwright decision, had unanimously decided that the Negro had a legal right to vote in the Mississippi Democratic primary; though, as one of its members testified: "We didn't tell the darkies that . . . he had a legal right to vote, but as I say, we thought he ought not to vote."

To strengthen the above primary statutes, however, the Mississippi legislature in 1947 authorized state executive committees of parties holding primaries to "make reasonable rules and regulations that will insure a

fair primary" and empowered county executive committees to hold new registrations of party members and to appoint assistant managers in precincts to hear complaints of challenged voters—the county executive committees to make final decisions as to persons denied participation in primaries. No person is to participate in a primary who is not "in accord with the principles of the party" as proclaimed by its state executive committee. The possibilities of these provisions are obvious.

VI

The reaction to the Allwright decision in South Carolina was immediate and the attempt to circumvent it most determined. Within a few days after the decision, a special session of the General Assembly, called for the purpose, repealed "each and every provision in the laws of this state authorizing, recognizing, or regulating the organization of political parties . . . and the primaries, elections, or nominations in primary elections for a federal, state, county, or municipal office, or for any office in any other political division. . . ." The same session initiated a constitutional amendment striking out the words: "The General Assembly shall provide by law for the regulation of party primary elections and punishing fraud at the same." The amendment was subsequently ratified. This was a new and drastic departure in the history of the direct primary, designed to circumvent in thorough fashion the effect of the Allwright decision. In fact, the courts would be forced to find a new and broader doctrine if the new arrangements in South Carolina were to be judicially undermined.

This doctrine was found by a federal district court in South Carolina in *Elmore* v. *Rice,* decided on July 12, 1947. On the following December 30, the Fourth U.S. Circuit Court of Appeals sustained the decision. The federal Supreme Court on April 19, 1948, in a formal order refused to review the latter ruling. Elmore was qualified to vote in South Carolina, but was deprived of voting an account of race in the Democratic primary by the party rules which now completely controlled it. The district court stated: "We need hardly look back of 1941 when the famous case of *U.S.* v. *Classic* was decided and a few years later in 1944 *Smith* v. *Allwright.* These two cases now completely control and govern the matters under discussion." The court relied particularly on a statement in United States v. Classic which reads: "Where the state law has made the primary an integral part of the procedure of choice, *or where in fact the primary effectively controls the choice,* the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Art. I, Sec. 2." *Chapman* v. *King,* the Georgia case, was also cited as authority. The court then compared the situations in South Carolina before and after the repeal of the primary statutes and concludes that there was no substantial difference between them. After the repeal, the state Demo-

cratic convention acted to embody all the former statutory provisions into the party rules. Thus the Democratic party occupies the same determining position that it had under the primary statutes. The party cannot be treated as a private business or a social club—it is the determining body in the choice of national and state officers in South Carolina. "It is time," concludes the court, "for South Carolina to rejoin the Union. It is time to fall in step with the other states and adopt the American way of conducting elections." In upholding this decision, the federal circuit court added little, except to say that "no election machinery can be upheld if its purpose or effect is to deny to the Negro, an account of his race or color, an effective voice in the government of his country or the state or the community wherein he lives." The reasoning of the lower courts was in effect accepted by the federal Supreme Court.

Thus, it would seem, the white primary proper is judicially ended. Certainly, no further efforts will be made to repeal primary statutes in order to place primary elections beyond the law, such as those unsuccessfully attempted in Florida, Georgia, Louisiana, Mississippi, and Texas between 1944 and 1948. The decision will not, however, dispose of all remaining suffrage and registration hurdles in the way of the Negro, nor will it insure that his vote if cast will always be counted. There will need to be legislation and litigation if these obstacles are to be removed. The President's Committee on Civil Rights has advocated the strengthening of national administrative machinery for the protection of suffrage and other rights, the establishment of a permanent Commission on Civil Rights and a Joint Standing Committee on Civil Rights in Congress, the enactment of the federal Anti-Poll Tax Bill, and the enactment of Congressional legislation to protect the right of qualified persons to participate in federal and state primaries and elections. In his recent support of these and other accompanying recommendations, the President seems to have injected them deeply into both national and Southern politics. Under present political conditions, the possibilities of their realization in the near future are not clear. The history of the white primary, therefore, has not been entirely completed.



40. THE BIG HELLO [1]

THIS article by Rovere offers a lively portrait of an old-fashioned political boss, whose activities are reminiscent of the gaslight era in New York. It presents the favorable side of the type of man who is

[1] Richard H. Rovere, *The New Yorker* (January 12, 1946), pp. 29 ff.; (January 19, 1946), pp. 26 ff. Copyright, 1946, The New Yorker Magazine, Inc.

often characterized as corrupt, living on patronage, and a spoilsman. The career of Peter McGuinness is a case study on the local level of the theory of Harold D. Lasswell that politics is "the study of influence and the influential." It depicts what is sometimes called the social and humanitarian function of the political party.

PART I

PETER J. MCGUINNESS, a big, tough, happy, red-faced Irishman who for the past twenty-two years has been the Democratic leader of the section of Brooklyn called Greenpoint, is the first citizen of that community and the last of New York's old-time district bosses. "I'm the boss of Greenpoint," he often says. "What I say there goes." A district boss, unlike the boss of a county or a state, controls none of the actual machinery of government; he cannot, therefore, impose himself upon the community against its will. If he remains boss, he does so either because the voters are largely indifferent to local politics or because he is really popular with them. In McGuinness's case, it is altogether a matter of popularity. Almost no one in Greenpoint, a working-class community in which the Irish tradition is still the dominant one, is indifferent to politics. McGuinness, who was Greenpoint's alderman from 1920 to 1931 and has been its Democratic leader since 1924, has been before the voters of Greenpoint more than thirty times in primary and general elections. On each occasion his showing has been better than the time before. For the past few years no one has even run against him.

Very few New Yorkers today could name the party leaders in the districts in which they live; McGuinness is so well known in Greenpoint that he no longer needs to use his last name on campaign posters. "Vote for Peter," one flyer used in a recent election said. "It's no Wonder that everyone likes him. Peter is the only Politician in the forty-eight States who devotes All his time to the People." To many Greenpointers, McGuinness's name is synonymous with statesmanship in general; the *Weekly Star,* a community newspaper, has frequently reported that schoolboys or first voters, asked to name the Mayor or the Governor, have said he was Peter J. McGuinness. McGuinness is not only Greenpoint's political leader but its social leader and its arbiter of taste. The main social events of the year in Greenpoint are Annual McGuinness Night, a ball that is held in the Labor Lyceum Hall on the first Saturday after Lent and causes a considerable upswing in the hired-tuxedo trade, and the Monster McGuinness Theatre Party, which is held in the late fall in the Meserole Theatre. Possibly the greatest tribute to McGuinness's popularity in Greenpoint is the amount of poetry he has inspired. It may well be that more poetry has been written about McGuinness than about anyone in American politics since Abraham Lincoln. The community newspapers publish an extraor-

dinary volume of poetry, and a large portion of it in the past quarter century has been verse in praise of McGuinness. An example is a ballad of twenty-three stanzas by Maurice Dee, which ends:

> Oh, I could continue writing until this pencil wore down
> About the ways he is loved in this town,
> But the thing we prize most is the fact he is with us,
> Our tall, broad, and handsome Peter McGuinness.

At a time when the public is apt to be cynical about politicians and their motives, such standing as McGuinness enjoys is not easily won or maintained. McGuinness has achieved it because he works hard and loves his work. He tends his vineyard by day and by night. He is probably the only politician in the city who still follows the old custom of holding court on a street corner and greeting passers-by by name. Every Saturday evening and Sunday afternoon, in seasonable weather, he posts himself outside a store on the corner of Manhattan and Norman Avenues, Greenpoint's main intersection, and has a few words with the strollers. "That's when I give me people the big hello," he says. He enjoys giving people the big hello, just as he enjoys everything else about politics. Duties that other men regard as unpleasant chores are to him the main compensations of his career. He likes making speeches, marching in parades, attending weddings and funerals, and running Kiddies' Day outings. He says that the greatest thrill he ever had came during the 1936 Democratic National Convention in Philadelphia, when Jim Farley asked him to read, over a national hookup, the convention resolution thanking the radio companies for their coverage of the convention. "Bejesus," he says, "I stood up there on the platform with the Vice-President of the United States behind me, and senators, and governors from states that are Democratic, and I talked to the whole United States. I'm telling you, you could just see the sweat run down me back. Right then me whole life passed before me eyes."

Next to attending conventions, McGuinness can think of no pleasanter way to spend an evening than to sit behind his desk at his headquarters, the Greenpoint People's Regular Democratic Organization Clubhouse, listening to the requests of constituents and trying to do something about them. "I get a hell of a kick out of that," he says. "Sometimes I even do favors for people in Jersey." A New York district politician who concerns himself with the problems of a New Jersey voter is breaking new ground in human brotherhood, but McGuinness's high regard for his fellow-man extends even beyond Jersey. One Christmas he put an advertisement in the Brooklyn *Citizen* saying "Peter J. McGuinness, Democratic State Committeeman from the Fifteenth Assembly District, Extends Cordial Holiday Greetings to the World."

McGuinness thinks highly of the Jewish holiday Yom Kippur, the day

of atonement, on which the pious are supposed to make some charitable gesture toward their enemies. When he first heard of this custom, he sent a memorandum to all the Jewish members of his club telling them to observe the practice and to do something nice for the Republicans and Socialists. McGuinness is a Roman Catholic, but his favorite man of God was the Protestant evangelist Tom Noonan, who was known as the Bishop of Chinatown and who, until his death, several years ago, ran a Bowery mission. McGuinness respected Noonan because he did favors on such a large scale. Noonan ran a kind of revival meeting on the radio every Sunday, and ended his program with a plea to his listeners for old clothing, eyeglass frames, medicines, and other things needed by his friends on the Bowery and in Chinatown. The response to these appeals was enormous, and McGuinness felt that Noonan, by conceiving the notion of doing favors over the airwaves, had become one of mankind's great benefactors. "Tom Noonan was a most splendid gentleman," McGuinness says. "I never knew of anyone who done so much for the human race of people." McGuinness is probably the only man who ever ran for county sheriff on a program of making life pleasanter for prisoners. In 1935, when he was a candidate for Sheriff of Kings County, he promised in every speech that the prisoners in the county jail would be happy and well fed if he were elected. "Under me they'll get better meenus," he said. He was elected, and his first act was to throw a New Year's Eve party for the prisoners; his second, in fulfillment of his campaign pledge, was to order that beef stew be served twice a week and that hot drinks be handed around before bedtime.

McGuinness is almost always in high spirits. Sometimes he finds it impossible to contain his exuberance. On these occasions, he begins by bouncing up and down in his chair; then he whistles a few bars of jolly music, flicks the dust off the shoulders of his coat with his fingertips, and rises to do a couple of jig steps. "Jeez, I'm feeling spiffy today," he says when this mood is upon him. "Don't mind me, pals. It's just me nature to whistle." He calls everyone "pal," even people he has never met and is talking with for the first time over the telephone. His good nature has endeared him not only to the voters of Greenpoint but to all the professional politicians in town. In the places they most often gather—City Hall, Foley Square, and the Borough Hall section in Brooklyn—no one else is as popular. For the past two decades no social gathering of officeholders or city-news reporters has been considered a success unless McGuinness has attended and done some unusual things with the English language. Before his feet began to bother him a few years ago, he was often chosen to lead contingents of city officials in the annual St. Patrick's Day parade, which he now watches from a place of honor in the reviewing stand. Since 1921, he has been master of ceremonies at the annual outing of politicians and

city-news reporters at Travers Island, Whitestone Landing, or wherever.

Among politicians, one good index of a man's standing is the frequency with which he is asked to be an honorary pallbearer for deceased associates. McGuinness is in greater demand for this service than anyone else in the city, sometimes having to decide which of two distinguished corpses he will accompany to the grave on a given morning. He is chairman of the Association of Past Aldermen of the City of New York and an official of half a dozen other societies in which politicians gather to honor themselves. Among those who enjoy paying their respects to him are Mayor O'Dwyer, Fiorello LaGuardia, Jimmy Walker, Samuel Seabury, James A. Farley, Herbert H. Lehman, Newbold Morris, and Robert Moses. Governor Dewey once had a good word for him. The late B. Charney Vladeck, the Socialist leader of the lower East Side and a man who generally classed Democratic officeholders with sweatshop proprietors and exploiters of child labor, was one of his warmest admirers. "That Irishman!" Vladeck used to say. "Sometimes he makes me wish I was a Democrat."

To reciprocate the affection that other men in public life have shown for him, McGuinness honors them by admitting them to the Grand Order of Pork Chops, a fraternal organization of large but uncounted membership, all of it elected by him. Whenever he meets a member, McGuinness says, "Hello, there, me old pork chop!" He started the order some twenty years ago, when he was a member of the Board of Aldermen. "It's just sort of a humorous thing I thought up," he says reluctantly, when asked for an explanation. "What the hell? I had to have *something* to call me very dearest pals. I call them pork chops because all the old aldermen used to like eating pork chops." The Pork Chops have held only one meeting. That was in 1931, upon the occasion of McGuinness's resignation from the Board of Aldermen. The Board adjourned and, after several prominent outsiders had been admitted to the chamber, convened again as the Grand Order of Pork Chops. There were many testimonials to McGuinness, and he was presented with a gold watch, a chain, and a watch charm that he describes as "a gold statue of a pork chop." The Grand Master of the Pork Chops is Isidor Frank, a wholesale butcher who gives Democratic district leaders generous discounts on the turkeys and chickens they distribute to the poor at Thanksgiving and Christmas.

McGuinness is an anachronism. His approach to politics was outdated before he was born. His language went out along with cops in jardinière hats. His exuberance is Dickensian. Even physically, he seems improbable in the twentieth century. Newspaper cartoonists say that they can get a perfect caricature of the old-time Irish ward boss simply by drawing McGuinness as he is; Nast and Keppler, they maintain, never produced anything half so plausible as McGuinness. McGuinness, who is fifty-eight,

stands just under six feet and weighs about two hundred and thirty pounds, which is some forty pounds less than he weighed three years ago, when his doctor advised him to reduce. He has a massive head, clear blue eyes, a complexion that is a shade or two off ripe tomato. His hair is pure white but still plentiful. He parts it neatly in the middle and sometimes scallops it daintily over his forehead in the roach style affected by bartenders fifty years ago. His nose and chin are enormous, granitic affairs that jut far out from their moorings and then tilt sharply upward; they look as if they had been done by a sculptor of noble intentions but imprecise execution. McGuinness can look as benign as Old King Cole or Kriss Kringle in a nursery book or as belligerent as Roughie McToughie, the generic hard guy. He dramatizes his belligerent moods much as he dramatizes his happy ones. He doubles his immense fists, crouches forward in his chair, and starts jabbing sharply in the direction of the nearest wall. "You louse-bound bastard, you," he says to the shadow he is boxing, "who you think you're talking to?" Before he was elected alderman for the first time, in 1919, he had spent fourteen years as a teamster, a lumber-yard worker, and a boss stevedore, and had earned money on the side as a semi-professional boxer, a distance runner, and a bouncer in the barroom of a steamboat that made moonlight pleasure cruises. In those pursuits, he developed a hard, agile body, which has taken on weight without becoming slovenly. McGuinness does not look fat; he looks beefy, powerful, massive, and stately. He is powerful, in fact as well as in aspect. Several months ago, he was the cause of a brief slowdown in war production when he put two obstreperous young shipyard workers on the absentee list for several days. "They got wise with me and called me Pop," he explains. "I give 'em the back of me hand."

He carries his body and his head erect. His walk is slow, lordly, and rather ponderously graceful. Unlike the politicians of the gaslit era to which he is so clearly a throwback, he is conservative in dress, being given to gray tweed suits, white shirts, and patterned blue ties. He does not wear a stickpin, and his only ring is a simple gold one, set with a garnet, which was given to him thirty-five years ago by his wife, Margaret, a handsome woman of proportions nearly as heroic as his own. He addresses her as Maggie and often refers to her as "the old champeen." They have one son, George, an Internal Revenue agent, who is thirty-five and bigger than either of them. The members of McGuinness's club once raised a thousand dollars and bought him a ring with an enormous sparkler, but though they had ordered the largest one in stock, the ring would not fit on any of his fingers, which are as big around as pick handles. "Bless us, but it don't even go on the pinky," he said in his speech at the presentation ceremony, trying to make the best of an awkward situation. He keeps the ring at home and debates with himself the propriety of having the stone set in a

ring for Mrs. McGuinness. Perhaps to make up for his lack of jewelry, he bristles with fountain pens, mechanical pencils, and jackknives. His only concessions in dress to the century in which he belongs are his black, high-top shoes and his white cotton socks.

McGuinness has a silver tongue, and he loves to use it. In his twelve years on the Board of Aldermen he missed only two meetings, and he made a speech at every one he attended—generally a long speech. Once he spoke at such length that a fellow-alderman finally crept down the aisle and wrapped a muffler around his head. A cigarette was dangling from one corner of McGuinness's mouth as he spoke, and both he and the muffler were singed. Years of oratory have had a curious effect on him, not unlike the effect that years in the ring sometimes have on fighters. He is speech-drunk. Just as an old pug comes out swinging at the sound of a dinner bell, so McGuinness will break into a speech at the mention of George Washington, Pope Pius XII, Franklin D. Roosevelt, or any of the other names that are hallowed in his kind of politics. Often he will make a speech simply to fill in a gap in conversation. Recently he was conferring with several friends when someone walked in and remarked that a plate of good hot soup was just the thing for the weather that day. Everyone nodded and mumbled agreement. Then, since the subject seemed pretty well covered, an embarrassed silence followed. Before it had gone too far, McGuinness broke it with ten minutes of rhetoric on soup, the underlying theme being that one of the country's weaknesses was a general lack of the kind of nourishing soup made by American womanhood fifty years ago. In ordinary conversation, his voice is low and sometimes scratchy, because of the wear and tear it has had over the years. Often, when he is trying to make a point, he uses a hoarse, confidential whisper, as though he were talking in church. In public speeches, however, or in private ones, his tones are clear and resonant and have a volume comparable to that of the late Joe Humphries. The strength of his vocal cords, like the strength of his muscles, is the subject of tall tales in Greenpoint. One of these is about the time the transmitter went dead while McGuinness was speaking over WNYC. Informed of the mishap, McGuinness just raised his voice a trifle and went on talking. He was heard throughout Greenpoint as well as before.

McGuinness is easily the most successful pork-barrel raider in the city, and many of his accomplishments in this field are the result of his eloquence. His talking has got Greenpoint many millions of dollars' worth of playgrounds and public baths, a hospital dispensary, a nurses' home, one of the two largest public swimming pools in the city, innumerable street pavings, a new high school, and an incinerator. One of his most notable achievements was keeping a ferry line running for thirteen years after it had ceased to pay for itself. Before the Independent Subway reached Green-

In McGuinness's early days, when the Socialists were politically formidable in Brooklyn, he often campaigned against them, but he was friendly with many of the Socialist leaders and even at times helped to advance their cause. On the old Board of Aldermen, he particularly liked B. Charney Vladeck. On several occasions, when Vladeck knew that one of his resolutions would be defeated if it came from a Socialist, McGuinness offered to sponsor it himself, thereby making it a Democratic measure. In this way McGuinness became the author of resolutions expressing sympathy with victims of injustice of whom he had never heard and resolutions protesting abuses for which his own party was responsible. "I loved him like a brother," he says of Vladeck. "The Lord never made a more splendid man than Cheeny. I figured if Cheeny was for something, it was good enough for me. I said to him, 'Cheeny, if you ever got anything you want to slip through here, just give it to me, old pal. I'll make it Irish for you.'" Resolutions sponsored by McGuinness always passed. Two or three years ago, when there was agitation for the release of Earl Browder from the federal penitentiary, McGuinness was asked for his views by a Brooklyn reporter. "I'm for letting him out," he said. "They tell me he's not so bad. He's got a very good job with the Communists. I guess he believes all that stuff, too. You just go back and ask the people who want to keep him in jail how the hell would they like to be there themselves."

Like most district leaders, McGuinness has managed to keep himself on the public payroll a large part of the time. In addition to being an alderman, he has been Sheriff of Kings County and County Register, and at present he is Assistant Commissioner of Borough Works in Brooklyn. In one sense, his current job is a comedown, since it pays only seventy-nine hundred a year. The shrievalty paid fifteen thousand and the register's job paid twelve. The offices of County Sheriff and Register, however, were abolished three years ago on the ground that they served no useful purpose. On the same day in 1941 that the voters of Kings County elected McGuinness their County Register, the voters of the state adopted a constitutional amendment doing away with the office. McGuinness had to take his present job as the next-best thing. He was appointed to it in 1944, upon the death of the incumbent. "I like this here work pretty good," he says. "It don't keep me tied down none." The Department of Borough Works is charged with the maintenance of streets, sewers, and certain public buildings. It is run by civil engineers and most of its employees are engineers and laborers. McGuinness does not pretend to be an expert on public works—although, having once been in the lumber business, he considers himself an authority on the Coney Island boardwalk—but his job does not seem to require much technical knowledge. In fact, it does not seem to require anything at all except part-time at-

tendance at his office at Borough Hall. He is there two or three hours a day, but most of that time is spent in working on his "contracts"—the politician's term for favors requested of him by his constituents or other politicians. McGuinness has no qualms of conscience about holding a job that involves little work. He feels that his real service to society is the work he does as a political leader in Greenpoint, and he regards his being on the municipal payroll merely a technical device to give him the money to carry on. "The thing of it is," he says thoughtfully, "you got to make jobs like this so a political man can get his work done." Robert Moses, who has given a good deal of thought to matters of this sort, is inclined to agree with McGuinness. "Of course, it's pure nonsense to expect a man like Pete to be an administrator," Moses said recently. "Pete is a leader and one of the best in the city. I've known him and worked with him for twenty years, and whenever I've needed to know anything about Greenpoint I've got more practical help and coöperation from Pete than I could ever have got from a hundred social workers, city planners, poll takers, and all the rest of that trash. No matter what you say about them, men like Pete have held New York's neighborhoods together, and if the reformers ever succeed in driving them out, the city is going to fall apart into racial and religious mobs."

McGuinness's working day is a long and often arduous one. He is up by seven and by eight has started on a long round of errands. Some days he travels by bus, subway, and trolley; some days he is driven around in one of the several limousines at the disposal of the Borough President. He may stop in at a doctor's office or a hospital to arrange for the care of an ailing constituent, attend a funeral or two, pay his respects to the bereaved family, argue with some constituent's landlord about heating problems or unpaid rent, run down a loose-footed husband and try to persuade him to return to his wife, arrange with the head of a city bureau to shift a member of his club from night to day work, and call upon several public agencies to clear up various problems of widows' and veterans' pensions, Social Security, workmen's compensation, service allotments, old-age insurance, and any of the other government business that brings the poor so much closer to their politicians than the well-to-do ever are. McGuinness also visits a good many courts and police stations in his tour. He does not like to say much about what he does there; he considers that when he is acting as lawyer, it is his duty to keep his clients' confidences inviolate. "I never talk about me people's troubles," he says. "But you know how it is. You're walking along the street, and somebody you don't even know bunks into you. You push him away, and he comes back. You give him another shove, and he's back again. One of that kind, you know. You give him a good one, and then some goddam patrolman busts in and takes the both of yez down to the station. *He* don't know who started it, so it's drunk and disorderly, the

two of yez. What the hell are you going to do? All the nerves in your body are jumping. You're cold all over. Then it comes to you. 'I'll call Peter McGuinness,' you say to yourself. 'He'll help me out of this.' Bejesus, I *got* to give you a hand on a proposition like that."

Once every week or two, McGuinness simply spends the day in Greenpoint, covering his district on foot. He checks up on such matters of public interest as garbage collection, the efficiency of the Fire and Police Departments, playground administration, compliance with tenement restrictions, and the condition of the pavements. If he sees or hears of anything wrong—a stopped-up sewer, a hole in the pavement, or traffic on a play street—he gets in touch with the authorities. Greenpoint is the most industrialized section of the city, and among its products are soap, varnish, gasoline, and other things whose manufacture is often malodorous. One of McGuinness's many boasts is that he has made Greenpoint smell better. He has forced factory owners to install devices that eliminate objectionable smells and smoke, and he is constantly sniffing for new attempts to pollute the air. As soon as he detects an unpleasant odor on the wind, he calls on the manager of the offending plant and threatens to take him to court for violating a whole series of local ordinances.

The close watch McGuinness keeps on Greenpoint has brought unexpected dividends. During the 1936 campaign, President Roosevelt spoke briefly in Greenpoint. Before he was introduced, he confided to McGuinness that he had been worried by the *Literary Digest* straw vote, in which Governor Landon was well in the lead. "I said to him," McGuinness recalls. " 'Mr. President,' I said, 'don't give it another thought. I got that goddam fake figured out.' " The President asked McGuinness what he meant. McGuinness explained that he had recently assigned three of his club members to spy on the city incinerator in his district. Some Greenpointers who lived near the incinerator had complained that horses were being cremated in its furnaces. The McGuinness followers spent several nights hiding in some bushes near the plant to see if horses were being cremated there, and they discovered that every night, after the Sanitation Department trucks had dumped their loads, some men who they knew were Republican party workers were coming there and buying up huge stacks of paper. A little closer snooping showed that they were blank *Literary Digest* ballots. "The people in Brooklyn got them fake ballots," McGuinness told the President, "and they turn them right out. The Republicans come around here and buy them for a nickel apiece. That's why Landon's ahead." The President laughed, and later in the campaign he sent word to McGuinness, through Postmaster Farley, that he was no longer worrying about the straw vote. "You know," McGuinness says, "when you make a man like that feel good, it sends a thrill right through you. It just made me feel cold all over."

McGuinness is in his office in Borough Hall by noon almost every day. He stays there until two-thirty or three, checking up on his contracts, welcoming constituents who find it more convenient to see him then about their troubles, and passing the time with old friends. Early in the afternoon he goes across the street to the press room in the Supreme Court Building, where he spends an hour or so catching up on political gossip, general news, and sitting in on the all-day rummy game there. He leaves not later than five, goes home to dinner, and and then walks to the Greenpoint People's Regular Democratic Organization, a made-over three-story frame house just around the corner from his own house, which is very much like it. In a large, gloomy room—decorated only with some blown-up tinted portraits of McGuinness with his arms around Jimmy Walker; a faded pennant bearing the name and portrait of Franklin D. Roosevelt; and a huge picture of McGuinness as a brawny young longshoreman—he sits down at his desk, ready for whatever the evening will bring. Constituents start arriving about six o'clock and wait their turn in straight-backed chairs in a room adjoining his office. These chairs, aside from a couple of small, plain tables and McGuinness's desk, chair, and safe, are the only furnishings in the club. McGuinness, who admires a touch of color in his surroundings, would like his clubrooms to be cheerier, but he says that it would be foolish for the Greenpoint People's Regular Democratic Organization to spend much money on furniture or decorations. "The fellows that come in here," he says, "talk a lot about baseball and things like that, and sometimes they get to arguing." The club telephone is kept in a padlocked squirrel cage, which McGuinness has to unlock every time the phone rings.

He stays in the club until twelve-thirty or one. He may see anywhere from a dozen to a hundred people before ten o'clock, but not many show up after that. Still, he feels that he should stay. "You never know when there'll be a late struggler," he explains. At about eight-thirty, some of his friends arrive and set up a rummy game, in which he takes a hand whenever he can. Most of the people who come to see him want the kind of routine favors he has done for others earlier in the day; the services McGuinness offers make him a combined attorney, job agent, accountant, and social worker. McGuinness asks no questions and extracts no promises. "A lot of Republicans come in here," he says. "If I can do a Republican a favor, he'll probably go out a Democrat." He also serves as a domestic-relations court. "It's one of the great happinesses in me life," he likes to say, "to think of all the husbands and wives I've kept together." His matrimonial advice to husbands consists of eloquent variations on one theme—"the old girl is always best." There are no statistics on his percentage of success, but McGuinness's way of handling people in trouble is admired by district politicians throughout the city. "None of the rest of us are in it with Peter," one of them said recently. "Sometimes I go out there to play

a little rummy with him, and I see him at work. Of course, he always takes people in his office to talk, and he never lets anyone else know what was said. But lots of times you can see the results. One night last winter, I saw something I could hardly believe. A young widow whose husband was killed in the war come in with a lot of papers about pensions and all that for Peter to take care of. She had her kid, a little boy, with her, and the two of them were crying. Peter scooped up the kid and put an arm around the girl and took them both in his office. When they come out—well, it's almost blasphemous to talk about it—but honestly, the two of them was smiling and laughing so, you'd almost think they were happy about what had happened. Just as they were leaving, I heard Peter give them the name of a picture framer and tell them to take the death certificate there. He said to order the very fanciest frame they could get and send the bill to the club." McGuinness, like most men of political influence, is often sought out by distraught relatives of people who have become involved with the law. Since he is considered Greenpoint's leading exemplar of virtue, he is also sought out by parents who simply want him to have a talk with young men and women who show signs of waywardness. His frequent lectures on the upright life are delivered with great solemnity. But he is usually ready to help even when his counsel has not been followed. "Murder, rape, and robbery with a gun I never touch," he says. "But something like housebreaking—what the hell, the first couple times don't prove there's anything wrong with a boy."

McGuinness considers his evening sessions with constituents the pleasantest part of his day. "As the fellow said," he will tell you with quite a show of sentiment, "helping out a pal in trouble—that's all there is in life."

PART II

Peter J. McGuinness, a rotund, robust, perennially high-spirited man who for the past twenty-two years has been Democratic leader in the Greenpoint district in Brooklyn and is today looked upon by many people as the classic American city politician, was born on June 29, 1888, in the section he now bosses. His father was a brass polisher, and there were thirteen children in the family besides Peter, but the McGuinnesses were never poor. The elder McGuinness owned the house the family lived in, and when he died, about twenty years ago, he left an estate of more than twenty thousand dollars, none of which went to Peter, because, he says, his father had wanted him to be a brass polisher and was humiliated by the fact that one of his sons was a politician. "To the old gentleman," McGuinness says reverently, "there was nothing in the world as good as brass polishing. I could never see it that way." McGuinness entered politics at the age of eight, when he became a ward heeler for Senator Pat McCarren, then the boss of Green-

point and for many years the boss of all Brooklyn. From the time he was five or six, he had worked at odd jobs in the neighborhood, not because his family needed help but because he enjoyed working and wanted pocket money. He ran errands for storekeepers and carried growlers of beer for workingmen; he also sold the eggs of some hens he kept in the back yard. His week-end sideline was serving as standard bearer for a marching society known as the Rinky Dinks. "The Rinks were a lot of young fellows around the Point," he says. "All of them were keeping company with girls, and the girls marched with them. None of them wanted to leave his young lady friend to carry the flag, so they hired me to do it." At his various jobs, McGuinness, who today is on more intimate terms with his constituents than any other district leader in New York, became well known throughout Greenpoint. "I was pals with the whole town," he says. "When I wasn't working or in school, I used to sit in the gutter on Greenpoint Avenue, the corner of Franklin. That way I got to know everybody because everybody came by there. People would come along and say, 'Bejesus, there's Petey McGuinness! Hello, Petey! What are you doing today?' I'd say, 'Oh, I'm fine, thank you, Mr. Flaherty. I was just sitting in the gutter here. How are you today, Mr. Flaherty?' Even in them days I was out there giving them all the big hello." One of McCarren's men, taking note of young McGuinness's politeness and good standing in the community, offered to take him on as a doorbell ringer. On election day of 1896, McGuinness went on the party payroll and made a dollar for getting out thirty or forty votes for Bryan and Free Silver. Each election and primary day he did the same thing, and between elections he was a chore boy for the local Democratic organization, the Jefferson Club. "I liked that kind of work the best of anything," he says. "I was always a great one for anything that had to do with people."

When he was fourteen and in the eighth grade, McGuinness left school, and though he continued to live in Greenpoint and to help out the local Democratic machine, he went to work every day in Manhattan. He was an office boy for R. H. Hoe & Co., printing-press manufacturers; then a runner on the Bowery, delivering Thomas J. Plunkitt's Celebrated Cigars to the Chatham Club, Steve Brodie's, McGurk's Suicide Hall, and other well-known resorts of the period. Everything about McGuinness's speech and appearance suggests the old Bowery, but he never considered himself a Bowery boy. "There were some splendid people on the Bowery in them days," he says, "such as Chuck Connors and Big Tim Sullivan, but I never thought too much of the place. I'm a neighborhood man, and the Bowery wasn't really what I'd call a neighborhood. It wasn't so tough as they say, either. Right now, Greenpoint is a lot tougher than the Bowery ever was, and it's a decent place, too." Later, when he grew old enough for man's work, he became a teamster for S. Brinckerhoff, Hay and Feed, and worked

evenings as a bouncer in the barroom of a Hudson River steamboat. For a while he was a promising young middleweight fighter; he fought fifteen bouts in all, of which he lost none and drew two, but he gave up boxing partly because he did not see how it could contribute to his political advancement and partly because, much as he enjoys fighting for fun or honor, he is not the sort to punch people for money. He says that he likes jobs in which he can be of service to his fellow-man, and he sometimes classifies the various political offices he has held according to the opportunities they have provided for social usefulness. Thus, he did not like being Sheriff of Kings County nearly as much as he liked being an alderman. "Being a sheriff and arresting people isn't a very loving thing," he says. "When you sum it all up, I'd say that alderman was about the most loving job I ever had."

Off and on, during this period, McGuinness attended night classes in bookkeeping, but that was the end of his formal education. On the whole, he is sorry he did not get more schooling. He believes in education, particularly in the liberal arts. He was deeply offended a few years ago when, after he had put in a decade of lobbying for a public high school in Greenpoint, the handsome one that was finally built turned out to be the Automotive Trades High School. He feels that there was something undemocratic in this—an assumption, perhaps, that because Greenpoint is a working-class section, it can breed only mechanics. "They think they put something over on me," he says. "Bejesus, now that this war's over, I'm going to get me another high school in here, and this time we're going to get an educational school." In one way he considers it fortunate that his education ended when it did. He had his heart set on a political career, but he wanted to become a district boss as soon as possible and to spend no more time than necessary in the service of some other boss. By making a name for himself, as he later did, outside the machine, he was able to become a full-fledged leader when he was thirty-six, but he feels that if he had gone on to high school or college, he might have been tempted to take a political job immediately upon graduation and then wait his turn for the leadership in the hierarchy of the Jefferson Club, which, like all political hierarchies, was based rather rigidly on seniority. In that case, he might have spent the better part of his life as a time server in a municipal job or perhaps in the State Legislature or Congress. No thought appalls him more. Like most politicians of his school, McGuinness considers congressmen members of an inferior class. To him, the local party bosses, who pick the legislators and tell them what to do, are the élite of politics and congressmen are men who, unable to make the grade as leaders themselves, must serve as legislative secretaries to men who have made the grade. He cannot understand the tendency, compara-

tively recent in this city, of political bosses to take congressional nominations for themselves. "I've sent plenty of them to Albany and Washington," he says, "but I'd never be such a damn fool as to send meself. Believe me, I'm glad I was never in a fix where anyone else could send me. If a man's a leader in New York, what the hell business has he got in Washington?"

Long before McGuinness became political boss of Greenpoint, he was the boss of its waterfront. In 1908, he gave up his career on the Bowery and started in as a lumber handler and stevedore in the John C. Orr lumber yard in Greenpoint. He was soon a rising figure in Lumber Handlers' Local 955 of the International Longshoremen's Association and was known throughout the section as the toughest of all the dock wallopers. "You could just about say," an associate of those days recalls, "that Peter was the king of this here waterfront right down to the Navy Yard or even Irishtown. He could work better than anyone else, and he could lick anyone else. He would fight anyone, and he licked everyone he fought." McGuinness brought himself to the attention of his fellow-longshoremen by his handling of two union delegates whom he overheard dividing up the dues they had just collected and telling each other their plans for spending the money. He knocked them cold. After he had taken the money away from the delegates and turned back the dues to the men who had trustingly paid the money in, he found that he had several dollars left over, so he bought a few kegs of beer for the next meeting of the local. At that meeting there was a purge and McGuinness got the first of several promotions in the local. He says that his fight with the delegates was the only grudge fight he ever had. "We had fights almost every day," he says, "but they were just for fun. Besides, you had to do that to be boss in them days. The others figured that if they could lick me they'd get to be boss themselves. We had a hell of a lot of fun out of it. Most of the time, we'd fight at lunch hour or just after work. Everybody'd stand around and watch. After the fights, I'd practice oratory for a while. I'd stand up there on a pile of lumber and give them all a hot spiel on something or other. They'd say, 'Bejesus, Peter, you're improving every day. Pretty soon we'll be after sending you to the Board of Aldermen.'"

McGuinness enjoyed the ten years he spent working in the lumber yard, and he regards lumber handling as the most stimulating work he knows of aside from clubhouse politics. He believes that it would be a perfect substitute for peacetime military training. "If they left this conscription thing up to me," he said recently, "I'd have all the kids in the country putting in a year or two in lumber yards. That's where you really get tough and learn to fight. If them Germans or Japs knew they'd be fighting lumber handlers, I don't think they'd ever try anything again."

Today McGuinness is a pillar of Brooklyn Democracy and will tolerate no irregularity, but in his youth he was a seditionist. In 1919, the boss of Greenpoint was James A. McQuade, who enjoyed a brief fame during the Seabury investigation, when he explained his bank deposits of more than half a million dollars by saying that he had borrowed the money to feed "thirty-three starving McQuades." McQuade was a short, squat, and essentially drab Irishman who spent most of his time at the race tracks and in the saloons of Greenpoint, places that McGuinness never patronized. McGuinness was frank and naturally exuberant; McQuade was inclined to be sly and lugubrious. Nevertheless, McQuade was a reasonably popular leader and was well entrenched. When McGuinness was getting his start in politics, he knew that if he accepted patronage from McQuade, he could not become boss himself until McQuade retired or died, and at the moment either event seemed rather remote. He therefore decided to overthrow McQuade, a job which took him six years and was regarded by those who watched it as a masterpiece of insurrection.

At the beginning of the war between the McQuade and McGuinness forces, Greenpoint was a discontented neighborhood. In the late nineteenth century it had been a community—a town, in fact, and the inspiration for "There'll Be a Hot Time in the Old Town Tonight"—made up of prosperous citizens who worked sedately and industriously, for the most part, in the lumber and ship yards along the waterfront. It was an important shipbuilding center; the Monitor was built there, and in its honor the principal hotel had been named the Yankee Cheesebox. Most of its buildings were row houses, owned by the people who lived in them and amply surrounded by open space. Salt water could be seen from almost any point; shipbuilding had been attracted to Greenpoint in the first place because it was nearly all waterfront. On the west was the East River; on the north and east was Newtown Creek, a salty inlet that is shaped like a scythe; and on the south another inlet, which has since been mostly filled in. But at the start of the new century, Greenpoint began to change, both physically and economically. The city had grown up all around it, so it was no longer a country village but almost the exact geographical center of Greater New York. Its waterfront became too valuable to stay in the hands of minor industries. The ship and lumber yards were replaced by factories and oil refineries, and they brought about an influx of low-wage immigrants, who in turn caused congestion. A hedge of smokestacks rose up along the waterfront, shutting off the view and pouring out upon the residential area clouds of soot, smoke, and smells. Property values went down. People who could afford to leave Greenpoint moved. No investors could be found to finance the replacement or the improvement of old property. The city was reluctant to do much to

benefit a community that was degenerating so fast. One of Greenpoint's amateur poets, a woman of insight, wrote in a local paper:

> Daily neighbors move to other sections
> Where buildings rise in process of erection,
> Where bridges close and cars are ever moving,
> Where roads and all conditions are improving.
>
> Yet dear Greenpoint, noble town of fame,
> Year after year e'er remains the same
> Through lack of unity to make a stand,
> To fight for the improvements we demand.
>
> Oh, those on high who watch mere mortals act,
> Send us a fighter, strong, clean, and intact,
> That we may save our fair town from decay
> And from the chains of unrest break away.

McGuinness began his attack on the McQuade machine by blaming it for Greenpoint's plight and by becoming the "fighter, strong, clean, and intact," for whom the poet—Julia V. Conlon, who later became his first district co-leader—had called. The press was his first forum. Every time he heard of a new grievance in the community, he wrote a letter to one of the local newspapers blaming McQuade and his organization. He blamed McQuade for Greenpoint's lack of playgrounds, the run-down condition of its streets, the smoke and smells from the factories, the garbage in Newtown Creek, and the fact that livestock was being herded through the streets of Greenpoint to the abattoirs of Long Island City. "These animals," he wrote, "knock over baby carriages with babies in them, and they knock down mothers, and the bulls kick them and knock them down, running into store windows and kicking them and breaking them. Why does Greenpoint have to put up with this? What's our leader McQuade and his Alderman and his Assemblyman doing to stop these beasts?" Other neighborhoods, he said, were getting public baths and showers, but Greenpoint, which was short on domestic plumbing, was not. "What's the matter with Park Avenue Jim McQuade? Don't he think his own people are good enough to have these baths and showers? What we need around here is fighting leaders. Why shouldn't Greenpoint be right up there with Flatbush and places like that?" McGuinness also attacked John McCooey, the Kings County boss, who was supporting McQuade against McGuinness. Like all good politicians, McGuinness pretended to be scornful of politicians in general and presented himself merely as a long-suffering private citizen who had been driven to action by corruption and abuse. "I have to laugh," he wrote to the editor, "when I think of these big bluffs of politicians coming into this district around election

time, getting on the platform and telling the people what they will give them, and when elected you never see the old blowhards again. If you ask me, all this is McCooey's work. Now, I say, let Mr. McCooey and his officeholders refuse us these improvements and we'll show them what Greenpoint can do. And who is this Mr. McCooey anyway? Does anyone ever see him around Greenpoint? Our motto here should be 'Greenpointers Work for Greenpoint.' "

In 1918, McGuinness felt that the iron was hot enough for striking. He announced that he would run against McQuade's alderman, William P. McGarry, in the next year's Democratic primary. When the Jefferson Club, for which he had worked since childhood, barred him and his followers, then mostly his fellow-lumbermen, he defiantly organized what he called the Open Air Democratic Club and held meetings on convenient street corners. He ran ads in the Greenpoint *Weekly Star*. "The Man of the Hour," most of them said. "Who Is He? Peter J. McGuinness." He continued to write letters to the editor and made himself good copy. Innumerable items appeared about him in the local press: "When you see Greenpoint's fighting candidate for Alderman, Peter McGuinness, ask Peter why he don't eat macaroni. Boy, he's got some answer." Or: "Jim McQuade better watch out. The Stormy Petrel of the North End was down at the Du Tel Pleasure Club one night last week, and the boys say he's on the warpath again." He organized the Peter J. McGuinness Greenpoint People's Regular Democratic Organization, the Peter J. McGuinness Greenpoint Patriotic League, and the Peter J. McGuinness Charity and Welfare Association. The first of these, from whose title his own name has since been docked, still exists. The others were wartime organizations. McGuinness said that McQuade and the Jefferson Club were not doing enough to boost the morale of Greenpoint's soldiers. McGuinness ordered his followers to canvass the neighborhood for money to buy presents for the men going off to war. Naturally, this was a popular cause. In the last war, the drafted men entrained for camp in public. Whenever a batch of Greenpoint boys went, they were given a sendoff by McGuinness and his partisans, carrying the banners of all three McGuinness organizations, and by the Full Military Brass Band of Professor William F. Connolly, a musician who was, and still is, one of McGuinness's most important political allies. Each draftee was presented by McGuinness with a martial bon-voyage kit of food, cigarettes, soap, razor blades, and the like, as well as an inspirational leaflet signed by Peter J. McGuinness. The soldiers continued to receive presents in camp and overseas, and when they returned many of them joined the Greenpoint Labor Veterans' League, Peter J. McGuinness, Honorary President. One local boy, who claimed to be the first soldier from Greenpoint to reach German soil, wrote home a letter that was prominently displayed in the

Star. "I was thinking of Greenpoint through every minute of it," he said. "In the last few months I've seen a lot of other Greenpoint boys over here. We talk about home all the time. . . . I find that most of the boys feel about the way I do. They think that Peter J. McGuinness is doing very good work for Greenpoint. We sure hope he keeps it up and that Greenpoint appreciates him." In the next primaries, McGuinness won the Democratic nomination for alderman despite the regular organization's opposition, and he was easily elected that November. He kept his job in the lumber yard until the day before he took office.

McGuinness stayed an alderman until 1931, and for those dozen years he was unquestionably the Board's most celebrated member. Nowadays he seldom gets into the newspapers, largely because, as Assistant Commissioner of Borough Works in Brooklyn, he is not where news is made, but during the twenties he was the subject of almost as many feature stories as Daddy Browning, Admiral Byrd, and Dr. John Roach Straton. A comment by McGuinness on prohibition, the New Woman, or the war debts, frequently accompanied by a picture of the Alderman in an aggressive pose alongside MacMonnies' statue of Civic Virtue in City Hall Park, was almost a regular department in the afternoon papers. He liked to give out statements defending New York against bluenose attacks on the city. When the Board of Temperance, Prohibition, and Public Morals of the Methodist Episcopal Church released one of its periodic denunciations of New York for its profanity, short skirts, and iniquitous theatre, he said in rebuttal, "New York is the cleanest city in the world. You can't find a more moral race of people on earth. The theatres of New York are great educational institutions. There's no more profanity here than anywhere else. New Yorkers may swear on impulse but never from the heart. New York has the healthiest air in the country. What if the girls do go in for few clothes? The good air gets to their bodies and makes them healthier. Look at Adam and Eve. They wore fig leaves. Think how many descendants they had. Good night, there's no harm in women wearing few clothes."

Unlike most aldermen, McGuinness attended every meeting of the Board and almost always had something to say. He probably made more attempts to devise a legal way around prohibition than any other legislator in the country. No epidemic of grippe or head colds could strike the the city without McGuinness's petitioning the federal government to release its stocks of seized liquor to the public. "It's a shame," he would declaim, "to allow whiskey to lie idle while people are lying at death's door who could be saved by it." His most generally admired speech, however, was delivered when Mrs. Ruth Pratt resigned from the Board after being elected to Congress. McGuinness, a lover of political ritual, who is today the President of the Association of Past Aldermen of the City of New York,

always took charge of the purely ceremonial functions of the Board, and when Mrs. Pratt resigned he delivered a testimonial on behalf of his fellow-aldermen, which ended:

> Ruth, all we have to say is that when you go down to Washington you want to take along that beautiful fur coat that your dear husband gave you. You want to wear that coat in Washington, Ruth, because it's very, very cold down there. Washington may be further to the South than New York, but the people there are as cold as ice. They don't love one another the way people here do. Why, you know yourself, Ruth, that here in the Board of Aldermen there isn't a single man who if you were cold and unhappy, he wouldn't put his arms around you and hug you and try to make you feel good. But you'll never in your life find such loving hearts in Washington. I know, Ruthie darling, because I been there and in the coldness down there I nearly froze meself to death. So you'll sure need that fur coat, Ruthie, me darling.

McGuinness feels that his greatest triumph as a legislator was a series of resolutions asking the heads of city departments to give what he calls their "per dime" employees holidays with pay; these resolutions, which were passed in 1921, are the complete negation of the idea of per-diem employment, but McGuinness holds that they were forerunners of such legislation as the Fair Labor Standards Act and the National Labor Relations Act. He often cites them as evidence that his devotion to the New Deal is of long standing. "When you look back on it," he says, "you can see I was working on a lot of them humane matters meself twenty-five years ago."

The best example of McGuinness's resourcefulness as a politician is his campaign for farm gardens for the children of Greenpoint. During the first World War, most of the local war gardening was done in city parks, parts of which were plowed up and parcelled out to amateur vegetable growers. McGuinness found that the children in his district enjoyed working in the gardens, and when the war was over he persuaded the city administration to let them continue. After a few years, however, when McGuinness's skill at legislative maneuvering was getting Greenpoint far more than the district's fair share of appropriations for improvements, the Board of Estimate began to rebel. By persuasive argument, McGuinness headed off several attacks, but finally he was forced to use guile. He got the funds that made the gardens possible by announcing that, to show the Board how much the children appreciated the privilege, he was going to bring six hundred of them to City Hall for the Board's public hearing on the matter. "I knew that would scare the bejesus out of them," he says. He told a functionary that he had chartered several buses to get the children over. "They'll need a lot of room, God bless them," he said, "because I want them to have their little shovels and hoes and rakes along with them to show the Mayor how much they love tilting the soil." The prospect of six hundred youngsters loose in City Hall with garden tools

produced immediate assurance from Mayor Hylan that the appropriations would go through.

The next year, McGuinness got money for the gardens by nominating Mayor Hylan for President. He says that he argued before the Board for an hour and knew that he would lose unless he got the support of the Mayor. "I could see he was going to vote against me," he says. "The sweat was pouring down me back. All the nerves of me body was jumping. I could just see them kids when I had to tell them there wouldn't be any more gardens. Then it just come to me. It burst right into me brain. I made it up as I went along." He said:

Mr. Mayor, in the history of our glorious country there have been two great Presidents. One was the Honorable George Washington, who led this nation to freedom, and the other was the Honorable Abraham Lincoln, who freed the poor slaves in 1865. Ever since 1865 a pair of old black shoes have been standing beside the President's desk in the White House. Those shoes are old and worn, but they stay there in the White House because they know that the man who used to walk around in them was loved in the hearts of the poor people of America. And he loved the poor people, too, Mr. Mayor. He was the man who said that God must have loved the poor people because he made so many of them. Now, when they laid Abraham Lincoln away, those shoes came walking back into the White House and put themselves beside his desk, and they've been waiting there ever since for a man who loves the poor people as much as he did to come in and fill them. Today, Mr. Mayor, the City of New York is going to fill those shoes with one of its own, John Francis Hylan, who in his splendid wisdom in voting for these farm gardens is bringing happiness into the lives of the little ones of Greenpoint and is showing his people and the great Democratic Party, which has always fought for the poor people, that he loves them too. John Francis Hylan will be the next President of the United States.

Hylan cast his three votes for the appropriations. The next morning the newspapers ran stories headlined "Hylan-for-President Move Started by Local Democratic Leader" and the like. When reporters called on McGuinness, he ducked most of their questions. "Hylan's a splendid man," he said, "one of the highest-type men in the country today." When he was finally pinned down, however, he said, "What the hell, I don't mind giving out a few nominations if it will help Greenpoint."

After he was elected alderman, McGuinness let four years pass before he ran for county committeeman, thus challenging McQuade for the district leadership. By that time, he had delivered on most of his campaign promises. In 1924, he defeated McQuade for the leadership. After the election, he told McQuade he had better close up the Jefferson Club and join the McGuinness Club. McQuade declined, and the war was really on. McQuade, who was backed by McCooey and the county machine, tried to regain the leadership in 1926, 1928, 1930, and 1932. Each time

McGuinness was reëlected by a larger majority. The contests were exciting, nevertheless. "You should have been out here then," one old Greenpointer has said. "You never saw anything like it. There were bands playing all the time and fights on every street corner. The two clubs were right across the street from each other in the early days, and you'd see Pete making a speech in front of Jim's club and Jim making a speech in front of Pete's club and all the torchlights flaring up around them. And Peter's parades—you never saw such parades." McGuinness feels that his parades had a lot to do with his success. "Them and the baskets," he says. "We gave out the biggest Christmas and Thanksgiving baskets in the history of New York State. I don't think you could name a kind of vegetable we didn't put in them baskets, and we always bought the fattest, juiciest turkeys we could find."

McGuinness's parades were generally in celebration of his triumphs in wheedling improvements out of the city. "Almost every time we'd get a new lamppost, there'd be a parade," he says. Since the improvements were for the benefit of the whole community, everybody marched in the McGuinness parades, even McQuade and the handful of Republicans in Greenpoint. But there was no mistaking the fact that it was McGuinness's show. His club members were always first in the line of march, just behind Professor Connolly's band. Sometimes they rode horseback. McGuinness used to borrow dray horses from the John C. Orr lumber yard. "We held the parades at night," he says, "and the horses wasn't working then, so we thought it would be nice to have them in the parades." McGuinness often led the parades, mounted on a white truck horse and wearing a ten-gallon hat.

Along with the parades, McGuinness arranged a good many clambakes and kiddies' outings, as well as an annual event called Ye Olde McGuinnesse Farme Barne Dance Nighte, with Professor William F. Connolly's Hayseede Orchestra. Most of these parties were designed simply to maintain good will in the district, but a few were on a more commercial basis. These "rackets," as politicians, harking back to an early meaning of the word, call the parties, were to raise money for campaign expenses. Part of this money went for some of the most cryptic propaganda in political history. McGuinness believes less in the placards which most politicians put up in store windows and paste on fences than in throwaways the size of calling cards. "With them, they got something they can carry around and think about," he says. He still has some of the cards used during the long war with McQuade. One of them says:

VOTE FOR MCGUINNESS
MCQUADE CANNOT BE TRUSTED
QUINN (FLOPPER) HAS NO PRINCIPLES
ELIMINATE THE SOREHEADS
VOTE FOR MCGUINNESS

Another goes:

DON'T MIND THE DARN FOOLS
THEY DON'T KNOW WHAT IT'S
ALL ABOUT
EVEN THOUGH THEY WOULD BE
NOMINATED THEY WOULDN'T
KNOW WHAT IT IS TO
BE A LEGISLATOR
NOMINATE EXPERIENCED MEN

McQuade's surrender was a magnificent occasion, as solemn and formal as the Japanese surrender to General MacArthur in Tokyo Bay. It came one May evening in 1932. McQuade and an even hundred of his followers met at the Jefferson Club and locked the front door for the last time. Then, with McQuade at their head, they marched slowly down the middle of Manhattan Avenue, the main thoroughfare of Greenpoint, to Norman Avenue, and down Norman Avenue to the new headquarters of the McGuinness Club. McGuinness stood at the head of the flight of stone steps leading to the door. He was flanked by John McCooey, the county leader, who had finally boarded the McGuinness bandwagon, and by James Burns, the Borough President of Brooklyn. McQuade walked up the steps, and McGuinness stepped a few paces forward and took his hand. He then wheeled about and led him inside, where McGuinness, McCooey, and Burns watched McQuade and the hundred followers sign the McGuinness Club roster and give the treasurer their first month's dues. When this was over, McGuinness and McQuade went outside again, where a crowd had gathered for the ceremony that was to follow. McGuinness and McQuade made brief addresses. "Peter J. McGuinness," McQuade said to the audience, "is now the undisputed leader of this district. Let no man say that I am not earnest in my admiration of him. These ugly rumors must stop." "From this day forward," McGuinness said, "Pete McGuinness and Jim McQuade march forward hand in hand like brothers for the benefit of the grand old Democratic Party."

In one of his speeches before the capitulation, McGuinness had said of McQuade, "He is the most despicable man in public life today. He is a man who is not even a man among men." When McQuade died, in 1935, McGuinness spoke at a memorial service. "You could always say of old Jim McQuade," he said, "that he was a man among men."

Most of the time that McQuade was district leader, he was on the public payroll either as Sheriff or as Register, and when McGuinness became leader he succeeded to these jobs, which he held alternately. Both posts were abolished some years ago, and McGuinness has had to be satisfied with being Assistant Commissioner of Borough Works. He can have this

job as long as there is a Democratic administration in Brooklyn, but he has one further ambition. He would like to be Borough President of Brooklyn. He has never wanted a job that would take him out of the city or force him to relinquish his leadership in Greenpoint, but he feels that the Borough Presidency would be a fitting climax to his career. He has had his managers do some exploratory work in the past ten years, but he has only once publicly avowed his ambitions himself. Around convention time every year some reporter with a long memory asks McGuinness whether he would accept the nomination, and he is usually indirect in his answers. "I don't think I ought to be saying anything meself," he once replied, "but I will say for me sweetheart that it would make her proud as a bird of paradise." It was in 1937 that he made his one unequivocal announcement on the subject. "The demands," he said on that occasion, reading from a prepared statement, "have been so many and so general that after considerable thought and for the best interests of Greenpoint and my supporters, I have decided to throw my hat in the ring and declare tonight that I am willing to accept this nomination should the County Leader see fit to honor me."

If McGuinness should ever be nominated, the Citizens Union, which keeps a close check on all candidates for public office, would undoubtedly dust off a statement it has been issuing periodically since 1921, which reads, "The record clearly indicates that Mr. McGuinness is not qualified for any public office." Since neither the opposition nor the endorsement of the Citizens Union has been known to affect the outcome of an election, McGuinness has never bothered to defend himself against it. However, he is always ready to talk about his record for honesty, which is impressive. "Bejesus," he says, "they'll never show anyone where Peter J. McGuinness ever stole a single vote or took a nickel from a man for getting him a job." McGuinness has been investigated twice, once by Samuel Seabury, for the Hofstadter Committee, and once by Paul Blanshard, the former Commissioner of Accounts. Both times his affairs were found to be in order. In 1927, his clubhouse was raided because it was quartering bookmakers. McGuinness makes no bones about the matter. This was during the war with McQuade. Some bookmakers approached McGuinness and told him that many good precinct workers, McGuinness followers at heart, were being kept in bondage to McQuade merely by their love of horseflesh. The McQuade club had facilities for betting; the McGuinness club did not. If McGuinness would provide them with space for operations, the bookmakers said, his club's membership would increase. McGuinness thought that their point was well taken, and so it was. When the gamblers came in, membership rose quickly. The police held him briefly after the raid but released him when the play-and-payoff sheets showed that only the reasonable profit of twelve per cent was being made by the

bookies and that there was no evidence that McGuinness or any other official of his club had received any of the gambling money.

At the Seabury investigation, McGuinness was the most ingratiating of all the witnesses. Many of the district leaders called upon to testify were sulky on the stand; a number of them refused to sign waivers of immunity. McGuinness was delighted with the whole proceedings. He came accompanied by dozens of Greenpointers and walked briskly to the witness stand, where he signed a waiver with a flourish. "Gentlemen," he said to the attending members of the Hofstadter Committee, "I am glad to present me presence here today. How do you do?" Seabury kept McGuinness on the stand for hours, largely, he said later, because he liked to hear the man talk. He asked McGuinness about his rise in Greenpoint politics. McGuinness responded with the story of his life and his fight with McQuade, who, Seabury had just discovered, had banked a few hundred thousand dollars more than he had earned. Seabury asked McGuinness if he had any such ill-gotten gains on deposit or in one of the celebrated tin boxes. McGuinness pulled out of a pocket a wallet the size of an overnight bag, which he has always used as a filing case for his "contracts," the politician's term for requests for favors. "Judge," he said, "this is the only tin box I got. Look it over, Judge. It's never contained anything but the heartaches of me people, me Jewish *mazuza*, and me father-in-law's front collar button. He was a great old champ, Judge." Now and then, Seabury questioned McGuinness about gambling in his clubhouse and asked if he would accept responsibility for anything that went on there. "Judge," McGuinness said, "there's only one leader of that club. Right here before you. Shoot, Judge." There was some more aimless questioning about what had for years been a matter of record, and McGuinness finally grew bored with this. "Judge," he said, "what do you say we bury this? Don't let's be talking about it any more. It's dead, and I'm tired of looking at it." Seabury, after a few pleasantries, ended the examination. As he left the stand, McGuinness again addressed the committee. "Gentlemen," he said, "it's been a pleasure, I assure you, having this great pleasure of coming before you. I want to thank Judge Seabury, too, for being so kind and courteous to me. Good afternoon."

At times, McGuinness adopts a great air of virtue about his honesty. "How do you think I'd feel," he says, "if I was to stand on the corner and see some pal coming down the street, and I couldn't look him in the eye without thinking, well, I got five hundred bucks for getting that one the job he has today? Why, I'd feel just awful inside to think I had one nickel that should be going to feed another man's little ones." More often, however, he puts it on a purely pragmatic basis. "There's no percentage in it," he says. "Suppose I tell a precinct captain to use repeaters. He gets away with it in a city election, then a state election. Then he tries

it in a federal election and gets caught. He says I put him up to it. Then I'd have to go before a federal judge that I mightn't even know." He also points out that he is never exposed to the temptations that beset other politicians. He lives simply. He has never, he declares, tasted liquor in his life, or seen a horse race, or placed a bet on anything but his penny-a-point rummy games. He is not a prude, but he just has no need for artificial stimulation. McGuinness and his wife live in a four-room apartment which seems to be furnished largely with blue-tinted mirrors, golden-oak chairs and tables, fringed lampshades, and a reproduction of the "Last Supper" done in butterfly wings. Mrs. McGuinness does all the housework. McGuinness seldom takes any time off. He tries to get away from his club one evening a week to meet Mrs. McGuinness in downtown Brooklyn and go to a motion picture. "The wife picks all the shows," he says. McGuinness has not seen a movie he really enjoyed since Marie Dressler died. He used to smoke five packages of cigarettes a day, but his doctor ordered him to give up tobacco four years ago. "Right now," he says, "I don't smoke, drink, chew, nor gamble. And I never go to any of them Jesse James night clubs. As the fellow said, 'If you don't do none of them things, Peter, what the hell do you do?' I say, all I do is take God's beautiful air and sunshine. And I play politics."



CHAPTER VII

Political Parties

41. POLITICAL PRIMER FOR ALL AMERICANS [1]

LARGE numbers of Americans are convinced that politics is evil and that most politicians are dishonest. This conviction becomes their justification for not participating in politics. It is probably safe to say that the politician is no better or worse than those who elect him and that he reflects the standards of his most active supporters. If the politician is ever to become a mirror of the interests of the whole community, then the whole community must participate in politics. This selection is an exhortation and a guide to action.

I. POLITICS AND POLITICIANS

POLITICS is the science of how who gets what, when and why. Politics exists in every civic group, church, labor union, family. The key man is always a politician. He keeps things going, wheels turning. Politicians are good, friendly people. They resolve conflicts, compromise in the best sense. The alternative to our politicans is a dictator, someone who hates life and people.

To the average American, politicians are crooks. *"What's the use of voting?"* asks Mr. Citizen. *"Politicians are all alike!"* The truth is that politicans are no more corrupt than the people who elect them. The people corrupt the politicians. They demand traffic enforcement along with ticket *"fixing."* They want an efficient, honest police force and civil service so long as their sons and cousins get jobs—and a fine school system with the faculty staffed with relatives. The politician who refuses requests for patronage and spoils is told that he'll not be reelected.

Let's quit blaming the politicians and face the responsibility of full

[1] Prepared by the CIO Department of Research and Education; Director, Kermit Eby.

citizenship. Let's go to work where it counts—in the political party of our choice. Let's be sure our organizations do not waste their vote by splitting it. We are strong *if we vote* and vote together.

II. THE REST OF US

The USA is full of people of good will. They want to make this nation a happier place. They seek out the likeminded. An organization is formed. Committees are assigned to study problems. Minutes are kept, resolutions written, petitions circulated. Sometimes letters are written to public officials. If the situation is critical, citizen groups call on the mayor or governor, are received politely, dismissed politely, often ignored politely. And they become discouraged.

Ever more people in our big cities are rootless, unattached to the community. Men with business in the heart of the city commute to the suburbs. Professional workers in crowded schools and offices live in cleaner, more comfortable areas. In May and October, great numbers of people move from one community or neighborhood to another, failing to register and thereby losing their vote.

Leadership is often left to job-holders, corrupt persons on the spot. Independent voters who cannot be controlled do not bother to vote; machine-controlled voters who can be, do. As a result, our futures are decided by those who act under instruction and those who do not act at all.

III. EDUCATION

Americans are brought up to believe that every profession is honorable save politics and public service. Students inherit from parents and teachers a naive conviction that statesmen are born, that their high place in life is due to a combination of idealism and noble character. National offices—the Presidency, Congress, the Supreme Court—are discussed at length in civic classes; local offices—the mayor, the sheriff, the town council —are skimmed over. It is unfortunate that we grow up so well informed about the terms of offices and salaries of national officials, with whom we have the least influence and contact, and so ignorant of the ingredients of their positions.

Boys and girls should be taught that statesmen are first politicians; should be encouraged to enter politics, join the youth organizations of the Young Democrats, Young Republicans, or Labor Party. Unions should assume the responsibility of training their members in effective political action. Everyone interested in practical steps should learn to ring doorbells, crank mimeographs, keep headquarters in order, study names and faces.

To continue functioning as a democracy, we and our children must learn how democracy works in practice. We must rewrite our textbooks. We must emphasize the individual's responsibility not only to vote but to join a political party, to form and voice his considered opinions, to do his share of legwork. In that way we may earn true citizenship!

IV. PRECINCT CAPTAINS AND HOW THEY GROW

Action follows membership in a political party. Precinct captains are men of influence and action. They meet people, help them with their traffic tickets, provide access to the school administration, find legal help and clearance with the courts when needed. During the depression, the precinct captain was often the friend in need, who came through with food and shoes when everyone else had failed. Voting for the captain's candidates was the least a grateful voter could do.

The following steps lead to captaincy:

1. Know the number of your ward and precinct.
2. Do anything which needs doing.
3. Become acquainted with the "bosses" and your neighbors.
4. Listen to your neighbor's beef, but don't argue with him.
5. Make out a list of your friends and acquaintances. Call them on the phone, invite them to meetings, introduce them to candidates, keep a list of those who attend.
6. Do whatever favors you can for people.
7. Make yourself heard at meetings, especially on subjects of policy.
8. Start discussions of local politics at social gatherings: bridge parties, afternoon teas, stag affairs.
9. Distribute literature of sympathetic organizations: labor unions, PTA's, religious and liberal groups.
10. Get control of more votes than anyone else in the precinct—and the job's yours.

V. THE CAUCUS

Once you've become a precinct captain, the next important function is to become part of the caucus to select the candidate. The caucus is the "in-group." Nominate a friend as delegate to the convention and have him nominate you. Nominate your wives as alternates. If this shocks you, remember that the choice is between your policy and your man, and the opposition's policy and man.

The operation of the caucus is more important than the primary, perhaps as important as the election itself. The trades which precede the nomination of candidates should be understood. At the caucus the original choices are made. At the primary our choice is reduced to one.

At the election we choose the man on our side as against the man on the other side.

VI. LABOR AND POLITICS

Party caucuses select men who are known. Labor must develop men known for their civic leadership, on school boards, park commissions, etc. The statesman of tomorrow is the politician of yesterday. The effective labor leadership of tomorrow will include the whole community. Labor alone can not be secure in an insecure world.

Organized labor should set up political action committees, both in local union and congressional district, on a permanent basis, which can find and work with labor men active in politics, sympathetic friends in racial and nationality groups, friendly newspaper editors and writers, liberal church and civil leaders. Trade unions should coordinate their political activities through their city and state organizations. They should unite, not split the labor vote.

Labor's contribution to the war effort—through its record-breaking production—and to the normal activities of the community—through the strength of its democratic organization—must be understood and appreciated by middle-class America. The constant hammering of the anti-labor press, emphasizing strikes and reporting anti-union speeches, reviling union members and labeling their leaders racketeers, confuses many citizens. The NAM spends millions on such propaganda, which goes to schools and ministers, poisoning the minds of teachers and children, and glibly keeping from them the true state of affairs.

Labor is no longer a minority group, part of the community. In many sections of America, *labor is the community!* It must therefore assume political leadership. Members of the CIO should follow the leadership of the CIO Committee for Political Action. Every union member should be incorporated in the political activity of his union.

All of us must register.
All of us must vote.
All of us must help get out the vote.
All of us must contribute to campaign expenses.

The non-political union is becoming a thing of the past. Government decisions constantly affect labor.

Organized labor and liberals have failed in the past to elect the right men. They will fail again if they don't get busy now and see that the labor vote is organized and ready for the polls.

Labor's rank and file must assume responsibility for decisions referred to them instead of asking their officials, "What are we paying you for?"

VII. FINANCES

Political organizations and their leaders must be supported by the people they serve. Too often has the income come from special interest groups, organized vice at the bottom of the social scale and organized privilege at the top.

One hundred $1.00 contributions are better in a democratic set-up than one $100 gift. Small gifts from thousands of contributors are the next thing to active participation by all those voters. People are inclined to take more interest in causes they support financially.

"He who pays the piper calls the tune." This is particularly true when contributions are large and from a few sources. More small contributions mean more freedom and democracy in the organization.

VIII. POSTWAR PLANS

The postwar world will contain all the elements of the present world. It is up to us to remold them nearer to a working pattern. Blueprints are legion. Now it is time to make sure our kind will be used. Congress makes the decisions. The kind of Congress which passes anti-union legislation, encourages inflation, stalls on social security and follows conservative business leadership on postwar planning is hardly the kind to foster the people's world we have been fighting for.

In a democracy, our national representatives represent either us or our enemies. Leadership standards in the state legislatures are as high as we demand and are willing to work for; so are members of city councils. The survival of modern society depends on the workers. Let's quit blaming the politicians and face the responsibility of full citizenship. Let's go to work making our organizations strong. Let's not scorn politics! Let's become politicians, ourselves!



42. SOME LOBBIES ARE GOOD [1]

EVERYONE is aware that lobbying is an important phase of the governmental process, but few have any knowledge of the techniques of lobbyists. Too many of us think lobbyists are reprehensible characters engaged in shady, underhanded tactics. Mr La Follette, a former Senator from Wisconsin and an acute student of the Washington scene, here presents a favorable picture of the lobbyist and his techniques.

[1] Robert M. La Follette, Jr., *New York Times* (May 16, 1948), pp. 15 ff.

THE lobbyists in Washington are out in full force. The reason is self-evident. The Congressional calendar is jam-packed with controversial legislation which affects the pocketbooks and general welfare of millions of businesses, trade organizations, labor unions, professional societies and individual citizens. Lobbying with respect to Federal legislation is a multi-million dollar enterprise and seemingly increasing.

Public housing, labor legislation, Government subsidies, public power development, universal military training, legislation pertaining to oil, railroads and airlines—whatever the decisions may be by Congress on these and other pending issues, they will vitally affect the lives and fortunes of many.

The extent, methods and influence of lobbying activities in the nation's Capitol are not easy to evaluate. Not all of the activity that exists is discernible on the surface—notwithstanding the lobbying registration provisions enacted in conjunction with the Legislative Reorganization Act of 1946. On the other hand, exaggerated opinions are easily conjured in the absence of more complete facts. This much is certain: lobbying with respect to Federal legislation—and this does not necessarily mean attendance in Washington—is a major activity and has developed in recent years to the point where all the intricate and elaborate techniques known to the arts of advertising and public relations are frequently involved.

The fundamental aspects of lobbying are nothing new. In fact, the concept of trying to influence legislation by contacting legislators stems directly from a fundamental right in our democracy—the right of petition. The term itself, which is peculiar to the United States and not used generally elsewhere, apparently has its origins from the practice of seeking contact with legislators in the waiting rooms or lobbies, near the legislative chamber where the public is permitted. It is picturesque, just as the associated term to "buttonhole" a legislator, which is duly listed in Webster's Dictionary with the definition: "to hold by the button or buttonhole, as for conversation." It is doubtful how effective the literal application of the term may be; but "buttonholing" in the more general sense is in fact lobbying in its simplest and sometimes most effective form.

The practice of lobbying undoubtedly has been stimulated over the years as a result of the greater role assumed by Government in dealing more and more with the everyday activities of its citizens. For better or for worse, gone are the days of laissez-faire, caveat emptor and rugged individualism. The Government, and especially the Federal Government, has become an interested party in all manner of human relationships, economic organization, and with respect to the entire fabric of society.

Undoubtedly, lobbying has been stimulated too by the improved facilities of communication and transportation, whereby the public is enabled to keep tab on every step in the legislative process and to register reactions

before it is too late. News and reaction on a large scale can be registered now in a period of a few hours, as against days, weeks or months a century ago. It is possible now, as we saw a few months ago, for a Senator to begin a filibuster speech and express a hope that a public reaction will set in before he finishes that very speech!

Also, lobbying is directly related to the complexity of the legislation under consideration. The more complex or technical a bill may be, the more need there is for expert advice and assistance on details. Often the persons directly affected can give the best information on practical application, as contrasted with the academic approach of the public administrator less familiar with details, even though such "practical" opinion often needs to be discounted to eliminate personal bias or generalized to meet a broader application. Tax legislation most certainly falls in this category.

Lobbying may be a pernicious evil at one extreme or an indispensable part of the legislative process at the other, depending on the circumstances and the methods of lobbyists. Few if any legislators would hold a brief for the avaricious, anti-social or unscrupulous tactics to which some special interests sometimes resort; but even fewer would be willing to abolish lobbying and cut off essential sources of information in exchange for "protection" against the unscrupulous.

The cloud of suspicion and the connotation of evil associated in the public mind with respect to lobbying is probably due primarily to three factors: (1) some lobbying activities do embrace undesirable methods or are working toward objectives which are inimical to the public welfare; (2) an element of secrecy often surrounds lobbying and is conducive to undesirable activities; and (3) there have been instances, which are now rare, when contacts for lobbying purposes were frequently associated with the giving and taking of bribes.

The latter situation was brought within the purview of the criminal code of the United States as far back as 1852 and has been strengthened by several major enactments since then, which provide for heavy fines and imprisonment plus forfeiture of public office and disqualification for holding thereafter any office of honor, trust or profit under the Government of the United States.

It is generally accepted that cases of outright bribery connected with lobbying are rare in Washington nowadays. I have been on the scene and close to many news sources in the Capitol for many years and my own observations confirm this opinion. The distribution of gifts of products or commodities to members of Congress is not uncommon, but there is no evidence that the practice has influence on legislation.

Efforts to curb the abuses of lobbying have been directed generally at the objective of full disclosure of sponsorships and expenditures. The force of public opinion, it is reasoned, will then be brought to bear on its

abuses. That is the theory, too, on which most of the state laws on lobbying have been based. Massachusetts passed the first lobbying law in 1890 and about thirty-five states now have such laws, with varying provisions and varying degrees of enforcement.

The Federal Government's general lobbying act went on the statute books less than two years ago as a part of the Legislative Reorganization Act of 1946. Although lobbying on specific issues had been investigated on various occasions, and although legislation was passed on a few random aspects—such as the prohibition on the issuance of free railroad passes to legislators, and the special provisions directed against lobbying by the public utilities and shipping interests (in 1935 and 1936)—the enactment of general legislation had been frustrated for the primary reason that proposed legislation always followed too closely after disclosures of flagrant abuses. This tended to paint all lobbyists with the same black paint. It was naturally resented and opposed even by those who had nothing to fear from disclosure.

Fortunately, the 1946 act was not an aftermath of any lobbying scandal. It was sold to the Seventy-ninth Congress for what it is—an act to reveal the activities of lobbyists, not necessarily to curb or pass judgment thereon, and certainly not to interfere with the rightful access of citizens to their Congress.

As to the effectiveness of the present law in providing disclosures, it is generally agreed that considerable activity goes unreported, much of it under the interpretation that lobbying is not a "principal" activity of the organization or person. The Department of Justice, which is currently investigating compliance with the law, takes the position that any lobbying for compensation which is more than incidental activity must be reported, whether it be by an organization, its agents, or individuals. Until recently very few national trade organizations made reports as such, although their representatives did file reports of their own particular activities; and labor unions took the same course under the law. It remains to be seen what interpretation the courts will place on this section of the act, but already the action of the department has spurred many new registrations on the part of organizations as well as their agents.

The techniques of the lobbyists are many, varied and ingenious. They change and develop as conditions change and develop. The system of deluging Congress with thousands of communications obtained by "pressing a button" and giving the signal to the "faithful" back home to write or telegraph (without their knowing necessarily what the facts and issues are) is a comparatively recent development in Congressional annals. Yet, in the opinion of many, this technique is already outdated and has lost much of its effectiveness. Trade associations, labor unions and public utilities have pushed this device to the limit in past years—to say nothing of the

officials in the executive departments who have used it to gain legislative ends or to stave off impending cuts in appropriations, notwithstanding the prohibition in law against using appropriations for such purposes.

A variation of this technique, that of sending large delegations to call in person on members of Congress, has proved to be a liability in some cases. Delegations of this sort are usually not adept in the art of lobbying and, by the very nature of their trek to Washington, they are usually keyed up to the point where almost inevitably they greet Members in an emotional, belligerent or threatening manner which can more easily alienate than win a vote.

However, the situation becomes different if it is apparent that the correspondent or visitor has a reasonable personal knowledge of the issue under consideration or has a viewpoint that is his own; or, if for some other reason the correspondent or visitor is well known and respected by the Congressman. Some of the simplest and most effective lobbies are built around the friendship and respect which is naturally accorded a capable man who represents a responsible organization in an open and above-board manner; who lays his cards on the table before the legislator and is in a position to commit his organization to performance on which they will deliver. Some of the farm organizations and railroad brotherhoods are noted for this technique.

Sometimes the contacts are made in a way that has been called "grass roots" lobbying. An organization which has branch offices or membership throughout the country can apply pressure through friends and associates of the Congressman in his own district—after the persons of influence back home have been properly approached, briefed on the situation and persuaded to make the contact and representation. This technique is often very effective and can be done without undue commotion or show of lobbying activity in Washington. The technique is well adapted for national organizations such as the railroads, labor unions, public utilities, real estate boards, used-car dealers and the like.

The use of the press, radio, or special propaganda publications to influence both the public and the Congress is still another medium for the lobbyist. There has been a growing realization in recent years that winning the support of public opinion is a tremendous asset in influencing legislation. Hence, it is not uncommon to use public-relations techniques to secure favorable opinions in the public prints or on the air. Information on articles or editorials "caused to be published" is required to be reported under the Federal Lobbying Act. Only about one in every eight or ten registered lobbyists acknowledges in his reports any attempts to lobby in this fashion, and then usually the articles are in the trade journals of his industry.

More recently it has become a customary procedure for lobbying organi-

zations to try their own cases in advertisements in the press or in attractive pamphlets and documents intended to influence public opinion—and the Congress. In the controversy over the Taft-Hartley bill, for example, large sums were spent on both sides of the issue for radio and newspaper advertising. It appears that many expenditures for subtle public relations and advertising to influence legislation are charged to routine advertising and legal costs, without ever being reported under the Lobbying Act.

There is a type of lobbying known as "plush-horse" lobbying. This involves social entertainment. Social life is an important part of the Washington scene, and there is no doubt that lobbyists utilize this technique. Usually members of Congress are invited, not to discuss business but to make or maintain the lobbyist's contacts or to add prestige both to the social affair and to the reputation of those who arranged the party. How effective such non-business affairs may be to a lobbyist is a moot point, and it often is difficult to draw any definite line of demarcation between social activity for its own sake and entertainment designed to influence legislation. In any event, to the extent that the costs of such entertainment can be charged off as business expense, the entertainment is a good time for all and the tax collector is the heaviest loser.

So much for some of the techniques of the lobbyists. What about the extent of lobbyists' activities and the purposes for which they lobby?

In sheer numbers there are more registered lobbyists than members of Congress. More than 1,000 have registered under the lobbying law, although not all of these are currently reporting. A tabulation based on current registrations and quarterly statements reveals that the reported expenses and compensation are at a rate which exceeds $4,000,000 per year.

Of this amount, business and trade lobbies account for almost $3,000,000. Prominent in this group are the public utilities, the railroads and other transportation agencies; the N. A. M. and Chambers of Commerce; fiduciary institutions; sugar interests; and construction and real estate organizations. This group includes many of the higher paid individuals, ranging up to $65,000 per year for compensation. Almost 100 current registrants in this group receive compensation and expenses exceeding the rate of $10,000 per year.

The next largest group, labor organizations, accounts for about $400,000. Various professional societies, including those of doctors, dentists, nurses, libraries, teachers, osteopaths, chiropractors, optometrists, architects and insurance agents, account for about $250,000. A score of "public" lobbies, including various citizens' committees, women's leagues, etc., total a similar amount. Lobbyists for the various farm organizations have reported expenditures aggregating about $150,000; and the veterans' organizations about $80,000.

Some of the subjects that are or have been under consideration by this Congress and which produced the major portion of lobbying activities are: rent control, public housing, reduction of taxes, amendments to administrative features of the tax law, taxation of cooperatives and insurance companies; long-range agricultural policies embracing price support, land use, soil conservation and the contest between butter and oleomargarine; railroad legislation such as the Bulwinkle bill granting exemption from certain provisions of the anti-trust laws; public utilities, including amendments to the Natural Gas Act, TVA and the California Central Valley project; sugar, labor, health, Federal aid to education, veterans; and foreign policy.

In summary, anyone who examines Federal lobbying will be impressed by the amounts of energy and dollars which are devoted to an effort to influence legislation. Some of it is useless. Some of it is wasteful. Some of it is contrary to the public interest. By and large, however, lobbying reflects the complexity of our society and Government. The bulk of it is a representation of viewpoints and interests which should be and are considered in the legislative process.

The legislators and the public must properly evaluate each lobby. Pressures exerted are not necessarily proportionate to the strength of an organization or to the merits of its position. Similarly, a "compromise" piece of legislation which satisfies various pressure groups does not necessarily make it good legislation. Legislative "log-rolling" (you support my proposition and I'll support yours) is one form of compromise which is indefensible.

The lobbying law relies upon publicity to accomplish its objectives. In this connection, three points should be emphasized:

(1) A stigma should not be attached to lobbying *per se* or to registration under the present lobbying act. The facts of full disclosure should speak for themselves without prejudice.

(2) Better compliance with the present lobbying law will be forthcoming when the law is further clarified by the courts and improved by the Congress.

(3) The Federal lobbying law is a step in the right direction. It is not the number of lobbyists in Washington that is most important, but rather what they are doing and how they are spending their money. It is in the public interest for the people and the Congress to have this information.



43. THE FARM BUREAU [1]

THE Farm Bureau Federation undoubtedly maintains one of the most effective lobbying organizations in Washington. This case study of lobbying describes the growth and development of the Federation, its aims, its officials and their methods.

THE farmer has learned that to be strong in Washington he needs more than a good cause. He also needs a good lobby. The American Farm Bureau Federation is the best lobby he ever had and probably the best lobby in the business. In the rousing spring days of 1933 it helped pass the first Agricultural Adjustment Act. During the next ten years over $7 billion was distributed for special farm legislation; Bureau President Ed O'Neal, more than anyone else, nursed the necessary appropriations through Congress. During the same years Ed made parity—that generous and arbitrary formula for deciding where farm prices should be—the national synonym for a square deal for the farmer. In 1941, at the behest of the Bureau, Congress guaranteed a minimum price of 85 per cent of parity for the great farm staples; a few months later, the Bureau got a prohibition on price ceilings below 110 per cent of parity. The figure has since been reduced 10 per cent, but the floors have been raised. If a majority of Congress could override a presidential veto, the Farm Bureau would long ago have eliminated consumer subsidies. The Farm Bureau nearly always gets what it goes after.

The Farm Bureau is not the only representative of the farmer in Washington; indeed, one reason for the public's meager knowledge of the farm lobby is the large number of farm lobbyists. The urban American has heard a little about more organizations than he can remember. There are free-lance lobbyists—a scrofulous collection of inexpensive mercenaries who serve anyone with a grievance and a checkbook. Their stock in trade is a close familiarity with the Capitol, an exceptional faculty for second-hand emotion and third-rate oratory. They are an unsightly appendage of democratic government but fortunately they are unimportant.

There are also scores of farm-commodity organizations—one for virtually everything made, grown, or produced by American farms. They are active—the day is long past when they confined themselves to staging a National Apple Week or promoting essay competitions on the food value of cheese. Producers of walnuts, peaches, turpentine, lemons, grapes, and many other products have negotiated highly profitable deals with the Department of Agriculture for the purchase of surpluses or their conversion into byproducts, and for the stabilization of prices. Sheepmen can

[1] *Fortune* (June, 1944), Vol. XXIX, No. 6, pp. 156–160; 188–196. Reprinted by special permission of the Editors. Copyright by Time Inc.

—and do—thank their organization for getting special preference for domestic wools in Army clothing purchases. Organized dairymen have worked hard to stamp out traffic in oleomargarine, a commodity they deem injurious to the public health and their own butter market. But the commodity men serve only their own commodity; they do not speak on the great issues of farm policy. Just as numerous business lobbies appeared to pick tariff plums when these were the greatest gift in the giving of the U.S. Government, so the commodity organizations have appeared to pick those plums provided by the farm program of the thirties.

The great issues of farm policy—price and wage stabilization, parity loans, marketing quotas, soil conservation, manpower, steel for farm machinery—are the business of the Farm Bureau. To be sure, even in this field it has competitors—or allies. There is the National Grange, the oldest and (because it admits both farmer and his wife to membership) also the largest of the general farm organizations. However, the modern Granger has little of the militancy of the great railroad baiters of the seventies. The leaders are hesitant, worried, and profoundly conservative. Rather than striking out for themselves, they line up with the Farm Bureau. So also does the National Council of Farmer Cooperatives. This is an organization of organizations—a holding company of the federations into which dairy, poultry, citrus, and other marketing and farm-supply cooperatives are grouped. Both leaders and members of the Co-op Council are more concerned with their near $4 billion merchandising operation than with legislation.

The Farm Bureau's only notable opposition is the Farmers Union—officially the Farmers Educational and Cooperative Union. The leaders of the union are young and aggressive and closely allied with organized labor and the Administration. They are not conservative; the Bureau considers them wildly radical. But the union's membership is small and sparse and until recent years it was badly rent by internal strife. Its leaders would concede that compared with the Bureau they are still small potatoes.

THE GOVERNMENT BUILDS A LOBBY

Among farm organizations and among lobbies, the Farm Bureau is unique. It is, as its detractors never tire of pointing out, a private lobby sponsored and supported by the government it seeks to influence. The Bureau locally is the official and unofficial sponsor of the federal-state Extension Service—more briefly the county-agent system. And this accounts for a good deal of its strength and a great deal of its permanence.

The whole thing came about rather innocently. When the first county agents were appointed, state governments feared that farmers might look

this new gift horse in the mouth. To make sure that farmers really wanted an adviser badly enough to use him, it was commonly specified that farmers of the county must first club together and agree to pay part of the expenses of the new office. The county agent soon proved himself one of the country's most useful citizens; farmers organized rapidly to obtain his help. By way of clubbing together, they organized bureaus; then to keep their agents they had to keep their bureaus. In 1914 the federal government began matching dollar for dollar the money spent by states and localities for extension work. By doing so it underwrote with federal funds the tie between local bureaus and the county agent. Five years later, in 1919, these local bureaus had banded into state federations or bureaus, and the state federations were meeting in Ithaca, New York, to form themselves into a national organization, the American Farm Bureau Federation. The local bureaus were ready to come to Washington as the country's first semi-official lobby.

In several states farmers must still organize a bureau to obtain the services of a county agent and the corps of specialists backing him up. In these states the grass-roots organization of the Farm Bureau is especially secure; membership brings to the county not only the best (and most expensive) technical and educational aids available to farmers anywhere in the world, it also brings a skilled organizer in the person of the county agent. The Farm Bureau works very closely with the Extension Service even in states where there is no official tie between the two. The county agent finds that members of the Bureau are good clients; he uses local bureau meetings as a forum for presenting and discussing new methods, new farm programs, and the effect of new laws and regulations. The state bureaus are alert to see that the state legislatures keep the Extension Service well supplied with funds.

Their official and common-law marriage with the Extension Service the Farm Bureau leaders neither publicize nor disguise. But they know well what it means to their organization. Farmers are scattered, hard to organize, and harder to keep organized. The fruits of organization—benefit checks and higher prices—are shared by both those who belong to the organization and those who do not. Farm leaders have no collective-bargaining agreement around which to rally their members and no closed-shop agreement to hold the backsliders. During the past hundred years farm organizations have mushroomed time and again only to disappear a year or so later because the rank and file stopped paying dues. The tie with the Extension Service keeps the local or county farm bureaus alive and strong—and on these the strength of the national organization depends.

There is another thing in the Bureau's favor. It appeals to the prosperous farmers—those who do not need to count their pennies when they

pay their dues. The Bureau leaders would like to think that they represented all men of the land; they are often accused of being the organization of the great land barons. The truth is in between. There are not enough great landlords in the U.S. to make a successful organization. Still, the Farm Bureau does not speak for the small owner or tenant. Its 690,000 members who pay dues ranging from $2 a year in Georgia to $15 in Illinois are the larger commercial farmers, who understand most readily the benefits of organization.

The special privileges of the Bureau have not gone unchallenged. In the last few years New Deal agencies—Triple A, Farm Security, Rural Electrification, and the Soil Conservation Service—have brought a whole new corps of officials into farm counties. These are independent of the Extension Service. The county agent has been dwarfed by his now numerous competitors and the local bureau has shared in the partial eclipse. Both Bureau and county agent have found the large number of competing meetings and committees especially exasperating. The national officers of the Bureau are deeply concerned. Since 1940 they have been talking about legislation to give the state directors of Extension Service a large hand in the farm programs of the Department of Agriculture.

The other farm organizations are jealous. The Grange, which relies on community fellowship and a ritual to hold its members, would like to see the Bureau divorced from the Extension Service. The liberal Farmers Union, which is built on cooperative elevators and liberal ideas, vigorously assails the "Farm Bureau-Extension Axis." State legislatures, under this pressure, have occasionally considered separating the two. It has also been suggested that federal funds be withdrawn from states that allow these funds to strengthen so potent a federal lobby. However, the franchise of the Bureau is probably secure. Self-preservation is the first plank in its platform. It would be a poor lobby if it could not protect its own privileges.

None of this means that the Farm Bureau can take things easy; no farm organization can do that. Active and continuous organization work is essential. Even more essential is a supply of issues to keep membership interest alive. Many have wondered why the Farm Bureau has continued to battle for higher farm income at a time when farmers are making record returns. Others have been puzzled by the vigor with which the Bureau has opposed consumer subsidies. The principle of using such subsidies is surely debatable, but the Farm Bureau is hardly their natural foe on grounds of principle; it has sponsored farm subsidies by the billions. Part of the answer is that the Bureau, because it is a farm organization, must do battle over something. Were it to make peace in times of high farm income, it would give the appearance of somnolence and decay. It

would lose its reputation for militant farm leadership and with its reputation would go its members.

THE CORN AND COTTON COALITION

Six states provide nearly half of the membership of the Bureau and a good deal more than half of the leadership. Three of these—Alabama, Mississippi, and Arkansas—are in the cotton belt and three—Illinois, Iowa, and Indiana—in the corn belt. Four of them are represented on the eighteen-man Board of Directors of the national organization; the other two, Alabama and Illinois, supply the President and Vice President. The border states—Kentucky, Tennessee, and Missouri—where commercial farming follows the pattern of either corn belt or cotton belt, have moderate-sized state bureaus, and Tennessee is also represented on the Board of Directors. Few of the remaining state federations (there are forty-three state bureaus in all, plus one in Puerto Rico) are influential in the national organization. The large and efficient California federation devotes itself mainly to state affairs. The Bureau is strong in New York and moderately so in Ohio, Vermont, and New Hampshire, but chiefly as the sponsor of farm purchasing cooperatives, cheap insurance, and the Extension Service. In the south Atlantic states, the Pacific Northwest, and most of the mountain states the state federations are small and weak. Texas, leading farm state of the union, has never supported a strong Bureau. Kansas is the only strong Farm Bureau state on the Great Plains.

The American Farm Bureau Federation in brief is a coalition of corn and cotton farmers. As such it represents farmers of the two most populous agricultural regions of the land. From these regions come the legislators who have few industries and little or no labor vote to worry about. They can work full time for the farmer. By themselves corn or cotton farmers would be a political force to be reckoned with; in partnership they become one of the nation's most powerful groups. The job of the Farm Bureau is to preserve that partnership.

Keeping peace between corn and cotton is what Ed O'Neal calls "keeping agricultural unity" and it isn't easy. There are differences in temperament. The Southerners accuse the cornbelt leaders of identifying all agriculture with the corn belt and being unable or unwilling to understand the special problems of cotton. Corn-belt leaders on the other hand think Southerners have an inborn tendency to substitute passion for plain common sense. There are political differences. Southern farm leaders are Democrats; they are now at odds with the Administration but they have never thought of voting Republican. This blind party regularity, northern leaders believe, elects too many legislators who, in the pinches, follow the President rather than the Farm Bureau. The corn-belt leaders are

rock-ribbed Republicans; those that strayed briefly with Henry Wallace are again back in the fold. The Southerners dislike Republicans on principle; and they have never been sure the Republican party approved of the Agricultural Adjustment Act and related measures. The Southerners do.

The hardest job is to reconcile the strictly economic differences between corn farmer and cotton planter. History is (or was) against any bargain between the two, and for nearly a century after the Ohio Valley was settled none was struck. The South wanted low tariffs, an international market in which to sell cotton and buy cheap supplies. The new corn-belt lined up with northeastern industry and plumped for a protected market at home. Farmers of the two regions believed they had little or nothing in common.

They continued to think of different solutions until the long agricultural depression of the twenties. This common disaster forced an agreement on some method for raising farm prices above competitive levels; for the South it meant separating itself from the world market and surrendering its ancient faith in free trade. The first peace treaty between the farmers of the two regions, the McNary-Haugen bills, was twice vetoed by Coolidge. Campaigning in Topeka in 1932 Mr. Roosevelt made it clear that he was of a different mind, and the Agricultural Adjustment Act was the new and enduring bargain. It provided a common formula for raising prices and incomes for both the North and South; farmers of the two regions could get together without discussing high principles.

It still wasn't easy to legislate or administer legislation and treat North and South alike. Bureau leaders had a deep and influential interest in the way parity (farm subsidy) appropriations were divided. Meetings to consider the division between the two regions were occasionally long and bitter. Southern leaders wanted to plant corn on some of the acres diverted from cotton by Triple A. Corn-belt leaders stoutly opposed any increase in corn acreage outside what they termed the "natural corn area."

In 1940 Bureau leaders abandoned their policy of requesting large appropriations for direct (parity) payments by government check, a feature of the farm program to that time. Instead they voted for a government guarantee of farm prices to be made effective through commodity loans with the collateral passing to the government should the price fall below the loan level. The cotton leaders wanted loans at full parity price—then about 18 cents. The corn belt was opposed. Except in the purely cash corn areas, corn is marketed as pork. High corn prices only yield high returns after the price of hogs has had time to adjust upward. In the meantime, under the new policy, the corn farmer would not get his benefit check. The corn market, moreover, might be damaged were corn

to rise too suddenly while other feeds remained cheap. However, Farm Bureau leaders have learned the value of compromise. A compromise eventually was reached on loans at 85 per cent of parity with parity payments making up the rest. Congress ratified the deal and the President accepted it.

Of late the most troublesome problem for the peacemakers has been inflation. Among some southern leaders fear of inflation is tempered by the possibility that it might mean 25-cent cotton. The corn belt is more cautious. Leaders remembered the World War I sequence of boom and disaster and do not want another. Last year some Bureau leaders joined a bandwagon movement in support of the Pace bill, which would have included farm labor costs in the parity formula and forced higher ceilings. However Earl Smith of Illinois declined to go along and so did the Congressmen from Illinois. The Iowa Farm Bureau followed Smith's lead. As a result the Pace bill was stopped—and the Bureau leadership had an impressive lesson on the importance of keeping peace in the coalition.

So long as the present leaders remain in office the coalition will continue. They remember the days when the North and South could not agree and what it cost in power. Under these leaders farm policy in the U.S. will be made not by and for farmers at large but by and for the producers of corn, hogs, and cotton. For the farm policy and farm politics of the U.S. this is a fact of first-rate importance.

THE HIGH COMMAND

Farm organizations of the past have too often disguised the qualities of a racket with the trappings of a crusade. The leaders have been petty larcenists who preached the ancient injustices of the farmer to provide themselves with a job. Farmers developed a healthy suspicion of their self-appointed messiahs. But the leaders of the Farm Bureau are mostly bona fide farmers or farm owners; few of them depend on the organization for a livelihood.

The two most influential men in the organization are President O'Neal and Vice President Smith. The Board of Directors . . . meets quarterly with the officers. Emergency sessions have been frequent ever since the beginning of the New Deal. Once a year a resolutions committee, headed by Earl Smith, meets to hammer out a platform for the next twelve months. Afterward this is approved at a full-dress convention of delegates from the member states. As a guide to forthcoming farm legislation it merits considerably closer study than the convention platforms of the major political parties. If the officers find it expedient to modify the established *line* they do so, but rarely without first consulting the Directors or an executive committee of the Board. Individual Directors, par-

ticularly if they represent coalition territory, can usually count on a sympathetic hearing for their views.

The Farm Bureau has escaped management by job-hungry promoters but from another classic weakness of farm organizations it has not escaped. That is weakness in staff. Whatever money farm-organization leaders had in the past they have either paid to themselves or used to recruit new members. To impress legislators and their own members they depended on a few physiocratic clichés and a great deal of hot air. Facts were an expensive luxury with which they dispensed. The Farm Bureau staff is better than most farm organizations but far inferior to those of business and labor organizations. In the Chicago headquarters (Bureau doctrine holds that a Washington head office would lead to a warped and urban personality) a small research staff has recently been established. Under the guidance of Bureau Secretary and Treasurer Roger Corbett, until last year head of the Maryland Agricultural Experiment Station, it is likely to grow. And in the three-man Washington office the Farm Bureau has William Raymond Ogg.

It is the tireless Ogg who more than anyone else has kept the staff weakness of the Bureau from being fatal. Thin, low-voiced, unprepossessing, and terribly serious, Ogg is one of the hardest-working men in all Washington. From nine in the morning until ten at night, he digs information out of official reports or government departments, prepares statements for committee hearings and memorandums for Congressmen, confers on legislative strategy with Bureau allies on the Hill, helps draft bills and amendments, and attends meetings called by executive agencies. On minor legislation he appears on behalf of the Bureau to testify. He is constantly on the watch for unauthorized legislation on Capitol Hill, undesirable programs in the Department of Agriculture, and subversive price ceilings from the Office of Price Administration. On all of these matters he reports by long-distance telephone to President O'Neal in Chicago; if things look serious Ed, in turn, will call for a reservation on the Capitol Limited.

But on few things in Washington can the work or views of the inexperienced man be trusted; in spite of the faithful Ogg, the Bureau has paid heavily for its failure to develop and use an expert staff. Bureau legislation is often superficial and badly drafted; on occasion it has missed entirely the purpose for which it was planned. The Bureau was sharply reversed on amendments to the OPA appropriations bill during the summer of 1942 because, unwittingly, it asked for the virtual repeal of the price-control law. Both Ed O'Neal and Earl Smith are capable of great anger; occasionally they have conducted legislative sorties based on emotion untempered by reasoned study.

THERE IS NO FARM BLOC

Speaking at the annual convention of the Farm Bureau last December, Congressman Everett Dirksen gave the main reason for the existence of a farm lobby. Said he, "There is no farm bloc unanimity in the Congress. It is everybody thinking for himself." He was right; the notion that there is a closely knit, well-disciplined band of farm legislators, who think and vote alike on farm issues, is a popular fiction. There is no such organization in Congress; that is why the Farm Bureau exists.

The literal-minded farm legislator comes to Washington, not as a friend of an idea, but as the representative and protector of his own cotton, wheat, or dairy farmers. To do his job well he must, on occasion, be free to oppose the conflicting interests of other farm areas. So he sticks to his own knitting. Senator Bankhead, often styled the farm leader of the Senate, concerns himself largely with cotton. He knows better than to try to represent dairy farmers who favor taxes on oleomargarine, a derivative of cottonseed oil. Bankhead is a leader only because the cotton Senators and Congressmen he commands are the largest farm group in Congress. Senators Gillette of Iowa and Lucas of Illinois represent the midwest corn and hog producers; neither of them would think of speaking for eastern dairy and poultry producers who buy corn. An ancient rift divides the range-cattle producers protected by Senator O'Mahoney (Wyoming) from cattle feeders represented by Senator Butler (Nebraska). Cattlemen in general have never been friendly to the Triple A. Corn and cotton farmers are its staunch supporters.

In the House of Representatives the situation is the same. No member presumes to speak for farmers as a whole; none would be taken very seriously if he tried.

If legislation is to pass it must be planned so as to enlist the support of these diverse and sometimes conflicting groups. Congressmen who cannot be fully satisfied must be made to see that a half cake is better than none at all. A good deal of explanation and persuasion is necessary. Trades must be arranged. Above all, the legislation must be nursed through a Congress that, although it starts many bad laws, has the great virtue of finishing very few of them. All this is done both by the Farm Bureau and by the Department of Agriculture, which has always pleaded the farmer's case before Congress. Sometimes they work together; frequently, in recent years, they have been at odds. The Bureau works through its own special allies—Congressmen Cannon, Dirksen, and Wolcott, Senator Bankhead, Senator Lucas, and a few others. The Department uses the official leadership and a considerable number of special friends of its own. The Department has the higher batting average on completed bills. But it passes few bills over the objection of the Bureau.

THE ROLL CALL IS THE PAY-OFF

Anthony Trollope, one of the shrewdest political observers as well as one of the best novelists of his time, remarked, "A man in the right relies easily on his rectitude, and therefore goes about unarmed!" The Farm Bureau is certain of its rectitude and of the strength that inheres in virtue. Contrasting the tactics employed by the opposing forces in one of its recent legislative battles, the Bureau house organ *Nation's Agriculture* recently reported: "Against this avalanche of propaganda, prejudice, and misrepresentation, agriculture relied mainly on the simple justice of its case." Nevertheless the Bureau does not enter the lists unarmed—or equipped only with that triple armanent classically associated with just causes. It has a number of tried methods of getting votes. Five are important:

First. The Bureau rewards its friends with reelection, without trying too hard to punish its enemies. To campaign against a candidate means a dangerous opponent should he be elected, and an angry one if he is defeated. Electioneering is conducted partly by formal endorsement of favored candidates, partly by the weekly newsletter that tallies the votes of Senators and Representatives and makes clear which is right or wrong by Bureau standards. No farm Congressman likes to have his district told he is voting against the best interests of the farmer.

However, direct participation by Bureau leaders in state and local politics is far more important than this scorekeeping. In the key Bureau states—Illinois, Alabama, Iowa, and a few others—the state and local leaders are influential politicians in their own right. Under their guidance state and local bureaus go powerfully to the support of candidates who deserve election and against those who do not. Thus, in Alabama where the small electorate lends itself well to Bureau methods, the state federation is an important cog in one of the quietly efficient political machines of the country. Compact support is given Alabama's John Bankhead and, with his advice and consent, to the members of the congressional delegation who are good friends of the farmer. In Alabama the relation between the Bureau and the Extension Service is very close. The Extension Service is theoretically above politics, but the people of Alabama are accustomed to quiet political activity by public servants. The Alabama Farm Bureau is a great comfort to any legislator who works faithfully for larger appropriations or their modern equivalent, which is higher prices.

Nevertheless the number of Senators and Congressmen whom the Farm Bureau has elected or could defeat is not large. Even in Alabama, John Bankhead is stronger than the Bureau; he has consistently supported the Farm Security Administration, which by Bureau standards is the greatest of all legislative crimes. What the Farm

turn a sure thing into a horse race, or make unimportant opposition serious. More frequently the Bureau is just one of the organizations that a candidate needs to have on his side if he is to have the best possible chance at the polls.

Second. The Farm Bureau makes masterful use of the conventional lobbying methods. After the Farm Bureau has convened and formulated its platform for the year, a full-dress presentation is made before the House Appropriations Committee and the agricultural committees of the House and Senate. The presidents of the state federations, all skilled in down-to-earth politics, come to Washington for the hearings and to hold private conferences with their own state delegations. Every farm Congressman is thoroughly informed on what the Bureau wants and why. When important legislation is up, Ed O'Neal calls the officers back. Meetings to persuade reluctant or backsliding legislators follow in the Capitol, in the Senate Office Building, or downtown at the Raleigh Hotel. These meetings, it should be said, are almost always friendly; the Bureau leaders talk a great deal about putting on the pressure but they use persuasion rather than threats. At all times Ed and the permanent Washington staff work quietly with friends of the Bureau at the Capitol. All members of Congress receive a steady flow of mimeographed explanations, protests, and denunciations. Few of these reach the public, for, unlike every other official or unofficial agency in Washington, the Farm Bureau issues few press releases.

In emergencies the Farm Bureau asks the officers to wire the members of their congressional delegation. At rare intervals—usually when the prestige of the organization is at stake—the same request is made of the rank and file. Last January *Nation's Agriculture* reported that convention delegates "voted unanimously to barrage the Senate immediately with all the power they could muster in their states, and to carry the fight on to the bitter end." In some states orders to apply pressure to Congressmen are transmitted to local bureaus through the federally aided county agents. This gets results. Congressmen know that a farmer who writes a letter about something is likely to remember the subject until the next election. Nevertheless the Farm Bureau uses such pressure sparingly. Congress will not respond if the appeals are too frequent.

Third. The Farm Bureau has become a powerful supporter of the legislative branch of the government against the executive. In the early New Deal the Farm Bureau defended the programs of Henry Wallace and the appropriations for his department (many people in the Department of Agriculture still believe that the Farm Bureau is a better ally than the President). But those days are gone. The Bureau now fights along with Congress against suspected encroachments by the executive on legislative

powers; it has become a spectacular critic of the bureaucrats, including those of the department. A year ago a columnist reported with horror that a congressional sub-committee had given copies of an investigation of the Farm Security Administration to Ed O'Neal and had denied copies to officials of the agency itself. Farm members of the committee saw nothing remarkable about this; Farm Bureau friendship means votes.

Fourth. The Farm Bureau offers prominence and publicity to the legislators who are its friends. Those with some seniority in committees or in the service of agriculture can expect to have their names attached to legislation the Bureau is supporting. Bureau support ensures that there will be hearings and a better than average chance of enactment. Through the house organs and particularly through the thousands of meetings that it conducts, the Farm Bureau advertises its friends. After his fight on subsidies early this year, John Bankhead was publicly thanked by the Bureau and its allies and described as "able and brilliant . . . valiant . . . unwavering," a source of "inspiration and courage." Other friends of the Bureau can expect the same.

This last method of winning friends is probably to be explained by the Irish ancestry of Edward A. O'Neal. Blarney has many uses, as Ed knows. On no person has he used it more lavishly than on Clarence Cannon, chairman of the House Committee on Appropriations. Three years ago Chairman Cannon received the Farm Bureau award for distinguished service to American agriculture. Many who had watched the farm appropriation bills of preceding years believed he had earned the honor.

Fifth. Votes are obtained by skillful trading. In the early years of the New Deal, Ed O'Neal was able to work out many an arrangement with labor by which farm support for relief appropriations and labor legislation was exchanged for urban support of Farm Bureau measures. Numerous arrangements for reciprocal support are also made between the corn and cotton coalition and farmers from those parts of the country where Farm Bureau influence is slight.

Except for trading between farm groups, this method of getting votes is of markedly less importance now than it was a decade ago. For one thing the rift between the Farm Bureau and the unions has widened to the point of open warfare between the two. Bureau leaders believe labor has profited unduly from the war. Labor is blamed for subsidies, which the Bureau has now decided are downright shameful. But more important, the Bureau in recent years has been strong enough to pass legislation without logrolling. Resort to logrolling by a lobby is the result of weakness not strength.

As matters now stand, few things in politics are as certain as Ed O'Neal's ability to get votes. In the House of Representatives, Bureau friends head

the Committee on Appropriations and, until the death of Congressman Steagall last year, the Committee on Banking and Currency. They are influential in the Committee on Agriculture. Nearly all farm legislation comes before one or another of these committees; the Bureau can count on a favorable report from any one of them. On the floor of the House of Representatives the Farm Bureau can pass or stop any *farm* measure on which it makes a determined fight. This does not mean that the Bureau controls a majority of the members. But in a showdown with the Administration (the strongest opposition it encounters) it can depend on the help of enough of the Republican minority to win. And the farm allies of the Bureau in Congress stay in Washington and stick to business while the urban members, on which the White House depends, are chronic absentees. The Bureau has met some defeats in the past two years but not in the House.

In the Senate, normally more sensitive to farm issues than the House, the Bureau is not so powerful. Members of the Senate have more political strength in their own right, and the Administration is stronger than in the House. In a pitched battle the Bureau cannot always win in the Senate. However, not all farm legislation requires a fight; and many a good half cake comes out of a conference committee.

The farmers—the kind of farmers who belong to the Bureau—are well represented in Washington.

44. RENTS AND THE REAL ESTATE LOBBY [1]

IN HIS article on lobbying (selection 42) Mr. La Follette explains the tactics of lobbyists in general. In "The Farm Bureau" (selection 43) the author details the lobbying practices of a particular organization. This article analyzes lobbying activities with relation to rent control.

EVEN though it happened in Washington, a city that has seen many a fact tortured into unnatural frame, the recent achievement of Herbert U. Nelson deserves to be better known. Mr. Nelson was speaking of the Chicago election of April 1, in which the Democratic candidate for mayor ran up such a handsome majority that some politicians wondered if the Republican surge of 1946 had already spent itself. Mr. Nelson rejected all partisan interpretations; the election, he announced, was a resounding popular repudiation of rent control. His reason: the Republican candidate had

[1] *Fortune* (June, 1947), Vol. XXXV, No. 6, pp. 96–97; 195–198. Reprinted by special permission of the Editors. Copyright by Time Inc.

come out in favor of it. Here it should perhaps be mentioned that the Democrat was also in favor of it, and that Herbert Nelson is executive vice president of the National Association of Real Estate Boards, the most vocal opponent of the present ceilings on residential rents.

Mr. Nelson's participation obviously imparts a certain extravagant quality to the national debate on rent control. But even on the off days when Mr. Nelson has had nothing to say for publication, the debate has never been dull. James B. Carey, the 137-pound secretary-treasurer of the C.I.O., had barely finished his defense of rent ceilings, in testimony before the Senate Banking and Currency Committee, when he was set upon by a party of warlike landladies, many of them from Michigan. Chairman Tobey of New Hampshire eventually created a diversion, and Mr. Carey, somewhat mussed, was able to get away. Senator Tobey himself has done what he could to lighten up the proceedings in his committee chamber. While listening to a middle-aged Dallas belle, sent up to the hearings by the Texas Property Owners' Association, which has no use for rent control, Senator Tobey broke in to say: "There used to be a song in the opera, *Floradora*,[2] whose question I propound to you, 'Oh, tell me pretty maiden, are there any more at home like you?'" The witness replied that she was an only child. Another witness (male), the proprietor of hundreds of rental units in a large city, presented an impressive criticism of rent control and then confided to the committee, off the record, that he had made more money in the past three years than in all the rest of his business career. Three landladies went so far as to picket the White House with sandwich boards denouncing rent control. The incident would have attracted no particular notice, however, had the lead picket not been flourishing a lorgnette.

For all the innocent entertainment it has provided, the argument over rents has demanded a weighty decision. Rent control is the last survivor among the major wartime restraints on the play of a free market. It has acted as a brake on the cost of living of 13 to 14 million householders, and on the income of some eight million landlords. It was to expire, unless Congress intervened, on June 30, along with other remnants of OPA powers.

That Congress would intervene seemed certain at the time this article went to press. Senator Tobey's committee had reported out a bill to extend the present rent ceilings until March 1, 1948. Continuation of controls was almost unopposed; the real division would come on the issue of a rent increase across the board, and even the sponsors of an amendment to raise rents by 10 per cent were not ready to predict that it could carry.

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THE OGRE OF K STREET

Of all the contractual relationships devised by man, few have chafed so consistently as the compact between owner and renter. The literature and legend of many peoples testify to the possibility that a merchant may be honest, an employer kindly, a servant faithful. Favorable mention of the landlord is exceedingly rare.

It must be noted that the National Association of Real Estate Boards has done little to make the landlord more lovable. The association is spokesman for 37,000 U.S. rental-property managers and owners, real-estate brokers, and builders, each entitled to call himself a "realtor," and it has gone into the courts seventeen times to prevent imposters from using the registered word. In recent months its energies have been largely consumed by the fight against rent control, which it describes as the spearhead of Communist penetration in the U.S. The case against rent control, now that the war is nearly two years behind us and the law of supply and demand is at work in almost every other sector of the U.S. economy, is not without a certain logic. It is the peculiar folly of the real-estate lobby to present its arguments with such grotesque intemperance that Republicans recoil in fear and morale is fortified in Housing Expediter Frank Creedon's rent-control division, late of the OPA.

As a lobby, N.A.R.E.B. is no more sinister (and certainly no more influential) than dozens of trade associations and miscellaneous pressure groups that keep offices in the pleasant neighborhood between Dupont Circle and the White House. The association rents three floors of a house on K Street and maintains another headquarters in Chicago. It operates on a budget of about $350,000; the 900-odd local boards pay the national organization $10 a year for each of their active members. Realtors are also solicited from time to time for special contributions to the association's Washington Committee, which maintains a staff of registered lobbyists. The committee's work has been budgeted at $59,000 for 1947.

Herbert Nelson, who is not himself registered as a lobbyist, leaves the calls on Congressmen to the Washington Committee. At the drop of a hat, however, he will testify at any hearing on housing legislation, debate rent control on the radio, make a speech to real-estate men, or receive the press. His is the voice of the association, and an irascible voice it is. With reporters, his opening gambit sometimes is: "Are you Communists?"

Mr. Nelson believes, for instance, that the housing shortage has been grossly exaggerated by New Dealers to help them slip through socialistic public-housing measures like the Taft proposals. (So profound is his distrust of the Administration that Nelson recently refused to serve on one of the committees of President Truman's national Conference on Fire Prevention.) What seems to many like a housing shortage is to Mr. Nelson

an "overconsumption of space" on the part of people whose wages have gone up while rents were frozen. If rents were increased, the stenographer who is now keeping a whole apartment to herself would not be able to afford this luxury; she would move in with another working girl and space would be released for a deserving veteran and his family. Meanwhile, if ceilings were removed from new rental construction and other federal harassments lifted from the building industry, enough new housing would go up to end the "honest" shortage within a year. This is the main theme of the N.A.R.E.B. attack on the present rent ceilings, though interesting digressions can be noted now and then. In a signed editorial in *Headlines*, the weekly bulletin of the association, Mr. Nelson recently hinted that if the housing shortage really is anywhere near as serious as the government claims, one reason is that "we are giving house room to several million foreigners who have slipped in illegally during the war."

Through *Headlines*, the association last November notified its membership: "In 1947 we must find some way of getting rid of rent control." Sometime during the winter N.A.R.E.B. apparently decided on a change of tactics. With a painful effort at self-restraint it has refrained, so far this year, from any direct demand for outright removal of rent control. Its formal position now is that a 15 per cent increase would tide the landlord over until 1948, when ceilings must come off. Most of the real-estate lobby's arguments in support of this idea are so violently worded, however, that they might just as well be aimed at abolition of rent control tomorrow.

LANDLORD ECONOMICS

Mr. Nelson claims his constituents are being driven to the wall. But despite the clamor on K Street, the fact is that the $5-billion residential rent industry is in good shape.

It is true that the industry is forced to sell its product at prices averaging only about 5 per cent higher than the level prevailing in 1939, whereas wholesale prices have jumped more than 90 per cent in the same period, retail prices about 55 per cent, average hourly wages in manufacturing about 75 per cent. While rents have been frozen (the 5 per cent increase includes the total national effect of all individual adjustments granted by OPA since 1942), the landlord has seen his own living costs as unmercifully inflated as the next man's. All this adds up to something less than a monstrous injustice, however. For Congress authorized, and OPA has enforced, a ceiling on rents, not a ceiling on rental income.

The latest count of U.S. rental housing, taken in 1945, showed about 15,400,000 occupied units, not counting farm dwellings or rented rooms. On April 1, 1947, ceilings were in force in 648 "defense rental areas," in

which 85 to 90 per cent of the country's rental housing was concentrated. As to the type of housing in this supply, the best available figures are those of the census of 1940, when 41.4 per cent of all rented dwellings were single-family houses, 21.6 per cent were in two-family flats, 15.1 per cent in three and four-family flats, and 21.9 per cent in larger buildings. Under OPA, when a tenant moved out of a rented house, it has usually been more profitable for the owner to find a buyer than a new tenant, and there has been a net withdrawal of at least one million single-family houses from the rental market. Thus the other types of rental housing today account for a somewhat higher proportion of the total than they did in 1940.

At least eight million buildings are covered by rent control, but there are no firm figures on the number of owners involved. N.A.R.E.B. literature, threatening Congressmen with the wrath of "eight million small investors," assumes that for each individual who owns several rental properties there will be another property with several owners. The Census Bureau considers this a fairly reasonable assumption. OPA, without offering any specific figures, points out that the number of persons deriving any substantial part of their income from rental housing would be well under eight million.

Within the huge rental housing market, there are enough variations in costs and profits to permit the selection of special cases to prove almost any point about rent control that you might care to make. This, in effect, is the technique of the National Association of Real Estate Boards, which has filed with congressional committees hundreds of horror stories from landlords all over the country. Here and there the N.A.R.E.B. exhibits can be broken down on internal evidence alone, but the mass of this material is convincing and frequently moving proof of the obvious—that rigid price control in a market of millions of sellers will not be fair to everybody.

In the studies of rental income prepared by the Rent Control Division of OPA, the deficits (as well as the bonanzas) of individual landlords are absorbed in a national average. Indeed OPA is the only agency, governmental or private, that can offer any figures purporting to cover the income of a scientifically selected sample of rental properties. Since rent control began, OPA has been sending out accountants to look at the landlords' books. In the latest of these surveys, income from 75,000 rental units in forty cities was analyzed for the twelve months ended June 30, 1946. For apartment houses, net operating income before interest and depreciation charges was up 28 per cent from 1939; for four-family flats and smaller units the comparable figure was 43 per cent. But the increase in actual earnings, according to OPA, is much fatter than the increase in net operating income. The most significant changes in the profit position of the average landlord are these:

• Gross income has been substantially increased because vacancy rates for apartment houses declined from a national average of 8.6 per cent in 1939 to 0.2 per cent in the first postwar year. In buildings accommodating four families or less, the drop was from 9.1 per cent to 0.4 per cent.

• At the same time gross income was rising because of continuous occupancy, the owners of small rental housing units were able to cut operating expenses about 5 per cent. In a rented house or duplex, heat or janitorial service is seldom furnished by the owner; the landlord's principal operating expenses are taxes, repairs, and maintenance; taxes have been fairly stable for these properties and maintenance standards have been lowered.

The apartment operator, on the other hand, must meet fuel bills (up 20 per cent from 1939, according to OPA) and payroll (up 27 per cent). His property taxes are up at least 7 per cent. Here it should be noted that the OPA figures, based on an average for the twelve months ended June 30, 1946, take no account of price, wage, or realty-tax increases in the past year. However, the apartment owner has also reduced his repair, maintenance, and decorating expenses, and in practice OPA has not allowed the tenant a cut in rent unless he could show a "substantial" decline in the quality of his apartment or the services normally furnished. Continuous occupancy has not only increased the gross yield of apartments but has permitted virtual elimination of advertising or selling expenses of any kind. Balancing off all the changes in income and operating expenses of the apartment owner, the result is an unmistakable increase in net operating income, though the increase is probably somewhat smaller than the 28 per cent reported by OPA.

For many rental properties, of course, the heaviest charges against revenue are interest and depreciation. These charges have not increased; indeed interest in many cases has been cut by refinancing during a period of cheap money. Thus a relatively modest increase in net operating income, before interest and depreciation, can be accompanied by a sharp increase in net income after all charges. For example, a property producing a net operating income of $10,000 in 1939 and $12,500 in 1946, with interest and depreciation totaling $7,500 in both years, would show an increase in net income from $2,500 to $5,000, or 100 per cent.

To all this the National Association of Real Estate Boards has no very persuasive answer. Though it has the facilities for making a national survey of landlord income, the association offers no statistics comparable to those of the OPA. It relies, instead, on its own selected case studies, and on a blanket denial that any figures coming out of OPA can be believed.

The OPA findings in fact must be given a good deal of weight. They are corroborated, in a general way, by reports from untainted sources. The U.S. foreclosure rate, generally considered a good measure of the

health of the real-estate market (including rental properties), was only 1,000 a month in 1946, as compared with 8,000 in 1939, and more than 20,000 at the depth of the depression. Sales prices of rental properties, though they have eased a bit from the highs of late 1946, do not suggest that OPA has turned the ownership of rental housing into a losing proposition.

In at least one respect OPA's figures understate the profitability of the renting industry—they assume that no tenant is paying a penny more than the prescribed ceiling on his rent. Wholesale conversion of apartments into "cooperatives," as a means of enabling rental-property owners to get out from under the ceilings, was finally stopped in 1945 by an OPA regulation that no building could be converted unless 80 per cent of the tenants approved. But "side money," tie-in sales of furniture, and other violations of the ceilings still add up to a hidden surcharge on the country's rent bill. In some of the subleasing transactions that elude OPA enforcement officers, it can be observed that the morals of the tenant himself are in no way superior to those of landlord or building superintendent.

Ceiling violations have not been common enough, however, to destroy the reputation of rent control as the most effective of all OPA operations. The very zeal with which the control has been administered is one of the grievances of the rental-property owner. In eviction proceedings and in "substantial hardships" petitions for rent increases, the OPA has rarely resolved the borderline case in favor of the landlord. But these, in a sense, are incidental irritations. The real complaint of the landlord—not often stated in so many words—is that his prices are controlled while everyone else who has something to sell is free to charge as much as he can get.

CEILINGS AND VOTES

The case of the landlord has been gingerly handled in the Eightieth Congress. Back in January it seemed to be a foregone conclusion that the new Republican majority would put through a flat increase in rental ceilings, something in the neighborhood of 10 or 15 per cent. For a few hours on January 29 it looked as though the Administration itself might beat the Republicans to the punch. OPA mimeographs were rolling out copies of an order increasing rents by 10 per cent; at the last minute Mr. Truman called the whole thing off. The official explanation was that Major General Philip Fleming, Administrator of the Office of Temporary Controls, had authorized the order without consulting the President. Be that as it may, the President has subsequently found time, on three separate occasions, to insist that ceilings should be held at the present levels.

The congressional vacillations began shortly after the Truman-Fleming bumble. The political attractions of the bill finally approved by Senator

Tobey's committee were obvious. Rents could still be said to be frozen, though not without a bit of thawing around the edges. The bill would remove rental ceilings from new construction and conversions, from any other housing offered for rent for the first time, and from dwellings now renting at $225 a month or more. Rent control would be administered by the Housing Expediter. (The 6,100 employees of OPA's Rent Control Division were transferred to the office of the expediter by President Truman's executive order of April 23.) The expediter, from recommendations made by the state governors, would appoint local advisory boards for each defense rental area. These could recommend decontrol of their own areas, across-the-board increases, or relief for individual landlords, but final action would be up to the expediter, presumably working through the same people now staffing the area and regional rent-control offices of OPA. Any state that had enacted its own rent-control law and wanted to take over the job would be free to do so before federal controls were dropped next March, when the state laws would automatically take effect. (As of April 1, New York, New Jersey, and Virginia had rent-control statutes on the books, and fifteen more state legislatures were considering them.) As a formula for easing the federal government out of the rent-control business, the bill was an ingenious one. And if the housing shortage were still critical early in 1948, there would be nothing to prevent Congress from writing another rent bill, perhaps extending federal controls beyond Election Day.

Congress, needless to say, has not overlooked the fact that the tenants outvote the landlord. But in the case of rent control, good politics and good sense lead to the same conclusion.

THE CASE FOR CONTROL

It is in the housing shortage, of course, that the only valid grounds for control can be found. The prices at which houses have changed hands in the past two years suggest what might happen to rents in the absence of any ceilings. For the most congested cities, control will probably be essential throughout 1948 and perhaps beyond, though at the point when the housing shortage has passed from a national problem into a scattering of local situations, controls should be locally administered. Removal of rent controls from new construction, as provided in the Senate committee bill, would not of itself stimulate any new building to speak of; on the other hand, building for rent is now so nearly negligible that removal of ceilings would do no harm. The real obstacle is the shocking cost of building. Without some reduction of building-materials prices, it is idle to lift rental ceilings from new construction, and it would be folly to remove them from the existing supply of rental housing.

An across-the-board increase in rents, though undesirable, would not be the national catastrophe pictured by the tenants' pressure groups (which need no lessons in lobbying from Mr. Nelson). Rents last winter accounted for 13.3 per cent of the total cost of items in the Consumers' Price Index for "moderate income" families in large cities surveyed by the Bureau of Labor Statistics. Galloping food and clothing prices have driven rent's share in the average family budget down from the pre war 19 per cent. Today a 10 per cent rent increase would seem to add only 1.3 per cent to the cost of living of families in the income brackets covered by the BLS study. But the lower a family's income, the higher the proportion that will be spent for rent. The BLS survey applies to incomes of about $1,500 to $3,000; in the lower ranges of this sample a 10 per cent increase would in many cases add 3 or 4 per cent to the cost of living. It is doubtful whether hardship cases among individual landlords are numerous enough to justify an increase of this order in low-income living costs.

A rent increase of 10 per cent—or 50 per cent—would not permit every landlord in the U.S. to operate at a profit. In any industry of several million entrepreneurs, some are bound to lose money, with or without price control. Once it is conceded that the housing shortage is serious enough to justify some sort of ceiling on rents, a criticism of specific ceilings requires proof that the rental industry as a whole is not making a fair return on its investment. Such proof has not been forthcoming. What has been established is that the U.S. landlord, unlike the farmer, the used-car dealer, and countless corporations and labor unions, has not been allowed to clean up.

Rent control boils down to a problem in political morality. The landlord is asked to subsidize one element of stability in the living costs of a large section of the population. He says this amounts to discriminatory legislation, and so it does. But the same can be said of the income tax and a good many other laws that are now well beyond argument. The landlord happens to be dealing in an essential commodity in acutely short supply; the shortage happens to bear hardest on the veteran (and that also involves some moral claims—as well as some demagoguery); and the price of the commodity happens to be susceptible to effective control. For these very reasons, incidentally, it is just possible that the landlord will soon be better off than many of the businessmen who now enjoy complete freedom to price themselves clear out of the market.



CHAPTER VIII

Nominations and Elections

45. AGAIN IT WILL BE "THE SMOKE-FILLED ROOM" [1]

WRITING in the pre-convention period of the 1948 presidential election year, Arthur Krock undertook to illuminate the actual process behind the nomination of a presidential candidate. Obviously the voters cannot elect a distinguished president unless the nomination process itself produces a distinguished nominee; the nomination process is therefore of crucial importance. And it is the party and not the public that nominates the presidential candidate. The carefully stage-managed demonstrations on the convention floor are not the conclusive determinants leading to nomination, the real decision is often made in "the smoke-filled room," that is, in the back-stage maneuvering of powerful groups in the party, the results of which are shown on the convention floor. Mr. Krock deals with the qualities of leadership produced by the usual partisan nomination process.

SELDOM in this country does the voice of the people break through the wall of professional politics and call on a major party to nominate for President one man and no other. Even then it may be silenced before the event by devices well known to the politicians. And it may be silenced by a statement from the intended beneficiary that he would not accept the nomination if tendered.

Self-elimination has happened very rarely in our history—only twice in the cases of citizens who had never held political office or engaged in politics in any way before the call for them arose. One was, the other is, a general—William T. Sherman in 1880, Dwight D. Eisenhower in 1948.

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[1] Arthur Krock, *New York Times*, February 1, 1948, pp. 5 ff.

In the meager list of those whose first nominations were by popular demand are Jefferson, Jackson, William Henry Harrison, Ulysses S. Grant and Herbert Hoover. Washington was the unanimous choice of the people and the politicians—the only form of real draft and perhaps the only one Eisenhower would ever have considered, well knowing it has become a political impossibility. Thus five citizens in all have been party nominees by popular choice and then elected, though thirty-two have served as President of the United States.

Jefferson barely defeated Aaron Burr in 1800. Lincoln trod a rough, uphill path to nomination, as did Blaine, Cleveland, McKinley, Wilson, Willkie and others. Franklin D. Roosevelt was in great danger of being rejected by the convention of 1932. His declining fortunes were salvaged only when the late Senator Pat Harrison drove the wavering Mississippi delegation back into line and William Randolph Hearst—uninterested in Ritchie of Maryland, personally bitter against Alfred E. Smith and determined that Newton D. Baker should not be chosen because he was an ardent League of Nations man—permitted the California delegation to go to Roosevelt, a move that was promptly joined by the other Garner group, the delegation of Texas.

Theodore Roosevelt has a strong claim for admission to the list of those whose nominations came through popular demand, because he was the first Vice President in history that had succeeded to the Presidency by death who was nominated to fill it for four years in his own right (1904). In a lesser degree, since T. R. had broken the trail for him, Calvin Coolidge has a similar claim. But neither can be established as firmly as those of the five others can—Jefferson, Jackson, W. H. Harrison, Grant and Hoover. And this must also be the judgment as to Harry S. Truman, whose nomination—if he wants it—is conceded.

For, since Theodore Roosevelt's time, it has become a political axiom that the party which denies renomination to a President who desires it, whether or not he has previously been elected in his own right, enters the campaign with an apology for his record. Mr. Truman may be the overwhelming choice for nomination of the party voters—and this could be true even if Henry A. Wallace should get the delegates of a state or two in the convention of the party he has repudiated. But that cannot and will not be tested in the circumstances.

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Wilkie entered the Republican convention of 1940 without anything like the popular demand of a majority behind him. That formed only after Taft and Dewey exhausted themselves, and even then it was shrewdly and ceaselessly stimulated by professional organizing work behind the scenes.

The fact is that almost every four years the American people are required to make a selection for President between two men with whose nominations they have had very little to do.

On the other hand, the nominee of minor parties is always the direct choice of those who intend to vote for him. The very surge of protest against the major political groups which results in the decision to put national candidates in the field against them invariably casts up a single leader. The convention in which he is handed the independent party standard is a mere ratification meeting and always genuine, in contrast with those sham demonstrations in which a President is renominated because there is nothing else his party can do with any hope of success at the polls.

Thus Republicans who were disgusted with the first Grant administration in 1872 held a rump session in which no real contender arose against the national voice of that disgust, Horace Greeley. No name except that of Theodore Roosevelt was put forth in 1912, when once again protesting Republicans formed the Bull Moose party. Robert M. La Follette Sr. was the spontaneous choice of the insurgents against the Harding-Coolidge administration in 1924. . . .

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"We want Wilson," the battle cry for the successful contender at Baltimore in 1912, came from the throats of college boys. But behind it was a shrewd and patiently formed organization. "We want Willkie" was a popular chorus at Philadelphia in 1940, sincerely uttered by people off the streets among whom the Willkie managers had scattered tickets. But one of the most remarkable publicity jobs in the history of politics preceded it, in which cost was no object. And it was preceded also by expert pressure on key leaders and influential delegates from their home states, pressure engendered by supporters of Willkie who made it their business to find out who listened to whom. Their purpose, which they achieved, was to produce the belief among the delegates that, after the deadlock, only Willkie of all the eligibles could be sure of election.

At Chicago in 1940, while many Democratic delegates and their leaders faltered uneasily at the prospect of a third nomination for F. D. Roosevelt, and the Southern forces were white with anger against the sham "draft," there was heard the famous "voice from the sewer." Uttering each time the name of a different state in his Taurian bellow from underground, this shouter helped to create the psychology the third term managers required. It was a wholly artificial device, supplied by Mayor Kelly and operated by his Commissioner of Sanitation from a loud speaker in the cellar of the convention hall.

Episodes like this moved Senator Vandenberg to declare that there has been no such thing as a real draft since Washington's time.

What qualifications do the people seek in the rare instance when a popular favorite is nominated by their demand instead of by routine political process? The record shows that he is a citizen who has been commander in a victorious war (Washington and Grant); the leader of a new social-economic movement (Jefferson and Jackson); or one whose appeal arises from a humanitarian labor (Hoover). Despite the masterly achievements of Lincoln, Wilson, Cleveland and the Roosevelts, they were not forced on the politicians by the people. Their nominations were products of compromise among the professionals.

What qualifications do these professionals seek before they come to the decision in the smoke-filled room? First of all, they want a winner. Second, they want a practitioner of their own trade who "speaks their language" and with whom they think they can get along. After this they measure the other talents on which the country must eventually depend for its security and progress.

But there are times and conditions when the first qualification of the professionals—the wish for a winner—has the elements of great usefulness in the Presidency. These times are when the nation and the world are flowing in great and dynamic movements, when the political tactician, the pussyfooter and the mediocrity are shouted down by the anxious people. These conditions are when the party long in power seeks to retain it by scattering reckless promises as catch-alls.

Then to have a winner the opposition must produce a commanding and gifted citizen, a man whose character and record can withstand the corrosive of campaign analysis, a man with intelligent and constructive views and the wit and courage to express them. The professionals must accept one on whom they cannot depend to redeem their political debts and those of the party at the expense of good government and the general welfare.

This was the challenge that brought about the nominations of Lincoln, Cleveland, Wilson and Hoover by convention bosses who had other preferences. There are more examples but they are not so well documented.

When, therefore, there is no true draft, the process is choice by negotiation. Then the political bosses either surrender their real preferences, as noted above, because they must do so to win, or, as in the case of Harding, exert these preferences because they feel sure of victory regardless. This process is the usual and familiar one.

Hence it is that, unless a popular uprising nominates and elects a candidate, overwhelming the political machines in so doing, a convention draft is a rare phenomenon. This being so, the people are generally confronted with two Presidential nominees in whose selection they have played no direct part, one of whom they must send to the White House to exercise

four years of vast power over their daily lives and the future of their progeny.

The state preference primary arose as part of an effort to register a popular choice over that of the professional politicians. But it is subject to political control in enough instances to weaken its intended effect, and the convention method of choosing delegates in other states weakens it further. Both systems are influenced by the professionals because politics is their business. They work at it every hour and the average citizen operates it as a sideline for a few weeks a year.

The only strong force for popular action is the true draft. For this to be effective in either the Democratic or Republican parties a man must come on the scene who appeals so powerfully to the people as their salvation in a desperate time that they override his wish to remain in private life, or as vigorously support his known or suspected willingness to serve.

The few examples of the draft that have previously been cited establish its rarity.

Almost as rare is the third party movement that has for its objective the election of its Presidential candidate. Nearly always its real purpose is party reorganization so that the independent leader may take control and come to the White House later as a regular nominee.

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46. WHAT THIS COUNTRY NEEDS [1]

THIS and the following selection (47) are strongly slanted political comments on the Republican convention of 1944, which nominated Thomas E. Dewey and Henry W. Bricker, and on the Democratic convention of 1944, which nominated F. D. Roosevelt for his fourth term and replaced Henry A. Wallace, his third-term vice-president, with Harry S. Truman. Mr. Mayer's articles illustrate the vigorous feelings that presidential conventions produce in commentators and the public alike. His argument that the major parties are much alike and that a real alternative is what the voters require is the line of reasoning that led to the progressive candidacy of Mr. Henry A. Wallace in 1948.

IT WAS the same hall where, four long years ago, Chicago's Superintendent of Streets and Sewers, established in the basement with a loudspeaker, ventriloquized the delegates into thinking that they were hollering for Roosevelt and Wallace. But since Sanitary Ed Kelly of the Roose-

[1] Milton Mayer, *The Progressive*, Madison, Wisconsin, July 10, 1944, p. 5.

velt-and-Humanity mob still owns Chicago's streets and sewers, and the Superintendent thereof, the voice from the basement was missing last week, and the Republicans had to ventriloquize themselves.

Like the Democratic delegates four years ago, the Republicans went through the motions, but they couldn't get themselves to holler. At no time during the convention, not even when Mr. Dewey ascended the platform to accept the nomination, was the Mighty Stadium Organ drowned out by the roar of the mob. The place was a Turkish bath for wet heat, and the delegates just sat there. One delegate died the day of the nomination, but it was not from excitement.

GHOSTLY APPLAUSE

Brothers, it was enough to make a man vote for Roosevelt, only it is getting harder and harder to distinguish the Albany stuff from the product of Hyde Park. The day the platform was "adopted"—and I suppose I ought to put the word "platform" in quotation marks, too—the Chicago *Tribune*, which hates internationalism, ran the following streamer: G.O.P. PUTS U.S. FIRST, while the Chicago *Sun*, which loves internationalism, had it this way: G.O.P. APPROVES WORLD PROGRAM. So, in another one of the Greatest Crises in American History, the Republicans have nothing to say except, "We have here everything for everybody." They got the idea, as they get all their ideas, from Roosevelt, whose present policies the *Sun* and the *Tribune* could just as easily endorse, except that the *Tribune* would take a yellow dog, or poodle, in preference to That Man. I can hardly wait to rush to the polls in November, or whenever it is, and choose between Twiddledelano and Twiddledewey.

Still, it's my personal feeling that there's a choice, if it's only between a man of some sort and no man at all. I have gazed upon the shining countenance of Thomas E. Dewey, my friends; I have listened to his honeyed words, spoken with the same ineffable eloquence with which I myself copped first prize at the Edmund Burke Grammar School Reading Contest. I have stood close enough to this Dewey to touch him with a fork. And I still do not believe he exists. There is no reality in him. He is certainly not his own man, but I can not for the life of me figure out who he is, unless it's Walt Disney's. I tell you that if you elect him President, you will wake up on Inauguration Day and find nobody there.

I was not alone, either, in this sense of hearing a voice from the dead Mark Hanna combined with the voice of the still-to-be born Robot Ruler. While the man, or whatever it was behind the mustache, was speaking, I dropped pin after pin and my neighbors in the gallery jumped at each crash.

The delegates applauded in a ghostly way—the left hand passing the

right like opposite trains on parallel tracks—when they heard the phrase "one-man government," and they applauded again when they heard the word "bureaucracy," or government by too many men. And then they got up and went home, and Roosevelt laughed and laughed and laughed.

Four items remain for the history books. One is Herbert Hoover, bumbling along with the old incantations against the New Deal failure to solve unemployment, while the millions of pallid shadows held out their hungry hands to him from the ruins of '32. Another was Madame Luce, the beautiful blonde warmonger of a few years ago, invoking the blood of dead soldiers against the man whose name signed the orders that sent them to war. Still another was the rumbling of "No, no," from the floor when Bricker, the honest Harding, announced his withdrawal in the interest of unity. But the best was the heroic sacrifice of Gov. Warren of California.

ODDS ARE COLOSSAL

Gov. Warren, you will remember, played the Dewey game until the midnight before the first ballot. He was not a candidate for the vice-presidential nomination, but neither was he *not* not a candidate. Suddenly, at the instant the prize was to be dropped in his lap, he discovered his solemn obligation to continue to serve the great people of the great state of California; he would not accept the nomination. The Republican papers sang of his solemn sense of duty, but the hotel lobbies whispered of a smart politician, sniffing around the delegations, and then announcing, slightly privately: "These boys are going to get the pants licked off them, and I don't want any part of it. I am going to wait until 1948."

Dewey is the tall guy for '44. The odds are colossal that he can not beat Roosevelt. For four years now Dewey has been playing dead; but win or lose, when this is all over, he will not have to play.

I give you the Republican Party, fellow-Americans, as I am unable to find any use for it. Some of you handy folks around the house may be able to stop up a leak in the plumbing with it. Two weeks from now I will give you the Democrats, complete with the Messrs. Hague and Bilbo. What this country needs is a two-party system.

47. THE DEAL IS DEALT [1]

For an introductory statement to this selection, see the headnote for selection 46 on page 289.

[1] Milton Mayer, *The Progressive*, Madison, Wisconsin, July 31, 1944, pp. 1–2.

BACK in 1940, Sanitary Ed Kelly of Chicago gave the signal for his mob to emerge from the Stadium basement, and the mob emerged with signs reading ROOSEVELT AND HUMANITY. Last week Sanitary Ed gave the signal again, and the mob emerged. But the signs had been changed. ROOSEVELT AND HUMANITY had given way to ROOSEVELT AND LUCAS.

Kelly didn't want Lucas last week any more than he wanted Humanity in 1940. Both times he wanted whatever Roosevelt wanted. In 1940 Roosevelt wanted Wallace run. In 1944 Roosevelt wanted Wallace run out. Lucas was simply one of the 13 favorite-son dummies set up to draw first-ballot votes from Wallace. When the ROOSEVELT AND LUCAS signs were turned inside-out, they read ROOSEVELT AND TRUMAN.

So ends the excursion of the Democratic Party into the vineyard of the Lord. Described so truly, and so long ago, as the left wing of the bird of prey, it had its little 10-year fling at being the party of the people. While the country was starving and at peace, there were votes in insisting, as Roosevelt insisted, that reform was the only way to lasting recovery. With the country gorging and at war, there are not many votes in insisting, as Wallace insists, that reform is the only way to lasting victory.

BLAME THE BOSSES' BOSS

Don't blame the bosses. Blame the bosses' boss. Don't blame Kelly, Hannegan, Hague, and Flynn, or the frockcoat Tories from darkest Dixie. They had to want what Roosevelt wanted. In 1940 they choked to do his bidding; this time they cheered. Don't blame the Party, or let Wallace tell you, as he told the convention, that the Democratic Party has to be liberal in order to survive. You see who survived the convention and who didn't.

In 1932 and 1936 Roosevelt led the Democratic Party down the profitable by-path of reform. In 1940, already facing homeward himself, but uncertain as to how much profit there might still be in reform, he gulled the reformers with Wallace. By last week he was so far to the right of Wallace that he had to knock him off with a harpoon instead of a stiletto.

The peerless leader was ready, last week, to lead the Party back home, and he did; back home to Southern racism and Northern corruption, back to its historic purpose of preserving those two great American traditions against the Republican tradition of feeding the rich.

"Mr. Roosevelt wants Henry A. Wallace of Iowa," I. F. Stone wrote in the *Nation* as the convention opened. "Wallace it will be. The big interests of this country do not want Wallace. . . . The 'practical' politicians were there to reinforce them. Their efforts broke on the rock of Mr. Roosevelt's 'Dutch stubbornness.' . . . I can report that the Presi-

dent feels that only with Wallace as Vice President can he be sure that his great objectives at home and abroad will be pursued."

"Morality and expediency both point in the same direction," said the prayerful *New Republic* in its preconvention prayer to the great god in behalf of Wallace. Why did the great god abandon morality and expediency both? I submit that he abandoned them both—and all his "liberal" idolators—for immorality. He knew he was gaining no votes and losing the Negroes when he threw the harpoon into Wallace. Why did he do it?

HENRY WALLACE IS DEAD

He did it—and the reactionaries like Col. McCormick called the turn on him from the beginning—because he is still Jim Farley's playboy, coming home from the New Deal debauch. The New Deal was, for a while, the game for a playboy to play. But Henry Wallace was playing for keeps; as he was the first New Dealer in the Administration, was he the last. The war gave Roosevelt something new to play with. It gave him the world to play with.

It had to happen, in the nature of the case. Roosevelt, the politician, was a reformer as long as reform was good politics. Wallace, the reformer, was a politician as long as politics was good reform. As a politician Wallace failed. The reformer in him ruined his sordid efforts—such as jumping aboard the war-wagon and waving the one-world banner of Willkie—to be a good politician. As a reformer Roosevelt failed. The politician in him ruined his lofty efforts to be a good reformer.

On Thursday, July 20, standing before the politicians in the Chicago Stadium, and grinning the silly grin of a reformer trying to look like a politician, the reformer gave up politics. The politician had already pronounced him dead, and the ear-to-ear grin was not his mouth at all, but his slit and bleeding throat. Now he stepped to the microphone and the klieg lights to display the corpse and haunt the house with the moan of the Common Man.

Henry Wallace—he will get a super-ambassador's job next January—is dead. All mixed up these last few years—back in 1935 he said that war would be the end of the New Deal—he came home to die a reformer. His short speech seconding the nomination of Roosevelt—almost nobody bothered to print it in full—was the speech of a hero. It didn't help Wallace—he knew he was dead the day he got back from China—but it didn't help Roosevelt either.

In that speech, so ironically dedicated to the re-election of Roosevelt, Henry Wallace told the convention exactly what they were taking if they took him: a cured politician and an incurable reformer. Of only one disease is he still uncured—the blind, tragic devotion of the reformer to the

politician who plays him for fish. Here, after all the baloney about Roosevelt's personal loyalty to his friends, was the pay-off. Standing straight on the sacrificial altar, with his pants already aflame from the fire lit at Hyde Park, the incurable reformer proved himself the incurable friend. He asked the people not merely to forgive Pilate but to crown him king.

Thus the visionary, who, four years too late, proclaimed to an audience which did not want to believe him that war is not the work, as Roosevelt proclaims it, of "criminals and outlaws," of "aggressor nations," of Hitler and Hirohito and whoever else happens to be on the other side, but of gross inequality in educational, political, and economic opportunity, gross inequalities in Charleston and New York and North Dakota as well as in Tokyo and Berlin.

Thus the visionary, proclaiming, as the flames leaped up to his belt-buckle, "The poll tax must go," to a Party whose sole proprietor had consecrated it to silence on the poll tax.

Thus the visionary, proclaiming, as the fire licked at his chin-whiskers, that the war at home was being lost and had to be fought and won; proclaiming this heresy to a Party which, like the Republicans, never wanted to fight the war at home, and to a nation which is no longer interested.

Wallace is not so great a man as his speech of Thursday, July 20. If he were that great a man he would break with Roosevelt and lead what is left of reform to probable and glorious defeat. It was the *belief in him* of people starving for someone to believe in that made him great enough to write that speech.

"His support," said the Chicago *Tribune*, quoting a non-existent "political leader," "comes from the Negroes and the CIO." Yes, from inarticulate working stiffs, in fields as well as in factories, and from men, in Asia and America, whose color or creed is their curse. They made him their desperate symbol, their animated idol, and he spoke their hope that injustice everywhere—which is the cause of war always—could be grappled with here and now.

The father-complex crowd of the *Nation-New Republic*-Marshall Field variety will continue to assure the naked king, like the subject in the fable, that his new uniform becomes him. They will forget Wallace—their indispensable man until the king dispensed with him—and proceed to tell themselves that Truman is better than Byrnes or Barkley, and ever so much better than Pappy O'Daniel. By November they will be telling themselves that only the great king could have been wise enough to pick Truman.

And Truman is not at all bad, as it happens. He's a border man from a border state, an organization man, a far-better-than-average Senator, mildly liberal, and, above all, non-controversial. He is acceptable to labor, Phil

Murray says. *(We have no second choice, Phil Murray said.)* He has done magnificent work, or at least enabled Hugh Fulton, the counsel of the Truman Committee, to do magnificent work. He has become the symbol of economy, a sort of liberal Byrd. Truman's o.k.

But if we have to love Wallace for the enemies he's made, we have to take a gander at Truman's friends. He was the bosses' candidate against the people's.

Postmasters of the world, arise! You have nothing to lose but your jobs! If Wallace was the symbol of something greater than he is—of the man who might save the world, so Truman is the symbol of something much less than he is—of the watchdog, who will keep things in order at home while the Commander-in-Chief hurls lightning through the universe.

Roosevelt's victory over Wallace was a victory for reaction. It was the last and most fateful of all the death-blows that Roosevelt has struck at progressivism. And it leaves small-p progressives with a hard choice. As Sanitary Ed Kelly said, in nominating Lucas, "The eyes of the world is upon us." Where shall we turn?

We can all go forward together—or is it, by any chance, backward?—with Roosevelt. We can lock arms, close ranks, shut our eyes tight, proclaim ourselves the liberals, and squeal with delight at the new uniform of the naked king. We can stay with him through very, very thin, and get to work now for a fifth term or a 10th.

Forward with Roosevelt! *He* can change horses, but we can't! Don't ask whether he's going upstream or downstream, or what's on the other side! Hang on, boys! Keep your eyes shut, your ears shut, and, above all, your mouths shut! And down with the cynics who stand on the bank we left behind us and tell us it's time to quit playing horseback, and change the course of the stream!



48. THE BATTLE OF ATHENS, TENNESSEE [1]

IN THIS article White gives a vivid description of a rural political machine, how it operates and how it is unseated, in contrast to Rovere's "The Big Hello" (selection 40), which provides a somewhat sympathetic view of an urban machine. In Athens, Tennessee, the more usual characteristic of machine politics is emphasized—a determined, unscrupulous, corrupt group keeping itself in control by violence if

[1] Theodore H. White, *Harper's Magazine* (June, 1947), Vol. 194, No. 1160, pp. 54 ff. Reprinted by permission of Ann Watkins, Inc.

necessary. With the ballot boxes regularly stuffed with illegal ballots, the only means of removing the machine seemed to be by violence. The old residents of the county were loath to use force; but the returning G.I.s, accustomed to violence by their war experiences, overcame this reluctance, and thus unseated the old machine. It was fortunate, indeed, that it was the passion for democracy which unleashed the violence in an essentially revolutionary situation.

THE Sweetwater River, a pleasant mountain stream that falls into the basin of the Tennessee, cuts through McMinn County beneath a canopy of high tension wires. The people of McMinn County, like the taut, coppery wires, hum with subdued peaceful activity until they are disturbed; and then, like the wires, they snap in a shower of sparks and violence. It took several killings, ten years of extortion and thuggery, a world war and an official invasion by legal gunmen to bring on the violence of August 1, 1946, and the bloody siege of the Athens jail. But when it was over, democracy was firmly established and authority once again rested with the citizenry.

The people of McMinn County are God-fearing men and women. When the Robert E. Lee highway climbs out of the Shenandoah Valley, which can take its religion or leave it, into east Tennessee on the road to McMinn the highway is sprinkled with signboards telling the godless wayfarers that "Jesus is coming soon" or warning them "Prepare to Meet God." McMinn itself is relatively free of such shrieking witnesses to faith; McMinn's religion is Methodist and Baptist, quiet, bone-deep, and sober. On Saturday afternoon when farmers throng the town, preachers are allowed to call sinners to repentance in the shade of the courthouse at the county seat. But most of McMinn meets God in the serenity of Sunday morning at the red brick or white board house of worship in peace and devotion. The church-goers have made liquor illegal, and Sunday movies are unlawful, too.

Next to religion, politics is the most important thing. But until 1946, religion absorbed so much of the spirit of right-thinking people that politics fell automatically to the bad. First, it was the Republicans. They had McMinn County for years and years. The Republicans would let a Democrat get elected now and then, but the sheriff was theirs and they held tight to the county trustee who disbursed funds and issued poll-tax certificates. Then, from 1936, when Paul Cantrell won the election and established an eastern outpost of the Crump machine, it was ten years of Democrats.

Paul Cantrell, state senator from the McMinn area and boss of the county, was a medium-sized, bespectacled man of sallow complexion, a big head, and little neck. Cantrell loved two things: money and power.

He had a nervous, fidgety way about him; he rarely looked directly at a man when he talked to him; towards the end, an armed deputy accompanied Cantrell as guard when he strolled through Athens, the county seat. Pat Mansfield, his sheriff, was a tall, handsome man from Georgia. Pat was kind to his family and gave money to his church. He might have been popular but many people resented the sour troop of plug-uglies he had recruited to be his deputy sheriffs. Pat did Cantrell's bidding.

The Cantrell forces were hard, well-connected people. Cantrell was allied with Burch Biggs in neighboring Polk County; the pair were tied tight to the Crump machine, and Crump ran all of Tennessee. They were so close to the Crump machine that George Woods, who represented McMinn in the state legislature, was speaker of the house in the legislature of the State of Tennessee.

The machine bossed the county with a rough hand. The sheriff had sixteen regular deputies and about twenty or thirty other men he would deputize in "emergencies." Three of the deputies had served penitentiary terms. One of them had been convicted of taking a little girl out and violating the age of consent. It wasn't rape, but then it wasn't good, either; and God-fearing people like those who farmed and worked in McMinn didn't like it. When the deputies arrested a man they often slugged him until he was sensible. Nobody talked back much in public because it wasn't safe. The deputies threatened to kill people they didn't like. They were brutal men, ready to beat, blackjack, or bully anyone. One GI who was home on leave during the war was shot and killed by a deputy at a public entertainment house near Athens; a sailor home on leave was killed at the other end of the county.

The gambling joints and bootleggers were all tied to the machine. They paid off the proper people and operated punchboards and slot machines, sold liquor, did as they pleased. As a matter of fact, if someone was in the pen the best way to get him out was to work through the small-time racketeers to get the machine to go easy.

The take from the bootleggers and gamblers wasn't the only source of revenue for the machine. The county was directed by fee-grabbers. A tourist comes riding down the highway; maybe he has a bottle of beer. The deputies arrest him and take him to court. In the court is a little man, called "the informer," who says he is a lawyer. He advises the tourist to plead guilty, pay his fine, and go his way. Sixteen dollars and a nickel. No one will ever know how many people paid their sixteen dollars and a nickel, over and over again, to support the sheriff and his deputies. The sheriff was paid five thousand dollars a year and expenses, but he got seventy-five cents a day for every man in jail that had to be fed. When a

drunk was arrested, he was put back on the street next day with a clear head and an empty stomach, but the charge to the county was two days' food at seventy-five cents each. In ten years, county expenses for the sheriff's office had run to over three hundred thousand dollars. McMinn has an audit committee working on the books now.

There was nothing that could be done about it, because you couldn't vote the machine out of office. The machine had taken the county from the Republicans by a famous vote-grab in 1936; some people still tell how the last ballot box from a normally Republican precinct was fixed to show just enough lead to carry the county.

From then on, no matter how people voted, the machine counted the votes. In the key districts when the polls closed the deputies took the ballot boxes to jail, or another safe place, and counted them without any opposition watchers present. Then they would announce the results and always the Cantrell men won. There was nothing that could be done about that either. Appeal to the courts was useless; the Republicans tried that but no suit-at-law was ever won by the opposition.

Things had been that way for a long time when the war came, taking thirty-five hundred boys from McMinn homes and flinging them across the face of the earth. Folks kept writing to their sons about affairs in McMinn County; sometimes the boys would visit on furlough and then write to their friends in camps all around the world. There were four years to think about McMinn County, and Ralph Duggan, who was a lieutenant in the Navy, says he thought a lot more about McMinn County than he did about the Japs. Many were thinking as Ralph did—that if democracy was good enough to put on the Germans and Japs, it was good enough for McMinn County, too. It got to be a saying in Athens: "Wait till the GI boys come home."

By spring of 1946, the GI boys were trickling back to McMinn from France and Germany and Italy and the Pacific. The people of McMinn say there is nothing but what some good doesn't come of it, and what happened afterwards in McMinn came from the war. The boys learned a lot about fighting and more about patriotism in the Army; when they came home they were ready to do something about democracy in Tennessee.

In February they set to planning. They met secretly because the Cantrell forces had the guns, the blackjacks, and the law; and the deputies could make life hell for anyone they could catch. Once in the summer campaign, they seized one boy, locked him up, took his poll-tax receipt from him, and then, threatening his life, made him sign a statement that no such incident had ever taken place. There were five GI's and one civilian in on the first secret meetings. They decided that in the summer election for sheriff and county officials the GI's would put up a complete

slate of their own. Mansfield, Cantrell's sheriff, was going out of office and Cantrell was running for sheriff himself.

The veterans sounded out general feeling and in May they called a mass meeting. To get into the GI meeting you had to show your discharge papers, or your membership card in the American Legion or VFW. The veterans picked a non-partisan slate: three Democrats, two Republicans. Knox Henry, a tall handsome boy who had been hurt in North Africa and ran a filling station, was the man for sheriff. He was Republican, but the county trustee was to be Frank Carmichael, a farmer and a Democrat. Carmichael had been a major in the war and was badly wounded at Saint Lô. The other candidates were GI boys, too, except Charlie Pickel who had been in the first World War and had returned with his wounds to be a carpenter. Jim Buttram, a sturdy, solid chunk of combat infantryman, was to be campaign manager. Jim's family had a grocery store in Athens and Jim was new to politics.

With the slate chosen, the campaign picked up speed. Ralph Duggan, who had come back from the Navy to his law practice, was legal adviser and they pored over the Tennessee Code to see what the laws allowed them. The business men who feared the Cantrell forces contributed money secretly. They were afraid to give openly because the machine could raise the taxes, or arrest them, or generally make life hard. But eight thousand dollars came into the campaign fund and soon loudspeaker trucks were rolling over the hill roads, the *Daily Post-Athenian* was carrying campaign ads, and the local radio station was putting out fifteen minutes of talk a day. Up and down the pockets and roads went GI's calling meetings in evenings at schoolhouses or homes, begging, urging, pleading with everyone to get out and vote. It wasn't hard to pin scandal on the Cantrell forces; McMinn County had lived with the scandal for almost ten years. Nothing had been done about it for two reasons: first, the only alternative was the old Republicans; and second, it did no good to vote because the Cantrells always counted themselves to victory anyway. So over and over, like the beating of a drum in the darkness, the GI campaign chanted its theme: "Your vote will be counted as cast, your vote will be counted as cast."

"Everybody knew we were trying to do the right thing," said Jim Buttram. "We had twelve public meetings and we knew they were damned good. About three weeks before elections we knew we had won the votes and the hearts of the people of McMinn County. But the hardest thing to do was to build an organization to help us see we got a fair count on election day."

The GI's asked the governor for help; but the governor was elected with Crump backing and was silent. They asked the Attorney General in Washington for help; he did nothing. They made contact with the

FBI office in Knoxville; the FBI agent said he couldn't do anything unless Washington told him to, and Washington wasn't telling. The GI's were on their own.

II

Election day dawned sweet and clear over McMinn County. McMinn numbers twelve voting precincts but the decisive vote is cast in two townships, Etowah and Athens. Etowah is some ten miles in the hills from the main highway, but Athens, the county seat, is dead center. Athens sprawls fragrant and green about the old white courthouse; the Robert E. Lee hotel sits on one side, Woolworth's and a movie house on another, stores and offices on the other two sides. One block up from the courthouse lies the red brick county jail. Maple trees and green lawn surround the courthouse; old people sun themselves on the benches, children romp on the grass, blue-denimed farmers stroll casually about buying supplies for home and land.

Election day saw Athens an armed camp. As the voters came to the polls, they found the Cantrell machine in ominous demonstration of force. Almost two hundred armed deputies strutted about, pistols and blackjacks dangling from their belts, badges gleaming. The deputies were strangers. Mansfield claims he asked the governor for National Guardsmen to help him, and the governor authorized him to get deputies where he could. The machine had turned up a sodden gang of plug-uglies, most of them from foreign counties, some from as far as Georgia. Fred Puett, the Chamber of Commerce secretary, said that they looked as though they were drugged; their eyes seemed as cold and arrogant and hard as those of a band of Nazis.

By the Tennessee Code of Law, each polling place must be staffed with watchers from both parties, and the GI's had chosen boys of the best families, with the best war records, to stand as their representatives at each place. As the polls opened in Etowah, one of the GI watchers asked to see the ballot box opened and demonstrated empty as required by law. "Hell, no," said one of the deputies; an argument sputtered, a highway patrolman was summoned and Evans, the GI poll watcher, was hauled off to jail.

At 9:30 trouble flickered in Athens; the machine charged Walter Ellis, a GI watcher, with an unspecified federal offense, took him from his appointed place at the polls and put him in jail, too. At three in the afternoon Tom Gillespie, a colored man, appeared at the eleventh precinct complete with poll-tax receipt. "You can't vote here," said the machine watchers.

"He can too," contradicted the GI spokesman.

"Get him," yelled one of the deputies and someone slugged Gillespie.

Gillespie broke for the door and ran down the street. As he ran, a deputy at the door drew his pistol and shot him in the back. Gillespie was taken to the hospital. Fifteen minutes later, Bob Hairell, another GI watcher at the twelfth precinct, was in trouble. The machine wanted to vote a nineteen-year-old girl; Hairell objected. One of the deputies settled the argument by pulling his blackjack and laying Hairell's head open. Hairell was off to the hospital. The *Daily Post-Athenian* sent a reporter to get the story on Hairell. He, too, was slugged and told not to ask questions.

At four, the polls closed. In the eleventh precinct, the two GI watchers, Charles Scott, Jr. and Ed Vestal, were thrust to one side as the machine prepared to count the vote. Through the plate glass door of the polling place, the people could see the two boys penned in their corner of the large room. By this time, Jim Buttram, the campaign manager, had decided that the vote of the eleventh precinct wasn't worth trading off against the lives of two of his men. Twelve armed deputies had cleared the sidewalk in front of the eleventh precinct polling place, but hundreds of people stood on the opposite side. They watched Jim and Mr. Scott, father of Charles Scott, cross the street to speak to Mansfield, the sheriff.

Mansfield was sitting in a red 1946 Dodge. There were six men in the car. Buttram offered to give him the precinct in return for the release of the watchers.

"Are you trying to tell me how to run this election?" asked Mansfield. "You go over and get them yourself if you want them."

"You wouldn't want me to get shot, would you?" said Jim. A deputy sitting beside Mansfield lifted his thirty-eight from his lap and said: "Buttram, I ought to shoot you right now, you're the son-of-a-bitch who started the whole thing."

Mansfield knocked Moses' gun down and told him to shut up, he was doing the talking.

Mr. Scott leaned over and said: "If you won't let my boy out of there and anything happens to him, you'll have to pay for it."

Pat grabbed his gun, snarled "Let's settle this right now," and started to open the door of the car. Buttram slammed the door on him, and he and Scott hastily made their way back to the cover of the crowd.

A few minutes later Neal Ensminger, the editor of the local paper, strode over to the precinct door to see if he could get a tabulated count. As he asked one of the deputies a question, the two GI's in the polling place broke for safety. With his shoulder down, young Scott burst the door and pounded out, followed in a moment by Vestal. Bleeding, they ran across the street to the crowd as the deputies trained their guns on the boys. By this time women were screaming, children were crying, and the veterans—

still unarmed—stood cursing and shouting from the opposing pavement. The deputies held their fire as the two boys slipped among the people.

It was five now, and following their practice the Cantrell forces removed the ballot boxes of the eleventh and twelfth precincts to the security of the jail for counting.

III

The GI's had promised to get the vote counted as cast, and they gathered at their campaign headquarters around the corner to confer. As they stood in the street, two Mansfield deputies approached to break up the group. Otto Kennedy was watching from his tire store as the deputies walked up the street. With Otto was his brother Oley Kennedy, just out of the Navy, and his brother J. P. "Bull" Kennedy, just out of the Army.

"Pat Mansfield said he was going to give us a fair and square election," said Kennedy, "and then we saw those sons-of-bitches from Georgia, walking around with their guns and badges, telling us to kiss their neck. They'd put our boys in jail, they were running all over us. I stepped up to the door. I saw them coming. I just couldn't take it. I said to my brother: 'Bull, let's get them.' "

As the deputies stepped into the crowd, the GI's closed about them. They hit hard and high and low. The guns were taken and distributed among the GI's. Three more deputies, then two more walked into the crowd. All were disarmed and the guns handed out. The deputies were loaded on cars, taken to the woods, stripped of their clothes, and left to walk their way out.

The GI's were still indecisive and the Kennedys became cautious. They had struck the first blow; they were vulnerable. Otto decided to go home, telling the veterans that if they decided to do anything the Kennedys were ready to come back; otherwise they were staying away. Dusk was settling and the vets talked. A city policeman walked by to say that Mansfield was coming with tommy-guns and tear gas. Then something happened.

From dusk to dawn, the story of the siege of Athens dissolves into anonymity. The people had voted the GI ticket, trusting the GI guarantee of a fair count. Five districts which had been fairly tabulated by evening had already given the GI's almost a three-to-one lead. But the ballot boxes of the eleventh and twelfth precincts were being counted in the jail. Tomorrow the Cantrell forces would have victory and no one would be safe. On the one hand, the Common Law says that every citizen has the right to prevent a crime or felony from taking place; on the other hand, to take the jail by storm against the lawfully deputized thugs seemed perilously close to insurrection. A very fine point of law

is involved and Crump still runs Tennessee. Therefore, no man knows or tells who played precisely what role in Athens on the night of Thursday, August 1, 1946.

Down the highway from Athens is one of the armories of the National Guard. By eight o'clock rifles and machine guns were held by dozens of the veterans. It was a quiet movement. There was no raving or shouting. They collected at their headquarters and gravely, under cover of darkness, walked the two blocks to the jail where the sheriffs had taken the ballot boxes. Behind the jail is a barbed wire enclosure. Facing it, across the street, is a low hill covered with vines and several houses and buildings. The deputies had made a mistake that the battle-wise GI's recognized immediately: they had concentrated forty or fifty of their number in jail and left no reserves in town. The GI's deployed in the darkness in a semicircle above the jail, on the hill behind the cover of vines, on rooftops. A veteran strode into the street and yelled at the silent jail a demand for the ballot boxes and the release of the GI prisoners.

A voice answered, "Are you the law?"

The GI yelled back, "There isn't any law in McMinn County."

A lone shot went off from within the jail. The man that answered from the hill answered with a tommy-gun.

There were several hundred veterans in the semicircle and hundreds of boys and civilians. Some had rifles, a few had tommy-guns, others had bird guns and hunting pieces. The fusillade rose and fell above the night, echoing into the suburbs and hills. Bullets spattered the Chamber of Commerce and the newspaper office a block away. A block down the road, a man standing on the corner of the courthouse square was nicked in the arm.

The local radio station had sent a reporter with a microphone to cover the action; up and down the county farmers tuned in to the running account. Some of them put their clothes on, got their guns, came to join in the shoot. Boys too young to cock a rifle came down to see the fun and remained to learn how to shoot in the night.

The deputies were safe behind the thick brick wall of the jail, and the bullets of the GI's could do no more than cut out chunks of the wall. As the sporadic shooting dragged on hour after hour, the veterans realized with a sick feeling that night was wearing away and, with daylight, state patrolmen—perhaps even the National Guard—might be called in to reinforce the garrison of deputies. Defeat would mean that McMinn County would never be safe again for any man who had taken part in the night's firing. It was go through with it, or get out of town.

At midnight a detachment went over to the county farm where a case of dynamite was located. During a lull, the veterans yelled that unless

the ballot boxes and prisoners were released in twenty minutes they would blast the jail. An hour went by and the jail made no answer. Somebody fitted a cap to a stick of dynamite and tossed it into the street. A second stick followed. On the third throw, two sticks were tied together and thrown across to the sidewalk of the jail. The fourth throw of two sticks landed on the porch of the jail and tore it wide apart. Somebody had learned about demolition in the war; for the last try they decided to prepare a homemade satchel charge of the rest of the case and place it under the jail wall. But before the charge could be placed, the jail was yelling surrender. It was 3:30 in the morning.

"We're dying in here," came a call. "Don't use any more dynamite, we're giving up."

No one was dying. Four of the deputies were pretty badly hurt and required hospitalization; ten of the GI's were wounded in the day's action; but the war was over.

The vets ordered the deputies to march into the courtyard with their hands up, leaving their guns behind. As they marched out, the crowd gathered round, yelling, cursing, and booing. Someone in the crowd reached out with a razor and slashed at one of the deputies, laying his throat open. Duggan tried to stop the man; the man explained that the deputy had arrested him before, taken him to jail and kicked in four of his ribs. Duggan tried to reason with him, but he made another razor pass. Then Duggan slugged him into obedience and led the deputy off to the hospital. Behind them a file of deputies, guarded by GI's, paraded through the street to the courthouse and back so that the people might see and taunt their unthroned impotence.

By this time dawn was lighting the county and the radio station, broadcasting the victory, was bringing farmers in from all the hills to see what was happening. The state capital had been alerted and the State Commissioner of Public Safety, Lynn Bomar, called up to locate a GI to negotiate. Ralph Duggan answered the phone and spoke to George Woods at the state capital. Woods, who was Election Commissioner of the county, promised—if given a safe conduct—to return to Athens on Monday and certify the election of the entire GI slate. Duggan announced the victory to the crowd at six in the morning and then went home.

Violence flickered on for several more hours. The GI's had had their fill, but the civilians and boys were carrying on. They smashed in windows of the deputies' automobiles, turned them over, burned cars indiscriminately. It was the GI's now who had to restrain the civilians and protect their prisoners. By ten o'clock, however, the fury had spent itself and the GI's were carefully escorting their prisoners out of town. At three, a giant mass meeting was held in the courthouse, men jamming the assembly hall, overflowing onto the steps and the lawn. The Reverend Bernie

Hampton read the twenty-third psalm and asked the body of citizens what their will was. Someone suggested the appointment of a three-man committee to administer the county till things settled down. The three-man committee was elected immediately and from Friday to Monday it conducted the county's affairs on a volunteer basis.

It summoned the county court—the local legislative body—to a meeting on Monday morning. The county court declared vacant the offices held by machine contestants in the elections and declared the GI slate duly elected. Six of the twelve precincts' votes were thrown out entirely, for no fair count had been given there. When the GI's broke into jail they found that some of the tally sheets marked by the machine had been scored fifteen to one for the Cantrell forces. Where the GI's witnessed the count, the margin was three to one GI. Thus it was decided that only in those precincts where both parties had watched should the count be accepted. By Monday afternoon, Knox Henry was sheriff of McMinn County and the law was safe.

IV

McMinn is quiet and peaceful again. The courthouse has been painted for the first time in years, and the big clock has been fixed so that it strikes the hours loud, clear, and free over the entire town. The jail has been repaired but it is curiously empty. Within a month Henry was running McMinn County with eight youthful GI deputies. Saturday night no longer filled the cells with fifty or sixty men waiting to be fined; by the end of the month, Saturday night found only three men in jail. The four city policemen had been fired and replaced by veterans. Pat Mansfield was back in Georgia, working as a fireman on a railway. Paul Cantrell was in Nashville and didn't want to come back.

The gambling joints have been closed down, the bootlegging ring has been smashed, fee-grabbing ended. There are no more slot machines or punchboards. Henry has pledged the new regime that the sheriff will live on his lawful salary.

The GI party, too, has been disbanded, but a Good Government League has succeeded it. The Good Government League has branches in fifteen different communities of the county and is the public whip. The county court still has a majority of old Cantrell men, but they don't come up for election till next summer. Meanwhile the Good Government League suggests various actions to it, and the court pays heed.

The first thing the county court was persuaded to do was to establish an audit committee. The Good Government League wants to see what resources are available for the two most pressing local problems: schools and roads. Schools are pretty bad in McMinn. Pay for teachers is so poor that all the best teachers are leaving. In some places in McMinn,

teachers get eighty-five dollars a month for the eight months they work; that averages less than fifteen dollars a week, year-round, as take-home pay. Even a waitress at the hotel makes more than that. Highest pay is at the high school and that comes to only thirty dollars a week for a teacher with a master's degree. The Good Government League wants to divert money from the sheriff's heavy budget to the education budget. When the schools and school buses are fixed, they want to do something about the roads. Maybe after that the League will move on to such long-range plans as a permanent county-manager system and a new structure of government.

The GI's like McMinn and they think they can keep it healthy. There will always be bootlegging unless the church people let the county make liquor legal. But now the government will be master of the bootleggers instead of the bootleggers masters of the government. The GI's say they aren't interested in "issues"; they aren't interested in unions or poll-tax laws or running the country. This was a McMinn matter, strictly a battle to give McMinn fair and square elections and force Boss Crump back to Shelby County.

It is true, of course, that Crump still runs the rest of Tennessee and that Crump helped send back to Washington a man named Kenneth McKellar. And until November 1946, McKellar was president of the Senate of the United States of America, called the greatest deliberative body in the world.



49. POLITICAL ACTIVITY IN ARKANSAS [1]

THIS small section of the report of the Senate special committee on 1944 campaign expenditures emphasizes the close relationship between democratic government and the actual electoral machinery. Unless the ballot laws are carefully drawn and conscientiously enforced, the results are not likely to be accurate; and to the extent that they are not accurate, the wishes of the voters are misrepresented. In Arkansas and most of the other Southern states the primary contest, not the general election, is important. The successful victor in the Democratic primary almost always feels assured of election in November because of the preponderant power of the Democratic party in the South. Thus the device of two primaries is used, the first to select the two highest contenders if no one of them has a majority, and the second, a run-off primary between these two highest. The investi-

[1] Reprinted from United States Senate, Special Committee To Investigate Presidential, Vice Presidential, and Senatorial Campaign Expenditures in 1944 (79th Congress, First Session, Report No. 101, pp. 31–42.)

gating committee found shocking irregularities both of expenditure and of voting methods in the Arkansas primary, although the results were not vitiated thereby. As a remedy the committee offered the solution of publicity and urged the application of the Federal Corrupt Practices Acts to primary elections for national offices.

COMPLAINT

COMPLAINTS relating to the primary campaigns for the office of United States Senator in the State of Arkansas were filed with the committee alleging that (1) large and excessive amounts of money were being expended and (2) that the expenditures of these excessive amounts of money had led to fraud and corruption in the preferential primary of July 25, 1944.

A preliminary investigation was initiated; and, acting upon the findings of this investigation, a subcommittee, consisting of Senator James Tunnell, chairman, and Senator Homer Ferguson, was appointed on September 1, 1944, for the purpose of conducting hearings relating to the charges. The subcommittee conducted hearings at Little Rock, Ark., on September 7, 8, and 9 in the courtroom of the Federal building, made available through the courtesy of Federal Judge Trimble. The committee heard the testimony of 35 witnesses and ordered the opening and examination of a score of ballot boxes for the purpose of ascertaining the validity of the allegations of fraud and corruption in the primary campaigns.

STATEMENT OF FACTS

Election law. For a clearer understanding of the significance of the testimony presented to the committee and the facts established thereby, some comment should be made with reference to the primary election laws of the State of Arkansas and, particularly, their practical application. Geographically, the State is divided into 75 counties. In these counties there are 2,087 voting precincts. By statute, the major control of the primary election machinery is placed in the hands of county central committees of the party. Precinct judges and clerks are appointed by each county central committee (Popes Ark. Stat., sec. 4724). The county central committee is responsible for the printing and distribution of the ballots (Popes Ark. Stat., sec. 4725). The county central committee is also required to furnish carbon paper for use with the duplicate ballot (Popes Ark. Stat., sec. 4759). The county election commission, a board which is appointed by the State election commissioners, are required to furnish ballot boxes and the law provides that the box shall be "a good and sufficient ballot box with lock and key" (Popes Ark. Stat., sec. 4758). It is not

unusual, however, to find various types of ballot boxes, many of a unique variety being used in each county.

Upon closing the polls the judges and clerks begin a count of the ballots and upon completion of the count the ballots, poll books, registry of voters, and the returns are turned over to the county central committee (Popes Ark. Stat., sec. 4729). Only the original ballot box is thus transferred to the county central committee. The county central committee makes a canvass of the returns and certifies the result to the State central committee (Popes Ark. Stat., sec. 4736). The law provides that the ballots must be returned by the county central committee to the county clerk in the ballot boxes, locked and sealed (Popes Ark. Stat., sec. 4737).

The duplicate ballot law of the State is of particular importance. Briefly, under the duplicate ballot law, and elector, upon entering the polling place, receives a ballot printed in duplicate. The ballots are in one piece, being so printed and perforated that by folding over and using carbon paper an exact duplicate can be made. The most significant feature of the law is the fact that the voter is required to sign the duplicate ballot (Popes Ark. Stat., sec. 4759). In addition, the duplicate ballot is numbered by the election officials when it is handed to the voter and the law requires that the ballot bear the name or initials of one of the election officials on the back thereof. No ballot shall be received from any elector or deposited in the ballot box which does not have the name or initials of at least one of the judges endorsed on the back of it (Popes Ark. Stat., sec. 4776). The number on the ballot must correspond to the number which is given to the voter on the list of electors voting. For example, if John Jones is first elector to arrive at the polls, his name is entered on the list of electors and the number (1) is placed opposite his name. The number (1) is marked on the back of the duplicate ballot which, in turn, is initialed by one of the election officials before being handed to the voter. The elector votes his ballot by scratching off, erasing, or crossing out the names of all candidates except those for whom he wishes to vote (Popes Ark. Stat., sec. 4773). After marking his ballot, the voter places the original in the ballot box maintained for original ballots and the duplicate is placed in a separate box maintained for duplicate ballots (Popes Ark. Stat., sec. 4773). In the canvassing of the election, only the ballots in the original box are counted. This original box must be sealed and delivered to the county central committee and is deposited by them with the county clerk who must maintain it in a safe place. The duplicate ballot box is delivered to the county treasurer and is not to be opened and examined except upon order of a court of competent jurisdiction made in an election contest or by a grand jury in connection with its inquisitorial duties or by direction of a prosecuting attorney in the prosecution of a person for violation of any of the election laws (Popes Ark. Stat., sec. 4759). Basically, the purpose of the duplicate ballot is to provide a sound means of

determining an election contest for, in the event of a contest, the duplicate ballot box is opened and the canvassing of the ballots contained therein is determinative of the result.

It is further provided that when two or more ballots are folded together it shall be considered conclusive evidence of their being fraudulent and neither or any of them shall be counted (Popes Ark. Stat., sec. 4811).

The requirements relating to absentee voting are also of importance. Any person expecting to be absent from his voting precinct on election day may apply, by letter, to the county clerk for a ballot. The applicant must state that he is necessarily away from home and will not vote again in the primary. This is usually done in the form of an affidavit filed with the county clerk (Popes Ark. Stat., sec. 4782). It is unlawful for any person to cast an absentee ballot unless, in fact, actually absent from his or her voting precinct (Popes Ark. Stat., sec. 4794). A serviceman may obtain ballots in the same manner except that the law allows any member of his family to apply to the county clerk and secure the ballot for him. Absentee ballots are voted and returned to the county clerk who holds them until the canvassing of the regular votes is made on election day. Absentee ballots are counted by a board of three judges appointed by the county central committee (Popes Ark. Stat., sec. 4731).

Since separate boxes must be used for the original and duplicate ballot, in the 2,087 voting precincts, a total of 8,348 "boxes" were used in the two primary elections. Acting upon instructions, committee investigators impounded approximately 1,200 boxes from 11 counties. All impounded boxes were duplicate ballot boxes except 127 original ballot boxes from Garland County. Placed in the custody of the United States marshal's office at Little Rock and in the United States marshal's office at Fort Smith, they were kept in vaults under lock and key.

Primary election results. In a primary election in the State of Arkansas, the candidate must receive a majority of the votes cast in order to win the party nomination. Failing this, the first two candidates are paired in a run-off primary. The initial primary is commonly referred to as the "preferential primary." In the preferential primary of July 25, 1944, the candidates were Hon. Hattie W. Caraway, Hon. J. William Fulbright, Hon. Homer M. Adkins, Col. T. H. Barton, and Hon. J. Rosser Venable. The votes in this primary were as follows:

CANDIDATES AND NUMBER OF VOTES RECEIVED

J. William Fulbright	66,352
Homer M. Adkins	49,815
Col. T. H. Barton	43,469
Hattie W. Caraway	24,881
J. Rosser Venable	880
Total	185,397

ARIZONA UNIVERSITY

In the run-off primary of August 8, 1944, in which the candidates were Hon. J. W. Fulbright and Hon. Homer M. Adkins, the vote was distributed as follows:

CANDIDATES AND NUMBER OF VOTES RECEIVED

J. William Fulbright	117,131
Homer M. Adkins	85,163
Total	202,294

Expenditures: The initial hearing on the evening of September 7 was devoted to the examination of witnesses who were connected with the campaign of Homer M. Adkins, present Governor of Arkansas. The chief witness of the Adkins' forces, Clifton E. Scott, financial manager of the Adkins' campaign, testified that a total of $74,000 had been expended on behalf of the Governor's candidacy. A most interesting phase of his testimony was that relating to a special fund which was contributed by State employees earning $3,000 or more. He told the committee that statutory limitations on campaign expenditures "places all of us . . . in an embarrassing situation." Although contending that it was impossible to conduct an election in a large State, such as Arkansas, without spending seemingly excessive sums of money, he admitted that such practices might cause corruption in the ballot box. Most of the Adkins' disbursements were made through the Gerald L. LeFevre Advertising Agency, of Little Rock, Ark., which handled the entire advertising campaign for the Governor's group, including radio broadcasts. The committee found that a 40-page record book had been printed by the Adkins' campaign group and 200,000 copies thereof had been circulated throughout the State of Arkansas. The total cost of the printing of this ambitious record book was $11,800. This figure does not include the mailing charges.

Although not subpoenaed, Governor Adkins was present at the hearing and upon invitation of the committee, personally testified as to his own activities with regard to expenditures made during his campaign. He stated that he personally had expended $9,250. Of this sum, about $2,500 represented his own personal contribution and the balance consisted of funds that were turned over to him by representatives of the State employees. He specifically emphasized the fact that the contributions from the State employees were made without any solicitation on his part. Subsequent to the committee hearings Governor Adkins filed a questionnaire with the committee in Washington which reports a total expended on his behalf of $99,606.44.

On Friday morning, September 8, 1944, witnesses affiliated with the campaign of Col. T. H. Barton were called to the stand. Mr. Sidney M. Brooks, owner of the S. M. Brooks Advertising Agency of Little Rock, Ark., testified that he handled the advertising matters for the Barton campaign

and that the total disbursements through his agency were $60,686.75.

The most significant testimony with reference to the Barton campaign was that given by the financial manager, Mr. R. E. Meinert of El Dorado, Ark. Mr. Meinert is the vice president of the Lion Oil & Refining Co. of El Dorado, Ark., of which Colonel Barton is the president. He told the committee that a total of $118,797.29 was expended on the campaign. He further testified that the chief contributors to Colonel Barton's campaign fund were two sons of the candidate, Clark N. Barton and T. K. Barton who gave a total of $105,927.36. Clark Barton, also an executive of the Lion Oil Co., donated $50,500 to his father's campaign, while T. K. Barton, the publisher of the Arkansas Farmer, gave $55,437.36. Mr. Meinert related that he personally contributed $5,000 and that the balance was collected from a small number of individuals.

It was found, further, that a famous radio troupe known as the Grand Old Opry of Nashville, Tenn., was engaged to assist in the campaign of Colonel Barton. This company, numbering among its members such well known entertainers as Minnie Pearl, Jamup and Honey, and the Duke of Paducah, was engaged through solicitation by Mr. G. E. Zimmerman, general manager, of radio station KARK of Little Rock, Ark. Colonel Barton is a part owner of this station. It was found that the Grand Old Opry had been paid about $35,000, receiving $1,200 a day for their services, and staged 29 performances during the course of the Barton campaign.

Colonel Barton testified that he personally spent a total of $8,934.81. He denied that any bonus or payment was made by him or his corporation to his sons, one of whom was an officer of the corporation, to reimburse them for their contributions to his campaign. In questioning him regarding the $105,000 contribution made to his campaign fund by his two sons, the following colloquy ensued:

> Senator Ferguson. Did you have any conversation with your sons about the amount they would put in—about putting in any money?
>
> Colonel Barton. Yes; I discussed it with them.
>
> Senator Ferguson. Tell us what conversation you had.
>
> Colonel Barton. "The old man is going to run for the Senate. You boys want to kick in?" "Sure, we do. We will go the limit." * * *
>
> Senator Ferguson. Didn't they say: "Now, Dad, what is this going to cost us?" They are businessmen, aren't they?
>
> Colonel Barton. Yes. I do not think they looked upon this in a business way. They were anxious to see their dad elected and knew it would cost money and were anxious and willing to contribute.

Colonel Barton steadfastly maintained that the contributions of his sons were based solely on a family-interest basis. He did admit however, that he personally guaranteed the payment of all bills contracted by the

Sidney M. Brooks Advertising Agency, which conducted the publicity program for his campaign.

In addition to the employment of the Grand Old Opry troupe, the committee found that Colonel Barton utilized the services of a locally prominent revival preacher, Rev. James McKrell, widely known as "Uncle Mac." His radio program, operated under the name of Bible Lovers Revival, was reputed to be one of the most popular in the State. It was found that the Reverend McKrell had toured the State of Arkansas with a radio quartet, known as the "Stamp Baxter Boys," and conducted large and well-attended meetings on behalf of the Colonel's candidacy. It was stated that Uncle Mac's services were donated purely on a free and voluntary basis, and the committee was unable to develop any evidence to the contrary. The only disbursement to the radio preacher found by the committee was the sum of $484.50, which was disbursed through the Sidney M. Brooks Advertising Agency.

Mr. Archie F. House, the treasurer of the Fulbright campaign, stated that he had handled all of the money collected on behalf of Mr. Fulbright. He presented a complete list of the names of all contributors together with the amount of the contribution from each which showed that a total of $65,190.35 had been received. He declared that this represented the entire sum which had been expended on behalf of Mr. Fulbright in both primary elections except for the amount spent personally by the candidate which was $9,000.

Mr. House told the committee about 50 percent of this sum was expended in "purely defense" which was required because of slanderous attacks made on the candidate, many of them in elaborate printed form.

The committee directly inquired of both Governor Adkins and Colonel Barton as to whether or not they had any intentions of contesting the election. Governor Adkins testified that, in his opinion, despite any evidence of fraud, there would not be enough fraud uncovered to materially affect the 32,000-vote majority by which Congressman Fulbright had defeated him. Colonel Barton stated that he had no reason to believe that the election was decided by fraudulent votes.

The committee found that a total of $321,135.22 had been spent on the primary elections for the candidates therein. . . .

Fraud. In an effort to uncover facts relating to the charges of fraud and irregularities in the elections, the committee determined to open and examine some of the ballot boxes which had been impounded by the committee investigators. Evidence of flagrant violations was found in practically all of the boxes examined at this time.

The committee noted that the ballot boxes employed in the elections were of a most unorthodox and varied type. It was found that cardboard cartons, mail boxes, envelopes, improvised grocery and commodity boxes

were used, as well as regular steel and wooden containers. Many of the boxes did not bear the metal seal required by the State law. A number of them had only paper seals while some boxes had no seals whatsoever. This situation provides an open invitation to fraud.

The opening of the boxes and the examination and recount of the ballots were conducted publicly in the courtroom and in the chambers adjacent thereto, in the presence of spectators, members of the press, and the candidates or representatives of the candidates. The committee was ably assisted by Mr. Fred M. Bradley, deputy United States marshal, and by Mr. Sam Wassell, assistant United States attorney, former Governor Carl E. Bailey and his associate, John R. Thompson, both of whom were sworn and aided in the examination. During the course of the hearing, Governor Bailey challenged the constitutionality of the duplicate ballot law and told the committee the requirement that the duplicate ballot be signed was not mandatory but merely directory. The attorney general of the State, Guy E. Williams, who was present during most of the hearings, told the committee that he agreed in this view with Governor Bailey.

A duplicate box containing absentee ballots cast in Jackson County in the primary of July 25 was opened. This box was neither sealed nor locked. . . .

In another box, the committee found evidence of the same signature for husband and wife appearing on several ballots. The examination of the duplicate ballot box for South Lucas precinct, Crittenden County, for the August 8 election revealed that the box contained 96 ballots, all of which were cast for J. W. Fulbright. Similar signatures were found on 6 pairs of ballots in this box. The committee was told that it was not unusual for a husband to vote for his wife and vice versa. The official certification from this precinct returned 97 votes for Fulbright.

A duplicate box for the August 8 election subpoenaed from Union Township, Conway County, and brought before the committee by the county treasurer, when opened was found to contain 5 duplicate ballots. One of these ballots was unsigned. The total vote was 3 for Adkins, 2 for Fulbright. The official certification from this precinct reported a total of 98 votes with 75 for Adkins and 23 for Fulbright. The committee noted that this box was a pasteboard carton and bore brown and grey paper seals. The original ballot box of August 8 for this precinct when opened and examined, was found to contain a total of 45 ballots, 35 of which were voted for Adkins and 9 for Fulbright, and 1 ballot that was not voted. Three of the ballots were duplicate ballots and were voted for Adkins and were contained in the total of 35.

The duplicate ballot box of Union Township for the primary of July 25, when opened, was found to contain a number of ballots folded together in a like manner, the fold running lengthwise. The box con-

tained a total of 98 ballots and the recount showed the canvass as follows: Barton, 14; Caraway, 16; Fulbright, 4; Adkins, 63; and 1 not voted. The duplicate ballot box for this precinct in the July 25 primary contained 103 ballots, none of which were signed or numbered and none of which bore the initials of one of the election officials. The recount of these ballots showed that the candidates received the following votes: Adkins, 63; Caraway, 14; Barton, 13; Fulbright, 4. Five of the ballots were so marked as to render a canvass doubtful. The official certification from Union precinct gave the following returns: Adkins, 55; Caraway, 12; Venable, 2; Fulbright, 12; Barton, 19.

Mr. James T. Willis, a 77-year-old resident of Union Township testified that he sat in front of the polling place all day on July 25 and that he counted 28 persons entering the building beginning at the time that the polls were opened until they closed. Mr. Willis stated that he wanted his vote to be counted so he and his wife voted absentee and further testified that for the past 8 or 10 years it had been impossible to get an honest election held in Union Township. His statements were corroborated by Steve Combs, former State Senator from Union Township. Mr. Combs declared that he, too, had voted absentee in order to have his vote counted. He told the committee that because of corrupt election officials in the town, who for the past 6 or 8 years had been engaging in stealing votes, a number of the voters in that district resorted to the practice of voting by absentee ballots at all elections. He said that he notarized a block of 21 absentee ballots himself and that his father, who was a justice of the peace, notarized 20 or more.

Mr. John Sheffield, an attorney of Helena, Ark., stated that he was a judge of absentee ballots in Phillips County in the August 8 primary election. Startling facts concerning the counting of absentee ballots in the run-off primary in that county were related by Mr. Sheffield. Mr. Sheffield said that the two other judges decided to count the votes cast for the run-off candidates, Homer Adkins and J. W. Fulbright, in the July 25 primary, and add those votes to the number cast for them in the August 8 primary. The reason advanced by them for this course of conduct was to protect the servicemen, who, otherwise, might be denied their franchise, since very few, if any, ballots, for the run-off primary had been printed in time to be forwarded to men in the service. In addition, he told the committee that a group of civilian employees of the Helena Air School, which was preparing to close on August 4, and none of whom were legal residents of the county all voted by absentee ballot in this primary. He stated that about 25 of them were solicited by the county clerk.

Sheriff John Gower of Stone County told the committee of an unidentified Locust Grove Township political boss who publicly predicted the exact total of votes that each candidate would receive in the primary.

Further investigation. On September 26, 1944, the committee considered the report submitted by the subcommittee and, after due consideration, it was agreed that the committee should continue its investigation into charges which subsequently had been made that in the preferential primary a sufficient number of votes had been taken from Colonel Barton and given to Homer Adkins to result in placing the latter in the run-off primary. The committee thereupon directed that the original and duplicate ballot boxes of 200 voting precincts bearing ballots cast in the preferential primary be opened and examined. The committee investigators returned to Arkansas on October 26, 1944, and completed the assignment on November 10, 1944. . . .

In approaching the problem of making an accurate count of the ballots, the representatives of the committee decided to check the ballots from 10 precincts in 20 counties, both duplicate and original boxes, the total of which would be 400 precincts. As a general rule, the total from 10 original boxes were compared with the totals of the corresponding duplicate boxes and these totals then checked against the official returns as certified to the State Democratic Central Committee. The results of the tabulations were recorded on mimeographed tally sheets which were grouped according to counties.

In the great majority of cases, a reasonable correlation was noted as between the totals of the original and duplicate boxes and also as between these totals and the official returns. Slight discrepancies in some instances were traceable to spoiled ballots and also to a reasonable doubt as to the candidate for whom the vote was intended. This latter situation was more prevalent in the cases of duplicate ballots wherein the carbon paper had undoubtedly slipped and, as a result, the obliteration of the candidate's name was not clear and definite. In numerous instances, it was noted that electors had scratched only two or three of the five candidates' names, thus voiding the ballot. Notwithstanding the requirements of the election law, very rarely was precise adherence to all of its provisions found.

County officials cooperated fully with the committee agents in transporting the ballot boxes upon request from the various county seats to the Federal Building in Little Rock. Usually, the officials accepted service of a subpeona by telephone and thus saved the committee much time and expense.

Incident to the count of the ballots, several glaring examples of irregularity were revealed. In the case of Sharp County it was estimated that ballots from 13 different precincts had been emptied indiscriminately into a large, cardboard box, thus making an accurate check of the ballots impossible.

The following statement was furnished by the clerk of White County:

I, Floyd E. Bradberry, county and probate clerk, within and for White County, State of Arkansas, hereby certify that the original ballots cast in the run-off primary, held on July 25, 1944, were destroyed by an agreement with the secretary of the White County Central Committee, Hubert Smith, so that the original ballot boxes could be used for the October 8 primary, 1944.

Floyd E. Bradberry,
County and Probate Clerk,
White County, Ark.

Examination of duplicate boxes from Poinsett County confirmed certain anomalous practices. For example, in checking ballots from Greenwood Township, Poinsett County, a striking similarity in handwriting was noted on numerous husband-and-wife ballots. Further, referring to this same Greenwood Township, 200 names taken from the duplicate ballots were checked against the official poll-tax list which was compiled for the 1944 primary. The payment of a poll tax is a prerequisite for voting in Arkansas and the only qualified voters not on the poll-tax list would be those who attained the age of 21 since the dead line for payment of poll taxes. These latter electors must sign an affidavit affirming this fact. Of the 200 names checked, 39 were not included in the list of qualified voters for Poinsett County.

Perhaps the most glaring examples of irregularities were found in the various types and sizes of ballot boxes used in the recent primary elections. The laws of Arkansas provide that county election boards must furnish "good and sufficient" ballot boxes with "lock and key." In Newton County, for example, the following types of ballot boxes were found:

(1) A regulation 5-cent match box.

(2) A Prince Albert tobacco box.

(3) An 8-inch long pasteboard box originally containing a dozen spools of thread.

(4) A cardboard candy box.

(5) A cardboard box with a petroleum jelly label.

In practically no instance did any two counties use identical ballot boxes. It was noted that Jackson County had furnished ballot boxes in the form of old gasoline cans. A few counties used mail boxes, envelopes, and one county utilized tin bread baskets. In three instances, only, did committee investigators find ballots contained in a box under "lock and key." It is difficult to see how elections may be preserved from fraud when the very receptacle in which the ballots are placed may be opened at will for lack of lock or seal.

Although finding wholesale irregularities in election administration, the facts disclosed by this extensive examination of the ballot boxes were not such as to substantiate the charge that the election results were vitiated by fraud. . . .

CONCLUSIONS

The committee found conclusive evidence of the excessive expenditure of funds in the primary election. The law of the State did not require the publication of the amounts disbursed by the committees sponsoring the election of the candidates although it determined a maximum amount that could be expended by the candidates personally and provided for the filing of a statement of receipts and expenditures with the Secretary of State. Prior to the investigation and hearings, therefore, no publicity had been given to the amount of the funds, or their source and manner of disbursement by committees acting on behalf of the principal candidates. The committee is of the opinion that the provisions of Federal law should be extended to nominating campaigns so that effective and prompt publicity may be given to the expenditures made on behalf of candidates for the United States Senate.

The committee found evidence of fraud and glaring irregularities in many specific instances. The committee found an appalling indifference to and a flagrant disregard for the laws governing the conduct of the elections. The careful and thorough investigation of the preferential primary of July 25, 1944, however, failed to establish the charges that the fraud was of such an extent as to vitiate the results thereof. Actually, in many cases, the irregularities were favorable to the opponents of the successful candidate.

It must be stated, however, that the committee did not find a scintilla of evidence that the election of the Honorable J. William Fulbright was in any way affected by the irregularities found, or that he had expended amounts in excess of the limitations determined by State law.

At all times, the committee cooperated with and received the assistance of both State and Federal enforcement officials. All evidence obtained by the committee and all related data thereto were made available to them.



50. PRESIDENTIAL CAMPAIGN FUNDS, 1944 [1]

THE information given here as to the source of presidential campaign expenditures illuminates the practical operation of American national politics. What favors, if any, were to be expected from the government in return for the more than $20,000,000 contributed by groups and individuals to the party campaign coffers in 1944? The first step

[1] Louise Overacker, *American Political Science Review* (October, 1945), Vol. XXXIX, No. 5, pp. 899 ff., in part. All footnotes and some tables omitted.

toward answering that question is the accumulation of detailed figures showing major contributors. Because of the danger of corruption in government growing out of campaign expenditures the Federal Corrupt Practices Acts and the Hatch Acts of 1939 and 1940, among others, undertook to regulate the raising of money and its expenditure, to prescribe the purposes for which it could be spent, and, above all, to provide for publication of campaign finances. Professor Overacker, who has prepared several articles for the *American Political Science Review* on this subject, concludes that the Hatch Act requirements limiting individual contributions to $5,000 and national committee expenditures to $3,000,000 per year were evaded in 1944 by the multiplication of interlinked committees. The section of the Smith-Connolly Act prohibiting labor unions from making contributions to national elections was equally ineffective. Whether its extension in the Taft-Hartley Act was more effective in 1948 remains to be seen. Professor Overacker agrees with the 1944 Senate committee investigating campaign expenditures that publicity is likely to be more effective than prohibition in regulating campaign expenditures.

THE 1944 campaign was the second presidential election in which the ceilings of the Hatch Act were operative, and the first campaign in which contributions from labor organizations were prohibited. It furnishes convincing evidence of the ineffectiveness of these limitations and of the imperative need for complete revision of existing regulations of campaign funds.

The financing of the 1944 campaign was subject to close study by special committees of both the House and Senate, and their hearings and reports supplement at many important points the reports required by the Corrupt Practices Act. The most controversial issues of the campaign centered about the Political Action Committee of the CIO, and this organization was subjected to close study by both committees. The House committee, headed by Representative Clinton P. Anderson (now Secretary of Agriculture), also stressed the increasing importance and questionable practices of non-party "opinion moulders," but did not attempt to summarize the total expenditures of the campaign. Senator Green's committee, in addition to studying certain party committees and independent organizations in detail, made a great effort to compile complete data on receipts and expenditures affecting the presidential campaign, and its report makes available what is probably the most complete and accurate over-all picture of the financing of a presidential election ever recorded. The notable recommendations of this committee will be discussed later.

The campaign of 1944 opened with both national committees solvent. The Republicans had settled all 1940 bills before the end of that calendar year; obligations of $400,000, carried over by the Democrats, were gradually repaid, so that January 1, 1944, found a small balance in the treasury.

Between campaigns, both national committees were relatively inactive, spending only about one-third as much as in 1937–39. The modesty of these expenditures, shown in Table I, indicates that the limitation of expenditures of national committees to $3,000,000 in a calendar year, provided for in the Hatch Act, did not spur these agencies to greater activity in "off" years. The reason seems to be that the Hatch Act, instead of reducing election-year activities, tended merely to divide them among a larger number of agencies. Ample evidence of this will appear later.

TABLE I

RECEIPTS AND DISBURSEMENTS OF NATIONAL COMMITTEES, 1941–43

Year	*Democratic*		*Republican*	
	Receipts	*Expenditures*	*Receipts*	*Expenditures*
1941	$651,574	$663,156[a]	$170,146	$232,089
1942	566,940	541,321	154,704	152,242
1943	296,884	317,786	641,432	505,399
Total	$1,515,398	$1,522,263	$966,282	$889,730

[a] Including $258,268 spent in payment of obligations contracted during the 1940 campaign.

TABLE II

EXPENDITURES OF NATIONAL COMMITTEES, JANUARY 1 TO DECEMBER 31, 1944

	Democratic	*Republican*
Disbursements, January 1 to December 31	$2,056,122	$2,828,652
Bills unpaid	112,955	—
Total	$2,169,077	$2,828,652
Transfer to state and other committees	$ 291,906	$ 14,400
National committee expenditures	1,877,171	2,814,252
Total	$2,169,077	$2,828,652

During 1944, the expenditures of both national committees were kept well within the $3,000,000 limitation of the Hatch Act, and the totals were somewhat less than in 1940. (See Table II.) The largest single item in both budgets was for radio time and expenses incidental to campaign broadcasts. During 1944, over $750,000, representing almost forty per cent of its disbursements, was spent by the Democratic National Committee for this purpose.[1] If one adds to this $175,000 paid on 1944 radio bills in the early months of 1945, most of which was chargeable to the cam-

[1] The writer is indebted to officers of the Democratic National Committee for this

paign, the total rises to the impressive figure of $925,000. Radio expenditures were also important on the Republican side. The national committee spent $841,600 for this purpose during the calendar year 1944, just under thirty per cent of its total. Both absolutely and relatively, the amount spent on radio exceeded the expenditures for this purpose in any previous campaign.

The fact that the national committees spent less in 1944 than in 1940 does not mean that the Roosevelt-Dewey contest was less costly than that between Roosevelt and Willkie, but rather that more financial responsibility was assumed by other agencies. In 1944, as in 1940, large sums were raised by Republican finance committees, some of which did a thriving interstate business and maintained a very close relationship to the national committee. The United Republican Finance Committee and the Republican Finance Committee of Pennsylvania each spent over $1,000,000. Between $300,000 and $400,000 of the collections of the URFC was turned over to the national committee; over $650,000 was allocated to the Congressional Campaign Committee, the Senatorial Campaign Committee, the New York and Connecticut state committees, and county committees in the New York metropolitan area. Some of the contributions of this organization came from out-of-state persons, but in the main its support was localized in the New York area. The RFCPA received contributions from states as far afield as California, Kentucky, Illinois, and Virginia, and advanced funds to the state committees of New Mexico and Wyoming, as well as to the party's congressional and senatorial campaign committees. Funds were

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figure and for the following interesting classification of the expenditures of the Committee, January 1 to December 16, 1944:

Chairman's Activities		
Chairman's office	$ 44,454.04	
Contributions to state and other organizations	230,315.75	
Vice-presidential candidate's expenses	11,988.69	
Absentee Voters, Labor, Veterans, and Young Democrats	19,631.77	
		$ 306,390.25
Treasurer's Activities		147,117.07
Secretary's Office		411.79
Publicity Division		
Radio	$757,344.09	
Other	264,438.05	
		$1,021,782.14
Women's Division		59,364.39
Speaker's Bureau		13,982.88
Negro Division		74,599.24
Overhead expenses, including rent, materials, postage and expressage, telephone and telegraph		241,218.46
Total		$1,864,866.22

The relatively large disbursement for "Treasurer's Activities" suggests that raising campaign funds is an expensive business.

transferred from the Ohio Republican Finance Committee to the state committees of Connecticut and Utah.

It is difficult to avoid the conclusion that these committees relieved the national committee of heavy financial responsibilities and that they worked in such close coöperation with the national committee that they were practically auxiliaries. The national committee advanced no funds to the congressional and senatorial campaign committees in 1944, and only $14,400 to state organizations. Their status under the Hatch Act and the Corrupt Practices Act is not clear, although each claims the right to spend up to the $3,000,000 limit, and most of them comply with the filing provisions of the latter statute. The report of the Republican Finance Committee of Pennsylvania, dated January 22, 1942, includes a declaration of intention to divorce itself from such obligations which is an amusing commentary upon the vagaries of our existing legislation:

> During the latter part of 1941 this Committee ceased to function as in any way a branch of the National Finance Committee and thereafter acted entirely as a branch of the Republican State Committee of Pennsylvania under different offices, and in no sense a 'political committee' within the purview of the Federal Corrupt Practices Act of 1925. This report is being filed simply to close out on your records the activities of the old committee, since its report with you covering the campaign of 1940 showed a balance in its hands as of Jan. 1, 1941, since disposed of as shown by the accompanying report.
>
> In the future, unless a change is made, the Committee will act entirely as a branch of the Republican State Committee.

Whether a "change was made," or the Committee thought better of its intention, is not clear, but in October, 1942, a report was filed and regular reports have been made since. Whether such a statement of intention is sufficient to change an agency from a "political committee" to something else is only one of many nice legal points in doubt under the present legislation.

No such system of finance committees has been established by the Democrats, but in 1944 the One Thousand Club operated on an interstate basis and might be characterized as a second national committee. The club, which was said to have originated with President Roosevelt, and of which he was a member, emphasized loyalty to him, and succeeded in winning the financial support of a considerable number of business men not traditionally Democratic in their loyalty. About half of its funds were used to finance radio broadcasts, including President Roosevelt's speeches of October 28 and November 6; the other half was divided between the support of speakers (including Mr. Ickes), and advances to Democratic candidates to the House of Representatives, amounts of $500 or $250 being given to some 150 candidates. The One Thousand Club was first and foremost a Roosevelt organization, but it relieved the Democratic National

Committee of considerable financial responsibility, and the coöperation between the two agencies must have been close.

In 1944, an unusually large number of independent, non-party organizations were active on both sides. The Senate investigating committee compiled a list of several hundred, and, as it points out, this represented only a small proportion of the total. Among the more important favoring Roosevelt and Truman were the CIO-PAC and its twin the National Citizens Political Action Committee, "Business Men for Roosevelt," "Hollywood Democratic Committee," "Independent Voters Committee of the Arts and Sciences for Roosevelt," and the "National Independent Committee for Roosevelt and Truman." Of less importance financially, but with interesting implications, were the "Committee to Enlighten the Electorate, New York City", "Farmers for Roosevelt Committee," Ithaca, N.Y.; "Friends of Roosevelt Committee," Ohio; "Harry S. Truman Campaign Fund Committee"; "Illinois American Federation of Labor Committee for Roosevelt and Truman," Chicago; "Pennsylvania Federation of Labor Committee to Elect Roosevelt"; Rank and File Committee to Reelect Roosevelt," Louisville, Kentucky; "Roosevelt All-Party Committee," Wisconsin; "Samuel Goldwyn Southern California Committee for Roosevelt"; "Servicemen's Wives to Reelect Roosevelt"; "Social Workers Non-Partisan Committee for Roosevelt"; "Young Americans for Roosevelt."

Fully as numerous and varied in their appeals were the agencies supporting Dewey. In addition to those listed in Table III might be mentioned the "All-American Committee for Dewey and Bricker"; "Aviation Committee for Dewey"; "Constitutional Democrats of North Carolina"; "Democrats for Dewey"; "Dewey-Bricker Clubs"; "Independent Committee of Doctors for the Election of Dewey-Bricker-Curran," New York City; "Jeffersonian Democrats of California"; "Minute Women"; "National Association of Pro-America"; "National Insurance Committee for Dewey and Bricker"; "People's Committee to Defend Life Insurance and Savings"; "Southern Anti-New Deal Association." The extreme to which the zeal for organization was carried is illustrated by the "Girls Who Save Their Nickels to Elect a Republican Club," Chicago, which reported receipts of $44.74!

The scale of operation of these organizations is, as the Anderson Committee pointed out, "impressive"; to an increasing extent, non-party agencies are taking over the work of campaigning. The problem of control is complicated because some of these insist that their activities are "educational," not political, and that hence they fall outside the scope of the Corrupt Practices Act. In the last campaign, some of these organizations received anonymous contributions and solicited campaign funds with the understanding that the name of the contributor would not be

made public. Full publicity of their activities is imperative for the protection of their members as well as the protection of the public generally. In 1944, there were instances in which organizations collected their funds by high-power, house-to-house salesmanship, and the collections were used very largely for the personal aggrandizement of a small group of men. Before the Hatch Act limitations were adopted, independent party and non-party organizations would have been discouraged; now they are often condoned and sometimes even inspired by the party's official hierarchy. This decentralization of responsibility for the collection and distribution of money in presidential campaigns is one of the most unfortunate effects of the Hatch Act.

The decentralization of expenditures, as well as the total cost of the 1944 campaign, is evident from Table IV. The disbursements of the two national committees represented less than one-fourth of the $20,000,000 total expended. The total is, of course, far in excess of the Hatch Act limitations, and closely approximates the total outlay of national committees, state and finance committees, and independent organizations in

TABLE IV

SUMMARY OF EXPENDITURES INFLUENCING PRESIDENTIAL ELECTION, 1944

Group	*Supporting Democrats*	*Supporting Republicans*	*Total*
National committee	$2,056,122	$2,828,652	$4,884,774
State committees and finance committees	2,033,370	9,260,528	11,293,898
Independent groups or individuals	3,352,308	1,106,197	4,458,505
Total	$7,441,800	$13,195,377	$20,637,177

the 1940 campaign. If county and local committees had been included, both totals would have been much larger. As significant as the size of these figures is the relative unimportance of the rôle of the national committees in both parties, and the relative totals of the two parties. The expenditures of the Democratic National Committee were less than one-third of the total; those of the Republican National Committee less than one-fourth. State committees and finance committees played the most important rôle in the financing of the Dewey campaign, but on the Democratic side independent groups spent more than either the national committee or state and other party committees. The total expenditure of organizations supporting the Republicans exceeded the Democratic total by $5,750,000.

The receipts of the national committees, summarized in Table V, show that although both parties kept within the limit, on the Republican side

it was by a very narrow margin. There must have been some nervous moments when the committee balanced its books. Deprived of the *Book of the National Convention* and trade unions as a source of revenue, most of the Democratic income came from individual cash contributions and

TABLE V

RECEIPTS OF NATIONAL COMMITTEES, JANUARY 1 TO DECEMBER 31, 1944

	Democratic[a]	*Republican*
Individual contributions	$1,908,631	$1,694,811
Members of trade unions	2,723	—
Political committees and collections	364,073	1,305,188
Dinners	251,675	—
Miscellaneous	29,033	—
Total	$2,556,135	$3,000,000

[a] This includes $2,500 note of Eugene Untermeyer, cancelled during 1944; it does not include a balance of $9,148 on hand January 1, 1944.

Jackson Day and George Washington Birthday dinners, with collections from members of trade unions, political committees, and miscellaneous groups making up most of the balance. A considerable proportion of the Republican receipts was in the form of transfers from the URFC and similar groups, in lump sums as large as $50,000.

Closer study of individual contributions (Table VI) reveals some interesting differences and similarities between the two parties. The number of persons contributing to the Democratic National Committee

TABLE VI

INDIVIDUAL CONTRIBUTIONS TO NATIONAL COMMITTEES, JANUARY 1 TO DECEMBER 31, 1944

	Democrats			*Republicans*		
Group	*No. of contributors*	*Amount contributed by group*	*Per cent contributed by group*	*No. of contributors*	*Amount contributed by group*	*Per cent contributed by group*
$1,000 and over	459	$ 976,783	51.2	549	$ 968,022	57.1
500 to 999	280	148,417	7.8	430	228,413	13.5
100 to 499		332,247	17.4	11,521	345,222	20.4
Less than 100	54,000	451,184	23.6		153,154	9.0
Total	54,739	$1,908,631	100.0	12,500	$1,694,811	100.0

was four times as large as the number giving to the Republican National Committee, and the Democrats drew more largely from contributors of less than $100. However, both committees received more than half of their contributions from those who could afford to give $1,000 or more. Contributions of $100 to 1,000 played a more important part in the financing of the Republican committee than in the case of the Democrats.

The analysis above is somewhat misleading because of the many large contributions made to President Roosevelt's reëlection through the One Thousand Club, and to the Dewey campaign through the United Republican Finance Committee. . . . It is unfortunate that contributions of less than $100 cannot be listed separately, for there is reason to believe that the Democrats drew more heavily from the very small contributors than the Republicans. This would become even more impressive if Democratic group contributions, most of which represented small gifts from many people, were included. This should not obscure the fact, however, that large contributors played a more important rôle than in the Roosevelt campaigns of 1936 and 1940.

Although the $5,000 limitation upon individual contributions was scrupulously observed in the case of gifts to the national committees of both parties, there are instances in which gifts to the national committees and closely related organizations exceeded this sum, the total investment of many individuals and families was often greatly in excess, and there were instances in which very large contributions were made to state committees expressly outside the scope of the Hatch Act.

Contributions to the Republican National Committee and the URFC frequently exceeded $5,000: William Nelson Cromwell gave $5,000 to each; Donaldson Brown gave $3,000 to the national committee and an equal amount to the URFC; Helen C. Frick gave $4,000 to the national committee and $3,000 to the URFC. These are but illustrations of a practice which was common among Republicans. In a few instances, gifts to the Democratic National Committee and the One Thousand Club exceeded $5,000. Charles Ulrick Bay, Walter Kirschner, and Harry M. Warner each gave $5,000 to the national committee and an additional $1,000 to the One Thousand Club. Such instances were rare on the Democratic side, but there were instances in which very large contributions were made to state committees. Among them were the following: Marion R. Ascoli, $10,000 to the New York State Committee; Arde Bulova, $10,000 to the New York State Committee; T. F. Courtney, $14,200 to the Illinois State Central Committee; Mrs. E. S. Heller, $10,000 to the Northern California Campaign Committee; Elinor Raas Heller, $9,000 to the same agency; N. W. Levin, $10,000 to the New York State Committee; Mrs. Adele M. Levy, $20,000 to the same agency. Instances in which Republicans gave more than $5,000 to a single agency were rare;

their total contributions frequently exceeded this sum, but they were divided among several committees in sums of less than $5,000.

As complete a picture as possible of the total investment in the campaign of the more generous individuals and families is given in Table VIII. Contributions to the national committees in 1941–43 are included, as well as those to the national committees and other organizations in 1944. The largest individual contributors on the Democratic side were Mrs. Adele M. Levy, $20,000, and Marshall Field, publisher of the *Chicago Sun*, $14,000; the Warner brothers of movie fame contributed more than any other family group ($33,500). These gifts, impressive though they be, pale into insignificance when compared with those of the Republicans. Once again, Lammot Du Pont may claim the distinction of being the largest individual contributor to the Republican

TABLE VIII

FAMILY OR INDIVIDUAL CONTRIBUTIONS OF $15,000 OR MORE TO DEMOCRATIC ORGANIZATIONS, 1941–44

Name	*National committee*		*Other organizations*	*Total*
	1941–43	*1944*	*1944*	
Ascoli, Marion R. ...	—	—	10,000	10,000
Ascoli, Dr. and Mrs. Max ..	—	—	1,500	1,500
Ascoli, Mrs. Max	—	5,000	—	5,000
Total, Ascoli family	—	5,000	11,500	16,500
Field, Marshall	—	4,000	10,000	14,000
Field, Mrs. Marshall	—	2,000	6,000	8,000
Total, Field family	—	6,000	16,000	22,000
Heller, Mrs. E. S.	—	—	9,000	9,000
Heller, Elinor Raas	—	—	10,000	10,000
Total, Heller family	—	—	19,000	19,000
Higgins, Andrew J. ..	—	—	5,000	5,000
Higgins, Mrs. Andrew J. .	—	4,000	—	4,000
Higgins, Dawn	—	—	1,680	1,680
Higgins, Frank P.	—	—	5,000	5,000
Higgins, Joy	—	—	5,000	5,000
Total, Higgins family ...	—	4,000	16,680	20,689
Levy, Mrs. Adele M.	—	—	20,000	20,000

TABLE X

DISTRIBUTION BY ECONOMIC INTEREST OF CONTRIBUTORS OF $1,000 OR MORE TO NATIONAL COMMITTEES, ONE THOUSAND CLUB, AND UNITED REPUBLICAN FINANCE COMMITTEE OF METROPOLITAN NEW YORK, 1944

Group	Democrats		Republicans	
	Amount	Per cent	Amount	Per cent
Bankers, brokers, financiers	$ 64,000	5.2	$ 275,750	16.7
Manufacturers	98,750	8.1	399,758	24.2
Iron and steel	*47,500*	*3.9*	*109,450*	*6.6*
Autos, trucks, airplanes	*7,500*	*.6*	*46,000*	*2.8*
Food products	*2,000*	*.2*	*83,138*	*5.0*
Chemicals	*2,000*	*.2*	*44,000*	*2.7*
Clothing	*17,000*	*1.4*	*5,500*	*.3*
Other	*22,750*	*1.8*	*111,670*	*6.8*
Brewers, distillers, soft drinks	63,300	5.2	3,000	.2
Oil	53,500	4.4	105,240	6.4
Mining	3,500	.3	62,500	3.8
Public utilities	46,000	3.8	81,000	4.9
Merchants, wholesale and retail	62,500	5.1	51,750	3.2
Contractors, builders, building materials	57,337	4.7	30,400	1.8
Real estate	17,000	1.4	31,000	1.9
Insurance	13,250	1.1	24,500	1.5
Publishers, radio, advertising	42,000	3.4	46,000	2.8
Amusements and the arts	128,750	10.5	8,500	.5
Professions	94,850	7.7	102,300	6.2
Officeholders	117,750	9.6	15,500	.9
Other groups	56,625	4 6	60,916	3.7
Unidentified	305,171	24.9	350,508	21.3
Total	$1,224,283	100.0	$1,648,622	100.0

campaign, with a total investment of $39,000. Other individual contributors of $20,000 or more included Harold S. Vanderbilt ($31,000), John D. Rockefeller, Jr. ($22,900), J. Howard Pew ($25,750), and William Nelson Cromwell ($20,000). Again the Du Ponts ($128,000), the Pews ($108,996), the Mellons ($68,500), and the Rockefellers ($67,400) supported the party with great generosity. . . .

There were many other instances of this practice: the $22,750 which J. Howard Pew contributed was divided among the Republican National Committee; the Congressional Campaign Committee; the Senatorial Cam-

paign Committee; the Republican Finance Committee of Pennsylvania; the Maryland Committee; state committees in Connecticut, Florida, Maryland, Missouri, New Jersey, New York, and Wyoming; and county committees in New York City. Frequently the favored committee was far from the benefactor's home state. Elizabeth Arden, New York beauty specialist, contributed to the Ohio Republican Finance Committee; A. Rex Flinn of Pittsburgh and James S. Kemper of Chicago gave to the state committee of South Dakota; the Pews of Pennsylvania helped finance state committees in Connecticut, Florida, Maryland, and Missouri; the Indiana and Massachusetts state committees received contributions from Alfred P. Sloan, Jr., of New York; Harold S. Vanderbilt of New York gave to the Oregon state committee. The practice was so common that it raises the question whether there was not a "master plan" behind the distribution of these contributions. In that case, what useful purpose was served by the $5,000 limitation of the Hatch Act?

"Splitting" of contributions was less common among the Democrats, although Marshall Field contributed to the Senatorial Campaign Committee and to state committees in Illinois, Kentucky, and New York, as well as the national committee and the One Thousand Club; and the contributions of the Podell family were divided among the Democratic National Committee, the National Independent Committee for Roosevelt and Truman, the NC-PAC, and the Liberal party of New York.

In the discussion of the size of contributions earlier in this article, it was pointed out that large contributors played a more important rôle in financing President Roosevelt's fourth-term campaign than in 1936 and 1940. Does this mean that Wall Street and "big business," which abandoned the Democratic party so completely in the earlier years of the New Deal, was giving it more support, and that the two major parties were again financed by much the same economic interests? Table X, in which contributors of $1,000 or more to the URFC and the One Thousand Club, as well as to the national committees, are divided according to economic interest does not indicate that such was the case. The further one goes into the financial backing of the two parties the more convincing is the evidence that they received their support from very different groups, with what might even be called distinct characters. The major part of the support of the Republicans (40.9 per cent) came from bankers and manufacturers, while the Democrats, even with the aid of the One Thousand Club, drew only 13.3 per cent of their support from this quarter. The composition of the manufacturing groups was significantly different also. The heavy industries—iron, steel, autos, trucks, and airplanes—were heavy contributors to the Republican side, with food products and chemicals well represented. Substantial support came, also, from the textile industries, cosmetics and drugs, and paper manufacturers. Opposition to

the 1938 amendments to the Food and Drugs Act, war-time rationing, and grade labeling proposals no doubt explain some of these contributions. Democratic contributions came mostly from manufacturers of consumer's goods, with the garment industry the most conspicuous group. In 1944, the management of the garment industry—as well as the workers—supported Roosevelt.

Aside from the two groups discussed above, the largest Republican support came from oil, professional groups, public utilities, mining, and merchants. More than half the oil money came from Southern interests, with Texas far in the lead. The increase in Republican support from this quarter is interesting and may be significant. Lawyers, many of them identified with corporations, predominated in the professional group, but architects, engineers, and physicians were represented. Apparently the "socialized medicine" bogey was used to good effect among doctors, although most of their contributions were less than $1,000. Under a single date, the reports of the Republican National Committee listed twenty-eight contributions of $100 or less from doctors at the Mayo Clinic; thirty-six were noted from doctors giving the Doctors' Building, Nashville, Tennessee, as their address. Among the contributions from publishers, the *Philadelphia Enquirer,* the *San Francisco Chronicle,* the *Los Angeles Times-Mirror,* and the *Chicago Tribune* were represented. John A. Hartford, president of the A & P, whose loans to Elliot Roosevelt have been so much publicized, was one of the chain store merchants who aided the Republicans. One name in this group which should occasion no surprise was that of Sewell L. Avery, president of Montgomery Ward.

The Democratic pattern of financial support was very different. Amusements and the arts contributed more than any other single group, with officeholders, the professions, and beverages following in that order. Local movie proprietors and amusement houses, as well as the big motion picture producers, were well represented, and without Hollywood's substantial support the party would have been in a sad financial plight. When one adds to the amount included in Table X the $136,000 raised by the Hollywood Democratic Committee, and the additional amounts given by movie artists to other Democratic organizations, the support of this group is impressive. In his fourth-term campaign, Hollywood's heart was with Roosevelt. Diplomats, active and retired, were conspicuous among the officeholders, while lawyers were heavily represented in the professional group. Brewers and distillers, who have consistently supported the Democratic party since 1928, were an overwhelming majority in the beverage group. Contractors, builders, and producers of building materials, many of whom had reason to support the Administration because of government contracts, gave 4.7 per cent of the contributions included in Table X. Merchants were even more important on the Democratic side

than on the Republican, but for the most part they represented "Main Street," rather than the big chain stores and mail order houses. With the exception of the *Chicago Sun* and the *New York Post*, the newspapers represented among the "publishers, radio, and advertising" were Southern.

A comparison of 1944 contributors with the list of individuals who, in 1943, received compensation for personal services from corporations in excess of $75,000, indicates how much more heavily the upper income groups supported the Republican party than the Democratic. Of approximately 575 persons appearing on the list of large income-tax payers, ninety-seven contributed to the Republican party, only twenty-three to the Democratic. Fifteen of the twenty-three Democrats were associated with the moving picture industry, either as artists or as executives. The above comparison is, of course, only part of the story. As many of the most generous contributors to the Republican party derived their incomes from investments rather than salaries, their names do not appear upon this list.

There are a number of interesting instances in which the same person contributed to both parties. Sometimes the dates suggested a change of political support from the Democratic to the Republican side, as, for example, when John Ringling North, of circus fame, contributed to the Democratic National Committee in 1942 and to the Republican in 1944, and the three Reisinger brothers, real estate operators of St. Louis and New York, each gave to the Democratic National Committee early in January, 1941, but to the Republican in 1944. There were, however, a number of instances in which the contributions were made so close together that the only possible conclusion to be drawn is that the individual thought it well to establish an *entente cordiale* with both parties. Frank Phillips, Oklahoma oil man, gave $1,000 to the URFC in June, 1944; $2,500 to the Democratic National Committee in September, 1944. Mr. Phillips also contributed to both parties in 1936. On almost the same date in October, 1944, Dr. Camille Dreyfus, New York, gave $500 to the Democratic National Committee and an equal amount to the URFC. Again in November he contributed equal amounts to these committees. Irving Geist, manufacturer of ladies' blouses, New York City, made two contributions to the Democratic National Committee in 1944 totaling $5,000, but gave $1,000 to the Republican National Committee late in October.

A visitor from Mars, dropping among us last fall, might well have thought that Sidney Hillman was a candidate for president, running on a Political Action ticket. During the 1944 campaign, the activities of the PAC, under CIO leadership, were widely publicized and subject to close investigation. Under the legislation prohibiting contributions from labor organizations, its expenditures raised some nice legal conundrums.

Although labor's part in the financing of the 1936 campaign had been

widely discussed, and the Lonergan Committee had recommended the prohibition of contributions from this source, no action was taken until the summer of 1943, when a wave of anti-labor feeling carried the Smith-Connally "Anti-Strike" Act through Congress over President Roosevelt's veto. The circumstances under which sweeping prohibitions upon contributions from labor organizations were included in this act are discouragingly reminiscent of the addition of campaign fund limitations to the Hatch Act in 1940. Again the provisions were not germane to the main purpose of the bill, which purported to be an emergency measure aimed to prevent strikes in wartime; again the provisions were inserted with little discussion of underlying issues of public policy; again the principle of prohibition was applied without discrimination, the act making it illegal for "any labor organization to make a contribution in connection with any election at which presidential or vice presidential electors or Senators or Representatives . . . to Congress are to be voted for, or for any candidate, political committee, or person to accept or receive any contribution prohibited by this section."

The clumsily drawn legislation presented no barrier to trade unions bent upon throwing their full weight on the side of their chosen candidate. In spite of its provisions, organized labor spent more money in 1944 than in any previous election in our history. Gravely concerned over the reactionary trend of the 1942 elections and the "anti-union" attitude of the Seventy-eighth Congress, in July, 1943, the executive committee of the CIO framed a program of political action which was adopted unanimously at the November convention. With very little ingenuity, the money-raising program involved was brought within the limits of both the Hatch and Smith-Connally Acts.

The CIO-PAC was under a central committee of seven CIO union executives, with Sidney Hillman, head of the Amalgamated Clothing Workers, as its chairman. Coördinating the activities of local groups were fourteen regional offices headed by directors responsible to the national headquarters. Closely associated with the CIO-PAC was the National Citizens Political Action Committee, organized in July, 1944, in response to pleas of progressives outside the ranks of organized labor, but sympathetic with its program, to participate in it. The national committee of this organization included such well-known liberals as George W. Norris, Freda Kirchwey, and Frank Kingdon, but its active chairman and guiding genius was Sidney Hillman, its offices adjoined those of the CIO-PAC, and its activities were synchronized with those of the CIO organization. Nevertheless, the separate identity of the two groups was strictly maintained in the field of finance.

The financing of the CIO-PAC falls into two distinct chapters, before and after July 25, 1944. Before the nominating conventions were held,

some $647,000 was collected from trade unions. The Amalgamated Clothing Workers, the Automobile Workers, the Electrical Workers, and the Steel Workers each contributed $100,000. These were, of course, general funds not earmarked for political purposes at the time they were received from union members. Somewhat over $478,000 of this fund was spent before it was "frozen" on July 23. The money was used partly for education in terms of the issues and the program agreed upon at the CIO convention, and partly to influence primary contests. None of it went into the final election campaign, but unquestionably the general educational program helped create an attitude favorable to certain candidates.

After the nominations had been made and the CIO-PAC had endorsed Roosevelt and Truman, in strict compliance with its interpretation of the Smith-Connally Act, the trade union funds were "frozen" and the second phase of its financing began. "A Buck for Roosevelt" became the slogan of its appeal to the 5,000,000 members of the CIO. Half of each contribution went to the PAC; the other half was retained in the state or locality to finance the work of local political action committees. Some $470,000, raised in this way, was spent for campaign purposes. The NC-PAC solicited contributions from persons outside the labor movement, spending $378,000 in the course of the campaign.

From Table XI, summarizing the receipts and expenditures of these organizations, it appears that trade unionists and their friends spent over $1,300,000 in the campaign—considerably more than the $770,000 spent by labor organizations in 1936.

TABLE XI

RECEIPTS AND EXPENDITURES OF POLITICAL ACTION COMMITTEES, 1944

Group	*Receipts*	*Expenditures*
CIO-PAC		
Trade union account	$ 647,903	$ 478,499
Individual contributions account	376,911	470,852
NC-PAC	380,306	378,425
Total	$1,405,120	$1,327,776

The rôle of the trade unions in the financing of the 1944 presidential election was widely criticized as contrary to law and sound public policy, and their activities were the subject of repeated investigations by House and Senate committees entrusted with the investigation of the 1944 expenditures. PAC officials vigorously defended their activities as in strict conformity with all legal provisions. The reports of the committees bring out clearly both the futility of the existing regulations and the complexity of the problems involved. Careful study of the experience of 1944 should

contribute to a fresh approach, based upon sounder principles of law and public policy.

The large contributions which CIO affiliates made to the PAC posed two puzzling legal questions. The Smith-Connally Act prohibited *contributions* by a labor organization *"in connection with any election."* Officers of the PAC took the position that inasmuch as these union funds were used before nominations had been made, they were not used in connection with an election, as defined in the Corrupt Practices Act. They were disposed to argue, also, that money spent directly by the unions and not given to candidates or parties was not a "contribution" in the strict sense of the word and, therefore, that the unions could have spent an unlimited amount *directly*, even during the campaign itself. However, in order to avoid public criticism and debate on what was clearly a controversial point, they did not press this issue, "froze" these funds after the convention, and depended upon voluntary contributions thereafter. The point, however, is both highly controversial and highly important, for if *direct* expenditures of trade unions are not "contributions" within the meaning of the act, neither are *direct* expenditures of corporations.

The status of the PAC committees also posed some legal conundrums. Union officials argued that these were not "labor organizations" within the meaning of the Smith-Connally Act, as they were separately organized under different sets of officers, and maintained independent treasuries. Nevertheless, the connection between the PAC and the CIO was very close on every level of organization. Sidney Hillman, president of the Amalgamated Clothing Workers of America, an important CIO affiliate, was chairman of both the CIO-PAC and the NC-PAC; the state political action committees frequently utilized the existing mechanism of CIO state councils; and local political action committees were similarly set up as committees of CIO locals. At the national level and in most of the states, financial separation was strictly observed, and at the local level union personnel assigned to full-time PAC work was transferred to the PAC payroll. But when CIO personnel was assigned to the PAC on a part-time basis, it was frequently impossible to distinguish the services which were political and should be charged to the PAC. In California, the separation between CIO and CIO-PAC was never very clearly defined. The state PAC was set up as a subcommittee of the CIO, funds were not separate, and no separate records were kept. And after the trade union fund was "frozen," the financial support of the CIO-PAC came from individual trade union members. CIO membership lists were, of course, used in soliciting contributions, and in some instances the "voluntary" character of these gifts was questioned. However, the modest size of the funds raised would indicate that if compulsion was used it was surprisingly ineffective.

Although the political action committee of the CIO was separately or-

ganized, and in most cases its separate identity was scrupulously preserved, it is hard to escape the conclusion that it was the *alter ego* of the organization which inspired it. The circumstances under which it came into being, the "interlocking of directorates" at the top, and the close coöperation at the local level all point in that direction. By the simple device of creating such a nominally independent but closely related organization, the trade unions had brought their political activities within the provisions of the Smith-Connally Act.

Although it may be argued that the CIO-PAC was not a labor organization within the meaning of the Smith-Connally Act, nor a "political committee" within the Corrupt Practices Act, in the pre-convention period, it clearly became a "political committee," once nominations were made and it had endorsed Roosevelt and Truman. As such, it was subject to the Hatch Act limitations; it could not spend more than $3,000,000 in any calendar year, or receive a contribution of more than $5,000. In 1944, these limitations occasioned no embarrassment, for the combined expenditures of all three CIO funds were less than half $3,000,000, and the $5,000 boys, for obvious reasons, were not throwing their contributions in the direction of organized labor. It should be noted, however, that it would have been possible within the existing legislation for each of the PAC committees—NC and CIO—to spend $3,000,000. By simply multiplying agencies, the trade unions could spent as much, or more, than various Republican agencies spent in 1940—*if* they could get it. It would be possible, also, for a trade union supporter to contribute $5,000 to each of an unlimited number of independent agencies—*if* he had it.

The effect of the Smith-Connally Act, added to previous regulations, may be summarized as follows: (1) trade unions could make contributions or spend directly to influence primary nominations or create a climate of opinion favorable to presidential or vice-presidential aspirants in the pre-convention period; (2) once nominations were made, labor organizations as such could *not* contribute to political funds, but political committees operating under trade union aegis could raise money from trade union members and spend this money for political purposes: (3) such committees were "political" committees within the Corrupt Practices Act and subject to the limitations of that act; (4) in 1944, labor's financial plans were too modest to be affected by either the $3,000,000 "ceiling" or the $5,000 limitation upon individual contributions, but a more ambitious money-raising campaign could have been kept within the limits of existing legislation by the device of creating a number of independent agencies. In [illegible] legislation forced the trade unions to make only one important [illegible] their money-raising plans; after the conventions they could not make contributions from *trade union treasuries*, but were dependent upon individual gifts of union members and their friends. It is, of course, more

"people's" party. To take the initiative in drafting legislation which frankly recognizes that responsibility must accompany power would be statesmanship of a high order—convincing evidence that organized labor has grown up to its new responsibilities.



CHAPTER IX

Congress

51. STAGES IN ENACTMENT OF A LAW [1]

IN THIS extract the various steps in the enactment of a law, from introduction of the bill by a member of Congress to its proclamation by the Secretary of State, are listed and described. The bracketed comments, which summarize the significance of each step, make clear to the reader the technicalities involved in the legislative process.

1. Introduction of bill
   [Informally dropped in basket on Clerk's desk on floor of the House. Bills which the Member does not desire to sponsor may be introduced "By request." Bills may not be introduced jointly.]
2. Reference to committee
   [If a public bill, the parliamentarian refers it by indorsing the name of the proper committee on the bill. If a private bill, the Member indorses the name of the committee on the bill before introducing it.]
3. Numbering and printing
   [Journal Clerk sends bill to Bill Clerk, who numbers it in the consecutive order in which received, and sends it to the Government Printing Office where it is printed. Available the next morning in the document room.]
4. Delivery to committee
   [Transmitted to office of chairman of committee to which referred, where it is received by clerk of the committee and entered on committee calendar.]
5. Hearings
   [If committee determines to consider the bill it may order hearings, and issue notice by announcement or by mail to those interested to

[1] Reprinted from Clarence Cannon, *Cannon's Procedure in the House of Representatives*, Seventh Edition (Washington, D.C.: United States Government Printing Office, 1944, pp. 928-933).

appear before the committee and discuss the merits and demerits of the proposed legislation. Transcripts of such hearings may, in the discretion of the committee, be taken down by committee stenographers and printed under direction of the chairman of the committee and are distributed through his office and not through the document room.]

6. Reference to subcommittee

[If committee elects, it may refer the bill to a subcommittee for preliminary or detailed consideration, and hearings may be held by the subcommittee.]

7. Consideration by subcommittee

[Subcommittee meets and reads the hearings, and after reading the bill for amendment, reports it back to the committee with suggested amendments and recommendations as to its disposition.]

8. Consideration in committee

[Committee receives and considers report of subcommittee and adopts or rejects its recommendations. If consideration is favorable the chairman is authorized to draft and file a report.]

9. Report of committee

[If committee is authorized to report at any time, the report is made from the floor by announcement, and delivery at the Clerk's desk. If unprivileged, the report is filed by dropping in the basket on the Clerk's desk. The Parliamentarian refers the report to the proper calendar and the Journal Clerk sends it to the Bill Clerk who numbers it and forwards it to the Government Printing Office, where printed. Available the following morning at the document room. Minority views must be submitted on same day on which report is made unless, at the time the report is filed, leave is obtained by unanimous consent to file minority views at later date.]

10. Consideration by Committee of the Whole

[If on the Union Calendar, the bill is considered in the Committee of the Whole where, after general debate, it is read for amendment under the five-minute rule, and reported to the House. If not requiring consideration in Committee of the Whole, the bill is taken up in the House and read a second time in full, after which it is open to debate and amendment.]

11. Consideration in the House

[When reported from the Committee of the Whole the bill is not read again but is subject to debate and amendment unless the previous question is ordered. It is then ordered engrossed, read third time, and the question is taken on its passage.]

12. Engrossment

[Engrossment is by printing on special paper under supervision of

the Enrolling Clerk. The law provides that House bills shall be engrossed upon a distinctive blue paper. Senate bills are engrossed on white paper. This blue paper indicates that it is the official copy of the measure as passed by the House.]

13. Messaging to Senate

[After passage, the engrossed copy is attested by the signature of the Clerk of the House and transmitted to the Senate by messenger, who is received in the Senate and announces the action of the House.]

14. Reference to Senate committee

[The engrossed House bill goes to the desk of the Vice President on the floor of the Senate, from which it is referred to the appropriate committee.]

15. Senate printing and filing

[The bill retains the number assigned to it in the House but is again sent to the Government Printing Office for reprinting as received from the House. Placed on the calendar of the Senate committee to which referred.]

16. Senate hearings

[The Senate committee may consider the bill on the basis of the House hearings or may decide to hold hearings of its own.]

17. Consideration in Senate subcommittee

[The Senate committee may refer to a subcommittee where consideration proceeds as in subcommittee of the House.]

18. Consideration in Senate committee

[The subcommittee having reported the bill back to the committee, the recommendations of the subcommittee are taken up and adopted or rejected, and the committee chairman authorized to draft report, but Senate rules do not require a written report as in the House.]

19. Report of Senate committee

[When reported to the Senate the report goes to the desk of the Vice President, where it is referred and sent to the Senate Bill Clerk who numbers it and dispatches it to the Government Printing Office to be printed. Copies are available at both House and Senate document rooms the following morning.]

20. Consideration by Senate

[The bill when taken up in the Senate has its several readings and is open to debate and amendment, after which vote is taken on final passage.]

21. Return to House

[If passed by the Senate without amendment the bill when messaged to the House is at once enrolled and delivered to the Committee on Enrolled Bills. If returned with amendments requiring consideration in Committee of the Whole, the bill is referred to the committee

having jurisdiction, which reports the bill back to the House for reference to the Calendar, and the Committee of the Whole having again considered and reported it, the Senate amendments are taken up by the House, although usually Senate amendments are considered in the House by unanimous consent or under special order. When Senate amendments need not be considered in Committee of the Whole they are laid before the House direct from the Speaker's table.]

22. Consideration of Senate amendments

[When taken up by the House, Senate amendments are considered separately and agreed to, disagreed to, or agreed to with amendment.]

23. Conference

[If there is disagreement between the two Houses on any amendment, conference is asked by one and agreed to by the other, and a committee of conference consisting of managers on the part of the House and Senate appointed by the Speaker and the Vice President, respectively, meets on the Senate side.]

24. Conference report

[The committee of conference having composed the differences between the Houses, a report embodying their recommendation is written in duplicate and submitted simultaneously to House and Senate.]

25. Enrollment

[The conference report having been adopted by both Houses, the bill is enrolled by the House in which it originated. That is, it is printed at the Government Printing Office on parchment under the supervision of the Enrolling Clerk, and delivered to the Committee on Enrolled Bills.]

26. Signature in House and Senate

[The Committee on Enrolled Bills having approved the form in which enrolled, the enrolled bill is reported to House and Senate, where it is signed by Speaker and Vice President, respectively, in open session.]

27. Approval by the President

[After signature by Speaker and Vice President, the bill is returned to the Committee on Enrolled Bills, which sends it by messenger to the White House for consideration by the President: If signed within 10 days or if retained more than 10 days, Sundays excepted, without action thereon, the bill becomes a law unless Congress adjourns before expiration of the 10 days. Such retention of a bill without signature on adjournment of Congress within 10 days after receipt by the President, known as a "pocket veto," is effective on adjournment of interim session as well as on final adjournment at

the close of the last session of the Congress (VII, 1115). Signature after adjournment and within 10 days validates. If returned by the President with objections the bill may again be considered and becomes a law if repassed by a two-thirds vote of both Houses.]

28. Proclamation

[If approved by the President, or if held for more than 10 days without disapproval, the bill is deposited in the office of the Secretary of State and proclaimed as law. If passed by the two Houses over the President's veto, it is transmitted to the Secretary of State by the House last acting on it.]

52. COMMITTEE ON RULES [1]

ONE result of the revolt of the House of Representatives against Speaker Cannon in 1911 was the growth in power of the Committee on Rules. Before the 81st Congress convened in 1949 it was virtually impossible for any major legislation to get on the floor of the House without the permission of that committee. If the committee majority thought little of a particular measure, however important it might be, the committee would not give it a "rule." Thus it could block legislation unless 218 members (a majority) of the House signed a petition to discharge the committee from consideration of the measure. During the last decade a majority on the committee was often in opposition to the existing Administration and considerable criticism was voiced concerning the ability of the Rules Committee to block legislation. The powers and duties of the Committee on Rules as detailed in the excerpts from the House rules in this selection were altered on January 3, 1949, when the House of Representatives amended paragraph (c) of section 732 to limit the authority of the Committee on Rules to block legislation for a period longer than 21 days. If the committee fails to act favorably upon measures referred to it in that time, the measure may be considered by the House on a motion of the chairman of the committee that had favorably reported the measure to the Rules Committee.

The text of paragraph (c) of section 732 as amended is:

"(c) The Committee on Rules shall present to the House reports concerning rules, joint rules, and order of business, within three legislative days of the time when ordered reported by the committee. If such rule or order is not considered immediately, it shall be referred

[1] Reprinted from *Rules of the House of Representatives* of the United States, Eightieth Congress (Washington, D.C.: United States Government Printing Office, 1947), pp. 303; 305; 307; 327–328; 331; 336–337).

to the calendar and, if not called up by the Member making the report within seven legislative days thereafter, any member of the Committee on Rules may call it up as a question of privilege and the Speaker shall recognize any member of the Rules Committee seeking recognition for that purpose. If the Committee on Rules shall adversely report, or fail to report within 21 calendar days after reference, any resolution pending before the committee providing for an order of business for the consideration by the House of any public bill or joint resolution favorably reported by a committee of the House, on days when it shall be in order to call up motions to discharge committees it shall be in order for the chairman of the committee which reported such bill or joint resolution to call up for consideration by the House the resolution which the Committee on Rules has so adversely reported or failed to report, and it shall be in order to move the adoption by the House of said resolution adversely reported, or not reported, notwithstanding the adverse report, or the failure to report, of the Committee on Rules, and the Speaker shall recognize the Member seeking recognition for that purpose as a question of the highest privilege. Pending the consideration of said resolution the Speaker may entertain one motion that the House adjourn; but after the result is announced he shall not entertain any other dilatory motion until the said resolution shall have been fully disposed of."

Sec. 669. (a) There shall be elected by the House, at the commencement of each Congress, the following standing committees . . .

. . . . . .

Sec. 670. 16. Committee on Rules, to consist of twelve Members.

. . . . . .

Sec. 675. All proposed legislation, messages, petitions, memorials, and other matters relating to the subjects listed under the standing committees named below shall be referred to such committees, respectively . . .

Sec. 715. (p) Committee on Rules.

1. The rules, joint rules, and order of business of the House.
2. Recesses and final adjournments of Congress.

. . . . . .

Sec. 717. Primarily the jurisdiction of this committee is over propositions to make or change the rules (V, 6770, 6776), for the creation of committees (IV, 4322), and directing them to make investigations (IV, 4322–4324). It also reports resolutions relating to the hour of daily meeting and the days on which the House shall sit (IV, 4325), and orders relating to the use of the galleries during the electoral count (IV, 4327).

Sec. 718. Since 1883 the Committee on Rules has reported special orders providing times and methods for consideration of special bills or classes of bills, thereby enabling the House by majority vote to forward

particular legislation, instead of being forced to use for the purpose the motion to suspend the rules, which requires a two-thirds vote (IV, 3152; V, 6870; for forms of, IV, 3238–3263).

. . . . . .

Sec. 726. (2) (a) The following-named committees shall have leave to report at any time on the matters herein stated, namely: The Committee on Rules—on rules, joint rules, and order of business . . .

. . . . . .

Sec. 732. (c) The Committee on Rules shall present to the House reports concerning rules, joint rules, and order of business, within three legislative days of the time when ordered reported by the committee. If such rule or order is not considered immediately, it shall be referred to the calendar and, if not called up by the Member making the report within seven legislative days thereafter, any member of the Rules Committee may call it up as a question of privilege and the Speaker shall recognize any member of the Rules Committee seeking recognition for that purpose. If the Committee on Rules shall make an adverse report on any resolution pending before the committee, providing for an order of business for the consideration by the House of any public or joint resolution, on days when it shall be in order to call up motions to discharge committees it shall be in order for any Member of the House to call up for consideration by the House any such adverse report, and it shall be in order to move the adoption by the House of said resolution adversely reported notwithstanding the adverse report of the Committee on Rules, and the Speaker shall recognize the Member seeking recognition for that purpose as a question of the highest privilege.

. . . . . .

53. EXCERPTS FROM A FILIBUSTER [1]

THE liberty of unlimited debate in the Senate has been abused by filibustering tactics from time to time. The closure rule, adopted in 1917, has not been effective in putting an end to the efforts of Senators to talk bills to death. Various amendments to the closure rule, all designed to end the practice of filibustering, were introduced in the 81st Congress soon after it convened in 1949. It may be doubted,

[1] Delivered by Senator Huey P. Long, who was speaking against the National Recovery Act (N.R.A.) on June 12, 1935. Reprinted from *Congressional Record*, Vol. 79, Part 8 (Washington, D.C.: United States Government Printing Office, 1935), pp 9090–9091; 9122–9124; 9128–9130.

however, that the end of this dilatory tactic is yet here. That filibustering may descend to the level of cheap vaudeville is only too evident in this extract from the one-man filibuster of the late Senator Huey P. Long.

. . . . . .

Mr. LONG resumed his speech. After having spoken for about 5 hours, he yielded to Mr. THOMAS of Oklahoma, and the following debate ensued:

Mr. THOMAS of Oklahoma. Mr. President, will the Senator yield?

Mr. LONG. I yield.

Mr. THOMAS of Oklahoma. I suggest the absence of a quorum.

Mr. HARRISON. Mr. President, I did not understand the request.

Mr. THOMAS of Oklahoma. I suggested the absence of a quorum.

Mr. HARRISON. Of course, I do not want to interfere with the speech of the Senator from Louisiana, but I will have to insist upon the rules with reference to the speech, that no Senator shall be permitted to speak more than twice in one day on the same subject matter.

Mr. LONG. Mr. President, that gives me another speech after this one.

Mr. HARRISON. I do not raise the point of order. I am just stating the rule of the Senate in respect to that matter.

Mr. LONG. It has never been the rule of the Senate that a quorum call shall be interpreted as bringing a speech to a conclusion, as I understand. That has never been the rule of the Senate. If the Senator invokes such a rule he invokes something which has never been done before.

Mr. GORE. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. GORE. Cannot the Senator from Louisiana yield for the purpose of a quorum call without losing his status?

The PRESIDING OFFICER. Under the rules of the Senate he can yield.

Mr. GORE. For the purpose of another Senator raising a point of no quorum?

The PRESIDING OFFICER. Yes.

Mr. HARRISON. Mr. President, a parliamentary inquiry.

The PRESIDING OFFICER. The Senator will state it.

Mr. HARRISON. If the Senator yields for a point of no quorum to be made, does the Chair rule that he can continue his speech under the rule of the Senate that no Senator can speak more than twice on the same subject matter on the same day?

The VICE PRESIDENT. Is there a parliamentary question before the Senate?

Mr. HARRISON. I made a parliamentary inquiry, Mr. President.

The VICE PRESIDENT. The Senator will state.

Mr. HARRISON. The inquiry is, If the Senator yields for the point of no

quorum to be made, will that be construed, under the rules of the Senate, as not coming under the rule which provides that a Senator cannot speak more than twice on the same subject in the same day?

The VICE PRESIDENT. Under the practice of the Senate a Senator yielding for the purpose of giving another Senator an opportunity of raising the point of no quorum does not yield the floor. That is the universal practice of the Senate.

Mr. HARRISON. What if he should yield twice?

The VICE PRESIDENT. It does not terminate his speech.

Mr. LONG. Very well.

The VICE PRESIDENT. That is the practice of the Senate. The Chair is so advised by the parliamentary clerk, who has been here longer than has the Chair. The clerk will call the roll.

Mr. CLARK. Mr. President, what business has been transacted since the last quorum call?

The VICE PRESIDENT. There has been none, so far as the Chair knows.

Mr. LONG. Mr. President, the Senate refused to table the motion of the Senator from Oklahoma. That question has been voted on.

The VICE PRESIDENT. That was done before the Senator from Louisiana took the floor.

Mr. CLARK. That roll call, Mr. President, developed the quorum.

Mr. LONG. There has been business transacted since the last quorum call.

Mr. CLARK. I make the point of order that there has been no business since the last quorum call.

Mr. LONG. Mr. President, there has been plenty of business transacted since the last quorum call.

The VICE PRESIDENT. The Chair is advised that the Senate voted on a motion, and the vote on that motion developed a quorum, and under the practice of the Senate that does not count as a quorum call.

The clerk will call the roll.

. . . . . .

Mr. LONG. . . . I have spent a number of evenings acquainting people with how to prepare oysters. I had a bucket of oysters sent to me from Louisiana the other night, and I was asked by a very fine bunch of my friends if I would not drop around with the New Orleans oysters and fry some of them for them in good Louisiana style and way. So, Mr. President, I bought a frying pan about 8 inches deep. I bought the frying pan because I was afraid they would not have a frying pan there in which I could fry the oysters. I bought a frying pan, as I said, 8 inches deep and about 17 inches in diameter.

Mr. TYDINGS. Mr. President, will the Senator yield?

Mr. LONG. I yield.

Mr. TYDINGS. When the Senator fries oysters, is potlikker one of the concomitants?

Mr. LONG. No; that does not go in with the oysters. I will come to that later. I am coming to that because I am going to have my remarks taken down and a copy made and sent out to the several places where I was supposed to go this evening in order that these recipes and directions may be had by those people, and I will ask the stenographer that as soon as possible he give me at least seven extra copies of these recipes which I dictate into the RECORD so that I may have them for ready circulation in case we do not have an early adjournment.

As I was going to illustrate, Mr. President, about these oysters that I got from New Orleans. I bought this frying pan 8 inches deep and 14 to 16 inches or 17 inches in diameter, and I bought a 10-pound bucket of cottonseed-oil lard, but I forgot to get a strainer, and when I got to the place to fry the oysters I had everything there except the meal and the strainer.

The lady had some meal, but she did not have any salt to salt the meal with, and that was the only bad thing about it. The strainer which they had was not the best strainer in the world, but I could use it all right. However, they had no salt for the meal, but I took the oysters, Mr. President, the way they should be taken, and laid them out on a muslin cloth, about 12 of them, and then you pull the cloth over and you dry the oysters. You dry them, you see, first with a muslin cloth, and then you take the oysters, after they have been dried, and you roll them into a meal which is salted. I did not have it salted this night, but it should have been salted. [Laughter in the galleries.]

Mr. President, you roll these oysters in the dry meal. You do not want to cook the meal or put water in the meal at any time or anything like that. Just salt the meal and roll the oysters in it. Then, let the grease get boiling hot. You want the grease about 6 inches deep. Then you take the oysters and you place the oysters in the strainer, and you put the strainer in the grease, full depth down to the bottom. Then, you fry those oysters in boiling grease until they turn a gold-copper color and rise to the top, and then, you take them out and let them cool just a little bit before you eat them.

Now, Mr. President, most people cannot tell when an oyster is done. They do not know when it has been fried enough. You wrongfully put them on the bottom of a skillet. You have got to have them totally submerged and you wait until they rise to the top, and when they rise to the top, a golden-copper color, then the oyster is cooked just exactly right, and then you take the strainer up out of the grease in the dish and the oysters are there and you let them drip for a little while and allow them to cool a little and then you eat them.

Mr. TYDINGS. Mr. President—

The PRESIDING OFFICER. Does the Senator from Louisiana yield to the Senator from Maryland?

Mr LONG. I yield.

Mr. TYDINGS. Does the Senator realize when he describes how these oysters are cooked and how appetizing they seem to be, that those of us who are listening are being inhumanly punished? [Laughter.]

Mr. LONG. I had forgotten that. I was trying to make the Senator from Mississippi [Mr. HARRISON] hungry, but he was raised in a part of the country where they do not understand the science of eating anyway. He has left the Chamber. I am afraid I made him hungry.

That is the way to cook oysters. If every Member of the Senate will clip out of the RECORD tomorrow what I have said today and not give it to his wife, but go and do it himself and then teach his wife—learn how to do it himself and then teach his wife—he will know how to fry oysters better than most families in Washington.

There is no telling how many lives have been lost by not knowing how to fry oysters, but serving them as an indigestible food. Many times we hear of some man who has supposed to have had an acute attack of indigestion or cerebral hemorrhage or heart failure, and the chances are the only thing that was the matter with him was that he had swallowed some improperly cooked oysters. [Laughter.]

It is very important that what I say here shall be correctly printed in the CONGRESSIONAL RECORD and that it shall be taken to heart and learned by every Member of the Senate.

Now, I come to potlikker. Now, I will give my recipe for potlikker. First let me tell Senators what potlikker is. Potlikker is the residue that remains from the commingling, heating, and evaporation [laughter]—anyway, it is in the bottom of the pot! [Laughter.]

Here is how potlikker is made. First you get some turnip greens. You have to wash turnip greens many times. One of the principal reasons why people do not like turnip greens is that they never do get them clean. "You have to wash them lots of times," said Cato, "lots of times." They always call him "Cato." [Laughter.]

Take the ordinary green, turnip greens or mustard greens, though turnip greens are better than mustard greens. Turnip greens contain more manganese than do mustard greens. The trouble with turnip greens is that most people never get the greens washed clean. Sand is always in them. You have to wash them and wash them and wash them, particularly if you have not any flowing water. If you have good flowing water to shower them with, you can wash them more easily. But you have to wash them plenty of times. In order to get every vestige of dirt and sand and grit out of the greens you have to wash them many, many times.

That is the first thing you do—wash the greens. You wash the turnip with the greens or you can cut the turnips off and peel them and wash them by themselves, and then wash the greens by themselves if you want to do it that way.

All right this far! Then you take the greens and turnips and put them in the pot. Remember this: Do not salt them. Do not put any salt, do not put any pepper, do not put any mustard, do not put any kind of seasoning in the pot with them. Put the greens in the pot. Cut up the turnips. The turnip greens could be cut up a little, too. Put them all in there together.

Then when you get them all in the pot together, put in a sizable quantity of water, I should say about as much water as you have of turnip greens. Then put in there a piece of salted side meat. I would say if you had a pot of turnip greens about two-thirds the size of this wastebasket which I hold in my hand, or perhaps three-fourths that much, you ought to put about a 1-pound hunk of side meat that is sliced, but not clear through, just down to the skin part. Put about a pound of side meat in there. That side meat is just salty enough and has just salt enough in it that it will properly temper the turnip greens when it has been cooked enough. That will be all the seasoning that is needed.

When you have cooked the greens until they are tender and the turnips until they are tender, then you take up the turnips and the greens, and the soup that is left is potlikker. [Laughter.]

That brings on the real question of the art of eating potlikker, the matter of consuming potlikker. You draw off the potlikker and you eat it separately from the turnip greens.

(At this point Mr. LONG yielded to Mr. MCCARRAN, who suggested the absence of a quorum, and the roll was called.)

Mr. LONG. Mr. President, the quorum call discloses a majority of the Members here, and I am glad they are here. Now, I wish to conclude what I am sending out to the neighborhood in general on the recipe.

I was at the point where I explained the cooking of oysters. I was just down to the preparation of potlikker, and had gotten through the first stages of the explanation of how to prepare potlikker. I had explained everything except to tell that the turnip greens must be cooked long enough. One great trouble here is that they never cook the turnip greens long enough. Do not cook them too long but cook them long enough. Do not steam them. You have to boil them.

I have stated those recipes for the RECORD this afternoon so that they may be had by all Members of the Senate and by the public at large tomorrow. Now that so many Senators have returned, I am no longer talking for the benefit of the RECORD. I am talking now for the benefit of the Senate because I have Senators here. I was speaking to the country a

moment ago. The remarks I made were intended more for the country than for the Senate. Of course, I intended them for the Senate, too, but I intended them more for the country than I did for the Senate.

Now, I am talking to the Senate, to the Members here only. I am not concerned with whether or not the country hears about it. I want the Senate to get it. I want each and every Member of the Senate to make himself ready to stay here for several hours, until I get through, and if I can do so without having to yield the floor, I should like to propound a parliamentary inquiry.

Would it be possible to call the roll and ask every Senator who will sit here and listen to me to indicate that he will stay here, and those who will not let them indicate that they will not do so? I would just like to find out how many of my friends in the Senate are really and genuinely interested in what I am saying. I do not want them to deceive me; I want to know how many Members of the Senate are genuinely glad to listen to me here today.

The VICE PRESIDENT. Does the Senator from Louisiana propound a parliamentary inquiry?

Mr. LONG. I wanted to know whether or not I could, by unanimous consent, have the clerk call from the desk the names of Senators and have them respond. I will put it in this way: Could I ask unanimous consent, without losing the floor, to have the clerk propound an inquiry to every Member of the Senate as to whether he is willing to stay here and listen to me or whether he really does not care about it?

The VICE PRESIDENT. The Chair will say to the Senator that he would have to yield the floor if that were done; but the Chair would suggest to the Senator that he can see the Senators sitting around him and he might ask them individually as to their sentiments.

Mr. LONG. Give me the list. I should like to find out if Senators really want to listen to me. The first name on the list is that of the Senator from Colorado [Mr. ADAMS]. I should like to know if the Senator from Colorado really wants to stay here and listen to me this evening?

Mr. LA FOLLETTE. Mr. President, I make the point of order that the Senator from Louisiana cannot yield except for a question.

The VICE PRESIDENT. The point of order of the Senator from Wisconsin is well taken.

Mr. LONG. Very well.

The VICE PRESIDENT. Any time the Senator from Louisiana yields for anything but a question he loses the floor.

Mr. LONG. Very well. I will not yield it, but I was hoping that, by unanimous consent, we could find out about it. I want to find out how popular I am in this body. [Laughter.] I want to know. If it should

get back to Louisiana that the Senators are sitting here this evening listening to me, after I had been speaking for 7 hours—

. . . . . .

Mr. LONG. The violation in this case [*Schechter*] was this: They sent a coop of chickens, I think, from New Jersey to New York. In that coop there were some "dominicker" roosters, a plymouth rock, a buff cochin, white leghorns, and some common chickens that nobody knows by any name except chickens, hill-billy chickens, and various other kinds of chickens. When this coop of chickens got to New York a man opened the coop; the chickens began to flutter around, and he looked into the coop and said to himself, "I believe I like that pullet right over there, that frying-size pullet. I believe I will take that one." The man in charge said, "Hold on there; wait a minute there; before you pull out that pullet hold on a minute; let us get down the N.R.A. rule book and look through it and see what the rule is before you take a chicken out of the coop, because these chickens come in here in interstate commerce and you have got to follow the rule book." So they got down the rule book, volume 6, or whatever volume it was of the code affecting chickens.

I presume there are about 16 or 20 volumes; I do not know as to that; there may not be so many; but let us say, for the purpose of the argument, they got down volume 6 and looked on page 631 of section 4, subsection (z), subdivision 2, and it said there that no man could reach into a coop of chickens and pick out any particular chicken; that he had to blindfold himself and reach in and take whichever chicken came to hand. [Laughter]. That is in the code; that is a part of this wonderful thing that we are sitting here to reenact after a few minutes as soon as I get through talking. Just so soon as I get through speaking that will be the next order of the day.

The rule book of the code said that a man could not reach into a coop of chickens and take whichever one he wanted. "Well," the chicken purchaser said, we will say for the sake of the argument, "that chicken there has got pin feathers that I do not like," or, "I do not want a hen; I want that rooster," or, "I do not want a rooster; I want a frying-size chicken," or, "I want a yellow-legged chicken; I do not want a buff cochin; I want a white leghorn." People are funny that way; they think there is some difference in chickens. As a matter of fact, there is not much difference in chickens; chickens are nearly about the same. Take them up and take them down, a chicken is a chicken, and you cannot make anything else out of it. However, this code said the purchaser had to take whatever chicken he found. He would not do that. So he proceeded to get the chicken that he wanted, regardless of the law and the code. He took the chicken home

and put it in his pot, made some dumplings—probably, in violation of the law, being made too big. [Laughter.] So they indicted the poor devil and ordered him sent to the penitentiary because he got out of the coop the kind of a chicken he wanted. He made the dumplings. He fried some dumplings and probably boiled the gizzard, when he should have roasted it. Mr. President, a gizzard is better roasted than boiled. I found that out years ago. Always roast a gizzard; never fry a gizzard. When he got through with the chicken the man was ordered to jail. Of course a man does not like to go to jail if he can help himself. I have been there myself. I was there one time because I did not have any other place to go and another time because they did not want me to go any other place. But this man decided that he would not go to jail. So he went to court. He hired a lawyer. The case was tried and he lost the case.

The judge called him up and said, "Sorry, old man; you violated the law." The defendant asked, "What law?—the law that Congress passed?" The judge said, "No; you violated a law that the rule maker under this chicken-coop case made, which is found in rule book, volume 6, page 641, paragraph Z, subdivision 2, which provides that a purchaser has to take chickens as they come; that he cannot discriminate between chickens." [Laughter.] I remember a poem about that:

> Chickens, chickens, what makes you roost so high?
> Chickens, chickens, they are going to get you before you die.

This fellow then gets a lawyer, pays him his cash, and gets convicted. He appeals the case to the circuit court of appeals. That is the next court up. For the benefit of the laymen of the Senate, I will state that a defendant is first tried in the district court. No; I am wrong as to that.

The first thing is that the rule maker, the man in charge of handling it, comes around and passes on the case. Then you appeal to the code authority of that particular industry, and they pass on the case. If they pass on it against you, you can appeal to the district court. That is the third court to which you get. When this man got to that court they convicted him, and he went to the circuit court. This man came here to the Supreme Court of the United States asking for a writ of certiorari directed to the circuit court of appeals to dissolve the whole case and to annul the sentence. The order would have to be from the Supreme Court to the circuit court of appeals requiring them to set aside the judgment of the district court, as I take it. We use the term "certiorari" in Louisiana. Certiorari is one of our writs, and I suppose it would be about the same procedure as that found in the courts here.

The Supreme Court finally passed on the case. It is a case of very great importance. It is one of the most far-reaching cases of jurisprudence in

the country. It is more important than anything since the days of the Roman Empire.

Who knows what the Supreme Court held in that case? This is what they held, that a man has the right to any kind of a chicken he wants to eat.

. . . . . .



54. THE LEGISLATIVE REORGANIZATION ACT OF 1946 [1]

IN 1946 Congress sought to reform its cumbersome method of doing business. Congressional committees and procedures had grown and developed since 1789 with little or no effort toward systemization. A great deal of criticism within and without Congress over a period of a decade or more preceding 1946 resulted in the Reorganization Act here reviewed. It is "the endeavor of this article to set forth the changes which should result from the operation of this Legislative Reorganization Act and to demonstrate their advantages and disadvantages, their merits and demerits, and to appraise their significance." Most discussions of this act are limited to the changes in the committee structure and procedure, Congressional salaries, and the regulation of lobbying. Professor Schull's article not only covers these points but also two frequently neglected Titles of this Act, the Federal Tort Claims Act and the General Bridge Act. It should be noted that this article was written before the reorganization plans became effective.

PASSED in the closing days of the Seventy-Ninth Congress, the so-called Congressional Reorganization Act came into a somewhat belated being. Signed by President Truman on August 2, 1946 the measure became law to be operative upon the convening of the Eightieth Congress on January 3, 1947. A number of subjects, loosely related to legislative procedure, are conjoined within the one statute, giving it the appearance of an omnibus measure. All of the proposed changes in congressional procedure have been urged, jointly and severally, for a number of years, and the Legislative Reorganization Act comes as the first step towards the fruition of these suggestions—some of which have become gray with age.

It will not be possible to present a complete historical review of the legislative history of this statute within the compass of this paper. Suf-

[1] Charles W. Shull, *Temple Law Quarterly* (January, 1947), Vol. XX, No. 3, pp. 375–395. All footnotes omitted.

fice for the present to state that the most recent among the moving spirits and forces behind this reform measure to whom the greater credit for the attainment of the objectives accomplished is due are Senator Robert M. LaFollette of Wisconsin and Representative Mike Monroney of Oklahoma. It will be the endeavor of this article to set forth the changes which should result from the operation of this Legislative Reorganization Act and to demonstrate their advantages and disadvantages, their merits and demerits, and to appraise their significance.

Technically six separate Titles divide the Legislative Reorganization Act into its organic parts. The first of these distinct Titles has to do with changes in the rules of the Senate and House of Representatives. Title II covers miscellaneous matters such as provisions relating to congressional personnel, to committees of Congress, and to the Capitol and the pages who serve the various chambers. Title III constitutes the Regulation of Lobbying Act and is to be cited as such. Likewise, the fourth Title is to be known as the Federal Tort Claims Act. The General Bridge Act comprises Title V. The final part, Title VI, has to do with the Compensation and Retirement Pay of Members of Congress.

The first Title contains more controversial material and matter, less readily acceptable to Congress itself, and is infested also with a question of constitutional policy, power, and procedure. These sections have to do with the reorganization and re-arrangement of the committee systems of the House of Representatives and the Senate of the United States, although certain provisions within Title I are applicable to both branches of the national Congress. The question of constitutional power and procedure arises from the fact that the Constitution of the United States gives to each house of Congress the power to determine its own rules of procedure. Prior to the passage of the Legislative Reorganization Act, this rulemaking power of each chamber of Congress had been exerted directly by the body itself by means of resolution or motion to adopt rules, and never by resort to statutory enactment.

One of the prime objectives of the current congressional reorganization was the re-arrangement and revision of the committee system of each branch of Congress. Over the years the committee system of the House of Representatives and the Senate of the United States had continued to grow despite several attempts at pruning, until it appeared about to become unmanageable if not incomprehensible in its ramifications.

At the outset of the Seventy-Ninth Congress the components of the committee system of each chamber were many and varied. In the Senate there were in 1945 thirty-three standing and eleven special and select committees. Memberships on these standing committees were allocated as follows:

TABLE I

Members on committee	*Number of committees*	*Total of places*
3	1	3
8	5	40
10	2	20
11	1	11
13	5	65
14	2	28
15	2	30
17	3	51
18	4	72
19	1	19
20	3	60
21	2	42
23	1	23
25	1	25
	33	489

All told, a grand total of 489 places were established for the thirty-three senatorial standing committees. For each of the members of the Senate considered abstractly, this indicated an average assignment of five committee posts. Excluding the special and select committees of the Senate from consideration at this point, an attempt will be made to analyze in tabular form the initial distribution of the standing committee assignments at the outset of the Seventy-Ninth Congress in 1945.

TABLE II

COMMITTEE ASSIGNMENTS PER MEMBER

No. of posts	*No. of senators so assigned*	*Majority*	*Minority*
3	2	2	0
4	15	14	1
5	55	19	36
6	21	19	2
7	2	2	0

Ninety-five individual Senators were involved in this initial distribution; there was a vacancy in the delegation from Connecticut. It would seem from the disclosures of the above table, that there was some effort to approximate the average of five committee seats per member, since fifty-five Senators eligible to be assigned to committees in January, 1945 received the average allocation in their committee placement. Twenty-three men were allowed to exceed the average in their individual assign-

ments, while seventeen were placed on fewer committees than the general overall average.

At the same date, there were in existence and listed as such, eleven special or select committees of the Senate. The membership of these special bodies varied individually from five to twelve. The total of the positions on these select groups was eighty-nine. Forty-six Senators shared these extra assignments, with the late Senator John Thomas of Idaho, Senator O'Mahoney of Wyoming, Senator Murray of Montana, Senator McCarran of Nevada, and Senator Lucas of Illinois grabbing three of these posts apiece. As a result, O'Mahoney earned the questionable honor of leading all Senators in the matter of committee obligations with seven standing committee seats and three special assignments. Murray had four standing committee posts, including the chairmanship of the Education and Labor Committee, and three places on the select bodies. Senator McCarran, the chairman of the Judiciary Committee, had six standing committee posts, plus three assignments to special committees. Lucas, likewise, was in the six and three class, while Maybank of South Carolina, the other one with seven standing committee places, got into the top group with an added obligation for one of the special groups.

Turning to the House of Representatives for comparable analyses, it may be said here that we shall later reveal the extent of revision in the Senate Committee set-up which would be worked by the Congressional Reorganization Act.

When the Seventy-Ninth Congress convened in January, 1945, the House of Representatives had forty-eight standing committees. Six special committees were also found in the House organization. The distribution of seats among the various standing committees of the House will be disclosed by Table III.

A grand total of 943 separate committee places was established by the House rules of 1945. A member could anticipate, therefore, assignment to two committees—just possibly to a third, as the average member approximated 2.17 places. The actual allotment of places to the 435 members is shown by Table IV.

Three Representatives—Speaker Rayburn, Majority Floor Leader McCormack, and Minority Floor Leader Martin—received no committee appointment. A single assignment was the fate of 237 members of the House of Representatives. Two assignments greeted sixty-five more; fifty-two received three places on various standing committees.

Four spots were the lot of thirty-four Congressmen; twenty-two fell heir to five appointments to committees. Twelve others got six ratings, while six members displayed seven assignments among their legislative wares. Four Representatives labored in eight different committee rooms.

The six select and special committees of the House of Representatives

TABLE III

SIZE OF HOUSE COMMITTEES—1945-47

Size of committee	*No. of committee*	*Total places*
2	1	2
3	2	6
5	1	5
7	1	7
9	4	36
11	1	11
12	1	12
13	2	26
21	15	315
22	6	132
23	1	23
24	1	24
25	3	75
26	1	26
27	2	54
28	2	56
30	3	90
43	1	43

ranged in size from seven to twenty-three, and totalled eighty additional places. The vast bulk of these special assignments went to members whose primary appointments to standing committees were two or less. At the other end of the scale, however, one member with seven basic posts, also drew an additional appointment to a special body.

It is now opportune, after this review of the condition of the existing committee setup of each branch of Congress, to examine the possible effect of the Legislative Reorganization Act, if and when it does become operative. First of all, the number of standing Committees in the Senate

TABLE IV

DISTRIBUTION OF COMMITTEES BY PLACES PER MEMBER

Committee assignments	*No. members*	*Committee assignments*	*No. members*
0	3	5	22
1	237	6	12
2	65	7	6
3	52	8	4
4	34		

is reduced to *fifteen*. These are defined in the statute as the committees on Agriculture and Forestry, Appropriations, Armed Services, Banking, Civil Service and Currency, District of Columbia, Expenditures in the

Executive Departments, Finance, Foreign Relations, Interstate and Foreign Commerce, Judiciary, Labor and Public Welfare, *Public Lands, Public* Works, and Rules. With the sole exception of the Appropriations Committee, which is allowed twenty-one members, all of the remaining bodies are given a fixed membership of thirteen. There are then 203 committee assignments possible under the new provisions of the Reorganization Act. Each Senator may serve on two standing committees and no more; except that Senators of the majority party who are members of the Committee on the District of Columbia and of the Committee on Expenditures in the Executive Departments may serve on three standing committees and no more.

In the House of Representatives there also occurs a severe revision of the committee system. The forty-eight House committees are reduced to nineteen—a very drastic cut. These are to be the Committees on Agriculture, Appropriations, Armed Services, Banking and Currency, Post Office and Civil Service, District of Columbia, Education and Labor, Expenditures in the Executive Departments, Foreign Affairs, House Administration, Interstate and Foreign Commerce, Judiciary, Merchant Marine and Fisheries, Public Lands, Public Works, Rules, Un-American Activities, Veterans' Affairs, and Ways and Means. Nine members comprise the Committee on Un-American Activities; twelve compose the Rules Committee. Nine committees, Post Office and Civil Service, District of Columbia, Education and Labor, Expenditures in the Executive Departments, Foreign Affairs, House Administration, Merchant Marine and Fisheries, Public Lands, and Ways and Means, have twenty-five members each. The Committees on Agriculture, Banking and Currency, Interstate and Foreign Commerce, Judiciary, Public Works, and Veterans' Affairs will have a membership of twenty-seven. Armed Services as a committee consists of thirty-three members, and the Appropriations Committee has forty-three. The grand total of committee seats under the new organization will be 484. Each member shall be elected to serve on one standing committee and no more with the following exceptions. Members of the District of Columbia Committee or of the Un-American Activities Committee may be selected to serve on two standing committees, while members of the majority party on the Committee on Expenditures in the Executive Departments or House Administration Committee are also limited to two posts.

The jurisdiction of each of these newer House and Senate Committees is carefully defined in the body of the statute with a view of eliminating the conflicts and overlappings which have marred the orderly process of congressional legislation. As far as it was possible, previous allocations of the fields of specialization of the individual committees were preserved. Much of the chance for confusion of effort and controversy within the congressional committee system was eliminated by the device of the statutory

definition of the field of endeavor and jurisdictional scope of each such body. Senate provisions mention the *appointment* of committees; the word election appears in those which have to do with the choice of the personnel of these bodies in the House. Presumably there will be no great change in the methods by which committees are actually chosen within each chamber, at the present time.

At the commencement of each Congress, says the statute, the House shall elect a chairman of each standing committee; temporary vacancies are to be filled according to seniority and rank within the group, but any permanent vacancy reverts to election by the whole House of Representatives.

Aside from the reduction in the number and volume of committees and committee positions, the effect of the statute upon the procedure and modes of establishing committee personnel will be scant. Seniority and specializations will still have to be considered in determining the personnel of the committees within each branch. Some members—for instance Senators O'Mahoney and Lucas—will have to descend from their lofty pinnacle of an impossible number of committee assignments.

Many individual critics of the measure will be disappointed that the reorganization of the committee system was not more thorough. Perhaps they are right, but a good half loaf is often better than a panful of mouldy loaves. Should there be an installation of this newer system, some difficulties, some dilemmas, some defects and demerits of congressional committee procedure and organization will certainly vanish and disappear.

Other features of the Legislative Reorganization Act now call for analysis and comment. Rule XVI of the Senate is also drastically revised with reference to the matter of amendments to appropriation bills, which, of course, receive on occasion frequent alteration at the hands of the upper chamber. The pertinent changes in this Rule XVI will be next presented.

All general appropriation bills shall hereafter be referred to the Senate Committee on Appropriations which may not receive any amendments to any such general appropriation measure whose effect would be to increase an appropriation already contained in the bill, or to add a new item, unless it be necessary to carry out provisions of some existing statute, or treaty stipulation, or acts and resolutions passed in the same session of Congress. Neither are amendments to accomplish such increase of amount, or new items of appropriations permissible unless moved by the direction of some standing or select committee, or proposed in pursuance of an estimate submitted in accordance with law. The Committee on Appropriations may not report a bill containing amendments proposing new or general legislation, or any restriction on the expenditure of funds appropriated, which establishes or proposes a limitation not authorized by law, if such restriction is to take effect or cease to be operative upon the occurrence of some

contingency. Points of order may be raised against amendments of this type, or on bills containing such amendments, and the matter must then be recommitted to the Committee on Appropriations.

All amendments to general appropriation measures moved by standing or select committees which propose increases in amounts already specified in the bill, or the addition of new items, must be referred to the Appropriations Committee one day before consideration; likewise any amendments of such character proposed to rivers and harbors bills, or post roads and offices bills, must go to the Committee on Public Works before further consideration.

Thus far we have been speaking of amendments which bear relationship to the subject matter of the appropriations measures, or which were germane and pertinent thereto. We come now to a different problem—that of extraneous matter or elements of amendments not immediately pertinent to the instant bill. Riders—amendments proposing general legislation customarily attached to appropriation bills, shall not be received by the branches of Congress under the Legislative Reorganization Act, nor shall any amendment not germane or relevant to the subject matter specific and general of the appropriation bill be proposed. This alone is a considerable reform of great import; clearly it eliminates the shotgun technique on the part of Congress by which material known to be certain of presidential disapproval or executive veto was slipped into Appropriation measures and rode with them into the status of law. This was a practice much abused by Congress, although justice and fairness require that it also be pointed out that one prime means for presidential escape of executive responsibility has also been obliterated, inasmuch as no president can now have available the ever useful argument that he could not veto obnoxious riders without hamstringing some administrative agency by denying it the funds appropriated in the bill containing the offensive rider. In addition, no amendment to an appropriation bill seeking to provide for a private claim may be received on any general appropriation bill, unless it be necessary to carry out the provisions of an existing law or a treaty stipulation which must be cited on the face of the amendment.

Part 3 of Title I of the Legislative Reorganization Act deals with provisions applicable to both houses of Congress. Here a number of unrelated matters are conjoined for legislative treatment.

Private bills are banned. No private bill or resolution, including omnibus claims or pension bills, and no amendment to any bill or resolution authorizing and directing (1) the payment of money for property damages, for personal injuries, or death for which suit may hereafter be instituted under the Federal Torts Claims Act or for a pension (other than to carry out a provision of law or treaty); or (2) the construction of a bridge across a navigable stream, or (3) the correction of a military or

naval record shall be received or considered in either the Senate or the House of Representatives.

Congressional adjournment comes in for consideration with the provision in Section 132 of the Legislative Reorganization Act that Congress shall adjourn *sine die*, no later than the last day of July in each year, except in time of war or national emergency, or if Congress shall direct otherwise by law.

Each standing committee of the House and the Senate, except the Appropriations Committees, shall establish regular meeting days with power still invested in the chairman to call additional sessions when deemed necessary. Complete records of all committee actions, including a tally of the votes, are required, and no measure or recommendation shall be reported from any committee unless a majority of its members were present at such committee meeting. All hearings of standing committees or subcommittees shall be open to the public except executive sessions for marking bills or voting, or where an executive session is ordered by a majority vote.

The customary powers of committees in the matter of procuring the attendance of witnesses and the production of testimony, both parole and documentary, are safeguarded to the full. To assist Congress in appraising the administration of the laws and in developing possible legislation, each standing committee of each branch is enjoined to exercise continuous watchfulness over the execution, by the proper administrative authorities and agencies, of any laws within the subject matter jurisdiction of each particular committee.

Another major innovation of the Legislative Reorganization Act is the so-called *legislative budget*. The Committee on Ways and Means and the Committee on Appropriations of the House of Representatives and the Committee on Finance, and the Committee on Appropriations of the Senate (or duly authorized sub-committees thereof), are authorized and directed to meet jointly at the beginning of each regular session of Congress, and after study and consideration, giving due consideration to the budget recommendations of the President, report to their respective houses a legislative budget for the ensuing fiscal year, including the estimated over-all Federal receipts and expenditures for each year. Such report shall contain a recommendation for the maximum amount to be appropriated for expenditure in such year, which include an amount to be reserved for deficiencies as may be deemed necessary by such committees. If the estimated receipts exceed the estimated expenditures, such report, which shall be made by February 15th of each year shall, and must, contain a recommendation for a reduction in the public debt. The report of the legislative budget shall be accompanied by a concurrent resolution adopting such budget and fixing the maximum amount to be appropriated

for expenditure in such fiscal year as is covered by the report. If the estimated expenditures exceed the estimated receipts, then the concurrent resolution seeking adoption must contain the following section: "That it is the sense of Congress that the public debt shall be increased in an amount equal to the amount by which the estimated expenditures for the ensuing fiscal year exceed the estimated receipts." Then a dollar and cents estimate of the amount must be set forth in the resolution.

The Committee on Appropriations of the two Houses are directed by joint action to develop a standard appropriation classification schedule which will clearly define in concise and uniform accounts the sub-totals of appropriations asked for by the agencies in the executive branch of the Government. No general appropriation bill, or measure or amendment thereto, shall be received or considered in either branch if it contains a provision re-appropriating unexpended balances, but this provision does not apply to appropriations in support of public works on which work has commenced. The Appropriations committees are authorized and directed to make a study of (1) existing permanent appropriations with a view of limiting the number of permanent appropriations, and to recommend to their respective houses what permanent appropriations, if any, are to be discontinued; and (2) the disposition of funds resulting from the sale of Government property or services by all departments and agencies in the executive branch of the Government with a view of recommending a uniform system of control with respect to such funds.

Title II of the Legislative Reorganization Act deals with a number of miscellaneous matters relating variously to congressional personnel, to committees of Congress, and to the Capitol and pages. The annual basic compensation of the elected officers of the Senate and House of Representatives (not including the Speaker, Vice-President or other presiding officer of the Senate), will be increased by 50%. The Speaker of the House of Representatives, the majority and minority leaders of the House, are each authorized to employ an administrative assistant at an annual salary of $8,000.

Each of the standing committees of the Senate and the House of Representatives, with the exception of the Appropriations Committees, which receive a more generous treatment, may appoint four professional staff members and six clerical assistants. The Appropriations Committees have a right under the new order to employ such professional and clerical staff as they may deem necessary. Here we find the first step towards the alleviation of the strain upon members of Congress by the institution of larger clerical staffs for the individual committees, and the inauguration of professional staff assistance for such bodies. This portion of the Reorganization Act alone would stand as a measurable advance in congressional operation.

In addition, the Legislative Reference Service of the Library of Congress will be greatly expanded in an effort to assure more effective use of its facilities by members of Congress. Thus the Legislative Reference Service is now authorized to employ by appointment senior specialists in a wide variety of technical fields, and the funds at its disposal have been largely increased until the Reference Service should win for itself, as an adjunct of Congress, a most enviable reputation. Likewise the Office of the Legislative Council is to receive expanded and enlarged appropriations over a period of years.

By other portions of this Title of the Act, the Comptroller-General is authorized to make a full and complete study of restrictions placed in general appropriation statutes, limiting the expenditure of specified appropriations therein, with a view to determining the cost to the Government incident to compliance with such restrictions and limitations, and is directed to report to Congress his estimate of the cost of compliance and his recommendations with respect thereto, as he may deem necessary or desirable. The Comptroller-General must also make an expenditure analysis of each agency in the executive branch of the Government, including Government corporations, which, in his opinion, will enable Congress to determine whether public funds have been economically and efficiently administered and expended. Reports on such analyses shall be submitted by the Comptroller-General, from time to time, to the Committee on Expenditures in the Executive Department, to the Appropriations Committees, and to the legislative committees having jurisdiction over legislation relating to the general operation of the respective agencies of the two Houses.

Included in Title II of the Legislative Reorganization Act is the newer procedure for the correction of military and naval records. The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military and naval record where, in their judgment, such action is necessary to correct an error or to remove an injustice.

Improvements in the format and organization of the *Congressional Record* are also decreed. Henceforth there shall be printed in the *Daily Record*, the legislative program for the day, together with a list of congressional committee meetings and hearings, and the place of meeting and subject matter; and a brief resume of congressional activities for the previous day to be incorporated in the Record, together with an index of its contents.

Title III of the Reorganization Act constitutes the Federal Regulation of Lobbying Act and is to be cited as such. Under its provisions every person who shall in any manner solicit or receive a contribution to any or-

ganization or fund for use principally to aid in the passage or defeat of any legislation by the Congress of the United States, or to influence directly or indirectly said passage or defeat of any legislation is required under penal sanctions to keep a detailed and exact account of:

(1) All contributions of any amount or value whatever.
(2) The name and address of every person making a contribution of $500 or more.
(3) The date of such contribution.
(4) All expenditures made by or on behalf of such organization or fund.
(5) The name and address of every person to whom such expenditure is made and the date thereof.

It is also stipulated as the duty of every such person to obtain and keep a receipted bill, stating the particulars, for every expenditure of such funds exceeding $10.00 in amount, and such receipted bills and accounts are to be preserved for a period of two years subsequent to the required filing of the statement containing such items.

Every individual who receives a contribution of $500 or more for any of the purposes of securing or influencing the passage or defeat of any legislation by the branches of Congress shall within five days after the receipt of such funds give a detailed account thereof including the name and address of the person making such contribution and the date thereof.

All persons who conduct themselves in such a manner as to come under the operation of the Federal Regulation of Lobbying Act shall make and file with the Clerk of the House of Representatives quarterly reports. These statements and reports are to be supported by oath or affirmation, and must disclose and contain the following material:

(1) The name and address of each person contributing $500 or more during the quarter covered by the report.
(2) The total sum of the contributions made to or for such person during the calendar year.
(3) The name and address of each person to whom an expenditure in one or more items of the aggregate or value of $10 or more, has been made by or on behalf of such person during the calendar year, and the purpose of the expenditure must be disclosed.
(4) The total sum of all expenditures made by or on behalf of such person during the calendar year.

The statements required to be filed with the Clerk shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported previously, only the amount needs to be carried forward. These quarterly reports are to be preserved by the Clerk of the House of Representatives for a period of two years from the date of filing, shall also constitute part of the public records, and shall be open to public inspection.

As we stipulated earlier, this Regulation of Lobbying Act extends to all persons (except a political committee as defined in the Federal Corrupt Practices Act, and duly organized State or local committees of a political party) who by himself, or through any agent or employee or other persons in any manner whatsoever, directly or indirectly solicits, collects, receives money or any other thing of value to be used principally to aid in the influencing or securing of the passage or defeat of any legislation by the Congress of the United States.

Any person engaging himself for pay or any other consideration for the purpose of attempting to influence the passage or defeat of any legislation in the Congress of the United States, must, before doing anything in furtherance of such an object, register with the Clerk of the House of Representatives and the Secretary of the Senate. He shall give to those officers in writing and under oath, his name and business address, the name and address of his employer in whose interest he appears or works, the duration of such employment shall be stipulated, the amount of compensation, by whom he is paid, how much he is allowed for expenses, and what expenses are included must be indicated. Each person so registered must make quarterly statements and reports, under oath, of all money received and expended by him during the preceding quarter in carrying on his work. He must specify to whom he paid any money, and give the names of any papers, periodicals, magazines, or other publications in which he has caused to be published any material whatsoever. He must also reveal the proposed legislation he is employed to support or oppose.

The provisions of this registration section are not to apply to any person who merely appears before a congressional committee in support or opposition to legislation nor to any public official acting in his official capacity; nor to any newspaper or regularly published periodical which in the course of ordinary business publishes news items, editorials, or other comments, or paid advertisements which directly or indirectly urge the passage or defeat of legislation, if such newspapers, periodical, or individual engages in no further activities in connection with the passage or defeat of said legislation, other than to appear before a committee of the Congress of the United States in support of or in opposition to such legislation.

All information required to be filed under the provisions of this registration section shall be compiled by the Clerk of the House and Secretary of the Senate, acting jointly, as soon as practicable after the close of each calendar quarter with respect to which such information is filed, and shall be printed in the *Congressional Record.*

The penal sections of the Regulation of Lobbying Act provide that any person who violates any portion thereof, shall, upon conviction, be guilty of a misdemeanor and shall be punished by a fine of not more than

$5,000, or imprisonment for twelve months, or by both such fine and imprisonment. In addition to the penalties just indicated, any person convicted under this Act is prohibited for the period of three years from the date of such conviction, from attempting to influence, directly or indirectly, the passage or defeat of any proposed legislation, or from appearing before a committee of Congress in support or opposition to proposed legislation, and the penalty for violation of this prohibition is defined as $10,000 fine, five years imprisonment or both, while the violation is classed as felony.

TITLE IV

The Federal Tort Claims Act is contained in Title IV of the Legislative Reorganization Act. Two procedures for the determination and settlement of claims against the United States are established for the future under this Tort Claims Act. The first has to do with claims of $1,000 or less. Authority is now conferred upon the head of each federal agency, or some designated subordinate to consider, adjust, determine and settle any claim against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property, or on account of personal injury or death, where the total amount of the claim does not exceed $1,000, and where the damage or injury or death has been caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable for such damage or tort, in accordance with the law of the place where such tort occurred. All such awards made by the proper administrative agencies shall be conclusive and final, except where procured by fraud, and all settlement shall be made of such awards by the head of the federal agency concerned out of appropriations that may be made therefor. The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on him, and shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim. The head of each federal agency shall make an annual report to Congress of all claims paid by such agency under this portion of the Federal Tort Claims Act. Such report shall include the name of each claimant, a statement of the amount claimed, and the amount awarded, and a brief description of the claim.

Succeeding portions of the Federal Torts Claims Act establish the right of claimants or plaintiffs in tort to institute suit in the federal district courts where the plaintiff is resident, or where the act or omission complained of occurred. These courts shall have exclusive jurisdiction to hear, determine, and render judgment on any claim, for money only, upon

alleged torts in all instances in which the United States, if a private individual, would be liable for such damage, loss, injury or death resulting from the negligent or wrongful act or omission of any employee. Subject to the provisions of the Act the United States shall be liable in respect of such claims in the same manner and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorney's fees.

The judgment in any such action shall constitute a complete bar to any action by the claimant against the employee of the Government whose act or omission gave rise to the claim. No suit shall be instituted under this section of the Legislative Reorganization Act upon any claim presented to any federal agency unless such body has made a final disposition of the claim. However, any such claimant may upon fifteen days written notice withdraw any claim from consideration by a federal administrative agency and institute suit within the appropriate provisions of the Federal Tort Claims Act. In the event of such withdrawal or administrative disposal of an administratively handled claim, no suit is permissible for any sum in excess of the amount of the claim presented to the proper federal agency, except where the increased amount of the claim is shown to be based upon newly discovered evidence not reasonably discoverable at the time of the presentation of the claim to the proper federal agency, or upon evidence of intervening facts, relating to the amount of the claim. Final judgments in the district courts in cases under this part of the Federal Tort Claims Act shall be subject to appeal in the Circuit Court of Appeals in the same manner and to the same extent as other judgments of the district courts, and may also be appealed to the Court of Claims of the United States. In cases taken to the Court of Claims that body is to possess with regard to such appeals all the powers and duties conferred on the regular circuit courts of appeals under the Judiciary Act of 1925. With a view to doing substantial justice, the Attorney-General is authorized to arbitrate, compromise, or settle any claim cognizable under this part of the Act, after the institution of any suit thereon, with the approval of the court in which the suit is pending. Every claim against the United States, cognizable under the Federal Tort Claims Act, is to be forever barred, unless within a year after accrual, or within one year after the enactment of this statute, whichever is later, the claim is presented to the proper federal agency, if the amount is less than $1000, or an action is instituted in the courts of appropriate jurisdiction.

The provisions of the Federal Torts Claims Act as a portion of the Legislative Reorganization Act shall not apply to the following cases:

(1) Any claim based upon an act or omission of an employee of the Government exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid; or based upon the exercise or performance (or the failure to exercise or perform) any discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

(2) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or other postal matter.

(3) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any law enforcement officer.

(4) Any claim relating to claims or suits in admiralty against the United States for which statutory remedies have been provided.

(5) Any claim arising out of an act or an omission of any employee of the Government in administering the provisions of the Trading with the Enemy Act as amended.

(6) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(7) Any claim arising from injury to vessels, or to the cargo, crew or passengers of vessels while passing through the locks of the Panama Canal or while in Canal Zone waters.

(8) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.

(9) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(10) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(11) Any claim arising in a foreign country.

(12) Any claim arising from the activities of the Tennessee Valley Authority.

Other provisions authorize the court rendering a judgment for the plaintiff, or the head of a federal agency, or his designee making an award, or the Attorney-General making a disposition as permitted under the compromise sections of the statute, to determine and allow reasonable attorney's fees. These are limited in the event that the recovery on the claim is $500 or more, to ten per centum if the claim is settled by the administrative agency, or twenty per centum if the award is allowed by a court upon proper institution of suit. These fees are to be paid out of the judgment, award, or settlement recovered, and do not constitute additional amounts beyond the terms of the award. Suitable penal sanctions are attached to render this portion of the Federal Tort Claims Act enforceable.

From and after the effective date of this statute the authority of any

federal agency to sue and be sued in its own name shall not be construed to authorize suits against such agency on claims which are cognizable, under Part 3, of this Act, and the remedies provided by this title shall be exclusive.

Title V of the Legislative Reorganization Act is to be cited as the General Bridge Act of 1946. By this Title V the consent of Congress is granted for the construction, maintenance, and operation of bridges and approaches over the navigable waters of the United States. The location and plans for such bridges must be approved by the Chief of Engineers and the Secretary of War before construction work of any character is commenced, and in approving such bridge sites and plans, any specific conditions relating to the maintenance and operation of the structure, which these officials may deem necessary in the interest of public navigation shall have the force of law. It shall, however, be unlawful to commence the construction of any privately owned highway toll bridge until the location and plans shall also have been submitted to and been approved by the highway department of the state or states in which the bridge and its approaches are situated. In the case of interstate bridges, and in the event of the failure of agreement upon, and approval of the location and plans for such interstate bridges, by the several highway departments of the states involved, then the matter of the site and the plans shall be submitted to the Public Roads Administration whose approval shall preclude action by the several state highway departments. If tolls are to be charged for the transit over any interstate bridge for engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, then such tolls shall be reasonable and just, and the Secretary of War may at any time, prescribe the reasonable rates of toll for such transit over these interstate bridges; such rates are then to be the legal rates demanded and received for such transit across the bridge.

Upon the completion of any interstate toll bridge constructed by any individual, or corporation, the states in which the bridge is located, or any public agency or political subdivision of either of such states, or combinations of such units, within or adjacent to which any part of the bridge may be located, may acquire any such bridge and its approaches by condemnation. If such condemnation occurs after five years from the completion of such bridge, the compensation or damages shall not include good will, going value, or prospective revenue, but shall be limited to the actual cost of construction, less a reasonable deduction for actual depreciation, the actual costs of acquiring such interests in real estate, actual financing and promotion costs, not to exceed ten percent of the sum of the preceding amounts, and actual expenditures for necessary improvements.

Owners of a privately constructed interstate toll bridge must report itemized statements of the actual cost of constructing the bridge and its ap-

proaches, real property necessary thereto, and real financing and promotion costs, in sworn reports to the Secretary of War within ninety days after completion of the bridge. Investigative powers to check the accuracy of these costs and to determine their reasonableness is vested in the Secretary of War, and his findings as to the reasonable costs of the construction, financing, and promotion of the bridge shall be subject to review only in a court of equity for fraud or gross mistake.

Toll rates charged by any state or political subdivision thereof on any bridge constructed or acquired by such public agency shall be adjusted to make possible a sinking fund to amortize the amount paid therefor within a period of twenty years. After such a sinking fund adequate for amortization has been accumulated, such bridges shall be maintained and operated free of tolls. Eminent domain to enter and acquire necessary real estate and other property is conferred upon any one empowered to build bridges within the provisions of the General Bridge Act. Penal sanctions are provided, and international bridges are exempt from the application of this Act.

TITLE VI

Title VI is the last in this rather comprehensive statute. It has to do with the compensation and retirement pay of members of Congress. By its provisions the compensation of Senators, Representatives in Congress, Delegates from the Territories, and the Resident Commissioner of Puerto Rico is fixed at $12,500 per annum, while that of the Speaker of the House of Representatives and the Vice-President of the United States is advanced to $20,000. In addition to this salary compensation, each Senator, Representative, Territorial Delegate, and the Resident Commissioner of Puerto Rico, is to be given under the new Legislative Reorganization Act a further expense allowance of $2,500 to assist in defraying expenses relating to or resulting from the discharge of his official duties; no tax liability is to be incurred upon this expense allowance, nor shall any tax accounting be required. This expense allowance is made payable in equal monthly installments.

By Section 602 of the Legislative Reorganization Act, the Civil Service Retirement Act is amended to make provision for the optional retirement of members of Congress. Such members of the House or the Senate must give notice to their disbursing officer if they desire to come within the purview of this Act. For members of the Eightieth Congress this notice must be filed within six months after the passage of the Legislative Reorganization Act of 1946, or within six months after any date on which said members take oath of office. Members who give notice of their intent to come within the retirement provisions of this Act shall deposit a sum equal

to six percentum of their basic salary, together with interest computed at four percent per annum. The deduction for the retirement purposes of the Act shall be six percent of the salary of the member who has given notice of his intent to avail himself of such privileges. No member shall be entitled to receive any annuity until he shall become separated from the service of Congress as a member thereof, after having had six years tenure therein and have attained the age of sixty-two years, except that any member who has had five years of service may, subject to later provisions of the Act, be retired for disability irrespective of age and be paid a proportionate annuity. No member of Congress shall be entitled to receive any annuity under these retirement provisions unless there shall have been deducted and withheld from his basic salary for the last five years of his service, or unless there has been deposited to his credit a sum equal to this total deduction, the requisite six percentum of the basic salary through that period. The annuity paid to a member upon retirement shall be an amount equal to 2½ percent of his average annual basic salary as a member, multiplied by his years of service, but no such annuity shall exceed a total equal to three-fourths of the final salary received at the time of retirement. Return of amounts deducted, together with interest thereon, is provided for those cases where members do not serve the required six years or are not withdrawing for reasons of disability. Annuitants who may subsequently be re-elected to Congress will have the payment of the benefit suspended during term of office, but do not lose credit for the previous period of service in the computation of his subsequent retirement annuity. Service as a member of Congress shall not be credited towards the earning of any other retirement annuity under the Civil Service Retirement Act.

From the above review of the manifold provisions of the Legislative Reorganization Act it can be discerned that it is a lengthy, important piece of legislation. As has been shown it deals with diverse subjects, ranging from the committee systems of the branches of Congress to the retirement compensation of members of Congress, and from tort claims to the construction of bridges. Certain generalizations are possible upon this measure and its probable effects.

First of all, attention has too largely been centered upon the reconstruction of the committee systems of the House of Representatives and the Senate of the United States to the neglect of the other features of the statute —the regulations of lobbying, the Tort Claims Act, and the General Bridge Act. Obviously the re-arrangement of the committee system of Congress with its more logical presentation of lines and channels of legislative procedure and responsibility is a major improvement. It is, however, no guarantee that the individual committees of Congress will be any better than they have been in the past, so far as personnel is concerned, for the members are still chosen by the same people of the various states, who

in years past have sent down the individuals whose vagaries and allegedly aberrant behavior upon the committees occasioned much of the complaint as to the dire effects of seniority. This latter practice—seniority—is not necessarily abrogated. It is possible that with larger memberships upon fewer committees, seniority will freeze still tighter the inner ring of control within the committee. Should the newer set-up be instituted, the expectation that the committee system will function more efficiently and effectively is not predicated alone upon the change in the internal organization of that committee system. Such improvement will also depend, to a far greater degree than is likely to be realized, upon the elimination from congressional consideration of such matters as tort claims against the United States, the correction of military and naval records, and permission for the construction of bridges over navigable waters of the United States. Thousands of bills will be lifted from the program and calendars of Congress by these changes alone. Consequently the benefit which will accrue to the House and the Senate in terms of better time distribution of effort and emphasis will itself be a very great advantage and improvement. Again this does not mean speedier legislation upon the remaining mass of materials; it may mean more careful consideration, uninterrupted and unimpeded by the need to take care of thousands of essential items of purely routine or minimal concern. Should this more mature, careful consideration of congressional legislation result from the barring of these petty concerns from the chambers that alone would seem to justify the entire enactment of the statute.

To appraise the significance of the act prematurely would be fatal. That it is a milestone in the treatment of legislative matters is patent. The newer committee set-up may bring improvement, for that newer organization will be free from some of the defects of the previous set-up, and to that extent should function more satisfactorily. The prohibition of riders is a suggestive gesture which offers a partial solution for some problems, affixing as it does responsibility more clearly than before for individual propositions of somewhat doubtful merit and desirability. The mechanism of the legislative budget may be a device productive of good results, although it must be chronicled that good administrative theory still speaks of budgeting as one of the functions of management, and makes references still to the executive budget.

As we have indicated earlier, the reduction in the total volume of legislative business which will follow the establishment of the newer methods of handling claims against the United States through administrative agencies and through the courts, which will also follow the exclusively administrative handling of corrections of military and naval records, which will accrue from the institution of the administrative procedure for obtaining consent for the initiation of construction activities on interstate

bridges and on those navigable waters of the United States, may in the long run be the most important factor in the development of better conditions within which the Congress may operate upon that legislation which is important.

The provisions for the regulation of lobbying are at best still experimental; it is to be doubted that the prescription of registration and report of records and expenditures will serve as effectively as its protagonists expect. Obviously the more adequate staffing of the committees and of the Legislative Reference Service of the Library of Congress will go far towards bridging the gap between the average member of Congress and the expert technical and clerical service which the member so patently needs in order to concentrate upon the task of legislation itself. One must regret the elimination from the final draft of the administrative assistant for each member, recommended in the earlier reports by the Monroney-LaFollette Committee. Members who wish to shirk their responsibility for legislation in favor of errands for their constituents still have that opportunity entirely within their own personal grasp. The increased compensation, expense allowances, and retirement annuities may have some effect upon the caliber of membership and upon the tenure and turnover rates, but here time alone can reveal the extent.

The high significance of the entire Legislative Reorganization Act inheres in the fact that it is admittedly a first step towards a more realistic treatment of a number of legislative problems, pertinent to Congress. It is possible that further improvements can be fitted into the proper portion of the basic statute and that the entire work may not need to be done again from scratch in the future. In that sense the Legislative Reorganization Act is foundation and framework, the studding and rafters of the edifice of congressional procedure.



55. A SUMMARY OF THE OPERATION OF THE REORGANIZATION ACT

Remarks of Hon. A. S. Mike Monroney of Oklahoma in the House of Representatives [1]

Saturday, July 26, 1947

IN THE previous selection (54) Professor Shull describes the provisions of the Reorganization Act. In his remarks in this selection Mr. Mon-

[1] *Congressional Record*, August 27, 1947.

roney, the vice-chairman of the committee that devised the Reorganization Act, assesses the manner in which the act operated in the first session of Congress after its adoption. (Mr. Monroney is not here concerned with those provisions of the act that do not relate expressly to working procedures of Congress.) Mr. Monroney also indicates additional changes in Congressional procedure that he considers desirable. It is worth noting that one of these—the abolition of the veto power of the Rules Committee over bills approved by other standing committees—was incorporated in the Rules of the House of Representatives on January 3, 1949.

MR. MONRONEY. Mr. Speaker, after 7 months' experience with the Reorganization Act, Congress has rung up a 50–50 score on performance in its first session under the new rules, a close study reveals.

Several marked improvements to congressional machinery have been carried out, others partially accomplished, and still many other important provisions virtually ignored.

Most of the failures of the act, criticized by various writers and Members of Congress, have been failures to put into effect the provisions of the act rather than proving its reforms unworkable.

Although the act was passed on August 2, 1946, it did not become operative until Congress convened in January of this year. Then Congress faced not only the problems of placing reorganization into effect, but it was under new management in both Houses as well. The new Republican majority accepted the act in toto and it then became the job of dozens of Members, committee chairmen, staff members, and others to carry out the many changes provided for in the bill.

COMMITTEES CONSOLIDATED

Only one of the three principal objectives was carried out in full. That was the realinement of the sprawling, overlapping, and duplicating committee structure of both Houses which, like Topsy, had "just growed" for more than 100 years. The standing committees were reduced from 48 to 19 in the House, and from 33 to 15 in the Senate. Despite the creation of numerous subcommittees, this phase of reorganization marks a major achievement.

The second principal objective, that of furnishing Congress with skilled technical service of its own through improved staffing and research facilities, was only partially successful in the first 7 months of operation. Difficulties were encountered in assembling qualified staff members, learning to use them effectively, and in allowing unqualified personnel to hold the professional staff jobs. Experience through trial and error should improve this situation.

The third objective, considered by many to be one of the most important, strengthening of Congress in handling the vast fiscal powers of the Federal purse, was virtually ignored and unused.

My own individual summary of the act would reveal this score:

WORKING

First. Realinement of committees.
Second. Reduction of jurisdictional conflicts.
Third. Reduction of special committees.
Fourth. Improvement of committee procedures.
Fifth. Limitation on conference committees.
Sixth. Separation of committee offices.
Seventh. Improvement of Legislative Reference Service.
Eighth. Improvement of Legislative Drafting Service.
Ninth. Reduction of private bills.
Tenth. Improvement of CONGRESSIONAL RECORD.
Eleventh. Increase in Members' pay and addition of retirement provisions.
Twelfth. Registration of lobbyists.
Thirteenth. Congressional adjournment.
Fourteenth. Miscellaneous improvements.

PARTLY WORKING

First. Legislative surveillance of departments.
Second. Improvement in committee staffing.
Third. Restrictions on legislation on appropriation bills.
Fourth. Reporting of appropriation bills.
Fifth. Open hearings of committees. Exception: House Appropriations.
Sixth. Investigations by standing legislative committees

NOT WORKING

First. Legislative budget.
Second. Expenditure analyses by Comptroller General. No funds appropriated.
Third. Study by Comptroller General of obsolete restrictions on bills.
Fourth. Establishment of standardized show-case accounting for departmental expenditures.
Fifth. House Appropriations Committee hearings closed.
Sixth. Studies for reduction of permanent appropriations.
Seventh. Adequate staffing of Appropriations Committees.

Eighth. Transfer of District of Columbia to home rule. Recommended in report but not included in act.

Ninth. Establishment of too many subcommittees.

Tenth. Drastic restrictions on deficiency appropriations. Recommended in report but not included in act.

NO STALEMATE

Despite dire predictions that the party division between the Executive and the Congress would result in a stalemate, the first session of this Congress passed more than twice the number of bills passed by either the House or Senate during the first session of the Seventy-ninth Congress. A total of 1,790 bills was passed this year as compared with 857 passed by the first session of the Seventy-ninth Congress. At least some of this accelerated action was due to better committee organization.

From the first the realinement of the committee structure of the two Houses was considered the keystone of reorganization. The importance of committee consideration of bills has grown to give the standing committees the importance of "little Congresses." Eighty to 90 percent of the legislative consideration of bills takes place within these little Congresses.

COMMITTEE IMPROVEMENTS

The new committee structure was purely functional and aimed at centralizing in one major committee all of the governmental activities along that general line. Instead of seven minor committees handling a part of the public works program, one Committee on Public Works now handles it. Instead of three committees dealing with veterans' problems, the work was concentrated in one major Veterans' Affairs Committee. The Military Affairs Committee and the Naval Affairs Committee of both Houses were merged into a Committee on Armed Services. Much jurisdictional disagreement, duplicating legislation, and overlapping was eliminated by the new alinement.

Despite the overgrowth of subcommittees within the new streamlined committee structure, the work of all the subcommittees is in one general governmental activity. Instead of a House Member serving on four or five widely divergent committees, and a Senator serving on seven or eight, House Members concentrate on one general line for specialization, and Senators on only two. Membership even on several subcommittees does not give the Member a confusing array of unrelated activities.

WORK LOAD DIVIDED

Contrary to the opinion of critics who have marked the committee consolidation as a failure, in most instances the subcommittees have merely

divided up the committee work for convenient study. The House Foreign Affairs Committee, for example, lists 11 subcommittees. Actually they are only divisions for a more complete study of world area problems. The Armed Services Committee of the House lists 11 subcommittees, but all are for functional studies of problems of all the armed services along such lines as aviation, medicine, supply, and so forth.

Critics who fear failure of the new committee structure have expressed anxiety lest these subcommittees again become standing committees. Instead, there is a strong likelihood that in the next few sessions many subcommittees found to be unnecessary will be dropped and the trend will be toward operation by full committee membership.

However, even with the increase in the number of subcommittees, there are 31 fewer committees of all types operating now than in the Seventy-ninth Congress.

TEMPORARY STATUS

The subcommittees will not have immortality because the perquisites of subchairmen do not compare with those of a full committee chairmanship. These subcommittees do not furnish, for the most part, separate committee rooms and offices, have no added secretarial staff, nor is the subcommittee chairmanship held in comparable prestige.

While not completely successful in channeling all investigations and special studies to the standing legislative committees, the act has greatly reduced stripping them of their rightful jurisdiction. Despite a clear break-through of the spirit of the act against circumventing standing committees, two special committees in each House were set up. However, two others based on membership on standing committees were established, but these largely recognized the jurisdiction of the standing committees and provided for joint consideration. Actually, the so-called special or select committees were reduced from 12 in the Seventy-ninth Congress to 4. With the change of party control in both the House and Senate, without reorganization there would in all probability have been well over 20 special committees during this session.

Special committees have no power to legislate, and their studies are limited to publicity, investigation, and a final report. Their work must then be referred to a standing committee for duplicate hearings and legislative action of corrective nature, if any is indicated. Thus the reduction of special committees eliminated widespread duplication of committee work.

PROCEDURAL GAINS

Other committee changes included many procedural improvements, such as requiring a quorum to actually be present in committee—and not

by proxy—before reporting bills; preparation of witnesses' statements prior to hearings; limitation on conference committees to prevent the writing of entirely new bills under their special privilege to compromise differences between the two Houses; the separation of the committee staff, work, files, and records from the chairman's activities connected with his particular congressional district. Both are now operated separately.

Vast improvement of informational and legal service to the Congress was provided by expansion of the Legislative Reference Service of the Library of Congress and by improvement of the Legislative Drafting Service. Refusal, however, of the Appropriations Committee to provide the funds authorized for further expansion of the Reference Service will curtail its service.

PRIVATE BILLS REDUCED

While the act did not completely eliminate the consideration of all private bills, it greatly reduced the number in the two most numerous categories. All tort claim bills for private relief, originating after January 1, 1945, were prohibited and the Federal courts authorized to handle them. Congress is still struggling with the backlog of older claims, however. Private bridge bills also were banned, as were private bills for correction of individual military records. Departmental consideration was provided for these.

Registration of lobbyists provided much public information on activities to influence legislation. More than 800 registered the first session. The final value of this provision is yet to be determined, but many believe that data secured may prove useful to the Congress and the public as well in the future.

The definite adjournment date, fixed in the bill as the end of July, enabled Congress to schedule its work load more uniformly with the result that Congress went out of session on the date fixed. Claims by various critics that the adjournment date was responsible for leaving important legislation on the calendars unfinished is not justified. Congress could have expedited these measures if the leadership were determined to consider them. If desired, the adjournment could have been postponed by the introduction of a simple resolution at the close of the session.

MANY MINOR GAINS

Other improvements include such minor items as integration of the school for the pages with the regular District of Columbia school system which resulted in a standardized course of study and elimination of tuition fees paid by the boys for their schooling. Various physical improvements

to the Capitol, dining rooms, and office buildings were started in a few instances, but most of them had to be held up because of shortages of materials and high building costs.

PARTIALLY SUCCESSFUL

To provide better understanding and teamwork between the elected Representatives in Congress and the agency heads, the act provided for legislative surveillance. It directed that the standing committee having jurisdiction exercise "continuous watchfulness over the execution of the laws" it passed. Because of the work load and problems connected with the change of party control, little of this section was accomplished. These regular report sessions for questioning and discussing with agency heads by the regular committees were intended to prevent misunderstandings of errors of congressional intent from becoming major rows between the legislative and executive branches.

The establishment of Majority and Minority Policy Committees in each House, aimed to implement better working relations between the two branches, was cut out of the bill in the House. The Senate, however, did provide itself with policy committees and used them during this session.

The vital problem of furnishing Congress with its own staff of experts to relieve it of the necessity of relying on Government agencies, pressure groups, or business associations for much of the statistics, data, and factual information on which to base legislation, was only partly successful.

STAFFING 50 PERCENT GOOD

It is generally agreed that about 50 percent of the committee professional staffs qualify by experience and education. In many cases clerical personnel or others have been upgraded to these positions as committee experts.

Most of the committees, however, have been careful in selection and many have not permanently filled these career posts. Still others have restricted the pay far below the maximum allowed. One reason for partial failure was the lack of immediately available qualified personnel for these posts. Undoubtedly a training period will be required before the staffing is fully effective. Furthermore, Congress, which has had to shift for itself for this type of research and data, has not yet learned to rely on or work with professional staffs.

LEGISLATION ON APPROPRIATION BILLS

Some progress was made in reducing legislation on appropriation bills. Amendments in the nature of expenditure limitations are often added. Many are actually legislative in their intent. Legislation of this type

was not eliminated, but the increasing trend in this direction was reduced.

The requirement providing that all appropriation bills be reported to the House three calendar days before their consideration was permitted, was observed on most bills, but violated in the closing days of the session. This restriction was to permit the full membership to be informed on the money items in the bill and to make the full hearings available for study 3 days before the bill was considered.

OPEN HEARING RULE

All committees, with the exception of the House Appropriations Committee and its subcommittees, held open hearings. Despite the clear intent of the act, all hearings remained closed, executive sessions. The Senate Appropriations Committees, however, observed the act, as did all other standing committees of the Congress.

The most conspicuous failure of reorganization was the failure to carry out, and in most instances even to try, the sections provided to improve the handling of the vast fiscal problems of a $35,000,000,000 Government.

No money can be spent that is not appropriated by Congress, and full responsibility for final determination on governmental expenses is theirs. For years the obsolete methods, inadequate staffs, uncertain and hodgepodge accounting systems have been severely criticized by students of Congress. The fiscal control of the largest enterprise in the world as handled by Congress cannot compare with the careful, modern budgetary methods used by even the smallest chainstore organization.

OTHER FISCAL FAILURES

To correct some of the most apparent deficiencies in the historic system of appropriating, the Reorganization Act recommended many reforms designed to tighten and improve fiscal control. Very few were put into force. Despite this lack of use of the act, it was blamed by many critics within and without Congress for the delay in appropriation bills. Since practically none of the reforms was even tried, this criticism was patently unfounded.

The provision for the legislative budget was an outstanding failure, largely because of lack of advance staff work prior to the convening of Congress in January. To make this valuable provision effective, a skilled, expert staff should confer often with the agency budget officers while their needs are being formulated and follow through with careful observation until the sums are fixed in the President's budget. With this advance staff work, the legislative budget would become more than a pious hope as it was characterized on the floor of the House.

NEED IS VITAL

No evidence was presented that the country did not need to adopt an over-all fiscal policy at the start of each Congress, carefully estimating the total expenditures for the year to be made by the Congress, and determining as nearly as possible the anticipated income. Despite this, both Houses missed their estimates of expenditures in the legislative budget so far that the resolution adopting it was allowed to die in conference and no final action was taken.

If the legislative-budget provision is allowed to go by the boards, then one of the principal gains of reorganization will have been lost. The Congress can make it work properly and effectively if it so desires. The sole objective is to chart a financial course for the year and to follow it as closely as possible rather than continue the present practice of unrelated action by spending and taxing committees, with the total expenditures still in doubt until the last appropriation bill is passed.

NO EXPENDITURE ANALYSIS

Other failures to use machinery provided by the act include the elimination of the expenditure analyses by the Comptroller General. Funds asked for this purpose were not provided by the Congress. This provision was designed to "enable Congress to determine whether public funds have been economically and efficiently administered and expended." While some informal reports on extravagance and waste are now supplied Congress by the Comptroller General, it is only an incidental by-product of the Office's work in checking the legality of expenditures.

Another provision was designed to eliminate useless and obsolete restrictions which might have been placed on appropriation bills in previous years and which still required the services of many workers to fulfill the requirements of the restrictions, although they had outlived any usefulness. Start of this study was made by the Comptroller General, but it will not be completed until at least next year.

"SHOW-CASE" ACCOUNTING IGNORED

Nothing has been done to establish show-case accounting of their expense items by Government agencies. The act provided that appropriation committes develop a standard appropriation classification schedule which will clearly define in concise and uniform accounts the subtotals of appropriations asked for by agencies. Hearings were to contain this brief, standardized break-down of agency expense items. The use of such clearly

understandable and standard expense break-down summaries would reduce much of the lengthy statements and testimony in appropriation hearings.

Failure to hold open hearings on appropriations in the House, in disregard of the law, prevents the House Members from knowing anything about the items in the bills until the day they are reported to the House. Many times important action affecting a Member's home district is considered by appropriation committees without his being permitted to hear the testimony for or against the measure.

The act also authorized the appropriations committees to study the laws governing permanent appropriations with a view of determining whether any of that type of recurring items could be eliminated, or should be subjected to annual review. Nothing has been done to put this into force.

REDUCE DEFICIENCIES

Another provision of the report, but not of the bill, was designed to reduce the evils of large deficiency appropriations which year to year are handled by the deficiency subcommittees. It was recommended that these be greatly reduced by the appropriation committee, insisting that agencies live within their regular appropriation, except in case of extreme emergency. The session this year did nothing to reduce this tendency to come back for deficiency allocations.

Failure of the Appropriations Committee of the House to vote itself adequate staff members for the gigantic job of going through the $35,000,000,000 budget with a fine-tooth comb marked another departure from the reorganization plan. Although a special investigating staff was set up and performed well during the session, only five of its members were on a full-time basis, and most of the others were laid off during the recess of Congress.

Few regular, full-time clerks and auditors were added to the regular staff. The total number of committee employees who could be classified as experts is 10. The remaining regular committee and subcommittee employees are clerk-stenographers.

STAFFING NOT ADEQUATE

The report on reorganization and the original act recommended that adequate, year-round staffing by auditors, investigators, and experts for each of the subcommittees be paid for in the same range as other committee experts. At the insistence of the Appropriations Committee, a change was made and they were authorized to employ whatever staffing they considered necessary in the belief that they would add professional

personnel to gain a complete understanding of every item in every appropriation request. By working through the recess period with budget officers of the agencies, then following the appropriation request through the budget office of the President, much economy would be effected by knowing where reductions could be made and pointed them out to the committee.

Failure to employ a full-time staff of experts on economy was explained by claiming that they were using as many as they feel are necessary. Results obtained by the special investigation force employed on a part-time basis, with only five full-time employees, has already pointed up the fact that a small amount of money spent for staffing to get additional information on Government expenditures can result in big savings.

TWO BILLION PER CLERK

But on the basis of only 15 employees for the full House Appropriations Committee considering a $35,000,000,000 budget, each employee would be responsible for a work load in excess of $2,000,000,000. Additional experts paid on a full-time basis should be provided for each of the 12 subcommittees of the House Appropriations Committee. To employ few is penny-wise and pound-foolish.

Other failures of the act, as stated above, include the establishment of too many subcommittees under the new committee structure. Where the work load is not great enough to require subcommittee division, the excess subcommittees should be eliminated in the next session by full committee action. Many very important committees of the House, such as Ways and Means and Banking and Currency, which have heavy legislative loads operate only by full committee sessions.

Many of the committees eliminated by committee streamlining have reappeared as subcommittees. As the lack of need for maintaining them as subcommittees becomes apparent to the Congress, many, if not most of them, can be eliminated.

DISTRICT WORK LOAD RETAINED

Transfer of the government of the District of Columbia to home rule, as recommended by the original reorganization report, would eliminate 12 subcommittees and save the Congress much time now spent as the city council for Washington. Action to transfer this extraneous work has again been delayed by the Congress.

The unused sections of the act, and those which have been only partly used, should either be put into full effect or repealed in the second session of the Eightieth Congress. To leave this legislation on the books, and to

ignore it, will prevent further effort at strengthening the legislative branch of Government.

REFORM IS CONTINUING PROCESS

Even the strongest proponents of reorganization have never claimed the act to be perfect or all inclusive of needed reforms. Undoubtedly, the strengthening and improvement of Congress is a continuing job and the Reorganization Act should be changed and improved whenever possible. But a retreat from or abandonment of those reforms already voted will further delay the strengthening of the legislative branch.

Several needed changes of minor nature already have shown up, such as the overloading of the work of the Judiciary Committees of both the House and the Senate. Other minor changes are needed to make the Regulation of Lobbying Act more effective, and to further restrict legislation.

Various other reforms, such as modification of the seniority rule, limitation of the filibuster, abolishing the veto power of the Rules Committee of the House over legislation from other standing committees, and creation of a question and answer period for Cabinet members before Congress, prohibited from consideration in the resolution creating the Special Joint Reorganization Committee, are still being strongly urged by many advocates of a stronger Congress.

STANDING SUBCOMMITTEES OF THE 80TH CONG.

Senate:	
Agriculture	1
Appropriations	12
Armed Services	1
Banking and Currency	8
District of Columbia	6
Civil Service	2
Labor and Public Welfare	4
Expenditures in the Executive Department	3
Foreign Relations	1
Interstate and Foreign Commerce	0
Judiciary	6
Public Lands	6
Public Works	4
Finance	0
Rules and Administration	5
Total	59
House:	
Agriculture	4
Appropriations	12

Armed Services	11
Banking and Currency	0
District of Columbia	6
Civil Service	0
Education and Labor	6
Expenditures in the Executive Departments	5
Foreign Affairs	11
Interstate and Foreign Commerce	0
Judiciary	8
Merchant Marine and Fisheries	8
Public Lands	5
Public Works	5
Ways and Means	0
Administration	4
Rules	0
Un-American Activities	1
Veterans' Affairs	6
Total	92

COMPARATIVE WORK LOAD, 79TH AND 80TH CONG.
(1st sess.)

	Senate	*House*	*Total*
79th Cong.:			
Bills introduced	1,730	5,111	6,841
Bills passed	199	658	857
Days in session		126	
80th Cong.:[1]			
Bills introduced	2,108	5,181	7,289
Bills passed	808	982	1,790
Days in session	128	127	

[1] Preliminary figures for 1st sess. of 80th Cong
Source. Calendars of the House of Representatives.

COMMITTEES OF CONGRESS

Type	*House*		*Senate*		*Total*		*Change*
	1945	1947	1945	1947	1945	1947	
Standing	48	19	33	15	81	34	−47
Special	5	3	7	3	12	6	−6
Joint	6	6	6	6	6	6	0
Subcommittees[1]	97	92	34	59	131	151	+20
Total	156	120	80	83	230	197	−33

CHAPTER X

State Legislatures

56. STATE LEGISLATIVE REORGANIZATION [1]

WHEN Congress reorganizes its procedures, that action receives the attention it deserves. When state legislatures reorganize, the significance of their work is likely to be ignored—at least outside the borders of the state concerned. If these "laboratory experiments" in reorganization are to have any influence upon our governmental system, they need effective reporting. Professor Perkins here reviews the results of legislative reorganization in twenty-eight states.

WHILE much attention has been given to the efforts of Congress to improve itself, the activities of the state legislatures which have sought improvements as diligently, incidentally fulfilling their laboratory function, have gone virtually unnoticed. Twenty-eight states have given consideration to the renovation of the law-making branch. Comprehensive studies were made in Massachusetts, Connecticut, and in a more limited manner in California. New York, currently intent on modernizing its legislature, has already issued an interim report on expenditures and personnel, although the complete recommendations of its Joint Legislative Committee are yet to come. Committees whose frame of reference limits them to "tinkering" rather than "overhauling" are at work in Michigan and Colorado, with no reports yet submitted. In Alabama, an interim committee called for limited changes. The Bureau of Research established by the Indiana General Assembly in 1945 is authorized, among other things, to conduct research into improved methods of legislation.

The crucial position of the state legislatures in our scheme of government cannot be over-emphasized. The failure to make themselves truly representative by periodic reapportionment and to streamline their or-

[1] John A. Perkins, *American Political Science Review* (June, 1946), Vol. XL, No. 3, pp. 510 ff. All footnotes omitted.

ganization and procedure, not to mention corruption among personnel, has resulted in an inability and unwillingness to rise to their responsibilities. Political collusion between rural legislators and their henchmen in local government has thwarted unification of multitudinous jurisdictions and the modernization of local administration. When depression-born demands for modern services were not met by state and local government, the federal government of necessity undertook new functions, causing centralization of government in the United States amid condemnation by the same state lawmakers whose inaction clipped democracy short at the grass roots. Wartime necessity increased centralization still further and made for an awareness of its disadvantages beyond the circle of local officialdom. Under the circumstances, it is not likely that the state legislatures will be willing any longer to confine the rôle of the commonwealths merely to setting up needed administrative organizations to implement policy the national government has laid down—the rather unequal partnership prevailing during the depression and the war and euphoniously labeled the "new federalism." There may now be an awareness that only by a real reformation can the legislatures hope to cope with the growing complexity and technical character of the subject-matter with which they would deal. To regain their long lost prestige, they must also demonstrate that they are not only responsive to local needs, but also sensitive to more than local problems.

The degree of responsiveness to local needs depends upon the frequency of reapportionment. The most thoroughgoing reapportionment of recent years was achieved in 1943 in New York, which had not been redistricted for a quarter-century. Inroads upon rural dominance were made by an increase in the representation of New York City from 62 to 67 assemblymen and from 22½ to 25 senators. The metropolis thus has 44.6 per cent of the legislative membership, while containing 53.4 per cent of the population. The constitutionality of the act was challenged in the courts because it raised the number of senators beyond what was construed to be the constitutional limit. Upheld by the Court of Appeals, the highest tribunal of the state, which reversed a lower court decision, the act went into effect for the 1944 elections. Several other states have redistricted their lower houses without revising the representation in second chambers. In 1943, Michigan did considerable juggling to redistribute her constitutionally-fixed membership of 100 so that the urban centers would be more equitably represented. Wayne county, containing Detroit, has a total of 27 seats (and that percentage of the total) and has 38.3 per cent of the state population. By passing an amendment in November, 1942, New Hampshire, which has the largest lower house of all the 48 legislatures, took steps to reduce its numbers from 443 to 375 or 400, without losing its unique position as to size. Kansas achieved a reapportionment of repre-

sentative districts in 1943, leaving the number of districts unchanged at 125. Minor changes were made in Louisiana. With the adoption of the new constitution in Georgia in August, 1945, the number of senators was raised from 52 to 54.

Missouri cities, particularly the metropolitan area of St. Louis, are assured of greater equality of representation through the adoption of the new constitution in that state. To bring about a redistricting of the state for the election of senators, which has not been done for 43 years, it is provided that the governor shall appoint a commission of ten members to be chosen equally from two lists of names submitted by the state committees of the two major political parties. If the commission fails to redistrict the state within six months after its appointment, it is discharged, and the senators are to be elected from the state at large, after which a new commission is to be appointed. A redistricting committee is to be appointed also after each decennial census. Reapportionment of representatives among the counties, not carried out since 1921, is made the responsibility of the secretary of state. After each decennial census, he is required to determine the number of representatives to be elected in each county according to a prescribed ratio of representation.

Reapportionment was rejected by New Mexicans in November, 1942, and the people of Florida refused to create new senatorial districts in the election two years later. An Alabama interim committee on the constitution and legislative procedure pointed out that there had been no reapportionment since the constitution was adopted in 1901, although the subject has been brought before each session of the legislature since 1910. The committee failed to make any recommendation itself, "realizing . . . that each individual member of the Legislature will vote his own personal sentiment or that of his constituents upon the question. . . ." Similarly, the Joint State Government Commission of Pennsylvania was directed by law in 1943 to submit a report on reapportionment, although investigation shows that none was forthcoming. Legislative reapportionment proved the overshadowing issue in the defeat of a resolution to revise Illinois' 75-year-old constitution. Downstate members feared they might lose the dominance they have enjoyed under the apportionment of 1901, which permits them to control the majority of the people in the state living in the metropolitan area of Cook county. The chairman of the reapportionment committee of the House is opposed to any plan that would give Chicago and Cook county "a single additional vote in the state legislature." This reluctance to meet the basic tenets of democracy in a country not only devoted to democratic theory but confronted by the problems of an urban society has contributed to the atrophy of state government as a policy-making jurisdiction. In answer to those who fear that proper urban representation would damage the legislative process,

it needs only to be pointed out that Massachusetts is one of the few states in which the overwhelming urban population is reflected in the somewhat exemplary legislature to the extent that it, too, is urban dominated.

Much of the discussion about state legislative organization has centered around unicameralism since its adoption by Nebraska in 1936. Enthusiasm ran high in 1937, when amendments providing for a unicameral system were introduced in twenty-two states. But only one state has recently come near adopting it. Missouri voters initiated a proposal for unicameralism in November, 1944, and then subsequently tried to withdraw it, realizing that the adoption of the new constitution then being considered would nullify any success in amending the old constitution. The question remained on the ballot, however, and lost by the small margin of 37,000 votes, which might indicate that success could be attained if attempt were made to change the bicameral provision of the new constitution. Although unicameralism deserves the high praise given it in Nebraska, all legislative reform does not wait upon it, for experience with annual sessions has proved their superiority over biennial sessions, although this test has been accompanied with less fanfare.

Annual sessions are proposed as a means of solving the problem of enormous work loads and changing budget needs of recent years. Having tried biennial sessions for six years, Massachusetts voters ratified an amendment in November, 1944, for returning to annual sessions, thus making five states that have such. The Connecticut legislature having passed an amendment for annual sessions, the people's action on the referendum is being recorded by town elections; thus far, returns forecast defeat. Annual sessions there would be limited to 70 days, whereas the biennial sessions are now allowed to run 150 days. The issue of annual sessions was closely linked in California with the desire, if not practical necessity, for an annual budget; but it was rejected in the November, 1944, elections. Georgia earlier had refused to adopt the change (in 1941).

While the debates on Congressional improvement reveal a desire for closer legislative oversight of administration, similar concern is not so evident in the states. In the arguments for annual sessions, however, the defects of the biennial sessions in this respect are brought out. The report of the Legislative Council of Connecticut explained: "The worst aspect of the biennial session is that it encourages the expansion of executive power." The Massachusetts special commission stated in the same vein: "It is undemocratic for the duly elected representatives of the people to delegate for the greatest portion of their terms the prerogatives which maintain the unbroken contact of the people with their legislative representatives." This very delegation has been upheld as one of the "most promising methods of improving the legislative process." In fact, there has been more concern that the legislature delegate administrative power,

thus improving the legislative process, than that the legislature, once having delegated the power, be made capable of overseeing its exercise. The writer has observed that the attitude of the legislators toward administrative departments is somewhat paradoxical. The lawmakers are reluctant to delegate, even as to details, that type of legislation which they feel they know something about (such as the dates of the open season for game). But they are quite willing to accept for quick passage legislation upon complicated matters of which they have little understanding when such legislation is recommended to them by the administrative departments.

In 1945, Michigan legislators took to themselves the power to abrogate rules and regulations of state agencies, feeling that the step was necessary to combat "bureaucratic activities." The act was vetoed on the ground that the legislature would be burdened with tremendously increased detail and would be diverted from major issues of public policy. In Connecticut, the legislature's annoyance with the rule-making of state agencies was centered on the failure to give adequate publicity to regulations. To correct this, it enacted a law in 1945 providing that all rules and regulations issued by state departments should be filed with the secretary of state and published in the *Connecticut Law Journal*, a state publication, before becoming effective. In the same year, the General Assembly of Pennsylvania approved a so-called *Register Act* providing for the publication and distribution of administrative rules. Michigan, two years earlier, passed an act providing for codification and publication of administrative regulations of all state agencies, and also required that each rule include a reference to the statute upon which the rule was based. These three acts indicate an awareness of the problem of control, but the legislatures have wisely refrained, or been restrained in the case of Michigan, from trying to exercise such control directly. Interim legislative commissions have approached the problem of control over administration in two ways: by themselves performing the function of review and by studying the need for legislation to accomplish that end. Ohio established an administrative law commission to study administrative practice, procedure, and process of review in effect among several departments, boards, and bureaus. An interim committee in Colorado may investigate any department of the state in which irregularities occur, or upon complaint made to the chairman of the committee, any irregularity being committed by any institution, board, or bureau; it may investigate the financial operation and expenditure of funds by any institution operating under state authority. The Minnesota Interim Committee on State Administration and Employment had broad investigative powers under which it gathered factual data and analyzed functions. It then submitted a report, with its recommendations, to the 1945 legislature.

Because the budget offers the best opportunity for legislative control of administration, interim committees have been set up in this area. California created a Joint Legislative Budget Committee in 1941 which meets either during or after the session to study and make recommendations concerning state revenues and expenditures. It has a staff under the Legislative Auditor, whose members serve as the fact-finders. Utah found its consideration of the budget more satisfactory after creating, in 1943, a joint committee staffed with experts to give it guidance and carry on continuous investigations. Of the six interim commissions appointed in Alabama in 1943, one was on appropriations and finance; while outstanding among the 18 interim commissions for the Illinois legislature was the budgetary commission to work with the state departments in preparing the state budget. The budget committee of Arkansas has met prior to the convening of the legislature, thus resembling an interim commission, although its emphasis has been on the preparation of a legislative program instead of investigating the administration, except in so far as that is an inevitable part of budgeting.

The legislative council device has been steadily spreading, thus improving leadership within the legislature and at the same time freeing the legislature of executive domination. Some of the early legislative councils were composed of representatives of both legislative and executive departments, but one by one the states have eliminated the members from the latter branch, until now all councils are entirely legislative. Kentucky followed the pattern in 1944 by repealing a provision that the governor and five administrative officials should be members. Thirteen of the states now have councils. One of these was given constitutional status in 1945, and three others were created in the same year. A permanent Joint Committee on Legislative Research, with most of the functions of a legislative council, was established in Missouri in 1943 and was put on a constitutional basis when the new basic law was adopted in February, 1945. The new Alabama Legislative Council has responsible to it a Legislative Reference Service with a director and staff, to serve as the council's "research, reporting, and bill-drafting agency." In North Dakota, a Legislative Research Committee with all the functions of a council was created. The Indiana General Assembly, in creating a Joint Legislative Advisory Commission to advise the legislative research bureau established at the same time, seemed to place the emphasis upon the staff aspects of the legislative council arrangement: possibly it is time that statutes recognize that the staff is the most important element in the success of such agencies. Two years earlier, Connecticut and Pennsylvania authorized, respectively, research and consultative agencies and a director and professional assistants for their councils of long standing, thereby enlarging their usefulness. The development of legislative staff agencies, be they connected

work program, the Massachusetts commission recommended that all bills be filed by the first Wednesday in December, and after this date no bill might be introduced unless approved by the committee on rules acting concurrently, and unless their report was accepted by three-fourths of the house where the bill was to be introduced. Introduction a month before the General Court convenes would permit work to begin at once, for reference of bills to the various committees would have been accomplished by the clerks, with the legislature having opportunity to object during the first few days of the session.

Considerable change has been made in the organization and procedure of committees to facilitate their functioning and thereby expedite the whole legislative process. California adopted a complete reorganization of standing committees in the Assembly. Whereas sessions prior to 1943 had 58 standing committees, a regrouping reduced them to 25—2 on the legislature, 16 on government, and 7 on industry. A schedule of committee meetings is worked out and then members indicate their preferences in committee assignments. On the basis of the schedule and the preferences, the speaker makes the final appointments, making certain that the three committees to which a member is assigned do not meet at conflicting times (thus avoiding one of the greatest complaints and excuses of legislators). Time conflicts are overlooked only in two circumstances: to give proper representation of a member's district or because of his previous committee experience. A similar reduction in the number of committees for the same sound reasons has been worked out and was adopted in 1945 by the Michigan senate. The reduction was from 25 to 19 committees, accomplished chiefly by abolishing separate committees for the various state educational institutions and assigning their functions to one committee on education. In the same year, the Illinois senate cut its standing committees from 35 to 26.

Connecticut, one of the few states using joint standing committees exclusively, has made even that superior system better by revising the list of committees to relieve one committee that was extremely overburdened. While the judiciary committee was given relief by careful distribution of bills, others were given matters of some importance for the first time. Notwithstanding a well-founded recommendation for reduction in committees in the Alabama legislature, no action was taken.

Several steps have been taken and others projected to make legislative committees more accountable for their action—or lack of it. Missouri's new constitution provides that each committee shall keep a record of its proceedings and that the recorded vote of the members shall be filed with the report on each bill. If the suggestion of her study commission is followed, Massachusetts would appoint a secretary for each standing committee who would keep a record for subsequent publication of attendance at

meetings and hearings, as well as an account of the minutes of each. The Bay State commission also suggested that every report to the General Court contain a brief statement of reasons supporting its stand. These reports would enable the lawmaker to make his decision on the basis of reasons, however succinctly they might be stated, instead of on the basis of faith in the sponsor, the governor, or his party. The new constitution of Missouri provides that a vote of one-third of the members of either house shall "relieve a committee of further consideration of a bill and place it on the calendar. . . ." In 1945, Connecticut adopted another precaution against clandestine committee action: When a bill has been introduced in committee ("raised"), instead of through regular channels, it must be assigned for a public hearing in the committee before being reported to either house or senate. Experience indicated that "raised" bills sometimes "slipped through" with no opportunity for the public to register its favor or disfavor before passage.

The discernible tendency for legislative salaries to be increased reflects the unfounded belief that more adequate remuneration will attract better men to the legislatures. Since 1942, salary increases have been provided in seven states. Maryland, Minnesota, Indiana, South Carolina, Kentucky, New Mexico, and Georgia. Increases were rejected in California, Utah, and Michigan. Pending amendments in Connecticut and Idaho would likewise, if passed, result in increases.

Changes in mileage and subsistence expenses took the form of lifting of limitations in Minnesota and Missouri, while positive increases were made in New Mexico and Washington. The courts approved California's allowing legislators their expenses as well as their pay while attending legislative sessions, but resisted the Kentucky legislators' attempt to increase their stationery allowance. Only in North Dakota were increased expenses and maintenance rejected.

The question of paying legislative employees has received much attention and was highlighted by the disturbing disclosures of the special grand jury investigating legislative spending in New York. To quiet public indignation, the Joint Legislative Committee on Legislative Methods, Practices, Procedures, and Expenditures recommended, and the legislature in 1945 quickly enacted, laws which itemized legislative positions giving the legislature better budgetary control, eliminated per diem payments, consolidated 13 separate appropriations for personal service into one section of the budget, and centralized in the legislative leadership responsibility for hiring and assigning employees. Other reforms called for by the Joint Committee's report, but not yet enacted, include consultation with job classification experts before preparation of legislative salary schedules, equal pay for equal work, promotion and transfers upon a job classification plan, and limitation of payment of employees to one source,

although they may be assisting more than one committee. Internal controls over expenditures recommended were uniform accounting, centralization of expenditure records in the office of a legislative fiscal officer who should pre-audit vouchers, and legislative use of the regular centralized purchasing organization of the state.

Changes which have been made in the payment of legislative employees in other states are chiefly in the form of salary increases. A 1945 North Carolina law is indicative of some progress in employment practices, for it places the compensation of committee clerks on the basis of their qualifications. Other states have testified to their interest in keeping themselves staffed by raising the salaries of various employees of the house and senate. New York experience indicates that if the legislatures are to staff themselves as they deserve to be staffed, and are to do so without discrediting the whole idea in the public mind, proper personnel practices are quite as important here as in the executive branch.

A unique kind of legislative employee has been the regional representative of a legislator. In 1943, legislative offices were established in Los Angeles, San Francisco, and Alameda counties, with each office under the management and control of the senator from the county.

Government might well take a lesson from the scientific cook-book on the importance of kitchen arrangements to production of good food. The importance of physical arrangements to proper functioning has never been given sufficient emphasis as a principle of good administration either in law-making or in the execution of law. The California report on the physical requirements of the legislature in the state capitol presents a plan to rearrange space in the building, near the legislative halls, so that all of the agencies servicing them, such as the interim committees, the joint legislative budget committee, and legislative counsel may be physically related. Private offices for all legislators are suggested to provide suitable places for conferences with constituents and for handling other off-the-floor business. Provision of such space, plus a well-designed time schedule of legislative duties, would eliminate from the floor of the two houses much business extraneous to the legislative process.

Encouraging as are these changes that have been made in state legislatures in recent years, and seminal as may be the reports upon which some of these changes have been based, they are not enough. The legislatures in the commonwealths are so strategic in our whole scheme of government, affecting as they do not only the states, but also local government, national government, and the whole federal scheme as well, that even more fundamental studies must be made and more resolute action taken.

57. STRENGTHENING STATE LEGISLATURES [1]

THE preceding article (56) surveyed legislative reorganization efforts in 28 states. Here Professor Caldwell describes the twelve proposals for improving state legislatures that were made to the Council of State Governments by a committee of state officials. The committee's suggestions are designed to strengthen legislatures as presently constituted. They do not deal with proportional representation or unicameralism, but with length of legislative sessions, terms of legislators, reference services, and the like.

DECLINING prestige of legislative bodies has recently prompted inquiries looking to self-appraisal and reform in Congress and in legislatures of a number of the states. Dissatisfaction with the traditional organization and procedure of state legislatures has grown among legislators, who undertake the perplexities of present-day law-making with inadequate assistance and ineffective machinery. Legislation was seldom a simple problem, but it is today more difficult than at any time in our national history. As the responsibilities thrust upon legislatures are increased, so must the tools and processes of legislation be improved if the quality of legislation is to meet the needs which call it forth

To assist in the reappraisal and review of state legislative organization procedure, twelve general suggestions for strengthening state legislatures have been reported to the Council of State Governments by a committee of state officials. Appointed in November, 1945, by the Board of Managers of the Council, the Committee on Legislative Processes and Procedures developed its report after broadly surveying legislative theory and practice and selecting for recommendation to the states those measures of most general application. Dealing with the problems of state legislatures generally, the committee decided at an early date to direct its attention to the strengthening of state legislatures as presently constituted. Questions of reapportionment, of representation in the legislature, proportional representation, unicameralism, and certain mechanics of procedure such as electrical voting were not treated in the final report. The committee held that any attempt to develop a program covering all phases of the legislative process would diffuse its efforts to the extent of defeating its purpose. Certain questions, notably legislative reapportionment, of particular interest in several states were not issues of primary concern to the greater number of states. Recognizing that no program could be drafted which would answer the needs of all states, the committee chose to

[1] Lynton K. Caldwell, *American Political Science Review* (April, 1947), Vol. XXI, No. 2, pp. 281 ff. All footnotes omitted.

limit its recommendations to those measures which might be expected to bring greatest benefit to the greatest number of the states.

Following are the recommendations of the committee, with brief comment on their application:

1. *Legislative Sessions.* Restrictions upon the length of regular sessions should be removed. If legislatures may be called into special session by governors or by a majority of their members without undue restrictions upon the measures to be considered, the question of annual versus biennial session is largely resolved.

The increasing number and complexity of public questions requiring legislative consideration have made obsolete traditional restrictions upon the length of legislative sessions. That constitutional and statutory limits upon the length of sessions do prevent legislatures from sitting as long as the effective discharge of their duties might require is suggested by a comparison of the average length of sessions in states which have restricted duration and those that do not. In 1943, the average length of sessions in twenty-six states limiting duration was approximately 73 days. In the twenty-two states having no restrictions, the average length was 114 days. Allowing for differences among the states with respect to how the actual number of days of a legislative session is calculated, and recognizing that for some states all legislative business may be adequately dispatched within the limits imposed upon the length of the session, the committee concluded that little was to be gained by restricting session length, whereas much was likely to be lost.

After considering annual versus biennial sessions, the committee concluded that no general recommendation could be made to the states with respect to this question. Six states—California, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina—now have annual sessions; but provisions for special sessions permit the legislatures of all states to meet annually, or even more frequently if necessary. During 1946, seventeen state legislatures convened in special session, and in California, Illinois, Michigan, and New Jersey two special sessions were held; three were held in Arizona and four in Ohio. In a number of states, restrictions upon the agenda of special sessions limit their value as a substitute for annual sessions. The committee concluded that although regular annual sessions might not be necessary for a considerable number of the states, consideration should be given to liberalizing the rights of the legislature with respect to the measures to be considered in special sessions, thus in large measure resolving the question of annual versus biennial sessions.

2. *Legislators—Compensation.* From the viewpoint of good public service, the compensation of state legislators is now too low. Annual salaries sufficient to permit competent persons to serve in legislatures without financial sacrifice should be provided by statutes. Salaries should not be fixed by constitutional provision.

Whether increased compensation for legislators will result in a more competent and independent legislature is a moot question. The committee believed increased legislative compensation justified upon the basis of the present responsibilities of legislators. Obviously, no uniform level of legislative salaries could be prescribed for all states. Nevertheless, the committee felt that in most states a review of the compensation of the legislators was in order, and particularly that the method of fixing salaries by constitutional provision should be abandoned. It was believed that the sensitivity of legislators to unfavorable public response to increased legislative salaries would provide adequate check upon the legislature, and that it is unwise to freeze a particular pattern of compensation by writing it into the state constitution.

3. *Legislators—Terms.* In order to strengthen legislatures by increasing continuity of membership, the lengthening and staggering of legislative terms should be considered. In representative government, frequent elections are necessary. Experienced legislative leadership and smoothly operating legislative machinery likewise contribute to the attainment of democratic objectives.

There appears to be growing feeling among legislators that the variety and complexity of contemporary legislative problems places a higher premium on experience in the legislature and on continuity of legislative membership than in earlier days. Offsetting this consideration is the traditional reliance upon frequent elections to hold a legislature accountable to public opinion and responsive to changing public views. It was the belief of the committee that the possibilities of increasing continuity of membership and length of terms and, at the same time, providing for frequent elections had not been sufficiently explored by American legislative bodies. The staggering of legislative terms was therefore suggested as one way to reconcile these several desirable objectives.

Although no recommendation was made with respect to specific methods by which new legislators might be assisted in preparing for their responsibilities, the committee directed the attention of legislators to presession legislative conferences such as have been held with some regularity in Arkansas, Colorado, Connecticut, Georgia, Massachusetts, and North Carolina. Attention was called to the publication of legislative manuals in 35 states. These booklets describe the organization, rules, procedures, and references and research aids of legislatures, and they have been found particularly useful in helping new legislators prepare to meet their responsibilities.

4. *Legislative Employees.* Skilled and essential full-time legislative employees should be appointed on the basis of merit and competence. The tenure of key legislative personnel should be unaffected by changes in party control, and as far as circumstances permit, the working conditions of legislative employees generally

should not be less advantageous than those of employees in the executive and judicial departments.

Although the committee did not think that employees of the legislature should be appointed on the basis of merit system or civil service rules, it believed that methods should be explored to insure that legislative employees, however appointed, should be honest and competent, and should enjoy reasonable security of tenure. The application of scientific personnel administration with respect to legislative positions was viewed sympathetically, and the committee believed that in so far as possible the compensation and work conditions of employees in the legislative branch should not be less favorable than those obtaining elsewhere in state government. With respect to all questions concerning legislative employees, however, the committee kept in view the need for "closest confidence and cooperation between the legislator and his assistants," and emphasized that "adequate and competent service should be secured by methods which do not unduly restrict the legislator's choice of persons who are to work with him."

5. *Legislative Committees—Organization and Procedure.* Committees should be reduced in number wherever practicable and organized with regard to related subject-matter, equalization of work, and cooperation between legislative houses. Committee meetings should be scheduled and announced so as to prevent conflicting duties for committee members, and a permanent and public record of committee action should be kept.

In the sixteen years since Winslow's study of state legislative committees, little progress has been made in reducing the number of committees so as to be commensurate with the time, energy, and information of individual legislators. A survey in 1946 by the Council of State Governments indicated that senate committees averaged slightly over 32 and house committees slightly less than 40. Although numerous inactive committees may not seriously encumber the legislative process, there is general agreement that the committee system in a majority of the states needs consolidation and reorganization.

The Committee on Legislative Process and Procedures favored the reorganization of a reduced number of committees around topics of major legislative concern, and in so far as practicable, the provision of equivalent house and senate committees. Substantially equivalent committees not necessarily bearing the same title, nor in all cases having identical jurisdiction, will greatly facilitate joint legislative hearings, permit economies in the provision of research facilities, and may simplify relations between the legislature and the governor. Systematic administration of the committee system was urged, with schedules of committee meetings established and published so as to be fully available to committee members and

to the public. Moreover, the records of committee action should be permanently preserved, so that the disposition of measures by committees and the vote of each committee member on each bill could be a matter of public record. The Committee on Legislative Process and Procedures did not believe that committees should be required to report all bills, but it agreed that a record of committee non-action upon bills should be reported to the legislature before the close of each legislative session.

6. *Legislative Committees—Public Hearings.* Provision should be made for public hearings on all major bills, and advance notice of hearings should be published and made readily available, giving time and place of hearing and subject-matter of legislation to be heard, and wherever possible indicating the number and title of bills. Rules of procedure by committees governing hearings should likewise be published and made readily available.

A major aspect of the legislative process is the representation of public views. Public hearings on major legislative proposals strengthen and supplement the representative character of legislative assemblies. Public hearings may have an educational value to legislators and to the public at large. Where hearings are properly announced, conducted impartially, and testimony and findings made widely available, they add greatly to public confidence in the legislative process.

Although hearings on all bills are held in Connecticut, Massachusetts, Nebraska, Wisconsin, and in the Illinois Senate, the Committee on Legislative Processes and Procedures considered that while hearings on all bills might be desirable, the essential requisite was that there be hearings on those measures of major public concern. In some states, hearings on all bills would diffuse the energy and attention of legislators to the detriment of legislation generally.

The importance of records, transcripts, and unpublished testimony to the legislative history of a bill was recognized by the Committee, and it was recommended that on the completion of hearings all committee papers and records be delivered to the legislative reference library for indexing and preservation. The committee urged that "regular records should be kept of all committee meetings . . . should cover time, place, committee members present and absent, the names of all persons appearing at hearings in favor of or against a measure, whom each represents, and a summarized statement as to the disposition of the measure by the committee in executive session."

7. *Legislative Councils and Interim Committees.* Provision for legislative councils or interim committees with adequate clerical and research facilities deserves serious consideration. These services can be provided most readily and effectively through a legislative reference bureau.

Although at least fifteen states have now established legislative councils or comparable agencies, the original legislative-council idea has been modi-

fied considerably as it has spread among the states. In the view of the committee, this adaptation of the council idea to the particular needs of the several states has been as desirable as it has been inevitable. States with long-established interim committee traditions may not need the type of council which has been notably successful in Connecticut, Kansas, and Maryland. There is room for further experiment among the states with councils or committees to provide for the establishment of priorities in the legislative program, to give focus and direction to legislative research activities, and to represent the legislature generally during the interim between regular sessions. The committee commended the council "idea" rather than a particular pattern of organization.

8. *Reference, Research, Bill Drafting, and Statutory Revision Services.* Legislative reference, research, bill drafting, and statutory revision services should be reviewed in each state, and strengthened wherever necessary by improved organization and more adequate staffing and appropriations.

Concomitant to the council idea is the provision of adequate fact-finding —research and technical legislative services of which bill-drafting and statute revision are particularly important. Although the legislative reference bureau actually antedates the legislative council and is considerably more widespread (32 states now have some form of legislative reference service), states have increasingly established or expanded legislative reference services as primary research agencies for legislative councils or advisory committees.

9. *Introduction of Legislation.* Consideration should be given to limiting by rule the period during a legislative session when new bills may be introduced. Provision should be made for the drafting, filing, and printing of bills before the opening of the session. All bills and important amendments introduced during a session should be printed promptly after introduction, and whenever possible they should be inspected before printing by bill drafters or revision clerks.

Publication of manuals covering the form, style, and grammatical construction of bills is suggested.

Pre-session bill-drafting is provided in at least thirty-two states, and pre-session filing is permitted in Massachusetts, New Hampshire, Vermont, and Nebraska, and has been recommended in New York by the Joint Legislative Committee on Legislative Methods, Practices, Procedures, and Expenditures and in Connecticut by the Legislative Council. Coupled with a limitation by rule on the period during which new bills may be introduced into a legislature, these provisions should go far toward regularizing the flow of measures into the legislature, and should reduce the so-called "jam" of legislation at the close of sessions.

The committee believed that the inspection and printing of bills does not receive adequate attention in most states. With respect to the printing

of bills and major amendments, the committee concurred in the view of the Connecticut Legislative Council that "there is no other way in which legislature, press, and the public can be guaranteed prompt and easy access to every proposed measure." In order to encourage better preparation of proposed legislation, the committee suggested the publication of bill-drafting manuals, covering the form, style, and grammatical construction of bills. Arizona, Illinois, Maine, Mississippi, New Jersey, New Mexico, Oregon, Texas, Washington, and Wisconsin have to date prepared or published manuals of this sort.

10. *Legislative Rules.* The rules of legislative houses should be reviewed and revised wherever necessary to expedite legislative procedure, with due regard for adequate deliberation on measures and fairness to minority parties.

Permanent standing committees or a joint committee on legislative organization, rules, and procedure should be established in some form by each legislature.

Recognizing the impracticality of any effort to review the legislative rules of the states generally, the committee urged that the legislative houses of each state regularly reconsider their rules and revise them to expedite procedure, provided for adequate deliberation, and insure fairness to minority parties.

11. *Legislative Finance.* The legislature should provide for a budget adequate to meet all probable expenditures during a fiscal period. Provision for a fiscal officer responsible for the centralized custody of legislative personnel, payroll, and expenditure records of each house, and the supervision of legislative expenditures, should be considered.

In dealing with problems of legislative finance, the committee drew heavily upon the experience of the New York Joint Legislative Committee which had made similar, but more detailed, recommendations to the New York legislature. The objective of the committee recommendation was to provide order and accountability for legislative fiscal affairs How the states could best regularize their legislative fiscal activities was left to them to decide, but with the suggestion that a legislative fiscal officer be designated or appointed. It was believed that existing budgetary and accounting machinery within the executive branch might be utilized for this purpose by the legislatures of some states.

12. *Local and Special Legislation.* Consideration and settlement of claims against the state should be delegated to judicial or to administrative agencies, and general, optional, or home-rule legislation should provide positive substitutes for special legislation affecting cities, counties, and other political subdivisions of the states, particularly in matters of purely local concern.

Although Illinois, Michigan, and New York have established courts of claims, and although in several states certain categories of claims may be settled by the attorney-general or secretary of state, most states continue to burden their legislatures with an excessive amount of private legisla-

tion. The committee urged the states to delegate this time-consuming function to designated administrative or judicial agencies capable of rendering decisions on merit and making, within reasonable limits, monetary awards.

With respect to local or special legislation, the committee concurred with the Council committee on state-local relations, which has recommended the adoption of general, optional, or home-rule legislation in place of the large volume of law enacted every session in many states specifying in detailed terms the authority and obligations of local government.

Concluding Observations. Although legislative organization and procedure customarily receive more attention among the states than in the federal government, the recent reorganization of Congress has renewed interest and stimulated action in the legislatures of many of the states, and the recent report by a committee of experienced state legislators and officials should give added impetus and direction. The states have not been afraid to experiment with the structure and operations of their legislative houses, but the accelerated tempo of contemporary life requires that their legislatures more rapidly than ever reorganize themselves to meet a seemingly ever-increasing volume of problems and responsibilities. Problems of legislative organization and procedure are on the agenda of a majority of the 44 state legislatures meeting in regular session during 1947. The report of the committee of the Council of State Governments should be of constructive assistance in the framing and consideration of measures intended to strengthen all legislatures.



58. HOW BILLS BECOME LAWS IN TEXAS [1]

WHEN a legislator arrives at his state capitol for the first time he is, very likely, not conversant with legislative procedure. He soon secures a copy of the official *Manual*, perhaps handsomely bound in imitation leather, with his name stamped in gold on its face but filled with a complex jargon understood only by the veteran legislator. Is it any wonder, therefore, that the neophyte soon ceases to consult the book and turns readily to some "kindly" lobbyist who is only too willing to be of service? Professor Smith has written a simplified version of the procedure for the enactment of laws in the Texas legislature that has been helpful both to "freshmen" legislators and to the

[1] Dick Smith, Bureau of Municipal Research, The University of Texas, Municipal Study No. 25 (Austin, 1945). Reprinted by permission of the Bureau of Municipal Research. All footnotes omitted.

general public. Although the details of legislative procedure may differ from state to state, the pattern remains the same. For that reason this selection has immediate interest beyond the confines of Texas.

ALL proposals for laws, i.e. "bills," in the Texas Legislature must be introduced by a member, even though during special sessions the Legislature is limited to passing laws on topics submitted by the Governor. According to a constitutional provision adopted in 1930, all bills in a regular session, except those dealing with emergency matters submitted by the Governor, are supposed to be introduced within the first thirty days. The next thirty days are theoretically set aside for the legislative committees to meet and consider the proposals which have been introduced. The last sixty days are to be devoted to discussing and making final disposition of all bills. The Legislature, however, has always made use of another part of the same constitutional provision which allows it to determine its own order of business by a four-fifths vote of the membership. The Forty-Ninth Legislature (1945) followed the example of its predecessors and abolished the so-called "split session" with its separate periods for introduction, committee consideration, and final disposition, and allowed unrestricted introduction of bills for the first sixty days. After that time, introduction could be only by unanimous consent, by a suspension of the rules (which requires a four-fifths vote of those present), or upon emergency submission by the Governor.

With the exception of proposals to raise revenue, which must originate in the House of Representatives, bills may originate in either house; but in order to become laws, they must receive the affirmative action of both houses. For the purposes of this discussion, in which we shall follow the progress of a bill from its introduction until it becomes a law, we are supposing that the bill originates in the House of Representatives.

INTRODUCTION AND FIRST READING

Any member of the House of Representatives may introduce a bill by simply filing it in duplicate with the Chief Clerk, or it may be introduced from the floor while the House is in session. In either case, the Chief Clerk keeps one copy of the bill for his files. No bill, except a general appropriation bill, may contain more than one subject, which must be expressed in its title. The only action taken upon introduction is that the Chief Clerk numbers the bill and the Reading Clerk reads it by caption to the House. The State Constitution requires that for a bill to become a law it must be read on three separate days: but this requirement may be suspended in case of emergency, which must be stated in the bill in the form of an "emergency clause," by a four-fifths vote of those members present

and voting. This reading of the bill by caption or title constitutes the "first reading."

REFERENCE TO A COMMITTEE

The Speaker then refers the bill to the proper committee. The House rules designate the types of bills (by subject matter) over which each committee has jurisdiction. During the first forty-five days of a regular session, unless directed otherwise by a majority of the House, twenty-four hours must elapse between the time of introduction and the time of the first reading and reference to a committee. This delay is to give the Chief Clerk time to make the necessary notations regarding the bill and to allow the Speaker opportunity of deciding to which committee the bill should be referred.

COMMITTEE CONSIDERATION

There are some forty-three standing committees, the members of which, together with the chairmen, are appointed by the Speaker unless otherwise directed by the House. It is customary, however, for the Speaker to appoint all standing committees, as well as special conference committees. The standing committees have regularly scheduled as well as called meetings to consider the bills referred to them; but no committee may sit while the House is in session without special permission from that body. Records are kept showing the time and place of each meeting of the committee, the attendance of the members, and the votes taken. No action or recommendation is valid unless taken at a formal meeting at which a majority of the members are present. Every committee hearing is open to the public unless otherwise determined by the House. Notices of public hearings must be posted forty-eight hours in advance and also released to the press. Much of the detailed work is done by subcommittees which are appointed by the chairman of the committee from the regular committee membership. These subcommittees make a special study of some particular section or phase of a bill and report back to the full committee.

COMMITTEE REPORT

Each committee is supposed to report on all bills referred to it, but this is by no means always done. Provision is made, however, that during the first sixty-six days of a regular session when a bill has been in committee for six days, the committee may be required to report, i.e. discharged, by a two-thirds vote of the House. After the first sixty-six days this may be done by a simple majority vote. All committee reports, together with the original bills, are filed with the Calendar Clerk and are printed in the Journal.

Committee reports are advisory only and may take the form of a favorable report, an unfavorable report, or a report of inability to agree; or the committee may report an amended bill or a substitute measure. No minority report may be filed unless it has, in general, been signed by four members of the committee who were present when the vote was taken on the bill. If the report on the bill is unfavorable and a favorable minority report is not signed and filed with the Calendar Clerk within two days, the bill is dead.

PRINTING AND PLACING ON THE CALENDAR

All favorably reported general bills, including substitute measures, are sent to the printer immediately by the Calendar Clerk, and printed copies are laid on the desk of each member at least twenty-four hours before the bills are considered by the House, except during the last ten days of the session. Bills which receive an unfavorable majority report are not printed unless there is a favorable minority report and unless, within five days, permission to print is given by a majority of the House. In dealing with local bills the committees may report favorably but with the recommendation they be not printed. All other bills which receive a favorable committee report must be printed, except on order of two thirds of the House.

All favorably reported bills, and those unfavorably reported but ordered printed by the House, automatically go on the Calendar for consideration on the floor. The bill has now reached the second reading.

SECOND READING

All bills on their second reading are taken up in the order in which they are introduced and numbered by the Chief Clerk unless they are considered (a) on suspension days, (b) by unanimous consent, or (c) made special orders. "Suspension days" are certain designated days (every Monday and during the first six of the last eight days of a session) in which the House may, by a majority vote, or a two-thirds vote during the closing days of the session, take up a bill out of its regular order. Bills are made "special orders" for a certain day (present or future) by a two-thirds vote, and will be taken up at that time regardless of their numerical order.

The House, however, has a daily order of business which is followed exactly, except on suspension days; but even then it is followed through the sixth item. This order of business is as follows:

"First. Prayer by the Chaplain.

Second. Excuses for absence of Members and officers.

Third. First reading of bills filed with the Chief Clerk, introduction

of bills from the floor and their first reading, and reference of bills to committees.

Fourth. Requests to print bills and other papers; requests of committees for further time to consider papers referred to them; and all other routine motions and business not otherwise provided for. . . .

Fifth. Resolutions offered from the floor. . . .

Sixth. The unfinished business. . . .

Seventh. Disposal of business on the Speaker's table as follows:

(1) Resolutions lying over from the previous day and Senate concurrent resolutions.

(2) Reports of conference committees.

(3) Senate amendments to House bills and resolutions, requests of the Senate for a conference and all matters of disagreement, amendments and requests between the two houses.

(4) Reports of standing and special committees.

(5) Postponed bills. . . .

(6) Bills on their third reading.

(7) Bills on their second reading."

In addition to this daily order of business, certain days are set aside for consideration of certain types of bills. For example, Mondays are suspension days; on Tuesdays House joint resolutions and bills on third reading are considered; Wednesdays and Thursdays are Senate bill days; while Fridays and Saturdays are devoted to House bills on third and second readings. Under recent practice, local and uncontested bills are considered at any time, usually at night, when ordered by a two-thirds vote of the House. Local bills, emergency measures submitted by the Governor, and emergency appropriation bills have, in general, precedence over all other bills during the first sixty days of the session.

It is only on second reading, i.e. when it is on its passage to engrossment, that the bill is given its first real consideration by the House. It is usually read by caption only, after which it is subject to debate and amendment. When the bill has been discussed and the amendments, if any, disposed of, the question of engrossment is put.

ENGROSSMENT

If a bill fails of passage to engrossment, it is dead unless a motion to reconsider it is made on the same or following day by a member who voted on the prevailing side and the motion is passed by a majority vote. If the motion for engrossment carries, the bill is then sent to the Engrossing Clerk, where it is rewritten with all of the amendments inserted exactly as passed. However, if the bill carries the emergency clause, the House may suspend

the rules by a four-fifths vote and take up the bill on third reading and final passage immediately after passage to engrossment.

After the Engrossing Clerk has finished with the bill, and the engrossed copy has been compared with the original and the amendments, the Committee on Engrossed Bills reports to the House that the bill has been correctly engrossed. The bill is now ready for its third reading and final passage.

THIRD READING AND FINAL PASSAGE

The third reading is usually by caption only, and although discussion is in order, a two-thirds vote is required for amendment. After the bill has been read a third time, it is voted on for final passage. If it receives a simple majority vote, it is passed and is ready to be sent to the Senate.

TRANSMISSION TO THE SENATE

After the bill has finally passed the House, the Chief Clerk transmits it to the Senate, together with a written statement certifying to the bill's passage. If the bill has been amended on the third reading, copies of the amendments are also sent to the Senate and are designated "engrossed riders."

ACTION BY THE SENATE

When received in the upper house, the bill follows substantially the same procedure as in the House of Representatives. First, the bill is read, usually by caption only, by the Reading Clerk of the Senate. It is then referred to the proper committee by the President of the Senate (Lieutenant Governor). Following committee consideration, if the bill is given a favorable report, it is printed, put on the Calendar and taken up on second reading, where the Senate may amend the bill in any way it sees fit. If the bill passes second reading, it is then read a third time and voted on for final passage.

RETURNING THE BILL TO THE HOUSE

When the Senate passes or defeats a House bill, the Secretary of the Senate so informs the House by message. If the measure has passed without amendments, it will be sent to the Enrolling Clerk of the House who will have the bill recopied on a typewriter, without erasures, interlineations or additions in the margins, and then deliver it to the Speaker for signing. If, however, amendments have been added by the Senate, this fact will be indicated in the Secretary's message by the statement, "with ac-

companying Senate amendments." The bill is then subject to the following action in the House.

ACTION BY THE HOUSE ON BILLS WITH SENATE AMENDMENTS

The amended bill now goes to the Speaker's table and is considered privileged business. The Senate amendments are read, and if agreed to by a majority of the House, the measure then goes to the Enrolling Clerk where it is enrolled as discussed above. If the House does not accept the amendments, a conference committee is usually requested. If the Senate does not agree to the request for a conference committee and insists that the House accept its amendments, the bill is dead unless the House or Senate reconsiders and reverses its action which has caused the disagreement.

SENDING THE BILL TO CONFERENCE

As noted above, if the two houses do not agree on the bill, the usual course is to refer it to a conference committee. In the case of a bill introduced in the House, the initiative lies with that body which, by a simple majority vote, asks the Senate for a conference. This action is reported to the Senate, and if agreed to by that body, again by a simple majority vote, the bill together with the amendments is sent to the Committee.

All conference committees are composed of five members from each house and are appointed by the respective presiding officers. When the vote on the measure in the House has been close, two of its members on the Committee are usually taken from those who voted on the losing side, i.e. the minority, and three from the majority. When the vote has not been close, the minority is ordinarily given only one member. After the Conference has been ordered, but before the members of the Committee have been selected, either house may instruct its members to follow a certain course of action as long as it is not in violation of the rules of that body concerning conference committees.

ACTION OF THE CONFERENCE COMMITTEE

The members of the Conference Committee from each house vote as a unit, therefore a majority of the committee members from the House plus a majority of those from the Senate must agree on the matter in dispute. The Committee is usually restricted to adjusting the differences between the two houses on the particular bill and is not supposed to change anything which has been agreed to by both houses. Nor may they include any new material not in disagreement even though such material may be pertinent to the question at issue. Under certain conditions, however,

conference committees sometimes change things not in disagreement and even insert entirely new provisions.

REPORT OF THE CONFERENCE COMMITTEE

After the Committee has settled the question in disagreement between the two houses, the members report to their respective chambers. This report may not be amended and must be accepted or rejected in full. If for any reason the report is not acceptable to either house, they may by mutual agreement send the bill back to the same committee for further consideration; or in the case of a House bill like the one we are considering, the House may request the Senate for a new conference. When no agreement can be reached by the Committee itself, or if their report is not accepted by either house, the bill is dead.

ENROLLMENT

When the report of the Conference Committee is agreed to by both houses, the bill is sent to the Enrolling Clerk of the House. (If the measure had originated in the Senate, it would have gone to the Senate's Enrolling Clerk.) After enrollment, the bill is then sent to the House Committee on Enrolled Bills; and if found correctly enrolled, this fact is so reported to the House.

SIGNING BY THE PRESIDING OFFICERS

The Reading Clerk of the House then reads the enrolled bill by caption, after which it is signed by the Chief Clerk and the Speaker. Then the chairman of the Committee on Enrolled Bills, or the Enrolling Clerk, takes the bill to the Senate where it is likewise read by title and signed by both the President and the Secretary of the Senate.

ACTION BY THE GOVERNOR

After the bill has been signed by the presiding officers of both houses, it is sent to the Governor who has ten days, exclusive of Sundays, in which to veto or sign the bill. If it reaches him within the last ten days of the session, he has twenty days, including Sundays, after the end of the session in which to act on it. In either case, unless he specifically vetoes it, the bill becomes a law at the end of the designated period, either with or without his signature. If he vetoes it after the Legislature has adjourned, he files the bill, together with the reasons for the veto, with the Secretary of State and the measure does not become a law. If, however, the Legislature is still in session, he sends the disapproved bill and the reasons for his disapproval to the house where the bill originated.

ACTION OF THE HOUSE ON A BILL VETOED BY THE GOVERNOR

When the House receives one of its bills which the Governor has vetoed, the veto message is read and then printed in the Journal. Several courses of action are open to the House. They may consider the question of passing the bill over the Governor's veto at once, postpone any action until some definite day, or refer the bill and message to a committee. In any event, to pass the bill over the Governor's veto requires a two-thirds majority of the members present (pre-supposing a quorum), whether all of them vote or not.

Upon receiving the requisite majority (otherwise it is dead), the bill is sent to the Senate together with a statement, signed by the Speaker and Chief Clerk, that the bill has been passed over the Governor's veto by the required two-thirds vote.

ACTION OF THE SENATE ON A BILL VETOED BY THE GOVERNOR AND PASSED BY THE HOUSE

After the vetoed bill has been passed by the House, it is sent to the Senate where, as in the House, it may be considered at once, postponed until a definite date, or referred to a committee. Likewise, a two-thirds vote of those present is required to override the veto. If this majority is not obtained, the bill is returned to the House where it is filed away as dead. If, however, two thirds of those present vote for the bill, irrespective of the Governor's veto, the Secretary of the Senate returns it to the House with the proper notation; and it is then filed with the Secretary of State by the chairman of the Committee on Enrolled Bills.

WHEN BILLS GO INTO EFFECT AS LAWS

No bills passed by the Legislature, except general appropriation acts, go into effect until ninety days after the adjournment of the session, except in case of an emergency, which must be stated in the preamble or in the body of the act and receive a record vote of two thirds of those elected to each house. In this case they become effective as soon as they are signed by the Governor or are filed with the Secretary of State without a veto.

REVENUE AND APPROPRIATION BILLS

Bills to raise revenue follow the regular procedure except that the Constitution requires that they originate in the House of Representatives. The Senate, however, may amend them in any way it sees fit, even adding new fields of taxation.

Appropriation bills may originate in either house. The procedure on these is the same as with any other bill, except that before they are sent to the Governor the Comptroller of Public Accounts (under a constitutional amendment effective for the first time in the 1945 Legislature) must certify that the proposed expenditure is not in excess of the cash and anticipated revenues of the particular fund or funds from which the appropriation is being made.

After being signed by the presiding officers of each house, the bill is sent to the Comptroller. He makes his certification on the bill itself that the money is available, signs the bill, and then sends it back to the house where it originated, which then sends it on to the Governor for his action.

When the Comptroller finds that an appropriation bill exceeds the estimated revenue, he returns the bill, together with his statement concerning the lack of funds, to the house where it originated. The two houses may then either provide sufficient additional revenue or else reduce the appropriation so that it will be within the Comptroller's estimate; or if an emergency and imperative public necessity exists and the bill receives a four-fifths vote of the total membership of each house, the bill may be sent to the Governor despite the Comptroller's statement concerning the lack of funds to cover the appropriation.

Where itemized general appropriation bills are concerned, the Governor has the item veto; i.e. he may strike out specific items without having to veto the entire measure.

WAYS IN WHICH A BILL MAY BE KILLED

A bill which has originated in the House of Representatives may be defeated at several different stages in its passage through the Legislature.

1. The committee may fail to report the bill and no action is taken by the House to keep it alive.
2. The bill may receive an unfavorable committee report with no minority report, in which case it is not printed and does not go on the Calendar for House consideration.
3. The House may refuse to print the bill even though a minority report has been made.
4. The bill may be tabled.
5. The bill may be amended by striking out the enacting clause.
6. It may fail to pass to engrossment.
7. It may fail on third reading and final passage.
8. It may be defeated in the Senate by any of the above methods.
9. If the bill is amended by the Senate, the House may refuse to concur in the Senate amendments.

10. If a conference committee is appointed, it may not be able to come to an agreement on the differences between the two houses.

11. Either house (or both) may refuse to adopt the Conference Committee report.

12. Either house (or both) may fail to pass a vetoed bill by the required two-thirds majority.

13. Appropriation bills may be killed if the Comptroller certifies lack of funds and the measure does not then receive the required four-fifths majority.

ADOPTION OF RESOLUTIONS

There are three types of resolutions, simple, concurrent, and joint. Simple resolutions require the action of only one house. They are given but one vote, which is usually taken upon introduction, without prior reference to a committee. No action by the Governor is necessary. They are used for such purposes as authorizing the creation of special committees, expressing the opinion of the body, adopting the rules, inviting distinguished speakers to address them, memorializing a person, recalling a bill from the other chamber, authorizing expenditures from the contingent expense fund, determining the number and salaries of the employees, or dealing with anything affecting that particular house.

Concurrent resolutions require affirmative action of a majority of both houses. As with simple resolutions, they are ordinarily voted on only once, without being referred to a committee. Unless providing for *sine die* adjournment, they must be sent to the Governor for his action and may be vetoed by him. They are primarily used to adopt the joint rules of the two houses, state the Legislature's interpretation of laws, give permission to sue the State, memorialize a person, or to request Congress to follow a certain line of action. They are not laws (as legislation may not be accomplished by resolution), and have no standing in the courts; but are sometimes used to accomplish the same purpose as laws, as for example, giving permission for an individual to sue the State.

Joint resolutions also require affirmative action by both houses, but action by the Governor is not necessary. They are used most often to propose an amendment to the State Constitution, although they may also be used to recommend the calling of a State constitutional convention and to ratify a proposed amendment to the United States Constitution.

The procedure on joint resolutions is the same as for bills, except where a proposal is being made to amend the State Constitution. When this is the case, a two-thirds majority of those elected to each house is required for passage. In the House of Representatives such proposals are not given the usual three readings if the resolution receives the required two-

thirds majority on the second reading. If it receives only a simple majority on the second reading, it is nevertheless passed to engrossment, and subsequent proceedings are the same as for the passage of a bill. It must, however, receive a two-thirds vote on third reading and final passage. Failure to get this majority at the final stage kills the proposed amendment, and it may not be brought up again unless a motion to reconsider is adopted or the rules are suspended by a two-thirds vote.

The Senate, acting under its own rules, requires that joint resolutions proposing a constitutional amendment be given three separate readings on three separate days. A two-thirds majority is, of course, necessary for final passage.



CHAPTER XI

The Federal Judicial System

59. THE LAW

Lord Chancellor:
The Law is the true embodiment
Of everything that's excellent,
It has no kind of fault or flaw,
And I, my lords, embody the Law.
—Iolanthe [1]

60. DOG LAW [2]

In 1792 in a moment of annoyance caused by a charge to a Middlesex grand jury by Judge Ashhurst of the Kings Bench division in England, Jeremy Bentham dashed off a manuscript entitled "Truth vs. Ashhurst"; it was not printed until 1823. "Dog Law" is a passage in that manuscript. Bentham, a lawyer and leading political theorist of the utilitarian school, argued extensively for a modernization and codification of the almost chaotic English law; indeed, the very word "codification" was introduced into the English language by Bentham. He attacked the slip-shod "authorized" private reporting of court actions; he attacked what he called "judge-made" law. It was not until 1865, however, that official and accurate records of court proceedings in England became available.

[1] Reprinted from *Authentic Libretti of the Gilbert and Sullivan Operas.* By permission of Crown Publishers, New York (1939) p. 55.

[2] Quoted from *The Works of Jeremy Bentham*, John Bowring, Vol. V (Edinburgh: William Tait, 107 Prince's Street, London, 1843), pp. 235.

SCARCE any man has the means of knowing a twentieth part of the laws he is bound by. Both sorts of law are kept most happily and carefully from the knowledge of the people: statute law by its shape and bulk; common law by its very essence. It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it. What way, then, has any man of coming at this dog-law? Only by watching their proceedings: by observing in what *cases* they have hanged a man, in what *cases* they have sent him to jail, in what *cases* they have seized his goods, and so forth. These proceedings they won't publish themselves, and if anybody else publishes them, it is what they call a contempt of court, and a man may be sent to jail for it.

If, then, you can be in the four Westminister Hall courts, and the twelve circuit courts, and a hundred other such places at once—if you can hear everything and forget nothing—if the whole kingdom can squeeze itself into a place contrived on purpose that it may hold none but lawyers—if it can live in those places for ever, and has always lived in them,—the "*whole kingdom*" may have that knowledge which Mr. Justice says it has of the law; and then it will have no further difficulty, than to guess what inference the judge or judges will make from all this knowledge in each case.

Counsellors, who have nothing better to do, watch these cases as well as they can, and set them down in their *note-books*, to make a trade of them: and so, if you want to know whether a bargain you want to make, for example, will stand good, you must go with a handful of guineas in your hand, and give half of them to an attorney, for him to give t'other half to a counsellor; and, when he has told you all is right, out comes a counsellor of the other side with a *case* of his own taking which his brother knew nothing of, which shows you were in the wrong box, and so you lose your money. Some of them, to drive a penny, run the risk of being sent to jail, and publish their note-books which they call reports. But this is as it happens, and a judge hears a case out of one of these report-books, or says it is good for nothing, and forbids it to be spoken of, as he pleases.

61. THE SUPREME COURT: 1947 [1]

A DISTINGUISHING feature of the American national government is judicial review, by which an appointed United States Supreme Court may in particular cases approve or nullify the actions of the popularly elected Congress and President. At one time a popular theory was that the process of judging constitutionality was nearly automatic. The judge compared the law with the constitution and made the obvious, mechanical decision. More nearly in accord with the facts is the sociological approach, which sees the determining factor in the process of judicial review to be the background, training, and attitudes of the Supreme Court justices. Good legal precedent exists for decisions in either direction; the judge's personal outlook will in this situation be decisive. Professor Schlesinger, inclining to this theory, describes the background and outlook of the members of the Supreme Court. He discusses the split between the Black-Douglas group, which argues that the court should accomplish social objectives in accord with the opinions of its members, and the Frankfurter-Jackson group, which holds that the court should exercise judicial self-restraint and leave to the legislature the task of making policy so long as it is not clearly contrary to constitutional precept.

WHATEVER Roosevelt's Supreme Court has turned out to be, rubber stamp is not precisely the word for it. From left to right as they sit on the bench these are independent men: Rutledge, with his honest and friendly face, rocking and squirming in his chair; Murphy, grinning or glum under bushy eyebrows; Frankfurter, quick, smiling, alert, ready to pounce; Black, far back in his chair, gazing urbanely at the speaker or at the ceiling; Vinson, weighed down by jowls and eyelids; Reed, bald, earnest, kindly; Douglas, with his ungovernable cowlick and restlessness, looking as if he wished he were somewhere else; Jackson, preoccupied, grim, but controlled; Burton, exuding concern, sobriety, and high principle.

These are young men by Supreme Court standards: the oldest cannot qualify for a pension till 1952. Because their decisions will help shape the nation for years to come, it is important to know the issues now dividing them—a division brought dramatically into the open by Mr. Justice Jackson's outburst against Mr. Justice Black. Indeed, the Court cannot help but be an intensely personal affair. Its balance wheel is the Saturday conference, where each expresses his opinion, from the Chief down, then each votes, from the junior Justice up. Perhaps no discussions in the world proceed at higher intellectual tension.

Two of the Justices—Frankfurter and Black—are men of unusual intel-

[1] Arthur M. Schlesinger, Jr., *Fortune* (January, 1947), Vol. XXXV, No. 1. Reprinted by special permission of the author and the Editors. Copyright by Time Inc.

lectual ability and personal force. Two others—Jackson and Douglas—are able, ambitious, and combative. Murphy's peculiarities of temperament give him a semi-mystical urge toward isolated positions. Reed, Rutledge, and Burton, though not dominating intellects, are in no one's vest pocket.

THE JUDICIAL ACTIVISTS

Hugo L. Black, Roosevelt's first appointment to the Court, looks younger than his sixty years. A slight, gray-haired man, with soft courteous ways, a pleasing smile, and a Rooseveltian cigarette holder, Black has come far from humble beginnings. He has had to fight hard for everything he has got—in politics, in education, and in life—and the experience has left its mark, not at all on his manners, but on his ideas and his will. The Klan was but one phase in a painful process of self-education. The New Deal and Justice Brandeis were more important; and Black's own trenchant intelligence brought him to a position of honest intellectual radicalism. With the exception of Frankfurter he is the best-read man on the Court.

As a New Deal Senator, Black displayed the qualities of intellectual force and personal implacability that have characterized his performance on the Court. Intense, stubborn, suspicious, he tends to distrust the motives of those who oppose him; and people who remember his cold, bitter manner in the Senate sympathize with Jackson's remark, "I would not stand for any more of his bullying." But his emotions center around ideas, not personalities. He works hard, and his clear, driving intelligence hits legal fundamentals. He is an honorable person, not given to petty politicking.

Black's closest associate is the youngest member of the Court, forty-eight-year-old William O. Douglas. Relaxed, loosely dressed, constantly scratching his tousled faded blond head, Douglas inspires fanatical loyalty in some people and absolute mistrust in others. He has executive vigor, intelligence, simplicity, and considerable charm; but he is also wary by instinct, highly ambitious, and fond of intrigue.

Douglas' position is complicated by the fact that few believe he has abandoned his presidential aspirations. No Justice gets better publicity. His special appeal is to "hardboiled" liberals who propose to escape the usual sense of liberal futility by concentrating on results at the expense of scruples. A group of writers—Richard Neuberger, Fred Rodell, Eliot Janeway—have constituted themselves a Douglas claque. Amusing little anecdotes about the Justice even make frequent appearances in Leonard Lyons' column. His political backers include men like Tom Corcoran, Thurman Arnold, Harold Ickes, Abe Fortas; and the recurrent Douglas boom, whenever a vacancy occurs in a top government job, is a familiar

feature in the Washington landscape. This group has staged small *demarches* at regular intervals since 1940 to make him Vice President, head of WPB, manpower director, Secretary of War, Federal Loan Administrator, economic stabilizer and Secretary of the Interior. He is now being pushed for Secretary of State if Byrnes should resign.

Most of these efforts were too little and too late; but they have contributed to the tension of the Court. Chief Justice Waite once wrote wisely of another Justice who hankered after the White House: "It was said that he permitted his ambitions in that direction to influence his judicial opinions. I am not one of those who believe he did so consciously, but one who occupies this position should keep himself above suspicion." This suspicion Douglas has been unable to shake.

Douglas ordinarily followed Black's lead up to the last term when he struck out on curious pro-states' rights, anti-OPA, and pro-business tacks of his own (all of which his detractors promptly ascribed to political considerations). But the rate of agreement between Black and Douglas has fallen steadily. By the 1945 term, according to the calculations of Dr. C. Herman Pritchett of the University of Chicago, they agreed on only 71 per cent of the non-unanimous opinions. During their first three terms together on the Court they had never once been on opposite sides of a decision.

Frank Murphy and Wiley Rutledge go even further than Black and Douglas in the protection of civil liberties and of defendants in criminal cases. Murphy, the former Governor of Michigan and former Attorney General, is now fifty-six years old. Beetle-browed, his red hair turning to gray, his voice sinking to a whisper and rising to a dramatic roar, Murphy is a strange, complicated, self-dedicated figure. His egotism is vast and somewhat messianic. Someone once said, "His face is a living drama written, screened, played, reviewed, and audienced by Frank Murphy." His legal competence is questioned more often than that of any other justice. Yet his devoted concern for individual rights has produced some of the most impassioned writing in recent Court history.

Rutledge, a former law-school dean and circuit-court judge, is fifty-two years old, an honest, likable man. He thinks through issues with painful honesty and then inclines to publish his whole process of decision—a method that sometimes gives his opinions the air of including all his preliminary notes.

CHAMPIONS OF SELF-RESTRAINT

Opposite the quiet and somber figure of Hugo Black stands the warm and impetuous figure of Felix Frankfurter. An immigrant boy who came to this country from Austria at the age of twelve, Frankfurter has had a career

quite as impressive in its testimony to the opportunities of American life as Black's. From his office in the Harvard Law School he picked out the bright young men in the graduating classes and sent them to Washington as clerks for Supreme Court Justices or as government lawyers. He was a great and beloved teacher, as well as an unsurpassed student of the Constitution and the Court. Some regard his judicial career as an anticlimax. "It is as if Walter Lippmann should become President," observed one eminent judge.

A rapid, sensitive, sparkling personality, generous in temperament, irrepressible in speech, given to gusts of enthusiasm or outrage, he cannot help but play an electric role in any gathering. Some find his manners on the Court irritating: he talks too much in conference, he procrastinates in writing opinions, he lectures his brethren, he harasses the attorneys. He knows more legal history than his colleagues and seldom lets them forget it. In the heat of argument he often cannot resist satirical or self-righteous remarks that offend more than he realizes. Moreover, his personal relationships tend to fall in a master-disciple pattern that creates emotional problems when the disciples strike out on their own.

Robert H. Jackson has often differed from Frankfurter on specific cases but is in agreement with him on the function of the Court. Fifty-four years old, he is another complex character, winning in manner, intellectually vivacious and even cocky, a persuasive advocate, the best writer on the Court, but given to playing with ideas rather than possessing them. Like Douglas, he has had ulterior ambitions. Roosevelt dangled too many possibilities before him—the governorship of New York, the chief justiceship, even perhaps the presidency.

The passion of his Nurnberg attack on Black was an index of frustration. It was the act of a weary and sorely beset man, committed to a harassing task in a remote land, tormented by the certainty that the chief justiceship had now passed forever out of his reach. Only someone who has lived the unreal life of an army of occupation can understand the violence of his response to the fragmentary reports of Washington intrigue; he reacted as a G.I. would to rumors of his wife's infidelity. His appeal to Congress did not adequately define the basic issue. Because it cannot be stated in readily verifiable terms, he seized on the weak side issue of Black's former law partner.

The statement thereby obscured and tribialized his own case. Its language was intemperate. Its logic was faltering. Some of its facts and more of its implications were wrong. Chief Justice Stone had, in fact, sat on the *North American* case from which Jackson said he had disqualified himself; Justice Roberts sat on many cases argued by his former law partner, Robert McCracken. Jackson himself sat on cases argued by Solicitor General Charles Fahy, with whom his relations were more recent

and cordial than Black's with his law partner of 1927. Black himself had shown a sense of propriety in refusing to sit on cases involving the Federal Communications Commission because one of the commissioners is his brother-in-law. If Jackson's objection were made into a principle, a plaintiff could rapidly eliminate the votes of Justices whose opposition he feared by hiring their past associates.

Harold Burton is the junior member of the Court. An earnest, proud, public-spirited man, fifty-eight years old, his white hair receding from a naturally high forehead, his eyes dark-circled, Burton has still not got deeply involved in the conflict. He is the only Republican and probably the only real conservative on the bench.

Stanley Reed, a former Solicitor General, was the second Roosevelt appointment. A bald Kentuckian with shining head, slow and affable, sixty-two years old, he stands squarely in the middle of the Court. The natural instincts of a man from a border state combine with the *ad hoc* disposition of a country lawyer to keep him out of the shooting; but his position as swing man makes him the object of special solicitude on the part of his brethren as well as of the lawyers before the Court.

THE GREAT DEBATE

Observers found it ironic that public bitterness should have shown up between Black and Jackson, because theirs was a secondary fight. Personal tension arose first between Douglas and Frankfurter. Black and Frankfurter are the intellectual protagonists and have scolded each other in dissents; but their personal relations started out well and continue amiable. The Black-Jackson fight developed purely as a subquarrel. The bad feeling between Jackson and Murphy is left over from their days together in the Department of Justice.

In the comradely days of the New Deal, Frankfurter and Douglas got along well. Frankfurter once favored his appointment to the Harvard Law School, and welcomed his arrival on the Court. But friction was perhaps inevitable in the contrast of two somewhat disruptive personalities. Frankfurter had an undoubted desire to dominate the Court, and Douglas' record at SEC shows him to be an inveterate schemer. Douglas' controlled, cagey behavior annoyed the more candid and outgoing Frankfurter, just as Frankfurter's professorial pedantries annoyed the more colloquial Douglas. Both men remained influential in White House inner councils, and each may have suspected the other's evil influence in the Florentine palace politics that went on around Roosevelt.

No outsider knows what incidents took place in conference. But soon after Frankfurter wrote the Court's 1941 decision in the *Meadowmoor Dairy* case that picketing "enmeshed with violence" could be constitu-

tionally restrained by injunction, the friends of Douglas took up the cry that Frankfurter had turned conservative, and the friends of Frankfurter replied that Douglas was an unprincipled opportunist.

There are issues of principle between Black and Douglas, on one hand, and Frankfurter and Jackson, on the other; but these issues might not have grown to their present overshadowing proportions had it not been for the personal animosities. On basic questions of the power to govern, this Court stands united. The problem of the constitutionality of New Deal Legislation would not flutter a hair (even Burton's) in Saturday conference today. Since the questions at issue deal on the whole with the interpretation of legislation, they do not involve the Court in decisions that a legislature cannot revise yet the clash of judicial personalities has transformed them from mere marginal divergences into a fundamental conflict over the proper function of the judiciary in a democracy.

This conflict may be described in several ways. The Black-Douglas group believes that the Supreme Court can play an affirmative role in promoting the social welfare; the Frankfurter-Jackson group advocates a policy of judicial self-restraint. One group is more concerned with the employment of the judicial power for their own conception of the social good; the other with expanding the range of allowable judgment for legislatures, even if it means upholding conclusions they privately condemn. One group regards the Court as an instrument to achieve desired social results; the second as an instrument to permit the other branches of government to achieve the results the people want for better or worse. In brief, the Black-Douglas wing appears to be more concerned with settling particular cases in accordance with their own social preconceptions; the Frankfurter-Jackson wing with preserving the judiciary in its established but limited place in the American system.

YALE ON HOW TO BE A JUDGE

The Black-Douglas view is founded upon a realistic analysis of the workings of the judiciary. This analysis rests upon ideas particularly dominant at the Yale Law School It owes much to the brilliant and iconoclastic writings of Thurman Arnold, a former professor at the Yale Law School, and of Fred Rodell and Walton H. Hamilton, both present members of the faculty. Douglas himself used to teach at the Yale Law School, and Black has sent his son there.

The Yale thesis, crudely put, is that any judge chooses his results and reasons backward. The resources of legal artifice, the ambiguity of precedents, the range of applicable doctrine, are all so extensive that in most cases in which there is a reasonable difference of opinion a judge can come out on either side without straining the fabric of legal logic. A naive

judge does this unconsciously and conceives himself to be an objective interpreter of the law. A wise judge knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results.

Even though this Court has, on the whole, abstained from invalidating laws of Congress, it is still inescapably vested with political power through its obligation to pronounce on the meaning of laws. The most carefully drawn statute has its silences and ambiguities; it cannot provide for every concrete case. As the wisest American judge, Learned Hand, once put it, the words a judge must construe are "empty vessels into which he can pour nearly anything he will."

The Yale school believes that the liberal case against the 1936 Court was based on a false and naive issue. The proper criticism should have been, not that the old Court indulged in judicial legislation, for this is inevitable, but that it indulged in reactionary judicial legislation. The Court cannot escape politics: therefore, let it use its political power for wholesome social purposes. Conservative majorities in past Courts have always legislated in the interests of the business community; why should a liberal majority tie its hands by a policy of self-denial that conservatism will never follow when it is in power?

Judicial self-restraint, they conclude, is at best a mirage. In a time of social crisis like the present, it becomes a positive danger. If any decision of the Court can reduce persecution, redress injustice, or promote the general welfare, it would surely be contrary to the spirit of the Bill of Rights to renounce these results for the sake of abstractions. "Under our constitutional system," wrote Hugo Black, "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement." Every resource must be mobilized today to preserve American democracy. The power of the Court to protect the underdog, they argue, must be affirmed and vindicated.

The basic cynicism about the possibility of an objective judiciary combines with the sense of social urgency to direct more attention to immediate results than to a system of law. As Professor Rodell observed of Black, "His heart is with the widow or the worker who lost a leg, and not with the niceties of legal logic . . . He sees the law always as a means to an end—the achievement of social justice, especially for the otherwise unprotected—instead of an end in itself." In approaching a case this group tends less to unravel legal right and wrong in any technical sense than to settle the particular case in what they regard as the spirit of the American democratic tradition. Thus Black and Douglas vote less regularly for doctrines than for interests—for the trade union against the employer, for

the government against the large taxpayer, for the administrative agency against the business, for the injured workman, for the unprotected defendant, against the patent holder—so that, in the phrase of Professor Thomas Reed Powell, "the less favored in life will be the most favored in law."

IN DEFENSE OF JUDGING

It is hard to quarrel with either the historical or the psychological observations that underlie this theory of judicial activism. It is particularly inappropriate, for example, for persons who greatly admired the pre-Roosevelt Court to work up huge moral indignation over Black, Douglas, and Murphy. It is not clear that Black's solicitude for labor unions is per se more reprehensible than Pierce Butler's, say, for railroad companies.

Indeed, the attitude of the old majority and the attitude of the Black-Douglas group appear logically indistinguishable in their assertion of judicial power (except that the old majority was more reckless in its use of the constitutional veto). Where the old Court tended to strike down state and federal measures of liberal economic regulation and to sustain state and federal measures of personal regulation, the Black-Douglas group tends to sustain liberal economic regulation and strike down laws affecting personal liberties. The Frankfurter-Jackson tendency, on the other hand, is to give the legislature discretion in both fields—in other words, to resist judicial supremacy, either of the right or of the left, in the name of deference to the legislative will.

Several factors complicate the problem. Black, for example, will invoke deference to the legislature when it does something he supports or Frankfurter will strike down laws when such action is within the well-established limitations of the Court. Black has sought to confine the due-process clause outside the civil-liberties field to procedural matters, such as the fairness of a trial, while Frankfurter and Jackson have used it against state legislation. Frankfurter, moreover, has not always been consistent on questions of judicial legislation, notably in the *Hutcheson* case, which in effect exempted labor unions from the antitrust laws. All the Justices would admit that the close cases always involve legislation—and most of the cases before the Supreme Court get there because they are close.

The question is what standards shall control judicial law-making, what determines the "results" with which the judge begins. The adherents of Frankfurter feel that Black and Douglas, by substituting their own for the legislative preference, tend toward a state of judicial despotism that threatens the democratic process. All legislation in a democracy, they point out, is the product of compromise among conflicting interests. The rough intrusion of the Court into this delicate equipoise may well upset a precarious balance of social forces. It should therefore be undertaken

only in cases where the Constitution is clearly violated or where political or economic unity is clearly threatened. In every other case, the judge must consciously suppress his personal views and endeavor only to ascertain the intent of the legislature wherever it leads.

When the Court sets out to revise results of legislative compromise on a broad front, it must assume all the risks of entering the political arena. The price of policy making, according to the advocates of self-denial, must inevitably be political reprisal, as the old Court discovered when it tried to usurp the functions of government. The obligation of the Court, they argue, is not to make wise policy decisions; it is to sustain and strengthen the process of political compromise. If the legislature makes mistakes, it is up to the legislature to remedy them. Any other course will sap the vigor of our democracy by encouraging legislatures in an irresponsibility based on an expectation that the courts will backstop their wild pitches.

THE PEOPLE AND THEIR LIBERTIES

The two positions have thus far produced similar results on the subject of economic regulation since most regulatory measures have been more or less acceptable on their merits to Black and Douglas. The more publicized divergence has consequently come on the subject of civil liberties. There are, for example, the flag-salute cases, involving the constitutionality of regulations requiring school children to salute the flag in defiance of their religious scruples as Jehovah's Witnesses. The dramatic overtones of these cases—a persecuted sect, wartime unity, and so on—brought them publicity that the issues probably did not merit. They were freak cases, without broad practical implications. Indeed, the Supreme Court had three times unanimously dismissed flag-salute appeals on the ground that they did not involve substantial federal questions; and the Court that did so included such loyal friends of civil liberties as Brandeis, Cardozo, Hughes, and Stone. The 1940 case—*Minersville School District v. Gobitis*—reached the Court only because the Third Circuit had nullified the local flag-salute law.

All the Justices except Stone concurred in Frankfurter's *Gobitis* opinion upholding the law. Then came the celebrated double take of Black, Douglas, and Murphy—due, according to their friends, to a revision of their blind faith in Frankfurter as a champion of civil liberties; according to their critics, to a recognition of the unpopularity of the *Gobitis* decision. In *West Virginia v. Barnette,* the Court reversed itself.

Frankfurter's dissent in this case has a depth and an urgency that make it a great democratic document. He sought to invoke the old Jeffersonian confidence in the people—the belief that any act of a legislature, so long as there is reasonable doubt about its unconstitutionality, should be up-

held. The fact that at one time or another thirteen Justices (including Black, Douglas, and Murphy) had seen nothing unconstitutional about the flag-salute law shows at least that its status was not an open-and-shut matter. Hence the obligation of the judge—whatever his own views about the wisdom of the law—was to regard it as a legitimate legislative choice. "Were my purely personal attitude relevant," Frankfurter wrote, "I should wholeheartedly associate myself with the general libertarian views in the Court's opinion . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I cherish them or how mischievous I may deem their disregard."

Frankfurter did not like the result of the *Gobitis* decision. He would not have voted for the flag-salute law as a member of the Minersville school board. But he did not find his personal views on its wisdom relevant to the Court's action on its constitutionality. Black and Douglas, on the other hand, after their "long reflection," decided that they did not like the result—so they set about changing it.

Self-denial has thus said: the legislature gave the law; let the legislature take it away. The answer of judicial activism is: in actual practice the legislature will not take it away—at least until harm, possibly irreparable, is done to defenseless persons; therefore the Court itself must act. Self-denial replies: you are doing what we all used to condemn the old Court for doing; you are practicing judicial usurpation. Activism responds: we cannot rely on an increasingly conservative electorate to protect the underdog or to safeguard basic human rights; we betray the very spirit and purpose of the Constitution if we ourselves do not intervene. On statutes involving civil liberties, activism adds, the Court has a special responsibility. As Stone pointed out in United States v. Carolene Products Co., such laws require "more exacting judicial scrutiny . . . than . . . other types of legislation" because they threaten the very processes that are relied on for the repeal of the other types of legislation.

The Stone doctrine does indeed furnish the activists with strong logical grounds for intervention on behalf of personal rights, particularly when laws restrict political agitation. For this reason, though the civil-liberty cases have supplied the most widely discussed of the Court's past disagreements, they are actually less explosive in their future implications than cases involving social and economic legislation.

THE PEOPLE AND THEIR ECONOMY

The new Republican Congress is likely to pass laws on social and economic questions, particularly with regard to trade unions, that eight members of the Court may well regard as unwise and dangerous. The record suggests that the Black-Douglas group may well choose to override legal

"niceties" to emasculate or veto the measures they consider mischievous; that the activist Justices will intervene to save the New Deal as their conservative predecessors intervened to stop it.

In the case that gave coal miners portal-to-portal pay, Jackson, dissenting, charged Black with endorsing as Justice an interpretation of the Fair Labor Standards Act different from the one he had given as manager of the bill in the Senate; for congressional intent, then, Black was apparently substituting judicial afterthoughts—which happened to correspond to a change in front on the part of the United Mine Workers. In the administrative field Black and Douglas have generally sustained the liberal agencies and have generally voted against the more conservative ICC. The blood, sweat, and tears with which the activists have worked upon the doctrine that picketing is a form of free speech will perhaps achieve what they conceive to be desirable results, but at the expense of legal clarity and common sense. If the Republican Congress enacts, say, Senator Ball's bill outlawing the closed shop, should the Supreme Court step in to correct what even the New York *Herald Tribune* regards as an error in national policy; or is this any different from Justice McReynolds and the New Deal?

To Frankfurter and Jackson any a priori commitment, whether to the business community or to labor, is ultimately fatal to the Court. Jefferson, the philosopher of American democracy, repeatedly attacked the notion of an independent judiciary with power over basic policy; and it is squarely in his spirit that Frankfurter observes, if the Court does assume such power, "then indeed judges should not have life tenure and they should be made directly responsible to the electorate." The appeal to Jefferson is confirmed by the appeal to history. As Justice Jackson observed in his *Struggle for Judicial Supremacy*, "in no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court."

"Courts," Stone once remarked, "are not the only agency of government that must be assumed to have the capacity to govern." And again: "The only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." The civil-liberty questions that have raised these issues in the Court have had no great practical significance. But if the Black-Douglas attitude of judicial activism is employed as systematically on behalf of the trade unions, say, as the old Court employed it on behalf of the business community, the political reprisals will be likely to be sharp and disastrous.

On this issue Frankfurter and Jackson are surely right. The larger interests of democracy in the U.S. require that the Court contract rather

than expand its power, and that basic decisions on all questions save the fundamental rights of political agitation be entrusted as completely as possible to institutions directly responsive to popular control

HOLMES VERSUS BRANDEIS

The debate between self-denial and activism can continue endlessly. But one point should be made: it is not a debate between conservatives and liberals. On their substantive views the entire Court, except for Burton, is made up of New Dealers. They disagree over the role the Court is to play in bringing about the kind of society they all want.

In some sense the split on the Court today is the activation of latent differences between the old team of liberal dissenters—Holmes and Brandeis. In the minority the two stood shoulder to shoulder, as any members of the current Court would if faced by a majority that challenged their views on the power to govern—as Black and Frankfurter stood together till 1941.

But there were concealed divergences. Holmes believed that if the American people wanted to go to hell, he could not see anything in the Constitution to stop them. Brandeis, in the words of his official biographer, was "like his conservative colleagues . . . inclined by the pressures and drives of his own nature to translate his own economic and social views into the Constitution." Where Holmes would sustain legislation though it seemed to him "futile or even noxious," Brandeis would require it to conform to certain standards of social wisdom. Thus in a case like *Meyer v. Nebraska*, where Holmes voted to uphold the right of a state to forbid the teaching of German in schools, the two men divided as Frankfurter and Black might divide today.

This point can be pushed too far. Holmes faltered less often in the quest for judicial self-abnegation than Frankfurter (who now occupies his seat, warmed for a few years by Cardozo). Brandeis was more reverent in his feeling for the system of law than Black is, less crude in applying merely humane criteria. In cases involving a conflict of laws, Brandeis could, for example, decide against a widow, an orphan, and a workingman, because he approached them as problems in federalism, not in social exploitation. Yet Brandeis had great respect for Black; and when Douglas was appointed, Brandeis said to him, "I want you to be here in my place."

A broad truth remains. Holmes wanted to make sure that the people could embody their desires in law, whatever the nature of the desires, while Brandeis could never relieve himself of a sense of responsibility for the results of judicial decision. This is the essence of the current struggle. Perhaps it has expressed itself too often on a level of personal irritability. But close observers of the Court say that Frankfurter and Black, for all

their fine intelligence, lack as yet the essential detachment and serenity that make a Holmes or a Brandeis.

THE COURT AND MOUNT OLYMPUS

The unity on basic issues is thus obscured by the vivid sense of profound differences in legal approach. Though these differences do not dictate decisions in particular cases (some lawyers, for example, prefer Frankfurter's reasoning and Black's conclusions, and do not always find the two incompatible), the differences do go to the marrow of the personal relationships on the Court and aggravate the lack of mutual confidence. The advocates of self-denial, with their belief in the autonomy of the judicial process, cannot in their hearts resist the feeling that the activists are unprincipled; while the activists, with their skepticism about judicial objectivity, cannot in their hearts resist the feeling that self-denial is a cover for conservatism.

Discord rose to crescendo last June. The new Chief Justice was saluted by an editorial barrage against the Court he was about to take over. What chance has Fred Vinson to resolve the situation?

In part, as Vinson well knows, the current fall in prestige results from widespread popular ignorance of Court history. From the days of John Marshall, conservatives have perceived the potentialities of the Court as a bulwark against change; and they have propagated the theory that it is an institution almost religious in its sanctity, and beyond passion or politics. Newspapers, condemning the present Court on the ground that it has overruled previous decisions and that it is convulsed by internal conflicts, earnestly believe this situation to represent a calamitous descent from Olympus.

The record shows that the Court has always overturned its own decisions, from *Hudson and Smith v. Guestier* in 1810, which overruled a decision of 1808. Sometimes these have been frank reversals; sometimes they have been reversals concealed by the legal stratagem of "distinguishing" the previous case and narrowing its applicability. Justice Roberts made the wisecrack so widely quoted against the Court about its decisions being like "a restricted railroad ticket, good for this day and train only"; but he himself made one of the great turnabouts in judicial history when he switched votes on the constitutionality of minimum-wage legislation between June, 1936, and March, 1937. Precedent has always been a weapon in the armory of legal debate; by itself it determines nothing.

Personal bitterness among Justices has an equally long history. Supreme Court records are filled with angry dissents, crammed with predictions of the disaster that will flow in the wake of the majority decision.

The only innovation of the present Court was contributed by Mr. Justice Jackson in his blast against Mr. Justice Black, issued from Nürnberg.

The fact is, of course, that the legend of universal past esteem is being trotted out today, not just by the honestly confused, but by those who wish to discredit the kind of Court that would unanimously sustain New Deal legislation. Some of the harshest language comes from people who regarded criticism of the Court as sacrilegious when uttered from another direction in 1936. Every important shift in the majority of the Court has speeded up the process of judicial adaptation and thereby brought down from conservatives identical prophecies of doom. Vinson, who has studied the Court's history, knows how seriously to take the stock charges against it.

WHAT CAN THE CHIEF JUSTICE DO?

The Chief Justice's influence lies essentially in his management of the Saturday conference. Charles Evans Hughes kept things moving briskly and efficiently, confining discussions to issues, forbidding fruitless argument, and adjourning promptly at four-thirty. Harlan Stone, a veteran dissenter with a New Englander's faith in town-meeting democracy, found it hard to cut off talk until everyone has spoken his fill. Especially in his last two years, conferences began to spill over to Monday, sometimes to Tuesday and Wednesday. As the discussion was prolonged, argument tended to degenerate into wrangling, which greatly increased opportunities for mutual irritation.

Stone's respect for the other person's view made him tolerant on the question of multiple concurrences and dissents. In the time of Chief Justice Taft, even Holmes and Brandeis might vote against a decision in conference without writing a dissent, and sometimes without even formally registering their disagreement. Similarly, an opinion of the Court, instead of expressing the clear-cut views of two or three Justices, would be diluted until it was palatable for all the Justices who concurred in the result. Holmes, gazing mournfully upon the wreck of one of his own original drafts, described this process as pulling out all the plums and leaving the dough; but the system did produce a greater impression of unity, even if it sacrificed individualities of style and doctrine.

His own experience had shown Stone the value of dissents in opening up new lines of constitutional reasoning. He was also under pressure, as a result of Roosevelt's 1937 indictment of the Court, not to fall behind in the dispatch of business. Fearing to clutter the docket, he would not let cases hang over long enough to allow emotions to subside and compromises to emerge. When Stone's name was mentioned for chief justice-

ship in 1929, Taft had written with percipience that his appointment would be a "great mistake, for the reason that Stone is not a leader and would have a great deal of trouble in massing the Court."

Vinson comes to the Court with unusual experience behind him. No other Chief Justice has held such important posts in all branches of the government. During the war his slow, drawling anecdotal common sense, masking a thoroughly capable administrative intelligence, won him a succession of jobs of ascending importance, and he grew under the impact of responsibility. His heavy-lidded, sunken face, the skin lying in impassive folds, gives an impression of patience and strength. He has seen through some of the toughest administrative wrangles in the government.

In Vinson's favor is the chastening effect that public outcry always has on the Supreme Court. Of course Jackson and Black have hardly forgiven each other, but both are now on their good behavior. Even the realists must appreciate the necessity from their own viewpoint of preserving the prestige of the Court as an institution.

But Vinson has never had to face such an independent and restive group as his brethren on the Court. It will be hard for him to cope intellectually with men like Black and Frankfurter: his mind does not move fast in the same way, and he is uneasy among abstractions. Where Hughes could dominate by superior clarity and knowledge, Vinson will have to follow the example of Chief Justices like Taft and Waite and hope to influence the Court by a certain massive instinct for practicality.

As someone close to the Court observed, "Frankfurter will watch the way he reasons; Black the way he votes." Vinson may well end by joining his fellow Kentuckian Stanley Reed in a middle bloc. He could then use the balance of power as a means of bringing pressure to avoid inessential clashes of high principle and reduce the passion for multiple opinions, which, by sustaining a result without sustaining a single line of reasoning, produce so many headaches for lawyers when they endeavor to advise clients.

But Vinson knows he is not playing with unruly boys. It would be disastrous if, for example, he tried overnight to restore Hughes's iron hand, though he has already shown administrative skill in conference. The Court still has its quota of frustrated ambitions. Vinson may yet sympathize with Stone's remark on Byrnes's resignation: "I told him that I was sorry to lose him but glad we had one member of the Court who could make up his mind about his own career."

This Court's achievements have already been impressive in its accommodation of the Constitution to current needs, in its affirmation of the power to govern, and in its vigilance to protect the rights of individuals and minorities. The conflict on the Court, if it can be restrained from intellectual and personal extremes, may lead to a debate in the most fruit-

ful tradition of American political thought. The tension between self-denial and activism is a historic element in our judicial system. Its wise resolution could easily make this Court, with its remarkable abilities and its agreement on a wide range of constitutional fundamentals, one of the great creative Courts of history.



CHAPTER XII

The State Judicial System

62. POLITICS AND JUDICIAL ADMINISTRATION [1]

THE theme of this selection is that the state judiciary should again become independent, as it was prior to the 1830's. The loss of its independence has multiplied evils in the judicial system and body politic. According to this author partisan politics, used in the bad sense of the term since the Jacksonian revolution, was the cause of loss of judicial independence. The major remedy lies in the method of selecting state judges. In this controversy the author is uncompromisingly against the present elective system and also against any solution short of a return to an appointive judiciary serving during good behavior. Any popular check on judges saps their essential independence. The unwritten premises underlying the author's arguments are that there are certain fixed general principles of justice which ought not to be affected by popular sentiment and that the judiciary is the guardian of this higher law.

AN INQUIRY into the relations of politics to the judiciary first calls for a definition of the terms in the sense in which they are used in the discussion.

In the broadest use of the word "politics," we think rather indefinitely of the general structure of an organized society, the principles that govern it, and the forces and instrumentalities involved in its polity. More particularly, and in the commoner use of the word, we mean the process whereby organized groups prevail over other groups for possession of the machinery of government, and whereby individuals advance themselves into official positions—in short, practical politics. By the term "judiciary" is meant, in this discussion, not merely judges but all judicial officers. The relationship of the two, thus defined, has raised one of the most urgent

[1] Stuart H. Perry, *Journal of the American Judicature Society* (February, 1934), Vol XVII. No. 5, pp. 133 ff. All footnotes omitted.

and momentous problems in America today—a problem that may be called unique in the history of judicature.

INDEPENDENCE OF THE JUDICIARY

That courts and judges should be independent, in some sense of the word, has been accepted by legal and political writers of all ages. The term "independence," however, has varied in its meaning and its connotations according to the political thought of the time and the particular influences that threatened a sound administration of law.

In France, and in other countries that have been influenced by French legalistic thought, great weight is attached to the doctrine of the separation of the executive, legislative, and judicial powers—not from solicitude for the judicial power in particular, but from a desire to insure each of the three from interference by the others.

Much closer to our present problem was the long struggle for an independent judiciary in England, where at an early period a new conception developed of the relation of the judicial power to the other branches of government, fundamentally different from that prevailing in any other European country. That conception, sometimes called the principle of the supremacy of law, or the rule of law, involved the principles that no person should suffer as to person or property except in accordance with established law enforced by regular tribunals (or as expressed in our constitutions, by due process of law), and that no person should be exempt from the equal operation of law and from its regular processes.

This fundamental conception of the judicial power, which we have fully inherited, had to make its way against the encroachments of the executive power. English judges being appointed by the sovereign, and holding office during his pleasure, would be inclined to favor the views of the crown. This was true despite the fact that the right of removal for political reasons was for a long period very sparingly exercised, even under the masterful Tudors. Under the Stuarts, however, it became common, contributing strongly to the great political and constitutional changes of 1688. Twelve years later the Act of Settlement definitely removed that handicap upon the independence of the courts by providing that judges should hold office during good behavior, that they should be paid fixed salaries, and that they should be removable only upon the joint address of Parliament.

From that time the British judiciary was fully independent of any important source of disturbing influence under the political conditions then existing. It was independent alike of the crown itself and of Parliament, to which the prerogatives of the crown had largely passed.

This independence was carried across the sea to the American colonies,

where it continued for nearly half a century after the War of Independence. Then a new form of influence arose, undreamed of at the time of the Act of Settlement, and destined gravely to undermine and pervert the administration of law in America—the influence of politics. The courts, liberated from the power of the executive and the legislature, fell under the power of public sentiment—not expressed through legislation but operating directly and personally upon judicial officers.

POPULAR SOVEREIGNTY

This profound change was a product of the great democratic revolution in American politics that is associated with the time and the personality of Andrew Jackson, and resulted directly from the innovation of electing judges of state courts for short terms. The change was due primarily to the wave of liberal political thought which tended to bring all offices more directly under the control of the electorate; but that influence was greatly reenforced by the motives and the needs of organized politics.

The democratic revolution may be said to have begun with the election of Thomas Jefferson, though it did not reach its full development until a quarter of a century later. His political philosophy, which was based on equality of individual rights, a strict construction of the Federal Constitution, and a liberal view of state sovereignty, naturally included the extension of suffrage, rotation in offices, and enlarged powers of local self-government. Pivotal in that general scheme was the extension of suffrage, which in that era proceeded rapidly. At the beginning of the century only three states had adopted the principle of manhood suffrage, but by 1820 it had been written into the constitutions of Alabama, Illinois, Indiana, Louisiana, Maine, Mississippi, and Missouri.

As reflected in this roster of states, the new liberalism was most strongly under way in the new states west of the mountains, where social and political equality had been established by the conditions of life, and where a bold and energetic people were jealous of their local political powers and impatient of legal restraints. This new political force—destined to determine the course of American political policies—triumphed completely in 1828 with the election of Jackson. He was the living embodiment of the political creed of the frontier people, who believed that everything should be decided according to the popular will. By this time broad, though not quite universal, manhood suffrage existed in all the states, except two of the original thirteen. Such property qualifications as still existed were liberal, and in the newer states they had little practical significance.

In such an atmosphere the restraints imposed by courts were often irksome. Even in Jefferson's administrations there was opposition to the

Federal courts among Democrats in Congress, who wished to get power over Federal judges by removing them at pleasure.

Still more did the Federal courts stand in the way of Jackson, who conceived a popular mandate to be superior to any court's interpretation of the Constitution, and considered himself to be the exponent and the instrument of the popular will. A conspicuous example of that attitude was his open defiance of three separate decisions of the Supreme Court upholding the treaty rights of the Cherokee Indians in Georgia, which he refused to enforce. The last one was in 1832, and in his campaign for reelection that year he explicitly declared that he would leave the matter to the people—in other words, that he would permit the Georgia settlers to oust the Indians in violation of law because that was in accordance with their interests and desires. There were specific sources of dissatisfaction, too, notably on the part of the debtor classes in a number of states, especially Alabama and Kentucky.

A critical attitude toward all courts was a natural incident of the Democratic victory. They had taken over the legislative and executive branches of government, but the Federal judiciary still remained in power, most of the judges holding office during good behavior and therefore remaining unaffected by the electoral upset. That was true not only of the Federal bench, but also of judges in all but one of the original thirteen states, and in the Northwest Territory as organized under the Ordinance of 1787.

It was therefore no coincidence that precisely in that period a general movement started to curtail the authority of courts by diminishing their independence. This was done by limiting the tenure of judges and by making them elective.

THE FIRST ENCROACHMENTS

Action was first directed toward limiting the tenure of appointive judges to fixed terms, and between 1830 and 1845 nine states made such changes in their constitutions, all but one of them being Western or Southern states. One of these, Mississippi, also made its judges elective—the first state to adopt that plan with the exception of Georgia, which in 1777 provided for the election of judges of the superior courts.

During this period no changes were made in the manner of choosing judges. The liberal movement, however, was gaining momentum and extending into the more populous Eastern states, where full suffrage gave new power to the poorer classes and enormously increased the opportunities of organized politics. This movement developed in full force in 1846, when the new constitution of New York made practically a clean sweep of all appointive offices, including not only judges but also district attorneys and even clerks of courts.

New York's striking departure led a widespread movement to make judges elective for fixed terms, and in the decade from 1846 to 1857 no fewer than seventeen states wrote similar provisions into their constitutions, all but four being in the West and South. During the same decade two additional states which had not yet made judges elective reduced their tenure to fixed terms.

The process has continued until today the elective plan prevails in thirty-seven states. In five (Maine, Massachusetts, Delaware, New Hampshire, and New Jersey) judges are appointed by the governor; in five others (Connecticut, Rhode Island, South Carolina, Vermont, and Virginia) they are chosen by the legislature; and in Florida the higher judges are elected, while the district judges are appointed.

Thus the judiciary in America, for more than a century safeguarded against executive or legislative interference, was delivered into the bondage of politics. The safeguards established so effectively in the Act of Settlement failed to protect the courts from this powerful new influence that was destined to weaken and discredit the administration of law in a large proportion of American courts.

That tendency did not escape the keen observation of De Toqueville in 1832, who wrote with such prophetic vision:

"I am aware that a secret tendency to diminish the judicial power exists in the United States. . . . Some other state constitutions make members of the judiciary elective, and they are even subjected to frequent reelections. I venture to predict that these innovations will sooner or later be attended with fatal consequences; and that it will be found out at some future period that by thus lessening the independence of the judiciary they have attacked not only the judicial power but the democratic republic itself."

PRACTICAL POLITICS

With the culmination of the democratic revolution in Jackson's election came another influence that operated even more powerfully than a liberal political philosophy to make judges elective and to bring them even farther under the control of popular sentiment. That influence was organized party politics of the modern type, with which the name of Van Buren is often identified. One of the "Albany Regency," a political machine which had long operated effectively in New York State politics, the capable and adroit Van Buren helped greatly to elect Jackson in 1828, and as Secretary of State and later as Vice-President was his most influential adviser.

Whether the spoils system on a national scale was primarily the work of Van Buren or of Jackson may be debatable; the famous phrase "To the victors belong the spoil" is attributed to William L. Marcy, also of the "Al-

bany Regency." But at any rate the system came with a rush at the opening of Jackson's first administration in 1829, when there was a wholesale dismissal of Federal office-holders to make way for party appointees, and the same system quickly invaded state politics, where full suffrage made a fertile political field. It soon became universal, it was accepted by Whigs as well as by Democrats, and it remained thenceforth the most important factor in our political system excepting the Constitution itself. Party allegiance or party service became the criterion in filling all public offices.

Practical politics is not merely an incident or a phenomenon; it is a business, very definite in its aims and highly efficient in its technique. The control of elections in order to further broad policies is its ultimate purpose, and at times that is fully dominant and lifts campaigns high above sordid levels. But often that higher purpose is mingled with the complex of mere political business, and often, especially in state and local elections, broad policies become only incidental and serve as an excuse to capitalize party loyalty for selfish ends. The stock in trade of practical politics is votes. Its business is the gathering of votes. Its profits are offices, the salaries attached to them, and the patronage controlled by them.

In the actual operation of this business of practical politics every office is a prize to be bestowed or competed for according to the methods of the game. Nomination is a reward for service, a bid for future service, and a product of organized influence. The same is true of election. The favored one is a source of contributions and activity which inure to the benefit of the party. The game naturally attracts active and popular men —not necessarily men of the highest type, but men who can win votes and render useful political service. Therefore the practical politician has every motive to increase and multiply offices that are elective for short terms.

That process began with the great democratic movement already referred to, and it continued until state and local ballots in practically all the states became cluttered with offices that by every sound principle of public economy ought to be appointive.

That this multiplication of elective offices was in response to popular demands, and a direct expression of the prevalent political philosophy, is a common assumption, but by no means fully acceptable. That assumption sufficiently explains the change from appointment to election in offices of outstanding responsibility, or those in which the public is especially interested. It cannot, however, account for putting on the ballot unimportant ministerial offices in which only routine duties are performed, involving no question of policy or discretion.

It is impossible, for example, to imagine the public demanding the right to elect a register of deeds, a county surveyor, or the clerk of a court. It is easy, however, to imagine politicians making such offices elective in

order to advertise themselves as "willing to trust the people," and for the very practical purpose of creating new political prizes and new sources of party revenue and party services.

It may fairly be conceded that organized politics, involving in some degree the spoils system, is necessary under our political and social system. Party government is indispensable; its worst evils are less than those that would follow its abandonment. In a democratic social order, public offices must be open to poor men and therefore must be properly paid; salaried offices naturally become a reward for party service; and only by rewarding party service can party organization be maintained. It is not the writer's intent to express a general condemnation of the party system, or of the use of political patronage; such condemnation is directed only against their application to the judiciary.

THE JUDGES IN POLITICS

Practical politics thus organized tends to make every office a party asset and a political prize to be sought by political methods. Judgeships are no exception. The office is naturally attractive to aspirants, and political bosses welcomed its addition to the ballot. Various groups and interests, often politically influential, were interested in the personality of the judge whose decisions might affect them. The people at large—eager in those days for a free hand in every form of enterprise and exploitation, and impatient of all restraint—were (in so far as they thought about it at all) willing to see the administration of the law made more subservient to the popular sentiment of the time and place, and the politicians' platitudes about bringing judgeships "nearer to the people" were in harmony with the political feeling of the time.

Another influence in making judgeships political offices was the fact that the position was one that appealed to the most effective type of politician of that day—the politically minded lawyer. In the newer states especially, the lawyer found great political opportunities. He traveled about; he was a person of distinction; trials aroused great interest; oratory counted for much, both in and out of court. Political activity advertised him in his profession, and his professional work formed a stepping-stone to political success.

It should be added that politics attracted genuine ability in the newer states, and many men of the highest type reached the bench in spite of the inherent faults of the elective system. In the older states, especially in New England, the democratic reaction against everything savoring of aristocracy for a generation alienated the better classes from politics. Happily, the election of judges did not extend to those states, thus saving the bench from an undesirable invasion.

It is very interesting to observe that the drawing of the judiciary into politics was accompanied by a widespread movement to "strangle" the trial judge, as a recent writer has aptly put it, by forbidding him to comment on evidence. This change was first made by two states in 1796—by statute in North Carolina and by constitutional change in Tennessee. The Jacksonian epoch saw its adoption in three more states—in Mississippi and Louisiana by statute and in Arkansas by constitutional change. But in 1847, when the election of judges was sweeping the country, the movement was resumed, and in the next thirty years fourteen states followed. Today the power of judges is thus limited by constitution or statute in twenty-six states, while in twelve others the supreme courts have weakly abandoned the traditions of common law and imposed the same rule on trial courts without legislation.

Still further handicaps were imposed on state judges by legislation, such as compelling them to comply with requests to charge, and turning over to counsel the selection of juries.

These procedural changes, like the election of judges, are accounted for only in part by the reaction of liberal public opinion against authority and a desire to curb the powers of judges. Another element comes clearly into the picture. The same forces that put the bench into politics put the bar into politics. Lawyers, more than ever before, became politically minded, and a large proportion of them were politically active. Naturally they favored methods that would enlarge their own powers and give them greater opportunities to attract public attention. Thus the bar, instead of supporting the bench in adherence to traditional procedure, became in a sense its rival and sought to transfer the conduct of trials from the hands of the judge into its own.

In commenting, without expression of criticism, on the reasons for the extreme latitude enjoyed by counsel in American court rooms, Simeon E. Baldwin wrote:

"Another and more fundamental one is that the judge and lawyers stand more nearly on the same level both in public regard and in official position. *The lawyer holds a more permanent office in court than the judge.* He belongs to a class that is influential in the community, and whose members usually share actively in the direction of party politics. The judge in most instances holds but brief authority."

THE BAR IN POLITICS

Any discussion of the subject of politics and judicial administration would be incomplete without adverting to one of the most sinister phases in the whole disintegrating process—the influence of politics upon the American bar. By nature and by tradition a purely professional calling,

the practice of law has become so infected by politics that it must bear a large share of the blame for the gross evils that now afflict the administration of justice in this country.

Reference already has been made to the influence of the politically minded lawyers in making judgeships, as well as other offices, elective. The result has been not merely to make the bench an object of political ambition, but also to tempt the bar with various political opportunities. From the office of attorney general down to that of circuit court commissioner, every legal office has become a prize for the lawyer-politician. Even legal offices that remain appointive, such as that of city or village attorney, are sought and bestowed according to the methods of politics.

The effect upon the office of prosecuting attorney has been especially deplorable. By any proper appraisal the incumbent should be able, impartial, and fearless, and he should approach his task as an instrument of justice rather than as an agent of vengeance. Making the office political has often produced the opposite results. In rural counties, the pay being too low to attract leading practitioners, it becomes a stepping-stone for young lawyer-politicans. The result is inexperience where matured legal ability is called for. In large cities, where the office is one of great power and wide political opportunities, the prosecutor often becomes a powerful political boss and not infrequently yields to sinister influences. The political prosecutor is a prominent factor in the domination of politics over the administration of justice, he contributes to its most demoralizing effects, and his influence favors its perpetuation. The rescue of that office from politics is second in importance only to the rescue of the bench itself.

The malign effect of politics upon the bar, however, is not confined to the production of the politician-lawyer. It has also operated to lower the general standards of the profession.

Lax requirements for admission to the bar are the inevitable joint product of equalitarian ideas coupled with practical politics. The young man who wanted to be a lawyer with little or no preparation would get scant consideration under a system dominated by an independent judiciary. But political motives prompt legislators to make his way easy, and the same motives deter a political bench and bar from effective resistance. Politicians are not greatly concerned with the question of whether a given individual ought to practice; they are interested chiefly in the fact that he wants to, and that he and his friends have votes; and they well know that an uncritical public is inclined to approve the idea of giving anybody a chance to follow any vocation he chooses.

Such influences make it difficult to raise standards of professional conduct. Disbarment proceedings are very irksome to a political judge, and he is loath to employ the process of contempt. Politics is chiefly respon-

sible for those noisome by-products of our judiciary, the shyster and the low criminal lawyer.

THE PRESS AND THE JUDICIARY

The evil effects of politics upon the judiciary have thus far been discussed in the light of conditions that prevailed from the time the bench ceased to be independent. In more recent times another factor has greatly aggravated those evils—the relations of the press with the judiciary. A traffic has developed between newspapers and judicial officers which has wrought infinite harm to the administration of justice and to the prestige of the courts.

This traffic affords a classic example of the operation of the law of supply and demand. On the one hand is modern journalism, intensely competitive, catering to a public of all grades and tastes. In urban centers, with their appalling prevalence of crime and a large class of readers who revel in such news, a certain class of papers play up crime and other sensational court news to an exaggerated degree. Their reporters seek more than mere official proceedings; they want "inside stuff"—advance tips, evidence, theories, clews, predictions. At the trial they want a free hand to deal with the scene as a spectacle or a sporting event. Inasmuch as such methods often interfere with the administration of justice and would clearly be punishable as contempt, they demand a degree of license that amounts to immunity.

Such is the demand on one side. On the other side is a political prosecutor who got into office by votes and must appeal to voters for reelection. Advertising is invaluable to him; he must keep in the public eye. Police and detectives operate either under his orders or under the orders of a political sheriff or chief of police who feel the same urge to make medicine with the voters. The judge also came to the bench in a scramble for votes, and he must again have votes to stay there. Publicity is not unwelcome to him; not infrequently, especially in large cities, he is avid for it. By the same token he is very reluctant to offend or disappoint the newspaper men whose favor is so desirable.

Unfortunately each side can supply precisely what the other demands, and their coöperation has produced a shameless traffic whereby official information on judicial matters is exchanged for publicity. The reporters get what they want—the "inside stuff," the color, the background. Prosecutors and police officials strut in the spotlight; there is much official babbling about actions taken or to be taken, theories and suspicions, the importance of evidence, and expected confessions.

This all could be checked by a firm judge, under the unquestioned powers of contempt. But the judge is a politician, too. At the best he is

chary of offending a powerful, and sometimes an unscrupulous, newspaper. At the worst he eagerly uses the newspaper as his press agent.

Thus has arisen that unique disgrace to our legal system commonly referred to as "trial by newspaper," which has contributed so greatly to make the enforcement of criminal law in America the most inefficient in the civilized world. It is the result of the traffic in news, which in turn derives directly and solely from the demoralizing effect of politics upon the machinery of law enforcement.

THE PRIMARY

The doctrine of popular sovereignty which created the American system of organized party politics was destined to be invoked again against the excesses of that very system. The machine politics of Jackson's and Van Buren's day, after three quarters of a century of operation developed abuses that called loudly for reform. The result was the primary system of nominations.

Used tentatively as early as the sixties, it became common in cities in the nineties, and in 1903 Wisconsin extended that method of nomination to all offices. Within a decade thirty states had adopted the state-wide primary, which now prevails in almost all the states. Though some nominations in many of these states are still made by conventions, judicial candidates, especially for the lower courts, have largely been brought within the primary system.

How greatly the primary has improved American politics is debatable; but so far as the judiciary is concerned, the effect has been clearly detrimental. Upon the old party politics the primary has superimposed personal politics. The judicial candidate must still follow a similar path, but he must stoop lower.

The old system of organized politics was an adaptation of the general principle and method of representative government, and with all its faults it preserved an orderly and disciplined procedure, together with a large measure of party responsibility. Under the machine-ruled convention system, the nomination of a judicial candidate was at least an intelligent action. The delegates and leaders were interested in his merits, and fairly competent to pass upon them. The candidate also felt a responsibility to his party, and if elected he felt that a proper discharge of his duties would retain for him the confidence of his party organization and thus give some assurance of continued tenure. His status thus relieved him from the necessity of a personal scramble for votes. His fortunes followed those of a party ticket.

All that is changed by the primary. The representative principle embodied in the party convention is gone, and with it party discipline and

responsibility have largely disappeared. The candidate must make his appeal not to a fairly representative convention of delegates but to a great, indefinite public, most of whom are utterly incapable of judging his merits as a jurist, and still less capable of comparing his merits with those of several others. The capacity for wise selection is largely lacking; responsibility is wholly so. The candidate is in competition with an indefinite number of rivals, and the winner may poll only a minor fraction of the total vote. If nominated and elected, his tenure is governed by the same mischievous influences. His standing in the counsels of his party no longer protects him; his party's strength does not insure his reelection. That must depend wholly upon his power to get votes, and a vote got in one way is exactly as good as a vote got in some other way. Election is not a test of merit but of popularity, and popularity involves many factors other than judicial fitness.

The obvious shortcomings of such a system soon led to attempts to mitigate its effects on judicial selection by providing that candidates, instead of being forced to declare their partisanship, should appear on special ballots without party designation. This change has been adopted in about a dozen states, practically all west of the Mississippi. It by no means does away with the intrinsic weakness of primary choice, and in populous centers it seems to have made personal politics in judicial elections even more harmful and offensive.

THE RECALL

The doctrine of popular sovereignty found its final and most extreme expression in the methods generally described by the phrase "direct legislation"—the initiative, referendum, and recall, which in their essence are the substitution of mass action for representative government. In this discussion the recall alone need be considered.

This device, which developed concomitantly with the primary system, seems to have been first employed by Los Angeles in 1903 under a charter provision based upon a law in one of the Swiss cantons. Its use rapidly extended among cities, and in 1908 Oregon applied the recall procedure to all State offices. The recall was adopted in ten states, the last in 1920, all but one of these being west of the Mississippi River. In all but four of them, judges were made liable to recall.

A curious variant upon this method was proposed by Theodore Roosevelt in 1912—the recall of judicial decisions. Like the movement to weaken the judiciary nearly a century earlier, this move was prompted by President Roosevelt's dissatisfaction with certain actions of the courts, as well as by political expediency. This doctrine is defined as follows in the platform of the Progressive Party in 1912:

"That when an act passed under the police power of the state is held unconstitutional under the state constitution by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the act to become a law notwithstanding such decision."

It would be hard to imagine a step more inconsistent with the American conception of constitutional government. It is open in a degree to the same objections that lie against the recall of judges, and also to the much graver objection that it would tend to destroy the force and consistency of constitutional provisions. Fortunately the agitation for this peculiarly mischievous innovation passed away with other political issues of the time. In one state, Colorado, it was written into the constitution in 1912, but the amendment was declared void by the State Supreme Court in 1921.

CONCLUSIONS

In this brief survey of a century's political changes it is apparent how profoundly the original conception of an independent judiciary has been altered by the powerful currents of liberal political thought in America and by the practical operation of organized politics. In appraising the consequences we are not confined to deductive reasoning nor to doctrinary pronouncements, because, fortunately, throughout this period the operation of the unaltered, or less altered, judicial system in England, Canada and the New England States furnishes a reliable control for our observations.

Both in the historical view and in the light of such contemporary comparisons, it is indisputably plain that the administration of law in state courts has undergone a profound deterioration. Without going into the details of that extensive topic, the writer may be permitted to repeat a brief recapitulation from a former discussion of the subject:

"To the influence of politics can confidently be ascribed most of the chronic evils in our system of law enforcement, and certainly the egregious conditions in large cities where these evils attain their maximum. In the long category might be mentioned the corruption of police methods; the degeneration of trial by jury; the abuse of such procedural steps as bail, continuances, dismissal and habeas corpus, the perversion of probation, suspended sentences and pardons; the selection of unfit judges, prosecutors and police officers; and finally all the mischief that flows from the relations of those officers with the press. Some of these evils might occasionally arise under a nonpolitical régime of law enforcement, but they would be sporadic and unrelated; under the existing régime they are endemic—a natural and inevitable product."

The origin and the character of these evils indicate clearly the remedy,

which is solely and inescapably the divorce of the judiciary from politics. That is no small undertaking, because the unwholesome seeding that germinated a century ago has sent its roots deep into our political system. Yet though difficult it is not hopeless, but the contrary. For, after all, the result as it affects the judiciary has been to a certain extent adventitious, and not an inexorable result of our political philosophy.

If the subjugation of the courts to popular sentiment and political machination had been the direct objective of American liberalism, the problem for the present would be quite insoluble. But the judiciary, to a large degree, has been dragged along in the general movement to pull down arbitrary authority to a level of greater responsiveness to the people. The great principle of an independent judiciary, so perfect in its logic and so salutary in its application, has not been repudiated, but only temporarily abandoned through misunderstanding of its true nature and its validity.

Already the forces of reform are mobilizing. Not only have efforts been made to ameliorate the evils through such ineffective makeshifts as the nonpartisan primary for judges and the indorsements of bar associations and civic bodies, but in a number of states there is a strong and definite movement to make judges appointive for long terms or during good behavior. The legal press is filled with discussion of reform measures, and (much more significant) many newspapers are earnestly advocating the appointment of judges and publishing a great volume of editorials, interviews, and special articles pointing out the superior results attained under the appointive system in England and Canada and in such of our states as have an independent judiciary. The illuminating questionnaires conducted by the National Economic League have shown that judicial reform and better law enforcement are among the foremost issues that engage contemporary public thought.

Palliatives and half-way measures are illusory. They are wasteful of time. Their net results may even be unfavorable, because they tend to give a false impression of accomplishment and thus postpone that genuine and radical reform which alone will bring the satisfactory results. Emerson's famous apothegm, "Hitch your wagon to a star," could not be applied more aptly than to this effort. There can be no fundamental and durable improvement in the administration of law in America until the judiciary is restored to genuine independence.



63. JUDGES: THEIR SELECTION AND TENURE [1]

FOR years a controversy has raged over the best means of selecting judges. Should they be appointed with legislative confirmation, as in the federal judiciary, or should they be popularly elected, as in more than three fourths of the states? The problem of removal presents an equally difficult question. In the federal judiciary the method is the complicated and little used impeachment process. In most of the states the elective process solves the problem, often leading to the removal of a judge because of a general partisan shift rather than a measuring of the individual judge's actions. An appointive judiciary serving during good behavior is independent. An elected judiciary is more responsive to the popular will, a responsiveness that is desirable partly because of the social effect of judicial decisions overruling legislative action. The American Bar Association favors a compromise of the two positions—appointment of judges by the chief executive from a selected list made by a partly professional and partly lay commission, and periodic voting on the judge in the form of the question, "Shall Judge Blank be retained in office."

"It is an old saying that by looking at a frog one cannot tell how far he can jump. It is likewise true, although perhaps not as fully realized, that by seeing a man's picture on a telephone pole voters cannot tell whether he possesses the essential judicial qualities."

OUR methods of judicial selection and tenure have mainly resulted from two revolutions: the Revolution of 1688 against the Stuart Kings in England and our so-called Jacksonian Revolution of the eighteen thirties. The latter, while more peaceful, was no less drastic in its effect on government, particularly our state governments.

In England before Magna Charta, the will of the prince was the law of the land. Thereafter, the limitations and safeguards of the great charter were effective in individual cases only to the extent that the courts would enforce them. When the judges' commissions read at the pleasure (*durante bene placito*) of the king, these great principles of liberty meant little in a case in which the king's interest was opposed to them. This was fully recognized in the long struggle for freedom against the tyranny of the Stuart kings throughout the seventeenth century. There were some outstanding instances of courageous judges, like Lord Coke, who would not let the king dictate their decisions. But the fact that they usually lost their offices, after refusing to follow the king's will, was not conducive to the establishment of an independent judiciary. Judicial independence came only after James II was driven out by the Revolution of 1688. The

[1] Laurance M. Hyde, *Journal of the American Judicature Society* (February, 1947), Vol. 30, No. 5, pp. 152 ff. All footnotes omitted.

Settlement Act of 1701 established that the judges' commissions should thereafter read "during good behavior." (*Quamdiu se bene gesserint.*) The present high standing of the English judiciary has been the result. It has become the great bulwark of English liberties during the last two centuries, as well as an outstanding model of efficiency in the administration of justice.

The events leading to the Revolution of 1688 were fresh in the minds of the men who wrote our constitution. They had still more recent examples in the acts of colonial judges controlled by the king. They had complained in the Declaration of Independence that "he has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." They believed as stated in the Federalist papers that "independence of judges is equally requisite to guard the constitution and the rights of individuals." Jefferson commented: "In England, it was a great point gained at the Revolution that the commissions of the judges, which had hitherto been during pleasure, should thenceforth be made *during good behavior.* A judiciary dependent on the will of the king had proved itself the most oppressive of all tools in the hands of that magistrate."

At the beginning of the French Revolution Edmund Burke wrote to friends in France criticizing proposed provisions for the judicial branch of their new government, as follows: "Instead of seating your judges on a bench of independence, your object is to reduce them to blind obedience. * * * They are to be sworn to obey all the rules, orders, and instructions from the National Assembly. * * * They become complete and most dangerous instruments in the hands of the governing power, which, in the midst of a cause, or on the prospect of it may wholly change the rule of decision. * * * They know not by what law they judge, nor under what authority they act, nor by what tenure they hold." It is significant and perhaps not surprising that "the Reign of Terror" followed such ideas of government, and this demonstrated that control of courts by the legislative branch can be equally as dangerous to liberty as executive control. It was further proof of the following statements in the Federalist: "The standard of *good behavior* for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy, it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. * * * Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

For these reasons, a judiciary selected by executive appointment, with confirmation by the Senate, and with life tenure, was established by the

constitution as an independent branch of our government. This example of life tenure was either followed or preceded in the constitutional provisions of ten of the original thirteen states (although judges were chosen by the legislature in some) and by eight of the eleven new ones admitted before 1830. But during the next 25 years, 15 states changed to short terms filled by popular election. Every state admitted after 1846 adopted that system. Now only three states (all being among the original thirteen) retain life tenure, and only two of them have the appointive system.

Why was this situation so radically changed between 1830 and 1850? Many explanations have been made. Jefferson's personal differences with Marshall and other controversies over the acts of early federal judges resulted in a change of his views and influenced others. Some of the other reasons most frequently given are: the growth of the west and the desire to break the political monopoly of the more aristocratic groups in the older states; the wave of democratic fervor which swept over the world, bringing about universal suffrage throughout America, and resulting in the Revolutions of 1830 and 1848 in Europe; the recollection of many Irish immigrants of harsh prosecutions arising out of eighteenth century movements for Irish freedom as well as the earlier persecutions by English and Scotch judges, which were partly responsible for waves of immigration to America; the unpopularity of lawyers and the creditor classes they often represented; the unpopularity of many rules of the common law which the courts followed and which the new state legislatures believed should be superseded by statutes; the pioneer idea that any man should be able to perform any task or fill any office without special training; and the scarcity of well educated lawyers available to fill judicial positions especially in the new states. Whatever the reasons were, it is fairly obvious that the movement went too far, resulted in the impairment of judicial independence and lowered the standing of the judiciary in our state governments. James Bryce, writing in 1889, commented: "Any one of the phenomena I have described—popular elections, short terms, and small salaries—would be sufficient to lower the character of the judiciary. Popular elections throw the choice into the hands of political parties, that is to say, of knots of wire-pullers inclined to use every office as a means of rewarding political services, and garrisoning with grateful partisans posts which may conceivably become of political importance. Short terms oblige the judge to remember and keep on good terms with those who have made him what he is, and in whose hands his fortunes lie. They induce timidity, they discourage independence."

THE FACTOR OF EXPERIENCE

Other harmful effects resulted from these factors. Where tenure is secure, so that judges may be sure that judicial work will be a life career, they can have time to study and utilize the best judicial methods. However, where the turnover of personnel is frequent, as is usually true in states closely divided politically if judges are elected on party tickets, judges cannot expect to stay on the bench long enough to have much inducement to thoroughly study and perfect their work. To do the best judicial work, or even to learn the best methods for doing it, years of research and experience are required. Many judges do good work from the beginning of their service, but, as in any other work, all can learn to do better work in the hard school of experience. There has been a vast waste of judicial talent in many of our states by turning men out of judicial office about as soon as they have begun to learn how to best do the job. This situation has been one of the greatest of all handicaps to progress toward better judicial methods.

It seems reasonable to believe that the great number of cases decided during the last century upon technicalities of procedure instead of upon the merits, may be partly explained by the factors described by Bryce. Men of inferior learning in substantive law have great temptation to take refuge behind procedural technicalities in their decisions. Likewise, this is a good device for reaching a result which could not be justified upon a discussion of the merits. The great mass of precedents for decisions on procedural technicalities which has accumulated in this country during the last one hundred years has long been a retarding influence on the improvement of the administration of justice. We have finally begun on a nationwide basis to relieve this situation by procedural reform with the adoption of the new federal rules now being followed in many states.

On the subject of short term tenure with elections on political tickets, a former Chairman of the Judicial Administration Section of the American Bar Association, Judge Henry T. Lummas of Massachusetts, has pointedly stated that even a politician may make a good judge if he can stop being a politician when he goes on the bench, but that it is a great handicap to have a system which requires a judge to be a politician to remain a judge. The foundation of our whole law enforcement system must be respect of our people for the law and this must depend mainly upon confidence in the independence, ability and integrity of the judges who apply it. There must be no partisanship in the administration of justice and there should be none in the selection and tenure of judges.

THREE DIFFICULT PROBLEMS

Nevertheless it must be recognized that there are three difficult problems of judicial selection and tenure, namely: How to select a man who is competent to be a judge?—How to keep him on the bench if he does become a good judge?—and, How to get rid of him if he does not? The first and most difficult problem of selection may likewise be divided into three parts: To find a man with the three essential qualities of personal integrity, judicial temperament, and adequate legal training. The two remaining problems of tenure both are: To make the judge's tenure depend as much as possible upon the record he makes in service on the bench.

However, the matter of proper selective methods is most vital to the maintenance of a highly qualified judiciary. As Dean Roscoe Pound has commented: "Too much thought has been given to the matter of getting less qualified judges off the bench. The real remedy is not to put them on." Even the operation of the system of executive appointment with confirmation by the Senate in our federal government has not been completely satisfactory. Too often it has resulted in the actual selection being made by one senator or by a senator's political sponsors. Since the president must rely upon senators for support in other matters more important to the success of his administration, he is likely to give greater weight to their choice for judicial positions than to recommendations of the bar.

In recent years there has been a tendency toward improving the standards of the state judiciary, especially to free the judges from dependence upon politicians and political parties. In several states the terms have been lengthened, particularly for appellate court judges. In others judges no longer run on party tickets. However, these remedies do not solve the three principal problems of selection and tenure. It is an old saying that by looking at a frog one cannot tell how far he can jump. It is likewise true, although perhaps not as fully realized, that by seeing a man's picture on a telephone pole voters cannot tell whether he possesses the three essential judicial qualities. Many voters have little more than this as a basis for their decisions on state-wide judicial officers or even on local judicial officers in large cities. It requires personal acquaintance to determine whether a man has the essential judicial qualities. Often, in rural districts of small population, the majority of the voters either do have such personal acquaintance with candidates for judicial office or know someone who has. This was particularly true in the past when a term of court was a great event and gathering place for people of rural counties and when most of the men of every community had the informative contacts of jury service. In elections on a state-wide basis, people may learn something of the personality and ability of candidates for governor or senator, who

go about the state appearing before large crowds discussing their views concerning governmental policies in which the voters are intensely interested. Since judges cannot do this, voters do not expect to see state judicial candidates or to be able to have any sure source of information about them. Therefore, they do not get interested in them and either vote blindly or follow the suggestion of someone who does have an interest.

This lack of interest, because of lack of sure means of information, is the reason why attempts at completely open non-partisan judicial elections, on a state-wide basis, usually show no better results than elections on political tickets. Party labels are sometimes better than no labels at all. If voters have no means of their own for selection, necessarily, someone must make a selection for them. Since a political party must take the responsibility for failures of its candidates, party leaders will make an effort to obtain more or less intelligent selections. However, the nominating primary election has weakened their responsibility and helped the chances of the self-advertiser and the machine-made or pressure group candidate; and this is so perhaps even to a greater degree of non-partisan statewide elections. Another trouble is that the politically minded frequently consider a judicial position like any other office, as only a reward for the faithful, and are likely to overlook the necessity for other requisite qualifications. The same thing may be true even in the system of appointment by the chief executive, whether with or without the check of Senate or other confirmation.

Just as bad too is the fact that, under the party primary and election system, tenure depends even more than selection, upon issues wholly irrelevant to any judge's ability, record or qualifications. This has been illustrated by recent experience in Missouri, where, in twenty years between the first and second World Wars (1919 to 1939), only twice (1922 and 1936) was a judge of the Supreme Court of Missouri who had served a full ten-year term re-elected to another term. The ten elections during this period all turned on national party issues. One able former member of our Supreme Court said that he was elected to be a judge in 1916 because Woodrow Wilson had kept us out of war; and that he was retired from office in 1920 because he had not. Judges, the same as persons in other positions requiring special knowledge and training, should improve with experience in doing their work. Certainly, it is not conducive to obtaining the best possible judicial services for the state, to replace judges as soon as they have had sufficient experience to learn how to do their work well. Moreover, even when a judge is reelected much time has been lost from judicial work by participation in long primary and general election campaigns. This is one factor that has made it difficult for many courts to keep up with their dockets.

THE A.B.A. PLAN

The necessity of improving these conditions has been given much study during the past quarter of a century, with the realization that high qualifications for our judiciary are required to make it possible for the many new problems arising from modern industrial and urban conditions to get prompt, intelligent and efficient treatment in our courts. The American Bar Association has furnished leadership in this cause. The House of Delegates of the American Bar Association, at its first meeting in January, 1937, at Columbus, Ohio, adopted a resolution designed to establish methods of judicial selection "that will be conducive to the maintenance of a thoroughly qualified and independent judiciary and that will take the state judges out of politics as nearly as may be." This resolution specified two essential provisions for accomplishing this high aim:

First—Appointment by the executive "but from a list named by another agency composed in part of high judicial officers and part of other citizens, selected for the purpose, who hold no other public office."

Second—After a period of service, the appointee should "go before the people upon his record, with no opposing candidate, the people voting upon the question 'Shall Judge Blank be retained in office?' "

In 1938, under the presidency of the Honorable Arthur T. Vanderbilt, and with the Honorable John J. Parker as Chairman of the Section of Judicial Administration, the whole field of improving the administration of justice and selection and tenure of judges was surveyed and discussed at the annual meeting at Cleveland. Very extensive reports of these studies were published and are still available. Steps were taken to carry on the movement for better methods of judicial selection and tenure. California had adopted certain features of the recommended plan for its appellate courts in 1934. In 1940, Missouri adopted a constitutional amendment, submitted on initiative petition, which put into effect the complete plan recommended by the American Bar Association. Several other states are now considering constitutional amendments to put this plan in effect.

MISSOURI VOTERS UNDERSTOOD IT

When this new plan was proposed in Missouri almost everyone said it had no chance of adoption. Even its sponsors thought they were beginning a campaign of education which would require several submissions. To the surprise of everyone, the amendment was adopted at the 1940 election by more than 90,000 votes. Its opponents said that the people did not understand it, and obtained its resubmission by the 1941 Legislature. It was then retained by more than 180,000 votes. This was considered a

rather effective demonstration that the people did understand it; and also showed that the people likewise understood what some opponents of the plan wanted. Therefore, when a convention was assembled in 1943 to frame a new constitution for Missouri, this plan was reincorporated in it without change except to place more judges under it. The popularity of this nonpartisan court plan with the people of our state was an important factor in bringing about the adoption of a progressive modernized constitution in 1945.

Missouri's new constitutional provisions contain both of the essential provisions advocated by the American Bar Association. All of our appellate courts are under the new plan; but only the trial courts (circuit courts) of St. Louis and Kansas City are under it. As to all other trial courts (circuit courts) of the state, it is optional with the voters of any circuit to adopt it in a local option election if they want it.

Under our plan, selection is made by the governor's appointment, but from a list of three names submitted to him by a Selection Commission. The Selection Commission, for our Appellate Courts (the Supreme Court and three Courts of Appeals), is composed of the chief justice of the Supreme Court as chairman, three lawyers elected by the bar, and three laymen appointed by the governor. The members, other than the chief justice, have six-year terms, staggered so that one term expires at the end of each year. These members are not eligible to succeed themselves. The lay members are appointed by the governor, one every two years, each from a different court of appeals district. The lawyer members are elected, one every two years, by the members of the bar of the court of appeals district which they represent. The ballots for the election of lawyer members are sent out by mail by the clerk of each court of appeals, and returned to him to be canvassed by the judges or lawyers appointed by them. The Selection Commissions for the city trial courts have five members. They are, the presiding judge of the court of appeals of the district in which the city is located, as chairman, two laymen appointed by the governor, and two lawyers elected by the bar. They also have six-year terms which are staggered so that the term of each member expires in a different year. Members of these commissions are limited to one term, and no governor can appoint all of the lay members of these commissions, because our governor has a four-year term and cannot succeed himself.

The next step, after a judge has been appointed from the list submitted, is that when he has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regular term (trial courts, six years; appellate courts, twelve years). Thereafter, a judge given a full term must, at the expiration of each term, submit his declaration of desire for another

term to be voted on by the people. Likewise, all judges in office at the time the amendment was adopted were required to be voted on by the people to get another term. At all such elections, the judge's names are placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge . . . . . , of the . . . . . court, be retained in office? Yes. No." Voting is by scratching one answer and leaving the other. Thus the judge has no opponent, and runs against no political party, or national political policy, but only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect that he would receive a favorable vote. Certainly, the voters may, if they desire, dispense with the services of a judge whom they believe has proven himself dispensable. They have already done so in one instance in an election under this plan.

No one should claim that this new method is fool-proof or that it will operate automatically to select good judges. Like all institutions of democracy, it will require eternal vigilance to prevent its perversion and to make it work properly. One can build the finest automobile and put it in the best possible mechanical condition, but the best machine will not have any more sense than its driver has. Likewise, the best governmental methods require public interest and intelligence to make them function properly. This plan especially, requires a high degree of unselfishness and devotion to duty, on the part of lawyers, to make it work as well as its sponsors hope and believe it should. Members of the bar are solely responsible for the choice of half of the members who are elected or appointed to the selection commissions. The members they elect, together with the chairman, make a majority of lawyers on each commission. Lawyers can also have much influence in the appointment of other members and in other phases of selection. They have the best opportunity to know whether prospective nominees have the essential judicial qualities. Thus members of the bar can have the kind of judges they want, but it will require sacrifice of some time and effort on their part to see that their highest ideas are properly represented by the members of the selection commissions.

The bar likewise must give the public information concerning the record and qualifications of judges whenever a vote is to be taken on their retention. This can best be done by first taking a poll of the bar on this question. Then if the result is favorable, the organized bar, and not the judge, should conduct the campaign for retention and inform the public of the record of the judge involved. Also if the vote of the bar is unfavorable the organized bar should see that the public is informed of that result and given the reasons for it. Thus an independent and courageous bar and an enlightened public are both necessary to the complete success of this plan.

COMBINES THE BEST OF BOTH

It is submitted that this plan utilizes the best features of both the appointive and elective systems, but provides safeguards lacking in either. It is more democratic than the old appointive system because it gives a better opportunity for consideration of the views of the people in selection and really amounts to an executive appointment with confirmation by the vote of all the people rather than only that of one house of the Legislature. Likewise, the people have the opportunity at regular intervals to decide the question of further service. Thus the people also apply the standard of good behavior. The provision for confirmation by the entire electorate is in itself an excellent preventative of poor appointments; and the further provision that appointments must be from a previously selected list removes the opportunity to appoint personal or political favorites of either the governor or senators. The selected list is made by a commission which has no other function and upon which both the bench and bar are represented, with representation as well of the viewpoint of those who are not lawyers. The members, other than the chairman, can hold no other office nor any official position in a political party. Thus, this commission is well adapted to receive and impartially consider both the views of the public and the appraisal of the legal profession as to the ability of lawyers under consideration for election. Furthermore, the fact that at regular periods, after original confirmation by the electorate, the people may retire a judge, by a majority vote against his further retention in office, is a great incentive to all judges at all times to make a good record; and provides an easier way than impeachment to terminate the service of one who does not. Moreover, since tenure depends solely upon the test of satisfactory service, no campaigning is required and no time is lost from judicial work in election years. Judges know that their tenure is secure, if they do good work, and may count on making the judiciary their life career, with practically the same assurance as under the Federal "good behavior" standard. Therefore, under this plan, our states should be better able to attain the ideal of the founding fathers to establish an able, independent judiciary which will guard the Constitution and impartially preserve the rights of all citizens.



64. LEGAL SERVICE OFFICES FOR PERSONS OF MODERATE MEANS [1]

DRAWING from the experience of legal aid clinics, army and navy legal assistance offices, lawyer reference plans and neighborhood law offices, Mr. Smith here sets forth blue prints for a brand-new institution allied to and supplementary to these others, and shows how it will bring legal service for the first time to a large segment of the population, open up a vast new reservoir of clients for regular law offices, facilitate the training of young lawyers, and forestall the threat of "socialization" of the legal profession. The author is a member of the Boston bar, a pioneer leader in the American legal aid movement, and author of the historic book *Justice and the Poor.*

THE creation of adequate facilities which will assure competent legal advice and assistance to the millions of persons of moderate means has emerged as one of the greatest post-war problems confronting the organized bar.

Before attempting to describe how these legal service facilities could be constructed and maintained, it is illuminating to summarize the four entirely separate factors which have, in combination, pushed this problem into the foreground.

The four factors are:

(1) The request by the Legal Assistance Officers of the Army and the Navy for cooperation by the civilian bar in handling cases for soldiers and sailors;

(2) The mounting pressure from persons of moderate means for more adequate facilities to serve their needs for legal advice and assistance;

(3) The desirability of supplementing the education given in law schools by practical training so that persons, on their admission to the bar, may in fact be duly qualified to practice law; and

(4) The necessity for prompt action by the organized bar to meet the public demand so that the government may not feel forced to set up law offices itself. This would mean, in lawyers' terminology, "socializing the profession."

I. DEFINITIONS: STANDARD TERMS SUGGESTED

We need terms that will be acceptable in public usage and as clear in meaning as "legal aid."

The phrase "low-cost legal service bureaus" has been used so am-

[1] Reginald Heber Smith, *Journal of American Judicature Society* (August, 1947), pp. 57 ff.

biguously that it will be well to abandon it. Classified along functional lines, we have four separate plans to consider.

A. *Lawyer Reference Plan*

This, as well defined by William Dean Embree, is "an agency whereby the general public can be referred to competent and reliable lawyers who, for a fixed moderate fee, would be willing to give a consultation on a legal problem and then render additional legal service for a moderate fee if further legal service seemed desirable or necessary."

B. *Legal Service Office*

The basic concept of the first project is that the client will be served *in the office of the lawyer to whom he has been referred.*

The basic concept of the second project is that the client shall apply at *an office maintained under bar association auspices and staffed for the purpose of serving him right there.*

The name "Legal Service Office for Persons of Moderate Means" would be fully descriptive, but is too long. The public would either alphabetize it or invent a nickname.

If the term "Legal Service Office" is accepted, it will soon come to mean a law office for persons of moderate means, just as clearly as "Legal Aid" denotes a law office for the poor.

C. *Neighborhood Law Office*

This is a type of Legal Service Office. The plan is based, not upon the concept of a large central office, but on small decentralized offices in neighborhoods where persons of moderate means live.

The name is accurate. The experiment deserves careful consideration. In Section VIII, its similarities to, and differences from, the legal service office will be examined.

D. *Legal Aid Clinic*

This term should be reserved to signify a law office where part of the staff consists of law school students who, by doing part of the legal work under supervision, learn to practice law through the apprenticeship or internship method.

Such offices today serve only the poor—hence the term "legal aid clinic." The internship feature could be, and ought to be, an integral part of the Legal Service Office.

This idea will be more fully developed later in Section IX of this article, but this is a good place to present Dean Albert J. Harno's categorical exposition of our present situation in this regard:

The apprenticeship system of legal education went out of existence because law schools were able to present the theory of law better than the apprenticeship system could possibly present it. Legal education lost considerable vitality when the apprenticeship system went out. The (legal service office) can reintroduce into legal education the factor that was lost when the apprenticeship system went out. It can complement the programs of the law schools.

II. LEGAL NEEDS OF SOLDIERS AND SAILORS

Of the four factors that have, in combination, brought our problem to the front, unquestionably the most dramatic, as well as the most pressing, is the earnest request by the Army and the Navy that the American Bar Association, in cooperation with state and local associations, set up a nation-wide system of offices or agencies to which can be referred the thousands of soldiers and sailors who need legal help.

A. *Legal Assistance in the Army and Navy*

In World War I our troops received medical assistance from the Army and the Navy but no legal assistance. In World War II they received medical assistance *and* legal assistance.

Colonel Beatty, Chief Legal Assistance Officer for the Army, and Commander Ryan, Chief, Legal Assistance Liaison for the Navy, estimate the total number of cases handled by their Legal Assistance Officers as follows:

Period	*Army*	*Navy*
March 13, 1943–June 30, 1944	2,500,000	301,635
July–December 1944	1,470,000	210,783
January–June 1945	2,475,000	302,789
July–December 1945	1,515,000	240,018
January–June 1946	845,200	151,578
July–December 1946	297,600	102,728

The Army and Navy intend that this Legal Assistance Plan shall be permanent. They have found that it is one of the greatest morale builders ever discovered. The testimony comes from officers overseas, general hospitals, Air Forces installations, disciplinary barracks, and the U.S. Constabulary.

The reason is plain and is well known to every legal aid worker. Nothing rankles more in the human heart than a brooding sense of injustice. A bodily wound inflicted by the enemy inspires anger and the desire to fight back. A wrong perpetrated back home—such as an unfaithful wife continuing to collect her soldier-husband's allowance and allotment—about which the soldier can do nothing and to which the whole machinery of justice seems callous, inspires that soldier with rage, not against the enemy but against the home front.

B. *Bar Association Cooperation*

Many problems of soldiers and sailors can be solved by Legal Assistance Officers on the spot, but thousands must be referred back home for appropriate action by civilian lawyers. During the war, this need was met by War Work Committees set up by the American Bar Association and state and local bar associations in every city and county. They were manned by lawyers who, with the legal aid organizations, received all referred cases and took care of them.

When war ends, the patriotic impulse inevitably weakens and War Work Committees disintegrate. Since the cases, in somewhat smaller numbers to be sure but still in the thousands, continue to demand attention, who shall now receive and care for them?

The legal aid offices continue to exist as before. But as a permanent arrangement they should not be called on to handle these cases. They have their hands full serving the poor. Soldiers and sailors are not the "poor"; they are not entitled to "legal aid"; they do not ask for *free* services. At least 90% of our military personnel consists of persons of moderate means.

They may not be able to pay in full what we may call the ordinary fair fee properly charged by a lawyer, but they are able to pay something.

The pointed question asked by the Army and the Navy is: "to whom and through what channels do we refer these cases of our soldiers and sailors?"

Obviously the bar associations of the country must answer. To ignore this request by doing nothing is, in effect, to say, "We will cooperate fully during the war but when the shooting is over we quit." That would be any bar association's own death warrant. And that is not the temper of any modern bar association.

At the American Bar Association convention at Atlantic City in October 1946, its House of Delegates voted:

> Whereas, the bar generally owes a duty to members of the armed forces in peace time, as to other citizens, to provide machinery for making adequate legal advice available to them,
>
> Resolved, (2) that the American Bar Association undertake to sponsor the creation of machinery by the state and local associations to provide active members of the armed forces with means of referring cases requiring legal service to competent civilian counsel in the localities concerned; and
>
> (3) that a Special Committee on Legal Service to the Armed Forces be appointed to organize and sponsor this work.

•

Realizing that the problem of a great many civilians is *identical* with that of soldiers and sailors, in that they do not know what to do or where to go, the House of Delegates also voted:

Whereas, the American Bar Association believes that it is a fundamental duty of the bar to see to it that all persons requiring legal advice be able to obtain it, *irrespective of their economic status*, (italics supplied)

Resolved, that the Association approves and sponsors the setting up by state and local bar associations of lawyers' referral plans and low cost legal service methods for the purpose of dealing with cases of persons who might not otherwise have the benefit of legal advice.

We can be grateful that the representatives of the legal profession in the House of Delegates saw the problem as a whole. The needs of many civilians are the same as the needs of our military personnel. Many of their cases are the same. The problem depends not on whether a man is in or out of uniform but on his economic status.

The Army and Navy are interested in the problem as a whole because they see clearly that their own part of it will most surely be solved on a *permanent* basis if the organized bar can devise *permanent* methods for filling the legal needs of all persons of moderate means.

What are those needs? That answer depends on estimating, however roughly, how many people comprise the group we call "persons of moderate means."

III. LEGAL NEEDS OF PERSONS OF MODERATE MEANS

The large number of Army and Navy cases has already suggested that the problem is one of great magnitude.

In January 1947 *The American Magazine* published a leading article entitled "When You Need A Lawyer" in which the author, Frederick G. Brownell, states, "One authority estimates that, year after year, upward of 100,000,000 Americans do not have access to any form of legal assistance." In the same month, Judge Conway of the New York Court of Appeals, in his address before the New York State Bar Association, spoke of "the hundred or more millions of Americans who have no access" to legal services.

Mr. Embree has said there are "several million persons" needing such aid in New York City alone. Writing in *The Boston Bar Bulletin* for April, 1947, Mr. George N. Welch, Chief Attorney, Boston Regional Office, Veterans' Administration, stated:

The Chief Attorney is not permitted or equipped to render (general) legal services, yet during the past six months more than 3,400 veterans contacted this office seeking legal advice and assistance of personal problems.

If it were possible to refer veterans to some central agency sponsored by bar association groups, such an arangement would materially augment respect and admiration for the Bar, and would decrease the feeling now prevalent, not only among service groups, but throughout the community, that lawyers charge excessive fees and legal services may not be obtained at moderate cost.

While legal aid societies have been established and there is a real need for them, they are not the answer for a man in moderate circumstances.

The most reliable current statistics available are those of the Federal Reserve Board and the Department of Commerce (National Income Division, Office of Business Economics).

It is estimated that in 1946 there were 46,000,000 "spending units" in the United States. A "spending unit" would, on the average, consist of a little over 3 persons.

In the income class of $2,000–$2,999, there were 10,600,000 "spending units," or about 35,000,000 men, women and children.

This is significant because, in the larger cities, the legal aid offices consider (among other tests) that a married couple with one child having an income of $40 per week or less (about $2,000 a year) is entitled to legal aid.

In the group from $3,000 to $3,999 there were approximately 23,000,000 men, women and children.

If one thinks the figure of $2,000 too high for the lowest bracket of persons of moderate means, then in the group from $1,000 to $1,999 there were approximately 43,000,000 men, women and children.

Conditions are different in different sections of the country, and they vary as between large city and small town. Any man can define "persons of moderate means" as he deems best, but under any definition he will come out with a tremendously large group. This is necessarily so because 59% of our people live in "spending groups" whose gross income is between $1,000 and $3,000.

IV. THE ECONOMIC CONDITION OF THE BAR

Alongside this huge demand for legal services have been many competent lawyers unable to earn a living. From that stark fact sprang the Bar's first efforts to understand and cope with our problem.

In the classic report to the American Bar Association in 1938 by its Special Committee on the Economic Condition of the Bar, of which Dean Lloyd K. Garrison was chairman, were these trenchant words:

We wish to reaffirm our conviction that in the circumstances in which the profession finds itself, with large numbers of lawyers either unable to earn a living in the practice, or earning the barest pittance; with innumerable young lawyers unable to find openings; with many of the older men, after a lifetime of practice, scarcely able to keep going—in these circumstances we think it imperative that the bar should take action both to get at the facts more fully and to experiment with remedies.[8]

The time has come to be bold in striking out along new paths of group effort, which, if properly safeguarded, will not impair either the traditional independence of the lawyer or the dignity of the profession.

This Report suggested a new professional agency—"the bar association law office for persons of moderate means." This idea was given national prominence when it received the endorsement of the Solicitor General of the United States, now Mr. Justice Jackson of the Supreme Court, in a brilliant address on July 9, 1939 whose arresting title was "Briefless Barristers and Lawyerless Clients."

The Bar was not then ready for any new agency, but it was fast changing its mind about the propriety and desirability of devising a plan for referring clients to existing law offices.

Legal aid offices had applicants who could pay and who came there simply because they knew of no other place to go. Bar Associations in some cities forbade the legal aid attorney from referring the would-be client to *any* lawyer. They said that would be "feeding" cases. He was required to hand the bewildered applicant a classified telephone directory. In any large city that was a mockery. It was legal aid experience that at that point the prospective client quit in disgust.

Today that has all been changed. The Legal Aid Society in New York, for example, was given a list of lawyers to whom cases might be referred. In 1945 the Committee on Legal Aid of the Association of the Bar of the City of New York reported that—

> The equivalent of one lawyer's time (in the legal aid office) is continuously taken up in each year with the operation of the Referral List; and two-thirds of such time is devoted to non-legal aid applicants.

In other words, two-thirds of one man's whole time was required simply to tell people who could pay something what lawyer they could go to.

V. THE LAWYER REFERENCE PLAN

The first lawyer reference plans were set up by the Los Angeles Bar Association and the Chicago Bar Association.

They have been followed by Bar Associations in Baltimore, Cincinnati, Milwaukee, and most recently, New York.

Let it be noted at once that Charles J. Lind, secretary of the Chicago Bar Association Lawyer Reference Plan, speaking out of six years of actual experience, states that *80% of the persons who appeal to him have never had a lawyer.*

The plan is simplicity itself. A person needing legal advice and not knowing where to turn, goes to the office of the bar association. There he is given the name and address of a lawyer and an appointment is made for him. The client is told he must pay $3.00 in advance for a one-half hour consultation and $5.00 if it takes longer. If further services are needed, client and lawyer agree on the basis of the charge. If there should be a

dispute as to the final fee, both parties agree to have it decided by the Committee of the Bar Association in charge of the Reference Plan. Mr. Lind reports that in six years the Committee has received just one complaint of overcharge.

Quite naturally, the plans vary in detail from city to city. Thus, in New York, the fee for the first half-hour's consultation is $5.00. And, in Los Angeles, lawyers on the panel to whom cases are referred pay a small registration fee.

One interesting development is that in Baltimore, Cincinnati, and Milwaukee the Bar Association has selected the legal aid office as the referral office.

What is likely to prove a highly significant development is indicated by Mr. Embree's statement that "inasmuch as the plan is for the entire local public and the entire local bar, a program of full, frank and repeated publicity may be pursued with propriety and dignity."

This view is supported by the 1946 report of the American Bar Association's Special Committee on Professional Service Policies, already referred to. The following carefully chosen words went into the report after discussion with the Board of Governors:

> The object of the proposed machinery is to make counsel readily available, especially in cases involving the affairs of persons of moderate means *and to make it known that counsel is available to such persons at moderate fees well within their means.* (Italics supplied.)

Until the Lawyer Reference Plan is brought to the public's attention by the modern media of advertising and communication, we shall not know how great the pent-up demand is and how far the plan is capable of meeting that demand.

It is to everyone's advantage for bar associations to establish Lawyer Reference Plans as promptly as they can. The plan is beautifully simple. It requires a minimum of machinery. It costs little to operate. It is the best type of public relations because it does something concrete for the public welfare instead of talking about it. And it brings deserving clients to deserving lawyers.

VI. WHY A LEGAL SERVICE OFFICE?

While the Lawyer Reference Plan is an answer, it is only a partial answer to a problem as great as ours is.

To the extent that the clients referred cannot pay the ordinary fair fee, their cases must be handled by the lawyer at a loss. He can afford to do that if he has any idle time, but beyond that he must either neglect his regular clients or operate his office at a loss. The amount of idle time

is quite limited and so the amount of "low-cost" business that can be referred is limited.

Furthermore, the Reference Plan, following the dictates of common sense, irresistibly tends to evolve into a Legal Service Office.

This is shown by legal aid history. It started as a "reference plan" but, as the volume of cases grew, its leaders, with great wisdom, decided to establish *offices* especially adapted to the needs of the legal aid clientele. It has been the existence of these fully-staffed *offices* that enabled legal aid to develop so much more effectively in the United States than in England, as I tried to make clear in the article on "The Rushcliffe Report" in the May, 1947, issue of *American Bar Association Journal.*

In 1940 the Chicago Bar Plan referred 400 cases. It now handles some 16,000 telephone, mail, and personal inquiries every year. Since the secretary of the Plan is a good lawyer, he is able to answer and does answer 80% of the inquiries, *thus disposing of 80% of the cases without referral.*

If an applicant can be correctly advised in a few minutes, it is common sense and it is only decent public service to answer the question then and there instead of consulting a list, locating an available lawyer, making an appointment, and sending the client off—possibly across town—to be told something he could have been told at once and without stirring from the office.

Treble the number of applicants and then three lawyers would be required to deal with their cases without referral. That would be the nucleus of a Legal Service Office.

VII. BLUEPRINT OF A LEGAL SERVICE OFFICE

A. *Purposes*

A bar association will do well to follow legal aid experience and establish its legal service office as a separate "non-profit" or "charitable" corporation.

The directors should be drawn from the bar association, the law schools, and other community groups.

Its purposes will be:

1. To provide for persons of moderate means the legal service which they need and which they now obtain with difficulty, if at all.

2. To supplement, not compete with, the professional work of the regular lawyer in private practice, and to refer to him clients who are able to pay ordinary fees.

3. To constitute an institutional office where law school graduates will serve two years of apprenticeship training under (a) a staff of practicing lawyers and (b) teachers from an approved law school.

4. To accept cases from the Legal Assistance Officers of the Army and the Navy in time of peace as well as in war.

5. To observe law in action and study the practical operations of the machinery of justice; to keep appropriate records; and to cooperate with judicial councils, bar associations, law schools, legal aid organizations and other agencies, public or private, concerned in the administration of justice.

B. *Cost System*

For many reasons it will be imperative for the office to operate under an accurate cost system. The principles of a cost system are well known and are set out in the "Law Office Organization" articles published in the May, June, July and August 1940 issues of the *American Bar Association Journal.*

In all discussions by lawyers of this general subject, there is repeated insistence on the desirability of "low cost." It is impossible to know what "low cost" is until we first know what the cost of a case is.

The only scientific way to try to reduce costs is to determine actual cost, find of what elements it is composed, and then see what items can be cut.

The honest way to convince the bar that the Legal Service Office supplements and does not compete with lawyers in their own practice is by stating the costs. If it is shown that to handle a given case costs $100 and the client is able to pay only $30, no lawyer will want to base his practice on those cases. To the extent that he has idle time, the $30 fee would be welcome and the case should be referred to him. But if he handles many such cases, he will not be able to meet even his overhead.

There will be no mystery about these costs. They will, in fact, be *fixed* by the Board of Directors. The main items of cost are salaries of lawyers, salaries of secretaries, stenographers, file clerks, rent, depreciation of equipment (desks, chairs, file cabinets, typewriters), postage, stationery, light, telephone, supplies. The representatives of the bar will fix the salaries, rent the office space, buy the equipment, and budget the other items. We may assume they will do their best to be economical. After they have done their best, the basic figures will have been established. From then on, costs are determined mathematically.

C. *"Screening" the Applicants*

Applicants at the Legal Service Office will be "screened" both at the top and at the bottom.

The bar association will set the upper and lower limits. These will vary from city to city. Normally, income (and other assets) will be the determining criteria. In one city the limits might be $1,000.–$3,000.; in

another $1,500.–$3,000.; and in cities with the highest living costs $2,000.–$4,000. Experimentation must be gone through. It will be better to begin conservatively, to fix the top limit too low if there be doubt, and then to raise it in the light of experience.

At the *bottom*, will be applicants who can pay nothing or practically nothing. Some legal aid societies charge applicants a "registration fee" of twenty-five or fifty cents if they can pay it, but, for our present discussion, such "fees" can be ignored.

Applicants unable to pay anything will be referred to the legal aid office, which is maintained by the community for exactly that purpose.

At the *top*, will be applicants whose incomes make them ineligible for the Legal Service Office and who will be referred, according to the bar's Reference Plan, to an appropriate lawyer. There undoubtedly will be a great many of these clients. Just as a considerable number of persons now go to a legal aid office in order to find out a lawyer to go to, so many more persons will go to the Legal Service Office for that purpose, as soon as the office becomes established and well known. In fact, the Legal Service Office can become a great "feeder" to the whole bar. And all the evidence available thus far indicates that this will be *new* legal business from persons who in the past got along without lawyers (often to their great loss) because of fear, ignorance, or because they were not law-conscious.

D. *Economy—"Low Cost"*

It is desirable that the Legal Service Office handle its cases at low cost, but that must be subordinated to doing correct, competent, lawyer-like work.

Large volume can yield some, but only some, of the economics of "mass production." Economy there results from *standardization* of materials, tools, and processes. You can standardize some of the routines in law practice, but you can never standardize human beings or their legal entanglements.

What a large volume of cases does make possible, however, is *specialization*. That reduces costs sharply because the expert handles a case in his own field so much more rapidly than his less experienced (though equally intelligent) brother.

This was recognized by Henry P. Chandler, President of the Chicago Bar Association, in his address at the annual meeting on June 8, 1939:

> Perhaps ultimately more than a reference plan on the part of the Association will be deemed advisable. This rendition of legal services in small matters from the standpoint of the amount of money involved, at commensurately low cost, *requires a considerable volume permitting a high degree of specialization.* (Italics supplied.)

Economical operations in the Legal Service Office will result chiefly from specialization by members of its staff. They will be able to work fast. This is no new discovery. It is the stubborn economic fact that has forced lawyers to associate themselves together in large firms.

One special feature of the Legal Service Office may help to reduce costs sharply. That will be so if men seeking admission to the bar devote some time after graduating from law school, in apprenticeship training as junior members of the staff of the Office. That is the time-honored system in medicine, where it is called internship.

VIII. NEIGHBORHOOD LAW OFFICES

This is a pioneering experiment by a group of young lawyers who set up seven law offices in different neighborhoods in Philadelphia in 1939. The whole story is most interestingly told by Robert D. Abrahams in his article "The Neighborhood Law Office Experiment" published in the April 1942 issue of *The University of Chicago Law Review* (pages 406–426).

The fee for a one-half hour consultation was fixed at $1.00. During the eighteen months from November 1, 1939 to April 20, 1941, 1,101 clients were served. *Of these, 82% stated they had never before entered a law office.*

Simple forms and routines were worked out by a supervising committee whose members had no financial interest in the offices.

The guiding spirit, to whom much of the success of the plan must be attributed, was Mr. Abrahams, who had the zeal and practical skill of a good legal aid attorney, which was quite natural as he has long been on the staff of the Philadelphia Legal Aid Society.

The differences between the neighborhood law office and my concept of the legal service office are apparent from what has already been said in Part VII.

The neighborhood office does not envisage a large central office with a large staff. It could never attain the same degree of specialization. It could not be a place for the training of law school graduates. Its advantages are those of decentralization—low rent and less "overhead."

It is not necessary to make a decision as between the two plans. There may well be room for both. But, it would seem essential, that both plans —any plan—be conducted under the auspices of the local bar association.

All of the lawyers interested in the Neighborhood Office plan were members of the Philadelphia Bar Association. The original program called for "supervision of the standards of such offices by some central agency, preferably by a committee of the local bar association." Approval was not sought of the Philadelphia Bar Association because the "climate" was not considered too friendly. As a matter of true history, that fear was justi-

fiable. Sponsorship was secured from the Philadelphia Chapter of the National Lawyers Guild.

For a national pattern, supervision by the regular local bar association is highly desirable and, it is to be hoped, is now obtainable.

There are two reasons why this is so important. Legal aid has learned to its sorrow that a good name may be exploited by an unscrupulous attorney, and the bar association is the right party to seek an injunction.

Second, any office for persons of moderate means must let such persons know of its existence. That requires advertising of some sort. Under our canons of ethics, the local bar association is the proper body to authorize and conduct such advertising.

IX. APPRENTICESHIP AND LEGAL EDUCATION

A. *The Gap in Legal Education*

The third of the four factors which, in combination, have forced our problem into the foreground has been a growing awareness of, and uneasiness about, the great gap between legal education in law schools and actual practice in law offices.

Dean Arthur T. Vanderbilt, of New York University School of Law, in his 1946 Report says: "The modern law school has never been able to provide a satisfactory substitute for certain aspects of the old clerkship at its best."

Professor James E. Brenner, of Stanford University School of Law, wrote on February 21, 1947, "As a practical matter we all know that no law student fresh out of law school, without office experience, is qualified to practice law without close supervision."

Dean Merton LeRoy Ferson emphasizes this same point in his "Teaching Theory and Practice in the New Day," published in *The North Carolina Law Review* for June 1946.

That chasm has not been bridged because the law school does not serve flesh-and-blood clients and so cannot teach how it is done; and the law office is not, and does not purport to be, an educational institution.

The bar examinations, conducted by the state, dodge the issue. They do not examine a man on his ability to practice, to interview a client, or try a case. Yet if a man can answer the theoretical questions, he is admitted to the bar as a full-fledged lawyer.

As Judge Dale Souter said in a frank article in the April, 1946, issue of this *Journal:*

"It is unfair to the public, if not a misrepresentation, to admit these young men to the bar before they have had any experience or spent any time in the practice of law."

In 1946 the Solicitor of Veterans Administration felt constrained to rule

that the G.I. Bill of Rights, which gives financial support to any veteran during his course of training-on-the-job, does *not* apply to any veteran who is getting his training in the office of a practicing lawyer or in a legal aid office if the veteran has passed his bar examinations.

His decision that when a veteran has been admitted to the bar, the "job-objective" has been attained so that he needs no more "training" or "experience" rests on a *de jure* basis that we have long tolerated with complacence.

This intolerable result was brought to the attention of the American Bar Association at its meeting in February 1947. Its House of Delegates, without dissent, adopted a resolution which has since been introduced into the Senate by Senator Lodge of Massachusetts (S. 986) and reads as follows:

A bill to amend the Servicemen's Readjustment Act of 1944, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That paragraph 11 (b) of part VIII of Veterans Regulation numbered 1 (a) is hereby amended by inserting the following at the end thereof:

"4 Notwithstanding the preceding provisions of this paragraph, lawyers with less than two years' active practice, exclusive of the period of their military service, shall be eligible for training on the job for a period not exceeding the unexpired portion of said two years of active practice. In such cases the lawyer need not be training for a specific job or job objective, and the approving agency for the State or the Administrator shall waive the preceding requirements of this paragraph provided that the written application discloses that the training program is one appropriate to equip the veteran for active practice as a lawyer either in a job or in independent practice. This subparagraph shall be retroactively effective as of June 22, 1944."

B. *The Resurgence of the Apprenticeship Idea*

The only way to learn to practice is by practicing. And the right way to learn is by actual practice under supervision.

The germ of the idea for the true solution never wholly disappeared, thanks to the legal aid–law school affiliations established at Northwestern, Minnesota, and, most notably at Duke University. A successful variation of the idea is the Harvard Legal Aid Bureau conducted for the poorer people of Cambridge by honor students at the Harvard Law School.

Discussions of this idea in the literature of legal education have been persistent and recently have been rising in a steady crescendo. For example, see the editorial and symposium in the August 1946 issue of this *Journal* (at pages 35 and 59), and Dr. Eric F. Schweinburg's book, *Law Training in Continental Europe* (Russell Sage Foundation, 1945).

The most authoritative exposition of the apprenticeship method in action will be found in Professor John S. Bradway's *Clinical Preparation for Law Practice* (Duke University Press, 1946) which was commented on editorially and also reviewed at length in the *American Bar Association Journal* for March 1947 (at pages 250 and 259).

The problem of the law schools has been to find a suitable body of clinical material such as the medical intern finds in any modern hospital.

C. *The Legal Service Office as a "Hospital"*

The legal service offices, together with the legal aid offices, can provide the solution. According to our statistics in Section III, they will together serve approximately 79% of our people.

Based on legal aid experience, we can estimate that the legal service offices, when they have become well established, together with the legal aid offices will handle about a million cases a year. This is not the saturation point. It is a figure that could be attained fairly promptly.

Apprentice training should be *after* law school and *before* admission to the bar. The intern should devote all his time and energy to this work. The length of service will have to be determined by experience. I know that if a man spent two years, he would be richly rewarded. Professor Karl Llewellyn says that a law school graduate with a B- or higher grade could learn an enormous amount in six months, and I cannot disagree.

While the clients of the legal service office will present problems of infinite variety, the substantive law content of their cases is of no importance. We are dealing with a different "dimension."

The student can learn the *art* of interviewing a client regardless of whether the case is one in contracts or torts or domestic relations. The same is true of the art of negotiating a settlement, and it is true of the art of trying a case in court.

D. *Apprenticeship and Ethics*

One final observation about the plan is pertinent. It needs no elaboration because it is self-explanatory.

No medical intern can see the pain and suffering in a hospital and strive to alleviate it without coming to understand the Hippocratic Oath and whether he has the inherent aptitudes required of a good doctor.

The apprentice-intern in the Legal Aid or Legal Service Office will learn his own aptitudes and he will absorb through his pores the ethical concepts which make the legal profession a noble calling.

When he applies for a warrant in behalf of a deserted wife and her hungry children in order to apprehend the deserting husband and father, he sees the law not as a bag of tricks but as an instrument of social righteousness.

He will come clearly to see, what is too often obscured, that the law office is an integral part of the administration of justice in our country because more than ninety percent of all the legal problems that people have in all their lifetimes are dealt with, settled, adjusted, and disposed of not by judges in courts but by lawyers in law offices.

He will come to realize that the whole purpose, the end of his entire education, is to fit him to be a worthy minister of justice.

X. "SOCIALIZATION" VS. INDEPENDENT BAR

The last of the four factors which, in combination, have pushed our problem into the foreground comes right out of the heart of the times in which we are living. Every man knows and feels that a great deal is going on, that new currents are sweeping around the world, that millions of peoples are struggling towards freedom, that there is a universal yearning for peace and justice on earth, that all institutions are being tested, and that none are sacrosanct.

All this ferment is expressed by each man in his own way, and I can only state my own interpretation.

For selfish and unselfish reasons we hope that the new world will be attracted by our form of government and the American way of life so that, in other nations, free peoples will set up democratic regimes and institutions.

In order that our general system may make its maximum appeal, and because we are not hypocrites, we are engaged in reexamining our own institutions. We want to keep what is good, and add what is found needed.

Law is the foundation of our whole structure. We are determined that it shall be strong. We know that law is not self-enforcing, and that lawyers are essential.

There being cumulative evidence that a vast section of our population finds access to lawyers so difficult as to be impracticable or impossible, we have put our minds on that problem. There appear to be two solutions, which are not inconsistent but complementary, so that we should give both a thorough tryout.

They are the Lawyer Reference Plan and the Legal Service Office.

Such agencies, like legal aid, are not steps towards "socialization" of the bar; they are the only way to avoid socialization. If properly conducted, they supply a direct and emphatic answer to a cardinal tenet of communism, namely, that in a capitalistic society the law is a class weapon and access to justice is made so difficult and expensive that the working classes are outlawed.

The President of the Oregon State Bar, Mr. James T. Donald, stated in 1946: "Legal aid work is the answer to any demand for socialized law."

Because legal aid work has been developed primarily by the Bar, Dean Arthur T. Vanderbilt said at the 1946 convention of the National Association of Legal Aid Organizations:

> As to the great problem of the age—the relation of the individual and the state—the legal aid organizations of the country are making their contribution to the practical solution of one phase of this great question in a very constructive way.

Judge Augustus N. Hand, in his address to the New York Legal Aid Society on February 27, 1946, clinched the point thus:

> The inevitable alternative which, because of its encroachment on the legal profession and because of its bureaucratic tendencies, I hope will not come to pass, is some form of socialized law.

The *American Bar Association Journal* published an editorial entitled "Legal Service Policies" in its December 1946 issue which said in part:

> As to the organization of legal services for persons of moderate means . . . the profession is confronted with an early choice as to whether it will maintain its historic prerogatives and position by itself fulfilling the new needs, or will stand by while these essential forms of legal service are taken over by institutions, by labor organizations, or by bureaus of government.

Mr. Justice Jackson, in his address as Solicitor General, previously referred to, concluded:

> In default of our attention, this problem will be likely to be forced upon government. We cannot afford to become defendants in the case of *Society* v *The Bar*.

Finally, Judge Albert Conway in his address to the New York State Bar Association on January 25, 1947, declared:

> Believing as we do in our democracy and its constitutional provisions for the equal protection of our laws for all, what answer as a profession can we offer if we do not make those provisions work? That is the test always. 'Does it work?' We must make our democracy work in this respect too. That is our responsibility.

Legal aid offices and legal service offices *are* much better entrusted to bar associations rather than to governmental bureaus. But legal aid offices and legal service offices conducted by the state are much better than nothing.

XI. CONCLUSION

Why is the control of legal service offices by bar associations to be preferred? For the answer, "let us," as Jefferson liked to say, "have recourse to fundamentals."

Our forefathers knew that the greatest and most pervasive danger of tyranny comes from government itself. That is why they insisted on a

bill of rights and a written constitution providing for a judiciary that should be independent of the executive and legislative departments.

The guarantees to the individual in the bill of rights are printer's ink on paper until an independent lawyer draws a writ of habeas corpus and presents it to the court of appropriate jurisdiction.

If the lawyers representing individual citizens are more and more transferred to the public payroll and appointed by political influence, they will not dare to be independent when the citizen needs protection against the government—the lawyer's paymaster.

An independent bar is even more important than freedom of religion, freedom of speech, and a free press, in the sense that those freedoms depend on law. They can have no other protection.

Without an independent bar, habeas corpus vanishes. The government can then arrest any man, however unjustly, with impunity. That is the Gestapo.

That leads to the totalitarian state, which necessarily denies that a human being has an immortal soul because that would be more important than government, and which is finally driven to substitute The State for God.

This result is the contravention of all that we hold dear and sacred.

Yet it has come about in other lands and the pattern of its happening has more often been a failure by the people's leaders than intent by the people themselves.

In the field of law in America, the people look to the organized bar for leadership.

That places the responsibility on us.

The issue is not whether we shall do something or do nothing. The demand for ordinary everyday legal justice is so great and the moral nature of the demand is so strong that the issue has become whether we devise, maintain, and support suitable agencies able to satisfy the demand or, by our own default, force the government to take over the job, supplant us, and ultimately dominate us.



CHAPTER XIII

The President and the National Administrative System

65. STAFFING THE PRESIDENCY [1]

THE President of the United States is one of the most powerful elected chief executives in the world. So powerful is he and so multifarious are his duties that he cannot himself be aware of all the actions taken in his name. The problem treated by Dr. Price in this selection is that of developing machinery which will free the President from attention to minute details in order that he can effectively deal with broad matters of policy. But in order to build broad policy the President must be able to coordinate the work of the departments more effectively than the cabinet device at present permits. Rather than change the character of the cabinet, which is too large for many purposes and too small for some, Dr. Price suggests the creation of a very small presidential staff unit that would, by creating systematic machinery for consultation, more closely tie together the President and the heads of the agencies who now report to him.

I

IF WE look back over several decades, we can see that Congress and the President have done a great deal to unify their treatment of the managerial program of the executive branch. Congress no longer lets its members or committees interfere very much in detailed personnel or budgetary matters, but reviews in a comparatively systematic way the President's general management of these affairs. Then, too, the Executive Office of the President was created to carry out the idea that staff agencies not merely

[1] D. K. Price, *American Political Science Review* (December, 1946), Vol. 40, pp. 1154 ff.

should administer restrictive controls, but should help the President put his program into effect.

In dealing with general policy, however, we have made less progress. The reason is partly that the President has not had the tools for the job. It is plain that a chief executive needs institutional help for such managerial work as budgeting or planning or personnel, because it requires special technical skills. It is less easy to show that the President needs in his Executive Office a staff and a procedure by which he can direct his department heads in building up a unified program, and adjust differences between them.

II

In one federal department, the need for such staff work became obvious almost half a century ago, and Secretary of War Elihu Root got the Army General Staff established. In spite of opposition from the several arms and services, the General Staff proved its usefulness. During World War II, the President superimposed on it the Joint Chiefs of Staff. The success of this machinery in directing world-wide strategy—that is to say, military policy and programs—led some of the staff officers to wonder why a similar system of coördination of policy could not be applied to the whole executive branch.

The Joint Chiefs of Staff themselves noted that their system was something like that of the British war cabinet, its committees and subcommittees and the secretariat that served them, and had a study made of the British scheme. Like some columnists and political scientists, some military staff officers began to say that they do these things better in England, and to believe that the United States should adopt the parliamentary or cabinet system.

The trouble with this idea, of course, is that the same constitutional and administrative arrangements, on a different social and geographic and political basis, may produce entirely different results. We start in the United States with a people that is not culturally homogeneous; that differs from region to region in the ways it thinks and makes its living; that organizes politically—and socially as well—on a federal basis; and that is loyal, in a litigious sort of way, to a Constitution. We cannot assume that, should we amend the Constitution to abolish one house of Congress and let the other elect a prime minister, we would automatically develop the strong party discipline needed to elect an effective executive and maintain a stable government.

The British cabinet system developed only because the House of Commons unified each of its parties into a responsible group in order to take control of the government away from the king without a revolution. In

the United States, by contrast, each party unites mainly to elect the President, and Congress encroaches on the executive branch most effectively on a piecemeal and irresponsible basis.

The President tries to control his department heads, and may even dismiss one now and then for differences over policy. But within the legislative branch it is a different matter. A congressman is his own subordinate. As a member of the Senate, for example, he reviews proposals made to the Senate by some committee, say, on agriculture, of which he is a member. As a member of the Senate, he is one among ninety-six; as a member of the Committee on Agriculture and Forestry, he is one among twenty. And if by seniority he has become chairman, he is boss of the works. For this simple reason, it is hard to get either house to review critically the policies of its committees; neither house ever thinks of removing a committee chairman for opposing majority policy.

This makes it hard for the President to consult with his department heads and direct their policies in the way—or rather, to the same degree—that a department head may count on the cooperation of his bureau chiefs in developing a common program. If the Secretary of Agriculture, for instance, has a new policy to consider, he must decide whether to discuss it confidentially first with the President or with the chairmen of the committees on agriculture in Congress. The President will probably want to coördinate the proposed policy with those of other departments. The committee chairmen, on the other hand, are likely to sympathize with the Secretary in thinking foremost of agriculture, and to ally themselves with the private groups that are the customers and constituents of his department.

The explosion of the first atomic bomb raised issues that affected every department of government. Yet the first bill introduced with the support of the War Department had been drafted secretly for it by a group of private citizens, and was presented to the Congress without going through the usual channels of clearance by the President's Executive Office. The War Department showed the bill to the President personally and to several departments, but not others. Representative Andrew J. May and Senator Edwin C. Johnson, of the military affairs committees, introduced the bill with the intimation that it had top support. But it was soon clear that something was wrong. Other departments and other outside groups began to be heard. The Senate, with the support of the President, set up a special committee under Senator Brien McMahon to deal with atomic energy. Senator McMahon, with some help from the executive side, drafted his bill. The President backed it, and so, finally, did the Secretary of War. The McMahon bill was enacted.

In our political practice, the main points in this little story are repeated again and again. An executive department gets the jump on the President

by dealing with an interest group and a congressional committee. It presents its proposal to the public before the President—whether or not he hears of it personally—can tie it in with the programs of other departments. Sometimes the President can iron out the matter belatedly; sometimes he cannot do so at all; sometimes he never even hears of the issue.

III

In 1855, Attorney-General Caleb Cushing foresaw that Congress, by supporting its committees and the departments against the President, might disintegrate the executive branch. While pointing out that the Constitution vested full executive responsibility in the President, no matter where a statute might assign a function or power, he wrote as follows in an official opinion:

> I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless—whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution.

The Honorable Mr. Cushing, however, probably had no idea how many ways could be devised by interest groups, in addition to the practice of giving statutory powers directly to departments and their subdivisions, to make it harder for the President to supervise his subordinates. First, of course, there was the invention of the independent regulatory commissions. Next, there is the supervision of administration by congressional committees, which often is so detailed as to amount to direction. It is usually informal in nature, but occasionally the general practice is described in a statute, such as the act of 1944 requiring the Navy to obtain the approval of both naval affairs committees before buying or selling any tract of land.

Another way is to require one department to work under the supervision, not of the President, but of another department or a special board. Thus the Department of Agriculture was given a veto over OPA decisions on ceiling prices on meat, and a special board was created to consider which prices should be restored to OPA control. Then also the President may be required by statute to exercise his supervisory powers through some specific agency. Statutes define the functions of the principal agencies in the Executive Office itself, and give even more extensive powers over policy directly to the Office of War Mobilization and Reconversion. Finally, the President's discretion in managing the policies of the executive branch is limited by interdepartmental committees and advisory committees, some

of which have statutory powers. Both types of committees can be highly useful, but unless the President has some way of keeping in touch with their work, he may find that they prevent him from hearing of issues that he alone should determine.

People who like to keep the major issues "out of politics" are just beginning to see how much use can be made of advisory committees, especially those with statutory authority. In the 1920's, the opponents of federal control of electric power simply proposed to sell Muscle Shoals to Henry Ford for half a billion dollars. Today their tactics would be more refined. They might propose that the government own Muscle Shoals but operate it through a commission of unpaid members not subject to presidential removal, as the May-Johnson bill proposed to handle atomic power. Or they might suggest that the Muscle Shoals agency have power to act only with the approval of an "advisory" board of private citizens professionally interested in its program, just as the Hospital Survey and Construction Act of 1946 put the government's hospital program under the control of boards of private citizens concerned with hospital administration.

In times of crisis, the opposition to the President has often sought to create a supervisory or coordinating authority to be played off against the President himself, or to take power away from him. Lincoln had to carry on a running fight with the Congressional Committee on the Conduct of the War. President Johnson lost control of the executive branch entirely. Wilson had to threaten a veto against a bill to create a war cabinet. Franklin D. Roosevelt had to stave off several efforts to set up a czar of everything. With political tactics like these to contend with, it is no wonder that Presidents are extremely wary of proposals to create a cabinet secretariat, or a White House chief of staff, or an Assistant President.

In the long run, we may hope that Congress will increase its internal responsibility to the point of demanding that the President discipline the executive branch and prepare a unified governmental policy for review. It can do so in policy matters just as it did in budgetary matters. The President himself cannot protect the integrity of his budget, and neither can his Budget Bureau. Fortunately, the appropriations committees—which Congress under the executive budget system made responsible for a comprehensive review of all federal spending by taking power away from specialized committees—generally protect the unified financial program, and generally discourage the departments from appealing against the President's decisions.

Until Congress takes similar steps to unify the legislative program, the best the President can do is to devise a staff organization and staff procedures by which he can increase his leadership over the executive departments.

IV

What can be learned from the experience of the past decade or so about the way in which the President's staff can help him develop government policy?

The most important administrative event of this period was the creation in 1939 of the Executive Office of the President. This office was set up on the theory that the President should not only be the political and ceremonial head of the government, but be staffed to discharge his executive responsibilities as its general manager.

In the fields of personnel and budgetary management, it has been clear that in the long run—since, say, the 1880's—the authority of Congress as a whole and the authority of the President have increased together at the expense of particular units, whether we think of them as executive agencies or individual congressmen or legislative committees. Congress created the Civil Service Commission in 1883 and the Bureau of the Budget in 1921 as agents of the President, while it also concentrated most of its own dealings with personnel and budgetary matters in one committee in each house.

Even so, Congress held back in several ways from putting the personnel and budget agencies exclusively at the disposal of the President. In the Reorganization Act of 1939, it refused the President permission to transfer the Civil Service Commission or put it under a single administrator. The President could only create a liaison officer in his Executive Office through whom to deal with the Commission. The problem of supervising a three-member, bipartisan body has often led the President to deal mainly with the commissioner representing the minority party, whom he is free to choose at his own discretion, rather than with either of the members of his own party, whom he often appoints for reasons of patronage. So it was with President Cleveland and Commissioner Theodore Roosevelt, just as later with President Franklin D. Roosevelt and—in succession—Commissioners White, Ordway, and Flemming.

The Budget Bureau, on being moved in 1939 to the Executive Office, expanded greatly and took over, in addition to its estimates functions, the work of studying the organization and methods of management of the federal government. While the Budget Director is appointed by the President without Senate confirmation, the Bureau administers a considerable number of government-wide controls prescribed by statute, such as the enforcement of personnel ceilings and the Federal Reports Act. Certain congressmen have appreciated the Bureau's potentialities and sought to transfer it from the President's control to supervision directly by a congressional committee. It is still too early to judge how much the Legislative Reorganization Act of 1946, which requires the Comptroller-General to study

and report on the conduct of operations of the executive branch, may hamper the Bureau's program of improving federal administration.

The top-ranking officers of the Budget Bureau and the most active members of the Civil Service Commission have worked consistently to make their agencies assume a more positive rôle as aids to better management, and to avoid over-stressing their restrictive controls. The Budget Bureau, probably because its director is not hampered by two colleagues, has been the more successful in this direction. Even so, it is difficult for an agency which is necessarily staffed by technicians or specialists to keep them from over-emphasizing their specialties. Staff members, especially those several layers down in the hierarchy, find it not too easy to get a vivid sense of the positive purposes which their chiefs may be seeking to advance—a sense which is transmitted most effectively by face-to-face relations, and which becomes much weaker when filtered down through official communications. It is always a problem for the subordinate staff officer to broaden his views and work toward general objectives. He is easily tempted to gratify his self-esteem by forcing his special regulations and his special schemes on operating agencies.

Nevertheless, in both personnel and budget work the central staff agencies have sought to gain their ends by getting the departments to improve their own staff services and controls. The Civil Service Commission, for example, supported an executive order in 1946 which transferred the recruitment and classification of departmental personnel to the operating agencies, subject to its audit. The Budget Bureau similarily administers controls over statistical programs largely by serving as the secretariat for a network of interdepartmental committees, and it has added to its regular system of estimates hearings a program of training departmental budget staffs. In functions such as classification and budgeting, most of the detailed decisions can be settled by technicians, and the policy issues can be segregated for determination by higher authority, if necessary by the President.

It is principally in those functions in which the Budget Bureau faces political pressures that it cannot act in close cooperation with line agencies. The Bureau, in preparing reorganization plans for the President, generally is unable to discuss them with the agencies affected lest these start political campaigns against the plans. Similarly, in its work of clearing legislation, legislative recommendations coming from the departments, and executive orders proposed by them, the Bureau maintains a somewhat less intimate relation with the operating establishments.

The appropriations committees of Congress have explicitly insisted that the Budget Bureau, even though it acts on behalf of the President, shall not tell executive agencies what they can say and what they cannot say. Con-

gress demands the right to hear the independent views of a department head or those of any of his subordinates, although such views may collide with the program of the department itself or that of the President. Thus, to go back to the story of the legislation on atomic energy, Senator Johnson heard Secretary Patterson state his recommendations, which had been altered somewhat to conform with the President's wishes. Implying that the Secretary's statement on behalf of the War Department was not enough, the special committee decided to hear the independent opinion of General Groves, directing the development of atomic energy, who, as every newspaper reader knew, was not in agreement with his civilian chief.

The Budget Bureau is therefore permitted only to require that the departments report whether their legislative proposals are, or are not, in accord with the program of the President. This type of clearance helps prevent conflicting recommendations, especially on the less important issues, but for several reasons it can hardly guide the departments in developing a common policy.

First, the President and the Bureau—unlike the British cabinet—are not free to determine the legislative agenda. They can present a unified budgetary program, because estimates are submitted on a fixed schedule. But a department head may recommend legislation whenever he pleases, either directly or by informal arrangement with a congressman or a pressure group. This puts the Budget Bureau in its legislative clearance work always on the defensive. A department can submit its recommendation to Congress with the excuse that the pressure of time did not permit it to receive advice as to the proposal's relation to the President's program. Or, on a very important issue a department head may go directly to the President and by-pass the Bureau.

Second, because its procedure is to wait for a document to be referred to it, the Bureau cannot choose the issues with which it must deal. It must handle a great mass of routine clearance requests. It is therefore bound by a sort of Gresham's Law of administration, by which responsibility for a quantity of specific routine work makes it impossible to handle more general and important problems.

Third, the staff of the Bureau's division handling legislative clearance does not work personally with the President. On important policy problems, they must work through the Budget Director, who, of course, has a wide range of other functions, many of which get priority. The staff member reviewing estimates can settle many problems that are not worth the attention of department heads, since he can deal with subordinate officers on a relatively equal basis. In the legislative clearance work, however, a larger proportion of the problems are policy matters in which a Secretary or Assistant Secretary is apt to be personally interested.

On issues of this level of importance, which are too numerous for the Budget Director to handle personally, his staff members cannot negotiate on an equal basis with departmental political officers.

Fourth, the general procedure of legislative clearance is to tell a department whether its proposal is or is not in accord with the President's program, and maybe suggest that it would be in accord with this program if a certain change or two were made in order to meet specific objections. The Bureau replies to departmental inquiries after clearing a proposed bill or report by correspondence with the departments concerned, or after consulting the President. It does not, however, call together the interested agencies at an early stage in their policy-planning and lead them in working out a common approach.

The organization work of the Bureau suffers from some of the same handicaps. The staff for this purpose must do research work independently of the agencies involved and present a confidential proposal to the President, simply because the President does not have tight enough discipline over the operating departments to let him discuss reorganization plans with them in confidence.

The National Resources Planning Board not only prepared long-range plan for public works and helped establish state and local planning agencies to coöperate with the federal program, but it also brought together leading authorities from both public and private life to draft reports on basic objectives of federal policy. Some of these were confidential reports to the President and others were published at his direction. The board usually included on the committees that prepared its reports professional specialists from federal agencies, who served in their personal capacities—rather than as representatives of their departments—along with recognized private experts. Only in this way could it have governmental committee members serve without being subject to departmental instructions. In other words, the Board was able to develop consistent long-range plans solely by refraining from dealing with current policies on which the departments would not permit their representatives to deliberate without instructions.

Congress abolished the National Resources Planning Board by denying it appropriations. But three years later it created a Council of Economic Advisers in the Executive Office of the President to aid him in the preparation of economic policies which the Employment Act of 1946 required him to present to Congress. At the same time, the act created a Joint Committee of Congress to consider and take action on the President's reports.

It seems clear from federal experience with budgeting and planning that in at least these fields Congress looks to the President for an integrated program. But this experience also suggests that independent staff work for the President, while it may be capable of enforcing regulations and con-

trols or of preparing long-range plans, cannot alone build up a unified program of policy and legislation. The next big step in that direction must consist in strengthening the leadership of the President over his department heads.

V

It is not only the principal staff agencies that have helped the President guide departmental policies. He has had special assistants for special areas of policy, general assistants with broad assignments, and the aid of wartime coördinating agencies now lumped together in the Office of War Mobilization and Reconversion.

The use of a special assistant to deal with a single function of government—covering one or two operating agencies—may sometimes help as a temporary expedient, but is useless as a permanent arrangement. The obvious trouble is that the coördinator becomes just another kind of operating head, without the operating head's responsibility.

The President has employed various special assistants in a more satisfactory way by letting them handle certain problems so as not to conflict with departmental responsibilities. While Presidents Roosevelt and Truman used some of their administrative assistants on many types of work, two deserve special mention for their contribution to the management of federal policy.

Harry Hopkins was the only man who ever became a member of the President's personal staff after holding a cabinet position. Perhaps partly because of his appreciation of the point of view of the operating official, Mr. Hopkins, by all reports, was singularly free from the vice of most of those who have been tagged as "Assistant President": he did not come to think that he was exercising authority of his own for his own purposes. He lived in the White House, avoided the press, and was personally close to the President, while handling for him assignments of the greatest importance.

Judge Samuel I. Rosenman, who helped draft public papers for Franklin D. Roosevelt for several years in Albany, and for thirteen years in the White House, played a large rôle in helping the President determine the course of policy. An annual message on the State of the Union touches on many aspects of policy. To collect drafts of pieces of the message from many executive agencies, to reconcile or reject conflicting proposals, and to balance them all with each other and with the President's personal wishes is one of the highest administrative arts.

The Office of War Mobilization and Reconversion might be described as an attempt to institutionalize the type of leadership over policy that Mr. Hopkins and Judge Rosenman exercised. The President created this

office for war mobilization in May, 1943, and Congress in October, 1944, by statute made it responsible also for reconversion. The statute, in addition to putting into OWMR specific programs for the contract settlement, surplus property disposal, and reëmployment, gave the director more explicit authority to direct executive agencies in certain types of their activity than the President had ever granted, and it required the director to make reports and recommend legislation directly to Congress.

The office set up a committee of agency heads and several committees of lower-ranking officials to help it coördinate particular phases of reconversion. It frequently called special meetings of operating officials to discuss those current aspects of the President's legislative and administrative program that it considered important. While OWMR had independent statutory status and was required to present reports to Congress, the act left the director subject to the control of the President. The director was given an office in the White House and was considered one of the President's principal assistants. The work of his staff and the committees which it served did much to iron out wrinkles in the reconversion program. But no one ever defined satisfactorily the relationship of the office with the other staff agencies of the President, nor the procedures by which it sought to advise and inform the President. On important issues, therefore, a department head might have some doubt whether an OWMR instruction constituted the last word from the President or not, and might well take up with the President issues that seemed to be settled by OWMR decison.

Perhaps the greatest difficulty was that the first three OWMR chiefs did not consider themselves permanent staff aides to the President. Mr. James F. Byrnes and Mr. Fred M. Vinson were men with independent political careers, and Mr. John W. Snyder followed their example in accepting as a promotion his transfer to a cabinet position. Similarly, while the staff members of OWMR did enterprising and even brilliant work, they never became a closely knit organization. The OWMR directors were not very much interested in creating a coherent organization by which the presidency could be staffed. Nevertheless, OWMR probably proved the necessity of providing the President with some type of staff assistance to enable him to deal with current policy problems in a more selective and flexible way than would be possible for, say, an agency with general responsibility for the federal budget.

Even though the relation between OWMR and the principal staff agencies—notably the Budget Bureau—was poorly defined, on several issues staff members of the two organizations worked together with great effectiveness. They could do so because they had the common purpose of serving the President, and because their institutional habits complemented each other in a valuable way. OWMR had the advantages of flexibility and initiative, even though its institutional habits were disorderly to a shocking

degree, and the Budget Bureau, while somewhat less mobile, had ready access to all the resources of information that were kept current by its variety of controls permeating all aspects of federal administration.

All these efforts to help the President guide the development of federal policy had two principal weaknesses. First, they were not tied together by systematic staff work, so that many political conflicts developed simply for lack of clearance of information. Second, when the President asked an aide to settle a dispute between departments, some department head was pretty likely to appeal against the decision to the President himself.

VI

In order to manage the development of policy more effectively, the President needs a system that will let him make more use of his agency heads in person. He needs to draw them into the closer and more loyal relationship that can result only from their participation in more frequent common counsel on national policy. If he can do so, the administrative organization will be able to operate with greater coherence and flexibility than it ever could as long as the President must rely entirely on his Executive Office staff to help him work out orders to be given to department heads.

The President can do this, of course, only if he is determined to accept the responsibility for developing a consistent policy, and is unwilling to play a negative rôle in which he merely arbitrates differences as they arise, case by case. If he wants to accept such responsibility, however, he must have a system. He cannot personally manage the whole business himself, with all his other duties. Nor can he continue to rely on miscellaneous personal assistants.

The cabinet does not serve the purpose, by all accounts, because it is too big to discuss some subjects and too small to discuss others, and its members know they can operate more effectively by getting the President's ear individually than by open discussion. Yet the cabinet is founded on three constitutional principals that it is useful to remember. First, the President may ask any one he pleases to come to a cabinet meeting. Second, he controls the agenda of the cabinet and then, after hearing the cabinet's advice, decides any question as he chooses. Third, the proceedings of the cabinet are confidential.

On the basis of these traditional principles, with the help of a staff unit of a new kind, the President might well develop and systematize the process of counseling with his department heads. The proposed staff unit in his Executive Office would be very small and would seek, not to stand between him and his department heads, but to tighten up the relations between them.

How would this system operate? First of all, the new staff unit would deal primarily with the heads of operating agencies who are directly responsible to the President. It should have no authority whatever of its own. At the President's direction, it should call the appropriate department heads together to work out a common approach, if possible, on any important issue of policy; and if they disagree, it should report the majority and minority opinions to the President for his decision.

Such meetings should be held in the White House, and the President should nominally be the chairman. He might preside briefly at the first meeting, and then turn the chair over to the head of the proposed staff unit—for convenience, let us call him the Chief of the Secretariat. If the issue were important enough, the President might take the chair whenever he pleased. The report of the group, if it received the President's approval, would automatically constitute an instruction from the President to all departments and to all staff in the Executive Office.

On matters on which department heads agreed, the President, if he chose, would not need to study the issues personally. The selection of issues which he should study and those which he need not study, however, should be under his own control. He and his own staff should choose when and how he should intervene in any issue.

If the President should refuse to discuss high policy with department heads individually, and act only after receiving recommendations presented in a systematic manner through his secretariat, the department heads would be all too willing to attend the meetings in person. If a department head, in such a meeting, should deny the President's authority to instruct him, as did Andrew Jackson's Secretary of the Treasury, the President would have to be prepared to apply Andrew Jackson's remedy.

Some working groups of agency heads might become in effect continuing committees—presidential policy committees. The President, however, should have it clearly understood that any such "committee" was not to acquire a fixed frame of reference, a fixed membership, and a separate secretariat—in other words, an independent corporate status of its own. A formal status would destroy the group's usefulness to the President, who would need to manage its relationship with other similar groups with great elasticity. He would gain nothing if he set up committees to bridge the differences between his departments, only to have a set of jurisdictional conflicts between the committees themselves to deal with. Perhaps the reason executive committees are less useful in the United States than in Great Britain is that they feel impelled, like legislative committees, to acquire a corporate existence or operating authority of their own, rather than being content to serve as the channel of agreement between other bodies.

From a cautious beginning, the President might develop a flexible system of groups of agency heads to advise him on the several principal fields of

public policy. These groups could have sub-groups at various working levels, perhaps making use of some of the presently constituted interdepartmental committees. After some period of experimentation, the President might build up as complete a scheme of committees and sub-committees as proved useful. The secretariat would itself need to serve only the upper-level groups, but it should keep as well informed as possible on interdepartmental relations at all levels. With some such system, created to meet the needs of the whole government, it might be possible actually to reduce the number of interdepartmental committees that have been created to work on pieces of public policy.

Would such a system take up too much of the time of busy department heads? It is hard to think of any better way they could spend time than in avoiding the jurisdictional disputes with other departments that now cost the whole executive branch a tremendous loss of time. Half the time they now spend in waging jurisdictional warfare with each other would be enough for them to develop agreement, if brought together under presidential instructions.

How would the secretariat relate to other parts of the Executive Office? Staff work is not divided by governmental function, as is the work of operating departments. The secretariat would have no exclusive interest in any problem. It would choose only the main issues of policy to deal with, and hence would not touch the great mass of details on which the other parts of the Executive Office would work. It would not restrict the independent advice that would be given the President by others in his Executive Office, first, the secretaries and assistants who administer the President's immediate office and deal with the press, the party organization, and Congress; and second, the units doing institutional staff work for the President, such as the Budget Bureau and the Council of Economic Advisers.

The staff of the secretariat should be kept quite small, and it should work closely with other parts of the Executive Office. The legislative clearance of the Budget Bureau would be closer to the secretariat's function than any other present activity in the Executive Office. But the secretariat should not take over this activity, with all the detail involved. It should rather keep closely in touch with it, and keep the Budget Bureau fully informed of all secretariat proceedings, in order to give the Bureau—and other parts of the Executive Office—a chance to add its advice to that of the operating departments on any current issue.

Why cannot the present Office of War Mobilization and Reconversion simply be extended to do the job proposed for the secretariat? This question can be answered only by suggesting that the most important principles about the staffing of the presidency are the negative principles—referring to the things the President should not do. If he is to be chief executive, it is more important for him to guard against the tactics which the political op-

position—and even his own departments—use to diminish his authority, than to work out some neat pattern of administration. What are these negative principles?

First, the staff agencies of the President ought not to exercise authority in their own right over departments on issues of policy. Agencies like the Budget Bureau and the Civil Service Commission necessarily regulate aspects of federal management that the President never hears of, even though personnel regulations and budget estimates are finally determined by him, and a department head can appeal to him. On current policy questions, a staff unit must act less independently. The secretariat may sort out pertinent information, summarize for the President the advice of operating agencies, and administer the system by which he issues instructions to his department heads. But it will be handling the actual or potential subject-matter of legislation. If it makes decisions itself, Congress may well insist on formalizing its status, treating it as an independent agency, and making it answerable to a congressional committee.

Second, the President ought not have any single aide who is his sole channel of staff advice. A single chief of staff, or Assistant President, is all too likely to develop political ambitions. Or, even if he were immune to that all but universal weakness, congressmen and executive officials alike would thrust a political rôle on him by creating or provoking differences between him and the President, and playing the two off against each other. For purposes of internal management of the Executive Office, the President, of course, might well designate one of his staff aides as a sort of *primus inter pares* for certain limited purposes; but the less conspicuously he does so, the better. If the President puts his policies at the disposal of one man, he will virtually lose the right to discharge him. He could not hire an *alter ego* without, in effect, giving himself a vote of no confidence. The surest way for the President to become a mere constitutional monarch would be to make someone else his prime minister.

Third, the President should not have the internal affairs of his Executive Office frozen by statute. He ought to be able to adjust its internal relationships at will. Moreover, he should be able to choose his immediate aides as he now appoints the Budget Director, without the necessity of getting them confirmed by the Senate.

Fourth, the President should have discretion in managing the relations between his executive departments. The statutory creation of, for example, the proposed Council of Common Defense would hamper the President's ability to adjust the relation of its members with other department heads.

Once the government departments are given their basic functions and powers by statute, it is an executive job to coördinate them and to manage the development of their policies. The creation of statutory agencies for

coördination, between the level of the departments and the chief executive, can only add another layer of semi-independent establishments to those which the President must try to coördinate. If he is to have his subordinates develop a unified policy—always, of course, subject to legislative approval, amendment, or rejection—he must exercise full discretion in deciding when to consult with any of them individually, when to require them to clear their policy proposals with each other, and when to have his own staff units review these proposals and advise him about them.

The constitutional principles on which the cabinet is founded are sound. Nevertheless, the cabinet has become an administrative anachronism. The President needs a new system for the development of executive policy. If he does not create one, Congress may set up by statute a confusing complex of interdepartmental clearances and committees. It would strengthen the President's political as well as administrative leadership if he were to systematize the methods by which he advises with his subordinates—always taking care to preserve his right to determine whom to consult, when to consult, what issues to discuss, what decisions to make, when to announce them, and when to operate occasionally outside the channels he has created.



66. MR. TRUMAN'S ECONOMIC ADVISERS AND HOW THEY WORK [1]

THE Employment Act of 1946 established a Council of Economic Advisers with the duty of reporting annually to the president on the state of the American economy. The Economic Reports that stem from the work of this Council may well become the most important socio-economic documents annually published in this country. In this article Mr. Soule briefly describes the activities of the Council and comments on the conclusions reached in the first three reports issued by it.

WAY back in 1946 there occurred an event which, though temporarily obscured by the many alarms and excursions since then, may in the end be recognized as one of the most momentous in the post-war years. Congress passed a law declaring it to be the responsibility of the Government "to coordinate all its plans, functions and resources * * * to promote maximum employment, production and purchasing power." Numerous qualifications were inserted in the declaration by meticulous legislators, and of course the customary obeisance to "free competitive enterprise" could not

[1] George Soule, *New York Times Book Review* (February 1, 1948).

be omitted, any more than Russian documents can dispense with compliments to Lenin and Stalin. Yet a major failure in achieving the main purpose could endanger all other objectives of the nation, foreign and domestic, including the promotion of free enterprise.

The Economic Reports of the President constitute the focal point of the procedure outlined by the Employment Act of 1946. As they have appeared from time to time, they have frequently been discussed as if the President had retired to his study and dreamed them up all by himself, with an eye on the political barometer. In fact they are drafted by a body set up by the law, the Council of Economic Advisers. The council is something brand new in the American order. It is the first official agency ever created in this country for the sole purpose of concentrating on the efficient operation of the economy as a whole. It is supposed to advise and consult, not only the President, but with business, labor, farmers, the citizens—in short, you and me.

The council consists of only three men, who are nonpolitical economic experts. The total force of the agency comprises twenty-eight full-time and five part-time employes. Although the budget granted it by Congress was but $350,000, it returned over $90,000 to the Treasury on June 30 last. These facts emphasize that its job is not to do research or to administer a bureaucratic machine, but to think. The United States is richer than any other country in material goods and in facts and figures concerning them: it is not always distinguished by the rarer but less expensive treasure of concentrated, consistent and disinterested thought about what those facts mean and how they should affect policy.

Messrs. Edwin G. Nourse, Leon H. Keyserling and John D. Clark, who compose the council, must be brave men to sally forth like David with only the pebble of reason to do battle against the Goliath of economic confusion. Reason, especially expert reason, is none too popular, except when it deals with physics and chemistry. The members of this team have some practice in casting their pebbles. Mr. Nourse was for many years vice president of the Brookings Institute, Mr. Keyserling was an economist at Columbia University and technical adviser to various Senate committees, Mr. Clark was vice president of the Standard Oil Company of Indiana and dean of the School of Business of the University of Nebraska. Their opponents consist not only of the intrinsic difficulty of their assignment, but the ignorance, the self-interests and the political irrelevancies which often determine what government, business, labor and agriculture do.

This book contains the first three Economic Reports—January, 1947; July, 1947, and January, 1948, hitherto available only as official documents. Those who are concerned about their country's future should take a few evenings off to study them and see how we are getting on with this ambitious task. The reports are more comprehensible to the layman than the

Smyth Report on atomic energy, and the matter with which they deal harbors even greater potency for explosion or for human welfare, depending on what we do about it.

The first report, after analyzing the forces which had brought about the high employment, the large production and the rising prices, registered its disagreement with the then current opinion of many economists and business men that a recession was probable during 1947. But it did point out growing dangers which would bring a recession unless they were remedied before long.

Consumers' purchasing power, though far higher than before the war, was being reduced by rapidly rising prices. The average factory worker, taking home $46 a week in October, 1946, could buy no more with it than with the $35 he had in April, 1942. Those on the lower levels of income were eking out their resources by saving far less than during the war and by tapping such savings as they had—though 24 per cent of American families had no war bonds or bank accounts in 1945, and 29 per cent had less than $500. Unless wages went up without raising prices, or prices came down, consumer buying would soon begin to shrink, except in so far as breadwinners went into debt. But too great an increase of installment and other debt would in the end bring a sharper collapse.

A lot of money was being spent on housing, but prices were so high that the need could not be met. The most recent Report points out that the physical volume of construction is less than in any year of the Nineteen Twenties. High prices for houses inflate debt and limit the market.

Heavy demand for exports, large business investment and expansion of bank credit would, the Council thought, keep things going through 1947 even if inflation were not checked, but such supports could not continue indefinitely.

The second Report, issued last July, re-emphasized the conclusions of the first, though it observed with satisfaction a leveling out of prices which had occurred in the previous quarter. It noted the prospect of higher food prices on account of the short corn crop, and pleaded with coal operators, steel makers and others not to translate the recent boost of miners' wages into higher prices, until they had time to find out whether it could be absorbed by more output per man-hour or otherwise. Coal, steel and automobiles in succession promptly did the contrary.

The current report carries on the sad story of inflation, with telling figures. Production, it demonstrates, cannot possibly be increased enough at the moment to obviate the necessity for anti-inflation measures, since there is now maximum employment. Added capital equipment and better efficiency may raise output 3 per cent this year.

This brief summary does scant justice to the skill with which the Reports have brought great masses of statistical information to bear on current

problems. Overshadowing everything else is that remarkable new device for understanding our economy—the Nation's Economic Budget, which covers the receipts and spending of all of us.

This budget matches receipts against spending (or investing) under the four great heads of receivers and spenders—consumers, business, government and foreigners. If the figures are correct, the receipts must always balance the expenditures for all taken together, since everything received by anyone is spent by someone else. The account is kept not to see whether there is a surplus or a deficit—either of which would be impossible—but to see what happens to total demand, and why, as a guide to policy.

One thing this budget shows is that markets and employment have been enlarged to the present size from the pre-war level by a much greater growth in business investments, governmental outlays, and exports than by increase in buying on the part of individual consumers. In terms of real goods and services, consumer purchases have increased 48 per cent since 1939, while business purchases equipment have increased 170 per cent. If in the next fews years we are to have a falling off of business investment, of the export surplus and of governmental buying, there must be a tremendous increase in consumer spending to sustain employment, unless a drastic fall in prices occurs. But where will consumers get the money? This is not somebody's crackbrained theory; it is simple arithmetic.

Opinions of the excellence of the Advisers' advice differ; some think they have gone too far, others that they have not been nearly emphatic enough in their warnings or drastic enough in their proposed remedies. Whether the present American political structure and economic institutions will submit to the discipline of foresight is open to question. So far, the Council's (or the President's) recommendations have been adopted to perhaps 25 per cent of full measure—and this includes retention of existing taxes so that substantial Federal debt reduction could take place in 1947, a policy which required a Presidential veto to effectuate.

But one thing is certain. The hope of American democracy has in the past always rested and still rests on trust in the capacity of the people to understand major issues and exercise common sense in deciding them. In the major field of controversy and danger we now have a competent agency to illuminate the issues and focus attention on relevant proposals. Let us make use of it by paying close attention to its counsel.

67. TOOLS OF ADMINISTRATION [1]

DEAN Upson wrote this letter to men about to be graduated from the National Training School for Public Service at Wayne University in Detroit. He assumes a knowledge of the fundamentals of public administration and, building on that, emphasizes the practical application of the art. His letter describes the general problems of an administrator. What tools are used by an executive to accomplish his objectives? How does he organize his service or business so that the work is efficiently completed? Much the same sort of problems have to be solved by any person in a directing position, whether a business man, a high school principal, or a public servant. Dr. Price's "Staffing the Presidency" (selection 63) is a particular application of the problems presented here. Essentially the question is how to get other people to work for you, or how to lead other people.

AFTER a year or so of graduate activity, possibly even study, it is assumed that you have mastered what Luther Gulick has yclept the "POSDCORB." Posdcorb stands for planning, organizing, staffing, directing, coordinating, reporting, budgeting—some of the tools of administration, although the word looks Russian and smacks of communism, or at least of the New Deal. It also means the art, science, necromancy and phrenology of public administration.

You are about to take the federal civil service examination for junior administrative assistant (with 10,000 others), importune some city manager for the job of office boy, or invite yourself to become "leg-man" for one of the civic organizations devoted to the worthy task of hurrying the inevitable. In brief, you are trying to get your foot into the door of your profession—and I venture the hope that that foot is in a shined shoe, that your pants are pressed and that you are washed behind the ears, because those are the things that your new boss will see before you can get your mouth open.

But this letter hasn't to do with professional amenities, reserved for another communication on *Being an Executive*, but rather with tools of administration and how you can use them to get things done. Getting things done thru others *is* administration.

It is thus an aggregate of duties and responsibilities imposed upon subordinates. It involves always a knowledge of *what* is to be done—and an organization built around *who* and *how* and *where* and *when*. In effective administration it frequently involves "why"—but not always, *vide*

[1] Leni D. Upson, from *Letters on Public Administration* (National Training School for Public Service, 451 Kirby Avenue, Detroit 2, Mich.). Reprinted by permission of the author.

the charge of the Light Brigade at Balaklava—"theirs not to reason why." Bad administrators frequently do not tell subordinates *why*.

Professor Spencer A. Parratt of the School of Citizenship and Public Affairs of Syracuse University, in one of his lectures to you Volker Fellows, defined public administration as "a knowledge of the social objectives of government and of the processes necessary to their attainment." That is an idealized way of saying what, and lumping the *who, how, when,* and *where* as parts of total *how*.

That all government has social objectives is evidenced by the mere fact that it exists, but Herbert Spencer and Karl Marx were the poles apart as to what those objectives were. I have not consciously attempted to influence your own opinion of the ends of government. Unconsciously, I have done so—no instructor can defy his genes or deny the sun and rain of his youth or the experiences of his maturity—his last a dear school in which not only fools, but all of us, matriculate. He can, however, refrain from economic and social preachments except insofar as facts themselves are propaganda; and he can urge that you formulate your own social philosophy on a *firm* foundation of history, economics, sociology—and politics, in its best sense. Then across the years you will make your own determination of the role of government in our society. But do so with a willingness to change your mind and on as broad a knowledge of significant facts as you can get. You can always learn administrative procedures when put to it—and fast. Fundamentals of politics and economics come slowly, painfully and seldom. I would not have you narrow, even though expert technicians, at the expense of wisdom. Neither would I like the psychology that accompanies the ownership of two pair of pants or of two million dollars to warp your outlook on society. An education in fundamentals will keep you from being a crackpot on a soap box in either Union Square or in Union League Club. All of which has little to do with the purpose and processes of administration and arises only because Professor Parratt used the phrase *social objectives of government* and you, as well as I, scribbled a line in our notebooks.

Where has more of a place in administration than we often think. To be sure, if work is to be done it must have a place of doing—and so often place is taken for granted. But sometimes, the very nature of the place may require the merging of responsibility for two antipathetic services in a single individual—as for example, the union of the services of probation and parole in one officer in a remote, sparsely settled area, although probation is a responsibility of the court, and parole a responsibility of the correction authority.

Always, some consideration must be given to the physical area in which work is to be done—the area basis used by other agencies and with whose authority your activities must be correlated; areas for which census data

are available; areas with limited transportation facilities or with natural barriers to communication. For example, what would you think of an administrative district the boundaries of which crossed at random areas used for tax assessment and collection? Professor James K. Pollock said that the U.S. Army did just this in apportioning the French area of occupation in Germany.

Also, administration is often built around *personnel,* illogical as that process may be. Duties aggregate to individuals—sometimes because of administrative ability, sometimes for political reasons, always to the detriment of the theory of sound biological structure.

If you have learned anything at all from the courses on administration you have learned the difference between "staff" functions and "line" functions—a distinction I first heard enunciated a millenium ago by Frederick A. Cleveland, then one of the joint directors with William H. Allen and Henry Bruère of the old New York Bureau of Municipal Research. I believe that Dr. Cleveland borrowed the terminology from the army. To him, line functions affected the public directly—such as policing, fire protection, education, street cleaning, garbage removal. Staff functions did not directly affect the public but helped the line functions to function, although the line of demarcation is sometimes obscure. Auditing, accounting, budget making are more obvious examples of staff functions. Line functions differ at every level of government and for every kind of private agency. Staff functions are always the same. The smallest and the greatest of organizations must audit, account, budget—among other activities. And you must know how these things are done because they are the tools you will use whether you run a peanut stand, a railroad, or the greatest of governments.

Lately, those few who write on the subject of administration have come to recognize that there is more to administration than the staff and line functions we oldsters were brought up with. That "something" has to do with "management," although the word management has been mouthed about until it has lost its vitality just as some old-fashioned genealogical epithets have degenerated into boisterous cocktail lounge greetings.

In that recognition, Leonard D. White tentatively suggests that the staff functions fall into two groups—one called "staff" and one which he dubs "auxiliary" or "housekeeping" or "service." Dr. Gulick refers to these "staff" activities as "knowing, thinking, planning."

I venture that these newly called "staff functions" are not functions at all, in the accepted sense of the term. Rather, they are aids to management—work that is inherent in the job of being an executive—what Clarence Ridley calls "undelegatable" duties—undelegatable in the sense that these staff persons are not part of the "Command" but advisory to it.

Personally, I think of these "staff" or "management" duties as consisting of organization, coordination, reporting, enforcement, planning, research, and timing. They have to do intimately with the administrator, must be undertaken by him or under his immediate personal direction, and the personnel involved should be attached to his office.

There is likely to be some confusion between certain or all of the auxiliary services and the staff aids because the first has in them certain elements of the second. Personnel, as an auxiliary function, is in part *staffing;* accounting and auditing are in part *reporting and research;* budgeting is likewise *reporting.*

That leaves as auxiliary or housekeeping or service functions: staffing, accounting, auditing, revenues, custody of funds, budgeting, purchasing and perhaps some of those occasionally pooled functions such as clerical, transportation, and maintenance of facilities.

This letter has little or nothing to do with the quarrel as to whether public administration is all techniques, and hence has no truck with the determination of policies. To be sure, administrators are endowed (and some believe divinely so) with administrative discretion and do their governance with a lively respect for the opinions of the policy determination group that often confirms their appointments and pays their wages. Administrators can always soften or harden the law (and do) for the benefit of home owners or big business, of labor or management, of one little pressure group or another. Always, the administrator suggests and helps formulate legislative policy. There is no clear demarcation between policy determination and policy enforcement. But these are tricks of being a good administrator, and one of them is to make everyone believe you have nothing to do with policy discrimination. Anyway, this particular *Letter* deals with tools, and not with the skill with which you use them or for what purpose.

STAFF AIDS

Now back to the newly defined aids of administration—*organization, coordination, reporting, enforcement, planning, research, and timing.*

Organization involves determination of the "span of control"—the several brass hats that report directly to the chief—and of "depth of command" under each brass hat—the arrangement of generals, colonels, captains, lieutenants, sergeants, and finally the privates. As the span of control narrows or widens the depth of command obviously becomes deeper or shallower. To esoteric thinkers this arrangement is known as "echelons of command" or the "scalar process."

In good administration every decision should be made at the lowest practical level of command. Otherwise there is little or no use for the

creation of a pyramid of organization. Only bad administrators insist on making every decision, both large and small.

But bad administrators always insist that they are good ones and *do* delegate authority. Actually, they know the rules of delegation but congenitally or environmentally are inhibited and just can't forgo the ego satisfaction of having a finger in every pie. The Freudians have a word for the reason why some well informed and forceful persons are sometimes bad administrators in spite of good intentions—their indelible "inferiorities" must be "compensated"; they were youngsters who were once laughed at because of their big ears or "game" legs or color or race; their mothers suckled them too briefly or indifferently, or for any one of many causes they have never felt "secure."

You can organize a service by any of four methods—what, where, who or how, all of which means what is done, where it is done, for whom it is done, or by what means. Sometimes, the element of time is involved —i.e., organization on seasonal activities such as summer or winter, night or day, but such classification is not important at higher levels. These sentences are ordinarily good for an hour's classroom lecture or a chapter in any respectable book. But fundamentally your organization will be by what is done (functionally) or by where it is done (territorially) and mostly the former.

Further than that, much of the detail of administration will be based on the capacities of individuals. Administrative responsibility gravitates to the competent administrator in defiance of all the rules for orderly organization.

But in theory, at least, fix up your organization on a "unifunctional" basis, which means give every sub-administrator some like things to do, which means put people and activities into neat compartments or pigeonholes Your principal job as administrator is to test the results and sometimes the procedures with which these cubby-holes are concerned—if you know enough. Otherwise leave them alone and hope your subordinates will know how to run the business without you.

Set up just enough of these unifunctional cubby-holes so you can see the fellows who sit in them often enough that you can know what is going on and not so often that you try to run their jobs for them. If you have forgotten, this is called Graicunas' Law—and I hope that you have forgotten.

Actually, nobody can say how many cubby-holes are required. It depends on the kind, size, and complexity of the main job, your own capacities, how early you get down in the morning, how much time you spend gossiping with callers about politics and baseball, and how soon you can get rid of callers.

The best way to expedite both the sub-administrators and the callers is

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Organization involves determination of the "span of control"—the several brass hats that report directly to the chief—and of "depth of command" under each brass hat—the arrangement of generals, colonels, captains, lieutenants, sergeants, and finally the privates. As the span of control narrows or widens the depth of command obviously becomes deeper or shallower. To esoteric thinkers this arrangement is known as "echelons of command" or the "scalar process."

For good administration every decision should be made at the lowest practical level of command. Otherwise there is little or no use for the

creation of a pyramid of organization. Only bad administrators insist on making every decision, both large and small.

But bad administrators always insist that they are good ones and *do* delegate authority. Actually, they know the rules of delegation but congenitally or environmentally are inhibited and just can't forgo the ego satisfaction of having a finger in every pie. The Freudians have a word for the reason why some well informed and forceful persons are sometimes bad administrators in spite of good intentions—their indelible "inferiorities" must be "compensated"; they were youngsters who were once laughed at because of their big ears or "game" legs or color or race, their mothers suckled them too briefly or indifferently, or for any one of many causes they have never felt "secure."

You can organize a service by any of four methods—what, where, who or how, all of which means what is done, where it is done, for whom it is done, or by what means. Sometimes, the element of time is involved —i.e., organization on seasonal activities such as summer or winter, night or day, but such classification is not important at higher levels. These sentences are ordinarily good for an hour's classroom lecture or a chapter in any respectable book. But fundamentally your organization will be by what is done (functionally) or by where it is done (territorially) and mostly the former.

Further than that, much of the detail of administration will be based on the capacities of individuals Administrative responsibility gravitates to the competent administrator in defiance of all the rules for orderly organization.

But in theory, at least, fix up your organization on a "unifunctional" basis, which means give every sub-administrator some like things to do, which means put people and activities into neat compartments or pigeonholes. Your principal job as administrator is to test the results and sometimes the procedures with which these cubby-holes are concerned—if you know enough. Otherwise leave them alone and hope your subordinates will know how to run the business without you.

Set up just enough of these unifunctional cubby-holes so you can see the fellows who sit in them often enough that you can know what is going on and not so often that you try to run their jobs for them. If you have forgotten, this is called Graicunas' Law—and I hope that you have forgotten.

Actually, nobody can say how many cubby-holes are required. It depends on the kind, size, and complexity of the main job, your own capacities, how early you get down in the morning, how much time you spend gossiping with callers about politics and baseball, and how soon you can get rid of callers.

The best way to expedite both the sub-administrators and the callers is

to set square at your desk and look as if you had some other business just around the corner. If that doesn't work with the really hard-boiled cases, arrange that your secretary, at an appropriate signal, jump out to the switchboard and call you up reminding you of an urgent appointment. An effective device is to drop your watch or desk clock on the floor. The noise will attract her attention if she is busy manicuring and the timepiece will connote appointment if she has forgotten the arrangement.

Seriously, an initial test of your ability as an administrator will be your ability to keep your appointments—particularly those in your own office. Your visitor's time may be worth more than yours—impossible as that may seem. Certainly, his opinion of your administrative capacity and of your sense of courtesy is worth more than your opinion of yourself. A tactful secretary can help—one who will remind both you and your current visitor that your allotted time has elapsed—and that continuance is stealing the time of the next appointee.

If you habitually have visitors without appointments, see that each is announced to you as he comes in, otherwise the president of your board of trustees or some one who owes you money may be cooling his heels and warming his temper while you exchange banalities with a colleague. Try to interrupt your business long enough to see each person as they are announced—a minute may answer someone's question or direct him to someone else or make an appointment convenient to both.

After you have your activities carefully allocated into neat little cubby-holes, there will be no way by which the fellow in one pigeonhole can know what the other fellow is doing. That is how it happens that street paving sometimes gets laid before water mains and sewers, and in recent days, the artillery got shells that were a couple of sizes too big or too small. There is no real cure for this trouble that the textbooks have thought up yet. But staff meetings help and there is talk nowadays about "staff officers" to do nothing but "coordinate." More of this later.

Also, occasionally, you can shuffle the cubby-holes around or pull out the partitions between a few of them. This process is called "integration."

Akin to this difficulty of coordination is the fact that two services sometimes have to work together although they are under different bosses. This arrangement permits the janitor of the school to thumb his nose at the principal because he, the janitor, reports to the business manager downtown. There is no cure for this trouble either, although the authorities on administration have thought up a lot of reports for one or the other injured persons to fill out which gives him some mental relief and keeps him from blowing a fuse.

When a service covers a lot of acres you start "unifunctionalizing" it on a territorial basis. But we know little about how to organize effectively

functions that must have a geographical distribution. The Roman Empire and the Roman Catholic Church organized or organize (with certain modifications) by geographical areas and then by functions within the areas. Our federal government and most governments for that matter reverse the process—organize first by functions and then, in scores of instances, administer those functions geographically.

Few of these federal administrative districts are coterminous, in few are the administrative headquarters located in the same cities, in none is there complete collaboration between regional administrators—sort of sub-cabinet meetings—decisions are frequently prescribed by law rather than by common sense, regional quarrels and conflicts run the long course to Washington and back for adjustment.

An alternative might be to chop the country up into a dozen or more administrative districts, put a sub-capital in each, and set up the machinery by which the right hand of one department could know what the left hand of another was doing. We might even have regional gauleiters, each ambitious to be and in training for the presidency. This would appear to be a slick, new idea, almost worthy of the late National Resources Planning Board, except that Alexander Hamilton proposed something like it to the Constitutional Convention of 1787—all of which goes to show that there isn't much new in government except the men who write about it.

Territorial organization means a lot of new overhead in each territory and gives your successor a chance to re-unify everything when you pass on. Then his successor can undo this re-unifying. This re-unification is called "integration" or "streamlining." The reverse is called "decentralization" or "disintegration" or "grass-root administration," depending on the school of thought.

Nobody knows what to do with the fellows who lose their jobs in these periodic shake-ups. In government they usually get transferred to some other department which has little or no use for them. In business they sometimes get fired and live on social security and their relatives.

Also, so-called "streamlining" is the process of jerking "service" functions out of each of the principal activities and consolidating them into general overhead units. That means, in low-brow language, that you take the jobs of personnel management, budgeting, accounting, purchasing, maintenance of facilities, and sometimes clerical work including stenographic, statistical and drafting service—and centralize these in a half-dozen main auxiliary departments.

This kind of business is supposed to make for economy and efficiency and also makes some sub-administrators mad as hops, and they can argue from here to Sunday on how their work is hampered, hindered and mayhemed by the process. And each sub-administrator also cries because he hasn't his own stenographer to sit on his knee, but must accommodate

himself to the amorous anonymity of a wax cylinder shoved on and off his desk by the office boy.

Sooner or later, the department heads wrangle some of these services back into their departments, clandestinely entering bookkeepers and statisticians on the payroll as chauffeurs or doorkeepers. No answer to this one either except that auxiliary functions are in the constant process of centralization and de-centralization and/or integration or disintegration which keeps everybody on edge as to whether or not he is going to have a job next year. These reorganizations and attendant economies usually happen just as some poor devil has gotten married, had a baby, built a house, or turned down a better job with another organization out of "loyalty."

If organization is the delegation of responsibility to others to further the accomplishment of a common purpose, then coordination is the effective use of that delegated responsibility as a single force—something largely absent in government.

The maxim, "To have a thing well done, do it yourself" has no place in the science of administration. By definition, administration is getting things done through others. These others seldom work perfectly together for a variety of reasons—failure to transmit instructions intelligently, failure to interpret them intelligently, inadequate reporting that leaves one sub-administrator in ignorance as to what the other sub-administrator is doing—a disability that is aggravated by territorial dispersion of responsibility—personal ambitions, zealous desires to do a job well that some other sub-administrator is not doing well or not at all.

There are no rules for being intelligent. You can gain the appearance of it by keeping your mouth usually shut, looking solemn, and disagreeing moderately with other people's conclusions but never to the point of having to prove your own.

Ambition and zeal are much to be desired qualities in administrators that doubtless derive either from too active endocrine glands or an overdeveloped inferiority complex. There is nothing like a first class inferiority complex to put a burr under the tail—but the thing is also easily overdone. It is a part of your job as administrator to make these diseases among subordinates useful to the common endeavor.

Possibly a part of the answer to effective coordination is the use of the "staff officer"—a personal agent of the administrator, a spreading of his ears and a bulging of his eyes. Such an officer presumably does not give orders—he is not part of the "command," as has been said. He may interpret orders to the sub-administrator, if he is sure they are being misunderstood. It is his job to see that the activities of each sub-administrator are coordinated with the activities of every other one or to report to his chief that they aren't so coordinated.

However well this coordinating office has been developed in military circles, it has been little recognized in civilian public life. The New Deal has developed a half-dozen "assistant presidents" and a pack of "expeditors" and "coordinators"—but governors and mayors usually rely for information on a favorite secretary or some operating officer with a roving commission to snoop added to his other duties. The office of "assistant to the mayor" has been suggested in a number of cities but in those that have tried it—New York and San Francisco—it has not amounted to much. Here is a field for further thinking and experiment.

Perhaps one principal reason for slowness in the development of this "staff" office is the exceeding distaste that "line" officials have for the incumbents. Staff officials have an aggravated tendency to become know-it-alls who sooner or later attempt to push the line officers around. Staff jobs will assume their rightful importance when staff men realize they are coordinators and interpreters and not bosses.

From the foregoing do not conclude that staff activity should be all at the top like cream on a milk bottle. Staff is not a little research bureau basking in the greatness of the chief administrator. Good staff work must permeate the several "eschelons of command" clear down to the high private in the rear rank who actually washes the elephant. The military knows something of how this "total approach" is accomplished: few industrial and no political organizations do. In these latter organizations staff usually takes the form of committees or councils recruited at various levels and geared continuously upward. Unhappily, most administrators forget to define the scope of activity for such staff groups, which should always be advisory and inspectorial, never legislative or administrative, although Top Management enumerates several categories of authority for such staff organizations. Since, next to sex, power is the greatest of urges, these staff agencies almost invariably attempt to become part of the command itself, issue regulations, approve actions, and generally commit the unforgivable sin in sound administration—negation of unity of command.

Coordination requires *reports* and the idea of operating reports was doubtless thought up by the first paleolithic administrator who sent somebody to do something over a hill where he couldn't be watched. The more fellows there are over the hill the more the reports—until the administrator is smothered with them, unless he learns the distinction between what he should know and what only his sub-administrators should know.

Reports have to do with whom, and how many and how much. They must be comparative because measurement always involves comparison—comparisons with other periods of time and with other organizations. The knack of effective reporting is to sift out detail and formulate mean-

ingful comparisons as the reports of the several agents are consolidated and reconsolidated and move up through sub-sub-administrators, to sub-administrator, to administrator, to executive. A railroad section foreman is concerned with spikes, rails, man hours; a railroad president with the cost per mile of maintenance of way and a lot of other things. When a railway president starts counting spikes he ceases to be a railway president—and many pseudo executives do count spikes or nothing at all. Yet little is known about the devisement of consolidated periodic reports for each of the numerous activities of government and of the details to be included for each of the several levels of administrative responsibility.

The first reporter to the first administrator invented the science of statistics and the mathematicians have been improving on it ever since. In its simpler aspects there have been invented averages (means of several sorts, medians, and modes which the statisticians know as "measures of central tendency"), deviation, correlation, error—all to befuddle college students who know little calculus and less catechism. If you wish an on-the-other-side-of-tracks acquaintance with the subject, there is another letter in this series on *Statistical Theory in One Easy Lesson.*

Enforcement has to do with your orders to your subordinates and your orders to your betters—the latter being the public which has hired you to serve them and which is also the taxpayers that put marmalade on your toast, glamourize your wife, and hang things on your children's Christmas tree.

Getting your subordinates to carry out orders with intelligence and to fill in the gaps left by your lack of lucidity and the almost universal incapacity of people to understand the written and spoken word, involves being an executive. Considering the respect paid to executive leadership, it is a wonder the professors can't teach how to do it. In another *Letter* I have set down what I believe to be some of the rules for executive conduct—except that rules cannot provide the intelligence, honesty, and courage upon which all leadership is based.

Your orders to the public will have to do with what the courts call "administrative discretion." Administrative discretion enables you to cultivate an insufferable arrogance simply because your employer is an amorphous citizenry that can not easily hand you a blue envelope on Saturday night.

Unhappily, laws cannot be enacted in maggoty detail and their fine interpretation must be left to administrators subject to review by the courts —a review that is concerned primarily with two questions: was there an illegal attempt to delegate legislative authority to the executive, and, if not, did the persons affected by the administrative orders have the benefit of "due process of law"—a guarantee that under the 5th and 14th Amend-

ments of the federal Constitution extends to all levels of government, federal, state, and local.

But the guarantee that life, liberty, and property may not be taken except by due process of law only means that prescribed legal procedure must be conformed to—and different procedures are prescribed for each agency. Ordinarily the courts are too busy to inquire into the accuracy of the facts upon which administrative decisions are based—unless there is evidence of fraud, capriciousness, or of egregious error. Sometimes an appeal authority of sorts is provided to review the facts upon which your administrative decisions may be based. But there are means available by which you can frequently circumvent such controls, small as they are.

The most scurvy of these means is to enter into a deal with the individuals and corporations affected by your orders. Simply tell these folks that unless they admit the correctness of your decisions without a court fight you will apply every penalty in full in event they lose. Usually your "clients," as the social workers say, will prefer the possible illegality of your decisions to the possibility of a stiff line, even a prison sentence.

Still another neat enforcement device can result from your failure to appeal a court case you have lost when you feel certain that the higher courts will deny the appeal. That process limits the decision of the court to the area over which it has jurisdiction and you can go on enforcing your illegal orders in other jurisdictions until some other victim has money enough to hire a lawyer.

Enforcement requires orders to enforce. Initially, administrative orders or "interpretations of law," particularly when an administrative organization is new, are frequently "off the cuff"—made up as the administration goes along. Within the rough scope of the statutes, the more specific boundaries are determined by the human passion for absolutism tempered by fear of public opinion. Unhappily, the latter restraint is "slow to wrath," is ignorant of who and what to be mad at, and so is often ignored. Therein lie some of the difficulties of the transition of our once simple agricultural democracy to a complex industrial civilization.

But to come back to make-shift administrative orders and "interpretations" which some folk believe threaten our democratic system—out of a welter of such, eventually must come a definite pattern of procedure. It is this pattern which the administration eventually coagulates into "rules" which now-a-days the Federal government and some state governments require to be published, since they have "the force and effect of law." Nevertheless, many administrators resent such controls and stave off exact rule making as long as possible, because rules in themselves limit further "administrative discretion." Once an administration interprets and puts

in writing the legislative meaning of such words as "substantial," "monopoly," "fair cash value," "fire proof," "safe," "bargaining in good faith," he is estopped from guessing in each case presented—which restriction is sufficient to frustrate many administrators.

The one sure cure for such frustration is to devise a licensing system as a means of enforcement. Licensing provides an administrator's heaven. Once an individual or organization is licensed, he or it has not a right, but only a privilege to exist. An administrator can close a theater because he doesn't like its shows, cancel a mailing permit because he doesn't admire a publication's pictures or politics, or starve a citizen because a ration book is the property of the United States Government and can be withdrawn at administrative whim. If the victim doesn't like this system of rule enforcement he has recourse to the courts because life, liberty and property may not be taken except by due process of law, either by the nation or a state. But to the courts the presumption is that the administrator is always right, and how to get the case into court is still something else. If an OPA Board found you guilty of rule violation, for real or fancied reason, and lifted your ration book—what did you do about it? Nothing: and as a result, you may not be alive to read this; in Russia or Germany you wouldn't be, period.

Planning is one of those tools in the use of which there is a lot of Ho and very little Heave. The only comparably abused word in the language is cooperation. Planning is of two kinds—physical and financial, to neglect the spiritual.

Physical planning means drawing up pretty pictures of subways, crosstown highways, and school houses, which can be materialized *if* the federal government will pay for them. It is amazing how chambers of commerce will weep like minnow buckets about taxation and the national debt and then send anxious delegations to Washington to get their share of the loot for some limited access highway or unlimited access airport all in the name of defense or relief. Possibly they work on the axiom of public administration that when others are getting theirs in a cup, you might as well be there with a bucket. But this axiom has never been printed in the *American Political Science Review* so probably isn't one at all.

Financial planning is something else. It involves fixing a decent tax rate and keeping operating expenditures within it in spite of labor unions, improvement associations, and pressure groups, humble and otherwise. It means a pay-as-you-go policy on some well thought out public improvements to be continued over a period of years—all of which is poor politics since it means raising the current tax rate in order to lower it twiceas much ten years from now. So a hundred or so cities have tried long term planning and then have stopped dead in their tracks. Long term planning would be a fine thing if some city would try it. Exceptions are that gang

ridden town of Chicago (which Chicagoans may demur is a case of the spittoon calling the kettle black) with its Wacker Manual and Lake Front Drive, and Robert Moses' parks and parkways about New York.

Spiritual planning means the thinking up the coordination of the thousand details that go into getting the Lord's work done a little better—and perhaps a little cheaper. Planning to save taxes just so somebody can have more mink coats or more trips to Miami isn't worth anyone's life effort—no matter how well you are paid for doing it. Planning so public services are well done and some money left available for more of them is a man's size job—and is a real staff activity.

There might have been another "R" in "POSDCORB"—for *research*, which some genius has defined as copying from two books; copying from one book is plagiarism.

Whenever you make a decision, no matter how simple or unimportant, you do research. You collect the facts pertinent to alternate courses of action—compare the satisfactions or dissatisfactions involved in one with the satisfactions or dissatisfactions involved with the other, and make a choice. Nothing is good or bad, far or near, crooked or straight except in comparison with something else.

Then good research, at least in the social studies, means to accumulate all of the facts that are important to alternate decisions; to understand what facts are important and what are unimportant; and to be able to know the desirable from the undesirable. Sometimes, in this last element, the desirable yardstick of comparison may be taken for granted. For example, you do not need to prove the undesirable character of murder, mayhem, and rape, whatever your personal inclinations may be. Any facts that prove these indulgences also prove a deviation from accepted standards and warrant recommendation for change. Thus, after facts have been gathered the proof of goodness or badness of the conclusion eventually falls back on the social non-acceptance of certain conditions—filth, waste, delinquency, crime, disorganization, taxes, graft.

When, as the result of painstaking research, you recommend changes in government—many of the troubles that will come to you will come because the public has not yet accepted your standards of goodness and badness. To you, ramshackle organization, the long ballot, the patronage system, political partisanship are bad. But not so to the ordinary voter. So you have to carry your researches further, and relate, say, the long ballot, to incompetency, waste, graft—concepts that the voter accepts as bad. It's a long, tedious process that involves educating and arguing at the same time—always difficult. It results because deductive reasoning, the syllogism, seldom applies in the social field.

In the social studies there is no such worth while thing as collecting facts for the facts' sake. That may be all right in the physical sciences where

you can never know what intelligent accident is going to produce the X-ray or sulfanilamide. But in the social sciences you find out what existing conditions are, compare them with best practice, and make recommendations for change. That is research.

If all the time and energy wasted in the collection of useless facts under the guise of research were placed end to end and conserved, there would be ample leisure for all of us to dig around roses and delphinium, or just to sit in the shade of a maple and watch the clouds float lazily across a summer sky. There is therapy in both when you are tempted to fret too much about the state of the Union.

AUXILIARY FUNCTIONS

Now, as to the "auxiliary" or "housekeeping" or "service" functions.

Among the servants of administration, the blondest of the fair-haired boys is staffing—and the one that is going to give you the biggest headache. Next to taxation, probably the worst administered function in government is the merit system. But bad as it is, it is better than the patronage scheme which fills every worthwhile job with political hacks and brothers-in-law and at the end of two or four years turns them out for a new set of political hacks and brothers-in-law. But the fellows that run the civil service are not entirely to blame for its conditions. Legislatures are also responsible, because they have enacted funny statutes exempting positions right and left, knuckling to the professional veterans and other pressure groups, and in general writing laws under which a merit system works in spite of rather than because of—if you get what I mean. You young men may develop a new type of merit system that will work better than the current one.

The personnel administrators are to blame, too, because—they have an idea that in examining for a janitor's job, if they ask the candidate whether or not he hangs his mops in a transom or on a sky hook, or ask a social worker where the great seal of the city is kept, they can determine with micrometer fineness and in absolute rank order who is best fitted to be a janitor or a social worker. Then they make you take the first one off the eligible list even if he or she is redheaded and squints and you hate redheads that squint because you were slapped by one before you were four. The psychologists tell us that if you were slapped before four you go through life with an insurmountable inferiority complex, which is probably your hard luck and shouldn't be charged up to the civil service people at all.

And speaking of psychologists, they are also partially to blame, because outside of the good old Army alpha and its cousins, they apparently have discovered no tests yet that will indicate what chances a chap has of making

good on a job, including fellows like you who have demonstrated patience, tenacity, and broadmindedness, even gullibility, by hanging around the seminar rooms at the university for a year or two. The personnel officers must use the examining tools the sciences have given them and they haven't been given too much.

Then, when you try to fire and bring charges of downright cussedness against one of these employees upon whom the hands and blessings of the personnel administrators have been laid, some lawyer will bob up at the hearing and ask you who was that blonde you were out with Saturday night —and from there on in you will have sense enough to let the incompetents live off the taxpayers undisturbed.

Another headache will be the classification system which writes specifications in such detail that an eligible list for clerks has to be made up for almost every department. If this tendency keeps on we can shortly expect to have eligible lists for street cleaners—street cleaners, asphalt pavement; street cleaners, brick pavement; street cleaners, cobblestone pavement; et cetera, through most of the types of patented pavements the contractors have thought up to confound city managers and gyp the taxpayers. But the labor unions with their "feather-bedding" are responsible for a lot of that.

One of your tasks in the future will be to examine the common qualities that underlie present diverse job classifications and evolve fewer and simpler ones based on the characteristics of personality and the kinds of information that make for success in a given position, to devise examinations that will measure such elements, and to struggle with performance records that don't always perform creditably themselves and to devise one that will.

I know—you've been told all of these things before, and the personnel people insist that they are on top of these problems with a full Nelson hold. I am inclined to believe, however, that these fellows are so busy with their day's work that the most they have done is to talk about them intelligently and hopefully at the yearly meeting of the Civil Service Assembly.

The periodic performance ratings that are coming into general use will get you into some hot water with employees and be a little heavy on your conscience. The theory is fair enough. The principal difficulty is to devise a rating form that will rate useful qualities—and not to ask whether firemen and refuse collectors have pleasantly modulated voices. Corollary is the difficulty of getting several informed and impartial ratings on each individual. Certain superiors naturally rate tough and others easy, all of which can be compensated for by mathematics. But nothing will compensate for the differential a patrolman gets when he has something on his desk sergeant.

And the labor unions will insist that all promotions be based on seniority —not ability—for some reason only known to labor unions.

In *budgeting* we have taught you what we knew in 1911 and we haven't learned much since—unless it's about allotment procedure, which doesn't seem to work too well. After the bureaus of municipal research had gotten their cities to undertake elementary budget making, they were too tired to experiment with planning, work units and cost records, and the public administrators were too busy finding money and staving off pressure groups to be bothered. The exceptions are the police departments which can always manufacture a crime wave for the newspapers at budget time and translate it in terms of additional policemen. Then sometimes they don't know what to do with the new officers so they give them a badge and a club and they tell them to walk up and down Main Street enforcing the Ten Commandments.

When William H. Allen, Henry Bruère, and Frederick A. Cleveland were going to and fro in the land peddling the gospel of modern budget procedure, Augustus R. Hatton apotheosized it as something that could be made "the most potent instrument of democracy." As predicted, it has been a great strength to democratic government, but right now it is in sad need of a glandular operation—which may be another of your jobs for the future.

In the last analysis a budget is an estimate of income and outgo which is eventually enacted into a law. It was so in the year of Our Lord, 1380, when history says that the Commons required the Chancellor of the Checker Table to itemize proposed expenditures before supplies would be voted. Since then there have been only bad budgets and better ones. The better ones of your time will be a part of a long term financial plan; estimates will be stated not only in men and dollars, but in tons, yards, miles and pupil hours; new programs initiated will tell to what dimensions they may be expected to grow and old ones will evaluate the relative usefulness of one unit of police protection against a unit of garbage removal or of education.

As *obiter dictum* to the foregoing, it is amazing that pressure groups are so effective in budget making when it is realized that the body politic—citizens and taxpayers—maintains the most expensive lobby of all in the city hall, the state house, and the National Capitol in the persons of councilmen, legislators, congressmen, mayors, governors, and presidents. Unhappily, the executives appear to be the only lobbyists upon which the public can rely—and not always upon these. The other representatives are frequently so busy welding diverse minority groups so that they will represent a favorable majority at the polls that they forget that their sworn job is to represent all the people and not part of them. Possibly this situation accounts in good part for the increasing confidence of the public in

their executives and the corresponding lack of confidence in their representatives, with transfer of legal and extra-legal authority to the former. Possibly, too, a resultant revamping of our ideas of effective representative government is taking place and in which you will have a constructive part.

In *accounting*, I hope that you have learned the difference between a fund balance sheet and an operating statement, and also, that we don't know much about cost records and depreciation in public business and seldom practice what we do know. The accountants have gone a long way since they discovered the difference between public and private accounting—which should be orchids to U. L. Leonhauser who wrote the Metz Handbook at a time when most governmental accounting systems were plagiarized from crossroad grocery stores. But don't believe that because a lot of dotted lines are signed on and a lot of columns add up correctly, that you have an accounting system that means anything. Governments that spend thousands of dollars auditing tax money in and out of the treasury won't spend a thin dime to be sure that those same tax dollars were assessed correctly and equitably, and not much more than that seeing that the taxpayers get results when they are spent. To steal a tax dollar is a crime—not to collect it or to waste it in bad management is often good politics. Operating audits are just as important as financial audits. Another of your jobs in the next twenty-five years may be to make taxpayers believe so.

Incidentally, governments usually maintain a double standard of morality—compel private business to maintain adequate accounting systems but operate utterly inadequate ones themselves.

An *audit* serves to check the integrity of the financial transactions intrusted to the administrator and his subordinates—that taxes imposed have been collected and expenditures have been made as authorized by the legislative body, that (so far as possible) goods and services have been received for money spent. It serves, too, as a part of the reporting system both to the administrator who requires current and periodic information about the enterprise for which he is responsible and to the citizens and taxpayers who pay the freight.

Audits are of a half dozen types—complete and check, cash and balance sheet, continuous and periodic, post and pre, external and internal, good and bad.

A brief *Letter* is no place for a dissertation on the nature and usefulness of auditing as an auxiliary service to administration—but there is room for some general observations.

Governments provide an exception to the rule of external audits—i.e., audits by private accounting firms—imposed upon private business by bankers and shareholders. Governments might benefit if their own bankers and shareholders demanded a little more of the same.

Government audits are largely pre-audits—primarily a checking of receipts and disbursements, and often done by persons subordinate to the principal administrator. Some well-organized communities go further than this even with internal auditing, and the United States Government and the City of Detroit both have independent post-auditors responsible to the legislative bodies representing the public. To be sure, there are numerous instances of elected auditors. I have never heard of a professional accountant being so elected but doubtless there have been such. And some states audit their local governments, frequently with an added touch of politics as a reminder of the glories of the two-party system.

Independent external audits are not without their drawbacks—if done by firms who don't know the differences between public and private accounting, if done by firms who will close an eye to irregularities in order to get the contract another year, if the firms are hired on the basis of the lowest and worst bidder. If you contemplate such an audit, determine whether a complete or check audit will best serve your purposes, to what extent the audit should be coupled with recommendations for procedural changes, and then write the Municipal Finance Officers Association, 1313 East 60th Street, Chicago, for a copy of *Municipal Audit Procedure* (Bul. 8, Aug. 1941, 54 pp.).

Centralized *purchasing* under standardized specifications is just what it implies—quantity buying of all supplies, materials, and equipment through a single agency established for that purpose, the goods being described in such specific terms that each bidder knows exactly what he must deliver if he secures a contract. Its counterpart is the older buying of services of personnel under a well-organized and administered merit system.

As far as I know, the procedure for centralized purchasing was first introduced into an American city—Cincinnati—under the reform administration of Mayor Henry T. Hunt in 1911—by Fred R. Leach and R. E. Miles, then co-directors of the Cincinnati Bureau of Municipal Research. I understood at the time that they took the idea from one of the great railway systems where it had been installed by W. Richmond Smith. The procedure was borrowed almost intact by the new city manager government of Dayton in 1914 and by the new strong mayor government of Detroit in 1918. Use of the system inevitably accompanies the introduction of competent, economical government; its absence always indicates waste, frequently graft.

Most of the "bugs" have been eliminated from such purchasing procedure. One remains—the extent of the authority of the purchasing agent to impose his will on department heads with respect to specifications and need of the goods requisitioned. The probable answer is that he hasn't any such authority any more than a personnel department has authority

to tell department heads how many and what type of men he can hire. To do otherwise is to divide responsibility—which is anathema to sound administration.

The foregoing are all what we old-fashioned "researchers" call "staff" or "service" or "auxiliary" or "housekeeping" functions as opposed to "line" functions, in spite of the tricky nomenclature that is coming out these days.

And speaking further of the service functions reminds me that I haven't mentioned taxation. Most writers on public administration don't. They organize and plan and manage and budget and account but never finance. Well, the truest thing Woodrow Wilson ever said, was that nobody knows enough to write a whole book.

There is room in this letter for only one or two canons *re* public finance, although Adam Smith had four. First, taxation should get the most feathers with the least squawk—a saying that has been ascribed to Plato, Aristotle, Bodin, Colbert, Pareto, *et al.* If you ever run across the original, write me the citation.

The federal government, until lately, has been *sui-generis* in applying this axiom—taxing everything from conception to funerals without anybody knowing it—or only so few that their squawk doesn't amount to even a discord in the alphabetic symphony, *Share The Wealth.*

Local governments still rely on the good old reliable taxation of real property invented by Henry the Eighth and Elizabeth for poor relief after their earlier efforts at a community fund fizzled out. We professional reformers have tried to make the scheme workable, devising land value maps, tax maps, unit foot rules, corner influence rules, plottage—all set down in an assessing manual.

Then we utilize these devices to assess industrial property at about half its value when it has any value, because the owners might move it out of town, and several times its value at other times—because the owners are too poor to move it then—and the assessors don't know what a factory is worth anyway; downtown property at something more than it is worth—because it can't move out of town except to get torn down for parking space; big houses at considerably more than they are worth—because their owners don't vote; little houses at considerably less than their value because their owners do vote and so do their wives, uncles, brothers-in-law.

Also, we still stick to elected assessors and minute assessing units so if people get mad when their tapestries or stocks are put on the tax rolls, they can move out to their summer places in the next township, where they will be welcome as the flowers in May. That keeps government "close to the people" and taxes down, which is what we have democracy for.

If there is a second axiom—it's soak the cities. This derives from the

fact that farmers are poor and honest and all the millions of folks that lives in cities are rich, if nothing else. So we go in for the under-assessment of rural property, for state subsidies to local governments distributed on some formula that rewards the great out-of-doors because they have to wake up cows in the mornings, and homestead exemption that benefits the rural home owner a little and nicks the city rent-payer a lot.

The third axiom is an old one and applies only if you are in a legislative body: vote for every appropriation bill and against every tax measure.

But it's a fair guess that federal taxation during the next generation is going to make taxpayers pretty conscious of unreasonable local levies and anarchisms in the structure of government. I hope that you young men have equipped yourselves to take a useful part in the correction of recognized abuses.

Of most importance, these service functions require thoroughgoing controls if they are to operate in the public interest—controls that have yet to be fully developed. It is worth remembering that the public does possess some vague standards of appraisal, hence of control when it comes to judging line services such as fire and police protection, street cleaning, etc., through a couple of hundred present day activities; but with the auxiliary functions the public has no way of knowing how well they are done until some rare grand jury gets to prodding around as to what was under the purchasing agent's Christmas tree.

The foregoing is but machinery. Machinery helps in production—but requires men—men who can think straight, honestly, and with good will.



68. ADMINISTRATIVE REORGANIZATION OF THE GOVERMENT OF THE UNITED STATES [1]

The Report of the President's Committee on Administrative Management was on epoch-making study on the need for, and recommendations on, the reorganization of the national government. The committee, created in 1936 and reporting in 1937, consisted of Louis Brownlow, chairman, Charles E. Merriam, and Luther Gulick, all recognized experts in public administration. They were assisted by a skilled staff under Joseph P. Harris. The major problem was the se-

[1] Reprinted from *The Report of the President's Committee on Administrative Management* (Washington, D.C.: United States Government Printing Office, 1937, pp. 31–33)

curing of an efficiently organized and managed executive machine, yet one responsive to the people. Since 1789 the administrative mechanism had "just growed" like Topsy, and although it was subjected through the years to various reforms, it had become more and more unwieldly and unmanageable. An outstanding difficulty was the independent regulatory commissions, such as the Interstate Commerce Commission, which were not directly responsible to the President yet not held to strict accountability to Congress. The committee recommended that these commissions be placed under the President. Some of the recommendations of the committee were put into effect through the powers granted to the President under the Reorganization Act of 1939, although the act prevented the President from creating or abolishing departments and specifically exempted a number of independent commissions from the act. Further extensive reorganization in the executive branch took place on a temporary basis as a result of the first War Powers Act early in World War II. Another reorganization occurred in 1945. The entire problem was restudied by the Hoover Committee on the organization of the executive branch, and its report submitted early in 1949

THE primary purpose of a rational reorganization of the administrative agencies of the Executive Branch of the Government is to reduce to a manageable compass the number of agencies reporting to the President.

The Constitution of the United States sets up no administrative organization for the Government. The whole matter of executive power is dealt with in a few brief phrases. First in importance is: "The executive Power shall be vested in a President of the United States of America." Reference is also made to the Army and Navy, of which the President is named "Commander in Chief," and, indirectly to the "executive Departments"; and there is laid on the President alone the duty to "take Care that the Laws be faithfully executed." In these few words, supplemented by those defining the scope of the Legislative and the Judicial Branches, there is set forth the constitutional principle of the separation of powers, which places in the President, and in the President alone, the whole executive power of the Government of the United States.

The administrative organization of the Government to carry out "the executive Power" thus rests upon statute law, and upon departmental arrangements made under the authority of law. The history of these laws and arrangements is a reflection of our national problems and development. At the beginning, in 1789, there were but four departments: State, War, Treasury, and the Attorney General. The General Post Office was permanently established in 1794, and 4 years later, the Navy Department was created. Thus, by 1800 there were six departments, all of them directly under the President in accordance with the constitutional principle of the separation of powers.•

For the next 50 years there was no change. Then came the creation of the Department of the Interior in 1849, of Agriculture in 1889, and of Commerce and Labor in 1903, from which the Department of Labor was separated in 1913.

Two new kinds of governmental agencies made their appearance in the generation after the Civil War. They were, first, executive agencies under the President but not connected with any department, such as the Civil Service Commission (1883); and, second, independent regulatory agencies, such as the Interstate Commerce Commission (1887), which were neither placed under the President nor connected with any department. Many additional agencies of these types appeared in subsequent years.

During the World War a large number of new agencies were established. These were chiefly councils, boards, commissions, administrations, and governmental corporations, and though not legally connected with the regular departments, they were definitely within the Executive Branch and under the President. In this period the innovation was the governmental corporation, which was found useful particularly in dealing with financial operations. Most of these agencies were abolished, or consolidated with the departments, in the years following the war.

During the recent depression similar need for emergency action has resulted again in the establishment of a large number of new agencies. These include administrations, boards, commissions, committees, governmental corporations, and authorities. The novel elements in this period are the extended use of the corporate form and the introduction of the "authority." Most of these agencies have been placed in the Executive Branch and under the President, but in the main they have not been connected by law with the regular departments.

As a result of this long development, there are now in the Government of the United States over 100 separately organized establishments and agencies presumably reporting to the President. Among them are the 10 regular executive departments and the many boards, commissions, administrations, authorities, corporations, and agencies which are under the President but not in a department. There are also a dozen agencies which are totally independent—a new and headless "fourth branch" of the Government.

THE EXECUTIVE BRANCH TODAY

The Executive Branch of the Government of the United States has thus grown up without plan or design like the barns, shacks, silos, tool sheds, and garages of an old farm. To look at it now, no one would ever recognize the structure which the founding fathers erected a century and a half ago to be the Government of the United States. A careful examination of the Government shows the following facts:

1. The structure of the Government throws an impossible task upon the Chief Executive. No President can possibly give adequate supervision to the multitude of agencies which have been set up to carry on the work of the Government, nor can he coordinate their activities and policies.

2. The normal managerial agencies designed to assist the Executive in thinking, planning, and managing, which one would expect to find in any large-scale organization, are either undeveloped or lacking.

3. The constitutional principle of the separation of powers and the responsibility of the President for "the executive Power" is impaired through the multiplicity and confusion of agencies which render effective action impossible.

4. Without plan or intent, there has grown up a headless "fourth branch" of the Government, responsible to no one, and impossible of coordination with the general policies and work of the Government as determines by the people through their duty elected representatives.

5. For purposes of management, boards and commissions have turned out to be failures. Their mechanism is inevitably slow, cumbersome, wasteful, and ineffective, and does not lend itself readily to cooperation with other agencies. Even strong men on boards find that their individual opinions are watered down in reaching board decisions. When freed from the work of management, boards are, however, extremely useful and necessary for consultation, discussion, and advice; for representation of diverse views and citizen opinion; for quasi-judicial action; and as a repository of corporate powers.

6. The conspicuously well-managed administrative units in the Government are almost without exception headed by single administrators.

7. Owing to the multiplicity of agencies and the lack of administrative management there is waste, overlapping, and duplication, which may be eliminated through coordination, consolidation, and proper managerial control.

These are the major features which stand out clearly in any examination of the structure of the Executive Branch of the Government.

There flow from these factors many obscure difficulties and problems. Among these is the time and energy which have been wasted for many years because of departmental jealousies and jurisdictional disputes among the department heads and bureau chiefs as to who should control particular activities. The people of the country have held the President responsible for failing to settle these internal quarrels, whereas in fact, because the President's authority is not commensurate with his responsibility, often he has been unable to compose the difference short of the summary dismissal of one of his Cabinet Members. The departments themselves and groups of citizens interested in particular activities often seek to settle such dis-

putes by direct appeals to the Congress, there again only to find the same or almost the same differences represented in the jurisdictional jealousies of congressional committees.

Another difficulty is found in the nature of the regional subdivisions of the departments and agencies. At the present time there are 109 different plans of geographical subdivision of the United States in use by the various governmental agencies for their local offices. From the standpoint of the citizen this does not make good service or good sense. Government should, of course, be carried to the people through the decentralization of the Washington departments, partly to make it fit their needs, and partly to keep it from becoming distant and bureaucratic, but this decentralization need not be chaotic and conflicting, provided it is properly integrated at the center and subjected to over-all management.

The method of decentralization of necessity will vary from department to department and from activity to activity within the department. A general principle that may be laid down is that the decentralization should be geographical and that more and more of the administrative work of the Executive Branch be carried on in the field in regional units set up to cover all parts of the United States. In this way the Government will be brought nearer to the people themselves and by this regional organization the Federal Government may the better cooperate with State and local governments in the conduct of its affairs.

This geographical decentralization also will diminish the waste of time and money, to say nothing of the patience of the people, entailed by excessive centralization of administrative activities in Washington. At the same time it offers the opportunity of lessening the insensitivity of the bureaucracy by bringing the persons who actually administer in detail the work of the Government into touch with the people whom they serve in their own communities.

The safeguarding of the citizen from narrow-minded and dictatorial bureaucratic interference and control is one of the primary obligations of democratic government. It can be accomplished only by so centralizing the determination of administrative policy that there is a clear line of conduct laid down for all officialdom to follow and then by so decentralizing the actual administrative operation that the Government servant remains himself one of the people in touch with the people and does not degenerate into an isolated and arrogant bureaucrat.

These difficulties and defects in the organization of the Executive Branch have been clearly recognized for a generation and have been growing steadily worse decade by decade. The structure as it now stands is inefficient; it is a poor instrument for rendering public service; and it thwarts democratic control. With such a planless organization, good management is almost impossible—a fact of great importance in the modern world in

which nothing can continue without good management, not even democracy.



69. LET'S GO BACK TO THE SPOILS SYSTEM [1]

REFORM of the civil service has been well described as the "romance" of the merit system, a reform desperately fought for and most necessary. Since the Pendleton Act of 1883 the merit system of filling government positions by competitive, non political examinations has been held by some to be the continuing panacea for the ills of government Efficiency could be produced only by freeing the administration from politics. Mr. Fischer's satirical article is a counter-irritant to this view. One of the unfulfilled recommendations of the President's Committee on Administrative Management was that the Civil Service Commission should be reconstructed under one head placed directly under the President. Mr. Fischer urges that this recommendation be activated. By this method he thinks that the devotion of the Civil Service Commission to keeping politics out of the federal service and its worship of personnel regulations could be harnessed to the larger task of efficient management of the federal service. In spite of its title Mr. Fischer's article is a plea for strengthening the merit system instead of abandoning it.

THE good citizens slapped each other on the back on the evening of January 16, 1883, and their hosannahs were heard throughout the land. A reluctant Congress had just passed the Civil Service Act, which would guarantee an honest, efficient, and economical government forevermore. The corrupt political bosses finally had been routed; their thieving henchmen would be shooed away from the public trough; and from then on federal jobs would be filled strictly on merit by the ablest men the country could produce. It was a major victory for Righteousness, Liberalism, and Good Government.

But somehow, in the sixty-two years since that glad day, the Great Reform has gone sour. Today Washington is filled with good citizens who lie awake nights thinking up new and sulphurous curses to hurl at Civil Service. Nearly every agency pays a large staff to figure out ingenious schemes for carrying on the public business in spite of Civil Service regulations. (These rules and regulations, couched in language that would gag a Philadelphia lawyer, fill a 524-page book, plus 46 pages of reference tables. Probably no living man wholly understands them; but they govern every waking hour of the three and a half million people in

[1] John Fischer, *Harper's Magazine* (October, 1945), Vol. 191, No. 1145, pp 362 ff.

the federal service, including—*especially* including—their behavior off the job.) Thousands of typists, who might be doing useful work in a hand laundry, waste their dreary lives filling out stacks of Civil Service forms, usually in quintuplicate. A responsible executive officer in the War Department recently offered (very privately) his considered judgment that the Civil Service system had been the greatest single obstacle to the war effort.

Even Congress finally has recognized the failure of Civil Service. Whenever our lawmakers want to set up a really effective and businesslike agency—for example, TVA or the Federal Farm Mortgage Corporation—they always provide that it shall operate "without regard to the provisions of Civil Service."

II

What's gone wrong with Civil Service is easy enough to find out. You can get the story, in almost identical terms, from anybody who has ever held an executive job in Washington.

First of all, it's too slow. If you were an administrator in urgent need of a new assistant, you might hope to get somebody on the job—with luck and infinite finagling—in six or eight weeks. (He wouldn't be the man you want, of course.) In wartime the pace was a little faster—there were even cases in which a man was hired within a week—but even then par for the course was at least a month. If you wanted to beat that, you had to "hand process" the appointment, personally carrying the sheaf of papers through the maze of the agency personnel office and the Civil Service Commission, and mobilizing all the pressure you could, including telephone calls from the applicant's congressman.

When you want to fire a man, the procedure naturally is more tedious. In theory, it is as easy to get rid of an incompetent in the government service as it is in private industry; in practice, the ordeal may drag on for six or eight painful months. If you are an experienced administrator, you will never try to fire anybody—you will foist him off on some unsuspecting colleague in another bureau, or transfer him to the South Dakota field office, or reorganize your section to abolish his position.

I once spent a whole winter trying to "terminate," as Civil Service puts it, an elderly female clerk who had become so neurotic that no other woman could work in the same room with her. This involved written charges, interviews with my tearful victim, protests from her senator, indignant union delegations, and formal hearings before a panel of personnel experts. In the end I gave up and arranged for her transfer, with a raise in pay, to the staff of a trusting friend who had just joined the government. She is there to this day, chewing paper clips, frightening secretaries, and muttering to herself as she misfiles vital documents; I think

of her every time I pay my income tax. My friend, who no longer speaks to me, is trying to get her transferred to the Veterans Administration, before General Omar Bradley learns how Washington works.

Even worse than the Civil Service Commission's leisurely gait is its delight in harassing the operating officials who are responsible for running the government. The typical administrator may spend as much as a third of his time placating the commission and the hordes of minor personnel specialists who infest Washington. He draws organization charts, argues with classification experts, fills out efficiency ratings, justifies the allocation of vacancies, and listens to inspiring lectures on personnel management until he has little energy left for his real job. He may search for hours for those magic words which, properly recited in a job description, will enable him to pay a subordinate $4,600 instead of $3,800. (This phrase "with wide latitude for exercise of individual initiative and responsibility" is nearly always worth $800 of the taxpayers' money; but it took me two years to find that out.)

No bureaucrat can avoid this boondoggling. If he fails to initial a Green Sheet or to attach the duplicate copy of Form 57, the whole machinery of his office grinds to a halt. If he deliberately flouts the established ritual, or neglects to show due respect for the personnel priesthood, his career may be ruined and his program along with it. In a thousand subtle ways the personnel boys can throw sand in the gears. They can freeze appointments and promotions, block transfers, lose papers, and generally bedevil any official who refuses to "co-operate." If they bog down a government project in the process, that is no skin off their backs—nobody can ever hold them responsible.

Nor can the administrator escape the Civil Service investigators, who drop in once or twice a week to question him about the morals, drinking habits, and possibly treasonable opinions of some poor wretch who has applied for a federal job. These investigators often are amusing fellows. I got well acquainted with one who formerly had been a small-town private detective; he had an uncommonly prurient mind, which led him to handle every case as if he were working up adultery charges for a divorce suit. Nearly all of them operate on the theory that anybody willing to work for the government must be a scoundrel, probably with Communist tendencies, who could never hold a job anywhere else. They have a boundless appetite for gossip, and they waste a lot of other people's time. What purpose they serve is obscure, because their investigations often are not completed until five or six months after the new employee starts work. If he actually were as villainous as they seem to suspect, he would have plenty of time to sell the country's secrets to a sinister foreign power before the investigators caught up with him.

These are minor indictments, however. The really serious charge

against the Civil Service system is that it violates the most fundamental rule of sound management. That rule is familiar to every businessman: when you hold a man responsible for doing a job, you must give him the authority he needs to carry it out. Above all, he must be free to hire his own staff, assign them to tasks they can do best, and replace them if they don't make good.

In peacetime, at least, no agency operating under the trammels of Civil Service has this authority. Suppose, for example, that Congress sets up a special Flood Control Agency, with urgent orders to harness the rampaging Ohio River. The new FCA administrator, full of zeal, asks the Civil Service Commission to give him the best chief engineer the merit system can supply.

After some argument whether a first-class engineer—capable of earning $30,000 a year in private practice—is worth $6,500 to the government, the commission finally tells the administrator to take his choice of three men. They head its list of people who once took a Civil Service engineering examination. All the best men on the list have already been snapped up by other agencies, of course, because the last examination was held five years ago. And it wasn't a very good list in the first place, because few people in the profession knew that such an examination was being held. (It had been announced in a bulletin, printed in the kind of type used for Bible footnotes and displayed on postoffice notice boards between the Marine recruiting posters and the FBI photos of escaped kidnappers.)

Of the three "referrals," one turns out to be a professor at Freshwater Academy who never poured a yard of concrete in his life. The second is afflicted with a personality which makes it impossible for him to work in any organization. The third actually has had some practical experience—he once designed a garbage disposal plant—but he has no sympathy with the flood control program; he is a firm believer in Free Enterprise and non-interference with acts of God. The administrator has to take him anyway, although he personally knows a dozen better-qualified men who are eager to tackle the job.

During the next six months, while the administrator tries desperately to recruit the rest of his staff from Civil Service registers, the chief engineer surveys the Ohio River. He reports that flood control is neither practical nor desirable, and that in any case it should be left to private industry. Meanwhile, a flood wipes out Cincinnati, Louisville, and Paducah. With one voice the press denounces the administrator as a bungling bureaucrat, and a Senate investigating committee demands his head.

The Civil Service Commission, of course, is unperturbed. It has done its duty in preserving the merit system free from all taint of patronage. The sacred regulations have been kept intact. If a few thousand unfortunates have been drowned in the Ohio Valley, that is none of its concern.

Fantastic? Not in the least. In the past twelve years a number of government programs have been hobbled in precisely this fashion.

III

Although the defects of Civil Service are plain enough, the reasons for them are not so easy to find.

By no means all the blame rests on the Civil Service Commissioners. They are three earnest, well-meaning people, who grieve sincerely over the flaws in their organization.

The chairman of the commission is Harry B. Mitchell, a ruddy-faced Montana rancher and publisher, who once served as mayor of Great Falls. His health is none too robust, he has had no special training in large-scale management problems, and even his admirers do not describe his leadership as dynamic. Perhaps his chief interest has been the improvement of the retirement system for decrepit government employees. Appointed in the early months of the Roosevelt regime at the suggestion of the late Senator Tom Walsh, he serves—like his colleagues—at the pleasure of the President. Since his son recently was elected senator from Washington, no one doubts that the President will be pleased to keep him on indefinitely.

The other Democratic member is Mrs. Lucille Foster McMillin, widow of a former congressman and governor of Tennessee. Her husband was the boon friend and political mentor of Cordell Hull, and she herself once represented Tennessee on the Democratic National Committee. So long as Hull's influence is felt in the Administration, her seat presumably is safe. A Southern gentlewoman of the old school, Mrs. McMillin devotes much of her energy to the protection of the federal working girl. Every fresh outbreak of rape in the Washington parks fills her with alarm, and she labors tirelessly to improve housing and working conditions for women.

Paradoxically, the commission actually is run by its lone Republican member, Arthur S. Flemming, the youngest, most progressive, and best qualified of the three. Roosevelt drafted him six years ago from the American University School of Public Affairs, which Flemming had directed with marked ability. To him belongs the credit for most of the wartime improvements in the commission's operations.

His major reform was a temporary relaxation of the regulations to give the war agencies considerable freedom in recruiting their own staffs, subject to a review of each appointment by the commission. He also has decentralized a good deal of responsibility to the field offices, brought in a number of able assistants, improved the techniques of examination, and cleaned out most of the witch-hunters and hayseed dicks from the investigation staff.

In these and other efforts to shore up their rickety machine, Flemming has won the assent of his Democratic colleagues by the exercise of unmeasured patience and tact. They now leave to him the day-to-day chores of management, and even permit him to speak for the commission before congressional committees. He has had less success, however, in gaining the support of the commission's permanent staff—the most inbred, tradition-ridden clique in Washington.

These veteran bureaucrats know that their bosses come and go, while they endure forever. They are skilled in the art of passive resistance, and they have no intention of letting any upstart commissioner tamper unduly with their time-hallowed procedures. Their idol is Theodore Roosevelt, the only Civil Service commissioner who ever attained national prominence—his desk is enshrined in the central hall of their F Street lair—and they look with grave suspicion on any ideas which he did not sanction in 1895.

The tight inner circle of the permanent staff is made up of men who started with the commission as messengers or clerks some twenty years ago, and rose to positions of power on the seniority escalator. Few of them have had any experience in private business or other government departments; they have little conception of the problems of an operating agency.

They have two guiding principles. The first is Keep the Rascals Out. Civil Service, in their view, is a kind of police force designed to keep political patronage appointees from creeping into federal jobs. This they do well—but they rarely feel any responsibility for positive action to make the government work, or to persuade the best possible men to enter the federal service.

The second aim of the commission bureaucracy is to increase the dignity and power of the personnel profession. To this end, they have developed a special jargon which no outsider can understand, plus an elaborate structure of regulations, red tape, and ritual which can be mastered only after years of study. They demand of the whole government what Dr. Floyd W. Reeves, professor of administration at the University of Chicago, has described as "an almost idolatrous worship" of the commission's "detailed and antiquated rules."

It is hard to blame them for this—after all, they are only doing what the legal and medical professions did centuries ago. The result, however, is a vested interest in complexity and formalism which is largely responsible for the ill-repute of the Civil Service system.

But the greatest share of guilt falls on Congress. Lacking any real enthusiasm for the Civil Service idea, it has never bothered to work out comprehensive legislation for a modern, effective system of personnel administration. Instead, over the course of years it has encrusted the

original act of 1883 with scores of piecemeal amendments and special statutes. This has resulted in a legal patchwork which would baffle even the ablest and most aggressive commissioners. One law, for example, sets up special qualifications for coal mine inspectors; another provides that employees of the Farmers' Home Corporation must be residents of the states where they work; a third specifies that superintendents of national cemeteries must be disabled Army veterans—no sailors or Marines need apply. All of these laws, and many more like them, undermine the principle that the best man ought to get the job; each one is intended to confer special preference on some particular group of job-hunters. They are simply devices for legalizing favoritism and patronage on a large scale.

In addition, Congress has steadfastly refused to give the commission enough money to hire a proper staff or to run its business efficiently. (Until a few years ago, one of the field offices got along with a single telephone and borrowed chairs from the federal jail whenever it had to hold an examination.) Nor have there ever been funds to develop scientific testing methods, or to keep the registers fresh with frequent examinations.

It is true, of course, that the commission seldom fights aggressively for the money it needs, and that it sometimes has actually encouraged Congress to pass bad legislation. Only a few months ago, for example, the commission managed to have written into law one of its most hampering regulations—the so-called "Rule of Three," which limits choice in appointments to the three names at the top of the register. Dr. Reeves, a leading authority in the field of public administration, characterized this step as "a major disaster."

Nevertheless, such blunders would be impossible if Congress took an intelligent interest in the problems of federal employment. Of all the present congressmen, only one—Robert Ramspeck of Georgia—has shown such an interest. The attitudes of the rest range from indifference to frank contempt. As a result, government pay scales are notoriously low, and any bill designed to harass or discriminate against government workers is almost sure to pass with whoops of glee.

Worst of all, Congress has perpetuated the basic flaw in the original Civil Service Act. The commission is still an independent agency, entirely divorced from the normal structure of government. Although it wields great power it is responsible to no one. It serves only as a kind of decrepit watch-dog, which growls at the regular departments, but seldom tries to help them get their job done.

IV

It can be argued, in all seriousness, that Congress would do well to wipe out Civil Service, hide, horns, and tallow, and go back to the old-fashioned spoils system.

Any political party which believes intensely in its program presumably would choose the ablest men in its ranks to put that program into effect. Each administrator would be in sympathy with the project he is assigned to run, and he could expect loyal support from every subordinate. Moreover, he could count on fast action; no ward heeler could survive unless he handled appointments more promptly than the present Civil Service machinery.

Naturally every congressman would slip a few of his maiden aunts and broken-down henchmen onto the public payroll. But they could hardly be more useless or expensive than the thousands of personnel men now roosting in Washington. Indeed, the treasury might well save a few millions, since most political hacks are harmless creatures, who merely draw their pay and don't bother anybody, while personnel experts take great zest in pestering the working officials.

And if the party in power should ever load the payroll with too many thieves and incompetents, then a healthy democracy would throw out the whole gang at the next election. The constant threat of a change in administration would help keep all government employees on their toes; they would never dare sink into the smug mediocrity which now afflicts so many civil servants who are sure of indefinite tenure.

Such a forthright return to the patronage system would, however, be a pretty drastic step—probably more drastic than is actually necessary. Before junking Civil Service entirely, maybe Congress should consider replacing the 1883 jalopy with a 1945 model.

The blueprint for a modern and workable Civil Service is already at hand. It was drawn up in 1937, after months of careful study, by a group of experts from outside the government known as the Committee on Administrative Management. The committee's suggestions were warmly endorsed by most of the recognized authorities in this field, and the President urged Congress to put them into effect immediately. As usual, Congress wasn't interested, and nothing happened.

These proposals are still as sensible as they were eight years ago and even more urgently needed. They call for four major reforms:

1. The present commission should be abolished, along with its whole collection of red tape and the senescent bureaucrats who weave it. (These gentlemen should be permitted to leave Washington quietly, in spite of a widespread demand among other government workers that they be tarred, feathered, and ridden out of town on their own filing cabinets.)

2. Each agency should be permitted to hire its own help. They should be chosen strictly on merit, with all political influence ruled out, on the same basis which TVA now is using so successfully. Every department would then be able to get a competent personnel staff to replace its present

herd of second-raters—it could attract good men because it could give them real responsibility.

3. A single Federal Personnel Administrator, responsible directly to the President, would lay down over-all policies for the various agencies, and see to it that they are carried out. (He would *not* try to enforce a multitude of petty rules.) His office also could carry on the few functions of the present commission which really need to be centralized—such as handling retirement funds, arranging transfers, and pooling the recruitment of minor employees.

4. A part-time, unpaid, non-political board should be set up to keep a wary eye on the administrator and on the personnel operations of the agencies. From time to time it might suggest general policies or standards. Its main job, however, would be to look out for the public interest, and make sure that the new, decentralized merit system actually worked with a minimum of political interference. (It would of course be impossible, and probably undesirable, to get a scheme which would be entirely free of politics. The present setup certainly is not—the whims of a senator now are treated with religious deference by nearly all Washington personnel men, from the commission down.)

These changes, plus a number of minor reforms suggested by the Committee on Administrative Management, should result in an immediate and substantial saving for the taxpayer. By eliminating the present overlapping and duplication between the functions of the Civil Service Commission and those of the agency personnel offices, it should make possible a sharp reduction in the total number of personnel men in Washington. What Dr. Reeves describes as the "elaborate, time-consuming, and costly reports" now prepared at the commission's behest could be dispensed with; every week, according to my rough estimates, this should save 1,328,772 forms, Green Sheets, affidavits, and classification charts, thus releasing from bondage whole regiments of typists. Moreover, many an expensive subterfuge could be abandoned. A department could put a new man on the regular payroll the day it needed him, for example, instead of hiring him as a "temporary consultant" at $25 a day during the months it takes for his appointment papers to trickle through the commission.

Far more important, however, would be the gains in speed and efficiency throughout the entire government. Offices no longer would be demoralized by the annual ordeal of efficiency ratings. Transfers and promotions might come through on schedule. Administrators could spend their time administering, instead of practicing the mumbo-jumbo of the Civil Service liturgy. Men of stature might then be more willing to enter the public service, and the machinery of government perhaps could cope a little more

adequately with the unprecedented loads which are being thrust upon it.

It is too much, of course, to hope that Congress will do anything to improve the Civil Service on its own initiative. But President Truman already has asked Congress for authority to undertake a sweeping reorganization of all federal agencies. His request presumably will be acted upon early in the present session. If Congress does not exempt the Civil Service Commission from the reorganization—as it did when Roosevelt made a similar request—Truman will have a chance to give the merit system its first thorough overhauling. It may also be his one best chance to save his program from being marred, as Roosevelt's so often was, by inexcusable failures in administration.



70. TEXT OF SECRETARY ICKES' LETTER OF RESIGNATION TO PRESIDENT TRUMAN [1]

THE sulphurous letter of resignation of former Secretary of Interior Harold L. Ickes to President Truman well illustrates the political and personal side of presidential appointments. The immediate cause of Mr. Ickes' resignation was his outspoken opposition to President Truman's nomination of Mr. Edwin Pauley to be Under Secretary of the Navy. Mr. Pauley had previous connections with the California oil industry; he was at one time treasurer of the Democratic National Committee. In the hearings held before the Naval Affairs Committee of the Senate concerning Mr. Pauley's appointment, Mr. Ickes said that Pauley had mentioned that large contributions might come from California oil interests to the Democratic campaign coffers if the federal government would abandon any claim to control the enormously rich oil lands off the California coast. Manifestly, Mr. Ickes' letter discussing the matter exposes but one side of the story. Mr. Pauley urged in his own defense that the tidelands oil issue and the Democratic contributions from California oil men were both discussed with Mr. Ickes, but not simultaneously; that there was no connection between them. Whatever the justice of the charges, Mr. Pauley, to avoid continued embarrassment to President Truman, requested that his name be withdrawn from nomination.

MY DEAR Mr. President:

I have concluded to resign as Secretary of the Interior and this letter is for that purpose.

[1] Harold Ickes, *New York Times* (February 13–14, 1946).

I understand that hearings on the proposed Anglo-American oil treaty, which I have nurtured and raised by bottle from the beginning, will begin on March 4. I would like to be here for those hearings. Moreover, it will be no easy task, shorthanded as I am in the Secretary's office, after such a long tenure, to put the affairs of the department in order for my successor. For these reasons I propose that my resignation take effect at the close of business on March 31, but if you desire an earlier date I will be glad to comply with any wish that you may express.

In thus presenting my resignation without recourse, I am moved by compelling circumstances over which I have had no control. I cannot stay on when you, in effect, have expressed a lack of confidence in me.

I shall go somewhat at length into my reasons for resigning as Secretary of the Interior because I owe a full explanation, not only to you, but to the country, in view of the evidence that the political gnats in Washington are already swarming.

Despite them, I cannot accept the theory that I should have told to the Naval Affairs Committee anything less than the truth. I have no apologies for having done so, although I did regret the unhappy personal position in which I involuntarily found myself.

JULY OFFER TO QUIT CITED

You will remember that on July 6, 1945, I took to you personally my written resignation to take effect the following Aug. 31. I told you that the twelve years of the great adventure that I had shared as a member of the Roosevelt Administration had been an inspiring experience, adding that they had required me to remain in continuous Government service much longer than any man would wish, and had left me beyond desire for further official work.

You insisted that you did not want me to resign and that your wish had been that I should continue as Secretary of the Interior. You had no one in mind to take my place, you said, and the office was a danger spot in the Administration. So it was left that I would continue. If at any time I should feel that I could no longer remain, I was to tell you first and you volunteered that if you should decide that you would like me to resign you would tell me first, and directly.

I had understood that this meant a personal conference between us. But since I have not been able to get an appointment with you from the time that I undertook to do so on Tuesday afternoon, Feb. 5, I have decided that, while I would have preferred to talk with you personally, the only course left open to me is to write you this letter.

Several days have already elapsed since your press conference of last

Thursday and I cannot remain longer than is necessary in the equivocal position in which certain of your remarks on that occasion placed me, although I shall continue to be available for further hearings on the Pauley nomination. Therefore, I feel that I owe it to myself to make my position known publicly before noon of tomorrow.

"RESIGNATION SEEMS IN ORDER"

I deeply appreciate the wish that you made known to me on the occasion mentioned that I continue as a member of your Cabinet. During the interval there have been other expressions of trust and confidence on your part that have meant much to me. Now, in view of your evident conclusion that you no longer feel as you did, coupled with the desire that I have had for many months to retire from Government service, my resignation seems to be in order.

You may recall the passing allusion to my possible retirement at our interview on Wednesday, Jan. 30, on which occasion you told me that you wanted me to stay on to help you solve some of the problems that lay ahead. At the previous Cabinet meeting you had asked me not to wind up the affairs of the Solid Fuels Administration until May 1, and in explanation of this you told me, during this Wednesday interview, that, in the event of a strike of the coal miners on April 1, you wanted me to handle that situation.

However, since that interview, some of your close friends have felt moved to resent keenly the fact that when called as a witness by the Senate Committee on Naval Affairs to testify on the nomination of Mr. Edwin W. Pauley to be Undersecretary of the Navy I told the truth which I later verified. I am at a loss to understand what these gentlemen think I could or should have done in the circumstances. I am unwilling to believe that their view is that I should have committed perjury—it will be remembered that I was under oath—or that I should have spoken anything less than the truth. After all, the constitutional provision that calls for ratification by the Senate of a nomination of this sort imposes a duty upon all citizens, if called as witnesses, to speak the truth.

I feel that it is my due that I should recall certain circumstances with reference to this nomination and my appearance before the Naval Affairs Committee upon a telegraphic summons by its chairman, Senator Walsh.

"PROPRIETY" OF OIL MAN RAISED

On no occasion did you ever tell me that you proposed to nominate Mr. Pauley for Undersecretary of the Navy. I had seen reports to this effect

in the newspapers and this possibility seemed to be on the tongue of many people in Washington.

Having the convictions that I have about the propriety of putting a man active in the oil business in a position in the Government, except under the pressure of necessity during a war emergency, where one of his important duties would be to deal with oil matters on behalf of the Government and anticipating that you might have in mind the nomination of Mr. Pauley to be Undersecretary of the Navy, I suggested to you on two or three occasions, as you will doubtless recall, that the administrative responsibilities with respect to petroleum that lie in the Navy Department be transferred to a commission consisting of the Secretaries of War, Navy and Interior.

Your reply was that you had been thinking of doing this. Time continued to run and, not hearing from you further on this matter, I caused a suggested executive order to be drafted which I sent to you. The signing of this order would have removed this aspect of the question of oil so far as Mr. Pauley and the Navy Department were concerned. Unfortunately the order was not signed, so that when Mr. Pauley's nomination went up there immediately arose the question of the propriety of nominating an active oil man for a job that carried with it responsibility for Government oil.

Word came to me indirectly that Mr. Pauley himself had told you of my probable opposition to his nomination. In the circumstances it surprised me that you did not frankly ask me what might be the basis of such opposition. You will recall that after the Cabinet meeting of Jan. 18 you stepped aside with me into the corner of the room. We discussed one or two matters relating to my department.

The nomination was undoubtedly at that moment on its way to the Senate, if indeed it had not already been received there. It was that same afternoon that I learned from the news ticker that the nomination had gone up. Yet during this interview you did not mention Mr. Pauley, although his nomination was no longer a secret and you already knew from Pauley himself that I had reservations about his qualifications.

"NOT ASKED" ABOUT PAULEY OBJECTIONS

On the day to which I have previously referred, Jan. 30, as I was about to leave your office, I told you that I wished that, on occasion, I could feel that I might talk frankly and freely with you. There were, I remarked, situations arising from time to time that worried me.

Your answer was a general one to the effect that some day we would "sit down and talk things over." Persisting, I brought up the name of Mr. Pauley, remarking that it was not true, as had been printed in an oil

journal the preceding week, that I had inspired the fight against his nomination. You replied that you knew this. I added that it was not my intention either to initiate any opposition to Mr. Pauley or to "plant" anything with respect to him. Mr. Pauley's name was thus brought definitely into our conversation. Still you did not ask me what objections, if any, I had to him.

Late Thursday afternoon, Jan. 31, I received a telegram from Senator Walsh, chairman of the Naval Affairs Committee of the Senate, asking me, at the request of Senator Tobey, to appear before his committee on the nomination of Mr. Pauley the following morning at 11:30. The Cabinet met at 10 o'clock that day. At almost exactly 11, as we were about to adjourn I left my chair so as to reach you first and showed you the telegram from Senator Walsh. However, you still refrained from asking me if I had any objections to this nomination.

I proceeded to the meeting of the Naval Affairs Committee and I think that the record will show that I did everything that I could in behalf of Mr. Pauley except to foreswear myself. The committee, it seemed to me, had got off on a false scent by considering evidence about Mr. Pauley's interest in building and operating a 100-octane gasoline refinery in Mexico. I could not see that this had any bearing upon his qualifications to become Under-Secretary of the Navy. However, this presented an occasion to criticize sharply Mr. Max Thornburg, at one time petroleum adviser to the State Department.

When Senator Tobey asked me whether, in any conversation with me, Mr. Pauley had ever linked the proposition of campaign contributions from oil men in California with the possibility of abandoning any claim of Federal title to the offshore oil lands of that State, my answer was "yes." At that time Senator Tobey did not pursue the matter further than to ask whether anyone was present at this conversation and whether I had made a memorandum of it. My answers were that Under-Secretary Fortas had been present and that I had made a memorandum.

PAULEY MONEY DENIAL QUOTED

Mr. Pauley followed me on the stand. Senator Brewster asked him whether he had heard my evidence that morning to the effect that he had suggested to me that if he could be assured that the Tideland bill would not be filed, he could raise four or five hundred thousand dollars. Mr. Pauley replied, "That statement is not true."

Subsequently I received another telegram from Senator Walsh in response to which I attended a further meeting of the Naval Affairs Committee on the afternoon of Tuesday, Feb. 5. This summons required me to bring with me all memoranda relating to conversations with Mr. Pauley

with respect to compaign contributions and Federal title to offshore oil lands in California. Of course, I responded to this summons. On this occasion, under questioning from Senator Tobey, I read my memoranda —there were several of them on the subject—to the committee and introduced them into the record.

I followed your press conference on Thursday, Feb. 7, at which you definitely aligned yourself with Mr. Pauley as against me, thus making my position as a member of your Cabinet untenable. Of course this was your privilege but, if I may, I should like to question the propriety of your saying that I had not consulted you in advance of my testimony with respect to Pauley, and particularly of your statement that "Ickes can very well be mistaken as well as the rest of us."

It seemed to me clear from what you said at this press conference that you had prejudged this case without giving me a chance to be heard. In any other circumstances that I can conceive of I would have considered it my duty to continue in my present post until the issues had been finally determined. In the circumstances I see no such duty. On the contrary I feel that as a matter of principle it is clearly my obligation to submit my resignation now.

PRESIDENT'S REMARK HELD NOT PROPER

As to your statement that I might have been mistaken in my testimony, my feeling is that, since you were not present at the hearing and presumably had not read the record, it was not proper for you, even although you be the President of the United States, to pass judgment on a question of veracity between Mr. Pauley and myself. After all, I am a member of your Cabinet at your own request and I do not have a reputation for dealing recklessly with the truth. On the issue of veracity as between Mr. Pauley and myself, I am ready to appear before any competent tribunal at any time, although of course I should want one that would not announce, or even form, its opinion in advance of a full and careful consideration of all of the evidence.

As to whether I had or had not consulted you in advance of my testimony on the Pauley nomination, my reply is that you had full notice of the probability of my embarrassment, plus several opportunities, in addition to those that you might create at will, to ask me the reason why I might oppose him. After all, one may not thrust his unasked advice upon the President of the United States, and I did not feel that I could go further than to indicate to you, as I clearly did, that I was willing to talk to you about Mr. Pauley, although, of course, you did not need such an affirmative assurance.

Even at the risk of making this letter too long, I would like to explain why I was shocked by the suggestion that liberal campaign contributions

might be forthcoming if the Government should forego whatever claim it might have to the oil-rich lands lying off the coast of California. Above all departments, the Department of the Interior must always be on guard against any association of money with politics, and even over-zealous, by the standards of some men, in defending the Government's legal proprietary rights.

FALL OF SECRETARY FALL CITED

The forces that ruined Secretary Fall will always be playing upon anyone who is Secretary of the Interior. It is not now certain that other departments will be immune to similar sinister pressures. And the forces that ruined Secretary Fall because he made the mistake of deciding that, politically, he had to yield to them will always be seeking to oust or to discredit any Secretary who will not surrender to them. Always, in one form or another, they will be urging (a) that because of what it has to give out of the public treasure, the Department of the Interior can be made a flush source of money for use in politics, and (b) that a Secretary who insists upon protecting the public domain, as if it were his own property, from the encroachments of men politically and acquisitively ambitious, is an intolerable scold and a brake on progress.

The incapacity to resist this kind of political pressure spiritually wrecked the Republican party in the days of Secretary Fall long before its débâcle in 1932. And so, as I leave the department, I feel that I ought to warn you of a cloud, now no bigger than a man's hand, that my experience sees in the sky.

This cloud is the brash criticism of me voiced by party members other than yourself for the alleged failure of my department to make a contribution during the last national campaign of an amount deemed satisfactory. That I have found it necessary on occasion to decline to produce lists of the names and addresses of the department personnel to be used for purposes of political solicitation is quite true. My justification has been that such a procedure would be against my principles and, furthermore, would violate the law.

ELECTION CASH COMPETITION SCORNED

It is also undoubtedly true that my personal contributions have not been as large in terms of money as those of some others, although I have contributed within the limit of my ability to do so. Aside from financial contributions, I doubt if many members of the Administration have given more than I. However, even if I could afford it, I would not care to enter into a competition for political favor on the basis of cash contributions made. It continues to be a source of satisfaction to me to recall President Roosevelt's word to me at my home on the Sunday afternoon following the

last election. He said that he had come out to thank me personally for my services in the campaign, services which he appraised so generously that I refrain from quoting his exact words.

I need not emphasize the concern that I have felt about the oil situation along the Pacific Coast where we have a steadily declining production with a paucity of new discoveries. For strategic as well as for domestic purposes, we need in the Pacific Coast States a steady and reliable supply of crude oil. Naturally, in view of my responsibilities as the head of this department, I have felt that the national interest in the oil lying off of the shore of California should be carefully guarded. It may be that our future supplies in this area will come more and more from under the waters of the Pacific ocean.

I have felt that the national interest requires the determination of the ownership of this oil by the branch of Government set up by the people to decide such questions, namely, the courts. It is for this reason that I have for a long time pressed for the prosecution of a suit so that the courts might say whether or not the Federal Government has any title in or to any part of this oil.

CONGRESS' BY-PASSING OF COURTS HIT

For the same reason I have opposed all proposals that, without waiting for the courts so to decide, Congress simply quit claim any interest of the United States to other and private interests. It would be strange if, in view of my interest in the oil situation along the Pacific Coast, I should not feel some concern about the business affiliations and the natural aptitudes of any man nominated for the critically important post of Undersecretary of the Navy.

I cannot understand why any American should be afraid to entrust to the courts such a question as they were instituted to pass upon—and I am suspicious when I find such distrust. You must know how much I appreciated your instructions to the Attorney General to file an original suit against the State of California to test this question directly in the Supreme Court of the United States, thus moving to resolve legal doubts much more quickly and definitely than could be done in the suit that was pending in the District Court of Southern California.

I will leave the department grateful for the opportunity that President Roosevelt gave me and humble in my appreciation of the help and loyalty that I have had at all times from as fine a group of public servants as can be found in the Government.

It is they who have moved the department forward into new ground. I have been fortunate in being permitted to work shoulder to shoulder with the splendid men and women of the Department of the Interior

whose only politics have been the desire to accomplish for their country without self-seeking or partisanship. I thank you, too, for the opportunity that you have given to me to continue my public service to this date.

And so, Mr. President, I shall vacate my office on March 31, next, unless it is your desire that I should retire at an earlier date.

Sincerely yours,

HAROLD L. ICKES,
Secretary of the Interior

THE WHITE HOUSE
Washington

Feb. 13

"MY DEAR Harold:

"I have your letter of Feb. 12 tendering your resignation as Secretary of the Interior. The letter leaves me but one choice of action.

"I therefore accept your resignation, effective at the close of business on Friday, Feb. 15, next. I also consider that this terminates all of your other Governmental activities.

"Under the law Mr. Oscar L. Chapman, Assistant Secretary, will serve as Acting Secretary of the Interior. With every good wish,

"Very sincerely yours,

"HARRY TRUMAN"

CAUSTIC REPLY TO PRESIDENT

In reply to this, Mr. Ickes wrote a second letter in caustic terms:

"MY DEAR Mr. President:

"I deeply appreciate the generosity and graciousness displayed by your letter of Feb. 13. What particularly appeals to me is your statement 'I also consider that this (my resignation) terminates all of your other Governmental activities.'

"You will pardon me if I remark that this is in the nature of supererogation. I assure you that I have had no secret design, having resigned as Secretary of the Interior, to hold on to any other office under your jurisdiction.

"Sincerely yours,

"HAROLD L. ICKES,"
Secretary of the Interior

CHAPTER XIV

The Governor and Other State Executive Officers

71. AN EFFECTIVE CHIEF EXECUTIVE [1]

THE enormous increase in national government functions in recent years has been duplicated on a smaller scale in state governments. Yet state governmental machinery, following the attitudes of state constitution builders of the second half of the last century, was elaborately and inflexibly designed to check any possibility of abuse of power by state governmental agencies. The fear of abuse went so far that even the possibility of effective action by state governments was made exceedingly difficult. The standard restrictions hedging the office of state governor are a fair example of the restrictive tendency. All of the governors were given official families of independently elected officials through whom to exercise their executive functions. The problem of coordinating the exercise of the functions of state government is almost insoluble under the existing state constitutions Yet the business of managing state government is becoming increasingly complex. One of the solutions, put forward in Minnesota, was the creation of the office of commissioner of administration, who was responsible, under the governor, for the business management of the state, leaving the governor free to set general policies, and carry on his political functions. Mr. Gravlin describes how the office of commissioner of administration operated at its inception.

NOT many years ago the governorship of Connecticut was regarded as a part-time job. The state's chief executive could comfortably dispose of his work within the few hours he spent daily in his office at the capitol. His annual salary was a pittance, no doubt because it was thought he earned no more.

[1] Leslie M. Gravlin, *National Municipal Review* (March, 1947), Vol. XXXVI, pp. 137 ff.

Connecticut had not yet entered the struggle to get itself out of the mud nor had it embraced far-reaching programs of health and social welfare. It carried on with a small budget and few taxes. State employment then was small.

Able leaders in business were active in the guidance of the various departments where they served on part-time boards, and the state's operations were not so complex that close managerial direction from the top was an imperative. We could say the same thing about many other states in that era before the states began to assume a place of greater importance in the governmental scene. In a lesser degree much the same condition applied to our cities.

But it remained for the cities to blaze a trail which is not sufficiently appreciated in this country. Daring to strike out in new directions they first brought into being the commission form of government, trying to establish in government the principle of a small policy-determining body comparable to the board of directors so common in the world of business. When it became apparent that in too many instances this produced a headless organization they ventured to adapt the system to a council-manager plan in which the basic principle of separated powers is observed but in which there is an executive trained in public administration. They found the answer to making the executive more effective.

The idea of a manager, which finds growing acceptance in our cities, towns and counties, cannot, and I do not say that it should, be reproduced in its entirety in our systems of state or federal government. Yet it is significant that at least one state has borrowed liberally from it and there has been more and more talk about management at the federal level. Recently Congressman Monroney proposed the election of two vice presidents, one of them to be in effect a federal business manager. The congressman's proposal would, of course, require a constitutional amendment. In Minnesota the change was possible without altering the constitution.

Minnesota's now proven experiment, and the kind of thinking propounded by one of the leaders in congressional reform, may indicate a new trend in our concept of the executive, not alone in state government but in national as well. Perhaps we are now ready to recognize the tremendous burden which we place on our governors and presidents. But these remarks will be confined to observations drawn from my experience as an administrator serving a governor.

Let us assume that we are thinking about an elected chief executive —a governor chosen by the people. That is the pattern set by our state constitutions and there is no reason to believe that the people would consider giving up their choice of the state's chief executive to have an appointive manager. So long as there are important issues on which the desires of voters may be in conflict we can expect the people to want to

elect their governor. At the local level, where the cleavages of public opinion on basic issues are absent, we have a different picture. Therefore, a mayor limited to political leadership and a manager to direct administration are wholly in keeping with recognized democratic principles.

Consider a governor, however, who has to campaign for office, see thousands of people who feel they must talk to him, consult with party leaders and workers, guide legislative programs to which he or his party are pledged, serve on a pardon board, pass on extradition matters, make innumerable speeches, greet distinguished visitors, and always be planning for the next election. Somehow, in between that trip to the far-off corner of the state to address the crowd at the county fair and the next day's conference with the delegation that wants its teachers' college made into a branch of the state university, he must, in the absence of some device to meet the situation, attend to that question about making the welfare appropriation do to the end of the year.

EXECUTIVE POWERS LIMITED

Also consider the limitations of executive power that prevail so widely under our state constitutions. We must recognize the fact that a governor's authority may be seriously modified by the executive power shared by elected auditors, secretaries of state and attorneys general, who may even be of an opposing political persuasion. How can a governor faced with such restrictions, if not actual obstacles, not to mention a sprawling mass of boards and commissions largely appointed by predecessors, effectively direct the administration of state affairs?

The series of state governmental reorganizations that followed the first world war were predicated on the assumption that the governor himself could fulfill the function of administrator if the host of boards, commissions and independent agencies could be regrouped into a few major departments whose heads would in effect be a governor's cabinet.

Undoubtedly great good has come from the consolidation of state agencies. The reduced span of executive control is in itself a gain. But in too many instances the expected results did not follow.

Such a reshuffling still leaves a managerial responsibility which few if any governors can effectively discharge. Minnesota's success with its department of administration, even under an organizational plan which did not proceed as far as it might have in the direction of consolidation, confirms this belief.

As a leader in legislation and the head of the state government who must be in constant touch with the public, the executive must be freed from all but the most important problems of state management. The Minnesota plan has met this requirement. At the governor's right hand

is the commissioner of administration, who has come to be more commonly known as the state business manager. He is the governor's alter ego in matters of administration.

GOVERNOR LAYS DOWN POLICY

Only management problems which clearly must be settled by the governor—generally matters of a policy type—take up the time of the governor. As an illustration let us take the budget. Under Minnesota's law there is definitely an executive budget. But the time-consuming task imposed on some governors who are required to sit patiently through long hearings in preparing the budget is eliminated. The governor merely lays down the over-all policies and the commissioner of administration with his staff conduct the budget conferences, after which the completed budget is submitted to the governor for final consideration. It then goes to the legislature together with the governor's budget message.

In a similar way the governor establishes the policy to be used in cutting back allotments when falling revenues make it necessary to take such action. In the first two years under the system spending of appropriations had to be curbed. Aside from a few basic decisions such as the amount to be saved, and exceptions to be made such as state school aids, the details were left to the discretion of the commissioner. The governor was periodically informed of the financial condition of the state through quarterly reports from the commissioner's office and occasionally by special memoranda.

Both of these provisions as to budgeting were, of course, prescribed by law.

Obviously, no law can prevent department heads from going to the governor with their worries but in my own experience there was exceedingly little of that. In this connection it might be pointed out that an important instrument in promoting direct relations between the commissioner and the various departments was the cabinet meeting which was held at frequent intervals. At such conferences, presided over by Governor Stassen, the policies to be carried out through the commissioner of administration were clearly outlined for department heads. Thus the governor relieved himself of many individual meetings with the administrators of the operating agencies.

But the real advantage of such a reorganization lies in the constant attention that the commissioner of administration can give to operating problems. The governor, whose calendar of appointments is always filled, leaving no idle hours to extract from talk and tables the facts that are essential to wise administrative decisions, is not equipped to do such a job well.

If the executive must rely on several officials to provide data on any given question of administration, he must sift out the facts and piece them together himself. But if he can turn to one official, who is clothed with adequate authority and provided with a qualified staff, to keep him informed, his effectiveness is increased immeasurably. Minnesota's unsuccessful reorganization plan of 1925 failed to heed this fact, and the commission of administration and finance then created soon exhibited the weaknesses of board control. By and large it added little to the effectiveness of the chief executive.

COORDINATION UNDER MANAGER

Like so many administrative boards it quickly apportioned spheres of influence so that the business of the purchasing commissioner, for instance, became none of the business of the budget commissioner. The reorganization act of 1939, in which the department of administration with a single head was created, brought an end to this lack of coordination. The commissioner of administration, appointed for a term coinciding with that of the governor, was vested with most of the powers previously entrusted to the "Big Three." Ex-officio he was budget director and purchasing agent.

The importance of this linking of related functions under one man definitely answerable to the governor cannot be overestimated in evaluating it as a device for increasing the effectiveness of the executive. Great importance attaches also to the power of the commissioner of administration over salary schedules and salary adjustments granted to employees of the civil service. Here we have a practical example of how a governor can assume his expected responsibility for expenditures because he knows that all the elements affecting those expenditures can be managed at one point.

It may be demonstrated by example just how purchasing was made to play its part in wiping out Minnesota's inherited deficits of 1939. Knowing that we had to get out of the red and also prevent any current deficits we overlooked no opportunities to achieve success. A competent purchasing agent was no small factor.

An illustration is the saving made in the purchase of liquor and beer tax stamps. Prior to 1939 they had been bought from one company and without open competitive bidding. The state had been paying $110,000 per year for the stamps. Open competitive bidding reduced the contract to about $17,000.

We were, of course, in a buyers' market which increased the possible savings, but the development of specifications contributed very definitely to reduced expenditures for supplies, materials and equipment. While establishing good standards for foods and other items for state institutions we at the same time cut expenditures for such purposes about 10 per cent the first year. This accomplishment was not alone the result of coordi-

nated efforts of the commissioner of administration and his subordinate, the purchasing agent. It also meant close cooperation with the director of institutions.

The governor was not left in the position of uttering pious hopes about preventing deficits and then leaving it to chance that several agencies would achieve such a result. His policies were effectively executed by a centralized authority employing simple managerial procedures. And certainly no executive can be effective who cannot produce the fiscal results expected of him by the public.

Moreover the lessons distilled out of the continuing experience of such an executive agency as a department of administration lay the foundation for the success of future governors.

VARIED TASKS OF MANAGER

The aspects of state management are so varied that one can do no more than sketch them briefly here. Minnesota's consisted of much more than preparing budgets and allotting funds and controlling their expenditure. To cite a few, there was the work with the highway department and the attorney general's office to establish sound and abuse-proof policies in the rental of equipment, our assistance in developing a practical annual-wage plan for certain classes of highway labor, and setting up property inventories and transferring unused equipment from one agency to another. The department also organized central agencies for the distribution of office supplies and the maintenance of typewriters. All but a few agencies with special problems were required to use a central duplicating division.

The tasks of management in state government are beset on the one hand by the diffusion of authority among the numerous departments, boards, bureaus and commissions and, on the other, by the acute sense of independence that many of them develop from having their own funds. The lush spending of one well heeled department and the starvation diet of another depending on the generosity of a legislature for its support impose a difficult task on an official responsible for the budgetary control of both. Yet it was found possible to enforce somewhat similar standards of operation on both, using the authority of the comprehensive budget control law. Stimulation of careful programming was sought.

Experience no doubt will disclose refinements that will be necessary in the organization and scope of the Minnesota plan. It is unfortunate that the original act did not coordinate the state's accounting with its budgeting by putting the two functions together in the department of administration. But as a tool for making the chief executive more effective it has solidly established itself.

72. SIMPLIFYING STATE'S BUSINESS [1]

THIS article by Professor Bromage deals with the same problems as that of Gravlin (selection 71) only from a wider angle. Gravlin discusses the Minnesota solution of the problem of making the antiquated and cumbersome state executive machinery efficient; Bromage describes several other approaches to the same problem. The *Model State Constitution* of the National Municipal League increases the powers of the governor so that they are not unlike those of the President of the United States. New York and Virginia have used features of this plan. Another solution is that adopted first in Illinois and used now in many other states, which consolidates many agencies under the governor's administrative code departments, yet leaves some important executive positions to be filled by election. A third method is the establishment of fiscal control agencies that through the governor can exercise some check on his administrative agencies. Once a reorganization plan has been proposed and drafted, the major problem still remains. How to convince the voters of the state that they need an efficient state government. The argument that that government is best which governs least seemingly still has great force in state government. To those who hold this view, an inefficient machine has greater appeal than one that is efficient.

THE *Model State Constitution* of the National Municipal League holds to the standard that the state governor must have a central and powerful position in administrative management. This document provides for a governor who is to be a chief administrator in fact as well as in theory. In the interests of sound public administration the *Model State Constitution* deserves careful analysis in those states which have not yet undergone major administrative reorganization.

Briefly, its major provisions designed to make the governor a chief administrator are as follows:

1. The governor is given a four-year term, time enough to develop and execute policies in public administration;

2. He is to have a span of control over administrative departments not to exceed twenty in number.

3. He is authorized to appoint and remove the heads of all administrative departments.

With these major standards in mind, and they are sound principles, let us examine the records in the 48 states. After World War I there was a significant trend to state administrative reorganization designed to integrate public administration under the governors. It is probable that a

[1] Arthur W. Bromage, *National Municipal Review* (March, 1947), Vol. XXXVI, pp. 131 ff.

similar trend will follow the resurgent interest in state administration now that World War II is history.

In administrative reorganization, designed to give the governor control over an integrated administrative mechanism, the states have made substantial progress in the last 25 years. The states which have been outstanding in following the principles of the *Model State Constitution* are New York and Virginia. These states are customarily designated as the integrated type because they amended their constitutions to provide for a short ballot and for the integration of administration under the governor.

In New York, in response to the demands of Governor Alfred E. Smith and others, the legislature placed a constitutional amendment before the people which was ratified in 1925. This specified the number of departments among which the legislature was directed to make appropriate assignment of all civil, administrative and executive functions. The result was that some 180 administrative agencies had to be correlated into not more than twenty new units of administration. Only the governor, lieutenant governor, comptroller and attorney general remained as elective officers.

This constitutional solution, following in large measure the principles of the *Model State Constitution*, has served New York well through the years. It has enhanced the prestige of the governor's office and has permitted the governor to be chief administrator in practice over a small number of departments within which public administration is integrated. The practical experience of New York attests the essential validity of the principles of the *Model State Constitution* as to administrative reorganization.

REORGANIZATION IN VIRGINIA

In Virginia, by the reorganization act of 1927 and the constitutional revision approved by the electorate in 1928, the governor became the focal point in administrative management. Only the governor, lieutenant governor and attorney general remained elective by the people. While Virginia failed to follow the desirable rule of single heads for many of its reorganized departments, the basic conclusion is that the Virginia reorganization established the leadership of the governor in administration.

Of the Virginia system, Professor George W. Spicer has said: "In addition to the governor's control over administration through the power of appointment and removal, and the power to require reports from, and to make investigation of, the heads of departments and institutions, he maintains a continuous control over the financial affairs of the state through the various divisions of the so-called Department of Finance and the Division of the Budget."

The governors represent the people of their respective states. The

people look to them for leadership in and control of the administrative process. There is no other logical place for them to fix responsibility. The New York and Virginia reorganizations followed through on this normal public reaction by making the governor a responsible chief administrator.

A majority of the states which have undergone administrative reorganization fall into the partially integrated type. This is frequently called the Illinois plan because it was originally adopted by that state in 1917. It has been the forerunner of a lesser breed of state administrative reorganizations.

The essence of the Illinois plan is a reorganization of miscellaneous statutory agencies into a series of administrative code departments under the governor, leaving untouched the long ballot for the election of the attorney general, auditor, secretary of state, treasurer and superintendent of public instruction. Some of the other states which have followed in the tradition of partial integration under the governor are Alabama, California, Idaho, Kentucky, Louisiana, Ohio, Pennsylvania, Rhode Island and Washington.

Where a state has accomplished only a partial integration and has continued the long ballot, the elective administrative officers can and do compete with the governor in administrative management and in public interest. The governor can be best described as a limited chief administrator having control over the greater portion of state affairs but lacking full and complete responsibility for all phases of public administration.

Exhaustive and authoritative studies are needed of the operation of administration in the partially integrated states. Comparative studies are also needed to evaluate the integrated and the partially integrated states. This is a fruitful field for investigation by political scientists and students of public administration.

PARTIAL INTEGRATION SYSTEMS

From fragmentary and scattered evidence it is argued that the partially integrated system does not always perform well. In Illinois, the originator of the system of partial integration, it is possible for an elective officer—and it sometimes happens—to embarrass the administration. The elective officer is entitled to act as an executive in his own right for he holds a direct mandate from the people. Partial integration is at best only a partial answer to the fundamental problem of making the governor a chief administrator with a central position in administrative management.

Still other states have emphasized fiscal management. They have depended in large measure upon fiscal control by the governor. In this group management is sought through financial supervision more than

through administrative integration. Examples are Connecticut, Maine, North Carolina, South Dakota and Wisconsin.

Fiscal control is one of the most important cogs in administrative management. In any system of public administration, whether integrated, partially integrated or disintegrated, adequate fiscal control in the hands of the governor is a fine-cutting administrative tool. On the other hand, we should not forget the basic problem of integration.

Connecticut is commonly classified as the fiscal-control type. The state elects a controller, treasurer, secretary of state and attorney general. Many of the administrative department heads are appointed for four-year terms although the governor's term is for only two years. The governor is automatically placed by constitutional and statutory provisions in a difficult position if he wishes to establish unified administrative management for state policy. The fiscal-control type like the partially integrated type falls short when judged by the standards of the *Model State Constitution.*

Some states do not fall readily into either the integrated, the partially integrated or the fiscal-control type. Michigan, with more than a hundred departments, boards and commissions, may be described as a collection of independent, semi-independent and some integrated units of government rather than a unified system of administrative management. Most outstanding in Michigan is the continuation of the long ballot and the lack of any comprehensive overhauling of the administrative mechanism since the Groesbeck limited reorganization of 1921.

During the administration of Governor Frank Murphy in 1938 the Michigan Commission on Reform and Modernization of Government raised six basic questions as to general executive organization in Michigan. These were:

1. Practice of electing certain department heads by popular vote (i.e., the long ballot for auditor general, secretary of state, superintendent of public instruction, attorney general and state treasurer);
2. Inadequate compensation of certain state officers, especially constitutional officers;
3. Proper use of the board or commission as an administrative agency;
4. Need for the consolidation of the whole executive and administrative organization into a smaller number of departments, perhaps not more than fifteen;
5. Lack of a governor's cabinet;
6. Four-year term as against the two-year term for governor.

MICHIGAN PROBLEMS UNSOLVED

These fundamental questions were raised by an official body in 1938. It is now 1947 and we have not yet found the answers in practice. Progress

has been made in the establishment of a department of revenue and of a merit system. But the basic problems of administrative integration in relation to the governor's office remain unsolved. In Michigan the long ballot is partially overcome by the admixture of the primary and convention systems. The candidates for governor are nominated in primaries but the candidates for secretary of state, treasurer, attorney general and auditor general are nominated by party conventions. This permits a gubernatorial candidate nominated in the primary to influence the selection of his party's slate at the subsequent convention.

The logical approach to administrative reorganization in Michigan would be a constitutional amendment providing for: (1) the short ballot; (2) a four-year term for governor; (3) consolidation of state agencies and activities into not more than twenty departments responsible to the governor, each embracing similar functions in public administration; and (4) an authorization to the governor to accomplish administrative reorganization by executive orders subject to review by the legislature. This is a long range objective. A four-year term for governor would be highly desirable. It would give a governor sufficient time to familiarize himself with the problems of state administration and to work out a program of constructive public service.

On the other hand, the voters of Michigan have recently presented the governor and legislature with basic problems which cannot be solved by administrative reorganization. At the November 1946 election they adopted an initiated constitutional amendment which provides for a diversion of approximately 76 per cent of the sales tax, the state's most lucrative source of revenue, to the school districts, cities, villages and townships. At the same time they adopted an amendment calling for a $270,000,000 bond issue to pay a bonus to veterans of World War II. This makes financial problems a number one priority in Michigan and new taxes, or increases in the rates of old taxes, inevitable if services are to be maintained.

Missouri is an outstanding example of a state which has recently tackled the problem of state administrative reorganization. In this instance administrative reorganization was required by the revised constitution adopted by Missouri voters in 1945. The major features are:

1. Consolidation of more than 70 agencies of administration into thirteen departments—ten major offices and departments enumerated by the constitution and three established by the legislature under a constitutional mandate limiting the total to not more than fourteen;

2. Retention of the long ballot for auditor, treasurer and secretary of state but limiting their powers and duties by constitutional definitions;

3. Established of a finance department with comprehensive powers under the title of a department of revenue;

4. Creation of a state merit system which places approximately half the employees under a centralized civil service system;

5. Integration of nine departments under the governor, five of these headed by single directors appointed by the governor and state senate;

6. A broad grant of responsibility to the governor for administrative reorganization which reads as follows: "Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane."

One may conclude that Missouri has greatly improved upon the Illinois plan of partial integration. Although the long ballot remains, independent lesser executives, such as auditor, treasurer and secretary of state, are restricted as to powers and duties and no duty may be imposed on them by law which is not related to their duties as prescribed in the constitution. This is designed to prevent the enhancement of these offices in the future by the legislature and at the expense of the governor's position in administrative management. In addition a broad responsibility for the assignment of agencies within the constitutional and statutory departments was vested in the governor.

NEW JERSEY PROPOSALS

A more sweeping proposal for executive control over administrative reorganization was made in the proposed revised constitution of New Jersey (1944). While this constitution was not adopted, it is worthy of note as a constructive suggestion for a technique of reorganization. The major proposals were as follows:

1. Principal departments were to be limited to twenty in number to be created by the governor by executive order;

2. State executive and administrative offices, departments and instrumentalities were to be allocated among the principal departments by executive order;

3. Such executive orders were to be transmitted to the legislature and to undergo a 28-day waiting period. They would take effect either upon approval by the legislature or after 28 days if the legislature failed to act. The legislature could disapprove within the specified time limit.

4. The principal departments were to be under the supervision and control of the governor. Each department was to be headed by a single executive unless otherwise provided by law, such single executives to be nominated and appointed by the governor with the advice and consent of the state senate. They were to hold office until a new governor was

elected and their successors appointed and qualified, but they could be removed as provided by law.

5. The governor was to select the state officers to serve at his pleasure as the members of his cabinet.

State administrative reorganization is a matter of primary concern to the governor. The New Jersey plan, although never adopted, properly provided that the whole problem of administrative reorganization be left as a continuing function of the governor's office to be resolved by executive order subject to review by the legislature. In the future, states considering basic administrative reorganization should analyze carefully the techniques proposed in the revised constitution which the voters of New Jersey rejected in 1944. Sound principles in public administration are sometimes rejected by the people because they are novel or untried at the state level. It will be of interest to see if any other state resorts to the broad principles of the New Jersey plan and places them in actual operation.

NEED FOR LEADERSHIP

Progress in state administrative reorganization can come about only through executive and/or legislative leadership sustained by widespread citizen endeavor and interest. If we are to have a further advance in reorganization after World War II, comparable to or exceeding the gains scored after World War I, it will be achieved fundamentally by citizen interest which makes clear and unmistakable the public demand for sound and progressive state administrations.

Only by their own efforts to improve state legislative and administrative processes can the states arrest the march to federal centralization. The movement for state administrative reorganization is by no means complete and still encounters resistance. Yet each year surveys and reports by citizens and experts lead generally in the direction of integration of administration under the governors.



73. WHY I WANT TO GET RID OF MY JOB [1]

MR. CROSBY advances the idea that the office of lieutenant governor be abolished in Nebraska because its real functions are few and unimportant. Others have made the same suggestion, but the states

[1] Robert B. Crosby, *State Government* (journal of the Council of State Governments), July, 1947, pp. 193 ff.

have given little heed to the proposal. However, the eleven states that have no lieutenant governor have experienced no difficulty, thereby giving weight to Mr. Crosby's argument.

"Bob, why do you want to abolish your office?"

So many of my friends have been throwing that question at me that I have undertaken to put the answer on paper.

It all began in February of this year when a bill was introduced in the Nebraska Legislature which suggested that the office of lieutenant governor be abolished. Yes, that is the office to which I was elected last year. The bill was introduced by Senator C. Petrus Peterson, a former Speaker of the legislature. I had asked him to introduce the bill.

In the Government Committee of the Legislature the bill was approved by a vote of seven to two. Later the bill was rejected on the floor of the legislature, largely on the grounds that this is not a propitious time to submit a Constitutional Amendment of this sort to the people and also on the grounds that this sort of proposition could be better handled at a Constitutional Convention.

Although many people seem amazed at the suggestion that the lieutenant governor can be dispensed with, I discovered when I began a careful study of the office after being elected that there is nothing new about the idea.

For many years, eleven states have gotten along nicely without electing a lieutenant governor. They are not confined to any particular section of the nation. In the East are Maine, New Hampshire, Maryland, and New Jersey. On the west coast Oregon's governor manages somehow without a lieutenant. Other western states without lieutenant governors are Wyoming (our neighbor), Arizona, and Utah. The South is represented by Florida, Tennessee, and West Virginia.

Nor by any means am I the first in Nebraska to favor such a proposal. Former Governor Sam R. McKelvie in 1920 recommended to members of the Constitutional Convention that the office of lieutenant governor be omitted from the new constitution. In a recent letter to me he said, "It should have been done long ago." By the way, Governor McKelvie is himself a former lieutenant governor, serving in 1913–15.

The group which in 1934 drafted the amendment creating our unicameral (one house) legislature was in favor of deleting the office, but did not propose it for fear of obscuring the main issue. It will be recalled that Senator George W. Norris conceived the idea of having only one legislative chamber with non-partisan membership and regarded its adoption in Nebraska as one of his proudest achievements.

A political writer for Nebraska's largest daily is said to have stated in 1944 that the office might well be abolished.

Even the members of the 1943 Nebraska legislature are reported to have

been "evenly divided on the wisdom of replacing the lieutenant governor as a presiding officer with a president elected by the legislature."

Incidentally, the recollection of this sentiment in the 1943 legislature, when I was Speaker, is one of the chief reasons for my proposal to this legislature. Remember that the lieutenant governor presides over the legislature. Even if the members of the legislature felt that his office ought to be abolished, it would be embarrassing to undertake such legislation if their presiding officer resented it.

It is my purpose to give the legislature a free choice in the matter. I shall not be troubled by its decision, whether favorable or not.

What does a lieutenant governor do in Nebraska? Just two things: stand by as a "spare tire," and act as parliamentarian when the legislature meets.

The "spare tire" function is performed when a vacancy occurs in the office of Governor. Then the lieutenant governor becomes acting governor. Did you know that never in the history of Nebraska has a Governor died in office? Taking the country as a whole the mortality rate of Governors has been surprisingly low. Worse luck for aspiring lieutenant governors! A vacancy did occur once in Nebraska in 1901 when our U.S. Senator died, and Governor Dietrich resigned in order to permit the lieutenant governor, having thus become acting governor, to appoint Dietrich to the unexpired term in the Senate.

Some folks think that the lieutenant governor "pinch-hits" when the Governor is out of the state or away from Lincoln. Our Supreme Court dispelled that notion in 1942 when it held that "mere temporary absence from the state . . . does not vacate the office of governor and instate the lieutenant governor therein. . . ."

So, the lieutenant governor just stands by.

It has been suggested that the lieutenant governor should be given the direction of an executive department to keep him busy and a salary commensurate with full-time employment. (I now draw $1,744 per year.) In 1933 they tried this in Indiana. The lieutenant governor was made the head of the Department of Commerce and Industries, and a member of three governing boards. Can you guess what happened? Everything went smoothly until 1940 when the Governor was a Democrat but the Republicans elected the lieutenant governor. You can hardly blame the Democrats' Governor for not liking a Republican at the head of some of his departments. When the dust settled the Indiana Supreme Court had declared that it is unconstitutional for a lieutenant governor "to exercise any executive powers or functions whatever" except in case of a vacancy in the office of Governor. Incidentally, twice in Nebraska during the last fifteen years the lieutenant governor has belonged to a different party from the Governor's.

Suppose the Governor and the lieutenant governor both die. Who then acts as Governor? Under our Constitution the Speaker of the Legislature does. It follows that if the office of lieutenant governor is eliminated, the Speaker is first in line to succeed to a vacancy in the office of Governor.

The above fact has caused consternation in two camps. The political parties do not like the idea of the Speaker being first in line of succession because he is non-partisan. As already indicated, our legislators, like Minnesota's but unlike any others, are elected on "non-political" ballots and actually serve in a non-partisan spirit (I can vouch for this, having been a legislator). To make it worse this year, when every state executive in Nebraska is Republican, the Speaker of our Legislature is, in private life, a member of the Democratic party.

Many members in this legislature feel it would be unwise for their Speaker to be first in succession to the Governorship because it would inject party-politics into the legislature. In other words, the members in such case would elect their Speaker with an eye to his private political faith.

Another angle disturbs many, including myself. It is that the Speaker has been elected to the Legislature by just the voters in one of the 43 legislative districts. We like to think of our chief executive, even tho' he be an acting governor, as being the choice of the people at a state-wide election.

Just one thought in defense of the Speaker being first in line: excepting myself, the Legislature has shown excellent judgment in choosing outstanding men to the Speakership. Considering the small membership, it is submitted that this will almost certainly continue to be true; in a group of 43 men (no woman has yet been elected to our unicameral legislature) faults of character and ability are quickly discovered.

Of course, this matter of succession really presents no problem. We need only designate one of our other elected state officers to fill a vacancy in the Governor's office if one should ever occur. In Nebraska we elect five other executive officers every two years besides the Governor and Lieutenant Governor.

In three of the states which now have no lieutenant governor it is provided that the Secretary of State shall succeed the Governor. Instead of trying to "make" work for the lieutenant governor, as Indiana did, it is much more sensible to pick for our "spare tire" an official who now performs a useful function. If, for instance, the Secretary of State should succeed to the Governorship the manner of filling the resulting vacancy in the Secretary of State's office is now provided by our Constitution.

Any office chosen as successor to the Governorship would for that reason gain in prestige and receive even more careful consideration from the voters.

Besides awaiting a vacancy, the lieutenant governor's only other duty is to preside over the legislature. Before 1937, when we had two houses in our legislature, the lieutenant governor presided over the Senate and the Speaker presided over the House. Now that we have only one house (a respect in which we are unique among the states) our legislature is still required to elect its Speaker. But he doesn't preside; the lieutenant governor does that. Having once been Speaker myself perhaps I can say the following more gracefully than could another: The Speakership is an office of high honor without any corresponding duties or authority.

Why shouldn't the legislature be permitted to choose its own chairman? The legislators themselves are the best judges of the qualities they desire in their presiding officer. The Speaker should be what his name implies: the presiding officer.

Haven't you been struck with the absurdity of having a Republican or Democrat serve as chairman of our non-partisan legislature? That is what I, elected on the Republican ticket, am doing.

One of the consequences of this mismating is that the lieutenant governor cannot have any influence on legislative issues. Oil and water do not mix. The non-partisan legislators do not want a party politician intruding into their deliberations.

It follows that our lieutenant governor, if he intends to be popular, will act solely as a parliamentarian. In states having partisan legislatures the lieutenant governor is a leader of his party in the Senate and takes an active part in the legislative program. Thus he has some real usefulness.

One argument favoring my proposal is so apparent it hardly needs to be mentioned. The ever-mounting cost of government causes most of my constituents to put on a wry face at tax-paying time. Elimination of the lieutenant governor would save the expense of operating that office.

In Nebraska, as in most states, the voter is plagued at elections by a long list of candidates for state office. There are never less than seven offices to be filled in Nebraska. It is my experience during campaigns that even the county leaders of my party are hard put to remember the names of all their candidates for minor offices, much less know something about their qualifications. Removal of one set of candidates by abolishing the lieutenant governor's office will assist in simplifying the task of the average voter.

Now a word of caution which can be said more tactfully by quoting Arch Mandel of the Detroit Bureau of Governmental Research. He said in 1921, "so long as the office of lieutenant governor carries with it nothing but an empty title, and is a blind alley politically, men of capacity and ability, men of large affairs who aspire to public service, will not seek the office nor will they have it thrust upon them."

If the office is a blind alley politically in other states it should be doubly

so in Nebraska. This is because of our peculiar constitution provision making the lieutenant governor ineligible to be a candidate for any other office during his term. The practical effect of this is that he must remain out of state office for two years in order, for instance, to become a candidate for Governor.

Let no one think from what has been said that I set a low value on my election as lieutenant governor. It is the highest honor that has ever been accorded me. I am proud of it, almost to excess perhaps. But pride of office should not obscure the facts nor prevent a regard for the best interests of the state.

Permit me one final argument in a lighter vein. Elimination of the office would save my constituents a lot of embarrassment. The title "lieutenant governor" is quite a mouthful. Some call me "Governor" which is a form of flattery that I enjoy, but it really isn't correct. Some call me "lieutenant" which is what I answered to in the Navy, but it revives my inferiority feeling about Commanders. Why not be done with it and abolish the title entirely?



CHAPTER XV

Local Administrative Organization

74. COUNTY PATTERN FOR THE FUTURE [1]

SINCE the end of World War II renewed interest in the improvement of local government has developed. County government, long referred to as "the dark continent of American politics," is in serious need of reform for the sake of increased efficiency and the preservation of democracy. Professor Mauck indicates reasons for, and suggests means of, making desirable changes.

AFTER the hiatus of the past years of world conflict, the interests of the people of the United States are turning once more to their normal peacetime institutions. Some of those institutions have been permanently modified as a by-product of the war; others are resuming their prewar characteristics. In the field of local government, most institutions have quickly sloughed off their battle dress. In a remarkably short time they divested themselves of all activities relating to selective service, civilian defense, price control, rationing and other wartime functions.

Another postwar development in local affairs is the resumption of interest and participation in improvement of government structure and procedures by local community groups and civic leaders.

The evidence is unmistakable that sentiment for reform in local government is developing rapidly and extending to all parts of the United States. For the forces of good government it cannot and will not be a losing battle! The institutions of local government must advance in conjunction with other social developments; there are no alternatives.

It is not to be blithely assumed that the advocates of county reform

[1] Elwyn A. Mauck, *National Municipal Review* (February, 1947), Vol. XXXVI, pp. 83 ff.

"know all the answers." They can merely formulate plans, on the basis of all available evidence, which will serve to guide the development of our institutions in order to have them serve our best interests. In the present momentous transitional period through which we are passing, no one can foretell precisely where the transition will lead us.

The shaping of things to come, however, does lie most definitely in the hands of the people in a democratic nation. Our government is exactly what we make it. It will suffer from our neglect or it will flourish as a result of our attention. If we are to retain our democratic institutions we cannot afford to assume the complacent attitude of the woman who, in answer to a question by a Gallup poll-taker, declared, "No, I have never voted in my life. Thank God, I am not responsible for that mess down in Washington."

The fate and future of county government are by no means clear. Some persons are prepared to sing a requiem for the county; but others are inclined to believe it will continue to exhibit an entirely satisfactory degree of life and vitality. To maintain a healthy condition, however, it is obvious that the county must continue to perform desired functions with an acceptable degree of efficiency. Otherwise it will atrophy and disappear like the vestigial organs of the human body.

Strong local government requires active participation by civic leaders in the community. An apathetic attitude can be as destructive to good government as outright opposition. If we relax our vigilance democracy will disappear at the grass roots, and our recent military victory over the authoritarian form and theory of government will have been in vain. What the people of the United States have won for themselves by force of arms must be preserved by virtue of popular insight and understanding of modern government. Any lesser course is unthinkable.

COUNTY SERVICES

County government provides essential services for practically all our people. In rural areas it frequently is the major unit of local government; only in urban areas is it sometimes of lesser importance. Almost everywhere it levies its taxes and, in return, performs specified services for its residents. Many of the important services it renders go unheralded. It records our birth, issues our marriage license, registers our title to real property (including all our mortgages on it), and it takes appropriate notice of our death. It might even investigate should we die under mysterious circumstances. If we want to own a dog or go hunting or fishing, county officials will issue the appropriate license. The county builds and maintains our roads, keeps the peace, cares for the poor, and provides for the administration of justice.

In addition, modern American counties have expanded their functions into many other fields of activity. They now have established health, medical and recreational services; they provide streets, water, lights, fire protection and sewerage systems; they plan and zone; they build houses, auditoriums and airports; and their war programs included participation in activities such as selective service, price control, commodity rationing, civilian defense and aids to service men.

What do the prophets of doom predict for the county? They point to the trend toward centralization as proof that the county is an outmoded unit. They ridicule its weak, disintegrated structure of government. They urge us to destroy the "court house gang." They declare that the needs of modern society require that we by-pass the county for the sake of efficiency.

The true friends of counties, however, also have been in the vanguard of those who have publicized the evils in county government. They recognize that only in eradication of the evils does there lie hope for thriving county government. Hence they have outlined the evils in order to point the way to reform. With reform the county should experience a renewal of strength.

Without reform, the county has been experiencing a gradual drain of power and authority to larger units of government. The trend toward centralization is a reality and to some degree it is inevitable and desirable. We cannot oppose the trend merely because it means that local governments lose their powers to states, states to the nation, and perhaps the nation to the United Nations. Local self-government, states' rights and national sovereignty are values which must be considered in conjunction with other values which may contain points of conflict. We must look to the values to be gained as well as the values sacrificed by every such trend or transfer of powers.

The trend toward centralization must be evaluated from points of view in addition to that of hypothetical administrative efficiency. The value of democracy is not open to question in this discussion. Assuming its virtue, there is little doubt that the most effective training ground for democracy lies in the field of local self-government. This is a factor that must be weighed along with factors of efficiency when one analyzes the effects of the transfer of functions to larger units of government.

HOW SECURE EFFICIENCY?

The standards of efficiency and democracy are less likely to be in conflict with each other when the problem involves local government consolidation. Much has been written about consolidation of counties, city-county consolidation, and functional consolidation. Developments on occasion

appear to be filled with promise, but satisfactory results have been meager. Several sparsely populated counties in western states have voted in favor of dissolution of their county governments and amalgamation of their areas with adjoining counties. No city-county consolidation has been effected for decades, although in numerous communities it is a topic of current discussion. Functional consolidation between municipality and county or between other local units has been adopted in many metropolitan communities, and almost without exception it has been an instantaneous success. In numerous other communities, some form of consolidation is being actively debated, and it is safe to assume that there will be further progress in the not too distant future.

The manager plan continues to be one of the most promising developments in the field of county government. Although less than a dozen of the country's 3,000 counties have a manager as recognized by the International City Managers' Association, many have some modified form of a manager plan which alleviates the worst features of the usual disintegrated type of county government. During recent decades the county manager plan has been the subject of vote and debate in many communities, and the number of manager counties gradually is increasing.

Home rule for counties also has been the subject of more discussion than action, although recent developments indicate that a revival of activity may be in prospect. The two new state constitutions of Missouri and Georgia contain county home rule provisions, and several counties in each state have initiated action to secure home rule charters. Also counties in other home rule states have indicated a revival of interest in securing home rule charters. In some states in which constitutional home rule has not been achieved, the counties are seeking to secure a degree of autonomy through statutory home rule.

A survey I completed recently for the Consultant Service of the National Municipal League serves to illustrate many of the problems and some of the solutions proposed with specific application to a given county. Wicomico County, Maryland, is located on the eastern shore, and probably can be described as a typical county in its area. It is a rural county devoted to truck gardening, although Salisbury, the county seat, contains several small industries and approximately half the county's population. There were no unusual governmental problems, no crises, nothing to set Wicomico apart from other Maryland counties. Its problems were those of most counties which cling to outmoded forms of government.

"FOURTEEN POINTS" FOR REFORM

The recommendations resulting from the survey can be summarized in fourteen points:

1. Adopt the county manager plan, if possible in cooperation with similar action by the city of Salisbury;

2. Adopt a modern budget system, including a long term capital budget, and consider changing the fiscal year;

3. Join with the city and board of education in centralized purchasing;

4. Integrate financial functions, including collection of taxes, in a division of finance;

5. Install modern personnel procedures;

6. Join with the city of Salisbury in all activities which prove adaptable to cooperative effort;

7. Investigate possibility of securing more favorable formulas for allotment of state welfare and road money;

8. Consider possibility of securing the return from the state of greater jurisdiction over services such as health, welfare, county roads and assessment of property;

9. Establish a planning and zoning board to provide controls for the orderly development of the county;

10. Develop and integrate the recreational services which have been initiated;

11. Investigate further the need for a county police force, with full consideration of existing state aid and city facilities;

12. Take necessary action to have control over the liquor dispensary transferred to the county;

13. Provide desired services for unincorporated communities by the establishment of special districts;

14. Seek codification, simplification and clarification of the statutory and constitutional authority under which the county operates, with a view to permitting more effective home rule in all matters of primarily county concern.

The problems of powers, organization and structure have been discussed to the exclusion of problems of functions because the functions will continue to be entrusted to counties only if they prove themselves appropriately organized and competent to retain or undertake such functions. They are being given an unprecedented opportunity at the present time to play a significant role in developing governmental services for which there is an acute need. Many counties have appointed veterans service officers, and other counties are currently announcing the appointment of such officers. They will assist in all problems of veteran readjustment to civilian life including vocational counselling, housing, securing of government surpluses, loans for business or continuing the veteran's education, and similar matters. Although new housing at present is primarily an aid to veterans, the problem permeates every aspect of community life and has its impact on everyone in the community.

NEW JOBS FOR THE COUNTY

Counties are being given a renewed opportunity in highway construction and maintenance. Roads have been allowed to deteriorate and new construction has been deferred during the course of the war. Hence an unprecedented demand has accumulated. Federal legislation requires that counties be consulted in the expenditure of federal grant-in-aid funds for highway construction purposes. The extent and effectiveness of such consultation depends ultimately upon the vigor with which counties assert their legal rights.

Airport construction and maintenance constitutes another field in which counties may assume a prominent role. It is obvious that we are now entering the air age. Commercial air transportation is expanding at a remarkable rate, and the large air lines are being supplemented constantly by smaller feeder lines. Unscheduled commercial flying and private business and recreational flying also are in their early developmental stages. The construction of airport facilities, airport zoning, and other aspects of development and regulation fall appropriately within the sphere of county jurisdiction.

There remains the question of the means to be employed to attain the objective of reform in county government. Organization, public education and the usual electoral processes furnish the answer. On this matter I may allude also to the exceptional means adopted recently by the citizens of a county in Tennessee. A group of ex-soldiers in McMinn County resolved to rid themselves of their local boss-ridden machine. They organized their own political party for county offices, but on election day they were able to secure an honest count only after a six-hour siege and exchange of gunfire with the election and other county officials. The count then showed that the GI party had won an overwhelming victory.

The action of the GI party cannot be either unqualifiedly endorsed or condemned. As a precedent it is undoubtedly dangerous. Illegal violence cannot be condoned under any but exceptional circumstances, and violent revolution must necessarily be suppressed by existing government. Violent means can be equally useful for good and evil ends, and in that lies its danger. The recent establishment of the fascistically-minded Columbians, Inc., in Atlanta, Georgia, amply illustrates this danger.

On the other hand, the vigor and determination of the GI party adherents to secure fairness and honesty in the election must command the admiration of all persons also interested in honesty in government For philosophic justification they can find ample support in the writings of Thomas Jefferson. In the case at issue, apparently the majority will could be secured only through violent seizure of the governmental machinery from corrupt officials. The uneasy question must continue to

plague many of us, "How many times is the will of the majority defeated only because a minority has a stranglehold on the election process?"

I believe we are safe in assuming that such conditions of extreme corruption are exceptional, although that they exist elsewhere there can be no doubt. In the vast majority of cases orderly processes can and must be followed, and illegal violence must be suppressed by duly constituted authority. As a first step, the forces for good government must organize inside or outside of existing party or civic associations. The organization must be built on a permanent basis, for the battle will never be entirely won. The necessary research must be undertaken, the program adopted, and the battle lines drawn. Temporary defeat must be regarded merely as an opportunity for re-evaluation and elimination of mistakes. Under such a program eventual victory for good government is inevitable. Only under such a program will we participate adequately in shaping our future and insuring the safety of our democratic institutions.



75. THE COUNTY HOME RULE MOVEMENT IN TEXAS [1]

PROFESSOR Martin examines the need for reform of county government in Texas, and the county home rule amendment enacted to meet that need. No county has succeeded in setting up home rule under the complicated provisions of the amendment. Professor Martin explains why the reform movement has produced such a barren result.

THE shortcomings of county government in Texas probably are not more serious than those which confront county government in the typical state. On the other hand, conditions at the level of the county in this state are not markedly better than those generally found. Thus it is that from time to time suggestions have been made for the reorganization of the structure of county government, which rests in its major features upon the state constitution, which in turn went into effect in 1876. The "movement" for county reorganization in times past has been content for the most part with occasional amendments or with random statutes, which have been almost entirely ineffectual.

Some five years ago, however, the friends of efficient county government inaugurated a move which bade fair to accomplish some measure at least of comprehensive reform. About 1930, agitation began to be heard

[1] Roscoe C. Martin, *The Southwestern Political and Social Science Quarterly* (March, 1935). Vol. XV, pp. 307–317. All footnotes omitted.

for home rule for the counties, and this led in 1931 to the introduction in the Texas House of Representatives of a joint resolution calling for a home rule amendment to the constitution. The resolution passed in the House but failed by one vote in the Senate. Introduced again in 1933, it passed both houses of the legislature and was approved by popular vote in a special election held August 26 of that year. The legislature, anticipating acceptance of the proposed amendment by the electorate, passed a preënabling act, which was superseded by a second enabling act passed after popular approval of the amendment. Thus, in the constitutional amendment and the (second) enabling act, was provided the legal authorization for county home rule in Texas.

The amendment in question is very long and detailed. Its more important provisions may be summarized briefly in the following manner:

1. Any county with a population of 62,000 or more may adopt a home rule charter. The state legislature may by a two-thirds vote authorize a county of less than 62,000 population to adopt its own charter.

2. A home rule charter may go into effect only if approved by the "resident qualified electors" of the county. In the election held on the charter the votes cast in incorporated areas and those cast in unincorporated areas are counted separately. Thus the county is divided into two electorates, *and both must approve the proposed charter before it may go into effect.* The legislature may overrule the provision for a separate count by a two-thirds vote.

3. A home rule charter may provide for the continuance of the present county commissioners' court or it may set up a new council. The council or commission may serve a term of two to six years.

4. The charter may itself provide for the complete reorganization of the county's administrative set-up, or it may empower the governing body to make any changes in machinery which may seem necessary.

5. A home rule county may fix the maximum ad valorem tax rates to be set for specific purposes, though its aggregate rate may not exceed that specified for counties in the constitution.

6. The county may borrow money. Its evidences of indebtedness and their supporting taxes "*constitute a first and superior lien upon the property taxable in such county.*"

7. The functions of any city, town, or district embraced within a home rule county may be transferred either in whole or in part to the county. Such transfers must be preceded by a popular vote; the voters of the yielding area must approve the arrangement by a two-thirds vote, those outside that area by a majority vote. Again the legislature may, by a two-thirds vote, overrule the provision for a separate count.

8. "In order to increase governmental efficiency and effect economy the county may contract with the principal city of the county to perform one or more of its functions, provided such contracts shall not be valid for more than two (2) years."

9. An unincorporated area which is eligible to incorporate under the laws of the state may be set up as an urban area by the county's governing body, which

thereupon may exercise such functions as the area might enjoy were it incorporated.

10. Except in certain specific directions, which relate chiefly to the administrative duties of judicial agents, the courts may not be touched by a home rule charter.

11. A home rule charter must make provision for its amendment. No amendment may be passed without the approval of the voters of the county.

The enabling act outlines the procedure which must be followed in adopting a home rule charter. Its provisions are of little importance for present purposes. It need be noted at this point only that the act specifies, first, that no proposal to consolidate or merge the government of any embraced jurisdiction with that of the county may be voted on in the charter election, and second, that in any county where a home rule charter is defeated no similar proposal may be initiated until one year has passed.

II

The population limit stipulated in the amendment restricts home rule (without sanction by two-thirds vote of the legislature) to thirteen counties. Several of these expressed an interest in the matter while home rule was under consideration in the legislature, and as soon as the amendment became effective home rule enthusiasts busied themselves in half a dozen counties. The first move of practical importance was made in El Paso county, where, only a few weeks after popular approval of the amendment, those desirous of reform drafted and began to circulate the petition required to set the home rule machinery in motion. In the course of time a charter drafting commission, which included among its members some progressive and capable persons, was appointed. This body, after labors which extended through several months, produced a charter which, while in good part the product of compromise, proposed what was by common consent a distinct improvement over the existing government. It provided for a county executive chosen by popular vote and for a board of four commissioners, residing one in each of four districts but elected at large. The executive was to preside over the board as chairman with a vote on all questions. Moreover, his powers of direction, appointment, and removal were broad. Not least important among the provisions of the charter were those which related to the civil service commission and the merit system, which it was proposed to install.

No sooner had the terms of the charter been made public than a vigorous campaign was launched against it. Its protagonists answered the challenge by organizing under a "Committee of 100," which assumed direction of the charter campaign. The arguments employed on both sides were those so familiar to students of government: the contest developed nothing more novel than the claim of increased efficiency on the one side

and the charge of "autocracy" on the other. Withal, however, the issue was closely fought, the contestants providing in vigor and aggressiveness whatever they may have lacked in ingenuity.

It became apparent early in the campaign that the major difficulty to be overcome was rural fear of urban domination. Proponents of the charter sought to dispel this fear on every occasion, and the press joined almost unanimously in the effort. The attempt was largely unsuccessful, however, as an analysis of the popular vote on the charter will reveal. Submitted on May 12, 1934, it was approved in the City of El Paso by a vote of 3,309 for to 2,166 against. Outside the city the vote was 761 for and 1,609 against. Thus the urban majority for the charter approached 1,200 votes, while the county-wide majority was almost 300. Notwithstanding this general approval, the charter failed of adoption, thanks to the provision of the amendment which requires majority votes in the incorporated and the unincorporated areas voting separately. Those who supported the charter did not hesitate to charge its defeat to the "controlled Mexican vote from the rural precincts down the river."

Travis county, in which is located the capital city of Austin, followed hard after El Paso. The home rule movement assumed form here in February, 1934, with the circulation of the required petitions. In due course a charter commission was named. The movement was under a cloud from its inception, owing to charges and counter-charges which involved an alleged effort to create a county political machine of those on the relief rolls. There was also the possibility that procedural defects prior to the organization of the commission would prove sufficient to undermine the whole movement. The first act of the commission, therefore, was to appoint a committee to determine the legality of past procedures and the status of the commission itself. The committee consulted the Attorney General of the state on the points involved, then found itself in the anomalous position of disagreeing with the opinion of that official. Whatever the merits of the controversy, it seemed clear that there was serious question concerning the status of the commission. That body, having no desire to draft a charter which would certainly be attacked on the ground of procedural defects, agreed to take no further action. Hence the home rule movement in Travis county died aborning.

In Tarrant county, where home rule is said to have had its birth, a charter movement was launched early in 1934. There the county convention allegedly fell under the control of a political faction which was not in sympathy with the movement. Thus those who were desirous of drafting an acceptable charter retired and left the field to their adversaries, who drafted a charter to their own liking. Eventually this charter was placed before the county commissioners' court in accordance with the law. That body proceeded to the performance of its duties by ignoring the charter,

perhaps to the satisfaction of all concerned. Observers agree that those who drew up the document are satisfied with the present government and so are content to let the charter die; there is little question but that those who favor reform consider the existing government almost if not quite as good as that proposed in the charter, and so likewise are content for the time being to let the whole matter drop.

In Bexar county the advocates of reorganization began the prescribed procedure early in 1934. Numerous shoals and reefs beset the path of home rule from the beginning. Eventually a charter commission was appointed, though the personnel was not satisfactory to those who had been active in the movement earlier. The commission pursued its duties in so halting a fashion that the time allowed for drafting a charter expired before anything of a tangible character was accomplished.

In Dallas and Harris counties petitions were circulated early in 1934. When they were presented to the commissioners' court, however, they were found to contain an insufficient number of valid signatures. Those who had been active in advocating home rule refused to continue in the face of the evident lack of interest and simply neglected to take up the matter again.

In several other counties, notably McLennan, Galveston, and Hidalgo, some home rule gestures have been made. In none of these, however, has the movement reached the point where petitions have been drawn and circulated. In one or two counties of less than 62,000 population a few lame steps have been taken in the direction of obtaining legislative authorization for home rule, but in none have these steps proved effectual.

County home rule in Texas thus has amounted to little more than constitutional authorization. Only one county has proceeded to the point of drafting a charter. In three others charter commissions either have felt it futile or have refused to discharge the duties placed upon them. In two the movement has died from evident lack of interest. In half a dozen others agitation for reorganization has been confined to a few small and unenthusiastic voices. In short, county home rule appeared much more attractive in Texas in the anticipation than in the realization. It remains now to analyze the situation and to ascertain, in so far as this may be possible, why this has proved to be the case.

III

The difficulties under which county home rule has labored in Texas may be grouped into three categories. First, there are some defects which are inherent in the amendment and the enabling act; second, there are certain arguments, plausible and to some extent logical, which may be urged against home rule on the basis of the provisions of the amendment

and the statute; and third, there are the many factors which operate against acceptance of any proposal which departs from the beaten path. These may be examined briefly in turn.

Among the shortcomings of the amendment and the supporting statute may be observed first the fact that both are unduly long, wordy, detailed, and repetitive. The amendment contains some 3,000 words, while the enabling act runs to more than 7,500 words. It is obvious that no such vast verbiage was necessary to extend the right of home rule to Texas counties. As regards the amendment in particular it is interesting to note that the home rule amendment for Texas cities comprises less than 250 words. With reference to the statute it is sufficient to observe that it repeats many phrases and several paragraphs of the amendment, and that it goes not only unnecessarily but disadvantageously into detail. It will be recalled that the failure to follow exactly the statutory procedure brought about the downfall of home rule in Travis county. In sum, the amendment contains much statutory material; the statute incorporates much that should have been left to administrative rules or ignored entirely.

Second, the law in question, both constitutional and statutory, is more than a little obscure in its meaning. To illustrate, the amendment provides that ". . . the county may contract with the principal city of the county to perform one or more of its functions, . . ." The question which immediately arises is, what is the antecedent of the word *its*? In conference with a group of persons interested in the subject, one of the original sponsors of the amendment identified first *county* then *principal city* as the antecedent, finally conceding that he had not the faintest idea what the amendment meant, though he had a very definite understanding of what it was intended it should mean. Unfortunately, the instance cited is not unique.

Third, both amendment and statute reveal the heavy hand of compromise at every semi-controversial turn. For instance, to get home rule through the legislature it was necessary to give the inhabitants of the rural areas power to reject any charter drafted. Thus was inserted the provision which calls for acceptance of a home rule charter by each of two electorates. It was this requirement which resulted in the defeat of the El Paso charter, notwithstanding the proposed new government was approved by a substantial majority of the voters of the county. There seems to be no reason in logic for requiring separate votes.

Fourth, the amendment contains several specifications which may be ignored with the approval of two-thirds of the legislature. If it was desirable that these provisions be included originally, no reason appears why the legislature should have power to authorize their being ignored;

moreover, if the legislature be conceded this authority, no good reason appears for requiring a two-thirds vote of that body.

Fifth, the amendment specifies that the evidences of indebtedness of the county and their supporting taxes ". . . shall constitute a first and superior lien upon the property taxable in such county." This provision was interpreted in some quarters as a requirement that debt service charges must be met before the general purposes of government might be pursued. It is entirely probable that it was not the intention of those who drafted the amendment to write into it this proviso; indeed the text of the section in which it appears would seem to suggest a contrary interpretation. It is not to be doubted, however, that a strenuous effort would be made to read into the section the meaning given statement above in the event that a county should adopt a home rule charter.

First among the obstacles of the second category is an argument which rests upon the question of the maximum ad valorem tax rate. The amendment provides that although the home rule county shall remain bound by the limit on the aggregate tax rate set in the constitution, it may fix its own maximum rates for taxes laid for specific purposes. Opponents of home rule immediately seized upon the opportunity offered by this section, charging that it sought to destroy the constitutional maximum rate. In fact, it of course does no such thing. It does, however, destroy the specific purposes rates limits, with the effect that all of the county's income presumably might be turned to one end at the expense of all other purposes. Moreover, if the governing body should elect to spend most or all of the ninety-five cents allowed for, say, roads and bridges, the county would be contributing more to what might be called a state function than a neighboring county which, in the absence of a home rule charter, would be limited to thirty cents for this purpose. The argument appears clear enough: it requires no elaboration.

A second obstacle is found in the amendment's authorization of a merger of city and county. The opponents of home rule argued that such a merger would result in transferring the debt which now rests exclusively upon the city to the whole county, and this in turn would necessitate an increase in the county's tax rate, in some instances probably of more than 100 per cent. Moreover, it is notorious that the city generally taxes property on a higher valuation than does the county. Almost of a necessity, therefore, valuations throughout the county would be raised until they approximated those currently found only in the city. Thus would the rural districts suffer in two ways: first, the tax rate would be raised, and second, property valuations would be increased. Further again, since the state tax is collected on the basis of the county's valuations, the home rule county with higher valuations than surrounding counties

(operating under the old constitutional provisions) would contribute more to the state's exchequer than its neighbors. These last arguments are somewhat far-fetched in the view of the position occupied by county home rule in this state, but they were used and used effectively by those who desired to maintain the status quo in county government.

Among the difficulties of the third class, those which arise from the existence of powerful vested interests are greatest. The county is notorious as the greatest remaining stronghold of spoils politics. The simple truth is that any proposal for the reorganization of county government strikes or may strike at the root of the material well-being of a considerable portion of the county's inhabitants, and that home rule has as yet commanded the support of no group with the influence, the money, the organization, and the solidarity to overthrow the machine (or machines) of the county officeholders.

A second hazard from which county home rule in this state failed to escape is found in the familiar and apparently ever-present urban-rural conflict. The rural dweller lives in constant dread lest advantage be taken of him by the townsman, and he safeguards his position with a jealousy and tenacity wholly out of keeping with the realities of the supposed clash of interests. The home rule amendment, openly recognizing as it does this seeming conflict, performs thereby small service in the cause in which it presumably is primarily interested. In truth, the amendment plays directly into the hands of the county officeholders and more particularly of the county commissioners, who are almost by definition usually local (precinct) politicians and who therefore are given the power to defeat any charter drafted.

In the third place should be noted the popular tendency to confuse county reorganization with city-county merger. The latter is nothing more than a remote possibility which is recognized in the amendment, and safeguards more than adequate are thrown around the "yielding" jurisdictions. Notwithstanding these facts, a large proportion of the population of any county in which home rule might be up for discussion labored under the delusion, from which they refused to be divorced, that the amendment called for complete and undelayed consolidation of the county and its major city or cities. The predilection for this misunderstanding, almost universally existent, placed in the hands of the county politicians another weapon which they were not slow to use.

Finally must be mentioned the familiar popular lethargy, which nowhere in this state has been more evident of recent years than in connection with the county home rule movement. This fact is not deserving of elaboration. It is sufficient to note simply that very few people have interested themselves in the reorganization of county government, and that any opportunity offered by home rule for the reform of the present

system has been very largely ignored. Here lies what is unquestionably the chief obstacle to the achievement of noteworthy change, and here is the most distressing fact brought to light by the county home rule movement in Texas.

In conclusion, it may be observed that while the amendment and the supplementary statute leave much to be desired, they also include some praiseworthy features. The least that can be said for them is that, poorly planned and drafted though they be, they afford the opportunity for a rather drastic reorganization of county government in Texas. It is doubtful whether a structure satisfactory in every detail could be devised on the basis of the present authorization. It is beyond question, however, that the instruments with which to forge a reasonably adequate system of county government lie ready to hand whenever the people of this state may choose to seize and use them.



76. THE REORGANIZATION OF COUNTY GOVERNMENT IN OHIO [1]

ALTHOUGH this extract is taken from a report on county government in a particular state, its analysis of weaknesses and suggestions for reconstruction apply to county government in general. Succinctly and clearly the report presents the chief criticisms leveled at county government and the principles which must be applied if effective reorganization is to be realized.

GOVERNMENTAL ORGANIZATION

THE county has undergone the least change of organization of any major part of the system of local government. It is cut to a pattern designed in pioneer days, the principal features of which have been but little modified in the last century. In fact, the county offices of today are the same as those of 1834, and with one exception they are filled in the same manner. While this pattern was never written into the constitution in detail, as in some states, its chief characteristics were prescribed by provisions of the constitution of 1851. Article X, section 1, which was repealed by the county home rule amendment in 1933, required the election of all county officers, thus determining the general form of organization for all counties. So long as this provision remained in the constitution, it was im-

[1] Quoted from *The Reorganization of County Government in Ohio* (Report of the Governor's Commission on County Government, December, 1934), pp. 35; 38–39; 42–44.

possible by state legislation or local action to apply to county government the principles upon which modern business and governmental organization are founded.

In the judgment of most students of government the present system of county government is basically unsound and ill-adapted to the performance of the functions entrusted to it. This implies no criticism of county officials but only of the system under which they are compelled to work. The first and most obvious defect of the present form of county government is the long ballot resulting from the former constitutional requirement that all county officers be elected. In presidential years there are nine county officers on the ballot and in other county elections eight, in addition to a varying number of judges depending on the size of the county. In primary elections it is not uncommon to have as many as 40 or 50 candidates for nomination to county office. That this long ballot confuses the voters and results in blind voting, especially in the larger counties, is now generally recognized.

A second weakness of the present system is the lack of an executive head. In this the county differs from all other important governmental units and from established business practice. Though the board of county commissioners performs some of the functions of such an officer, it lacks the power of appointment and removal of administrative officials, which in the last analysis is essential to effective control. Moreover, the fact that most of these officials derive their positions directly from the electors places them politically on a par with the members of the board and tends to discourage vigorous use of the authority actually vested in it. This condition is reflected in the frequent failure of the board to make effective use of its budgetary authority and its power to provide centralized purchasing.

A third criticism of the existing set-up is the haphazard and overelaborate organization of many county services. Though nearly all the work of county government may be grouped under five main functions, the average county has about twenty separate administrative bodies. Closely related activities whose operation should be correlated are scattered among independent offices and agencies. Welfare furnishes the most extreme example. In spite of the similarity of many of the services, the various types of relief and institutional care of the indigent are split among seven agencies in the average county. Recording is divided among three offices, tax administration among two, and in the larger counties engineering service is rendered by two offices. While a certain amount of overlapping and duplication of work characterizes this arrangement, it is probably less serious than the loss of efficiency through the lack of coordination of activities and the inability to make the most effective use of personnel and equipment. In the smaller counties the excessive number of administrative officials is also a matter of real consequence.

Out of the complicated, headless organization which now prevails arises a fourth and very serious defect—divided and obscured responsibility. The board of county commissioners cannot be held accountable for the administration of services they do not control, and the division of authority is such as frequently to enable officials to shift among themselves or to the board the blame for action or inaction. To illustrate, delay in the collection of taxes may be due either to the tardiness of the auditor in the preparation of tax lists or of the treasurer in the issuance of tax bills or to both; and the failure to repair a road may be due to the inaction of the county commissioners or of the surveyor. Similarly, the real responsibility for the failure to convict an offender may rest with the prosecutor, the sheriff, the coroner, or with any of several other agencies; but such is the complexity of the system that it may be utterly impossible to fix responsibility, and if fixed, the only recourse is to the polls at the conclusion of a two-year term of office. Effective popular control cannot be exercised over a system whose complexity confuses the citizen and enables the official to dodge accountability.

. . . . . .

PRINCIPLES APPLICABLE TO COUNTY REORGANIZATION

Though the reconstruction of county government in accordance with modern principles of organization is a recent innovation, it should not be viewed in any sense as an experiment. These principles have been evolved from half a century of experience in local government and private business and their operation has been amply tested in the reorganization of municipal government in the last 40 years. There is little reason, therefore, to suppose that the plans of organization which have proved most effective in other fields of government are not appropriate for or will not operate advantageously in county government. However, their application must be adapted, of course, to the conditions and needs of county government, which differ in some important respects from those of cities.

While these principles are now widely recognized, they have been so completely ignored in the case of the county as to make it desirable to restate them. In the judgment of the Commission the following principles of organization are fundamental and should guide the reconstruction of county government in Ohio:

1. Responsibility should be clearly and definitely fixed.

This is admittedly basic to efficient administration and is no less essential to real popular control over government. The mere election of officials accomplishes little unless the system is such as to enable the people to place responsibility for success or failure in the conduct of their affairs.

2. The determination of public policy and the execution of such policy should be entrusted to separate governmental agencies specifically designed for their performance.

Policy making and policy execution are fundamentally different functions calling for different types of agencies and personnel. Democracy demands that the determination of general policy be vested in a representative body so chosen as to be responsible to the electors of the community served and to express fairly their wishes. This means, as a rule, an elective council, board, or commission consisting of a number of members representing the various elements and points of view of the community. Such a body is well designed for deliberation and the formulation of legislation but not for prompt and vigorous administration. On the other hand, the efficient execution of policy calls for individual responsibility and the selection of officials on the basis of training and experience in the conduct of the particular services to which they are assigned. These are best secured by centralized organization with administrative officials chosen by appointment and continuously responsible for the success of their work.

While the determination of policy is rightly a function to be performed by intelligent and well-informed laymen, its execution should be entrusted to persons of special experience and training in public administration. The mixture of the two functions in the same office or body tends, in the case of the policy-making body, to involve it in technical problems of administration which it is ill-equipped to handle and, in the case of administration, to draw the executive into the political arena, encourage the spoils system, and undermine the quality of the administrative personnel.

3. In general, only those offices which are responsible for the determination of policy should be filled by election.

Democracy does not require the election of all officials, but rather effective popular control over public affairs. So viewed, the present system of county government is fundamentally undemocratic, for its long ballot, divided authority, and scattered responsibility confuse the voters and frequently make real popular control impossible. It is a well-known fact that the present long county ballot produces blind voting. Moreover, experience indicates that administrative officials are more often elected on the basis of general policies, party labels, and campaigning ability than on the basis of qualifications for the specific administrative position involved, for the simple reason that administrative qualifications are rarely disclosed by a political campaign. Most of the present elective county offices are purely administrative in character and could as well be filled by appointment as several other county positions which are now appointive.

4. There should be a chief executive with the necessary authority to supervise and direct county administration.

This is a cardinal feature of all successful business organization and is ignored in no other important governmental unit except the county. Without an executive head it is very difficult to secure proper cooperation among county offices or obtain effective budgetary control and the economies of centralized purchasing. The absence of such a head is no doubt the major cause of the inefficiency of the present system of county government.

5. The administration of activities should be concentrated in a few departments on the basis of function.

This is necessary to avoid duplication and overlapping and to bring together activities of a similar nature. It also simplifies administrative machinery and makes government more understandable.

6. Plans of organization laid down by state law should be sufficiently flexible to permit adjustment to the needs of different types of counties.

Ohio counties vary in size from 10,000 to over 1,200,000. While the larger counties will probably prefer to adopt their own charters, the machinery set up in the state law must at least be elastic enough to be adapted to the varying needs of counties of less than 100,000.



77. FORMS OF CITY GOVERNMENT [1]

WHAT form of city government is most efficient? In which is the citizen assured the maximum of responsible government? No definite answers may be secured to these questions. However, those who study the discussion of different types of government in this selection should be in a better position to answer these questions with reference to a particular city.

THERE are few today who would agree with Pope's oft-quoted couplet:

> For forms of government let fools contest;
> Whate'er is best administer'd is best.

Most of us desire good government, and most of us realize that there is a close relationship between form of government and efficient administration. A good form of government will tend to attract more capable men into public service, and it will also facilitate their work after they have

[1] Bureau of Municipal Research, Municipal Study No. 28, Revised, The University of Texas (Austin, 1946). Reprinted by permission of the Bureau of Municipal Research. Footnotes and charts omitted.

taken office. It is to be noted, however, that the form of government is only one factor in obtaining good government, but it is a very important factor.

Regarded from the pragmatic point of view, the only final and true test of any form of governmental organization lies in the results which it achieves over a long period of years. We, in this country, are interested in the means by which an end is reached as well as the end itself. Most of us desire efficient government; at the same time, we want government to be responsible to the voter. In appraising the various forms of government the latter factor should not be overlooked.

Comparing and evaluating the forms of city government is a very difficult task. In doing so, one has to deal with such variables as personnel, functions and services, period of time, methods of record keeping, and the ever-changing value of the American dollar. Any conclusion reached are open to grave criticisms. In government the materials and conditions under which an experiment is tried at any given time can never be reproduced for some later experiment.

There is no form of municipal government which may be designated as the best form, irrespective of local needs and conditions. Much depends upon the size of the city, its background and its problems. We may, however, draw certain principles of organization from the experience of various communities and then proceed to test the governmental structures by determining how they conform to these so-called principles. Although this is not a perfect means of evaluation, much can be said for it. It is practicable. However, the machinery of government is not composed of laws alone, or of men alone, but of both. The two are interdependent.

We shall now turn to a discussion of the different forms of city government. These are commonly considered to be the mayor-council type, the commission type, and the council-manager type. It is to be remembered that seldom, if ever, does one find a city with all the characteristics of any given type. Hybrids appear in the municipal government field as they do in the plant and animal world. Most cities, however, possess enough of the characteristics of one type or the other so as to enable us to say that they fall into one of the above-named categories.

THE MAYOR-COUNCIL FORM

We have two general types of mayor-council government. One makes the mayor the dominant figure in city government; the other confers on him less important powers and makes of the council a more powerful force in municipal affairs. These two types have come to be known as the strong mayor-council form and the weak mayor-council form.

In paragraphs to follow we shall attempt to give the major characteris-

tics of each form, remembering at all times that there are many variations of these two general types.

The Weak Mayor-Council Form

According to the weak mayor-council plan, the administrative department heads or board members are either elected by the people or selected by the council. The mayor makes few appointments which are not ratified by the council, and while he frequently is given the veto power, this may be overridden ordinarily by either a simple or two-thirds majority of the governing body. Usually the mayor is charged with the responsibility of overseeing the work of the various administrative departments and of seeing that the laws of the city are properly enforced. All too often he is held responsible for the proper administration of the city's affairs, but seldom is he vested with power to fulfill this responsibility.

The most common characteristics of the weak mayor type are:

1. A large council which is elected by wards.
2. An elected mayor with limited administrative authority.
3. Elected administrative heads, including the city attorney, treasurer, and various others.
4. Elected administrative boards.

This form of government lends itself easily to political manipulation, does not tend to attract competent department heads and efficient personnel in general, does not make possible the existence of a single responsible executive head for the city, and is so elaborate and diffused as to prove both confusing and a burden to the voter.

From an administrative point of view then, the weak mayor form is one of the least desirable types of city government. As we have seen, this form makes possible little or no control over administration by the mayor. He is forced to work with a personnel largely elective, or perhaps appointed by the council, and finds himself hampered at every turn by an array of independent or semi-independent officers and boards; and in addition, the council may be legally charged with close supervision of administrative detail. Generally speaking, this form has shown itself to be the least successful of the various types of municipal structure.

The Strong Mayor-Council Form

Sixty years ago virtually all cities were using the weak mayor form, but since then most of them have adopted certain features of the strong mayor plan or some other. As a matter of fact, most of the defects of the weak mayor plan are good reasons for the adoption of the strong mayor plan. This type makes possible the short ballot, the concentration of power, and the placing of responsibility for administration in the hands of a single

individual. Government is made more intelligible to the average citizen, and the opportunities for shifting responsibility become greatly reduced. The council is given the task of determining policy, or legislation, while technical details are left to the chief executive. The strong mayor plan, therefore, makes possible concentration of power and simplicity of form, both characteristics necessary for good government.

Briefly stated, the characteristics of the strong mayor form are:

1. A mayor elected at large.
2. A council elected at large or by wards.
3. The mayor has the power to appoint and remove more department heads.
4. The mayor is responsible for the preparation of the budget for council consideration.
5. The mayor has the veto power.

The strong mayor form, therefore, makes possible the concentration of administrative power in the hands of a single executive, and to quite an extent it makes possible the separation of policy making from policy execution. It does not, however, in most cases provide the city with an expert administrator. Only by chance would a qualified administrator be elected mayor. Experience seems to indicate that only occasionally is a mayor elected who is competent to direct the city's administrative affairs. There are few men with proven administrative ability who are also good enough politicians to be elected mayor. A few such individuals are to be found, but only in isolated instances.

The strong mayor form requires the mayor to be both administrator and politician. The political effort which must be expended to achieve the mayorship inevitably carries with it binding political obligations. To state it bluntly, almost any mayor is forced to play politics with the city administration. The maintenance of the political machine is necessary for his re-election. In other words, this form does not make possible the divorcement of administration from politics. The mayor serves the city as its political head and also as its administrative head.

Another weakness inherent in the strong mayor form is the possibility of deadlock between the council and the mayor. The council controls the purse strings, while the mayor is vested with the veto power. Political or other differences between the two sometimes seriously impede governmental functions. The possibility of shifting the blame from one to the other is not difficult, and the passing of ticklish problems or questions from one to the other is not unknown. The existence of a strong boss behind the scenes may serve to reduce such warfare, but, as someone has said, "Such a cure is worse than the disease."

The strong mayor type of city government has a number of severe weaknesses, but in the realm of government and politics there are few, if any, forms which may truthfully be termed perfect. One form of government

is better than another only in degree. The strong mayor form is unquestionably better than those which preceded it. Cities employing it under the proper circumstances have in some instances obtained good results. This form, or variations of it, is to be found in many of our larger cities today. New York, Boston, Detroit, and other cities have adopted the strong mayor plan.

The Mayor-Council Form in Texas

The Constitution of Texas makes the following provision for the organization of municipalities:

1. Those having a population of 5,000 or less must be incorporated under general laws.
2. Those above 5,000 population may adopt or amend their charters through local action and without legislative sanction, i.e., they are granted municipal home rule.

The home-rule cities are not restricted in their selection of governmental forms. In other words, they are not required to choose a form of government from a set of plans provided by the Legislature. Each city is permitted to make its own plan of government. In practice, however, the home-rule cities have relied upon the three basic forms, adjusting them to local requirements.

Ninety-five cities in Texas have adopted home-rule charters. The charters of 21 cities provide for the mayor-council form of government. Historically the trend in Texas municipal government has been to strengthen the position of the mayor. However, in a home-rule city the decision as to whether the office of mayor is to be strong or weak is a local matter to be settled at the time of charter adoption or amendment.

The general laws relating to municipal government provide for the incorporation of "cities and towns" and "towns and villages." The aldermanic or mayor-council form of government is available to either class at the time of incorporation. There is, however, some difference in the details of organization.

The general-law city or town has a government consisting of a city council composed of a mayor elected at large and two aldermen elected from each ward. If the city is not divided into wards, the council consists of a mayor and five aldermen elected at large. The term of office is two years. In addition, the statutes provide for the election of a treasurer, an assessor and collector, a secretary, a city attorney, a marshal, and a city engineer. However, with the exception of the secretary and marshal, these officers may be dispensed with by ordinance and their duties conferred upon others. Even the office of marshal, in cities below 3,000 population, may be abolished by the council and the duties imposed upon a peace officer

of the county. The council may designate additional officers and agents.

The mayor of a general-law city or town has the following important powers:

1. To preside at all council meetings and to give a casting or deciding vote in all matters except elections.
2. To summon meetings of the city council and to communicate information and recommend measures to the council.
3. To veto ordinances and resolutions adopted by the council.
4. To inspect the conduct of all subordinate officers and to cause all violations of duty to be punished.
5. To act as chief budget officer and to prepare a budget for council consideration.
6. To act as recorder or judge of the corporation court unless the council authorizes the election of another.

By reason of these powers, and others of a miscellaneous nature, the office of mayor is one of considerable prestige and authority. However, his position is not a particularly strong one. The existence of a number of important elective officials and others appointed by the council and the almost total absence of a power of removal in the mayor are barriers to the exercise of effective administrative control by the mayor. Additionally, any act of the council may be repassed over the mayor's veto by a simple majority of the whole number of aldermen. A higher percentage than a bare majority to override the mayor's veto is usually regarded as characteristic of a strong mayor. Despite the limitations of his authority, the mayor may, through personal influence and judicious use of his powers, direct in a very real sense the city's administrative affairs and play a leading role in the shaping of municipal policies.

The only officers for a general-law town or village mentioned by the statutes are mayor, five aldermen, and marshal, who are to be elected for one-year terms. However, the board of aldermen is authorized to appoint other necessary officers and define their duties. In the smaller communities, most of the routine administrative duties are commonly handled in the city clerk's office. The mayor's authority is even more circumscribed than in the city or town.

At the present time there are about 680 active incorporated municipalities in Texas. More than 400 of these have the mayor-council form of government; and most of this number, in fact all but a small number of home-rule cities, have the mayor-council form provided by the general laws. On a percentage basis, mayor-council government is much more popular with general-law cities than with home-rule cities.

THE COMMISSION FORM

Galveston is sometimes credited with the origin of the commission form of city government in 1901. It would be far more correct to say that Galveston advertised this form of government. As a matter of fact, the borough councils of colonial days were not radically different from the "Galveston Plan."

Houston adopted the commission plan with some modifications in 1905, and by 1907 five other Texas cities fell into line; so did Des Moines and Davenport, Iowa. It was Des Moines which popularized commission government. The framers of the Des Moines charter took the Galveston charter and super-imposed upon it initiative, referendum and recall, a non-partisan ballot for primaries and elections, and a merit system. Thus, as more cities adopted commission government, it was the "Des Moines Plan" and not the "Galveston Plan" which came to be used. By 1917 the spread of commission government reached its peak with 500 cities using it. Since then the number has steadily decreased, the losses being to the council-manager plan or the strong mayor form.

What Commission Government Is and How It Works

One is not likely to find any two cities using commission government where all the details are alike. Nearly every city has made changes and modifications to meet its particular desires and whims. But regardless of this lack of similarity in detail, there is much to be found in common regarding their administrative organization. The number of elected commissioners varies from three to nine, five being the more common number. Their terms of office also differ from two to six years, and their salaries vary greatly from city to city. Collectively this group constitutes the city council, but individually they serve as heads of the city's various departments. Thus, in a commission-governed city the commissioners serve in a dual capacity: As a group they compose the city's legislative body, formulating municipal policy, while individually they serve as administrative heads of the city's various departments.

The Galveston charter of 1901 did not contemplate that the administrative affairs of the city would be actually handled by the commissioners themselves. As a matter of fact, these individuals were to serve the city part time, and were given the authority to appoint and discharge all employees, including department chiefs. The original Galveston plan thus provided that appointed department heads were to serve the city under the supervision of the commissioners. This original concept was soon lost and various methods of assigning commissioners to head the departments rapidly came into use. The practice of permitting the commission to assign its members to head the various departments became common.

In a few instances these assignments are made by the mayor, while in a number of other cases the voters elect commissioners to head specific departments. There is a trend in the direction of the latter method today.

Unless one commissioner is excused from the responsibility of directing a department to serve as mayor, the number of city administrative departments will correspond to the number of commissioners. Ordinarily the mayor is elected to a specific position, such as the commissioner of public affairs. Some charters provide that the candidate receiving the highest number of votes will be mayor; in other cities the commissioners choose one of their own number to preside at commissioners' meetings and to serve as mayor. In commission government the position of the mayor is not an important one. He has no veto power and usually is not able to make more appointments than do the other commissioners. As titular head of the city, he may be more influential than the other members, but his administrative and legislative powers are shared with them. His salary, however, may be slightly higher than that paid the other members.

One advocate of the commission form of city government says that it is simple. Its two outstanding characteristics are:

1. A small commission, elected at large, which serves as the legislative body.
2. Each commissioner acts as head of an administrative department.

The proponents of the form claim that it attracts leading business and professional men to serve their city and that in this way it serves as a method of raising the prestige of public officeholding. It is unfortunate that experience and practice do not substantiate so many of the merits claimed for this form of government.

Commission government has been found to have most of the defects of the weak mayor form in addition to many of its own. One of its chief faults is that it makes no organizational distinction between the policy-making function of government and the administrative function. Most of us will agree that the qualifications are not the same for both the legislator and the administrator. The running of a department within a large city requires a considerable amount of executive ability in addition to specialized information on the subject matter with which the department deals. A policy maker represents the citizens, and he should know what they expect of government. Under the commission form, elected officials perform both functions: They legislate for the city, and they are also in charge of the city's various executive departments. The elective process seldom brings to office men with great administrative talent. Personality, financial backing, and the support of a political organization are all necessary to produce votes. Many good administrators do not have these attributes. Furthermore, one who possesses the qualities of a successful ad-

ministrator will rarely run for office under the conditions of the commission plan. He frequently will refuse to risk the uncertainty of tenure which every elective official faces.

In commission government no single commissioner has authority over his fellow commissioners in their administrative capacities. Whatever influence he may exercise over them is done in an extralegal capacity. All this means that there is no way of coördinating the activities of the city's various departments and agencies; there is no one with an over-all view of the needs of these organizations, nor is there anyone to make quick decisions or to act quickly in case such is required. In case of error or misdeed, both the legislative body and citizens alike are at a loss upon whom they are to fix the blame.

Someone once said that commission government is like a motorcar with an accelerator but no brake. When the men who vote the funds are the same men who spend them, the cost of government is not likely to be reduced. It is inevitable that each commissioner will ask for as much as he can get. If he is politically ambitious, he will naturally fight for more positions in his budget and will seek to have more contracts awarded in order that his sphere of influence be increased. The tendency is for the commissioner to spend, and there is no method made for reducing expenditures. The commission form provides no means of paring down budgets, despite the fact that experience teaches that most department heads ask for all they believe it is possible to get. It would seem that commission government gives full opportunity for the old principle of the pork barrel to operate.

The Commission Form in Texas

The commission form of government has been widely used in Texas. About 211 municipalities, of which 35 have adopted home-rule charters, have commission governments. The general laws permit either a city or town or a town or village to incorporate under the commission form. It is also possible for a community which has been incorporated under the mayor-council plan to adopt the commission plan, if the change is approved by a majority of those voting upon the proposition. Once this change has been effected, however, the municipality is apparently unable to return to its original form, except through the cumbersome and time-consuming process of disincorporation followed by reincorporation as a mayor-council city.

The governing body provided by the general laws is known as the board of commissioners, and it is composed of a mayor and two commissioners, elected by the voters for two-year terms. These three are the only elective officers. The board of commissioners is directed to appoint a clerk, who acts as treasurer, assessor and collector; in addition, it is authorized to ap-

point a city attorney, police officers, and such other officers as may be deemed necessary. The board may discharge any officer, clerk or employee which it appoints.

It appears to be the intent of the statutes that the board of commissioners is to perform the functions of legislation, appointment and removal of officers, and general oversight of the administration. The statutes do not direct that the mayor and commissioners are to be elected to head specific administrative departments, as is sometimes done in home-rule cities with commission charters. In practice, however, the mayor often devotes much of his time to city administrative affairs, and the commissioners may also give considerable attention to the administration of particular activities.

It will be noted that under the general laws the commission form differs from the mayor-council form in these respects: (1) Fewer officers are elected under the commission plan than under the mayor-council plan; and (2) the commission plan concentrates legislative and administrative authority in the board of commissioners, while in the mayor-council plan these two functions are divided among the mayor, the council, and elective administrative officers. The statutes extend practically identical powers to the two types of government.

THE COUNCIL-MANAGER FORM

Our newest development in city government is the council-manager form. Staunton, in the Shenandoah Valley of Virginia, was the first to use the term "manager" in 1908, where the office of "general manager" was created by ordinance as a rather novel adjunct to an old-fashioned city government consisting of a mayor and council. Three years later the council-manager plan appeared in a proposed charter drafted by the Board of Trade of the City of Lockport, New York. While the New York Legislature failed to approve this charter, much publicity was given to the idea. Sumter, South Carolina in 1912 became the first city to operate under a charter provision providing for council-manager government, and an amendment to the charter of Dayton, Ohio, made it possible for this form of government to go into effect there in January, 1914. Dayton's adoption gave wide publicity to the plan. Today there are over 600 cities and counties operating under manager government in the United States.

Only 28 municipalities have abandoned the council-manager plan by vote of the people since 1908, and in each case it would seem that the plan was not given a fair trial. To quote Professor Austin F. Macdonald: "They invited failure by adopting so-called manager charters that did not conform to sound principles of municipal organization; they permitted the government to fall into the hands of professional politicians;

or they used the manager plan as a scapegoat for their depression-created economic troubles."

What Council-Manager Government Is and How It Works

Briefly stated, the outstanding characteristics of council-manager government are:

1. A small council elected at large.
2. All legislation and policy making are located in the council.
3. The council employs a professionally trained city manager who is subject to dismissal by the council at any time
4. The manager is responsible for administration, having the power of appointment and removal subject to civil service rules.
5. The manager is responsible for the preparation and presentation of the budget to the council.

In manager government there is a clear differentiation between the policy-making function of government and the administrative function. The voters elect the council which in turn formulates policy and controls administration. The manager owes his position to the council. He alone is charged with administering the city's affairs. The *Model City Charter* specifically states that

> The city manager shall be chosen by the council solely on the basis of his executive and administrative qualifications with special reference to his actual experience in, or his knowledge of, accepted practice in respect to the duties of his office as hereinafter set forth. At the time of his appointment, he need not be a resident of the city or state, but during his tenure of office he shall reside within the city.

Also, according to the *Model City Charter*, the council is required to deal with the various administrative agencies and departments only through the manager.

The council-manager plan makes possible the centralization of administrative authority in the hands of a single individual. The manager is a single executive chosen to run the city government. He is given power to appoint department heads and through them to appoint all other city employees. The manager is charged not only with the responsibility of preparing the budget for the council's approval, but also with its enforcement after enactment. He coördinates all the city's various activities. It is to him that the council looks for information and expert advice regarding the management of the city's affairs. He attends council meetings and may make such recommendations as he deems desirable. Therefore, the manager is not entirely shut off from assisting in policy determination, for he is in a position to exercise considerable influence on the council.

By and large, the city manager maintains much the same relationship to the council that the president of a university does to the board of regents, or as the manager of a business does to the board of directors of the corporation. In each instance there is a single expert administrator, who is chosen and controlled by the board, to manage the affairs of the institution or the business according to the general policies established by the board. Manager government, therefore, is based upon tried and proven American business principles.

Under the manager plan the office of mayor is generally retained. He presides over council meetings, serves as the city's ceremonial head, and in time of emergency he may be charged with the duty of preserving order. He also serves as the city's political head. In some cases he is chosen by the council from among its own number; in others he is directly elected by the voters. His salary may be higher than those of his fellow councilmen, and some charters give him additional powers.

The Manager

The late English novelist W. L. George described the English civil servant as

> . . . a man of oil, silver and steel, capable of every delay and grace, suggestive of every sympathy and capable of none, incapable of a lie, always capable of an evasion, determined in public utility, yet not blind to private advancement, singularly addicted to justice, yet unable to suffer mercy. Not a man but a theorem, a diagram, a syllogism.

In many respects a city manager must be such an individual. He must possess such personal qualifications as honesty, forcefulness, tact, industry, loyalty, and a sense of humor. In such executive traits as ambition, courage, industry, initiative, forcefulness, open-mindedness, organizing ability, social sensitiveness, ability to judge people, to coöperate, and to reach decisions, he must not be lacking. In addition, he must be familiar with the general technology involved in the operations under his jurisdiction, and in some instances he must be a specialist in certain branches of technical knowledge. For the rest he may depend upon the experts. More and more is it coming to be recognized that he who aspires to enter the city manager profession should first have broad university training in the social sciences. In addition, it is highly desirable that he take some courses in engineering, law, and in business and public administration.

Council-Manager Government in Texas

Amarillo was the first city in Texas to adopt the council-manager form of government, abandoning its commission government for the new plan in 1913. In 1914 Taylor and Denton adopted the council-manager plan.

By 1946 the council-manager form had been adopted by more than half-a-hundred Texas cities.

The current directory of approved council-manager cities, prepared by The International City Managers' Association, lists 52 Texas cities. Additionally, the League of Texas Municipalities reports the following adoptions: Carrizo Springs in 1945 by ordinance; Clarksville in 1946 by election; and Odessa, a home-rule city, in 1946 by ordinance.

A few home-rule charters contain provisions permitting the governing body to appoint a city manager if it so chooses. The charter of Eagle Pass, for example, provides that the board of commissioners "may, at any time they deem it necessary, appoint a city manager, and may charge him with the duty of administering the affairs of the city, and may limit or increase his powers and duties from time to time. . . ." The charters of Pelly and Brownwood contain somewhat similar optional provisions.

A number of Texas cities have an official performing the duties of city manager who unofficially is so designated, but the plan has not been adopted by charter, by ordinance, or by election as provided by the general laws. Those cities known to have such an officer are: Columbus, Decatur, Freeport, Hearne, Liberty, Seymour, Sonora, Spearman, Weimar and Wellington.

Prior to 1943 there was no explicit provision in the statutes for the adoption of council-manager government by cities operating under the general laws. In a number of instances, however, general-law cities have provided for the manager form by ordinance. In 1943 the Legislature authorized any city, town, or village incorporated under the general laws and having a population of less than 5,000 to adopt the council-manager form of government by vote of the local electorate. By midyear, 1946, three cities, Clarksville, College Station, and Pittsburg, had adopted the the plan by election. A community which has adopted the city manager plan under the 1943 statute may later abandon it by a procedure similar to that used for adoption and return to the former type of government

By the end of 1945, the council-manager plan had been in operation in six Texas cities for at least 30 years. With the exception of the year 1921, there was at least one adoption annually throughout the period 1913–1932. However, during the following eight years there was no adoptions. Since 1940, more than a dozen cities have chosen the plan; five adoptions were effected in 1945 and four during the first six months of 1946.

The City of Denton was among the first three Texas cities to adopt the manager plan. It was the first city in the state to be dropped from the list of council-manager cities prepared annually by The International City Managers' Association. Denton was excluded from the list when, in 1919, the city electorate voted to amend the charter in order to provide for the direct election of the manager. The City of Waco adopted the council-

manager plan in 1924. In January, 1946, the voters approved amendments to the city charter which re-established the mayor-council form of government.

CONCLUSION

The interest of citizens in the form of their city government has been an outstanding characteristic of municipal politics during the past half-century. Moreover, this interest is still an active force in communities throughout the country. Texas citizens, during the past several years, appear to have become increasingly active in the quest for good government through new structure. It is for this reason that we have discussed the forms of municipal government in the preceding pages. No one form has been recommended. However, the accepted merits of each plan have been stated in order that the citizen may be assisted in making his own selection.

It may be appropriate to add a final word of warning. No form of government will of itself produce a civic millennium. Intelligent citizen interest, participation and supervision are just as important to the success of one plan as another. These factors in combination with a form of government which has proven itself in a variety of communities comprise the surest formula for successful democratic government.



CHAPTER XVI

Government Finance

78. OUR NATIONAL DEBT AFTER GREAT WARS [1]

THE average citizen is likely to be staggered by the magnitude of our present public debt. He may wonder whether it represents good or bad economic health. He may be concerned, too, over the inflationary pressures that stem, in part at least, from the size of the debt. There is no way of predicting the exact implications of our debt and the postwar inflation. Nevertheless, this study of the Committee on Public Debt Policy provides an invaluable historical perspective from which to view these problems. It reviews the national debt after the Revolutionary War, the Civil War, and World War I, and makes direct comparisons between the present postwar debt and the debt following each of those conflicts.

FIVE times in our national history we have incurred great public debts because of war expenditures. Each time it has been believed by many thoughtful people that the debts were so huge that we should never be able to pay them off or even to reduce them greatly. This has proved not to be true in the four instances previous to this one. For that and for other reasons it is worth while to review briefly the history of our previous war debts to find out whether we may learn anything of value from our earlier experiences in these matters.

INFLATION AND DEFLATION

The outstanding economic fact in this history of the debt and its results is that each great war produced a serious inflation of commodity prices.

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Each time, the cost of living soared. The experience has been painful; but more painful still has been the deflation which has always followed, bringing with it distress to the farmer and unemployment to the wage earner.

The facts of war-caused inflations and deflations were recognized by John Adams, the second President of the United States, who wrote on this general subject as follows: "I am old enough to remember the war of 1745 and its end, the war of 1755 and its close, the war of 1775 and its termination, the war of 1812 and its pacification. Every one of these wars has been followed by general distress, embarrassments of commerce, destruction of manufactures, and a fall in the prices of produce and of lands."

In Diagram 1 [omitted] the line shows in annual averages the course of wholesale prices from 1770 through 1945, and through the first half of 1946. The price index is that compiled by Professors Warren and Pearson for the period from 1770 to 1890, and using variable group weights. Beginning with 1890 it is the all-commodity index of the Bureau of Labor Statistics. The average for 1910–1914 is taken as being equal to 100.

It is striking that the Revolutionary War, the War of 1812, the Civil War, and World War I produced such huge increases of commodity prices in a few brief months, and such long drawn out decreases, with their direful economic toll. The question we are now asking is whether prices in this war will follow the same pattern. Already, in 1946, the price level is approaching the peaks of other previous great wars. Many people have believed that artificial government control of prices saved us from the great inflation we might otherwise have expected. This chapter is being written fourteen months after the fighting ended, but we note that wholesale prices are still rising. This may mean that government control has not, in point of fact, thwarted the great forces that produce price inflation in wartime but has merely delayed their action.

After the War of 1812, and after the Civil War, prices broke almost immediately after the fighting stopped. But after World War I prices rose for eighteen months from the time the armistice was signed in November, 1918. How long will prices continue to rise after World War II?

It is worth noting that the depression which followed the War of 1812 carried wholesale prices downward to levels far below those from which the war inflation got under way, but this is partly because this country had felt the effects of the price increases of the Napoleonic Wars abroad before we were involved. In the case of the Civil War the substantially continuous postwar deflation carried prices downward to levels almost exactly equal to those from which the war inflation started. Afterwards prices fell still lower in the 1880's and 1890's, but probably we should consider the postwar deflation following the Civil War as having termi-

nated in 1879 when we returned to the gold basis for our money. The inflation of World War I began in 1914 with prices at 99 and carried them to 226 but the subsequent two stage deflation brought prices in 1932 practically back to the 1914 level. Despite the similarity of some of these movements we must not, of course, assume that the statistical pattern will be repeated, but must search back into the causes.

INFLATION AND THE DEBT

One of the few findings in economics on which there is now fairly widespread agreement is that wartime inflations of prices are caused by governments being compelled to spend more than they can raise in taxes. When this happens they either print or borrow the money, and so pour into the hands of the people more money than they can find normal ways of spending. This is partly because in war time there is also a scarcity of goods to buy. Thus the now familiar spectacle of people with swollen pocketbooks spending lavishly.

In theory excessive price rises could be avoided by taxing the people so heavily that the government could take back, in the form of taxes, all the extra money it paid them in war wages and contracts. No government has ever found out how to do this. One reason is that the new money is very unevenly distributed, and heavy taxes may fall on people who have received none of it. Another reason is that taxes must be voted by the politicians who may lose their jobs if they are too bold in their taxing policies.

In the early wars in this country we had no adequate or elastic tax mechanism. In the Revolution the central government had no taxing power whatever, and levied on the states with pathetically poor results. Toward the end of the war, for example, Robert Morris persuaded Alexander Hamilton to become a tax collector in New York in the hope that with his great and rising influence he might persuade New York State to raise and pay to the government her assessment for the year 1782 of $365,000. In spite of his most vigorous efforts Hamilton collected only $6,250, and before many months resigned the position as hopeless. In this sort of situation, with no banks from which to borrow, with France and Holland making only a few modest loans, the Continental Congress resorted perforce to the printing of paper money of declining real value—eventually "not worth a continental."

By the time of the War of 1812 the National Government was more firmly established. But when war was declared in June of that year, neither the Congress nor the Treasury Department was ready with a financial policy adequate to meet the extraordinary demands of armed conflict.

Secretary of the Treasury Gallatin had gone on record in 1807, again in 1808, and once more in 1810, with proposals that if war should come, its expenditures should be met by loans, and that taxes should be increased only to provide for the expenses of the peace establishment, the interest on existing debts, and interest on any new loans. He even declared that in no event would he insist on internal taxes. In 1810 he formulated his views in response to a request from the Committee on Ways and Means, favoring borrowing instead of taxation, and thus developed the doctrine of war financing which is associated with his name. Hildreth, the historian, referred to the doctrine in caustic words. He wrote, "Out of a tenderness for the people or a tender regard for their own popularity, Congress had resolved to carry on the war without imposition of taxes." Fortunately the increase in expenditures was much less, relatively, than during later wars, so that about 57 per cent of the total expenditures during the War of 1812 were met by borrowing, and about 43 per cent from taxation and other receipts.

In the financing of the Civil War the Congress was very slow in enacting measures for increased taxation. In the first year of the war 90 per cent of the expenditures were met by borrowing and in the second year, 85 per cent. For the war as a whole it appears that about 77 per cent of the total expenditures was met by borrowing and the remaining 23 per cent by the receipts from taxation and from the sale of land.

This country entered World War I with two new features in its tax structure which aided enormously in its war financing. One was the income taxes applying both to individuals and corporations. Another was the excess profits tax on corporation income. These were made possible by the Sixteenth Amendment to the Constitution, adopted in 1913, which made it clearly legal to impose income taxes. In spite of these new tax features, however, about 72 per cent of total expenditures during World War I were met by income derived from borrowing and only 28 per cent from taxation. The explanation of this record probably lies in the fact that total expenditures in World War I were about ten times those of the Civil War.

In World War II the per cent of the total expenditures obtained from taxation in the five fiscal years of 1942 through 1946 was approximately 46, leaving 54 per cent derived from borrowing. This result was achieved despite the fact that costs of the war to the United States were about ten times as great as the costs of World War I. It reflected an even more vigorous use of the income tax and excise taxes.

The discouraging part of this picture is that even with a modernized tax system and its drastic application we have still found ourselves raising one-half of our war costs by borrowing; that is, by the very method which has proved to be inherently inflationary. One uncomfortable

question which this raises is whether in war periods we have not allowed ourselves to become unnecessarily lavish in our spending habits. Penuriousness, of course, does not win wars. Americans do not resent the huge expenditures for the atomic bomb. But we pay the cost in rising living expenses and later deflations. We need to find ways to keep the Treasury watchdog alert in time of war, and especially at the conclusion of each war, to eliminate promptly unneeded and costly bureaus and functions.

THE CHANGING PER CAPITA DEBT

In 1790, when Alexander Hamilton, then 33 years of age, and the first Secretary of the Treasury, had been in office only a few months he estimated that the public debt of the new nation amounted to about 72.4 million dollars. The foreign debt which was owned mostly in France and Holland amounted to 11.7 millions. The domestic national debt amounted to 42.4 millions of which one-third consisted of arrears of interest. The debt to the states for services and supplies furnished by them and put at the disposal of the armed forces during the late war amounted to 18.3 millions.

These dollar amounts which may now seem strangely small were in point of fact embarrassingly large. The total was 72.4 millions in hard money, and to the young nation, short of capital and impoverished by war and inflation, that amount seemed enormous. The debt had to be borne by a total population of only 3.9 millions; most of them relatively poor farmers, traders, and frontiersmen. Moreover, when Hamilton began his work there was so little confidence in the ability of the Government to pay its debts that certificates of public indebtedness were selling at from 10 to 20 cents on the dollar.

Diagram 2 [omitted] shows the changes in the national debt each year from Hamilton's time until the present. It is per capita—that is, the figures for the total debt in each year are divided by the population of the country. The debt figures used are the Treasury data of gross public debt on June 30 of each year. The population figures are those of the Bureau of the Census.

The diagram shows the burden of the debt which rested upon each man, woman and child. In 1790 the debt could have been wiped out had each living inhabitant of the United States paid in $19 to the National Treasury. After the end of the War of 1812 each person would have had to pay in $15. Just after the Civil War the figure rose to $78; and after World War I to $240. In 1946, to extinguish the debt each one of us,—man, woman, or child,—would have to pay about $2,000 to the Government, over and above the amounts collected each year to keep the Government running.

DEBT AND NATIONAL INCOME

Perhaps a better way to judge the magnitude of the national debt is to compare it with the national income. That term as used here is essentially equivalent to the sum of all the net yearly income before taxes of all the individuals in the population. The earliest estimate that we have of the national income is one for the year 1799 as compiled by the National Industrial Conference Board. At that time the public debt was something more than 78 millions, and it was 11.6 per cent as large as the national income. Perhaps, it may fairly be inferred that when the new Federal Government was organized its public debt amounted to a little less than 10 per cent of one year's national income.

Not until 1807 was the national debt reduced to an amount that was less than it had been when Hamilton began work on it in 1790. The first Secretary of the Treasury resigned his office in January, 1795, largely because he could not readily support his large family on his official salary of $3,500 a year. Following his departure federal finances were less skillfully handled, although his successor was an able man. When the War of 1812 broke out, the public debt had been reduced to 45.2 millions which was only a little more than 5 per cent as large as the national income. Of course the debt increased rapidly during the war years; and it continued to grow until 1816 when it amounted to over 129 millions, which was about 13 per cent as much as the national income.

Serious inflation developed, there was no central bank, money deteriorated, and government securities were sold below par. The result was that for loans of over 80 million dollars the Treasury received only 34 million dollars as measured in specie. In one extreme case the Treasury increased its debt by over five million dollars in order to borrow less than one million dollars. In terms of price it was selling its securities at the equivalent of the ridiculously low figure of 19.

Diagram 3 [omitted] shows the federal debt as per cent of the national income annually from 1799 to the beginning of 1946. The debt figures used in making the computations on which the diagram is based are the same as in Diagram 2. The data for national income are those of the National Industrial Conference Board from 1799 to 1929 and the income payments series of the Department of Commerce from 1930 to 1946. In the years from the beginning of the period covered by the diagram up to 1900 the Conference Board figures are available only at 10-year intervals. The intervening data were computed by straight-line interpolations adjusted for individual years by means of the data for fluctuations of business activity compiled by the Cleveland Trust Company, and published in its long charts.

After the War of 1812 the country grew rapidly, income from the cus-

toms and the sale of public lands was high, and the receipts of the Government were greater than its expenses. Public debt was steadily paid down. By January, 1835, the debt was entirely paid off, and in a spirit of optimism the surplus in the Treasury was distributed among the states. Symptoms of the coming great panic and depression of 1837 were already beginning to appear but they were not recognized, as indeed they seldom are. The Mexican War in the middle forties occasioned no considerable increase in the public debt, nor was there any until the outbreak of the Civil War in 1861.

By 1865 the debt had grown to 2,675 million dollars, and was 50.2 per cent as large as that year's national income. This is to be contrasted with the perhaps 10 per cent after the Revolutionary War, and the 13 per cent after the War of 1812.

After the end of the Civil War in 1865 it was found that only one-ninth of the total debt ran under any conditions for a period longer than two years. A contemporary critic described the remainder as follows: "Eight-ninths of it consisted of transient forms issued under laws made up to a great extent of incomprehensible verbiage giving unlimited direction over the mass to one man, and expressing in the aggregate nearly 100 contingencies of duration, option, conversion, extension, renewal, etc."

We never did entirely pay off the Civil War debt, but we paid it down steadily for 28 years until in 1893 it amounted to only 839 million dollars, or about one-third of what it had been at the peak in 1865. In 1893 the debt was approximately 7 per cent as large as that year's national income. It increased to 1,282 millions by the time we entered World War I in 1917, but the wealth of the country increased still more rapidly, and the debt was then only about 3 per cent as large as the national income. Within two years it had grown to about 41 per cent, but it weighed much less heavily on the country than did the Civil War debt. It was paid down steadily until 1930 it was only a little more than 16 billions, or about 22 per cent as large as that year's national income. Deficit financing began lifting this figure in 1931 and a decade later came the great burst of war expenditures.

By 1945 the debt was 161 per cent as large as the income payments of 1945, and by February of 1946 the debt was 180 per cent as great as the annual rate of income payments then reported by the Department of Commerce. It amounted to 279,214 million dollars. This present war debt is, therefore, different from all the earlier ones.

IS THIS DEBT MANAGEABLE?

Here, then, is a debt of unprecedented size, incurred in fighting an unprecedented war. It is another evidence of the disrupting influence of

total war, in which the whole of a country's energies become engaged. The purpose of the general debt study—of which this report is one section—is to seek ways of measuring the weight on this country of the huge war debt, and its probable effects; and to explore methods by which it can be handled with the least damage to our national economy.

This involves a whole series of questions, such as: By what methods and how rapidly can the debt be paid off? How heavy taxes ought we all to bear to pay off the debt, remembering, of course, the effect of taxes in impeding both personal and business operations? Who should hold the bonds which represent the debt—banks, insurance companies, private individuals, or others? How can its inflationary effects be reduced and alleviated?

One of the immediate and obvious questions concerning the debt is the amount of interest which must be paid each year to the holders of the debt, that is—the people from whom the Government has borrowed the money. The President has told us that in the current fiscal year the Government will pay five billion dollars in interest on the debt. This item alone is more than the total peacetime expenditures of the Government for all purposes in any year before 1934.

We need to take a careful and critical look at this huge figure for interest payments. Just as in previous pages we were not satisfied in thinking of the debt solely in dollar terms but related it to other factors which might show our capacity to pay, so it will be helpful to compare this interest figure with the national income out of which the interest must be met.

INTEREST AS PER CENT OF NATIONAL INCOME

In Diagram 4 [omitted] the data line shows annually from 1799 to 1946 the interest payments on our national debt as per cent of our national income. The per cent rose to 0.8 in the period shortly following the War of 1812, and to about 2.6 in the Civil War. In the period just after World War I the per cent rose to nearly 2.0, and it was not much less in 1932 and 1933 during the Great Depression. In the first half of 1946, shortly after the end of World War II, it rose to 3.5, which is the highest in our history, and above the record reached following the Civil War.

In some ways this is however the first encouraging evidence we have found in our examination of the national debt. In spite of having a debt 100 times the size of the Civil War debt and ten times the size of the debt of World War I, interest payments, in terms of the national income, are today only about 37 per cent larger than those after the Civil War.

There are two reasons. First, the national income is very high, part of it reflecting price inflation, but part also because of the great increase in the production and distribution of goods. The national income today is over

160 billion dollars a year, as compared with 57 billions just after World War I. Nobody knows whether and how long this expanded national income will last. If it should shrink, interest on the debt would be harder to pay because the necessary taxes would be harder to collect. The second reason why the interest burden is no larger is that interest rates are low—the lowest in fact ever experienced in this or any other country.

INTEREST RATES ON NATIONAL DEBT

In Diagram 5 [omitted] the data line shows for each year from 1790 to 1946 the per cents that the interest due on our interest-paying national debt were of the capital of that debt. The rates shown during the first four decades are lower than the actual prevailing rates of that time because part of the newly funded debt, representing arrearages of interest, paid at the rate of only 3 per cent, and on another considerable part all interest was deferred until 1801. War with Mexico stiffened rates in the late 1840's, and they moved up to record high levels in the period of the Civil War.

From the Civil War period to that of the first World War the course of interest rates on the national debt was mostly downward. This strengthening of the public credit resulted largely from the demonstrated ability of the Government to pay off its large war debt, and it was influenced by the fact that government bonds had enhanced value because some of them carried the circulation privilege for national bank notes. Interest rates rose sharply in the period of the first World War, and they have been declining most of the time since then. Since 1942 the average rate has been less than 2 per cent. This is the first time in our national history that we have incurred a great war debt without materially raising interest rates.

It is indeed extraordinary that at the time of its greatest need for money the Government has been able to borrow at the lowest rates in all its history. One reason is to be found in monetary management. The Government in Washington has used all the facilities of the Federal Reserve System and the Treasury to keep the interest rates for its borrowing low. The mechanism by which this has been done, with its advantages and its disadvantages, will be described in other sections of this investigation of the public debt.

The point to be noted here in this historical account is the great change that has taken place from the time when a weak National Government in 1798 and 1800 was forced to pay 8 per cent interest to induce the public to lend it money, to a time when the Government is able in a measure to dictate the rates at which it will sell its bonds to the public. Over this long span of years, confidence in the Government has increased; the

country's wealth has grown, its taxing system has developed; but even more important in this direction has been the increased governmental control over money. The principal move in that direction was the establishment of the Federal Reserve System in 1914. Through its operation the Government can change the amount of money in the banks and indeed in the hands of the public.

In exercising these powers to keep money rates low in World War II and after, the United States Government has not been alone. Other governments all over the world have done the same thing. By government controls they have circumvented the normal tendency in wartime for the laws of supply and demand to operate towards higher interest rates. This does result in a large interest savings to the Government; but it has other results as well, for in the process of keeping the rates low the Reserve System has had to pump out money into the spending stream, and thus has itself built the substance of inflation at the source. There is also a question whether at these lower rates the Treasury has been able to sell as many bonds to investors as it could have at higher rates and hence whether the amounts taken by the banks and Federal Reserve System have not been larger than necessary. These are questions that will receive full consideration in the course of this investigation of debt policy. Control over the interest rate by monetary management was aided by further developments in another feature of debt management, and that is in a vigorous sales program for the widespread distribution of bonds to the people.

Jay Cooke had taught the federal authorities during the Civil War that financing could be greatly helped by appeals to patriotism, and that war bonds could readily be sold to great numbers of individuals as well as to banks. These lessons were well utilized in financing World War I, and care was taken to make the bonds of the Liberty Loans convenient for the individual investor. They were to be had in either coupon or registered form, and the various types were interchangeable. Early issues were tax exempt (except for estates and inheritances). The country was organized through the Federal Reserve System for a vast bond-selling campaign and millions of citizens became bondholders for the first time, and so associated themselves with the war effort.

Perhaps the most serious criticism to be made of the management of the war debt during World War I is that appeals to patriotism, and resort to social pressure, were so effectively employed as to enable the Treasury Department to sell its security issues at prices which were probably higher than the current investment values of the bonds. Nearly all the new issues sold below par throughout the war despite the fact that they progressively carried higher coupons. When interest rates stiffened further in 1919 and 1920, bond prices sustained serious declines which caused much

dissatisfaction among many patriotic and inexperienced investors. For example, the second 4¼ Liberty Bonds which were callable in 1927 sold on the New York Stock Exchange in May, 1920, at $81.10. At that price the bond was selling to yield more than 7½ per cent to call date.

In World War II the Treasury profited both from the successes and mistakes of World War I. It followed the program of vigorous and widespread sales, and it also adopted types of securities adapted to different classes of investors in the hope of avoiding declines in market values of securities held by small investors.

Nearly one-quarter of the added debt has been in the form of savings bonds and savings notes which are non-negotiable and so are not subject to price quotations on the security exchanges. This feature largely removes the danger that sizeable numbers of small holders might hasten to sell their securities on falling markets as the owners of Liberty Bonds did after World War I when the market prices declined to the low 80's. By the use of this type of security and vigorous sales campaigns the number of bond purchasers rose to 85,000,000.

It is noteworthy that in the evolution of their philosophies with respect to war financing the fiscal authorities of this nation have swung all the way from the belief that substantially all the new debt occasioned by war should be sold to banks, to the conviction that as little of it as possible should be lodged in bank ownership. The widespread ownership of the debt is not only a vast aid in financing war but in the long run should give the people a wholesome interest in sound government fiscal policy.

While this section of the study has been devoted to the interest burden on the debt as a measurable factor over the years, it should be noted that interest payments are not the only or indeed the principal burden of the debt on the country. Even though the interest burden can be carried, the more vital question is what the debt has done and is doing in causing inflation or deflation, or both, through its effect on the volume of money. This is the central problem of debt management and it will be discussed in later studies of this series.

SUMMARY

1. Five times in this Nation's history we have incurred great national debts—all of them to finance wars.

2. Each time government war spending and borrowing have given us price inflation, followed in each case up to the present by painful deflation.

3. The inflationary forces in World War II have been greater than ever before as the war spending and the increase in the government debt has been on a wholly unprecedented scale, both in dollars and in relation to our population and its income.

4. So far the actual price inflation has been less than it was after World War I, but prices are still rising; inflation is still under way.

5. While we must pay interest of five billion dollars a year on the national debt, the portion of the national income that this represents is only about 37 per cent larger than that taken up by the interest payments after the Civil War. This is partly because of an enlarged national income, and partly attributable to a governmentally-imposed low interest rate policy, which has other serious economic implications.

6. It has been our national tradition to pay down our war debts promptly.

7. Our past record with respect to our national debt is good enough to encourage us, and poor enough to put us on guard. During the 154 years from 1792 through 1945 we have had ninety-three years of net surplus in our national budget and sixty-one years of net deficit.

8. Throughout our history the greatest obstacles to national financial strength, and the most acute dangers of fiscal collapse, have never been the results of inadequate or failing resources, but always consequences of weak financial policies. Increasing national wealth has always enabled us to pay down the public debt resulting from war expenditures.

9. George Washington gave some good advice on the subject of war debts in his Farewell Address of September, 1796. He said:

"As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible; avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding likewise the accumulation of debt, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars may have occasioned, not ungenerously throwing upon posterity the burdens which we ourselves ought to bear."

79. THE INGENIOUS TAXPAYER [1]

As THE income tax statutes have become more complex and as the tax burden has increased, a growing tendency has developed for some citizens to find technical means of evading payment of some part of their tax. This practice is facilitated "by taking advantage of some provision or lack of provision in the law." This article reviews various tax evasion and avoidance practices.

[1] *Fortune* (February, 1947), pp. 108–111; 149–152. Reprinted by special permission of the Editors. Copyright by *Time* Inc.

"TAXES," Oliver Wendell Holmes once said, "are what we pay for civilized society." The price at that time (1927) amounted to only 12 cents on the income dollar, and civilization was selling at a bargain. Today the same commodity, or perhaps one of slightly more dubious value, costs the U.S. taxpayer almost 32 cents of every dollar of income. Last year, for instance, he paid $40.6 billion to the federal government alone; contributed about $6 billion to state treasuries; supported county and municipal governments to the tune of some $4.8 billion. He paid income taxes, capital-gains taxes, commodity taxes, sales taxes, customs duties, property taxes. If he decided it just wasn't worth it and gave his money away, he was slapped with a gift tax; even if he died he didn't escape—his estate paid an inheritance tax. The overwhelming majority of U.S. taxpayers pay the price without demur, yet a growing minority, perhaps more skeptical of the value they are getting, are resorting to a multitude of legal and illegal devices to reduce their personal tax liability.

So inured has the average taxpayer become to the high cost of government that he sometimes forgets what a recent development it all is. In the five years after 1940 the federal Treasury collected 38 per cent more money than it had collected during its entire previous history. It was able to do so, of course, only because national income had also risen to unprecedented heights. The national income in 1945 was $161 billion, or more than twice 1939 income. The country was capable of carrying a big tax load, but not big enough. The prodigious cost of modern war forced the government to rely heavily on borrowed money, and the federal debt rose to $280 billion. The consequences were inevitable. Today the U.S. taxpayer is faced with the fact that the cost of servicing the federal debt alone will exceed total prewar annual revenues. Those who were heartened by the 1945 tax bill, which cut tax rates for the first time in sixteen years, lost sight of the fact that in the first year of peace, A.D. 1946, the cost of "civilized society," measured by federal revenues alone, was about $40 billion, or some six times the cost in any previous peacetime year.

GROWING RELUCTANCE

Although high taxes probably provide the chief incentive for tax evasion, there have been other contributory reasons for the up-swing in fraud cases in recent years: the black market, the addition of millions of new names to the tax rolls, the inadequate personnel force of the Bureau of Internal Revenue. All operated to encourage evasion. In prewar years the Bureau turned up between 600 and 1,000 cases of suspected fraud annually, but during the war, in spite of a curtailment in the size of its working force, it found 1,082 cases in 1944 and 1,253 cases in 1945 that warranted investigation. Last year more than 2,000 fraud investigations were undertaken.

Meanwhile a backlog of 39,000 reports of suspected fraud has piled up awaiting investigation, and the number of investigations undertaken is limited only by the availability of qualified personnel. Although these figures indicate that tax cheating is increasing, accurate measurement of the extent of the increase is impossible for a number of reasons: no one knows how much cheating is carried out successfully; the volume of returns has increased some ten times, whereas the number subjected to a thoroughgoing scrutiny has of necessity remained relatively stable; among those not investigated, many of the opportunities for evasion have been eliminated by the institution of other checks, such as the withholding of taxes, the flat 10 per cent deduction, and the requirement of a variety of information reports from the sources of income. But the fact remains that while roughly two million returns are subjected to a thoroughgoing scrutiny each year, a growing proportion of that number have shown evidence of fraudulent evasion.

Attempts to avoid tax liability, without resort to fraud, are also increasing. In the thirties the Bureau of Internal Revenue assessed some $300 million in additional taxes annually. During the war additional assessments rose more than $100 million each year, hitting $748 million in 1945. Last year more than $1.1 billion was collected. It is true that this increase was partly attributable to the increase in tax rates and income payments to individuals, but since 1943, for instance, there has been no increase in tax rates and less than an 8 per cent increase in national income, whereas additional assessments have risen more than 150 per cent.

EVASION OR AVOIDANCE

The distinction between tax evasion and avoidance is not hard to define. In the early days of the income tax Justice Holmes propounded the theory that "when the law draws a line, a case is on one side of it or the other." This gave rise to the belief that everything on the illegal side of Holmes's line was evasion, while practices that fell on the legal side were avoidance, i.e., legitimate ways to reduce tax liability, a stand that was not seriously challenged until 1935. To qualify as avoidance a device had only to adhere to the letter of the law while attempting to circumvent its intent. But a Supreme Court decision in 1935 (Gregory *v.* Helvering) and subsequent judicial rulings have injected something more into the definition of avoidance. The court has said in effect that it is not sufficient to stay within the letter of the law; the taxpayer must also stay within the spirit of the law. A business activity undertaken solely to avoid taxes, for example, does not satisfy a legitimate business purpose and is therefore invalid for tax purposes. The question of the taxpayer's intention began to assume paramount importance, and avoidance practices might or might

not be effective methods to reduce taxes depending on whether or not the spirit of the law had been unduly distorted. It is true that avoidance is no longer necessarily foolproof simply because it honors the letter of the law, but it can nevertheless be clearly distinguished from evasion, which is an attempt to escape taxes by fraudulent means and carries both civil and criminal penalties.

There is very little agreement among taxmen as to the proper definition of avoidance; some feel that the word has acquired an unfortunate connotation and should be used only to designate those practices that, while not fraudulent, have nevertheless been adjudged ineffective for tax purposes. They prefer to apply more euphonious names, such as "tax saving" or "tax minimization," to those practices that still enable the taxpayer to mitigate his tax burden. For all practical purposes, however, avoidance can be defined as any conscious attempt, successful or unsuccessful, to prevent or reduce tax liability by taking advantage of some provision or lack of provision in the law. There are, of course, certain statutorily authorized deductions and exemptions, the use of which cannot be termed avoidance; avoidance presupposes the existence of alternatives, and when the taxpayer chooses the method that entails the least taxability he has quite reasonably indulged in tax avoidance. Whether an avoidance practice succeeds or fails depends ultimately on whether or not it corrupts congressional intent in the eyes of the court; and this depends in turn upon such things as the political climate at the time a case is litigated, the skill with which the device was created, and the ability with which the case is argued. The only consequence of unsuccessful avoidance is failure; there is no other penalty, for tax avoidance, unlike evasion, is not a crime.

EVASION IS CHEATING

Evasive practices are identified by an element of intent, an intent not only to reduce tax liability but to do so by falsification. It is this element of intentional wrongdoing that distinguishes evasion from avoidance. Avoidance may be difficult to define but evasion is not. It is quite simply —cheating.

Anyone can cheat, though the opportunities for doing so and the chances of success vary widely according to income level and profession. Wage earners, for instance, the 42,500,000 persons who make up better than 80 per cent of the taxable population, have very little opportunity to cheat because their taxes are withheld. Information reports are sent by their employers to the Internal Revenue processing center where, each year, more than 200 million miscellaneous information reports are matched against transcripts of all tax returns filed. Similarly, persons receiving dividend payments in excess of $100 are precluded from evading taxes on such un-

earned income because the payments are reported by the disbursing company. But although there are numerous checks of this nature, honest mistakes can easily go undetected and an unscrupulous person can frequently bilk the government out of considerable revenue.

One of the most prevalent forms of cheating, particularly among low-income taxpayers, is the practice of taking credit for a fictitious dependent. By this means $500 can be shaved from taxable income, and anywhere from $100 to $450 saved in taxes. In the Longchamps tax swindle last year, Henry Lustig's nephew and codefendant, E. Allen Lustig, was found to have taken an exemption for a dead relative.

Another way to cheat is to overstate any deductible expense. The temptation to exaggerate charitable contributions, entertainment expenses, and the like is almost universal. The mass of low-income taxpayers are not exposed to this temptation. They are allowed a flat 10 per cent expense deduction if their gross income is $5,000 or less, and an optional deduction of $500 if their income exceeds $5,000. Since in most cases this deduction is overgenerous and appeals to everyone's inherent laziness it has been adopted by 80 per cent of the eligible citizenry. Persons earning over $5,000, however, and particularly independent entrepreneurs and professional men, still can and do usually give themselves the benefit of the doubt in estimating their philanthropic generosity, their advertising, traveling, and professional expenses.

CASH IS ELUSIVE

Aside from kiting exemptions and deductions, the only other way to cheat on taxes is to fail willfully to report income. The possibilities for doing this increase proportionately with the number of cash payments an individual receives. Salaried wage earners obviously cannot conceal income. A storekeeper, waiter, or cabdriver, on the other hand, has almost unlimited opportunities to stick part of his income in his pocket and forget it. The Revenue Bureau sometimes spot-checks an occupational group in a certain locality if an undue amount of evasion is suspected, but it is obviously limited in what it can do in this respect. Doctors, lawyers, and all the vast array of people who sell their services in return for fees can pocket cash payments with relative impunity. This is true only up to a point, however, and the point might be said to be reached when reported income fails to reflect what the tax collector, from experience, knows to be the norm for a given profession, or, in a more exaggerated case, when reported income ceases to reflect net worth. A doctor who reported a taxable income of only $5,000 year after year and was known to have acquired a $50,000 home, a yacht, and a country estate would have some explaining to do. The fact that he was a doctor would not place him above sus-

picion—far from it. Hippocrates would be surprised to learn that there have been more doctors convicted of tax evasion than any other group except professional gamblers.

If a man's activities are not adapted to the acceptance of cash fees he can still cheat if he has a mind to. He can falsify his books, forge or destroy invoices, conceal assets, etc. The risk is greater, but there are those who are willing to take it. Deliberate misstatement of income is a device that can be used by large and small proprietors alike, and if used in moderation is very difficult to spot. Fortunately for the tax collector it is seldom indulged in temperately—for long.

Probably the safest way to evade taxes is simply never to file a return. There is no provision in Revenue Bureau procedure for checking up to see that everyone who should have filed a tax return did so. Of course, the fact that an individual has failed to file might and frequently does come to light, particularly if he has ever had wages withheld for taxes, but if the evader keeps quiet, lives modestly, and derives his income from a source that is not automatically subject to report, the chances are against his being found out. Revenue agents are still looking for the man who won the sweepstakes back in 1932. He has never filed a return.

The old adage about honesty being the best policy would seem not to apply necessarily to the self-assessment tax procedure, but this is not altogether true. In fraud cases there is no statute of limitations on civil penalties, and the evader can never say to himself, "Well, I got away with it"—and be sure. Even so, the really remarkable thing about tax evasion is that there is not more of it. For all his shortcomings the U.S. taxpayer is apparently an amazingly honest fellow. Were he not, the Bureau of Internal Revenue with its limited facilities would never be able to collect $30 billion of income taxes annually, for there is too much opportunity for successful evasion in the administration of tax law today.

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GOVERNMENT-SPONSORED AVOIDANCE

Some fortunate taxpayers do not even have to try to reduce their tax liability; the law does it for them. Community property is the most obvious example of this type of preferential tax treatment. Nine western states bestow upon married couples residing within their borders the privilege of filing separate federal tax returns even though the husband is the only wage earner. The basis for this treatment is the conception of property held by the early Spanish settlers—that marriage invests in either spouse an equal interest in the property of the other. By virtue of the community-property provisions a married man earning $30,000 in California pays $3,570 less tax each year than a man earning the same amount

in New York. To date, all attempts to invalidate the inequities of community property by making joint returns mandatory have been successfully blocked by the Senators from the community-property states.

So attractive has the West become from a tax standpoint that hundreds of eastern taxpayers are emulating their forebears and heading in that direction. The sovereign state of Oklahoma found that it was losing so many of its wealthy citizens to the neighboring state of Texas (community-property) that it embraced the community-property doctrine in self-defense. Thwarted in its own efforts to defeat community property, the Treasury Department is planning to stoop to conquer in the same way. Treasury Counsel Stanley Surrey is plumping for a country-wide community-property law. If the plan succeeds, everyone in the country will be allowed to file separate returns, and marriage will be equally blessed by tax collectors from coast to coast—and the preferential status of the nine western states will be nullified.

There are many other types of government-induced avoidance. Cooperatives, charities, and educational institutions are usually exempt from taxation, and there are many who claim that they take unfair advantage of this privilege to compete with regular business organizations. One midwestern cooperative, for example, operates through eighty-seven member associations, owns insurance companies and manufacturing plants, and does more than $20 million of business annually. State and municipal bonds enjoy preferential tax treatment since the interest on such securities is exempt from taxation. Owners of oil fields are statutorily privileged to pay a lower tax rate than other property owners; they are allowed to take a 27.5 per cent "depletion" deduction from net earnings every year even after the original investment has been fully depreciated. Unearned income is favored over earned income, which cannot be easily transferred in the interests of tax minimization. It would be impossible, however, to devise a tax law that would be completely impartial and equitable.

AVOIDANCE IS NECESSARY

To say that avoidance is immoral is sanctimonious nonsense. There are certain kinds of avoidance which the government intends that all taxpayers should practice. It expects a man to invest in tax-exempt bonds. It does not expect him to lie about the amount of compensation he receives during the year. Somewhere in between these two extremes there exists a type of avoidance that goes beyond the intent of the law. The taxpayer is morally and legally justified in utilizing any avoidance device that, in his opinion, does not go beyond this point. He is free to interpret the intent of the law as liberally as he wishes; the Bureau of Internal Revenue will tell him if he has gone too far.

If, by properly ordering his economic activities, the taxpayer (individual or corporate) can reduce his tax liability he has accomplished a valid business purpose. He has *minimized* a cost that affects his profit position as much as or more than any production cost. He may sell depreciated machinery instead of trading it in on replacement machinery if by so doing he will reduce his tax liability; he may make a charitable contribution in stock that has appreciated in value rather than in cash, and thereby reduce the tax cost of his gift. The objective of all such tax planning is to minimize the part of the taxpayer's property or profits that he must turn over to the tax collector, and it is one of the most important considerations in making money today.

Avoidance, unlike evasion, is not a crime but a right, the exercise of which is sometimes abused. But the taxpayer who through neglect or ignorance fails to minimize tax liability to the full extent permissible by law is in effect paying more than his fair share of the price of "civilized society."

80. THE MANAGEMENT OF THE BUDGET [1]

IN A parliamentary system of government such as that of Great Britain the co-mingling of the executive and legislative branches of government simplify the problems of budget preparation and budget execution. In the United States, however, the division of responsibility between the President and Congress results in considerable difficulty in budgetary management. In this extract the present system of preparing and administering the budget is analyzed and suggestions for improving this system are presented. The suggestions are based on the assumption that a balanced budget is fundamental to a normal fiscal policy. Whether or not the student agrees with this assumption, he will find the discussion provocative.

BUDGETARY balance at the desired level should be the normal and regular policy to be followed by the federal government. The country cannot afford to trust to the course of circumstances to produce that result. It must be planned for and worked for, if it is to happen with any consistency and regularity.

To the present time there has been no definite responsibility upon either the President or the Congress for balancing the budget. The executive

[1] From "A Tax Program for A Solvent America, 1947" by The Committee on Postwar Tax Policy (Walter A. Cooper, Fred R. Fairchild, Rowland R. Hughes, Thomas N. Tarleau, Roswell Magill, *Chairman*, and Harley L. Lutz, *Director of Research*), February, 1947, pp. 26–32.

budget is not required, by law, to show a balance of receipts and expenditures. Under the American system, which created a federal government composed of three coordinate branches—legislative, executive, and judicial—governmental power is distributed among the three branches, each of which is supposed to function as a check and balance against the other two. All authority to initiate legislation is vested in the legislative branch, and no member of the other branches may also be a member of the legislative branch at the same time. In this respect our system differs from that which is ordinarily described as a "parliamentary system," under which the heads of the several administrative departments are also members of the legislative branch. As members of the latter, the department heads of the English cabinet, for example, sit in the House of Commons, participate in its debates, vote on all legislative proposals, and jointly, as a cabinet, introduce all public legislative measures. The English budget comes before the Commons with all the standing of a legislative proposal and is acted upon as such.

The President's budget can never be more than a series of recommendations. The Congress is entirely free to modify, up or down, the budget proposals as to both appropriations and revenues. The direct check which the chief executive may apply to Congressional action is the veto, but even this becomes ineffective if the Congress be sufficiently determined upon a certain course to enact a bill over the veto.

The management of the budget involves two aspects, its preparation and its application or execution.

PREPARATION OF THE BUDGET

The legislative reorganization act of 1946 takes a first and most important step toward the establishment of Congressional responsibility in the preparation of the budget. There is to be an authoritative legislative budget, in addition to the President's advisory budget. While due consideration is to be given to the latter, the two need not, and probably will not, agree in all respects. The legislative budget becomes an advance commitment as to the over-all total of expenditures and, it is to be hoped, of receipts. Its great merit lies in the fact that there will be established a broad framework within which the spending and the taxing are to be determined, each with reference to the other.

The new legislation obviously does not require that the budget shall ever be balanced, but it does require that if a deficit be estimated Congress shall specifically authorize a corresponding increase in the public debt. The level of the budget is a matter of policy, as is the question of surplus or deficit. The best hope for progress toward a lower total lies in the fact that for the first time in our history, the proposed spending must be

directly related to the necessary taxing. Under this arrangement, any disregard of the standard of budget balance will be brought more and more into the open and will be freely and fully discussed, in and out of Congress. As this procedure becomes better established in public thought it should lead to more effective and complete budgetary control.

It is too early to foresee the extent to which the new procedure may modify the practices that have hitherto been followed by the appropriations committees. A valuable feature of these practices has been the publication of the record of hearings before the several subcommittees on the various appropriation bills. While the review which these subcommittees conduct of the departmental requests necessarily duplicates, to a considerable extent, the review which the budget bureau has already conducted, the absence of any published record of the proceedings before the bureau means that the only public information regarding the proposed expenditure program is to be found in the reports of the subcommittee hearings. If the contribution which the two appropriations committees are to make to the joint statement on the legislative budget is to be based upon the kind of investigation which has been conducted in the past, it will be necessary to begin earlier and proceed more expeditiously with these hearings. Without them, much greater reliance than heretofore must be placed upon the President's budget recommendations.

One possibility would be to accept the President's budget as a series of maximum proposals, with the Congressional investigation and action pointed at the case for sustaining, or reducing, but not increasing, the expenditure totals proposed. In this connection the procedure followed in New York, largest of the states in population and resources, may be of interest. The following passages are from Article VII of the New York *Constitution:*

Section 2. Annually, on or before the first day of February, the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures.

Section 3. At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein.

The governor may at any time within thirty days thereafter and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or submit supplemental bills.

Section 4. The legislature may not alter an appropriation bill submitted by

the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose.

Section 5. Neither house of the legislature shall consider any other bill making an appropriation until all of the appropriation bills submitted by the governor shall have been finally acted upon by both houses, except on messages from the governor certifying to the necessity of immediate passage of such a bill.

Section 11. Except the debts specified in sections 9 and 10 (relating to short term debts in anticipation of revenues and of permanent bond issues, and on account of invasion, insurrection, war, and forest fires), no debt shall be hereafter contracted by or in behalf of the state unless such debt shall be authorized by law, for some single work or purpose, to be distinctly specified therein. No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for it at such election nor shall it be submitted to be voted on within three months after its passage nor at any general election when any other law or any bill shall be submitted to be voted for or against.

These provisions give the executive budget the predominant place in fiscal procedure. They do not entirely stop the introduction of appropriation bills by members, but the strictness of the debt provisions tends to hold the total spending within the available revenues.

Under such an approach as this there would be little opportunity of voting a larger total than was contained in the budget, and the question of surplus or deficit would turn on the degree to which the Congressional action may have resulted in a reduction of expenditures within the proposed budget total or in the adjustment of taxes to provide the needed revenue. The plan would not allow sufficiently, perhaps, for those purposes which appear after the budget has been prepared, except as they might be incorporated into supplemental budget statements which were regularly transmitted as amendments to the main document. As the federal experience in 1946 showed, however, unlimited leeway to appropriate for purposes not covered in the budget can lead to serious disorganization of a financial program.

THE ADMINISTRATION OF THE BUDGET

The expression "administration of the budget" includes (1) the administration of the revenue laws and other laws under which the taxes and other revenue receipts are collected and covered into the Treasury; and (2) the application of the funds appropriated to meeting the costs of governmental operation. Revenue collection has been established since the beginning of the Republic. Executive control of the application of appropriated funds was made possible through the creation of the budget bureau by the Budget and Accounting Act of 1920.

The bureau's control is, in one sense, a routine which is generally regarded as no more than an orderly adjustment of the rate of spending to assure that a given appropriation will last out the fiscal year. In this capacity, the several appropriations are apportioned and the funds are released to the various departments and agencies on a monthly basis suitable to the rate of their respective operations. There is no authority for apportioning sums in excess of appropriations, but the number and volume of deficiency appropriations indicate that the practice of making apportionments at a rate which necessarily involves overspending is fairly common. The new legislation, now effective as to the future, requires that the legislative budget carry such provision as may be deemed necessary for deficiencies.

The precedent for executive action dates from the early days of the present budget procedure. Shortly after the organization of the budget bureau it was made responsible for securing the compliance of all executive agencies with the provisions of the anti-deficiency act. President Harding inaugurated the practice of requesting the heads of the spending agencies to set aside a portion of their appropriations at the beginning of each fiscal year as possible savings. President Hoover undertook by similar methods to effect a 10 per cent reduction of expenditures for the fiscal year 1932. President Roosevelt effected salary reductions in 1933 and 1934 by executive order.

Thus, there has been ample precedent for the following statements by President Truman in his budget review message of August, 1946, referring to the increases in appropriations:

> I have directed the Secretaries of War and Navy to curtail military expenditures to the level contemplated in the January budget, except for terminal leave pay, and certain additional naval programs which the Congress authorized upon my recommendation.
>
> . . . . . .
>
> I am addressing letters to the heads of those agencies which have direct charge of public works, and also to those which have responsibility for grants-in-aid or loans, requesting them to take all measures to secure the postponement of public works at the present time so that the Government competes as little as possible for scarce labor and materials. I have also given instructions to postpone all purchases of automobiles, office equipment, and other items in short supply except in emergency cases.
>
> Furthermore, various agencies will absorb the major part of the recently enacted pay increases.

The version of the legislative reorganization bill which was passed by the Senate contained a provision which would have authorized the President to make reductions in the non-mandatory appropriations sufficient to keep the total within the budget as approved by Congressional joint resolution.

This provision was eliminated in the House. It would have given statutory regularity to a procedure which is now applicable only under the control which the power of appointment and dismissal gives the chief executive.

Under the Legislative Reorganization Act of 1946 unexpended balances, which have been troublesome in the past, will no longer present a problem. Section 139 (c) of that act is as follows:

> (c) No general appropriation bill or amendment thereto shall be received or considered in either House if it contains a provision reappropriating unexpended balances of appropriations; except that this provision shall not apply to appropriations in continuance of appropriations for public works on which work has commenced.

Another paragraph of the same section provides for a study, by the two appropriation committees, of existing permanent appropriations with a view to limiting their number and determining which, if any, should be discontinued, and also for a study of the disposition of funds resulting from the sale of government property or services by all departments and agencies with a view to designing a uniform system of control of such funds.

The excerpt just quoted from the reorganization act evidently has no retroactive effect, for the budget for the fiscal year 1948 proposes to use a large carry-over of unexpended balances. Against total expenditures of $37,528 million, the new appropriations to be asked for total only $31,300 million. The excess of expenditures over new appropriations is to be covered from appropriations previously authorized. In the budget message the following statement is made regarding these prior appropriations:

> Existing appropriations available for obligation in 1948 and subsequent years are again under review. As these appropriations become unnecessary, their withdrawal will be recommended to the Congress.

Since the appropriations in question were voted during the war years, at a time when the termination of the war emergency was not predictable, it is proper to suggest that they should be cancelled at once. Their extension into 1948, or even some later fiscal year, is contrary to the purpose of the reorganization act. Their continuing availability, under conditions utterly different from those under which they were originally provided, is conducive to extravagance. The fact that upward of one-sixth of all expenditures can be supported by authorizations of this character, as is the case in the President's budget for 1948, limits by so much the responsibility of the present Congress in its determination of a federal expenditure program. It really means that one-sixth of that program has already been determined by previous Congresses with no consideration hav-

ing been taken of the vast change in circumstances between the time of enactment and that of ultimate application.

Notwithstanding the road block set up by unrescinded prior appropriations, the present situation reflects a gratifying degree of progress toward better coordination of spending and taxing and toward the plain and direct assumption, by the Congress, of a significant degree of responsibility for budget preparation. The problems involved in the application or execution of the budget have been unaffected, as yet, except for the elimination of the carry-over of unused balances of appropriations. The failure to retain a provision directly authorizing the President to adjust appropriation totals under certain conditions leaves unsettled his legal right to do this, although there could hardly arise a serious doubt as to the validity of presidential influence exerted upon the persons whom he had appointed as administrative heads.

The success of a balanced budget policy requires the positive support of both the Congress and the executive branch. The total expenditures and the total revenues must be considered as parts of a whole, and there must be recognition of the fact that increased taxation must be provided when necessary to balance the budget. Under the new legislation we have the fortunate prospect that this correlation will occur. A surplus of revenues for debt reduction, or a state of budget balance, should not be simply a fortuitous outcome. The President and the Congress have a joint responsibility for the careful preparation of the budget, and the former has the principal, if not the sole, responsibility for producing the expected result in the application of the budget program. He should have clear and express authority to get this result by such control over apportionments as may be necessary. He should not be expected or required, however, to shoulder the responsibility of drastic adjustments such as would be required to correct large scale discrepancies between revenue and expenditure.

All of these problems of budgetary management are of greatest importance when they are related to the policy of budget balance. If deficits are incurred deliberately, control of the rate of spending becomes more difficult. Once we have taken the essential first step of declaring for the balanced budget as the foundation of normal fiscal policy, we shall be in a position to perceive and develop such measures, supplemental to existing procedures, as the achievement of the main goal may require.

81. MEETING THE NEEDS FOR STATE AND LOCAL REVENUES IN THE POSTWAR ERA [1]

BECAUSE the federal government has vastly enlarged its tax revenues, state and local governments are finding it increasingly difficult to augment their income. These units have serious trouble not merely to obtain revenue for new services, but even to raise sufficient funds to carry on existing functions. In this article Professors Graves and Scholz describe the prevailing revenue pattern in the state and local field and review the alternatives that may be followed in meeting the increasing financial needs of these governmental units.

"THE financing of government in the South presents an important field of study. The needs in relation to sources of revenue are greater in the South than in other parts of the nation. The South has relied heavily on the property tax to meet these needs, but it has also experimented widely with other forms of taxation. It has depended on federal grants to a great extent, though it has had difficulty in meeting certain conditions set up for some of these grants. The whole subject of government finance needs to be further studied and the experiences of the various states in the area need to be compared and contrasted. Materials will be found in state reports, in the reports of federal agencies which distribute grants-in-aid, and in the findings of various groups which have studied the general problem, as, for example, the Advisory Committee on Education which reported to the President in 1939, and the Committee on Intergovernmental Fiscal Relations set up by the Department of the Treasury."

Much of the foregoing comment by a group of Southern political scientists with special reference to the Southern region is equally applicable to states in other sections of the country. It has often been alleged that the American tax system, in so far as it may be called a system at all, is a survival of the horse-and-buggy age. The thousands of small local taxing jurisdictions existing throughout the country—some 165,000 of them—are striking evidence of our antiquated methods of levying and collecting taxes. In Pennsylvania alone—and many other states are in a worse condition—there are approximately 5,200 local units of government, half of them school districts, and all of them with the power to tax and to incur debt.

I. THE PLIGHT OF THE LOCAL UNITS

Limitations on Local Taxing Powers. In the face of the multiplicity of taxing jurisdictions, the base on which these agencies may levy taxes has

[1] W. Brooke Graves and Karl W. H. Scholz, *American Political Science Review* (October, 1944), Vol. 38, No. 5, pp. 904 ff.

become increasingly narrow. Local communities in Pennsylvania are not permitted to tax sources of tax revenue preëmpted by the state. Moreover, the state constitution prohibits levying any taxes which are not uniform on a given class of subjects. A progressive tax on net personal incomes based on ability to pay, recognized by tax authorities as an equitable tax, cannot be levied even by the commonwealth of Pennsylvania, let alone by local communities within the state.

Results of Inability to Raise Adequate Local Revenues. Parallel with the increase in the number of units of local government, there has been a tremendous increase in the number and scope of the functions of government performed, with a corresponding increase in the total expenditures incurred. Because of the narrow tax base available to meet these expanding local needs for public expenditures, local communities have been hard pressed to find sources of revenue adequate to meet the financial burden imposed on them. They have increased the tax on real estate values, often beyond the point of fairness and equitability. They have tried, within the constitutional limits imposed upon them, to devise new tax forms. They have made extensive use of their constitutional or statutory borrowing power, many of them rushing headlong into debt. Not least important of the methods which they have tried has been the appeal to the larger units of government for financial assistance; and thus have grown up the extensive systems of federal and state grants-in-aid. In view of the perplexing problems which face the local communities in the post-war era, it becomes important that we analyze now the effects of the grant-in-aid system, and that we consider ways and means of meeting the state and local needs for revenue.

II. FUNDAMENTAL ASSUMPTIONS

Any proposal for meeting the financial needs of the state and local units after the war must of necessity be based on certain assumptions, of which three are here important.

Trend toward Centralization. We may as well accept the fact that the development of modern science has made it not only possible but necessary for government to function in larger units than heretofore. Machinery and new methods of transportation and communication have changed our way of life. The diminishing importance of space has made government at long range possible; the increasing significance of the time factor has stimulated the demand for speed in governmental activity. Power has passed from one unit to the next successively higher, in one jurisdiction after another, both here and abroad. Counties, cities, and towns have lost to the states, the states to the nation; and now it seems likely that the nation will likewise shift some power to some international

organization designed to maintain peace and order in the family of nations. Politicians have denounced this trend, while scholars have expressed apprehension about the speed with which centralization has advanced, if not about centralization as such. Whether we like it or not, it is here, and as far as can be seen, it is likely to be more rather than less in evidence in the immediate future.

It is not meant to imply either that this trend toward centralization will go on forever or that it cannot be reversed. Certainly there is a point beyond which it cannot go, although no mortal may be wise enough to tell us precisely where it is. It may not be so far ahead as some are inclined to believe. Neither is it to be concluded that centralization has been an unmixed blessing: the verdict of the future may be that, in some of its forms, it has already gone too far. Since, however, the end is not yet in sight, we may well, for the present purpose, concern ourselves less about the fact of centralization and more about making adjustments essential to the operation of free institutions within the new and somewhat different framework which results from centralization.

Expanding Scope of Governmental Activity. In the second place, we may as well accept the idea that government will undertake more activities and assume more functions designed to promote the general welfare, and that it will enlarge many of the programs that are already under way. One may call it bureaucracy, if he chooses, but that does not in any way diminish the significance of the fact that the people are constantly demanding—and getting—more and better service from government at all levels—national, state, and local. While this trend, also, may not go on forever, no one knows where it will stop. If there is to be left a sizable sphere within which the individual is free to do as he likes, the trend should stop—one may even say, it must stop—somewhere well on this side of the assumption by government of control over all forms of human activity. Perhaps, even here, we may be nearer than we realize to the outermost boundaries of that expansion.

Nor should one forget that many of the supposed losses of power occurring through centralization have been offset, in whole or in part, by the development of new activities and the expansion of older functions already being performed by the very units which centralization is supposed to be destroying. New standards of administrative management demand not only that governments do more things, but that they do them better; and governments are meeting that challenge.

Continuance of Federal Financial Assistance to State and Local Governments. Finally, we must assume that, by some device or other, the amount of financial assistance given to the states by the federal government will continue to be very large and that it may even increase. Grants-in-aid for established state activities have grown from the small beginnings made

in the Morrell land grant act of 1863 to very considerable proportions. The number of purposes to which the subsidy system has been applied has steadily increased, along with the amounts appropriated. When periods of emergency have arisen, enormous additional grants have been made, regardless of the party in power. The Republicans established the Reconstruction Finance Corporation; the Democrats continued this agency and added many others—the Civilian Conservation Corps, the National Youth Administration, the Works Progress Administration, the Public Works Administration, etc. It seems reasonable to assume that, in the critical post-war period, old established grants will be continued as in the past, and that new ones will be made in large amounts, the purposes and conditions of which will be dependent upon the nature and proportions of the emergency. It behooves us now, therefore, to take thought for the morrow, before the pressure for immediate action in a critical situation precludes the possibility of careful analysis.

III. POSSIBLE SOLUTIONS

Continuance of the Grant-in-Aid System. Grants-in-aid by both the federal and state governments for specific purposes have become an important source of "public funds" in states and local communities during recent years. In the present discussion, consideration will be confined chiefly to federal aid payments to the state and local governments which, during the fiscal year 1938, for only three forms of public assistance, amounted to over a quarter of a billion dollars. Just before the outbreak of the war in 1939, federal aid to states and local communities, in the form of regular, permanent grants, reached approximately one-half billion dollars. Substantial increases in these grants may be expected in the years to come, particularly for public assistance grants under the Social Security Act, for public health, and for public housing.

In the light of this expansion in the use of so-called "federal funds" to help meet local needs, it would appear advisable to examine into possible alternatives, perhaps resulting in a radical change in the past and present policy of granting federal aid. The states and local communities, being either unable or unwilling to pay for new programs of governmental activity, have appealed to the federal government for more and more aid for more and more purposes. While the amount appropriated for such aid has been increased from year to year, this has not been done in accordance with any plan. The amount of increase has depended upon the resourcefulness of lobbyists and on the success with which their techniques have been applied in the sponsoring of new programs or of increases in existing programs. No attempt has been made, either to determine how much federal aid should be given to the states and local communities, in

relation to their over-all needs or to the total national income, or to allocate in some equitable and systematic manner the total federal funds to be apportioned among the various governmental purposes for which subsidies are desired.

Federally-collected, State-shared Taxes. A system of federally-collected, state-shared taxes might be used to supplement, or at least in part as a substitute for, the existing grant-in-aid system; the means test, which is widely applied in the allocation of such aid, might be in part dispensed with, so that the amount of funds agreed upon would be made available to the states as a matter of legal right. Where the grant-in-aid system was continued, some means test of eligibility for such grants should be required, with a view of maximizing the community benefits derived from funds made available by the federal government for state and local purposes. The term "federal funds" is an unfortunate misnomer, for in the last analysis, these funds are collected by the federal government in the form of taxes levied against the income of the people. Because federal taxes, under present laws, can be more equitably apportioned than locally levied taxes, the possibilities of extending the principle of centrally-collected, locally-shared taxes should be carefully explored.

Under this proposal, the federal government would serve as the collecting agency for a portion of the local taxes, which would be refunded in accordance with an acceptable formula, considering population, federal taxes paid, or other similar criteria to be agreed upon in advance. In highway appropriations, for instance, the old formula allotted equal weight to population, area, and post-road mileage. Extensive controversy has developed out of the current proposal to allot such funds by a formula in which one-half of the funds appropriated are allocated on the basis of population, one-fourth on area, and one-fourth on post-road mileage.

If the federal government were, at the close of the war, to refund annually to the state and local governments for some years to come ten dollars of taxes per capita, paid by the people in the form of federal income taxes, this would represent, in the case of the city of Philadelphia, a fund of $20,000,000. A similar refund of ten dollars per capita throughout the country would mean $1,300,000,000 annually, or less than one week's cost of financing our war effort. But if $20,000,000 additional tax revenue had to be raised locally by increasing the levy on real estate values in Philadelphia, it would necessitate increasing the city tax rate, which many regard as too high already, by practically 50 per cent.

The differences between obtaining grants-in-aid and obtaining federal tax refunds by the states or local governments are rather obvious. So-called "federal funds" would come to the states and their subdivisions without strings attached, and without wirepulling and political maneuvering to get them. A broad provision that these funds should be used for

local capital expenditures, as planned and recommended by the local planning commission, might be considered, but it is believed that control over the allocation of the refunds should be under local authority and not centered in the federal government. Funds collected by the federal government would be refunded as a matter of legal right, and not by requiring definite proof of need, as is the case with many of the current federal grants-in-aid.

Modernizing the State Tax System. It has been argued that it would be sounder procedure to aim at state and local tax reform, through constitutional amendments if necessary, in the interest of efficiency, economy, and equity in levying state and local taxes, rather than to centralize the taxing power in the hands of the federal government. Certainly the effort to achieve such reform should not be diminished; on the other hand, the solution of immediate postwar financial problems cannot be suspended while further efforts at reform are carried on. Constitutional revision in the states proceeds at a snail's pace. Few movements for revision ever get to the convention stage, and of those that do, very few indeed actually result in the adoption of revised constitutions. The prescribed processes for piecemeal amendment are so difficult to operate that, in most states, progress by this method is almost equally difficult. The proposal for change, by whatever method, arouses such determined resistance on the part of entrenched groups that the prospect of solution of the tax problem by the time-honored processes of state and local action seems extremely remote.

Our inquiries into overlapping taxes and possible ways of allocating sources of revenue to the three levels of government should go on, and undoubtedly will result ultimately in a more orderly and equitable revenue system than we now have. Once we have arrived at some degree of agreement on the broad outlines of such a system, there is likely to be more rapid progress toward state and local revision than we have had in the past.

IV. WHAT COURSE SHALL WE FOLLOW?

An effort has been made to indicate the framework within which a choice of method or methods in the handling of the postwar needs of state and local governments for funds will have to be made. Many of the states have not, in recent years, been able to provide the revenues they need, under the shackles of outworn constitutional provisions affecting their taxing powers. As a substitute for making the necessary changes in their constitutions, they have sought federal aid. Former Governor Pinchot of Pennsylvania, for instance, was among the first—if not the first—of the governors of the states to appeal for federal assistance in the relief crisis

of 1932, and Pennsylvania, a populous and wealthy state, might, if it had had a modern tax system, have met its own needs fairly easily. By seeking aid from afar, the states have to a large extent forfeited their control over their own affairs. Their citizens pay the tax bill anyway, in the form of federal taxes, if not in that of state taxes, and in so doing, they have surrendered to senators and representatives from other states the determination of the kinds and amount of taxes to be raised from their citizens, and the disposition which shall be made of the funds so obtained.

It seems reasonable to expect that in the postwar era, the need for public funds will be great. Governor Dewey has recently said that the state and local units will be relatively free from debt after the war, and therefore in a stronger position financially than the federal government. Even so, they will still expect federal assistance if the going gets tough, as very likely it will. The habit of expecting such assistance is well established, and it is not likely now to be reversed, no matter how strongly some may believe that the states should avail themselves of this favorable opportunity for reversing it.

There are, as has been shown, three ways of meeting the financial problem which will confront the states and many local communities after the war. Which one shall they adopt? The course that they ought to follow is perfectly clear—they ought to put their financial houses in order. This they have made no serious effort to do in the past; if they should do it now, they could, in all probability, get along reasonably well without wholesale financial assistance from the federal government. Perhaps one way of accelerating tax revision at the lower levels of government would be to remove Santa Claus from the upper level. A strong case might be made for a federal policy that would force state and local governments to bestir themselves in the matter of revenues rather than for pursuing, as in the past, or as seems likely in the future—a policy that would lull them to sleep. From that sleep there might be a dreadful awakening!

It is probably merely wishful thinking, however, to expect either that the states will themselves reform their financial policies and procedures in time to meet the postwar needs, or that the federal government will compel them to do so. We are confronted, then, with an unwelcome choice between a continuance of the haphazard grant-in-aid system and the adoption of a federally-collected, state-shared tax program. The subsidy system is, in a sense, a bribe to the states to increase their spending. It may, in some cases, be wasteful. It has been systematic and consistent only in its adherence to the principle of raiding the federal treasury. But it is not likely soon to be abandoned. The politics of the situation points clearly to its continuance. The senators and representatives from the many states that have the votes and that need the money are not likely to settle for less than they have been getting. But always the amount of federal aid should

be kept at the minimum necessary to aid states with limited resources to maintain essential services at a minimum acceptable standard, and the states and local communities should be required to carry as much of the burden themselves as they can. Locally raised money is less likely to be spent lavishly than money received as a "gift" from the federal government.

There are many objections, also, to federally-collected, state-shared taxes, one of the most important of which is the possibility that the plan might lead to further centralization of the taxing power in the hands of the federal government. As Chief Justice Marshall said in quite a different connection, "the power to tax is the power to destroy"; increasing concentration of the taxing power in the federal government might lead ultimately to the complete destruction of the state and local tax autonomy. Moreover, to accept the principle of centrally-collected and locally-shared taxes as a matter of legal right is an implied admission of failure to achieve state and local tax reforms, designed to make possible levying equitable taxes by the state and local governments.

It has been argued also that, unsatisfactory as the subsidy system is, to go from it to federally-collected, state-shared taxes is to jump from the frying pan into the fire. Under a system of federal grants for specific purposes, the amount of federal aid has to bear some reasonable relationship to specific purposes and specific needs, while under the latter, the grants would be for general purposes of the states only, and the sky might be the limit. Much larger sums might come back to the states under this plan than under the grant-in-aid system, and, it is argued, the evils inherent in having "gift" money to spend would be correspondingly magnified.

Another possible objection arises from the difficulties likely to be encountered in devising an acceptable formula for the distribution of the shared taxes. It will prove immeasurably more difficult, says one writer, to devise an appropriate formula than to say that there should be one. If such a formula were devised by Congress, it might be written by a pen guided by sectional interests rather than by considerations of justice, and it might change with the changing political complexion of Congress, thus introducing a high degree of instability into state finances. While every proposed change of major policy should be examined with a view to foreseeing the worst possible outcome of its adoption, this dire prediction exaggerates the instability of Congress and suggests a too ready willingness to expect the worst.

Not all taxes, of course, can be centrally collected to advantage. Careful selection must be made of the taxes to be so handled. Obviously, a tax on real estate values should not be centrally collected, nor should a mercantile license or other tax on the privilege of doing business. On the other hand, a sales tax—either general or specialized—should, if it is to be

effective, be so collected. Central collection of such a tax insures lower costs and a minimum of evasion due to the making of purchases in areas not included within the area in which the tax applies. Similarly, an income or wage tax can be best collected centrally.

In spite of the many objections to and limitations upon the centrally-collected, locally-shared principle, it seems definitely preferable to the subsidy system—the alternative that seems most likely to prevail. It is more economical in collection costs than duplicate collection systems in the individual states. The federal collecting machinery is more efficient than that in most states; hence there is less opportunity for tax evasion. The use of the graduated income tax principle assures fairness and equitability in the distribution of the tax burden. Most important of all, it makes possible the exercise of some control over the amount of federal aid given to state and local governments, and restores to them the opportunity to determine the uses that shall be made of the money. As such, it constitutes a move in the direction of the restoration of the vitality of the state and local governments in the management of their own affairs.

If such a plan is adopted, care must be taken to establish a situation in which the federal government will not take advantage of its position as collecting agency to force conditions upon the states, as has been done on many occasions in the past. The Hayden-Cartwright Act of 1934 well illustrates this practice. Here, funds appropriated to the states for highway purposes were made available only to those states which refrained from an "excessive" diversion of the funds raised by gasoline and motor vehicle taxes. While an amendment to the federal Constitution would give greater assurance of continued freedom from federal interference in the use of the funds, it will be necessary, in the absence of such an amendment, to rely upon the integrity of Congress.

V. A FEDERAL-STATE FISCAL AUTHORITY

A few months ago, the United States Treasury's Committee on Intergovernmental Fiscal Relations reported, recommending again the establishment of a Federal-State Fiscal Authority. Regardless of what the decision shall ultimately be as among the three alternative methods of meeting the financial needs of the state and local governments in the postwar era, the need for coördination in the field of intergovernmental fiscal relations will still be acute. The problem is a continuing one, and could best be dealt with by such a Federal-State Fiscal Authority as the Committee proposes. Whatever is done to meet the immediate need will, of necessity, be a more or less temporary means of handling an urgent current situation. The establishment of such an Authority would provide the

machinery for developing a long-range fiscal policy on a relatively permanent basis.



82. ARE OUR CITIES GOING BROKE? [1]

INFLATION and an increasing demand upon city governments for new and expanded services have created a need for additional revenue in many of our municipalities. This situation has resulted in both an increase in existing taxes and a frantic search for new sources of revenue. This selection outlines what cities are doing to meet their financial problems.

THE nation's cities are confronted with a rapidly developing financial crisis. In their operations, they have come to resemble huge business enterprises. They provide all sorts of services for their citizens. Costs of these services are moving up steadily. And income won't stretch far enough to pay for them. As a result, the cities are in a desperate search for new sources of revenue.

Rising costs are hitting municipal governments from every angle. Schoolteachers, policemen, firemen and other city employes, pinched by the rising costs of living, are demanding higher wages, and often getting them. The prices are rising on all sorts of city equipment. And tremendous backlogs of public works are piling up for the cities to carry out at premium prices for labor and materials.

Property taxes, although being boosted steadily, are proving inadequate as sources of revenue for the cities. All across the country, cities are turning to sales taxes, income taxes, and special charges of all kinds. The search for money has set the cities to charging individual citizens for some of the services that the municipalities perform for their residents.

Behind the crisis stand several factors:

The war years have piled up all sorts of urgent work for the cities. Housing needs have accumulated. City streets have worn out. Public buildings need repairs and expansion. For all of these, both materials and labor costs are up from 25 to 125 per cent as compared with the prewar period. And city revenues show only an infinitesimal increase in comparison.

[1] February 14, 1947, p. 20. Reprinted from *The United States News*, an independent weekly magazine on national affairs published at Washington. Copyright 1947 United States News Publishing Corporation.

A mood for decentralization is adding to the plight of the cities. More and more persons are moving out into suburban areas where taxes are lower. But, while the suburbanites contribute less to the support of the cities, they still earn their livings there, use streets and other city facilities, and often take their children to city schools. The cities want to tap the suburban source of income.

The historic grip of rural areas upon State legislatures stands in the way of the creation of a realistic relationship between the States and their cities. The cities, their industries and citizens, contribute 90 per cent of all taxes to all levels of government in the United States. But the cities get back only a small portion of this sum. And many forms of revenue are being withheld from the cities by legislatures in which rural members dominate.

Rising costs are standing in the way of many kinds of municipal works.

Municipal workers, from schoolteachers and policemen and firemen all the way through the list, have been hard hit by the higher costs of living. But, in spite of the fact that their pay has not kept pace with the 50 per cent lift in the cost of living that has come about since 1939, municipal pay rolls are more than 30 per cent higher than before the war.

City construction needs have grown into the billions of dollars during the war years when neither materials nor labor were available. Cities have upward of $7,000,000,000 of sewer and sanitary work to do, and need a minimum of $2,000,000,000 of new school buildings. New streets, municipal buildings and fire, police and recreational facilities may raise the total to well over $20,000,000,000.

But inflated costs are holding up these activities. Construction costs are from 20 to 50 per cent higher than before the war. Bids for construction sometimes run as high as 135 per cent above city engineers' estimates of what the costs should be. Even on small items that cities buy, the wholesale prices are up anywhere from 10 per cent on some pieces of equipment to as much as 125 per cent for various textile products.

The combination of higher wages and inflated construction costs is forcing many cities to postpone major public-works projects. Cities such as Austin, Tex.; Berkeley and Long Beach, Calif.; Roanoke, Va.; High Point, N.C., and Muskegon, Mich., have announced such postponements.

In spite of the increased costs, however, the cities steadily are being compelled to expand the number of services that they provide for their citizens. In 1824, Detroit gave its citizens 24 services. It now supplies about 400, including the traditional police and fire protection, public health, hospitals and education, along with such newer things as broadcasting stations and traffic control.

Migration. But the cities must find the money somewhere to pay for these things. And the men and money are moving out of the cities into suburban areas to get away from the crowds and into the fresh air. People

commute by automobile, by trains, by subways and otherwise, and pay smaller taxes.

But the suburbanites work and play in the cities and often educate their children there. The cities now are trying to tap the money that the suburbanites earn inside their borders.

The property tax still supplies about 85 per cent of the revenue for the 155,000 local units of government. In spite of all of their efforts to increase their receipts from this source, the cities are not getting enough money from it that is to run the big public-service institutions that they maintain.

Valuations and assessments are being pushed upward steadily. Between 1941 and 1946, the assessments in 249 U.S. cities were boosted by 10½ per cent. Seventy-one of these cities now assess property at 100 per cent of its value.

But upward of $20,000,000,000 of the property that lies inside cities is tax exempt for one reason or another. New York City alone has $5,500,000,000 of tax-exempt property in the form of schools, churches and government property.

Thus, while the costs are rising and new jobs are piling up for cities, their time-worn source of revenue is reaching the peak of its producing power, and city debts are rising. The bonded debt of cities over 25,000 slacked off from $7,795,000,000 to $7,492,000,000 during the war years when materials and labor were not available. Now it is beginning to soar again.

New sources of revenue. In this situation, the cities are tackling State legislatures for either a share of the revenues collected by the States—of which the cities pay upward of 75 per cent—or for permission to levy taxes on new sources of revenue.

In Illinois, Chicago is asking that the State share its revenues with the municipalities. Cook County revenues have been hard hit by an act of the Legislature that froze assessed valuations for five years at the 1942 level, low point for the war years. This fixed the assessed valuation of Evanston at $47,000,000, compared with $119,000,000 on which it might have collected taxes in 1945. Evanston is finding it necessary to reduce all its personnel by one third.

New York and several other States already have a system by which some of the revenues that are obtained from certain taxes are shared with the cities. In spite of this added revenue, the cities still are compelled to resort to all kinds of special taxes of their own.

Baltimore has received permission from the Maryland Legislature to impose any kind of tax that the State uses. But all of the legislatures keep a tight rein upon their cities and specify what kinds of taxes the cities may use.

All types of taxes are being devised by cities in their efforts to reach the money of suburbanites.

The income tax is being used by St. Louis, Philadelphia and Toledo.

Sales taxes are used by several cities, among them Denver, New York, New Orleans, Atlantic City, San Bernardino and Santa Barbara, Calif., and Huntington, W. Va. Gross-receipts taxes are used by St. Louis and Kansas City. Salt Lake City has a business-franchise tax.

Cigarette taxes are used by Baltimore, Denver, St. Louis, Kansas City and Birmingham.

Other taxes to which cities are turning include amusement taxes, and taxes on hotel rooms, gas, electric and telephone bills, pinball machines, music boxes, vending machines, motorbus mileage, water bills, taxicabs, carnivals, gasoline. In one way or another they are trying desperately to raise the money to keep going. Some cities are charging for garbage collection and for sewer connections, and are operating parking lots. Many are installing parking meters.

The cities are fighting for their municipal lives.

CHAPTER XVII

Commerce and Business: Their Regulation and Promotion

83. PRIVATE ENTERPRISE AND ITS IMPLEMENTATION [1]

IN REGULATING our economic system, or sections of it, the government attempts to protect competition and to establish a plane of competition. It carries on this program because of the general commitment of our people to the virtues that are supposed to inhere in the private enterprise system. Messers. Lyon and Abramson expand and defend this thesis in this selection A knowledge of the material discussed here is essential to a proper understanding of the complex relations between government and the American economy.

IT WILL be well first to consider government's relationship to private enterprise and the private enterprise *system.*

Private Enterprise Is a Human Capacity

It is important to be clear as to the meaning of the term "private enterprise." It is easily confused with the term "a private enterprise system." Private enterprise is a human capacity. It is the capacity of an individual to make decisions, to exercise judgment, and to use initiative. Obviously this human capacity can be applied to making decisions of an economic sort—decisions regarding the allocation of resources to various uses, the methods of converting them into desired goods and services, and the dis-

[1] Quoted from a pamphlet by Leverett S. Lyon and Victor Abramson, *Government and Economic Life* (Washington, D.C.: The Brookings Institution), pp. 8–32.

tribution of the social product. A private enterprise *system* is an economic system in which private enterprise is extensively used.

There have been few countries in the world in which there has been such widespread confidence in and use of private enterprise as in the United States, and few in which private enterprise has been more largely used in economic affairs. Our attitude on this matter was inherited from the thought, customs, and laws of the mother country. Moreover, initiative and independence were necessary to a pioneer life and in communities far removed from one another. Free land and unbounded resources gave an opportunity to those who would exercise qualities of enterprise. Perhaps most important of all was the fact that the economic rewards to individual initiative generated respect and support for these qualities. It was difficult, even as conditions changed, for those who had prospered, or had seen their generation prosper, to believe that it could be desirable to take action which would reduce the opportunities for individual decision or put extensive controls upon private initiative.

Governmental Action toward Private Enterprise includes Implementation and Regulation

To make private initiative and decision socially useful, two broad lines of public action have generally been considered essential. Both of these lines of action have been developed extensively in the United States. One may be called the implementation of private enterprise; the other its regulation. The implementation of private enterprise consists of establishing certain social institutions and arrangements which, it is thought, will be employed by private individuals in a manner at once advantageous to themselves and to society. Regulation in the form of limitations and even positive requirements is necessary to prevent private initiative from being expressed in ways which are regarded as socially undesirable, and to ensure its being channeled into expressions which are regarded as socially beneficial.

The Implementation of Private Enterprise Takes Two Forms

One form of governmental action designed to make private enterprise socially useful in an economic system consists of the provision of certain instrumentalities. These instrumentalities are designed to give this strong human force an opportunity to express itself—that is, enable it to function. The second implementing activity of government is the provision of information which is designed to improve the social effectiveness of individual decisions.

Private Property Is an Instrumentality for Implementing Enterprise

Perhaps the most fundamental instrumentality for implementing private enterprise is the institution of private property. On the one hand, the right to private possession and enjoyment and the possibility of increasing such possessions through personal efforts stimulates individuals to use their energies and to exercise their best judgment as to their own interests. On the other hand, it is only as individuals are given rights over the uses of resources that they will be in a position to use their initiative. For only to the degree that there is private ownership in one's self or of natural resources and mechanical equipment can private decision concerning the use of these resources be made effective. It sounds elementary to state this fact, but it is only through centuries of legislation and judicial decision that we have arrived at—that is, constructed—our present principles of private property rights. While in general we believe that these permit and require individuals so to use private property that the result is socially beneficial, many suggestions for change are constantly being presented.

Perhaps these general statements can be made more realistic if we consider governmental action in relation to some particular form of property rights, such as patents. The creation of patent rights rests on the notion that they will stimulate initiative toward invention and thus bring an improvement in the technological equipment of society. The property right granted is a very special one—that is, a greater or less degree of monopoly. Such a grant could not be justified in terms of our general attitude toward monopoly, except upon the assumption that the inventive effort stimulated will result in a net social gain—a gain which will more than offset the restrictions on freedom of enterprise which is imposed by the patent grant.

The question of precisely what rights should be given in a patent grant, however, is by no means fully settled. As in the case of other property rights, it is necessary to modify it as circumstances change. We have had several national patent laws, and innumerable patent cases, but as technology has changed, as corporations have developed, as patent pools have been constructed, new issues have arisen as to just how the property rights of a patent should be devised so as to furnish a maximum of stimulation to invention, and a minimum of undesirable limitation or control on freedom of action. Current proposals for change are directed chiefly toward limiting patent rights thought not to serve social purposes, and toward the provision of requirements which will promote a broader availability and use of patents and exert a limitation upon the monopoly powers which patent grants give.

Other property rights illustrate the same features of private property. For example, there are probably few pieces of real estate, at least in cities, where ownership carries the same rights that it did a generation ago. Zoning regulations, street construction, nuisance abatement ordinances, and other governmental actions have modified the meaning of private property in the public interest. Perhaps even more striking changes have occurred with reference to personal property, particularly one's money income. There have been many modifications of the freedom with which one may spend his income. Indeed, there have been, chiefly as a result of tax laws, many changes as to what part of his income one may spend at all. Property rights are not fixed, they are changed through governmental action.

The Right of Contract Is Another Such Instrumentality

No less important than private property as an implementing institution is the right of contract. It is the right of contract which makes it possible for individuals effectively to use their private property and personal effort. A private enterprise system in operation is in large part a continuous rearranging of private property rights by means of contractual relationships determined by the decisions of individuals as to what they believe will be personally advantageous. Closely related and of basic importance is the legal provision of courts to determine and enforce these rights of property and contract and the establishment of writs and processes evidencing the authority of court action. When our governments were constructing such institutions as these, they were building the instrumentalities that made it possible for private initiative and decision to function in an economic order.

The Right to Enter Business Is Still Another Instrumentality

An additional social device for implementing private enterprise are the legal arrangements which governments have established to enable private persons to engage in organizing economic activity.

While the very idea of freedom for an individual implies the right to choose a vocation, including the vocation of operating a business, this right is given specific meaning and significance through a variety of governmental actions. The forms of business enterprise to which we are accustomed—individual proprietorships, partnerships, and corporations—are only bundles of governmentally established rights and obligations.

Old as the right to enter business is, the question of what it shall mean presents some of the most irritating current problems of government in relation to economic life. This is particularly true when the organiza-

tional form used is the corporation. Much recent legislation has had to do with the problem of how to construct this useful form of business organization so as to make it as socially valuable as possible and to prevent its being used in ways which are regarded as socially harmful.

Not new, but currently urged with great vigor, are recommendations to restrict the size of corporate units, to increase the personal responsibility of corporate officers, and to limit their powers. By such changes, it is contended, tendencies toward monopoly will be checked, a competitive system preserved, and the private initiative and decision of the owners of the corporation—that is, the stockholders—placed more directly in control. It is obvious that these proposals, whatever their merits, have in view an implementation of private enterprise which is socially more effective.

Procedures for Getting Out of Business Are a Further Instrumentality

Lawmakers concerned with implementing private enterprise have not only established institutional arrangements for getting into private business; they have set up arrangements and procedures for getting out of it. There are perhaps as many issues of public policy which need consideration when a private business man desires to relinquish his activities, or has demonstrated his capacity to meet the obligations he has incurred, as there are when he originates the enterprise. A society which permits individuals to undertake, almost without restriction, any phase of the organization and operation of economic life, and to do so in competition with others in the field or with any who may volunteer, is certain to have numerous failures. It is important, therefore, to have a means of dealing with these failures with a minimum of disruption and impediment to the general functioning of the economy and with a maximum of equity to all those to whom liabilities may have been incurred. So-called bankruptcy and reorganization procedures are the means by which this is achieved.

The problem of the proper bankruptcy and reorganization procedures was probably never more important than during the depression beginning in 1929, and the modification of our bankruptcy laws during the last decade is a striking illustration of the development of governmental implementation of private enterprise.

But still further changes are suggested by some. Bankruptcy and reorganization procedures, it is argued, should be revised, with a view to providing advice and counsel before business situations have reached insolvency, and also by provisions which would restrict from re-entry into the conduct of the nation's economic affairs those guilty of negligence or bad faith.

The Provision of Information Is the Second Major Form of Governmental Implementation of Private Enterprise

Wisdom and judgment in making individual decisions are largely dependent upon knowledge. It is in providing information on which knowledge is based that governments play their second role in implementing private enterprise. The federal government plays a particularly important part in this activity. There are several groups for whom information is essential if private decisions are to be soundly made.

Business men need information. They need to know the available supplies of the various factors of production and the costs of procuring them; they need to know the relative utility of various productive factors and the techniques of production and distribution; and they need to know the range of probable demands for various products, at various prices, at different times and at different places.

Workers need information. It will be of help to them to know alternative opportunities for employment, and the relative attractiveness of such opportunities in terms of money income, nature of duties, hours of labor, conditions of work, and other factors.

Private investors need information. They need to know the relative earning potentialities of various possible investments, their security and tenure of income, and the chances of enhancement and decline.

By no means least interested in information are consumer buyers. Consumers need to know the range of products available to them, the prices at which they are offered, the relevant qualities of articles which they may purchase, and the relative satisfactions which they may expect to secure from one purchase or another.

Knowledge Is Often Difficult to Secure in Modern Society

It is hard to believe that even when markets were small in size, the range of products and techniques of production limited, contacts between producers and consumers close, and opportunities for employment and investment comparatively restricted, there could have existed on the part of all buyers and sellers, and all workers and investors, a really full knowledge of available choices. Many times more complicated is the problem of acquiring needed knowledge in the modern era of wide markets, varied and changing products, large-scale and specialized production, and employment of involved and varied techniques of organization and operation.

The problems confronting consumer buyers have been the most widely discussed. Evaluation by trial, the most reliable means of assessing the

worth of anything, has become less useful to consumers because of the multiplicity of products and the continued and rapid development of new ones.

Information provided by government has assisted all the major groups indicated—business men, workers, investors, and consumers. This work has been of three chief types. One has been the creation of grades and standards. This establishment of grades and standards for a wide variety of goods is perhaps the most important of the three forms of action.

Through research, governments have also made original knowledge available. In this field, significant examples are the work of the National Bureau of Standards, the Department of Agriculture, and the Public Health Service.

The third way in which government provides knowledge is through the collection and dissemination of information, as illustrated by the gathering and distribution of crop and price data by the Department of Agriculture; of data on sales, orders, shipments, and stocks by the Department of Commerce; of data on employment through the United States Employment Service; and of financial and industrial data through the Federal Reserve Board, the Treasury Department, and the Securities and Exchange Commission.

Indeed, as we make more and more use of specialization there is increasing requirement of adjustment by many individuals. The more this occurs the more imperative it becomes that private enterprise shall be aided by the creation, collection, and dissemination of relevant facts. In this work our government functions very actively.

REGULATION OF PRIVATE ENTERPRISE

The regulation of private enterprise has varied materially during our national history. Our country came into existence during a period when the governmental regulations which bound English economic life were being seriously questioned by the advocates of greatly increased individual freedom. During this period the term *laissez faire*, or "let alone," gained wide currency. To most people, however, the phrase never meant to leave everything free of governmental control, but it expressed a point of view at a time when governmental restraints were particularly oppressive to the emerging factory system.

It has always been recognized by advocates of individual enterprise that this potent force cannot be allowed completely free play. Regulations are believed to be necessary because private initiative is essentially selfish. Restraint must be placed upon actions which, while desirable from the point of view of an individual or a private group, are not desirable from a social or public point of view. Regulations may be regarded as the operat-

ing rules of a private enterprise system. It goes without saying that in the enactment of such rules some standards of what is socially desirable must be assumed.

The limitations placed upon private action in our society are numerous and varied. As Americans we inherited our elementary ideas concerning regulation from our English ancestors. In such doctrines as "restraint of trade" and "conspiracy to monopolize," in wider sense, indeed, in much of our criminal and other law, we became heir to an extensive body of legal concepts which had developed to control those engaged in private enterprise activities.

While regulation of private enterprise was thus always a part of government's relationship to economic life in our country, economic changes after the Civil War led to much more extensive regulation than was earlier the case. The increasing industrialization of the last third of the century, combined with growing urbanization, made it appear necessary to multiply the controls designed to hold private action within socially desirable channels and prohibit practices regarded as socially undesirable.

The regulations imposed upon private enterprise may for our purposes be classified into two major types. Although frequently overlapping and often dealt with in a single piece of legislation, they represent the two distinct approaches to the problem of regulation which have been made in our country. These may be designated as (a) the maintenance and protection of competition, and (b) the establishment of a plane of competition.

PROTECTING COMPETITION

An underlying element in governmental regulation of private enterprise has been the idea that competition among business men should be maintained. In line with this policy there are many regulations designed to prevent forms of business action which would have the effect of destroying competition, particularly if such action is unrelated to efficiency in production. Beneath our policy has been the view that private business enterprise should not be used to destroy business rivalry. It has been a part of the public policy of this country that the freedom to make contracts and to compete should be checked where there is danger that such rights may be exercised to destroy that freedom. These legal restraints on the right of contract have been imposed, however, only where important market controls were involved. Some regulations are designed to prevent the acquiring of such controls, whether or not related to efficiency in production. Restraints of these various kinds are best understood as efforts to maintain competition.

An essential part of the thinking of every understanding advocate of private enterprise is that competition is to be maintained. Indeed, "a

private enterprise system," is a more or less meaningless phrase unless it is assumed that there is not only freedom to "carry on" for those who happen to be in a given line of business, but freedom for others to enter at their own discretion. Anti-monopoly policy was firmly rooted in those doctrines against "conspiracy to monopolize" and "restraint of trade" which we took over from the common law of England. This policy was widely adopted in state jurisdictions in America, and anti-monopoly legislation was enacted in many states.

The Sherman Act Was Intended to Maintain Competition

Numerous economic changes, which need not be described here, but which were closely related to the growing industrialization of America, led to a wide public belief that the common law and state legislation were inadequate to maintain the competition essential to the effective functioning of a private enterprise system. The Sherman Anti-Trust Act of 1890, applying to industry, trade, and workers generally, with broad prohibitions against contracts, combinations, and conspiracies in restraint of trade, is the most outstanding example of a federal declaration of the kind of competition which it is socially desirable to maintain. In general this law took over the basic doctrines of the common law and applied them in the federal jurisdiction. It provided heavy penalties for prohibited actions and made these actions public offenses.

The court interpretation of the Sherman Act in cases involving business establishments, trade associations, and labor unions, has, over a period of fifty years, defined more specifically the presumed meaning of the law as to the nature of the competition it sought to preserve. Amendments to the law have been made in several instances with a view to expanding or limiting its significance as declared by the courts.

The effort to control monopoly under the Sherman Act, and particularly the meaning read into the term by succeeding court decisions, is one of the most interesting chapters in American economic history. It by no means stopped the tendency toward tremendous consolidations and accumulations of capital. Indeed, a number of gigantic concerns were formed in the period immediately following 1890. Yet under this law vigorous assaults were made on alleged monopolistic controls. The Standard Oil and American Tobacco decisions in 1911 finally established the applicability of the law to the curbing of industrial trusts and had an important effect on consolidation tendencies and on business policy. Indeed, there was a virtual cessation of large consolidations from 1912 until after the World War. Later growth of large industries tended to take the form of a piecemeal absorption through the purchase of particular companies, many of them non-competing. There also developed an important trade associa-

tion movement. Even in 1940 it is primarily the Sherman Act which is being used by the Department of Justice in its extensive current attack on industrial and labor combinations.

Competition Was Further Defined by the Clayton Act and the Robinson-Patman Act

As the judges have read the Sherman Act, its purpose was not to condemn mere size or even market control. Only when power was *unreasonably* acquired or was abused was it held to be proscribed; and *intent* to harm competitors or abuse customers and the *existence* of collusive action became the prominent tests of unreasonableness. It proved difficult under court interpretation to attack practices which tended to monopoly, prior to evidence that substantial market control had actually been acquired. It was such interpretation, making it impossible to check certain market practices believed to bring about the destruction of competitive forces, which led in 1914 to provisions in an amendment, the Clayton Act, prohibiting such actions as price discrimination, tying contracts, inter-corporate stockholding, and interlocking directorates, the effect of which might be substantially to lessen competition. In 1936 price discrimination was further regulated by the Robinson-Patman Act.

Public Policy concerning the Maintenance of Competition Is Criticized by Two Articulate Groups

Of the two groups who today criticize our policy concerning the maintenance of competition one consists of those who question the possibility of preserving effective competition under any circumstances. The other group is composed of those who believe that competition can be made effective, but who hold that in many cases monopolies arise out of sheer efficiency and cannot, therefore, be checked merely by laws directed against collusion, coercion, and abuse. Specific proposals for preserving competition include more vigorous enforcement of the existing anti-trust laws, limitations upon the size of industrial units, restrictions on advertising expenditures, requirements that more information shall be supplied to consumers, the lowering or removal of the tariff, and the elimination of some forms of patent protection. In some fields government competition with private business or complete governmental operation is urged.

The Maintenance of Competition for Employment Was Long Regarded as Essential

The preservation of competition among workers for employment was regarded as of hardly less importance than the maintenance of competition among business men.

The earliest expressions of American public policy in this field—expressions that have not been entirely abandoned—were, like those relating to competition among business men, found in doctrines of the common law. The common law attitude toward competition among workers assumed the social desirability of freedom to seek work and competition in securing it. It was opposed to combined action among workers. There was a tendency in general to deal with such actions in terms of conspiracy and restraint of trade similar to those applied to business men uniting to maintain prices or control production. The more extreme positions of the common law were, however, materially modified by the courts during the early half of the nineteenth century.

The court interpretations of the Sherman Act as applied to labor unions were regarded by union workers as a serious check upon their purposes. They were therefore instrumental in securing, in the Clayton amendment, provisions that the Sherman Act should not be construed as forbidding the existence and operation of labor organizations, as well as certain anti-injunction provisions of importance to the growth of unions.

Other laws modifying the common law doctrines and strengthening the combination and concerted action among workers were those forbidding discrimination against railroad workers for union membership, the Norris–La Guardia Act of 1932 limiting the use of the strike injunction by the federal courts, and the Railway Labor Act of 1926 protecting railway workers in organization.

A Major Change Was Initiated with the National Industrial Recovery Act

A major change in the social expression of what was regarded as a proper degree of competition among workers came with the National Industrial Recovery Act in 1933, which declared that workers should be permitted to "organize and bargain collectively through representatives of their own choosing . . . free from the interference, restraint, or coercion of employers." Although this act was declared unconstitutional in 1935, the National Labor Relations Act passed in that year reasserted the right of employees to organize, and defined a series of "unfair labor practices" which employers were forbidden to exercise. Basic to this law are the assumptions that workers should be free to bargain collectively if they wish; that collective bargaining by workers is socially desirable; that there is "inequality" of bargaining power between employees "who do not possess full freedom of association" and employers "who are organized in the corporate or other form of ownership association."

The declared public policy concerning a desirable degree of competition for work and among workers has therefore, during our history, shifted from far-reaching restrictions on combination and concerted action to the

gradual modification of many of these restraints, and, under the most recent legislation, to a tendency to facilitate labor organization.

While the passage of the National Labor Relations Act marks the most extreme modification of the maintenance of competition thus far to be seen in our country (with the exception of operations under the NRA), it must be realized that the Sherman Act and the Clayton Act are still operative, and that current indictments of labor unions are being secured under these laws.

Moreover, few pieces of federal legislation have ever been subjected to more intense and extensive criticism than has the National Labor Relations Act. A greater or less degree of modification of this legislation in the course of time seems inevitable.

Experience Has Led to Various Proposals for Change

Experience under the National Labor Relations Act has given rise to grave doubt in the minds of some people concerning the wisdom of governmental encouragement of labor organization. These persons ascribe to such encouragement many of the strikes which have occurred in recent years, and particularly the use of the jurisdictional and "sit-down" strike. They declare, moreover, that the encouragement of concerted bargaining has brought about wage increases and accompanying wage rigidities which have resulted in severely restricting the opportunities for employment. More widely held, however, is the view that current policy toward collective bargaining should be modified rather than abandoned. Important among the suggestions for modification are recommendations for revising the procedure for determining the appropriate bargaining unit, and the provision of greater protection for the employer through legally declared "unfair acts" by labor.

It is further urged that the responsibility of labor unions should be increased. This, it is recommended, should be done by making unions financially more responsible for their actions, through laws requiring their incorporation and the public auditing of their books. It is also contended that employers should be permitted broader rights in influencing employees concerning unionization and that there should be provided much more adequate means for settling jurisdictional disputes.

CREATING A PLANE OF COMPETITION

Regulation of private enterprise, as pointed out above, has not been limited to controls designed to prevent the destruction of competition. A second type of regulation consists of restraints placed on those business actions which, while not *essentially monopolistic* or conducive to monopoly, are regarded as unfair or undesirable competitive practices. These

practices are viewed as violating some accepted public standard of equity or morals. In the case of commercial bribery, for example, the opposition is based on the transgression of ideas of common honesty, and also upon its tendency to obstruct the full expression of efficiency. Other practices, such as misrepresentation, have been proposed both on moral grounds and because of their tendency to bring about an unwise allocation of social resources. Whatever the basis, the regulations designed to control such practices constitute what may be called a *plane of competition.*

A plane of competitive action has been established regulating the actions of business men as competitors, in their relations to consumers, and in their relations to their employees.

The Plane of Competition Was Founded in the Common Law

The beginnings of a plane of competition were established in the common law, and state legislation has made many contributions. An important step by the federal government, primarily affecting relations with consumers, was taken in 1906 with the passage of the Food and Drugs Act, and a year later in the Meat Inspection Act. Applied also chiefly to food and drug commodities, there has more recently come into existence a considerable body of legislation requiring disclosure of information and minimum standards of composition or quality. To some degree legislation of these several types has been applied in various other industries. There has also been an enormous growth of governmental activity in the grading and standardization of commodities. This development, in some of its forms, merely aids the buyer in making intelligent decisions, but to the extent that it is mandatory it adds to those regulations which make up a *plane of competition.*

The most important federal action affecting the plane of competition, particularly, though not solely, among business men themselves, came in 1914 with the establishment of the Federal Trade Commission, which was given broad powers to stamp out "unfair methods of competition" in commerce. Under this authority the commission has attacked a wide range of deceptive and obstructive practices by sellers. The Wheeler-Lea Act of 1938 has recently strengthened the powers of the commission in this regard.

The Federal Trade Commission Act, moreover, put a new emphasis upon enforcement. Under the common law, the buyers' remedy for the deceptive acts of sellers was to sue on implied warranty of contract. The Federal Trade Commission Act made deception of various forms a public offense, and provided for the surveillance of selling practices by a governmental agency with the power to issue cease and desist orders.

The establishment of a plane of competition has involved more than

restraints upon the tactics business men might otherwise adopt in the competitive contest. It has not consisted altogether of thou-shalt-not's. Positive mandates or *requirements* of disclosures calculated to safeguard public interests have been provided as well.

The most important proposals currently urged for the development of a plane of competition as it affects competitors and consumers are advocated with a view to improving the knowledge of buyers. For example, further regulations designed to increase the truthfulness and the completeness of information given in advertising are urged. Also strongly advocated is a wider use of minimum quality standards and of specifications for certain commodities, and the compulsory use of governmentally determined grades and standards. These proposals it will be seen are not only in the interest of buyers but are designed to place limits upon the advantages of sellers who, more than their competitors, may wish to conceal pertinent facts about their products.

Proposals for "self-regulation" of business are still frequently heard, but they are less popular than at the time of National Recovery Administration.

The Plane of Competition in Employer-Employee Relations Has Been Extensively Developed

Regulations creating a plane of competitive action as regards business men's relations to their employees have been applied to eligibility for employment, the period of employment, wages, and the physical risks of employment. On grounds of public welfare, children have been made ineligible for employment before attaining a certain minimum age and in certain types of work. Supreme Court decisions, on the ground of constitutionality, kept these regulations primarily in the hands of the states until 1938 when, under the Fair Labor Standards Act (Wages and Hours Act), the employment of persons under 16 years of age was prohibited. The constitutionality of this law has not yet been determined.

Regulations concerning the period of employment were at first applied only to children. Legislation fixing a maximum of 10 hours a day for women came in 1847 in a single state. By the end of 1938, under the Fair Labor Standards Act, there had been established for employees in general a "ceiling" of 8 hours a day and a weekly maximum which is subject to progressive reduction during the first three years of the act's operation.

It was not until the twentieth century that regulation of wage rates was begun in the United States. Such regulation was, prior to 1933, limited to women and minors. The first important federal attempt to establish minimum rates of wages came in 1933 under the NRA. The Guffey Act

of 1935, regulating wages in the coal industry, was declared unconstitutional. In 1938, however, general minimum wage rates were provided under the Fair Labor Standards Act.

Regulation of the physical conditions of work is sufficiently illustrated by so-called industrial homework, which has been made the subject of restrictive legislation in numerous states, and by the special regulation of working conditions applied in many industries, particularly mining and transportation.

Issues regarding the Plane of Competition Are Still in Active Controversy

There is support for still more stringent safety regulations, for further restrictions on the minimum age for employment, on the range of industries in which women and children are permitted to work, and on the hours of work. On the other hand, even the current regulation of hours and wages of labor has been condemned on the grounds that it is difficult to administer fairly and has tended to "freeze" existing unemployment.

The specific issues relating both to the plane of competition in industrial relations and to the maintenance of competition among workers are, in one way or another, part of the age-old problems of the proper allocation and conversion of society's resources and the distribution of income to the members of society. The length and severity of the depression of the thirties, however, focused particular public attention upon one aspect of allocation and conversion—the problem of how to organize the economic mechanism so that the nation's labor power would be more fully employed and, as a result, all of the other resources to which this labor power could be applied would also be more fully utilized.

It Is Not Easy to Determine What Is "Fair" in Competition

One often hears expressed the easy-going assumption that it is a simple matter to distinguish between fair and unfair action in devising a plane of competition, and that the mere use of such words as "destructive," "chiseling," "sweating," and "unethical competition" provides criteria of what is unfair. Nothing could be farther from the truth. Centuries of development of the common law, the enactment of federal and state statutes throughout our history, and 25 years of labor of the Federal Trade Commission have all indicated the fallacy of such a view. The experience of the NRA once more demonstrated it. Indeed, the intense, though brief, life of that agency most clearly indicates for all who will analyze its activities that the problem of *what is fair* in private enterprise is one of the most difficult and complicated with which business men and governments have ever tried to deal.

In every phase of economic life for which a plane of competition has been built, the current problems are many and insistent.

Regulation Has until Recently Taken the Form of General Laws

It is extremely important to note that regulation of private enterprise in our country has, until comparatively recently and with few exceptions, been applied to all industries on approximately the same terms. This is in marked contrast to the mercantilism of the seventeenth and eighteenth centuries. An outstanding characteristic of government's relation to industry, under our system, has been the practice of dealing with economic life as a whole, of dealing with it through general laws, and of applying criteria of national welfare as contrasted with the interests of special groups and special industries. The phrase "equality under the law" had a meaning when applied to industries, comparable to its content when applied to individuals. The tendency of recent years, however, has been strikingly in another direction. For the relationship of government to industry, this may imply a change as great as the shift a century and a half ago from mercantilism to economic liberty.



84. GIBBONS v. OGDEN

Supreme Court of the United States, 1824 (Appeal) 9 Wheaton 1

THIS case invalidates a New York statute granting to certain persons the exclusive right to steamboat navigation in New York waters. The New York Legislature in 1797 had by statute granted an exclusive right to steam navigation on the territorial waters of the State to one John Fitch for 14 years. The franchise was subsequently revoked and regranted to Robert Livingston and Robert Fulton for a 20-year and later extended to a 30-year period. Any person engaging in steam navigation on New York waters without prior license from Livingston and Fulton was subject to forfeiture of his boat.

These state provisions conflicted with a federal statute of 1793 regulating the licensing of vessels engaged in coastwise commerce and fishing. Ogden, who claimed to hold the franchise by indirect assignment from the original holder, sought an injunction against Gibbons, alleging the latter to be the operator of two steamboats moving between New York and New Jersey in violation of Ogden's franchise.

The injunction having been issued by the New York court, Gibbons defended his position by reference to the federal statute noted above. After being denied relief by the state court, he appealed to the Supreme Court of the United States.

In holding the state statute invalid, Marshall availed himself of the opportunity of giving a broad national interpretation to the commerce clause in the Constitution. Although the nature of commerce has proven to be one of the most difficult concepts with which the Court has had to deal, the decision in *Gibbons* v. *Ogden* set the general pattern for future Court decisions. In essence the decision established a broad interpretation of the word *commerce* itself; as the Chief Justice said, "Commerce undoubtedly is traffic but it is something more, it is intercourse." Further, the Court held that the control of commerce was an exclusive federal power as long as such commerce was interstate or foreign in character. The states were left with authority over purely intrastate commerce. In rendering this decision, Marshall broadened and strengthened his policy of expanding the power of the national government at the expense of the states and opened the way to extensive federal regulation of commerce and its instrumentalities.

Opinion of the Court

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court: . . .

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant:—

1st. To that clause in the constitution which authorizes congress to regulate commerce. . . .

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this

rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. . . . If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. . . .

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which

the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce" as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. . . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the

language or the subject of the sentence, must be the exclusively internal commerce of a state. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of congress may be exercised within a State. . . .

We are now arrived at the inquiry—What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. . . .

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in this application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise. . . .

This act demonstrates the opinion of congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act. . . .

Reversed

85. UNITED STATES v. SOUTH-EASTERN UNDERWRITERS ASSOCIATION et al.

Supreme Court of the United States, 1944 (Appeal) 322 U.S. 533

THE holding in this case distinguishes it from a series of previous cases in which the Court had held that the business of insurance was not interstate commerce. In deciding the present case, the Court held that a fire insurance company that conducted a substantial part of its business across state lines was engaged in commerce among the several states. As a result of this decision it was further held that since the business of insurance was now commerce, such business was subject to regulation under the Sherman Anti-Trust Act. Insurance companies are now subject to federal regulation and control, so long as they are substantially interstate in character.

Opinion of the Court

Appeal under the Criminal Appeals Act from a judgment sustaining a demurrer to an indictment for violation of the Sherman Antitrust Act. . . .

MR. JUSTICE BLACK delivered the opinion of the Court:

For seventy-five years this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today for the first time in the history of the Court that issue is squarely presented and must be decided.

Appellees—the South-Eastern Underwriters Association (S.E.U.A.), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals—were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. The indictment alleges two conspiracies. The first, in violation of § 1 of the Act, was to restrain interstate trade and commerce by fixing and maintaining arbitrary and non-competitive premium rates on fire and specified "allied lines" of insurance in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia; the second, in violation of § 2, was to monopolize trade and commerce in the same lines of insurance in and among the same states.

The indictment makes the following charges: The member companies of S.E.U.A. controlled 90 per cent of the fire insurance and "allied lines" sold by stock fire insurance companies in the six states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and concert of action effectuated through S.E.U.A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S.E.U.A. members on S.E.U.A. terms. Companies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S.E.U.A. companies were punished by a withdrawal of the right to represent the members of S.E.U.A.; and persons needing insurance who purchased from non-S.E.U.A. companies were threatened with boycotts and withdrawal of all patronage. The two conspiracies were effectively policed by inspection and rating bureaus in five of the six states, together with local boards of insurance agents in certain cities of all six states.

The kind of interference with the free play of competitive forces with which the appellees are charged is exactly the type of conduct which the Sherman Act has outlawed for American "trade or commerce" among the states. Appellees have not argued otherwise. Their defense, set forth in a demurrer, has been that they are not required to conform to the standards of business conduct established by the Sherman Act because "the business of fire insurance is not commerce." Sustaining the demurrer, the District Court held that "the business of insurance is not commerce, either intrastate or interstate"; it "is not interstate commerce or interstate trade, though it might be considered a trade subject to local laws, either State or Federal, where the commerce clause is not the authority relied upon." 51 F. Supp. 712, 713, 714. . . .

The record, then, presents two questions and no others: (1) Was the Sherman Act intended to prohibit conduct of fire insurance companies which restrains or monopolizes the interstate fire insurance trade? (2) If so, do fire insurance transactions which stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the Commerce Clause? Since it is our conclusion that the Sherman Act was intended to apply to the fire insurance business we shall, for convenience of discussion, first consider the latter question.

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce" as used in the Commerce Clause does not include a

business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted. And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to the same extent that it includes power to regulate other trades or businesses conducted across state lines.

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. Its total assets exceed $37,000,000,000, or the approximate equivalent of the value of all farm lands and buildings in the United States. Its annual premium receipts exceed $6,000,000,000, more than the average annual revenue receipts of the United States Government during the last decade. Included in the labor force of insurance are 524,000 experienced workers, almost as many as seek their livings in coal mining or automobile manufacturing. Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States. . . .

That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the national insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S.E.U.A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931–1941 a total of $188,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period $215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policyholders. Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. The insurance sold by members of S.E.U.A. covered not only all kinds of fixed local properties, but also such properties as steamboats, tugs, ferries, shipyards, warehouses, terminals, trucks, busses, railroad equipment and rolling stock, and movable goods of all types carried in interstate and foreign commerce by every media of transportation.

Despite all of this, despite the fact that most persons, speaking from

common knowledge, would instantly say that of course such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869 this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 8 Wall. 168, 183. Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper* v. *California*, 155 U.S. 648, 654, 655, decided in 1895, the *Paul* statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913 the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the *Paul* statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." *New York Life Ins. Co.* v. *Deer Lodge County*, 231 U.S. 495, 503–504, 510.

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes—the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866 the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses the various state legislatures, including that of Virginia, passed regulatory legislation. *Paul* v. *Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul* v. *Virginia's* generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning, not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business; and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause. . . .

The real answer to the question before us is to be found in the Commerce

Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. *Lottery Case*, 188 U.S. 321, 355. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier, *Hoke* v. *United States*, 227 U.S. 308, 320–323; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption, *United States* v. *Simpson*, 252 U.S. 465; to drive a stolen automobile from Iowa to South Dakota, *Brooks* v. *United States*, 267 U.S. 432, 436–439. Diseased cattle ranging between Georgia and Florida are in commerce, *Thornton* v. *United States*, 271 U.S. 414, 425; and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse and subject to paramount federal regulation, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U.S. 1, 11. Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation; —activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189–190: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id.*, 194. No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states. . . .

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from

the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance. . . .

Reversed



86. BARRIERS TO TRADE BETWEEN STATES [1]

Aspects of Motor Vehicle Laws as Barriers to Interstate Trade

LEGALLY the United States is a large free-trade area. The Constitution prohibits each state from levying duties on goods imported from or exported to other states. It may come as a surprise to many, therefore, that states have enacted a multitude of laws that hinder, if they do not in many instances prohibit, trade between states. This extract from The Marketing Laws Survey of the Works Project Administration summarizes various types of state tax and inspection laws that act as trade barriers.

THE motor vehicle laws present perhaps the greatest barriers to trade between the States. These barriers, in favor of domestic vehicles, are not always manifest on the face of the statutes, but operate as a cumulative burden on vehicles which must pass through several States, paying fees in each. Such cumulative burdens, justified perhaps for the use of the highways, may yet, when pyramided against a single vehicle, constitute a real handicap and interference with motor transportation.

Seven States grant no reciprocity to commercial vehicles of other States. And, while reciprocity in one form or another is provided for in the laws of the remaining 41 States, only 9 States grant complete reciprocity as to all fees. The 32 States granting partial reciprocity range all the way from almost complete reciprocity to reciprocity on a very limited basis. It should also be noted that the benefits of reciprocity decrease as the distance between the reciprocating States increases. Furthermore, the statutes do not reveal to what extent reciprocity is actually put into practice. It would be necessary to examine the orders of the administrative agencies, enforcing the laws, in order to ascertain the real situation.

Taxes on trucks which enter a State, not subject to reciprocity, are often

[1] Quoted from Works Progress Administration, The Marketing Laws Survey: *Barriers to Trade between States* (May, 1939), pp. 1–2; 21; 31; 47; 55; 63–64; 73; 83. All charts omitted.

heavy, and usually increase sharply with the size of the truck. For a 5-ton truck, for example, taxes vary from $30 in Illinois to $400 in Alabama and Georgia. As an example of the cost to an interstate trucker, it is interesting to note that such trucker traveling from Alabama to South Carolina (ignoring the extra fees if a trailer is involved) would be required to pay $400 in Alabama, $400 in Georgia, and $300 in South Carolina on a 5- to 6-ton truck, or a total of $1,100. In some States it is possible for interstate trucks to pay a mileage tax in lieu of registration charges, but these are often higher for interstate than for intrastate vehicles.

In addition to registration fees, eight States have enacted gross-receipts taxes. In the case of interstate transportation, these taxes are ordinarily apportioned on the ratio which the mileage within the State bears to total miles of transportation. They vary from one-half of 1 percent of gross receipts in Montana to 6 percent in North Carolina.

Some 14 States have enacted mileage taxes calculated either on the basis of ton-miles or on a graduated mileage basis for trucks of varying weights, which range from 1 mill per mile on a 5-ton truck to 2 mills per ton-mile. The gross revenue or mileage taxes apply equally to intrastate and interstate commerce (except as noted above where they are higher in lieu of registration) and it cannot therefore be said that they are distinctly a burden against interstate commerce. It would seem, however, that they do discourage both types of operations.

ITINERANT OR MERCHANT TRUCKER

The burdens upon motor-vehicle transportation generally fall upon the itinerant trucker with particular hardship. In the past few years, a considerable number of States have enacted statutes enlarging the scope of the old peddler laws to cover the merchant trucker who sells merchandise from his truck or sets up a temporary stand. In Arizona, for example, the merchant trucker must pay a license fee of $200 per year in each county ($25 additional for each assistant), and a wholesale peddler who sells for purposes of resale must pay a $500 license fee in counties over 100,000 population, $300 in counties of less population, and post a bond of $5,000 with a surety licensed in the State. Although nine States exempt the farmer from taxation if he is selling his own products, yet these laws, in their effect, operate against the out-of-State trucker who has large quantities to transport. Merchant truckers, however, are subject, in many cases, to registration fees, mileage taxes, and weight restrictions in the nondomiciliary State so that, despite the exemption to the farmer trucking his own crops, the burden upon him is still very considerable.

In addition to State taxes, some acts enable their political subdivisions, such as counties or cities, to tax truckers. A study of such regulations by

localities should prove very valuable. The exemption in Florida's truck law, for example, is apparently directed against nonresidents transporting crops into the State.

It is interesting, in this connection, to see how some States specifically encourage the merchant trucker to come into the State to buy, but not to sell. Note the "exceptions" under "registration fees," in Arkansas and Georgia, and also the itinerant trucker laws that prevail in those States.

Apparently in the interest of safety and preservation of their highways, most of the States have also enacted maximum requirements for width, length, height, and weight for motor vehicles. There is some uniformity in maximum width but there is considerable variance in height and length. Neither is there any uniformity as to the number of units which a single truck is permitted to draw. Some States impose no limitation on combination-vehicles, but maximum weight restrictions operate to limit length, even in these States.

The restrictions on maximum gross weight show by far the greatest variation, and thus operate as burdens upon interstate motor transportation. Texas has a low limit of 7,000 pounds, but it is interesting to note that this restriction is waived only if the vehicle is transporting property to or from the nearest practicable common carrier, or, where the point of destination is less distant from the point of origin than the nearest practicable common carrier. In such cases, the maximum permissible load is doubled, i. e., raised to 14,000 pounds.

Whereas the largest State in the Union permits the smallest weight, our smallest State, Rhode Island, permits the largest weight of 120,000 pounds. The other States also vary widely, even as between adjoining States. A comparison of a few figures as to neighboring States shows that Kentucky allows only 18,000, while Indiana allows 40,000 pounds gross weight to be moved over the highways; Rhode Island allows 120,000, but neighboring Connecticut only 40,000 pounds.

Although many statutes authorize special permits to be issued for oversize or overweight vehicles, it is a question whether as a practical matter this permission is often obtainable. Frequently, the overweight permit may be obtained for only one trip, or, within the discretion of the administrative agency authorized to issue it, for only occasional trips or over specified highways. The nuisance involved in obtaining the special permit in so many jurisdictions deters interstate transportation by motor, to which competitive carriers are not subject.

PORTS OF ENTRY

Not only are motor vehicles subject to the intangible burdens and requirements of diverse State laws, but in addition, in a number of States,

tangible barriers have been erected against them upon the State's borders. The ports of entry for motor vehicles constitute one of the most serious exercises of the State's inspection powers devised since the birth of our Constitution. Here, the out-of-State vehicles are compelled to stop, in order to insure full compliance with all laws and regulations of the State. Twelve States provide for some form of port of entry or highway checking station, where vehicles may be inspected for payment of registration fees, special mileage and gasoline taxes, equipment, weight and size restrictions, insurance, or other miscellaneous requirements.

Only the salient features of each port of entry law were indicated. Suffice it to point out here that not only are these ports utilized for collection of motor-vehicle taxes and fees but also for inspection and embargoes of plants, fruits, and vegetables. When it is remembered that Kansas has 66 such ports, Oklahoma 58, Nebraska 31, and New Mexico 22, one can readily see what practical difficulties result, not only upon motor-vehicle transportation itself, but upon the commodities and products transported.

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SELECTED DAIRY LAWS

The compilation of dairy laws attempts to indicate only a cross section of the barrier aspects of recent legislation pertaining to the dairy industry. Some of this legislation seems, on its face, to be purely intrastate in character, but, in operation and effect, it can seriously hamper interstate trade. No attempt was made to designate all the provisions of these laws which may operate as trade barriers, but the analysis was limited to licensing, inspecting, price fixing, and other restrictive features affecting the interstate market in dairy products.

The inspection requirements present one of the most serious aspects of barrier legislation, for the enacting State which sets inordinately high standards can exclude products which cannot meet those standards, as a condition precedent to the issuance of a license to sell. Inspection can also be refused on the ground of expense or inconvenience in sending inspectors to out-of-state farms. These requirements can exclude out-of-state products in the same manner as though they were specifically prevented from entering the State.

Practically all the States provide for general inspection of fluid milk, and, in some cases, also of milk products. At least seven require inspection of the source of supply by officials of the importing State. Connecticut prohibits its officials from inspecting beyond the natural or present milk shed, except in case of milk shortage or an emergency. In Louisiana, containers of out-of-state milk must have tags attached issued by Louisiana upon inspection at the source, and use of such tags is limited to 90 days.

at the expiration of which period there must be a reinspection. Two States require pasteurization of milk to be done within their borders. While a few States accept the State of origin certificate as to inspection, yet their administrative agencies may further inspect the supplying farms if deemed necessary.

In addition to inspection requirements, licensing and registration provisions present further barriers to interstate trade. Licenses are usually issued only after satisfactory inspection, and are subject to further rules and regulations of the issuing State. Connecticut and Rhode Island require registration of all dairies before they can supply milk, as a result of which many dairies can be excluded. In addition to all these restrictions on fluid milk, seven States go further and require out-of-state manufacturers of dairy products (including ice cream) to be licensed and registered before their products can be sold in the State.

Within recent years, a new and rapid development may tend to further burden interstate trade in dairy products. This new legislation is known as the milk control acts, enacted by about 20 States. Broad powers vested in administrative bodies, regulating the production, handling, transportation, and sale of milk afford a wide field for barrier legislation. In addition, these administrative officials can establish and determine milk sheds, designate marketing areas, and fix prices for all milk sold within the State. The milk control acts usually provide that milk, produced out of State, becomes subject to all the provisions of the importing State's law, the instant it ceases to be transported in interstate commerce.

Not only do the States regulate the dairy industry, but local and municipal legislatures are empowered to license the sale of milk, and thus add still further restrictions, tending to exclude products from other States.

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OLEOMARGARINE LAWS

All States, with the exception of Arizona, have enacted some type of statute, defining oleomargarine and regulating its labeling, selling, serving, taxing, etc.

Two-thirds of the States prohibit the sale of yellow oleomargarine, although the phraseology of some of this prohibitory legislation is not clear. Some States define "yellow" as "when in imitation of yellow butter," while others have adopted a definition used in the Federal Oleomargarine Act of 1930, as amended in 1931; namely, a color not to exceed more than 1.6° of yellow. Idaho and Utah, although prohibiting the sale of yellow oleomargarine, have also enacted a statute imposing an excise tax of 10 cents per pound on all colored oleomargarine.

About 20 States prohibit the use of oleomargarine or butter substitutes

in State institutions, although penal institutions are sometimes excepted. One State designates the specific institutions which may not serve oleomargarine and then further directs that butter, manufactured in and from products of that State, must be purchased for such institutions.

Twenty-three States have adopted excise taxes, ranging in scope from 5 cents a pound on uncolored to 15 cents a pound on colored, or all oleomargarine.

Sixteen States require licenses to engage in the manufacture, distribution, sale, or serving of oleomargarine, with fees ranging from $1 to $1,000 per year. Pennsylvania, Wisconsin, North Carolina, and Montana are in the highest bracket. Montana levies the tax on the wholesaler; the other three on the manufacturer.

Some States give statutory preference to oleomargarine utilizing domestic crops in its manufacture. Maine and the Cotton Belt States, except Mississippi and Oklahoma, exempt from their taxes products containing cottonseed oil, corn oil, peanut oil, soybean oil, oleo oil and stearine, and certain animal fats and oils, while cattle States like Minnesota, Nebraska, and Wyoming tax products not containing at least 65, 50, or 20 percent animal fats or oils, respectively. The State of Washington includes in its definition of oleomargarine all and every butter substitute not containing more than 80 percent butterfat. Others tax the product if competitive oils, not produced in the continental United States, are used, and a number apply the tax if the product is sold in the State, but exempt it if sold for export.

The labeling provisions present a confusing picture. There is practically no uniformity. Some States require containers to be marked, branded, or labeled, top, side, and bottom; others, top only; others, top and side; and still others, two sides directly opposite each other, etc. There is, furthermore, a variation in the sizes of type, from ¼ to 1 inch and larger; and in the style of letters such as roman, gothic, plain bold face, 20-point, etc. One State requires that a black band at least 3 inches wide be painted to run all around the container; in another State, certain substitutes must be labeled in letters painted with lampblack and oil.

A great number of the States require the product to be sold in a separate and distinct form, easily recognizable, and so as to inform the purchaser of its true character. The markings required on cartons in retail sales present the same confusion, varying from a plain wrapper labeled "Oleomargarine," which must be printed in different kinds and sizes of type, to handing the customer a statement, setting out all ingredients and percentages thereof contained in the product. One law requires not only the percentage of the ingredients but also a declaration as to the animals or vegetables used in the manufacture. When the product is served or used in hotels, restaurants, etc., signs must be posted giving the name of the

substance and prescribing varying size, color, and type of letters. Two States even require that the plate or vessel in which oleomargarine is served must be indelibly marked.

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SELECTED LIVESTOCK AND GENERAL FOOD LAWS

The following compilation presents only a very limited and select number of barrier laws relating to livestock, poultry, eggs and general foods.

In the livestock laws, an effort was made to designate the inspection, health, and sanitary requirements of both the State of origin and State of destination. Some importing States require health certificates showing freedom from infectious and contagious diseases; others, tuberculin-test charts, permits, and notices in advance of importation, etc. In addition to these conditions precedent to importation, the livestock is sometimes subject to further dual inspections when it reaches the State of destination, the period required before release varying in different States. These cumulative burdens operate to obstruct the shipment of livestock into many States. The mass of administrative regulations, which further restricts or excludes livestock from the importing State, is the source of additional barriers, but these could not be included in the present study.

In selecting egg laws of a barrier nature, labeling and standardization provisions were emphasized. Both types aim to prefer and promote the use of the domestic product.

The standardization laws often prescribe standards so high that they can be met only by the home product. Six States set a maximum grade which can be met only by domestic eggs. For example, "fresh eggs" are defined as eggs laid in the State, regardless of how fresh imported eggs may be. Two States require that any eggs imported from other States must be labeled "shipped." Another group of six States provides that eggs from foreign countries must be distinctly marked to show the country of origin, and of these two have enacted the "State of origin" label law, applicable to eggs from sister States, the purpose being to encourage the use of the domestic product.

Here, also, it must be remembered that a great number of barrier practices result from regulations issued by local and municipal administrative agencies in every State.

Under general goods, it was impossible to consider the great volume of standardization, labeling, and inspection laws affecting the free flow of products between the States. An attempt was therefore made to indicate only three types of such legislation: (1) The prohibition of the marketing of "culls," which prevents cheaper products from leaving the State; (2) some standardization laws, prohibiting the marketing, importation, or

exportation of fruits and vegetables unless conforming to specific and rigid requirements; and (5) the growing use of the "State of origin" label laws to promote and foster domestic products. Because of the great scope, diversity, and complexity of this legislation, the selection here was necessarily strictly limited.

In 10 States, commodities of inferior grade must be labeled "culls" or "unclassified." Some States forbid the shipment of such products out of the State altogether, as for example, Tennessee, which forbids the shipment of "cull" tomatoes; while others allow such shipments only if the products are specifically labeled as such. Among the States which have enacted rigid standardization requirements are California, which specifies minimum standards for some 30 types of fruits and vegetables, and Colorado, which has enacted similar legislation covering some 1 dozen products.

In order to stimulate further "buy at home" campaigns, the "State of origin" type of legislation is receiving increasing consideration by State legislatures. Nine States are listed, which have enacted such statutes applicable to fresh fruits and vegetables, grains, and nuts.

In addition to restricting imports through standardization and classification requirements, a number of States have added the powers of embargo, which under certain conditions would preclude the imported products from entering the State altogether. Three laws authorize the declaration of embargoes on fruits and vegetables. Georgia's law gives this power to her commissioner of agriculture, if he thinks the domestic supply is sufficient for home needs. Louisiana has a retaliatory statute which forbids the sale in the State of products from any State, which prohibits the importation of such products from Louisiana. Nevada's governor is authorized to quarantine farm crops, which may be infected, and to declare an embargo.

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GENERAL NURSERY STOCK LAWS

The compilation of laws concerning horticulture is limited to general nursery stock laws, enacted by practically every State in the Union. It was not possible to consider the great mass of rules and regulations relating to individual plants. These rest almost entirely in the discretion of the administrative bodies and form the basis of still further barriers to interstate trade.

Twenty-six States require some form of registration for nursery dealers, of which 14 provide for registration by the filing of State of origin inspection certificates. In some States it is necessary for an agent to register each principal nursery which he represents.• The statutes indicate that 6 States

charge registration fees ranging from $1 to $20 for each principal nursery.

In 26 States it is necessary to obtain a license as a condition precedent for doing business in the State. The fees for the licenses vary from $1 to $100 a year, the average fee being from $10 to $20. Additional fees are often charged to salesmen or agents who solicit nursery stock orders.

The inspection requirements, however, seem to be particularly exacting. Forty-seven States have inspection requirements of which 12 are mandatory for inspection on the entry of the stock into the State. Twenty-eight States require the State of origin certificates, which are often numerous, to be attached to all shipments of stock, and 7 States charge the carrier with a duty to notify the authorities of all nursery stock arrivals.

In addition to registration, licensing, and inspection requirements, many States have enacted further provisions, such as the filing of bonds ranging from $500 to $5,000 to insure faithful performance. Others require dealers to disclose the names of clients and agents and even the amounts and terms of their contracts.

Twenty-three States grant specific quarantine powers to their administrative authorities having jurisdiction over nursery stock. How many thousands of shrubs are destroyed or ruined in quarantine, how many are legitimately excluded because of genuine need to prevent the spread of pestilence, rather than to protect local interests, is information which is not revealed by a mere recital of the law on the books.

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SELECTED LIQUOR LAWS AFFECTING INTERSTATE COMMERCE

As a result of the Twenty-first Amendment to the Federal Constitution, the States are free to discriminate against alcoholic beverages from other States and thus to favor home products. The United States Supreme Court has held that this amendment allows a State to go so far as to put an embargo on alcoholic beverages from States discriminating against its own alcoholic products.

The compilation of liquor laws emphasizes four barrier aspects in recent legislation. The first . . . shows the stimulation and promotion of the domestic liquor industry through the fostering of State-grown crops, which enter into the manufacture of alcoholic beverages. No less than 26 States have passed such preference laws. This is done mainly through the device of levying lower license fees on manufacturers using local products. For example, Alabama taxes manufacturers of alcoholic beverages $1,000 annually for each place of manufacture, but wine makers using 75 percent or more of Alabama raw materials in their wineries pay $25 for each place of manufacture.

The liquor monopoly States are in a particularly favorable position to prefer local agricultural products. The Maine law provides that in purchasing liquor the State commission must give priority to those beverages made from Maine products. The Ohio Liquor Control Board is empowered to fix prices so that its profits do not exceed 30 percent of the sales price, but, as to liquor made from Ohio fruits, the profit may not exceed 10 percent. Other States stimulate local crops by requiring their use of liquor manufacturing. Minnesota, Iowa, North Dakota, and Oregon secure a market for their barley by providing that malt beverages sold in the State must contain 66⅔ percent barley malt.

A second method of encouraging the local liquor industry consists in tax exemptions or taxation at lower rates on alcoholic beverages produced for export to another State. . . . Such statutes give the brewer or distiller in the exempting State an advantage over competitors in other States who receive no such exemption. At least 25 States grant such exemptions to home producers.

Georgia and New Jersey, however, burden exports by levying additional taxes or higher license fees for exporting wholesalers than for wholesalers selling solely in the State. The Pennsylvania provision is especially interesting. It provides that the excise tax on exports be refunded in an amount equal to the tax levied by the State of destination on imports from Pennsylvania, if such State is in substantial competition with Pennsylvania. This illustrates how the power of taxation is employed for the purpose of equalizing competition.

While encouraging exports the States discourage imports. . . . No less than 30 States have enacted direct or indirect import restrictions. Three States discriminate against incoming beverages directly by taking them at a higher rate than local beverages. Georgia, for example, levies a tax of 5 cents a gallon on domestic wine containing not more than 14 percent alcohol, but foreign wines of the same alcoholic content must pay 40 cents.

But it is more common to impose restrictions on the importer (and occasionally on the foreign manufacturer), than on the import itself. At least six States charge a higher or additional fee for importing into the State than is charged for wholesaling or distributing the local product. In Washington the wholesaler's annual license fee for domestic wine is $50, but the importer must pay $250.

Massachusetts charges solicitors for foreign beverages a $100 to $300 annual license fee, as against $10 for those soliciting for the local product.

At least six States provide that importers or importing distributors must have resided in the State for a specified period of time. Similarly, corporations may be allowed to import only if a given number of their directors are citizens of the importing State. At times, beverage importers and dealers are required to maintain a place of business in the State or are dis-

criminated against for failure to do so. For example, Louisiana requires that dealers maintaining a regularly established place of business in the State pay only a $1,000 annual fee, but failure to maintain such place of business subjects the dealer to a $10,000 fee.

The fourth . . . shows the discriminatory and retaliatory legislation and several port of entry statutes. Nine States provide for embargoes or retaliatory taxes directed against States, discriminating against their alcoholic products. In some cases, the legislation is mandatory, while in others the State agency is entrusted with the power of imposing the retaliatory provisions. In 1939, Missouri repealed its retaliatory law and Indiana abolished its so-called port of entry law and enacted a new measure containing reciprocal and retaliatory features. Kansas and California have port of entry laws similar to those found in the motor vehicle field, but while the Kansas law is mandatory, the California law empowers the board of equalization to put it into effect, if it is thought necessary.

. . . . . .

STATE-USE TAXES AFFECTING INTERSTATE TRADE

The "use" tax was enacted by the States as a means of equalizing the tax burden: First, on transactions in interstate commerce which could not be reached by the sales tax; and second, to avoid the losses to their revenues, resulting from purchases made by their residents in neighboring States, where there were either no sales taxes or lower tax rates applicable to the particular transaction.

As of January 1, 1939, general-use taxes were found in 13 States with rates ranging from 1 to 3 percent. Seven of these provide for compensatory or offset provisions, crediting the taxpayer with the amount of sales or use tax paid on the purchase transaction in any other State up to the full amount of the levy in the use tax State. In addition, three States, Alabama, North Carolina, and South Dakota, have enacted general-use tax statutes during the early part of 1939.

Practically all of the States levy use taxes on gasoline or motor fuels. These levies are noncompensatory in character and are almost invariably at the same rate as the State gasoline taxes.

. . . . . .

GENERAL PREFERENCE LAWS AS BARRIERS TO INTERSTATE TRADE

General preference laws have been enacted by almost all the States of the Union, favoring their own laborers, contractors, products, or print-

ing. If a sufficient number of resident laborers are not available, several States then require that a substantial percentage of those employed (80 to 90 percent) must be citizens of the State. Other States go further and define the minimum period required for residence purposes, which may vary from 3 months to 5 years. Some specify the particular building, highway, or project for which the preference is necessary. In still others, the preference is limited to designated political subdivisions of the State such as counties, cities, towns, school districts, irrigation districts, etc.

Resident firms or contractors are preferred in many jurisdictions. In a few statutes, bids of resident contractors are preferred if they do not exceed those of nonresidents by more than 3 to 5 percent. Still others require that the contractor must be authorized to do business in the State, or that he must have his principal place of business in the State, or that he has paid a certain minimum amount of taxation in the State.

A little more than half the States make it mandatory to use domestic products of one kind or another in the construction or operation of public works. A few specify the particular commodities which must be used, as, for example, Indiana requires limestone; Maryland, green marble; Missouri, products of its quarries; and Oklahoma insists on using its own minerals and forests.

A group of States require their public institutions to use only domestic products and supplies, either wholly or partially produced in the State. In others, public institutions are specifically prohibited from purchasing products in competition with home crops or industries. Some 20 States prohibit oleomargarine or butter substitutes from being served in State-supported institutions, while Massachusetts requires all public institutions to use milk produced in the State. Arizona goes further and requires its public institutions to prefer all products raised or manufactured in the State.

Long before the present wave of barrier legislation, the States had enacted preference laws for domestic printing, requiring or preferring official printing to be done within their jurisdictions. Some States restrict such printing to firms who are licensed to do business in the State; others, who maintain plants in the State or who can show that they have paid taxes in the State. Statutes establishing an "official public printer" were not included.

Retaliatory measures resulting from the above preference laws are not lacking. Statutes of Minnesota favoring its contractors resulted in a joint resolution by the Wisconsin Legislature in 1928, forbidding government departments from furnishing any plans for use in Minnesota until the latter repealed its discriminatory laws. These laws were repealed by Minnesota in 1933.

Many of the restrictions connected with general preference laws are

contained in annual appropriation acts and are not incorporated in the official codes. . . .



87. THE POWER TO REGULATE COMMERCE [1]

THE authority of Congress to regulate business in this country is to a large extent based on its constitutional powers under the commerce clause. Since the October Term of 1937 the Supreme Court has so altered its attitude toward the phrase "commerce among the several states" as to increase materially the legitimate authority of Congress over our economic system. This development is succinctly presented in this article.

THE commerce clause has been a double-edged tool of constitutional interpretation from the earliest days of judicial review of state and federal legislative activity. It is at once a positive source of federal power and, in the absence of federal exercise of that power, a source of implied limitations on state legislation. Any consideration of trends of interpretation of the clause in the past decade must treat both aspects of the matter. In general, it may be said that expansive implications of the Wagner Act decisions in the spring of 1937 have been elaborated and broadened until the commerce clause is today an ample source of federal legislative authority to deal with a wide range of problems arising out of or having any substantial effect upon interstate commerce. No such clear generalization may be made with respect to the nature of the limitations which the unexercised commerce power imposes on state police power and tax legislation. But the tendency, not yet consistently dominant, seems to be in the direction of upholding much state legislation that would formerly have been ruled a burden on interstate commerce. It is, of course, unnecessary to labor the fact that state legislation incompatible with a valid federal exercise of the commerce power is unconstitutional.

Both the above generalizations require some further examination. The first can perhaps best be looked at in terms of (1) changing definitions of interstate commerce, (2) the reshaping of familiar formulæ for determining the reach of the power to regulate, (3) the abandonment of the "dual federalism" concept, and (4) the broad application of federal statutes to businesses alleged not to be in interstate commerce. Discussion of the second general problem may perhaps best be considered in terms of the gradual, and still wavering, emergence of what may be called the "leave-

[1] V. M. Barnett, *American Political Science Review* (December, 1947), pp. 1170–1181. All footnotes omitted.

it-to-Congress trend" in the review of state legislation alleged to burden interstate commerce.

Changing Definitions: Paul v. Virginia into the Discard. One of the hoariest precedents with respect to the definition of interstate commerce was overturned when the Court in 1944 reversed the 1869 holding of Paul v. Virginia that the making of contracts of insurance across state lines was not interstate commerce. The Court held in effect that the earlier series of decisions stemming from Paul v. Virginia was basically inconsistent with the definition of interstate commerce applied in numerous other cases, and must now be brought into line with them. The Court unanimously agreed that insurance was interstate commerce, differing only as to whether Congress intended the Sherman Act to apply. The basic theory of Paul v. Virginia was resoundingly rejected. "A nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature." Other decisions reveal, said the Court, that "not only . . . may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. . . ." To the dogmatic rule that insurance cannot be interstate commerce, the Court replied that numerous other decisions made it "difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such federal regulation." The precise line bounding the commerce power can never be reached by resort to any single abstract formula. But regardless of the formula, said the Court, "no enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance."

Changing Definitions: Federal Power over "Navigable" Streams. A significant broadening of federal power to undertake a wide range of activities was achieved by a latitudinarian interpretation of "navigable" streams, and the consequent validation of federal controls related thereto. The leading case involved the Federal Water Power Act of 1920, which gave the Federal Power Commission authority to license obstructions across navigable streams. An electric power company, unable to secure a license on terms satisfactory to itself, began to build a dam over the New River in Virginia and West Virginia without such a license. The company—joined in its protest by forty-one states—fought an injunction on the ground that the river was not navigable, or, if navigable, that the conditions of the license insisted upon by the Commission had nothing to do with the "navigable capacity" of the stream. The Supreme Court upheld the Commission. The high tribunal ruled that the New River was "navigable" even though not actually navigated, observing that "potential navigability"

and the "effect of improvability" were the keys to the question. Here, said the Court, the river could be made navigable by the expenditure of a not unreasonable sum of money. Since the stream was thus "navigable," federal authority was not restricted to controls which related only to navigation. The power in question was the commerce power, of which control over navigability is only a part. Flood protection, the development of watersheds, and the utilization of any electric power which may result—all are within the commerce power. Hence, "navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government." Since Congress could prohibit all obstructions whatever, it could grant the privilege under any conditions it saw fit. Despite a dissent by two justices ridiculing the test of "potential navigability"—asserting that every creek in the Union is "navigable" under this test—the case seems to establish on a firm basis the broadest kind of federal power over the water resources of the country. In the following year, the Court held that Congress' power over navigation extended to non-navigable tributaries of navigable streams, if that were necessary to protect the navigable rivers. And if legitimate ends such as flood control and improved navigation are achieved, said the Court, it is irrelevant that electric power is also generated in the process. In fact, there may be several purposes in the over-all plan; they may all be pursued so long as one of them is constitutional—and the valid objective need not even be the primary one.

Abstract Formulæ and the Economic Facts of Life. One of the most notable developments in interpretation has been the tendency of the Court to reject the formalism of earlier distinctions between that commerce which is regulable by the federal government and that which is not. The comments which pervaded earlier decisions—particularly as revived in the 1935 and 1936 cases invalidating basic provisions of the New Deal—to the effect that "production" was local and not interstate; that interstate commerce was primarily concerned with "transportation"; that regulations which were "indirectly" related to interstate commerce, no matter how important to its preservation or control, were beyond the reach of the commerce power—these have generally been replaced either by emphasis on competing concepts which were in fact contemporary with the above or by the more direct approach of declaring that these matters are simply not to be settled by resort to neat formulæ. In 1935 and 1936, the Court chose to revive and restress the narrower of two lines of decision, choosing in effect the doctrines of the Sugar Trust case and the first child labor case rather than the "stream of commerce" approach of Stafford v. Wallace and similar cases. In the NRA case and the Guffey Coal Act case, the Court turned clearly to the narrower conceptions; in the Wagner Act cases, it reversed, by implication, much of the basis of these decisions; and in

the succeeding ten years it has demonstrated that the conceptualism which dominated the earlier New Deal cases has now been abandoned.

In Currin v. Wallace, for example, the Court flatly rejected the argument that transactions on the tobacco auction market were "local" sales, that "purchases" were not as such interstate commerce, and that they were thus beyond the power of Congress. Such purchases were to be held a part of interstate commerce, which, stressed the Court, comprehended far more than mere "transportation." Again, in Mulford v. Smith, the Court chose the "stream of commerce" approach in upholding the establishment of marketing quotas for flue-cured tobacco by the Secretary of Agriculture under legislation of 1938. To the contention that this was really control of production, the Court answered that it was merely limitation of the amount of tobacco marketed at the auction warehouses, which are "the throat where tobacco enters the stream of commerce." Similarly, in an opinion sustaining the Agricultural Marketing Agreement Act of 1937, the Court ruled that price-fixing as related to sales within New York was valid, since the milk itself moved in interstate commerce. Although sales themselves were local, the commodities sold were part of interstate commerce and the entire enterprise was thus within the scope of the commerce power.

One of the most striking examples of this adoption of the broader line of competing precedents was in United States v. Darby, perhaps the most important single case under the commerce clause in the ten-year period. The Fair Labor Standards Act of 1938 not only outlawed the interstate shipment of goods produced under substandard conditions, but also prohibited the employment of workers engaged in producing "for interstate commerce" in violation of the wages and hours standards established under the act. The Court now clearly abandoned the conceptualism of Hammer v. Dagenhart, denied that since this was "production" it was necessarily "local," stressed the idea of an unbroken "stream of commerce," and held unequivocally that Congress can prohibit the interstate shipment of goods produced under labor conditions outlawed by Congress. In this connection, congressional motives "are matters for the legislative judgment, upon the exercise of which the Constitution places no restriction and over which the courts are given no control." Since the holding that federal power "is plenary to exclude any article from interstate commerce subject only to the specific prohibitions in the Constitution" was clearly irreconcilable with the entire basis of the decision in Hammer v. Dagenhart, the earlier case "should be and now is overruled." The opinion in this case also climaxed a basic shift in attitude toward attempts by Congress under the commerce clause to engage in general social and economic legislation. The earlier view—evident throughout the Hammer v. Dagenhart opinion and several others—strongly implied that Con-

gress was acting covertly, conspiratorially, and, in fact, dishonestly, when it attempted to use the clause for such purposes; the newer attitude apparently is not only that Congress is within its rightful power in acting thus, but that the provision actually enjoins upon the legislature a positive responsibility to ensure that the channels of interstate commerce are not used to foster or perpetuate conditions detrimental to the general interest.

By 1942 the Court was ready to announce outright the end of the old distinction between "production" and "transportation" as a touchstone of valid exercise of the commerce power. In upholding the Agricultural Adjustment Act of 1938 as applied to a farmer raising only twenty-three acres of wheat, all of which he consumed or fed to his own stock, and none of which was intended for interstate commerce, the Court denied the inapplicability of the act merely because none of this particular wheat was going into interstate commerce. The familiar contention that such agricultural production and consumption was a purely "local" matter, the Court reviewed carefully and rejected specifically. Commenting directly on the formalistic distinctions of earlier commerce decisions, the Court said: "We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." Such formulæ, continued the Court, cannot prevent the commerce power from being validly used to control intrastate activities having an actual effect upon interstate commerce, even though under earlier decisions they might have been defined as "local" or "indirect," and therefore beyond the reach of Congress.

The Death of "Dual Federalism." The landmark case of United States v. Darby not only went far toward destroying excessive formalism in the interpretation of interstate commerce as such; it also struck the death blow at the doctrine which had come to be known as "dual federalism." That doctrine, relied upon heavily in Hammer v. Dagenhart and applied vigorously in the early New Deal commerce cases, held in effect that Congress could not exercise even its delegated powers in such a way as to infringe the inviolable area of state activity deemed to be protected by the Tenth Amendment. The basic ambiguity of holding that the reservation of powers not granted somehow operated even to limit those which were granted was at last disposed of. The Darby opinion brusquely abandoned the entire concept. "The [Tenth] Amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments

as it had been established by the Constitution before the Amendment." In this respect also, therefore, the first child labor case was directly overruled, and the very dubious argument that the reserved powers of the states could operate as limitations on the specifically granted powers of the federal government was rendered no longer constitutionally respectable.

Statutory Interpretation: Application of Federal Laws to Businesses Alleged not to be in Interstate Commerce. But perhaps even more revealing than the cases which involved the constitutionality of federal legislation were those which dealt with the constantly-arising questions of the applicability of these laws to particular kinds of activities not clearly in interstate commerce. The National Labor Relations Act and the Fair Labor Standards Act, after being upheld in general, continued throughout the period to spawn controversies as to their application in particular instances. In upholding the application of these and other federal acts to situations which in an earlier period would certainly not have been held within the federal commerce power, the Court has indicated the degree to which it has broadened the concept of interstate commerce in recent years.

The Wagner Act, for example, was held applicable to a power company which did not sell power for resale outside New York State and nearly all of whose electric power was consumed within the state. Stressing economic facts, the Court commented on the "impressive evidence of the dependence of interstate and foreign commerce upon the continuity of the service. . . ." If the power were cut off, noted the Court, "instantly, the terminals and trains of three great interstate railroads would cease to operate; interstate communications by telegraph, telephone, and radio would stop; lights maintained as aids to navigation would go out; and the business of interstate ferries and of foreign steamships whose docks and lines are operated by electric energy would be clearly impeded." Congress, thought the Court, could protect commerce against such consequences, even though the service whose disruption would cause them was not itself interstate.

Several cases involving the application of the Fair Labor Standards Act are also illustrative in this connection. The act applies in terms to all employees engaged in the production of goods for interstate commerce, including anyone "employed in any process or occupation necessary to the production thereof, in any state." The Court has upheld the act as applied to the operating and maintenance employees of the owner of a building who rented space to producers selling largely in interstate commerce; to employees of a newspaper with a daily circulation of 11,000, one-half of one per cent of which was out-of-state, to employees of a company engaged in cleaning the windows of buildings whose occupants were producing goods for an interstate market; and to employees engaged in repair

and maintenance of vehicles which were rented for the transportation of other vehicles in interstate commerce. As Frankfurter said in the first-mentioned case above, "To search for a dependable touchstone to determine whether employees are 'engaged in commerce or in the production of goods for commerce' is as rewarding as an attempt to square the circle." What the Court now looks at, therefore, is simply whether there is in fact a "close and immediate tie" with interstate commerce. If there is, the act has been held applicable.

Interpretation and application of other federal acts reveal similar trends. The Court ruled, for example, that the Agricultural Marketing Agreement Act of 1937 could be applied to a firm all of whose milk was produced locally and none of which was sold in interstate commerce. Since Congress could regulate the price of milk sold in interstate commerce, it could also, as an incident to the broader power, regulate the price of locally-produced and locally-sold milk which competed with that sold in interstate commerce. This was not because the local milk was itself in interstate commerce, but because the control here exerted was necessary to protect interstate commerce. Said the Court: "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those intrastate activities which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end."

Even more sweeping language was used in opinions in 1945 and 1946 upholding the "death sentence" clause of the Public Utility Holding Company Act of 1935 as a valid exercise of the commerce power and as applied to the two companies involved. To the Court, these companies "depend for their very existence upon the constant and systematic use of the mails and the instrumentalities of interstate commerce," and therefore possess an "undeniable interstate character." "Congress, of course, has undoubted power under the commerce clause to impose relevant conditions and requirements on those who use the channels of interstate commerce so that those channels will not be conduits for promoting or perpetuating economic evils." Hence, continued the unanimous opinion, "to the extent that corporate business is transacted through such channels, affecting commerce in more states than one, Congress may act directly with respect to that business to protect what it conceives to be the national welfare. It may prescribe appropriate regulations and determine the conditions under which that business may be pursued. . . . In short, Congress is completely uninhibited by the commerce clause in selecting the means considered necessary for bringing about the desired conditions in the channels of interstate commerce. Any limitations are to be found in other sections of the Constitution."

The "Leave-it-to-Congress Trend" in the Review of State Legislation. A recent law review article speaks of the "leave-it-to-Congress trend" in the interpretation of the law of tax immunities. A similar trend is to be noted in the decisions of the Court dealing with state tax and police power measures alleged to interfere with interstate commerce. Beginning with expression in minority opinions in 1938 and 1939, there has been a growing tendency to uphold non-discriminatory state legislation where the attack on the statute is based on the judicially derived implications of the "still, small voice" of the unexercised commerce power. State taxes were invalidated in Adams Manufacturing Co. v. Storen and Gwin, White & Prince v. Henneford, over dissents urging that general non-discriminatory tax measures—even though they affect interstate commerce—should be upheld by the Court until Congress remedied whatever dangers lay in the cumulative impact of such taxes. By 1940, in McGoldrick v. Berwind-White Coal Mining Co., the majority was ready to go far toward adopting this view. Here another non-discriminatory state tax was upheld by the majority, nominally on the venerable formula of the degree of "burden" on interstate commerce. The language of the opinion, however, indicated the extent to which the non-discriminatory argument was adopted by the Court, as well as the general attitude that evils in this field must be for Congress, and not the Court, to correct. The general view is perhaps best expressed in the well-known Greyhound case in 1940 invalidating a state tax found to be a burden on interstate commerce. Here, dissenters Black, Frankfurter, and Douglas stressed again the view that the Court should not interfere with non-discriminatory state tax laws which affect interstate commerce.

> Judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford that full protection for interstate commerce intended by the Constitution. We would, therefore, leave the questions raised by the Arkansas tax for consideration of Congress in a nation-wide survey of the constantly increasing barriers to trade among the States. Unconfined by "the narrow scope of judicial proceedings, Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union. Diverse and interacting state laws may well have created avoidable hardships . . . But the remedy, if any is called for, we think is within the ample reach of Congress."

This view is not yet clearly dominant. In fact, some of the sharpest divisions of the Court in recent years have been over this issue. In gen-

eral, however, the Court has tended more and more to uphold non-discriminatory state taxes even though they impinge upon interstate commerce. In the term of Court following the Greyhound case, for example, there were six cases in which state taxes were alleged to burden interstate commerce. In five of them, the Court found the tax non-discriminatory and valid. In only one did the Court invalidate the tax, and there because the necessary operation of the statute was clearly to discriminate against out-of-state trade. But in the term just concluded, there was evidence that considerable disagreement still prevails in the Court in this field. In a leading case, the Court held invalid an Indiana gross income tax as applied to gross receipts from the interstate sales of certain securities. The majority distinguished the Berwind-White case and returned to the general principles of Adams Manufacturing Company v. Storen, holding that this was like a direct unapportioned tax on gross receipts from interstate business. Such a tax has always been held "definitely beyond state taxing power," even though non-discriminatory and similarly applicable to all business done within the state. Three dissenters emphasized the point that the tax was not aimed at interstate commerce and did not discriminate against it. They thought it no different from a tax on the proceeds of a sale of real property in some other state, where the mails were used to authorize it and to exchange the deed for the purchase price. The present tax should be upheld, thought the minority, if the Court will "adhere to the philosophy of our recent cases." In other cases at this same term, the Court divided sharply on the validity of state taxes on stevedoring and warehousing, invalidating the former and upholding the latter—each time over strong dissents which reveal the degree of fluidity prevailing in this field.

In numerous other cases under the commerce clause, the Court upheld state laws on the ground that a fair effort at tax apportionment had been made, or that the effect of a police power statute on interstate commerce was unsubstantial or indirect, or on other familiar bases. In general, a tolerance for state police power and tax legislation in the absence of congressional preëmption of the field is characteristic. For example, a California act controlling the marketing of raisins—ninety-five per cent of which were shipped out of state—was upheld in the absence of any indication that Congress intended to occupy the field. The Court recognized that the effect on interstate commerce was "direct," but ruled that this was a field which Congress might appropriately leave to state control until Congress itself acted. Despite occasional exceptions and a considerable degree of continuing uncertainty—especially in the tax field—it is probably accurate to say, therefore, that the trend in the last ten years has been toward granting more and more discretion to state legislatures to exercise tax and police powers which impinge on interstate commerce, and to adopt the general attitude that where such legislation, unless it is clearly discrim-

inatory, results in problems in the realm of interstate trade, those problems are properly left for the federal Congress to resolve by a positive exercise of its commerce power.

Conclusions. When the Court assembled in October, 1937, it was clear that much reshaping of the judicial gloss on the commerce clause was in prospect. The rulings in the preceding spring in the Wagner Act cases had indicated that the position of the majority was now inconsistent with several specific precedents still on the books and, perhaps more significantly, with a general approach to state and federal legislation out of which these specific precedents had been born. In the succeeding ten years, the Court has specifically overruled the restrictive precedents in the heretofore landmark cases of Paul v. Virginia and Hammer v. Dagenhart; it has largely discarded the formalism of the earlier approach to the commerce clause in favor of one which seeks to get at and recognize the actual economic interdependence of the nation and its subdivisions; it has restored the commerce clause to its full strength as a delegated power of the central government uninhibited by the constitutional truism that those powers not delegated are reserved to the states or the people; it has gone far to uphold the application of federal laws to businesses not directly in interstate commerce; it has greatly broadened the concept of "navigable" streams and the scope of federal power in relation thereto; and it has emphasized the commerce clause as a source of positive federal power, while at the same time diminishing its scope as an *ipso facto* delimitation of state power where Congress has not acted. All this is to say that the commerce clause as now interpreted by the Court tends to place in legislatures, and not in courts, the primary duty of meeting the commercial problems arising out of modern-day industrialization and technological advance. No one can deny that it means a sweeping increase in the legitimate authority of Congress to deal with a wide range of problems heretofore held to be beyond its reach. This does not mean there are no limitations on Congress—or, in the absence of congressional action, on state legislatures—in dealing with these matters. It does mean that the Court is now prepared to recognize (1) that the facts of modern economic life make national many problems which were formerly local, and (2) that, by and large, it is legislatures—state and national—rather than courts on whose shoulders, in a democracy, the attempt to wrestle with these problems must primarily devolve. This attitude is not, of course (as the rest of this symposium makes clear), restricted to the interpretation of the commerce clause. But it is in the interpretation of that clause, as one of the major sources of national power, that the implications of the reconstituted high tribunal's approach are perhaps most dramatically apparent.

88. THE MYTH OF RUGGED AMERICAN INDIVIDUALISM [1]

MANY persons who disapprove of governmental regulation are inclined to lay the blame for all governmental interference in business upon those who would undermine the American Way of Life. This group would give all credit for America's past and present prosperity to the operation of the doctrine of rugged American individualism. As Professor Beard shows in this article, however, the proponents of rugged American individualism—the businessmen—have often been in the vanguard of those asking for governmental interference. Although this article was written approximately twenty years ago, its appeal is timely and its viewpoint fresh.

"THE House of Bishops would be as much at sea in Minneapolis as at Atlantic City." This bit of delicious humor, all too rare in America's solemn assemblies, sparkled at a tense moment in the late conference of the Episcopalian magnates at Denver when the respective merits of the two cities as future meeting places were under debate. But the real cause of the caustic comment seems to have been a heated discussion, led by the Honorable George W. Wickersham, over a dangerous proposal to modify, not the Volstead act, but the sacred creed of rugged American individualism.

That contest had been precipitated by the report of a special commission in which occurred these highly inflammatory words:

It is becoming increasingly evident that the conception of society as made up of autonomous, independent individuals is as faulty from the point of view of economic realism as it is from the standpoint of Christian idealism. Our fundamental philosophy of rugged individualism must be modified to meet the needs of a cooperative age.

This frightful conclusion flowed from a fact statement which the commission summarized in the following language:

Side by side with such misery and idleness, there are warehouses bursting with goods which cannot be bought; elevators full of wheat while bread lines haunt our cities; carefully protected machinery lying idle, while jobless men throng our streets; money in the banks available at low rates.

These shocking passages Mr. Wickersham read to the assembled delegates with considerable indignation, and denied their truth. Then he added an illuminating exposition all his own: "I think this is an expression of a social philosophy that is expressed by the Soviet Government of Russia. It is a negation of the whole concept of American civilization. I think it would be a sad day when the American people abandon the principles on which they have grown to greatness." Coming to specifications, he

[1] Charles A. Beard, *Harper's Magazine* (December, 1931), Vol. 164, pp. 13–22.

particularly attacked a point in the report, that "compulsory unemployment insurance is feasible." Realizing that Mr. Wickersham was a specialist in individualism, since he was the chief author of a collective report from which each individual signer apparently dissented, the congregated deputies at Denver voted down the proposal that the commission's statement should be taken as "representing the mind of the Church," and substituted a mere pious recommendation that it should be given "careful consideration" by members of the Church. Such, at least, is the story reported in the press.

This is only one of many straws in the wind indicating a movement to exalt rugged individualism into a national taboo beyond the reach of inquiring minds. From day to day it becomes increasingly evident that some of our economic leaders (by no means all of them) are using the phrase as an excuse for avoiding responsibility, for laying the present depression on "Government interference," and for seeking to escape from certain forms of taxation and regulation which they do not find to their interest. If a smoke screen big enough can be laid on the land, our commercial prestidigitators may work wonders—for themselves.

Still more direct evidence confirms this view. For example, in the autumn of 1930, a New York bank published, as a kind of revelation from on high, a slashing attack on "Government interference with business," written by that stanch English Whig, Macaulay, a hundred years ago; and a few weeks later one of the leading advertising firms took a whole page in the *New York Times* to blazon forth the creed anew under the captivating head: "Cheer Up! Our Best Times Are Still Ahead of Us!" And the whole gospel was summed up in these words from Macaulay: "Our rulers will best promote the improvement of the people by strictly confining themselves to their own legitimate duties—by leaving capital to find its most lucrative course, commodities their fair price, industry and intelligence their natural reward, idleness and folly their natural punishment—by maintaining peace, by defending property, by diminishing the price of law, and by observing strict economy in every department of the State. Let the Government do this—the people will assuredly do the rest." In other words, here was put forth in the name of American business, with all the pontifical assurance that characterized Macaulay's shallowest sophistry, the pure creed of historic individualism, and here was served on the Government and people of the United States a warning revelation of confident expectations.

A year later, in a release to the press, Mr. Otto Kahn discussed the subject of planning and intimated that the fortunate position of France to-day is to be ascribed to the fact that the French Government interferes less with business than does the Government of Germany or Great Britain, with the implication that the United States might profit from this experience.

About the same time the Honorable Newton D. Baker made a long address at Williamstown which was evidently designed to show that nothing important could be done in the present crisis by the Federal Government, except perhaps in the way of tariff reduction by international agreement. And now comes from Chicago the announcement that a number of rugged business men are forming a national association to combat Government in business, to break up this unholy alliance. There is not a professional lunching-and-dining fellowship in America that is not now applauding to the echo such ringing cries as "Let Us Alone," "Take Government Out of Business," "Hands Off," "Unburden Capital." With an eye on such straws in the wind, President Hoover publicly states that all notions about planned economy come out of Russia, thus placing such distinguished men as Gerard Swope and Owen D. Young under the horrible Red ban. As one of the high-powered utility propagandists recently explained, the best way to discredit an opponent is to pin a Red tag on him—without reference to his deserts, of course.

Hence it is important to ask, calmly and without reference to election heats, just what all this means. In what way is the Government "in business" and how did it get there? Here we climb down out of the muggy atmosphere of controversy and face a few stubborn facts. They are entered in the indubitable records of the Government of the United States and are as evident as the hills to them that have eyes to see. Let us catalogue a few of them *seriatim* for the first time in the history of this adventure in logomachy.

1. *Government Regulation of Railways, from 1887 to the last Act of Congress.* How did the Government get into this business? The general cause was the conduct of railway corporations under the rule of rugged individualism—rebates, pools, stock watering, bankruptcy-juggling, all the traffic will bear, savage rate slashing, merciless competition, and the rest of it. If anyone wants to know the facts, let him read the history of railroading in the sixties, seventies, and early eighties, or, if time is limited, the charming illustrations presented in Charles Francis Adams' "A Chapter of Erie." And what was the immediate cause of the Government's intervention? The insistence of business men, that is, shippers, who were harassed and sometimes ruined by railway tactics, and of farmers, the most rugged of all the rugged individualists the broad land of America has produced. And the result? Let the gentle reader compare the disastrous railway bankruptcies that flowed from the panic of 1873, including bloodshed and arson, with the plight of railways now, bad as it is. Government regulation is not a utopian success, but it is doubtful whether any of our great business men would like to get the Government entirely out of this business and return to the magnificent anarchy of Jay Gould's age. . . .

2. *Waterways* Since its foundation the Government has poured hun-

dreds of millions into rivers, harbors, canals, and other internal improvements. It is still pouring in millions. Some of our best economists have denounced it as wasteful and have demonstrated that most of it does not pay in any sense of the word. But President Hoover, instead of leaving this work to private enterprise, insists on projecting and executing the most elaborate undertakings, in spite of the fact that some of them are unfair if not ruinous to railways. Who is back of all this? Business men and farmers who want lower freight rates. There is not a chamber of commerce on any Buck Creek in America that will not cheer until tonsils are cracked any proposal to make the said creek navigable. Dredging companies want the good work to go on, and so do the concerns that make dredging machinery. Farmers are for it also and they are, as already said, the ruggedest of rugged individuals—so rugged in fact that the vigorous efforts of the Farm Board to instill cooperative reason into them have been almost as water on a duck's back.

3. *The United States Barge Corporation.* Who got the Government into the job of running barges on some of its improved waterways? Certainly not the Socialists, but good Republicans and Democrats speaking for the gentlemen listed under 2 above.

4. *The Shipping Business.* The World War was the occasion, but not the cause of this departure. For more than half a century the politicians of America fought ship subsidies against business men engaged in the ship-building and allied industries. At last, under the cover of war necessities, the Government went into the shipping business, with cheers from business. Who is back of the huge expenditures for the merchant marine? Business men. Who supports huge subsidies under the guise of "lucrative mail contracts," making a deficit in postal finances to be used as proof that the Government cannot run any business? Business men clamor for these mail subsidies and receive them. Who put the Government into the business of providing cheap money for ship-building? Business men did it. Those who are curious to know how these things were done may profitably read the sworn testimony presented during the investigation of W. B. Shearer's patriotic labors on behalf of the ship-building interests, especially the exhibits showing how money was spent like water "educating" politicians. Who wants navy officers on half pay to serve on privately owned ships? Business men. Who wants the Government to keep on operating ships on "pioneer" lines that do not pay? Business men. And when the United States Senate gets around to investigating this branch of business, it will find more entertainment than the Trade Commission has found in the utility inquest.

5. *Aviation.* The Government is "in" this business. It provides costly airway services free of charge and subsidizes air mail. Who is behind this form of Government enterprise? Gentlemen engaged in aviation and the

manufacture of planes and dirigibles. Then the Government helps by buying planes for national defense. Who is opposed to air mail subsidies? A few despised "politicians."

6. *Canals.* Who zealously supported the construction of the Panama Canal? Shippers on the Pacific Coast who did not like the railway rates. Also certain important shipping interests on both coasts—all controlled by business men. Who insisted that the Government should buy the Cape Cod Canal? The business men who put their money into the enterprise and found that it did not pay. Then they rejoiced to see the burden placed on the broad back of our dear Uncle Sam.

7. *Highway Building.* Who has supported Federal highway aid—the expenditures of hundreds of millions on roads, involving the taxation of railways to pay for ruinous competition? Everybody apparently, but specifically business men engaged in the manufacture and sale of automobiles and trucks. Who proposes to cut off every cent of that outlay? Echoes do not answer.

8. *The Department of Commerce, its magnificent mansion near the Treasury Department, and its army of hustlers scouting for business at the uttermost ends of the earth.* Who is responsible for loading on the Government the job of big drummer at large for business? Why shouldn't these rugged individualists do their own drumming instead of asking the taxpayers to do it for them? Business men have been behind this enormous expansion, and Mr. Hoover, as Secretary of Commerce, outdid every predecessor in the range of his activities and the expenditure of public money. Who proposes to take the Government out of the business of hunting business for men who ought to know their own business?

9. *The Big Pork Barrel—appropriations for public buildings, navy yards, and army posts.* An interesting enterprise for the United States Chamber of Commerce would be to discover a single piece of pork in a hundred years that has not been approved by local business men as beneficiaries. When Ben Tillman shouted in the Senate that he intended to steal a hog every time a Yankee got a ham, he knew for whom the speaking was done.

10. *The Bureau of Standards.* Besides its general services, it renders valuable aid to business undertakings. Why shouldn't they do their own investigating at their own expense, instead of turning to the Government?

11. *The Federal Trade Commission.* Who runs there for rulings on "fair practices"? Weary consumers? Not often. Principally, business men who do not like to be outwitted or cheated by their competitors. If we are rugged individualists, why not let every individualist do as he pleases, without invoking Government intervention at public expense?

12. *The Anti-Trust Acts.* Business men are complaining against these

laws on the ground that they cannot do any large-scale planning without incurring the risk of prosecution. The contention is sound, but who put these laws on the books and on what theory were they based? They were the product of a clamor on the part of farmers and business men against the practices of great corporations. Farmers wanted lower prices. Business men of the smaller variety objected to being undersold, beaten by clever tricks, or crushed to the wall by competitors with immense capital. And what was the philosophy behind the Sherman Act and the Clayton Act? Individualism, pure and undefiled. "The New Freedom" as President Wilson phrased it in literary language. "Break up the trusts and let each tub stand on its own bottom." That was the cry among little business men. As lawyers put it in their somber way, "the natural person's liberty should not be destroyed by artificial persons known as corporations created under the auspices of the State." Whether any particular business man is for or against the anti-trust laws depends upon his particular business and the state of its earnings.

13. *The Tariff.* On this tender subject it is scarcely possible to speak soberly. It seems safe to say, however, that if all the business men who demand this kind of "interference"—with the right of capital to find its most lucrative course, industry and intelligence their natural reward, commodities their fair price, and idleness and folly their natural punishment—were to withdraw their support for protection, cease their insistence on it, then the politicians would probably reduce the levy or go over to free trade; with what effect on business no one can correctly predict. At all events there are thousands of business men who want to keep the Government in the business of protecting their business against foreign competition. If competition is good, why not stand up and take it?

14. *The Federal Farm Board.* This collectivist institution is the product of agrarian agitation, on the part of our most stalwart individualists, the free and independent farmers; but President Hoover sponsored it and signed the bill that created it. Now what is its avowed purpose as demonstrated by the language of the statute, the publications of the Farm Board, and the activities carried out under its auspices? It is primarily and fundamentally intended to stabilize prices and production through cooperative methods. And what has the Board done? It has encouraged the development of cooperation as distinguished from individualism among farmers; it has financed cooperative associations; it has denounced individualistic farmers who insist on growing as much as they please, and has tried to get them to increase their earnings by a common limitation of production. If the Agricultural Marketing Act means anything, if the procedure of the Farm Board is not a delusion, then cooperation is to be substituted for individualism in agricultural production and marketing. If there is ever to be a rational adjustment of supply to demand in this field, the spirit

and letter of President Hoover's measure must be realized through organized action by millions of farmers under Federal auspices. The other alternative is simon-pure individualism: let each farmer produce what he likes, as much of it as he likes, and sell it at any price he can get. But under the happy title "Grow Less—Get More," the Farm Board has given instructions to farmers: "One thing the successful manufacturers learned long ago was that they could not make money when they produced more than they could sell at a profit." The obvious moral is for farmers to get together under Government leadership or hang separately.

15. *The Moratorium and Frozen Assets.* The latest form of Government interferences with "the natural course" of economy is the suspension of payments due the United States from foreign powers on account of lawful debts and the proposal to give public support to "frozen assets." What was the source of inspiration here? American investment bankers having got themselves into a jam in their efforts to make easy money now demand Government assistance. In 1927 one of the most distinguished German economists told the writer of this article that the great game in his country, as in other parts of Europe, was to borrow billions from private bankers in the United States, so that it would ultimately be impossible to pay reparations, the debts due the Federal Government, *and* then the debts owed to private parties. The expected result? American bankers would then force their Government to forego its claims for the benefit of private operators who wanted to make bankers' commissions and eight or ten per cent on their money. Well, the game worked. American taxpayers are to be soaked and American bankers are to collect—perhaps.

And what is a "frozen asset"? It is a gaudy name for a piece of paper representing a transaction in which the holder expected to get a larger return than was possible on a prudent, rock-bottom investment. A Hartford, Connecticut, municipal four is not frozen; a holder can get better than par in the present dark hour of Wall Street's sorrows. A seven per cent Western farm mortgage is frozen tight—and ought to be, and the holder frozen with it. So is a Bolivian seven. Why should there be Federal interference to save investors from reaping the fruits of their folly and greed? No reason, except that the latter want the Government to bring home their cake so that they can eat it. The trouble is that American capital, in finding "its most lucrative course," has fallen into a slough, and if it gets out with its gains intact the Government must bring a derrick to hoist it.

In this survey of a few leading economic activities of the Federal Government the emphasis is not critical; so far as the present argument is concerned, any or all of these functions may be justified with respect to national interest. Indeed it is difficult to find any undertaking of the Government which is not supported by some business men on the ground of

national defense. In the early days of our history even those statesmen who generally espoused free trade or low tariffs were willing to concede the importance of making the nation independent in the manufacture of munitions of war. And in the latest hour, subsidies to the merchant marine, to aviation, and to waterways development are stoutly defended in the name of preparedness. Transforming a creek into a river navigable by outboard motor boats can be supported by military engineers on the theory that it gives them practice in their art. No; the emphasis here is not critical. The point is that the Federal Government does not operate in a vacuum, but under impulsion from without; and all of the measures which put the Government into business have been supported by rugged individualists—business men or farmers or both. The current tendency to describe the Government as a meddling busybody, prying around and regulating for the mere pleasure of taking the joy out of somebody's life, betrays an ignorance of the facts in the case. The Government of the United States operates continually in the midst of the most powerful assembly of lobbyists the world has even seen—the representatives of every business interest that has risen above the level of a corner grocery; and there is not a single form of Government interference with business that does not have the approval of one or more of these interests—except perhaps the taxation of incomes for the purpose, among other things, of paying the expenses of subsidizing and regulating business.

For forty years or more there has not been a President, Republican or Democrat, who has not talked against Government interference and then supported measures adding more interference to the huge collection already accumulated. Take, for instance, President Wilson. He made his campaign in 1912 on the classical doctrine of individualism; he blew mighty blasts in the name of his new freedom against the control of the Government by corporate wealth and promised to separate business and Government, thus setting little fellows free to make money out of little business. The heir of the Jeffersonian tradition, he decried paternalism of every kind. Yet look at the statutes enacted under his benign administration: the trainmen's law virtually fixing wages on interstate railways for certain classes of employees; the shipping board law; the Farm Loan Act; Federal aid for highway construction; the Alaskan railway; the Federal Reserve Act; the Water Power Act; and all the rest of the bills passed during his régime. Only the Clayton anti-trust law can be called individualistic. No wonder Mr. E. L. Doheny exclaimed to Mr. C. W. Barron that President Wilson was a college professor gone Bolshevist! And why did Democrats who had been saying "the less government the better" operate on the theory that the more government the better? Simply because their mouths were worked by ancient memories and their actions were shaped by inexorable realities.

Then the Republicans came along in 1921 and informed the country that they were going back to normalcy, were determined to take the Government out of business. Well, did they repeal a single one of the important measures enacted during the eight years of President Wilson's rule? It would be entertaining to see the Sanhedrim of the United States Chamber of Commerce trying to make out a list of laws repealed in the name of normalcy and still more entertaining to watch that august body compiling a list of additional laws interfering with "the natural course of business" enacted since 1921. Heirs of the Hamiltonian tradition, the Republicans were not entitled to talk about separating the Government from business. Their great spiritual teacher, Daniel Webster, a pupil of Hamilton, had spoken truly when he said that one of the great reasons for framing the Constitution was the creation of a government that could regulate commerce. They came honestly by subsidies, bounties, internal improvements, tariffs, and other aids to business. What was the trouble with them in the age of normalcy? Nothing: they just wanted their kind of Government intervention in the "natural course of industry." Evidently, then, there is some confusion on this subject of individualism, and it ought to be examined dispassionately in the light of its history with a view to discovering its significance and its limitations; for there is moral danger in saying one thing and doing another—at all events too long.

Historically speaking, there are two schools of individualism: one American, associated with the name of Jefferson, and the other English, associated with the name of Cobden. The former was agrarian in interest, the latter capitalistic. Jefferson wanted America to be a land of free, upstanding farmers with just enough government to keep order among them; his creed was an agrarian creed nicely fitted to a civilization of sailing ships, ox carts, stagecoaches, wooden plows, tallow dips, and home-made bacon and sausages; and since most of the people in the United States, during the first century of their independence, were engaged in agriculture, they thought highly of Jefferson's praise of agriculture and his doctrine of anarchy plus the police constable. Cobden's individualism was adapted to capitalist England at the middle of the nineteenth century—early industrial England. At that moment his country was the workshop of the world, was mistress of the world market in manufactured commodities, and feared no competition from any foreign country. English capitalists thus needed no protective tariffs and subsidies and, therefore, wanted none. Hence they exalted free trade to the level of a Mosaic law, fixed and eternal. They wanted to employ labor on their own terms and turn working people out to starve when no profitable business was at hand; so they quite naturally believed that any Government interference with their right to do as they pleased was "bad." Their literary apologist, Macaulay,

clothed their articles of faith in such magnificent rhetoric that even the tiredest business man could keep awake reading it at night.

Closely examined, what is this creed of individualism? Macaulay defines it beautifully in the passage which the New York bank and our happy advertising agency quoted so joyously. Let the Government maintain peace, defend property, reduce the cost of litigation, and observe economy in expenditure—that is all. Do American business men want peace all the time, in Nicaragua, for instance, when their undertakings are disturbed? Or in Haiti or Santo Domingo? Property must be defended, of course. But whose property? And what about the cost of litigation and economy in expenditures? If they would tell their hired men in law offices to cut the costs of law, something might happen. As for expenditures, do they really mean to abolish subsidies, bounties, and appropriations-in-aid from which they benefit? Speaking brutally, they do not. That is not the kind of economy in expenditures which they demand; they prefer to cut off a few dollars from the Children's Bureau.

Then comes Macaulay's system of private economy: let capital find its most lucrative course alone, unaided: no Government tariffs, subsidies, bounties, and special privileges. That is the first item. Do American business men who shout for individualism believe in that? Certainly not. So that much is blown out of the water. Macaulay's next item is: let commodities find their fair price. Do the gentlemen who consolidate, merge, and make price understandings want to allow prices to take their "natural course"? By no means; they are trying to effect combinations that will hold prices up to the point of the largest possible profit. Macaulay's third item is: let industry and intelligence receive their natural reward. Whose industry and intelligence and what industry and intelligence? When these questions are asked all that was clear and simple dissolves in mist.

Then there is Macaulay's last item: let idleness and folly reap their natural punishment. That was a fundamental specification in the bill of Manchesterism. Malthus made it a law for the economists: the poor are poor because they have so many babies and are improvident; nothing can be done about it, at least by any Government, even though it enforces drastic measures against the spread of information on birth control. Darwin made a natural science of it: biology sanctified the tooth and claw struggle of business by proclaiming the eternal tooth and claw struggle of the jungle. If the Government will do nothing whatever, all people will rise or sink to the level which their industry or idleness, their intelligence or folly commands. No distinction was made between those who were idle because they could find no work and those who just loved idleness for its own sake—either in slums or mansions. Those who hit bottom and starved simply deserved it. That is the good, sound, logical

creed of simon-pure individualism which Herbert Spencer embedded in fifty pounds of printed matter. To him and all his devotees, even public schools and public libraries were anathema: let the poor educate themselves at their own expense; to educate them at public expense is robbery of the taxpayer—that industrious, intelligent, provident person who is entitled to keep his "natural reward."

Do any stalwart individualists believe that simple creed now? Not in England, where Liberals, professing to carry on the Cobden-Bright tradition, vote doles for unemployed working people. Why not let idleness and folly get their natural punishment? Why not, indeed? There must be a reason. Either the individualists betray their own faith, or, as some wag has suggested, they are afraid that they might find themselves hanging to a lantern if they let the idle and the foolish starve, that is, reap the natural punishment prescribed by Macaulay. Nor do American individualists propose to let nature take her course in this country. There is no danger of revolution here; as Mr. Coolidge has said, "we have had our revolution"; yet business men agree with the politicians on feeding the hungry. It is true that they seem to be trying to obscure the issues and the facts by talking about the beneficence of private charity while getting most of the dole from public treasuries; but that is a detail. Although our rugged individualists advertise Macaulay's creed, their faith in it appears to be shaky or their courage is not equal to their hopes. Then why should they try to delude themselves and the public?

There is another side to this stalwart individualism that also deserves consideration. Great things have been done in its name, no doubt, and it will always have its place in any reasoned scheme of thinking. Individual initiative and energy are absolutely indispensable to the successful conduct of any enterprise, and there is ample ground for fearing the tyranny and ineptitude of Governments. In the days of pioneering industry in England, in our pioneering days when forests were to be cut and mountain fastnesses explored, individualism was the great dynamic which drove enterprise forward. But on other pages of the doom book other entries must be made. In the minds of most people who shout for individualism vociferously, the creed, stripped of all flashy rhetoric, means getting money, simply that and nothing more. And to this creed may be laid most of the shame that has cursed our cities and most of the scandals that have smirched our Federal Government.

That prince of bosses, Croker, put the individualist creed in its bare logical form when he said that he was working for his own pocket all the time, just as "every man in New York is working for his pocket." Fall, Doheny, and Sinclair were all splendid individualists; they explained that they hoped to make money out of their transactions, even while they covered their operations with the mantle of patriotism—national defense. Tam-

many judges, Connolly and his iron pipe, Doyle with his split fees, and policemen growing rich on vice are all individualists of the purest brand. W. B. Shearer collecting money from ship-building concerns to make a naval scare so that they might increase their profits belongs to the same school. Britten, bringing a fleet to Montauk Point to boom real estate in which he is interested, does nothing reprehensible under the Manchester creed; his capital is finding "its most lucrative course." Wilder and Bardo, representing shipping interests, when they spend money in Washington "educating" members of Congress, are following the law of the game. They are perfect individualists. The ruinous chaos in coal and oil is to be attributed to the same Darwinian morality. Finally, Al Capone, with his private enterprise in racketeering, is a supreme individualist: he wants no Government interference with his business, not even the collection of income taxes; if he is "let alone" he will take care of himself and give some money to soup kitchens besides.

The cold truth is that the individualist creed of everybody for himself and the devil take the hindmost is principally responsible for the distress in which Western civilization finds itself—with investment racketeering at one end and labor racketeering at the other. Whatever merits the creed may have had in days of primitive agriculture and industry, it is not applicable in an age of technology, science, and rationalized economy. Once useful, it has become a danger to society. Every thoughtful business man who is engaged in management as distinguished from stock speculation knows that stabilization, planning, orderly procedure, prudence, and the adjustment of production to demand are necessary to keep the economic machine running steadily and efficiently. Some of our most distinguished citizens—Owen D. Young, Gerard Swope, Nicholas Murray Butler, and Otto Kahn, for example—have, in effect, warned the country that only by planning can industry avoid the kind of disaster from which we are now suffering; on all sides are signs of its coming—perhaps soon, perhaps late, but inevitably.

And all of them know that this means severe restraints on the anarchy celebrated in the name of individualism. The task before us, then, is not to furbish up an old slogan, but to get rid of it, to discover how much planning is necessary, by whom it can best be done, and what limitations must be imposed on the historic doctrine of Manchesterism. And to paraphrase Milton, methinks puissant America, mewing her mighty youth, will yet kindle her undazzled eyes at the full midday beam, purge and unscale her long abused sight, while timorous and flocking birds, with those that love the twilight, flutter about, amazed at what she means, and in their envious gabble would prognosticate a year of sects and schisms.

89. THESE GOVERNMENT CORPORATIONS [1]

IN RECENT years government corporations have become increasingly important in our economic life. The Tennessee Valley Authority is one of the most notable of these, but there are many others, such as the Reconstruction Finance Corporation, the Federal Deposit Insurance Corporation, and the Export-Import Bank. Unfortunately the general public is largely unacquainted with the advantages and disadvantages of these enterprises or their organization. Professor Dimock here explains the three principal varieties of public corporations, the problems incident to their use, and the principles that should be followed in their development.

IN THE recent uproar over the nomination of Henry A. Wallace to succeed Jesse Jones as secretary of commerce, the chief hue and cry was over the immense lending powers of the Reconstruction Finance Corporation, which senators were unwilling to put into Mr. Wallace's hands. What attracted almost no attention, but is for the long run much more vital, was the impersonal issue behind the personal issue. The RFC is but one of a fleet of government corporations, the lending powers of these corporations constitute only a part of their potential authority, and too little thought has been given to the question how they shall be managed and controlled. The mere notion that one man—whether Mr. Wallace or Mr. Jones or some other—could personally dictate how this authority should be wielded threw into relief the fact that in the government corporation we have an instrument of imposing and potentially irresponsible power.

For the first time in our national history, these government corporations swing a commanding weight. What private corporation do you regard as monstrously big? The U.S. Steel Corporation? The American Telephone and Telegraph Company? General Motors? Well, the RFC is several times larger than any of them. It is the country's biggest banker. It alone has pumped out some thirty billions of dollars since 1932—more than the total value of all manufacturing plants in the United States at the beginning of the present war. And the RFC, though the biggest government corporation we have, is but one of a score whose authorizations and disbursements sound like the total national income before the war.

Take the matter of capital stock. The RFC is capitalized for $500 million; the Federal Deposit Insurance Corporation, for $300 million; the Smaller War Plants Corporation, for $150 million; while the authorization of the Export-Import Bank is $700 million.

[1] Marshall Edward Dimock, *Harper's Magazine* (May, 1945), Vol. 190, No. 1140, pp. 569 ff.

Take the property they command. At present the Defense Plant Corporation, a subsidiary of the RFC, owns outright 920 plants representing an investment of approximately six billion dollars, and has invested some three-quarters of a billion more for the expansion of 122 others, whose products include steel, aircraft, chemicals, machine tools, aluminum, synthetic rubber, and ordnance. As the Chicago *Tribune* said as early as 1935, "Using powers granted to it through these corporations, the government under the New Deal could manufacture anything from carpet tacks to steam engines."

This is big stuff indeed. And although it has grown vastly bigger by reason of war, it will not necessarily dwindle afterwards. Ours has become a mixed economy; regulations and subsidies are extensive and a large chunk of business is now government owned or government controlled. If trends are reliable guides, we shall see more government participation in business after the war than before it. Public opinion seems likely to force upon the government the role of stabilizer of the national economy. We may find government corporations being used as instruments to this end, engaging in peacetime operations on an immense scale.

For some purposes they may prove appropriate and useful instruments. But we cannot expect them to operate responsibly and efficiently unless the peculiar advantages and dangers to which they are subject are well understood—not only by the officials who administer them, and the members of Congress, but also by a wide-awake citizenry.

The first thing which we need to bear in mind is that the issue here is not between unregulated private enterprise and straight old-style socialism. There is a broad middle ground. What we call a private corporation is itself, in part, a creature of the state. Ever since the Romans adopted the *corporatio* ("association") before the Christian era, governments have chartered groups of individuals and given them privileges, powers, and immunities. From the end of the fifteenth century and for some two hundred years thereafter the "sovereign" kept a fairly tight rein on these privileged groups of business enterprisers. Later, incorporation could be had for the asking and the controls virtually disappeared. In recent years, however, the pendulum has been swinging back, "private" corporations are now being reminded of the historical circumstances from which they emerged, and more emphasis is being placed upon their public obligations. And meanwhile governments have added something new: they have incorporated their own economic ventures, thus setting up government enterprises that operate much like private corporations.

Why? Is there any special virtue in the corporate device? Business men universally testify that there is. The corporation is the most effective means yet invented whereby men—and government, too—may participate in a side issue, an activity apart from that to which they devote their princi-

pal time. This is done by concentrating managerial powers in the hands of competent people and giving them free enough rein to finance and management to achieve the desired results. Autonomy is the chief virtue of the corporation—greater even than corporate personality, limited liability, or perpetuity. It is the privilege of being left alone so long as you do not overstep the rules laid down in advance. Autonomy of management produces unity and requires freedom from outside interference—conditions precedent to the best managerial results in any field.

The nineteenth-century method of operating a public business was through the ordinary department of government. If Manchester, for example, wanted to manufacture and distribute electricity, the city fathers merely added another department to those already in existence, and subjected it to the same fiscal, personnel, and legal controls. The same was true of the British government's operation of the telephone and telegraph systems, or government operation of railroads generally, or our own post office system—a government department did the job.

Why the change to the corporation? Almost all of the new ventures in public ownership since 1900, the world over, have taken the corporate form. In Europe it has been the mixed enterprise and the government-owned corporation; in Great Britain the public utility trust; in the United States and Canada, and in Australia and New Zealand as well, the government-owned corporation; in Soviet Russia the state trust; in China the government-owned corporation. But whatever the names and the differences, all have shared in most of the generic characteristics of corporateness—separate identity, investment in a side issue, self-financing, profit and loss calculations, administrative autonomy, and the right to sue and be sued.

This has happened for several reasons. As compared with the public corporation, the traditional government department lacks continuity because of changing political fortunes. Its unity of management is weakened by central financial and personnel controls, such, for example, as the Civil Service Commission and the General Accounting Office in our own federal government. Because the department receives appropriations from a legislature and turns its surpluses and net earnings into the general treasury, the department is less responsive to a sudden need for flexibility. And its management, being subject to civil service rules and other rigid, centralized controls, lacks the independence necessary to outstanding business success.

One must admit that, despite all these disadvantages, some departmental enterprises—such as, for example, the British Post Office and the Los Angeles Department of Water and Power—have proved wholly adequate, judged by private business standards. Generally speaking, however, private enterprise has an advantage over departmentalism in its greater man-

agerial and financial freedom, and governments share these advantages when they adopt the corporate form of organization.

Public corporations have had some very conservative sponsors. In the nineteenth-century heyday of municipal socialism, leaders such as Joseph Chamberlain in England and Bismarck in Germany put many municipalities into the water, gas, traction, electricity, and telephone businesses. And when, in various countries, these experiments were succeeded by ventures on a national scale—chiefly in transportation, communications, housing, and finance—it was not ordinarily because of the influence of socialistic doctrine; more often the people behind these ventures were individualists, distrustful of the business operations of ordinary government departments. A perfect example is the fact that the RFC was created by Herbert Hoover, author of *American Individualism*.

The reasons why governments have gone into business have been varied. First, of course, they have done it for wartime operations, when private interest must be subordinated to the need for central planning, operation, and control. Second, for emergency purposes in a depression—for when a craft is sinking, men are not particular as to who does the bailing out. Third, for long-range purposes connected with the national interest, as when a Conservative government in Britain established a state-controlled nationwide electricity grid in 1926 because cheap power meant world markets and would also facilitate the national defense in wartime. Fourth, because of public fear of private monopoly; sometimes consumers say, "Monopoly is bad enough under any circumstances; but if we must have it, it is better that the government which represents all of us should operate it." Fifth, because of considerations of profit. These work two ways: sometimes an enterprise is unloaded on the public if it becomes unprofitable but remains essential; sometimes it is taken over by the government if its profits are so high that consumers are angered. Sixth and last, because the job which has needed doing has been one for which private capital could not easily be secured, either on account of the large amount needed—as in the case of railroading in some countries—or because of the risk involved—as in the case of waterway transportation for public hire generally.

II

If we in the United States are to use the public corporation wisely and dodge the pitfalls that accompany it, we should be well aware that the form with which we are most familiar here is not the only one.

There are three principal varieties of the public corporation:

1. The *mixed enterprise*, in which both public and private ownership combine to form a corporate partnership;

2. The *public utility trust*, in which ownership is private, profits are

limited by charter, and management is provided by the government; and

3. The *government-owned corporation,* where both ownership and management are public.

Which of these forms takes hold in any given country seems to be largely the result of chance. An experiment is tried, it seems to work, it is repeated, and presently the original experience has become a precedent. Certainly there is little logic in the fact that France has tended to prefer the mixed enterprise, Britain the public utility trust, and Germany the government-owned corporation, whereas here in the United States, although our social tradition resembles those of England and France more than that of Germany, we have used the government-owned corporation almost exclusively. It all goes back to our first American experiment in the field, over forty years ago; the United States government's purchase of the capital stock of the Panama Railroad Company, back in 1904.

This enterprise, which had helped to make Russell Sage wealthy, had been chartered under the laws of New York state in 1849 and for fifty-five years had been operated as a private venture. When the government took it over at the time the Panama Canal was built, the corporation's momentum and traditions succeeded in keeping its private corporate features remarkably intact. It has a real board of directors, finances itself without appropriations, makes its own rules of internal management, and has remained a true business concern. Congress has not seen fit to rock the boat—partly, perhaps, because Panama is far away. The Panama Railroad Company has been very profitable, having earned an annual return of 10 per cent on its capital stock in addition to investing millions of dollars from reserves in extensions and improvements. It has been a remarkably efficient enterprise. In consequence of its early success, it became an example for other American ventures in public business.

These have fallen into six main groups: transportation, represented by the Panama Railroad Company and the Inland Waterways Corporation; banking, of which the Export-Import Bank and the Federal Deposit Insurance Corporation are examples; industrial credit, a field occupied by the RFC and a half-dozen wartime subsidiaries which purchase and produce essential commodities and finance manufacturing plants; housing, including the Defense Homes Corporation, the U.S. Housing Corporation, and the Home Owners' Loan Corporation (its three billions of outlay now in process of liquidation); and regional development and power, represented, of course, by the Tennessee Valley Authority.

In general, these later ventures have followed the pattern laid down in 1904. But not always wisely, as we shall see, and on the whole with striking disregard of the experience of other countries with other forms of government participation in business. If in the future the United States government is to steer a wise course in organizing business enter-

prises, those who have the power of decision ought first to know what the alternative forms are, why they are, and what can be learned from them. Only then can the right administrative answer be found for each distinctive problem.

So let us look at these other forms which have worked well elsewhere.

The mixed enterprise (*public and private owners joining as partners*) was an outstanding social development in Europe after World War I, and it seems likely that many countries will take up where they left off at the outbreak of World War II. The resistance groups in France, for example, are bringing strong pressure on General de Gaulle to nationalize important sectors of the economy, and provisional nationalization has already been applied to the coal mines in the north. De Gaulle, however, insists that France will go back as soon as possible to her private ownership tradition, and recently shelved a report in favor of nationalization which had been submitted to him and his cabinet by M. Mendès-France, Minister of National Economy. Given this situation, and bearing in mind the vast amounts of capital required to rebuild the French productive capacity, it seems safe to predict that France will make extensive use of the mixed enterprise.

Every country in Europe has widely employed this device. In Germany, it took root even before the turn of the century. Used at first chiefly to run gas works and street railways and to supply electricity, it was later adopted for slaughterhouses, insurance companies, banks, garages, and even milk supply on a wide scale. There is no apparent limit to its use. In some countries the government was required to hold a majority of the stock; in others it was not allowed to. The French law, for example, limited the public share to 40 per cent. Representation on the board of directors was usually proportionate to the percentage of stock ownership. In Germany the public members typically predominated, while in France the opposite was true. Even the management was divided, the majority selecting the president, the minority the vice-president.

The mixed enterprise took root and spread rapidly for a variety of reasons. Private enterprise needed help; or voters wanted to establish government ownership but did not possess sufficient tax revenues to purchase more than a portion of the enterprise; or the mixed enterprise was considered a substitute for regulation; or governments saw the advantages of a business income in lieu of higher taxes; or the mixed enterprise seemed a useful weapon with which to fight monopolies and cartels.

On the whole, the mixed enterprise has proved successful. Its extensive use and the variety of fields it has entered indicate wide public acceptance. It has two major weaknesses: first, it violates the principle of unified management, because competing public and private interests are likely to disagree within the management as well as within the board—a

problem which might be minimized by not trying to make the management representative of both interests; and second, consumers sometimes object that rates are too high because the government has an interest in profits and there is no outside check.

In the United States we have few examples of the mixed enterprise, though the Federal Reserve System, the Boston Elevated Railway, and some of the joint agricultural banks are analogous. It would not be surprising, however, if at some time in the future we adopted it more widely because of its special advantages.

The public utility trust is a British device—*a chartered enterprise in which ownership is private but management is chosen by the government.* Although stock is issued or exchanged, the holder possesses no voting rights and receives a fixed rate of interest, more like income from a debenture bond than like a fluctuating dividend. The British argue that if you write the profit limitation into the charter, the fundamental problem of public control over monopolies has been solved.

Both the Conservative and Labor parties have fostered the public utility trust. This in itself seems to indicate that the idea has merit. The public corporation is the efficient substitute for regulation. "A regulated business," according to most British business men, "is worse than no business at all." It sets up one group of men to watch another, mistakes the number of regulations for their effectiveness, makes unity of management impossible, produces a repressed instead of a growing economy. Labor, on the other hand, argues that regulation has been "timid" and generally ineffective. "The problem is, at bottom, one of devising means for securing, both initially and continuously, an enlightened, efficient, and progressive management," a leading British executive has said. "Checks and controls can do little to secure this; they may arrest the criminal but they cannot make him good."

The answer to both lines of attack is thought to be the public utility trust. Thus the British formula for the regulation of monopolies is to make the controls inherent and automatic and then set the management free—as free as in any private enterprise. The rate of return on public utility trusts ranges from 3 to 5 per cent. Earnings above that may be used for replacements, expansion, or surplus, but beyond a certain point they must lead to reductions in price, because fluctuating profits are strictly out.

The success of this system depends largely upon the caliber of the trustees appointed. The Central Electricity Board was created in 1926, the British Broadcasting Corporation in 1927, the London Passenger Transport Board in 1933. The requirements for board membership are generally the same and are set forth in the charters: broad business or executive experience, success in one's field, demonstrated attachment to the public interest, and

no axe to grind. Both political parties have respected the tradition of filling vacancies with men from other than their own political party. The appointments are made by the appropriate minister (postmaster general for BBC, minister of transport for CEB and LPTB), after conference with the prime minister. Board members are well paid. The chairman of the BBC, for example, receives the equivalent of $15,000 a year, while the other members are paid a third of this amount; none gives his full time to the job. The board picks the management, which in turn is amply remunerated. The head of London Transport, for example, receives the equivalent of $65,000 a year. Members of Parliament may ask questions of the appropriate minister relating to the conduct of the public utility trusts, but the ministers do not interfere with the boards or their managements.

The public utility trusts have been a success. They will probably be extended after the war, one of the most likely fields being coal mining, when nationalized. Their securities have always sold at a premium. It is generally agreed that boards and management have been well chosen. The business independence and flexibility which it was hoped would result seem to have materialized in practice. Labor relations have been good. Britain has been stronger during the war because of a nationwide electricity grid, a broadcasting system devoted exclusively to entertainment and instruction, and an efficient network of transport in and around greater London.

There are, of course, some criticisms. In broadcasting, for example, the educational programs are said to be too "uplift" in character. The managers of the national grid have occasionally been accused of favoring some particular group of electrical manufacturers. London commuters want cheaper combination fares. More serious are the questions which arise among some labor leaders. Why, they ask, should investors earn a return on money that has been divested of risk and voting participation? And further, is what we mistook for gradual socialization merely a powerful prop to the rentier class? On one point, however, both the right and the left seem to have reached substantial agreement: the public utility trust is more efficient than either regulation or old-style socialism. It is truly the meeting place of individualism and collectivism.

The public utility trust possesses greater managerial unity than the mixed enterprise—more even than the government-owned corporation. In terms of structure, therefore, it should prove the most efficient of the three, although of course there are many other factors to be considered. That we in this country have been so little influenced by it is a matter of surprise, because business leaders who learn about it usually exhibit considerable enthusiasm for the basic formula.

III

Here in the United States, as already noted, we have stuck to the government-owned corporation, following the original Panama experiment, which was blessed with autonomy, a real board of directors, and self-contained financing. Generally speaking, the corporations which the government set up during World War I—such as the Emergency Fleet Corporation and the U.S. Grain Corporation—followed the legitimate corporate pattern. On the other hand, the Inland Waterways Corporation, which was established in 1924, has drifted away from original corporate traditions. It has not been entirely self-financed and throughout most of its history has been officer-dominated rather than guided by a representative board of directors with real powers. And by 1932, when the RFC was created, the corporate model began to lose many of its most important business characteristics. One might have thought that the pattern would have become set by that time, and that the underlying principles might have become ingrained in official thinking. This did not happen.

In two thousand years of corporate history, the term "corporation" has never possessed any kind of innate magic. There is nothing about corporate characteristics that cannot be changed or lost. Romancers such as Blackstone became eloquent about personality, perpetuity, limited liability, and other so-called innate traits, but experience has proved that all of these are subject to loss or profound modification. There is nothing in a device that can keep men from changing it if they will. The only real safeguard is a comprehension of concept and principle by the community.

The really important features of corporations are their freedoms and unities—their autonomy of management and finance. Since 1932, federal corporations in this country have steadily lost sight of these guiding principles. If we are to continue to use the public corporation we had better relearn some of the important things we have forgotten.

The public corporations created in recent years, for example, have generally been run by their officers. In some cases they are a one-man show, with an officer of cabinet rank voting the government's stock and making all the important decisions. (Hence the recent Wallace-Jones fracas.) Under such circumstances the administration of a corporation does not greatly differ from the administration of a department.

The first great problem which faces us, therefore, is what is going to happen to the independent board of directors. This is equally important in the case of private corporations, where the trend is also away from directorships chosen from outside the business. The arguments for officer control are that managers know the business more intimately than

outsiders; that officers give all of their time to the job, as outsiders do not; and that hence there is an economy of time and explanation.

Over against these, however, are considerations which would seem to carry more weight. Ownership requires independent representation if it is to exercise any degree of control. Concentration of power inevitably leads to its abuse. Outside viewpoints help to offset bureaucracy and grooving. Corporations must adjust themselves to larger social forces and hence need the experience of men in larger fields; public attitudes are better judged by nonofficer directors; and last and perhaps most important, the public will have more confidence in an enterprise, and be less inclined to interfere with it, if the traditional separation is continued between layman boards and professional management. History is replete with object lessons demonstrating the force of these principles. Let American business men profit by the trusteeship principle incorporated into public utility trusts. Let federal bureaucrats ponder the loss of corporate identity if representative boards are not reinstated.

Congress has consistently favored the corporate structure. It produces speedy action when time is scarce. But Congress does not seem to comprehend an essential feature of the corporation, namely, that the board of directors performs the role of a "little legislature." If the corporation is to discharge important functions of government and if autonomy is to be safeguarded, a representative group of men acting on behalf of the sovereign legislature must constitute an essential part of its organization. Congress cannot possibly supervise these enterprises itself—they are too many and their operations are far too complex. Yet supervision on behalf of the public is something they emphatically need, lest they be used for personal, political, or even corrupt purposes. Therefore Congress should provide the inner controls through incorporation, and then delegate future policy decisions and the direction of management to the board of directors. This requires an independent board, a separation between the making and execution of policy. A corporation is no stronger than its board of directors. If Congress does not see fit to revitalize this function, the corporation will lose ground in public confidence.

The second great requirement of the successful public corporation is self-contained financing. Ideally, the public corporation should have the right to use subscribed capital; to raise new capital by the issuance of bonds or other evidences of indebtedness; to utilize operating revenues to defray operating expenses, provide working capital, or finance expansions; to build up reserves out of earned income or other revenue; to introduce commercial accounting methods; and to carry on purchasing with ordinary business freedom. In recent years, however, Congress has sometimes insisted upon appropriating funds for public corporations when they could just as well have been borrowed, and has required that net earnings be

turned over to the general treasury even when they were needed at once for the ensuing year's operations. If Congress will not treat the public corporation's finances as business operations, then the public corporation cannot expect to deserve business respect.

There has also been an invasion of personnel freedoms in the management of the public corporation. This type of enterprise differs from ordinary government in that, until recently, it was free from civil service laws. But since 1938, under pressure from the standardizers-at-all-costs in Washington, Congress has almost completely undermined this necessary requirement of business management. Congress should reconsider. The British are under no illusion as to the disadvantages of grafting the "civil service mentality" onto a corporate enterprise. In this country, the Commission of Inquiry on Public Service Personnel laid down the sound rule in 1935 that "Utility undertakings should be excluded from the normal civil service personnel system . . . The personnel problem can be better handled in such cases as a part of management than as a part of government." Said Senator Wadsworth at the time when a corporation was being considered for the Muscle Shoals project, "You may apply civil service rules . . . if you please; but do not expect profits."

IV

If public corporations are to be usefully employed in vital areas of our national economy, we must, therefore, follow certain time-tested principles. They may be summarized as follows:

1. *The corporate device should be used for business purposes only.* Unless sales and profit-and-loss are intrinsic, the government would do better to use the departmental method. The public corporation will lose its virtue if a business operation is combined with nonbusiness programs and the combination is treated as a self-financing unit. (Here something akin to Gresham's Law seems to apply.)

2. *Financial self-sufficiency is necessary to business success.* This is the crux of the matter.

3. *A representative board of directors, chosen for demonstrated ability and attachment to the public interest, should be relied upon to secure public responsibility.* Except for granting the charter and modifying it if need be, Congress should keep hands off and let the board of directors do its proper job. The appropriate cabinet officer should be a member of the board *but should have no more power than his colleagues.*

4. *Business enterprises should develop their own personnel systems free from civil service rules and regulations.*

5. *There should be no exceptions to the rule that public corporations may sue and be sued.*

Congress should move without further delay to enact a model incorporation law for public corporations, setting forth the major principles and the measures of accountability which control corporate functioning. Simultaneously, steps should be taken to repair the breaches in corporate practice which now threaten to reduce this type of enterprise to a hollow symbol. Otherwise we may discover too late that we as a people have delivered huge power into the hands of men who are unable to wield it responsibly and effectively.



CHAPTER XVIII

Government and Labor

90. NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORP.

Supreme Court of the United States, 1936 (Certiorari) 301 U.S. 1

THIS decision holds constitutional the National Labor Relations Act of 1935, which guaranteed to labor the right to collective bargaining and protection from specified unfair labor practices by the employer. The constitutional basis of the act was the commerce clause. The Laughlin Steel Corporation sought to escape from compliance with the act on the ground that its business was intrastate in character and could not be brought under the act. In sustaining the act, the Court emphasized the doctrine that the federal power to control commerce extends also to its protection and advancement. If an action, although seemingly local in character, is of such a character as substantially to effect interstate commerce, then the power of the federal government to regulate such activity is included under the commerce power. The Court held that the act, by providing for collective bargaining and other measures and thus preventing labor disputes in industries engaged in interstate commerce, was directly related to maintaining commerce and therefore constitutional. The case is significant as an example of the broadening of the Court's interpretation of the commerce clause for the purpose of allowing federal regulation, especially when it is set against the Court's previous decisions in the Schechter (*Schechter* v. *U.S.* 295 U.S. 495), and Carter (*Carter* v. *Carter Coal Co.* 298 U.S. 238) cases.

Opinion of the Court

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court:

In a proceeding under the National Labor Relations Act of 1935, the

National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the Act by engaging in unfair labor practices affecting commerce. The proceeding was instituted by the Beaver Valley Lodge No. 200, affiliated with the Amalgamated Association of Iron, Steel and Tin Workers of America, a labor organization. The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. The discriminatory and coercive action alleged was the discharge of certain employees.

The National Labor Relations Board, sustaining the charge, ordered the corporation to cease and desist from such discrimination and coercion, to offer reinstatement to ten of the employees named, to make good their losses in pay, and to post for thirty days notices that the corporation would not discharge or discriminate against members, or those desiring to become members, of the labor union. As the corporation failed to comply, the Board petitioned the Circuit Court of Appeals to enforce the order. The court denied the petition, holding that the order lay beyond the range of federal power. 83 F. (2d) 998. We granted certiorari. . . .

We turn to the questions of law which respondent urges in contesting the validity and application of the Act.

First. The scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble (section one) and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent, and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *Schechter Corp.* v. *United States*, 295 U.S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides:

"Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The Act specifically defines the "commerce" to which it refers (§ 2 (6)):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The act also defines the term "affecting commerce" (§ 2 (7)):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the con-

gressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. . . .

Second. The unfair labor practices in question.—The unfair labor practices found by the Board are those defined in § 8, subdivisions (1) and (3). These provide:

Sec. 8. It shall be an unfair practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . ."

Section 8, subdivision (1), refers to 7, which is as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Thus, in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation, that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. . . .

Third. The application of the Act to employees engaged in production. —The principle involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent's enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce. . . .

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from

other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*Mobile County* v. *Kimball*, 102 U.S. 691, 696, 697); "to foster, protect, control and restrain." *Second Employers' Liability Cases*, [223 U.S. 1, at p. 47]. *Texas & N. O. R. Co.* v. *Railway Clerks*, [281 U.S. 548]. That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." *Second Employers' Liability Cases*, p. 51; *Schechter Corp.* v. *United States*, *supra*. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. *Schechter Corp.* v. *United States*, *supra*. Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree. As the Court said in *Chicago Board of Trade* v. *Olsen*, [262 U.S. 1, at p. 37], repeating what had been said in *Stafford* v. *Wallace*, [258 U.S. 495]: "Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it."

That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. . . .

The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the federal Anti-Trust Act. . . .

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. In the *Schechter* case, *supra*, we found that the effect there was so remote as to be beyond the federal power. To find "immediacy or directness" there was to

find it "almost everywhere," a result inconsistent with the maintenance of our federal system. In the *Carter* case, *supra*, the Court was of the opinion that the provisions of the statute relating to production were invalid upon several grounds,—that there was improper delegation of legislative power, and that the requirements not only went beyond any sustainable measure of protection of interstate commerce but were also inconsistent with due process. These cases are not controlling here.

Fourth. Effects of the unfair labor practice in respondent's enterprise. —Giving full weight to respondent's contention with respect to a break in the complete continuity of the "stream of commerce" by reason of respondent's manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience. . . .

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed

91. UNITED STATES v. DARBY

Supreme Court of the United States, 1941 (Appeal)
312 U.S. 100

THE implications of the Court's decision in this case are far reaching. By a unanimous decision the Court held constitutional the Fair Labor Standards Act of 1938. In reaching this conclusion the Court specifically overruled the old child labor case (*Hammer* v. *Dagenhart*, 247 U.S. 251) and sustained the right of the federal government to prohibit the shipment in interstate commerce of the products of child labor. In addition the Court sustained the power of the federal government under the commerce clause to establish minimum wage and hour regulations for businesses engaged in interstate commerce. In a subsequent case (*Opp Cotton Mills* v. *Administrator*, 312 U.S. 126) the Court likewise sustained the broad discretionary powers granted the Administrator under the act. This case and subsequent ones further expanding its doctrine dealt a body blow to advocates of states' rights and opened the door to the attainment of the goals of a "social service state," especially in the field of labor relations.

Opinion of the Court

MR. JUSTICE STONE delivered the opinion of the Court:

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. A subsidiary question is whether in connection with such prohibitions Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged "in the production and manufacture of goods to wit, lumber, for 'interstate commerce.'"

Appellee demurred to an indictment found in the district court for southern Georgia charging him with violation of § 15 (a) (1) (2) and (5) of the Fair Labor Standards Act of 1938; 52 Stat, 1060, 29 U.S.C. § 201, *et seq.* The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal . . .

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the

Act. Its purpose, as we judiciously know . . . is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. . . .

The indictment charges that appellee is engaged, in the State of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. . . .

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment is thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

. . . The appeal statute limits our jurisdiction on this appeal to a review of the determination of the district court so far only as it is based on the validity or construction of the statute. *United States* v. *Borden Co.*, 308 U.S. 188, 193–195, and cases cited. Hence we accept the district

court's interpretation of the indictment and confine our decision to the validity and construction of the statute.

The prohibition of shipment of the proscribed goods in interstate commerce. Section 15 (a) (1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by § 6 and § 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. . . . It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles . . . stolen articles . . . kidnapped persons . . . and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination. . . .

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the proscribed articles from interstate commerce in aid of state regulation as in *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, [299 U.S. 334], but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has selected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden, supra*, 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co., supra.* Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to

the public health, morals or welfare, even though the state has not sought to regulate their use. . . .

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. . . .

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . "The judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power." *Veazie Bank* v. *Fenno,* 8 Wall. 533. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons* v. *Ogden,* these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer* v. *Dagenhart,* 247 U.S. 251. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. *Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful

or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. . . . The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . . And finally we have declared "The authority of the federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." *U.S.* v. *Rock Royal Co-operative*, 307 U.S. 533, 569.

The conclusion is inescapable that *Hammer* v. *Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

Validity of the wage and hour requirements. Section 15 (a) (2) and §§ 6 and 7 require employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee's employees are not alleged to be "engaged in interstate commerce" the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it.

To answer this question we must at the outset determine whether the particular acts charged in the counts which are laid under § 15 (a) (2) as they were construed below, constitute "production for commerce" within the meaning of the statute. As the Government seeks to apply the statute in the indictment, and as the court below construed the phrase "produced for interstate commerce," it embraces at least the case where an employer engaged, as is appellee, in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers.

Without attempting to define the precise limits of the phrase, we think the acts alleged in the indictment are within the sweep of the statute. The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination and then after manufacture select some of it for shipment interstate and some intrastate according to the daily

demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate rather than intrastate commerce. . . .

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. . . .

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. . . .

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. . . .

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. . . .

Validity of the wage and hour provisions under the Fifth Amendment. Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of "not less than one and one-half times the regular rate" at which the worker is employed. Since our decision in *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment. Nor is it any longer open to question that it is within the legislative power to fix maximum hours. . . .

The Act is sufficiently definite to meet constitutional demands. One who employs persons, without conforming to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines, is warned that he may be subject to the criminal penalties of the Act. No more is required. . . .

Reversed



92. LABOR LEGISLATION IN THE UNITED STATES [1]

SINCE the early 1930's many and varied pressures have been brought to bear upon Congress for the enactment of legislation governing labor-management relations. An understanding of this problem requires a working knowledge of its legislative history. In this extract Professor Abell reviews the labor legislation that has been enacted since 1933 and provides an admirable background for an intelligent appreciation of existing, as well as future, legislation upon the subject.

THE current trend toward conservatism in American politics is most pronounced in the field of labor relations. This should occasion no surprise in view of the well-known fact that legislation in behalf of labor was the essential and constant element in New Deal liberalism. In keeping with the "American way" of swinging the political pendulum periodically from liberalism to conservatism and back again, the present Congress enacted the Taft-Hartley Labor-Management Relations Act with the aim of curbing the power of union labor so successfully enhanced by the New Deal. The bitter controversy attending the passage of the Act and the unrelenting and all but unanimous opposition of organized labor and many of its friends to the continuance of the law underscore the paramount importance of labor questions in the country's maturing economy. Other phases of labor legislation are indirectly involved in the present reaction: health insurance, and increased coverage and more generous benefits under the Social Security and Fair Labor Standards Acts. Though these supplements are badly needed, they fail to arouse general enthusiasm in the climate of opinion that now prevails.

. . . . . .

. . . Except for social insurance, the NIRA tried to effectuate the main ideas of intellectuals, business men and labor leaders on the momentous

[1] Aaron I. Abell, *The Review of Politics*, Notre Dame, Indiana (January, 1948), Vol X, No. 1, pp. 35, 55–60. All footnotes omitted.

issue of economic planning. Through industrial codes—731 in all—capital, labor and government strove over a two-year period to revive and stabilize business in accordance with the policy of Congress "to induce and maintain united action of labor and management under adequate governmental sanctions and supervision." By relaxing the anti-trust laws the code authorities were empowered to check over-production and ruinously low prices, the result, it was held, of excessive and unfair competition, low wages, long hours and child labor. The codes, therefore, provided for a minimum wage from twelve to fifteen dollars a week, reduced the work-week to forty hours and abolished child labor. These features were designed to stimulate re-employment, increase purchasing power and improve working conditions.

More directly, in behalf of labor, the Act in Section 7(a) restated the trade-union philosophy of the Norris–La Guardia law and declared that "no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing." Claiming that under this section Roosevelt and the New Deal backed the trade-union movement, the American Federation of Labor launched a highly successful organizing campaign. But the employers were even more successful with the company union which satisfied, they contended, the requirements of Section 7(a). This view Roosevelt accepted out of fear that otherwise the great business interests would sabotage the recovery effort. Labor bitterly complained that only through strikes (most of which failed) could it secure any gains under the Act. The employers insisted that the National Labor Board and the National Labor Relations Board, the successive agencies set up to deal with industrial disputes, were in fact friendly to "outside" unions.

Well before June 16, 1935, the date on which the NIRA was to expire, the two sides had lost confidence in the law. Saved by the "relief" measures of the Roosevelt Administration, employers now violently reacted against the very concept of planned economy. Labor, on the other hand, opposed not the objectives but the poor enforcement of the NIRA. Consumers and small business hated the price-fixing and other monopolistic controls imposed upon the nation's economy by the corporation-dominated code authorities. Shortly before Congress was ready to pass on the President's recommendation that the Act be extended, the Supreme Court by unanimous vote, in May 1935, declared the measure unconstitutional.

Despite the termination of the Act, its underlying philosophy continued to guide the industrial policies of the New Deal. If, owing largely to the opposition of great business interests, "united action of labor and management" could not be secured through a single, comprehensive statute, substantially the same advantages could be won through separate,

specialized measures backed up by labor and low-income groups. Moreover, the NIRA experiment re-awakened interest on all levels of government in nearly every phase of labor legislation, notably in laws for minimum wages, maximum hours, and the elimination of child labor. Furthermore, experience with the administration of the Act proved invaluable to those charged with the task of shaping labor legislation.

Thus the two labor boards under the NIRA hammered out by a process of patient trial and error a "common law" for collective bargaining. Employers must negotiate, the boards ruled, with labor organizations formed on a basis of free elections and majority rule. This ruling made substantial headway after July, 1935, when Senator Robert F. Wagner of New York, the legislative architect of the New Deal, pushed through Congress the National Labor Relations Act. The law expressly forbade employers to engage in five different varieties of unfair labor practices and set up a National Labor Relations Board, composed of three members, to apply the provisions of the law and to enforce them with the aid of the federal courts. Highly controversial but no less effective, the Wagner Act within a few years revolutionized industrial relations in this country.

For a time many believed with John L. Lewis that social insurance might be added to the code provisions of the NIRA. But, as the code structure weakened, sentiment rapidly crystallized in favor of distinct social security legislation. Placed on the President's "must" list, the Social Security Bill became law in August, 1935. The Act provided for old-age insurance, old-age assistance and unemployment compensation. After January, 1940, industrial workers as they reached the age of 65 were to receive pensions from taxes in equal amounts on payrolls and wages. To the many workers who reached 65 before 1940 and who were not included in the pension system, the Social Security Act extended old-age assistance through subsidies to the states. The federal treasury would pay those states having pension plans of their own dollar for dollar up to $15 ($20 after 1939) a person each month. The states were also given funds with which to pension the blind, provide for dependent children, educate the handicapped along vocational lines and improve public health services.

Unemployment compensation was provided through an ingenious federal-state arrangement. A federal payroll tax of three per cent was levied on all employers (certain classifications excepted) of eight or more workers. This provision was designed to keep business in the various areas on the same competitive basis. Employers were privileged, however, to turn over ninety per cent of their federal tax to state funds provided the state in which their firms were located set up an approved unemployment compensation system. Within a short time all the states enacted satisfactory measures. Free to prescribe details, a few states accepted in whole or in

part the Wisconsin plan for individual plant reserves while others, the great majority, established pooled funds, which, in the judgment of most experts, assured more adequate protection to the worker. Though the Social Security Act did not apply to agricultural and casual workers, domestic servants and persons employed in non-profit institutions, it nevertheless benefited a large part of the population. Thus by 1940 twenty-eight million people had already received unemployment compensation and forty-five millions were in line for old-age insurance as soon as they reached their sixty-fifth year.

The wage, hour and child labor provisions of the NIRA code authorities were greeted with enthusiasm by all fair-minded people. Under code stimulus the moribund minimum wage movement for women and children revived and the new laws adopted "fair wage" standards in lieu of the "living wage" formula outlawed by the Supreme Court in *Atkins* v. *Children's Hospital.* But in June, 1936, the Court struck down a New York statute of the new type. The all-but-universal revulsion against this decision precipitated a political storm out of which was to emerge the next year a liberal judiciary. As the courts accepted the New Deal the drive for fair labor standards on a national scale gathered momentum. In June, 1938, Congress passed the Fair Labor Standards Act, popularly known as the Wages and Hours Law. Designed to put "a floor under wages and a ceiling over hours," the statute provided that by progressive stages hours be lowered to forty per week and wages be raised to forty cents an hour in all industries affecting interstate commerce. Additional hours might be worked if paid for at a rate of one-and-a-half. The labor of children under sixteen was abolished and that of children between 16 and 18 restricted to non-hazardous occupations. Though the law did not apply to farm laborers, domestic servants and numerous other classifications, it improved the status of nearly thirteen million workers. By one fell swoop the country had established standards which humanitarians had sought in vain at the state level for several generations.

The importance of the wage-hour and the social security legislation has been obscured by the heated controversy attending the enforcement of the National Labor Relations Act. By setting out to eliminate employer weapons against collective bargaining, the Wagner Act augured a decided shift in the "power" relations of American industry. For this reason, though others were alleged, nearly all employers vehemently denounced the measure and, pending a final decision on its constitutionality, successfully defied the National Labor Relations Board to enforce its provisions. The careful strategy of the Board members, notably their scrupulous adherence to the letter of the statute, eased the way, however, for the Supreme Court's favorable verdict in April 1937. Its legality assured, the Act helped to effectuate the newly-formed CIO's powerful unionizing campaign whereby

collective bargaining agreements were secured all along the industrial front, especially in mass production industries heretofore immune to organized labor.

As was almost inevitable under the circumstances, many powerful corporations fought the organizing drive, some with time-honored company spies, thugs and puppet unions. With a regularity infuriating to employers, the NLRB issued "cease and desist" orders, and ruled that managements must rehire striking workingmen and enter into bargaining negotiations with unions approved by a majority of the workers of a bargaining unit in elections authorized and conducted by the Board. Almost invariably the Boards' decisions were sustained by the courts. The Board adjusted, however, the great majority of controversies involving unfair labor practices without being obliged to conduct formal hearings, persuading the two parties to reach agreements conforming to the letter and the spirit of the law. Designed to uphold and to encourage labor organizations and collective bargaining, the National Labor Relations Act, in the opinion of nearly all unbiased and detached observers, was vigorously, successfully, and on the whole fairly enforced.

Employers from the outset claimed that the law was "unfair" and "one-sided," because it discriminated against management in favor of labor. This charge was fundamentally justifiable in the sense only that the law and its enforcing agency discriminated against individual in favor of collective bargaining. Many of the countless amendments to the Act offered in Congress after 1938 were aimed at the "unfairness" which eliminated employer, and encouraged trade-union, influence over employees in every "appropriate bargaining unit." One series of amendments would prohibit employees as well as employers from interfering with the formation of labor organizations, thus putting "company" unions and "outside" unions on the same footing. Other amendments proposed that two or more unions be permitted in a bargaining unit. Ostensibly devised to represent all levels of worker desires and skills, the scheme was inspired actually by the employers' hope of weakening labor's collective power. Employers insisted that they as well as workers ought to have "free speech" during unionizing campaigns and a similar right to petition the Board for elections to determine the bargaining agent. Unfairness also stemmed, it was charged, from the triple jurisdiction of the National Labor Relations Board: the lodging in the same persons of investigation, prosecution and adjudication.

These and other criticisms looking to the "equalization" of the Act did not greatly impress public opinion so long as widespread unemployment continued. To be sure, a few state laws, notably Wisconsin's Employment Peace Act of 1939, condemned "unfair union practices" and established precedents for current legislation. But most people clung to

the philosophy behind the Wagner Act: that collective bargaining on a vast scale was necessary in order to increase mass purchasing power and thereby to revive industry and promote employment. The real impetus to the drive for the regulation of unions stemmed from developments on the industrial front during World War II and its immediate aftermath.

The rapid spread of unionism and collective bargaining during the war convinced many persons, formerly not hostile to organized labor, that the movement was becoming too powerful and that it needed to be curbed. There could be no question of labor's great gains. On its part, organized labor agreed to suspend the exercise of its right to strike. In return the War Labor Board granted the unions maintenance of membership and other favors as well as encouraged further unionization through the legal processes of the National Labor Relations Act. Under these conditions collective bargaining enlarged not only in area but in scope, impinging, that is, in various ways on managerial prerogative. The war "enabled unionism," concluded *A Twentieth Century Fund Report*, "to draw on collective bargaining to cover in a single stride many intermediary steps in its evolution from hired help to something akin to partnership in United States industry."

In exploiting its rapidly and somewhat artificially acquired rights, union labor perpetrated some abuses for which there was no justification. Only arrogance explained the frequent ultimatums served on employers by labor leaders. This refusal to bargain was a flagrant violation of the spirit if not the letter of the Wagner Act. Unions with closed-shop contracts sometimes unjustly expelled members and thereby deprived them of their jobs. This interference with the means of livelihood outraged public opinion. So did the mounting tide of jurisdictional strikes which interrupted production and tempted employers to become lawbreakers against their will. Thus minority unions in bargaining units frequently proclaimed strikes against employers and the majority unions certified by the NLRB. If the employer entered into bargaining relations with the minority union, he violated the law; if he refused, the union in question might destroy his business by means of a strike oftentimes reinforced by a secondary boycott. This intolerable condition stemmed mainly from the AF of L–CIO conflict which did not exist when the Wagner Act was enacted and for which no provision was made.

Though powerless on this point, the NLRB followed a policy of correcting union abuses as they arose. With a minimum of additional statutory authority, the NLRB would in time, no doubt, have eliminated them entirely. But the revulsion against unionism following the war's end was too violent to permit reform through the evolution of administrative rulings. The nation-wide strikes and strike threats during the winter of 1945–1946 angered the public which was already disposed to make labor

the scapegoat for all the vexations of reconversion. Bills to curb unions became the order of the day in Congress, one of which, the vicious Case bill (Labor Disputes Act), passed the House in February, 1946.

Decisive in the controversy over the need for a new labor relations law was the 1946 Republican victory which was hailed as a "mandate" for radical anti-union legislation. President Truman's declaration, however, that he would veto any but minor changes in the Wagner Act destroyed the prospects of the union-hating extremists. They were obliged, therefore, to accept the Republican leadership's "moderate" Taft-Hartley Labor-Management Relations Bill. Unacceptable to the President, the measure was repassed over his veto and became law on June 23, 1947.

In the cause of "equalization," the new law extends the concepts of "unfair labor practices" in the Wagner law to labor organizations. Thus, under the Taft-Hartley Act unions must not attempt to force the introduction of a closed shop, or try to impose a union shop without a majority vote of the employees in the bargaining unit, or strike for recognition before gaining certification from the NLRB, or conduct secondary boycotts, or urge jurisdictional strikes, or practice "feather-bedding," or refuse to bargain in good faith with employers. Still subject to the unfair labor provisions of the Wagner Act, employers have priority over unions in preferring some though not all charges before the NLRB. The Taft-Hartley law also retains the majority principle of the Wagner Act in determining the bargaining agent. The principle is considerably weakened, however. Foremen or supervisory employees are denied union status though employers may voluntarily bargain with them. Professional employees cannot be combined with non-professional employees in the same bargaining agency unless they vote to be thus included. Under certain conditions skilled crafts may form special organizations of their own apart from the large industrial unions. This snobbish, splintering tendency within the bargaining unit combined with the inability of unions to expel members except for non-payment of dues may possibly prevent many unions from securing a majority of the workers and thus undermine the collective bargaining process as a whole.

In the new law jurisdictional strikes and strikes by federal employees are prohibited. Otherwise, the Taft-Hartley Act expressly disavows any intention of denying workers the free exercise of the right to strike, and leaves intact the Norris–La Guardia law preventing employers from seeking and obtaining court injunctions against the economic weapons of labor organizations. The law does, however, attempt positively to promote industrial peace. Thus during the sixty days preceding the termination of contracts, walkouts or strikes cannot legally take place. Likewise an eighty-day "cooling-off" period is provided for national emergencies which the President may proclaim if in his judgment a threatened work-stoppage

in a key industry endangers the general health and safety. In order to have the "cooling-off" periods result, if possible, in satisfactory adjustments, the Taft-Hartley law sets up a Federal Mediation and Conciliation Service independent of the Department of Labor and empowered to encourage and help the parties to arrive at a settlement.

The effect of the Taft-Hartley law on the relations between the "powers" in American industrial society is something which only the future can disclose. The language of the statute suggests that its framers regard labor and management as permanent partners whose relations in the days to come may need to be more precisely defined by new laws. The measure is best understood as one of several experiments in the last twenty years to find a solution for a complex and dangerous problem in terms of peace, justice and meaningful industrial democracy. With the social security and other protective laws it forms a great body of labor legislation of which our people may well be proud. The United States, once a backward nation in the field of labor and social legislation, during the Progressive Era and the post-war twenties laid the foundations, and during the New Deal thirties built up, the imposing structure of the present system.



93. THE COAL MINER SPEAKS [1]

TO LARGE segments of the general public union labor is an abstraction or an impersonal force. To some it represents a considerable mass of humanity living at the beck and call of a particular labor leader. Relatively few consider union laborers as individuals subject to the average human frailties and responsive to the ordinary demands made upon human beings. This article presents a picture of the life and work of John Allshouse, coal miner and active member of the United Mine Workers. Through an understanding of this union member and others like him, in coal mining and in other industries, the problems, the hopes, the desires, and the goals of union labor generally may be more intelligible to others.

"PEOPLE seem to think miners are some kind of animal—underground rats, they call us—but we're just like other people trying to earn a living. Coal mining is all right—but you can't always keep working."

John Allshouse ought to know what he is talking about. His father was killed in a mine, and he has been a Pennsylvania coal miner for thirty-nine years—ever since he was thirteen. He and his wife and seven chil-

1 *Fortune* (March, 1947), Vol. XXXV, No. 3, pp. 97–99; 202–206 Reprinted by special permission of the Editors. Copyright by Time Inc.

dren have known plenty of bad times and some relatively good times. There have been months of hunger, and winters when it was hard to pay for coal to heat the house. But since 1942 wages have been high and now the Allshouses have meat every Sunday and are buying their own eight-room house. Working conditions were once abominable and Allshouse can still get sore ("With the company, it's production first, safety second"). But mining is no longer the hazard it once was. He is not uncritical of John L. Lewis but he gives him a lot of credit. Worst of all, perhaps, has been insecurity. Since 1942 employment has been steady, but in earlier years Allshouse was lucky if he got as much as 200 days' pay. Always a good union man, he has been through thirty or forty strikes—he can't recall the exact number—and at least as many layoffs. Allshouse feels that his own life is justified, and he expects to go on working in the Pittsburgh Coal Co.'s Westland mine as long as they'll keep him. But he hopes that his two sons will go through high school and stay aboveground. "I want them to get steady jobs even if the pay is lower. They'll thank me someday."

The Westland mine belongs to the Pittsburgh Coal Co., part of the largest commercial coal company in the U.S., Pittsburgh Consolidation, which includes the Fairmont mines in West Virginia, Consolidation in Kentucky, and Hanna in Ohio. Westland, Pennsylvania, is an isolated mining village, or patch, in Washington County, about twenty-five miles southwest of Pittsburgh. The naturally lovely rolling countryside is criss-crossed by railways and power lines, pitted and scarred by strip mines and quarries. The streams run poison-yellow from chemical-plant refuse. Even the sheep on nearby farms are dirty gray from coal smoke, and the smell of smoke hangs over the gray-brown scrubby hills. The mine tipple and beltway to the smoking slate heap dominate Westland as the cathedral spires dominate Chartres. The town itself is nothing more than the mine, the company store, the union hall, fifty or so shingled double houses in bleak rows, a couple of small independent stores and taverns, two schools, and the United Presbyterian Church. About a hundred of the mine's 550 employees live there; the others drive over from Washington, Canonsburg, Hickory, and other nearby towns and villages.

The mine was opened eighteen years ago and there is enough coal left in the Westland reserves (part of the rich bituminous Pittsburgh Seam) to last another fifty or sixty years. John Allshouse has been there since the beginning and is now working in an entry four miles back under the hill, about 350 feet below ground. There is no mine shaft at Westland—the white rock-dusted main haulways and entries run back from the pit mouth in gentle downward slopes, and electric locomotives, not mules, haul the coal cars and "man-trip" (personnel) cars direct from the tipple to the black working face.

Almost all the mine operations are mechanical. Every coal miner is a specialist, a skilled cutter, driller, shooter, loader, engineer, or (like Allshouse) tracklayer. An electrically driven machine undercuts the coal to a depth of about nine feet, holes are driven with electric drills for the explosive charge. The men move back around two corners of the entry before the "shooting" (the thud of explosive is little more than familiar dusty pressure and a taste for powder), and then back to the shattered coal on the wet floor. A mechanical loader, with groping steel fingers, moves in, and the mine cars are pushed after it by an electric locomotive.

John Allshouse is steady and reliable, although not quite so fast as some of the younger men. At fifty-two the muscles of his back stand out in hard ridges and he can still drag a 400-pound rail into place, bolt it, and spike it down as well as the next—and do his day-shift job from the time he boards the man-trip cars at the pit mouth at 6:30 A.M. until he comes out and hangs up his lamp at 3:30 P.M. He works with his foreman, young Fred Klink, who first came into the mine as Allshouse's helper, and two or three assistants. He is usually up near the face with the production crew, although he may be installing switches somewhere along the mine's seventy-five miles of track, or repairing ties and rails after a wreck. The floor is covered with water, the shored-up roof is close over his hard-skull cap. The only light is from his cap lamp and he must watch his footing as he drags the heavy rails into position.

There has never been a disaster at the Westland mine, but there is danger in any mine—more, in a way, than when most of the work was done by hand, because carelessness with equipment or machinery can mean sudden injury or death. But the greatest danger at Westland is from falling roof. The slate above the coal seam can break off in great chunks (the timbers used for shoring are chiefly valuable to give warning when they begin to crack). John Allshouse was laid up for thirteen months a few years ago with a broken leg. He and all the other men are required to wear hard hats, hard-toed boots, and goggles.

Aside from the danger of accident, conditions in the mine are not bad. The air is pure enough, although it is dusty at the coal face, and the temperature stays between 50° and 60° all year round. Coal mining is a dirty job—there are no showers at the pit mouth and the men must walk or drive home before they can wash—but there are no special disease hazards. Allshouse, at fifty-two, is not unhealthy, although he is slightly stooped from work and, at the end of the day, his tiredness shows in the slump of his body and the deep lines in his face as he sits in his warm, bright kitchen, still in his hard hat and heavy pit belt, to draw deeply on the first cigarette of the day.

BORN TO THE MINE

John Allshouse's father was a miner and a union man before him (of Scotch-Irish descent, he had been adopted by a German family and taken their name), working in a small privately owned mine in the village of Noblestown, about ten miles from Westland. Allshouse was run over and killed by the mine dilly three months before John was born. His widow worked to support her three children, and by the time John was thirteen and through eighth grade he persuaded the mineowners to take him on (the legal working age was fourteen) to help out his mother.

He went down as a car greaser at $1.25 a day and was later put on the job of coupling cars after the coal was dumped. Almost all the operations were by hand and he did everything from driving mules to pick-and-shovel. During World War I he spent a year overseas in the Signal Corps. ("He doesn't talk about it much," his wife says, "but he saw a lot.") Back home, he tried jobs in a steel mill, on the railroad, in a gas station—but it wasn't long before he was back in the mine as a coal loader. He stayed there until the strike of 1927, when the Noblestown mine shut down for good.

The new Westland mine opened in the fall of 1928 and word went round that there was enough coal there to provide a job for the rest of a man's life. It was the biggest commercial mine in the Pittsburgh area and John Allshouse was one of 1,200 to get work. He was on the tipple, loading railroad cars, at $4.25 a day. Soon after he had come back from the Army he had married Anne Chalmers, one of nine brothers and sisters from a Scotch family in nearby McDonald. He and his growing family (by the time he went to Westland there were two girls, Dorothy and Phyllis) moved into four rooms, half a house, for which he paid the company $8 a month. Food and clothing and supplies were bought at the company store and charged off against his pay check. There were many paydays when the check was only a dollar or so, and on some he owed money at the store.

"The worst was Hoovertime. The mine was down lots of the time and we either had no work or we'd be shifted over to another mine and get paid 75 cents or $1 a day." There were more to feed by that time—Peggy Anne (born in 1929) and William (born in 1931)—and sometimes Mrs. Allshouse's family had to help out. During the thirties Allshouse and the other miners at Westland worked an average of 200 days a year. Often the annual wage was less than $1,000. Many miners were laid off as the operations were mechanized. Today 550 men get out almost as much coal as the original 1,200 employees. The mine produces about 5,000 tons a day, nine tons per man.

After a year on the tipple Allshouse went into the mine as a track-layer, the job he has held, with one break, ever since. The break came as a result of the New Deal and Section 7a of the NRA, under which labor's right to bargain collectively was secured and John L. Lewis' United Mine Workers began to flourish. Allshouse had been a member of the U.M.W. since he started work in 1908 and he helped organize Local 2026 at Westland. He was elected checkweighman at the mine by the union members. He was paid a regular wage by the company but his job was outside, as the union's checker of daily production. He took an active part in the affairs of the local, as organizer and at various times later as treasurer, vice president, and secretary—a position he held until his resignation last year. As an official he was paid about $15 a month, which helped out on the budget, and he also picked up a few dollars as Democratic committeeman in his precinct. He can always use all the extra cash that comes his way.

In spite of labor legislation and a strong miners' union, there were still strikes, sometimes industry-wide, sometimes local, and also layoffs during periods of overproduction. The Allshouse family was growing: in 1933 the fifth child was born—Norman Robert Allshouse for NRA—and in 1935 the sixth. The older children needed clothes and shoes. There were no savings, and even a week without work meant going in the hole at the store. There was no running water in the house then, no electricity, and not too much food on the kitchen table.

A RADIO BUT NO BATHROOM

Life is better for the Allshouse family now—but still not what they would like it to be. The war brought higher wages and almost continuous employment. Allshouse often made $75 a week when he worked six days, and sometimes had enough to put into war bonds. The oldest girl, Dorothy, went to work for the company store and paid some of the household expenses. The company decided to sell its houses to the miners, and two years ago Allshouse began making purchase payments on the whole double house. He has paid off all but $100 of the $1,200 price and the family of nine (Mary Jane was born in 1939) now have eight rooms instead of four. There is a cold-water tap in the kitchen, but drinking water still comes from a pump a block away and hot water from a teakettle on the stove. There is electricity, gas for cooking, and two coal stoves for heating. Allshouse buys coal from the mine for $2.85 a ton. Dorothy and her mother have papered and painted the whole house and, by constantly battling the sifting coal dust, they keep it neat and clean. The floors are covered with linoleum, the windows with beige lace curtains.

The parlor and dining-living room are seldom used. Usually the family sits and eats and works in the two back rooms, the kitchen and a sort of general workroom where food is kept, coats hung, clothes laundered. In this room are a coal heater, behind which sleep two little whitish mongrels, and a glider on which Mr. Allshouse naps when he comes from work. Upstairs are four bedrooms, each with a double bed and a bureau. Mr. and Mrs. Allshouse sleep in one; the others are shared by Dorothy and Mary Jane, Peggy Anne and Edith, Bill and Bobby. Phyllis recently took a job in a glass factory in Pittsburgh. When she comes home she sleeps in with her two middle sisters.

There is a radio in the house, but no bathroom, no refrigerator, no telephone. The Allshouses do not own a car. They had a dozen chickens last year, but ate most of them during the November strike. They have a vegetable garden in the back yard between the coal shed and the outhouse. The rest of the food comes from the store, where prices are kept level with chainstore prices in neighboring towns. The family eats a big meal with meat and gravy and potatoes (half a peck at a time) and vegetables on Sundays; other days of the week they have sandwiches for lunch and a pot of soup or spaghetti or beans for supper, along with a lot of store-bought bread and pie and cake. Most of the children are fattish, like their mother, and pale, but they are seldom ill.

Mrs. Allshouse is a big cheerful woman, fond of and proud of her family. All the children were born at home with the help of the company doctor. The company deducts $2 a month for the doctor's services and he charges an additional $10 or $15 for a delivery fee. Mrs. Allshouse doesn't take up much of his time. "Two hours before Edith was born I was in the yard hanging out a big wash." The girls help their mother around the house and the boys carry in coal and water and fetch the groceries. All but Dorothy and Phyllis are in school. Peggy Anne and Bill go by bus to high school in Hickory, six miles away, and have difficulty with some of the courses. Peggy Anne, who wants to be a nurse, can't catch on to shorthand. She goes to jukebox dances at the miners' hall, likes to wear her older sisters' clothes, and wants to see New York, particularly the Stork Club and "21." The children spend Sunday morning getting ready for Sunday school, pressing dresses, curling hair, washing at the kitchen sink. Mr. and Mrs. Allshouse seldom go to church, seldom visit their neighbors. "There's too much to do at home, and always lots of us here for company." Sometimes the family plays euchre in the evening, but usually the children have homework to do. Once in a great while they take the bus into Canonsburg and see a movie.

John Allshouse is paid twice a month. At the end of a period of two six-day weeks his pay slip may look like this:

Earnings

10 shifts at $11.85	$118.50	
2 shifts at $16.00	32.00	
Shift differential	.10	
		$150.60

Deductions

Federal tax (old age)	$ 1.55	
Withholding tax	2.00	
Assignments (food, clothing, etc., at store)	107.83	
Union dues	1.00	
Doctor	1.00	
House purchase	25.00	
Employees Relief Assn.	.10	
Death fund	1.00	
		$139.48

There is $11.12 left over. There are also bills for electricity ($2), gas ($1.50), water ($1), coal ($1), insurance premiums ($2.50). Often Dorothy pays these bills, but there are always extras—dentist's bills or a high-school ring for Peggy Anne or birthday presents. And sometimes a collection at the mine for the family of a miner who has met bad luck. "Even during the depression, when I only had $1 in my pay check, I'd give 50 cents."

When Allshouse works a five-day week, as he has many times and probably will again, he gets only $59.25 and it is harder to make ends meet. Company officials are willing to run the mine six days, but sometimes orders are slack, sometimes there are no railroad cars available for loading, and for a while this winter the union voted a five-day week. Allshouse would like to work six days every week, even if he gets tired. With time and a half the extra day means an extra $16 a week. Since 1942, Allshouse has made an average of over $3,000 a year, but there is no assurance that his annual wage will stay at that unprecedented level.

"IT'S NOT THE MINERS' FAULT"

Last spring the mine was down for nine weeks during the strike, and last fall for three weeks. The spring strike wasn't so bad. Allshouse could work in the garden and around the house ("It's hard for a miner to loaf, no matter what the papers say") and he still had some war bonds to cash. The union won, too. But the November strike was something else. Westland was down for three weeks because some of the younger men jumped the gun by several days ("One guy hung his lamp on the rack and quit and the others followed. Nobody knew why"). It was cold in the late fall, there wasn't much to do, the war bonds were gone, Christmas was coming. And nothing was gained by the strike. Allshouse was glad to go back to work.

John Allshouse is completely loyal to the United Mine Workers. John L. Lewis, he says, has won for the miners everything they've ever got. "He earns his $25,000 a year." But he is not entirely unthinking or uncritical. He knows that public opinion was against Lewis and the miners last fall ("I hated to read the papers those days") and he thinks Lewis might have been "a little too smart." He knows that every time wages go up prices go up. "Somebody's got to quit sometime. Somebody's got to put things in balance. People say John L. Lewis ought to be shot or strung up, but it wouldn't surprise me if he turned out to be the one to balance things."

Some of the miners, and practically all the miners' wives, griped last fall—but only at home. And they are still for Lewis, ready to follow him out in April if he gives the order. Allshouse blames Truman and the press and the companies for the strike's failure. Lewis had a right to end the contract, he says, and Truman was wrong to bring him to court. The press took the companies' side and scared the public, he says. "People yelled about not having coal, but look what happened—we went back to work, and in a few days some mines began to lay off men. It's not the miners' fault if there isn't enough coal."

Strikes are not what they used to be. In the old days companies tried to keep the mines going. They brought in scabs from West Virginia or someplace, Allshouse says, and turned the strikers out of company houses. There were riots and battles—miners remember the Herrin (Illinois) Massacre in 1922 when twenty-five men were killed. Now, with coal mining a closed shop, there are no scabs and when the miners walk out the mine is down until they come back. U.M.W. members can do chores at home, go hunting or fishing, or pick up odd jobs. "We don't sit around drinking the way the papers make out," Allshouse says, "though once in a while I walk down to the tavern to have a beer and hear the news."

Even if they wanted to, it would be hard for most miners to find temporary jobs during strikes. There usually are no other jobs in a mining town and a man can't learn a new trade overnight or move away if he has a family. Besides, Allshouse says, you get used to working in an even temperature underground and you can't accustom yourself to cold or heat in a few weeks. Why miners stick to mining as a permanent job is something else again. Not all do, of course—some of the Westland men who went to the war did not come back to the mine, and not every miner's son becomes a miner. On the other hand, many miners' sons, like Allshouse himself, are faced at an early age with family financial troubles and the easiest job to get is in the mine.

Right now Bill says he wants to go into the Navy and Bobby says he wants to be a Marine. There is no guarantee, however, that they won't go into the mine. Already seventeen-year-old Billy Lloyd, next door, is

working as a breaker boy, picking coal off the belt leading to the slate heap, making as much as $10 and $12 a day, and he is trying to persuade Bill Allshouse to take a mine job next summer. If John Allshouse should be ill or laid up by an accident, or if he lost his job, the chances are that Bill would take the first work that came along. At Westland it would be on the slate belt or in the mine.

Retiring age for miners is sixty-five. Allshouse has thirteen years to go, if nothing happens to him or to the mine. There is more than enough coal under the Westland hills to keep him in a job, but no one knows what will happen to coal mining as an industry in the next years, or to miners and miners' wages. The President of Pittsburgh Consolidation, George Love, says, "Miners are, and should be, well paid, and we hope they will continue to be." But he goes on to say that in order to continue to pay the miners, production per man-day must be increased through mechanization and efficiency of operation.

Allshouse would not object to increased production if it were achieved through technological advances, but he would if it meant harder work or lower safety standards. State safety laws are strict. The union, however, would like one of its own men as a full-time inspector. Allshouse, chairman of the local's safety committee, may inspect any portion of the mine where danger is reported but has no right to inspect over-all conditions.

Allshouse goes about his work carefully and deliberately, and he does not hurry when the day is over. The younger men rush for seats in the man-trip car and run across the lot to hang their lamps on the rack and start for home. Allshouse is the last to leave the car and walk to the office. He walks home in the sooty winter twilight and into the bright kitchen. While he smokes his cigarette, Mary Jane opens his lunch pail to look for the bit of cake or pie he always saves for her. Mrs. Allshouse tells him there is a notice for him from the Boy Scouts, on whose local committee he sits.

After a short rest Allshouse strips off his coat and shirt and washes at the sink. He takes a look at the paper before supper. He tries to keep up with the news about the United Nations and thinks it is a good thing, but it wouldn't surprise him if there were another war. Roosevelt might have stopped it. Truman isn't much good. "I might like him better if I hadn't liked Roosevelt so much more." He is no radical. He doesn't want to do away with democracy or the capitalist system, but he thinks there will probably be a third party, a Labor party, if Truman is nominated next year. He wishes there were a good general magazine or newspaper to give unbiased labor news to the public. "The press writes us up all wrong when a strike is going on and then forgets about us."

John Allshouse and his wife like their house and love their children.

"There's something money can't buy." And they expect to go on living in Westland until he retires from the mine. By that time most of the children will be grown and self-supporting. Allshouse carries $500 life insurance on himself, $400 on each child. He has no savings, does not belong to a pension plan, and will get from his federal old-age insurance only about $75 a month. But, with the children's help, he expects to get along all right in his old age. "We've got a house and good health and food. When you come right down to it, we're a lot better off than some." But John Allshouse wants people to know how things really are. And he does not want his two boys to be miners.

CHAPTER XIX

Agriculture, Conservation, and Housing

94. MULFORD et al. v. SMITH et al.

Supreme Court of the United States, 1939 (Appeal)
307 U.S. 38

THE federal government, having been unsuccessful in its attempt to deal with agricultural problems by means of the taxing power (Cf. *U.S.* v. *Butler* 297 U.S. 1) turned to the commerce power and enacted the Agricultural Adjustment Act of 1938. This case involves the constitutionality of that act. In its decision the Court sustained the government's power under the commerce clause to institute a program for the control and regulation of agriculture. It made the distinction between control over marketing, which the Court holds to be within the commerce power, and control over production. Although the effect of the government's regulation of marketing ultimately constituted a regulation of production, the Court refused to consider this point, maintaining that the motive of the government in exercising its authority was immaterial to a decision of the case. The decision indicated the changing attitude of the Court towards New Deal legislation and was expressive of its willingness to accept the new regulatory policies.

Statement of the Case

Appeal from a decree of a three-judge District Court which dismissed the bill in a suit brought by tobacco farmers to enjoin warehousemen from deducting, and remitting to the Secretary of Agriculture, the penalties inflicted by the Agricultural Adjustment Act of 1938 on tobacco sold for the plaintiffs in excess of the quotas assigned to their respective farms. The suit was begun in the Superior Court of Georgia. The defendants re-

moved the case to the federal court. The United States intervened, under the Act of August 24, 1937.

Opinion of the Court

MR. JUSTICE ROBERTS delivered the opinion of the Court:

The appellants, producers of flue-cured tobacco, assert that the Agricultural Adjustment Act of 1938, is unconstitutional as it affects their 1938 crop.

The portions of the statute involved are those included in Title III, providing marketing quotas for flue-cured tobacco. The Act directs that when the supply is found to exceed the level defined in the Act as the "reserve supply level" a national marketing quota shall become effective which will permit enough flue-cured tobacco to be marketed during the ensuing marketing year to maintain the supply at the reserve supply level. The quota is to be apportioned to the farms on which tobacco is grown. Penalties are to be paid by tobacco auction warehousemen for marketing tobacco from a farm in excess of its quota. . . .

The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that, as applied to appellants' 1938 crop, the Act takes their property without due process of law.

First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse. The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent. of the tobacco so sold is purchased by extra-state purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales. This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress.

Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution.

Second. The appellants urge that the standard for allotting farm quotas is so uncertain, vague, and indefinite that it amounts to a delegation of legislative power to an executive officer and thus violates the Constitutional requirement that laws shall be enacted by the Congress.

What has been said in summarizing the provisions of the Act sufficiently discloses that definite standards are laid down for the government of the Secretary, first, in fixing the quota and, second, in its allotment amongst states and farms. He is directed to adjust the allotments so as to allow for specified factors which have abnormally affected the production of the state or the farm in question in the test years. Certainly fairness requires that some such adjustment shall be made. The Congress has indicated in detail the considerations which are to be held in view in making these adjustments, and, in order to protect against arbitrary action, has afforded both administrative and judicial review to correct errors. This is not to confer unrestrained arbitrary power on an executive officer. In this aspect the Act is valid within the decisions of this court respecting delegation to administrative officers.

Third. In support of their contention that the Act, as applied to the crop year 1938, deprives them of their property without due process of law in violation of the Fifth Amendment, the appellants rely on the following undisputed facts.

Tobacco growers in southern Georgia and northern Florida began to arrange for the planting of their 1938 crop in December, 1937, when it was necessary for them to prepare beds for the planting of the seeds. . . . At the date of approval of the Act each of the plaintiffs had planted his seed beds and, about the middle of March, began transplanting into the fields, which were prepared and fertilized at large expense. The plants were thereafter cultivated and sprayed, and harvesting began during June and continued during July, followed by the curing and grading of the tobacco.

All of these activities involved labor and expense. . . .

The marketing season for flue-cured tobacco in Georgia and Florida commences about August 1st of each year. Each of the appellants was notified of the quota of his farm shortly before the opening of the auction markets. Prior to the receipt of notice each of them had largely, if not

wholly, completed planting, cultivating, harvesting, curing and grading his tobacco. Until receipt of notice none knew, or could have known, the exact amount of his quota, although, at the time of filing the bill, each had concluded from available information that he would probably market tobacco in excess of any quota for his farm.

The Act was approved February 16, 1938. The Secretary proclaimed a quota for flue-cured tobacco on February 18th and, on the same date, issued instructions for holding a referendum on March 12th. March 25th the Secretary proclaimed the result of the referendum which was favorable to the imposition of a national marketing quota. In June he issued regulations governing the fixing of farm quotas within the states. July 22nd he determined the apportionment as between states and issued regulations relative to the records to be kept by warehousemen and others. Shortly before the markets opened each appellant received notice of the allotment to his farm.

On the basis of these facts it is argued that the statute operated retroactively and therefore amounted to a taking of appellants' property without due process. The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later years and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

The decree is

Affirmed



95. LET'S JOIN THE UNITED STATES [1]

THE late President Franklin D. Roosevelt characterized the South as the "Nation's Economic Problem No. 1." Many Southerners thought this description intemperate, if not insulting. The result was that these Southerners or their representatives let loose a flood of oratory "about the Constitution, about Thomas Jefferson, the Founding Fathers, Southern Womanhood, White Supremacy, and the Courage of Lee and Jackson." According to Mr. Maury Maverick, himself a

[1] Maury Maverick, *The Virginia Quarterly Review*, Winter, 1939.

Southerner, all this was meaningless and of no avail. In this article he describes economic and social conditions in the South and explains why and how the South must "join the United States."

SIR, there are two Souths. The South! The Glorious South! The land of noble families, illustrious traditions, of magnolia blossoms and beautiful poetry—of Old Black Joes bowing and scraping to their cultured masters who always treated their Negroes just exactly as Nobody Else Knows How. Then there is the region of poor whites and underprivileged Negroes; of the worst labor conditions in the United States, of unstable business and agriculture, of the lowest standard of living; of lynching bees; of the lowest production in dairy products and green vegetables, the worst housing and the lowest wages anywhere in our country.

One of these pictures is fancy, and the other fact. But it is true that the South is the crucible of America. The burning-hot metal of social and economic problems is constantly boiling over on the rest of the nation.

When the President said the South is the "Nation's Economic Problem No. 1" it really wasn't news. We have known that since the brave soldiers of General Lee's army hopelessly shuffled home with their sore feet and pained bodies. What we must do is to ascertain the historical reason, make necessary contemporary comparisons, and do something about it. The past, present, and future of the South are not alone important to the South itself, but its conditions bear an exact relation to conditions of the rest of the United States.

The South actually works for the North: mortgage, insurance, industrial, and finance corporations pump the money northward like African ivory out of the Congo. Few, much less than 10 per cent, of the money-service corporations which operate in the South are located in the South. Therefore, the South, as much as any British colony of old or today, is a colony, with headquarters in New York. There live the Privy Lords of Trade and Plantation, who pull the strings, send out the propaganda, make the decisions, and through economic, and consequently political power, govern the South by remote control.

Indeed, the South's leading citizens—lawyers, business men, doctors, clergymen, public officials—either consciously or unconsciously serve the Lords of Trade and Plantations. They are a part of the system; they are dependent upon it. They therefore work for a continuance of the system. They control opinion, they serve on school boards and grand juries, act as university regents; they are state legislators, congressmen, and members of public utilities boards, officers in the National Guard, governors, lieutenant governors, and gentlemen-in-waiting. (You have seen them waiting around state capitals, ready to use their "influence.") . . .

But before we appraise the present-day situation, let us take a look at

history. Let us get the background. For indeed, from the historical and the present-day point of view, facts will prove that the South owes its desperate status principally to the Negro. It is either the Negro in actuality, or in symbol.

Already tied to the South, slavery was nevertheless becoming unprofitable even before the Revolution. People, North and South, were ashamed of the institution. Soil of the Piedmont states were being destroyed by Negro slaves and too much tobacco. When Thomas Jefferson wrote the Declaration, he recognized this and inserted a clause denouncing the slave trade, hoping the infant nation could begin its life with both the trade and the institution abolished. But the clause was voted down, and the nation began its life with slavery clamped upon all its southern region.

At the Continental Congress, traditions began to be built up about the lawyer and plantation delegates from the South. Representing slave colonies, they were dignified, able, reserved, and somewhat haughty. Virginia undoubtedly sent the ablest. The tradition—or the myth—of high and noble Virginia blood was already getting the big build-up. So Virginia early became a model for the South. Leaders of other Southern states copied her high and mighty manners. Even now, if one must show good blood, a Virginia family tree must be pulled out of the bag. I have checked some of the so-called noble family trees. Most of them were really good, plain people, but not "noble." . . .

In 1794, eighteen years after Jefferson had attempted to lay the foundation of destroying slavery, Eli Whitney patented the cotton gin. It had an almost immediate effect on the economic structure of the South, because it made slavery profitable. It thereby became the "peculiar institution" around which the religious, political, and social theories of the South were built.

In the development of these institutions, the lawyers, most of them followers of John C. Calhoun of South Carolina, proclaimed that all sovereignty was vested in the State; that the nation had none. The teachers and thinkers of the day, though they did not call it economics, showed that slave labor was necessary for cotton, and cotton was the only way for the South to exist; ergo: slavery was proper. The clergy of all denominations proved slavery was a divine institution, created, maintained, and blessed especially by God. Thus by legal symbol, professorial logic, and Holy Scripture, slavery was "peculiar," but nevertheless perfect. In any event, by the time of the Civil War, slavery was part and parcel of the life, institutions, and psychology of the South. Whether it was good or bad is not the question.

The psychology of that period is of great interest today, as showing the thought of a dominant group in society. The main cry of the slave owners, the Big Business Men of the South, was to be "let alone." Damn these

troublesome abolitionists! The Big Business Men wanted no interference in their business; they knew best.

When the Civil War came, the Southern lawyers wrote the Constitution of the Confederate States of America, and it was a perfect expression of the slave-owning interest of the day. It is important because it represents as well the industrial psychology of today—not, of course, as to slavery itself, but as to general principles of government.

Little study and research have been made on the Confederate Constitution. More should be made, because it is an important document in American history. I here insert the preambles of both constitutions, showing the differing portions in italics:

UNITED STATES	CONFEDERATE
We the people of the United States, *in order to form a more perfect Union,* establish Justice, insure domestic Tranquility, provide for the common defence, *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.	We, the People of the Confederate States, *each State acting in its sovereign and independent character, in order to form a permanent Federal Government,* establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity—*invoking the favor and guidance of Almighty God*—do ordain and establish this Constitution for the Confederate States of America.

In the United States Constitution we see *union,* which the dictionaries define as "that which is united or made into one," while the Confederacy made it plain that theirs was merely a federated group of *separate, sovereign,* and *independent* states, really so many nations. More, the Confederate Constitution entirely omitted the general welfare, and this was done purposely, so that the government would have no such foolish and immoral purpose as promoting the welfare of the people. . . .

After the war, the people of the South were flat broke, and beaten down into a pulp. A horde of ignorant black slaves was turned loose on a helpless white people. Added to this were the Yankee troops and the carpetbaggers. This completed the destruction of all classes of the South.

The poor whites, who had been drafted into the Southern armies, and who had fought only to make their own conditions worse, began to build up mental escapes for having fought for the Confederacy. They had never owned slaves, and had never approved of the Southern cause, but now they began to see the menace of carpetbag and black control. And so out of the economic and political conflict there was born a race prejudice even greater than existed before the Civil War. Sectional emotion of all white men was built up. Because of the destruction of the South, the conditions of

the poor whites became increasingly worse. From then until now, the poor whites lost more and more of their lands. Over the years, until today, the South has become more and more in debt to the North.

Sharecropping and land tenantry hold from fifty to eighty per cent of the agricultural population, whereas there was little or none of either before the Civil War. Before, a poor white owned his own farm, though the land was often hilly, barren, and of the poorest type. What is worse, the landowners today are slaves to the same system. Most of them cannot be blamed for the onerous conditions they place upon sharecroppers and tenants. On top of this, conditions force the poor white to compete with the Negro and lower his standard of living to do it. It is therefore of no avail to the South to denounce the landlords or to weep over the tenants and sharecroppers. It is a system holding the whole South in its grip.

Colonialized as a whole region, it has been difficult for the people of the South to survive. Only those inheriting money and the most astute have come to the top, or have survived with a fair standard of living. Of those ground to the bottom, millions, black and white, have fled from the South as though pursued by the plague or by a murderous army. Others, too poor or diseased to get away, remain. This overburdens and weakens the South, because the South must pay the cost of rearing and educating the children who then leave. This has produced a strange psychology upon the present ruling class in the South. For these classes, hard-pinched to hold their own, most of them working directly or indirectly for the interests of the East and North, feel sure the masses are incapable of progress. This is true of the lawyer, the business man, and the landlord.

For anyone to speak lightly or vindictively of the soul-breaking problems of the South would be vicious and mean. It was not originally the "fault" of the South itself. I am not trying to express moral indignation, I merely try to state a condition. And I do not believe the problems will be solved by some idealistic plan, or by anti-lynching bills enacted by Congress. Nor, again, will anything be solved by months of filibuster and horrified orations against anti-lynching bills. Such efforts do not touch the real problems one way or the other.

What is the general effect on the South of all its accumulated problems? It has been to make of the South and its people an irritated, chip-on-the-shoulder minority. For straight thinking upon our own problems, we have substituted romance, and for answer to questions we have substituted the dare to fight for the dear old Southland.

Of those who have been washed to the top, the leaders have usually done so by working for the utilities, natural-resource corporations, textile plants, insurance companies, and mortgage concerns owned by Eastern capital. Of the lawyers, many reach the state legislatures and the Congress of the United States. By the time most of them reach Congress and the top of

their ladder, they have long since become reactionary and opposed to all the average interests of their own Southern people. A study of Southern congressmen and Southern politics is a job of analyzing a psychology in reverse. For indeed many congressmen of indubitable honesty and great ability, conscientiously and with great éclat vote against the South at every turn. Back of them is the ruling class of the South, which elected them, and of which they are a part. Back of them, also, is the poll-tax law, originally enacted to disfranchise the Negro, but which now disfranchises millions of white men and women. Thus in many districts voters consist of from 10 to 40 per cent of the number in Northern and Western districts of comparable population.

Should any such representative have an inclination to be liberal or progressive, this is soon bludgeoned out of him. It is accomplished by telling him he must not be "a traitor to the South." I have heard that expression often. When minimum-wage legislation was before Congress I often heard Southern men who had come there as progressives say they could not vote for such legislation because they could not be "traitors to the South." I never did quite understand where the treason came in. If any part of the nation needs protection against low wages, it is the South. But the great majority of Southern congressmen voted against this very law, and they generally vote against legislation directly beneficial to the South.

As in almost every other Southern question, the Negro was a long black shadow. It was frequently argued in private that the minimum-wage system would raise the wages of Negroes in industry to the phenomenal wage of $10 per week, which was more than a Negro should have—and he would waste it, anyhow. It was also argued that such a wage scale, even for white people, would destroy the South. More, solemnly orated a Southern senator, in the soft and balmy climate of the glorious South, a family could live well on fifty cents a day. Of course no Southerner, including the senator who made the statement, believed a word of this.

Many liberally inclined congressmen felt these kinds of apologies were not only the bunk, but malicious nonsense. But the leaders back home, representing sweatshops and outside capital, wanted this kind of "communistic" legislation defeated—and besides, anyone voting for it would be "a traitor to the South." A traitor to *whose* South?

The effect that the Negro has on political thinking runs from the naive and comic to the bitter and tragic. Once I was talking to a very intelligent Southern colleague in the House of Representatives about slum clearance. He represented a rather fair-sized city. He assured me his only interest in the subject was academic, that he had studied sociology in the university. He said that he would be glad to vote for slum clearance, but that in his city there were no slums at all and no slum problems.

"What! No slums?" I said.

He assured me there were none, and was quite sincere about it. Yet, I had just passed through his city and I knew there were slums. In more than half of his town were terribly poor, unsanitary Negro shacks. I called that to his attention.

"Oh, I knew that," he said. "You mean those nigger shacks?"

It suddenly dawned on him that there were slums in his city. To realize that there were slums in his city was painful; his Eastern university had taught him slums were inhabited by poor Americans, Bohemians, Italians, Jews not yet rich, and foreigners in general, with a good deal of vice and crime mixed up in the combination. That Negroes could be in slums had never occurred to him.

Another time during the discussion of a tenant bill, one of my colleagues who had one of the highest percentages of sharecroppers and tenants in America, took no part. I asked him why. He assured me that poor whites were a sorry class of people and didn't have sense enough to farm, and besides, if we passed any such bill, we would have to let Negroes have the farms just like white people. That, he said, would cause "trouble."

From all this we can gather that the Negro stands like a Black Colossus in the middle of every Southern, and hence every American, problem. He is both a symbol and an excuse for reactionary voting. But there is not much use in setting out problems unless we try to do something about them. So as a starter, certainly a unanimity of opinion should demand that the Negro obtain economic justice, that he should have the right to jobs, the right to own homes and farms, to have food and education. More, since the Negro is greatly subject to disease, he certainly should have the opportunity of benefiting by preventive medicine and public health measures. Or at least he should be allowed to earn enough to have doctors.

I do not present this as a charitable or humanitarian proposition for the Negro. It should be considered as largely selfish for the protection of the white people themselves. With white men constantly competing with the lower standard of the Negro, there must always be a constantly diminishing standard of living for all. With the health of Negroes bad, this can have and does have its constant effect on the white population. It has been only since the W.P.A. that the practice of requiring health certificates from colored domestic employees has been even partially adopted. The prevalence of disease has been alarming.

It is a simple proposition: the Negro should have a right to make a living; let us say not altogether for his own sake, but to keep him from being a drain and drag on the community. If the Negro's economic status is improved it will solve many other serious and complicated problems concerning the races. For the sake of the South and the nation the problem of the Negro must be approached with more light and less heat. And

the life of the Negro must be protected, and he should be allowed to feel secure.

There are a number of other things the South should do, such as breaking the financial domination of the North, establishing the protection of labor conditions, and backing the promotion of Federal projects—including conservation, slum clearance, and low-cost housing. Plainly, this must be through state action as well as national. From a state viewpoint, the constant outgo of capital can be halted by requiring certain investments in the state. Texas did that in insurance laws, and they were very successful; the only reason such laws have not been effective is that there have not been enough of them.

From the national point of view, the South must co-operate with national measures, including spending from a national viewpoint—of which a majority of Southern congressmen disapprove. The consciousness of the South still deeply resents the decades of persecution through the tariff, and is thus suspicious of national measures. For historical reasons, too, the South continues to sectionalize itself.

However, my point is that only by the firm and progressive action of each state, plus national co-operation, can the South be in a position to force correction of its draw-backs. Otherwise the South will remain not only an irritated minority, but an isolated minority. It may give mental satisfaction to belong to the "Solid South," but to be a minority and always to get beaten will not result in any solid satisfaction. The South must be in position to demand better freight rates and fairer tariffs. In short, if we use our heads, we must play ball with the rest of the nation to get what is good for the South.

There is one thing the South can surely do, and that is to require industry to pay fair wages and to offer decent and healthy working conditions. Instead of that, some Southern states give the most astonishing inducements—free factory sites, long periods of no taxation, and free water. Side by side with state protective legislation, the South should of course co-operate with the rest of the nation in labor laws protecting minimum wages and collective bargaining. . . .

The political problem confronting the South is that many, probably a good whacking majority, of its senators and representatives are the very worst enemies of the South. As long as they are "safe" and "conservative" they will have strong backing in the home district. But the people of the South are the ones who get the worst of it; these members of Congress bombinate about the Constitution, about Thomas Jefferson, the Founding Fathers, Southern Womanhood, White Supremacy, and the courage of Lee and Jackson.

This solves absolutely nothing. It increases rather than diminishes race antagonisms. Wages certainly don't go up, sweatshops do not close,

houses are not built, tenants and sharecroppers are not better off, and no lands are saved from further erosion and destruction.

The picture I have painted is certainly not very pretty, and not very encouraging. But in the universities I begin to see faint hope. The number of students attending the universities is enormously increasing. The students who attend are serious-minded, and they are spending less time on foolishness and carousing than those of twenty-five years ago did. They also have fewer prejudices.

Many of these students are sons and daughters of restaurant keepers, owners of small stores, farmers, tenants, and factory workers. They come from poor white and "foreign" families, and they cannot claim to be descended from the Lees, the Randolphs, and the Peytons.

These students have an entirely different viewpoint from those of the Old South. Their viewpoint affects the good and worthy sons from the Old Families. And there are so many students that the state legislatures cannot track down all the ideas; with the large number, someone is bound to learn something, use it for the benefit of the South and his country. Thus we can gather some courage from the students of today, who will be the congressmen, the lawyers, the doctors, and business men of tomorrow.

Something, I think and hope, is going to happen in the South and to the South. Possibly the white Southerner will rise and ask his place under the sun. Possibly he will say, "Here! There is enough for us all to live with a fair standard, let's try doing it. Let's conserve our soil, preserve our civil liberties, and begin to live like dignified human beings."

Yes. The South may rise, but if that is to be done, let us leave the magnolia blossoms on the trees, and use the brains in our heads for thinking, rather than for emotions and escape complexes. Let us say the condition of the South was forced upon us by the slave shippers of New England, and that New England stole the slaves away; let us lay it on those who destroyed us in the Civil War, and then kicked us down under the heel of Eastern exploitation. But let us agree that this is merely history, and solves nothing for the future. Let us resolve that from here on out we are determined to free ourselves. If we do not, this time it will be our own fault.



96. AMERICAN FOREST CONGRESS [1]

As PEOPLE moved westward from the Atlantic to the Pacific in the nineteenth century, conservation of natural resources was not even

[1] Ovid Butler, *State Government* (journal of the Council of State Governments), April, 1947, pp. 113–114.

thought of. As a result untold waste of our natural resources, particularly the soil and the forests, occurred. Now conservation is generally accepted as necessary. There exists considerable difference of opinion, however, regarding the respective roles of the state and federal governments. In this article Mr. Butler reports on a recent meeting of the American Forest Congress, where representatives of state and federal conservation agencies indicated the areas of their agreement and disagreement.

STATE control versus federal control of the cutting of timber on privately owned forest lands emerged as the dominant issue of discussions at the American Forest Congress held in Washington, October 9–11. Advocates of the policy of leaving the question of control to be worked out and enforced by states as local conditions require were led by representatives of forest industry and the state foresters. The group in favor of investing regulatory power in the federal government was strongly represented by the U.S. Departments of Agriculture and Interior led by Secretary Anderson and Under Secretary Oscar L. Chapman and by spokesmen from the C.I.O. segment of union labor.

The pattern of federal control held necessary by Secretary Anderson and Under Secretary Chapman would give the states a reasonable time in which to establish by state law the regulation of harvesting methods applicable to private forest property, but under a federal standard of forest practice that would be subject to federal supervision and enforcement. In case the state fails to act within reasonable time, the federal government would be empowered to step in and enforce regulation directly. The proposals of the labor representatives followed a much more extreme and drastic line. They advocated federal legislation patterned after the Hook bill, which would give the federal government unlimited power and funds to set up and carry out a national program of forest regulation.

Held at the call of The American Forestry Association, the Congress brought together from all points of the nation leaders of forest conservation to consider the situation in respect to the present condition of the country's forest and related resources and to present views and proposals looking to the formulation of a national postwar program of forest management and reconstruction. The Congress took no conclusive action; it had not intended to do so. Its purpose was to highlight the problems now confronting the American people in dealing with the nation's 650,000,000 acres of forest land.

HIGGINS LAKE PROPOSALS

As a basis of consideration and discussion the Congress had the findings of the Association's recently completed Forest Resource Appraisal and a proposed program of national action based on Appraisal findings and

drafted by a committee of nineteen leaders drawn from all fields of forest conservation. The committee's program, referred to throughout the Congress as the "Higgins Lake proposals," generated a wide diversity of opinion among the more than 400 representatives of government, industry, labor, and other fields of interest.

The discussions served to bring out and sharply define many lines of action which are necessary to maintain progress in postwar forest conservation, and there was common agreement that if these proposals are to be met within the pattern of American economy the states must take more aggressive action in promoting the management and development of privately-owned forest lands within their boundaries. According to Appraisal findings the greatest need for improved forest practice today is among the four million owners of small timber tracts including farm woodlands, and this is the problem that must be solved on state levels. The solution, it was agreed, is a problem of education, but there was not complete agreement regarding the mechanics of carrying out an adequate educational program.

PUBLIC LAND POLICIES

Another controversial issue developed around public land policies—whether public ownership, particularly by the federal government, should be expanded or restricted. Here again, federal agencies and organized labor favored expansion of public ownership, while others expressed agreement with the proposal of the Higgins Lake group that a thorough study should be made of public land policies and administration.

The Congress was unanimous in favoring the extension of more on-the-ground advice and greater technical assistance to the four million owners of small forest properties, but there was divided sentiment as to whether the states or the federal government should provide this service and whether it should be free or should be paid for by the landowner.

The program proposed by the Association of State Foresters agreed substantially with the proposals of the Higgins Lake group. The exceptions are, primarily, in certain proposals pertaining to the function and field work of state forestry agencies, particularly in respect to privately owned forest lands. Stanley G. Fontanna, deputy director of the Michigan Department of Conservation, said that the state foresters believe that such regulation, when necessary, should be provided by the state and not by the federal government.

This position was opposed to that of the federal agencies, who proposed a federal legislative charter within which the states could develop cutting practice rules, but which would permit the federal government to assume control if the states failed to enact satisfactory laws. Labor's proposals

were even stronger in this regard. These proposals called for immediate federal activity to bring cutting practices on all forest lands under regulatory legislation.

RECOMMENDATIONS OF THE STATE FORESTERS

Mr. Fontanna summed up the recommendations of the state foresters as follows:

The state forestry agency is the legally constituted authority for the conduct of forestry work in the state. As such, the Association of State Foresters pledges its support to the principle that any agency, state or federal, undertaking forestry work in a state or territory shall conduct such work or activity under or in cooperation with the state forestry department. Federal cooperation, under principles of the Clarke-McNary Law as now conducted, is rewarded as a satisfactory application of this principle.

State foresters propose to act as rapidly as possible in developing state programs for the use of all the correlated existing agencies which will furnish information to private forest landowners on the management of their holdings for timber production on an economically sound basis. Where state law now permits such activities, the state foresters propose to make available the services of competent foresters to work with timberland owners in setting up management plans. Where such enabling legislation does not exist, action toward legislative authority is recommended.

In making this statement, Mr. Fontanna was referring to aids and technical assistance to the 4,000,000 small forest owners (including some 3,300,000 farmers), who own 57 per cent of the commercial forest land of the United States. The extension of good forest practices to these lands, it was generally agreed, was a matter of on-the-ground education and help which could best be done by the agencies closest to the landowner, with the assistance of the federal government and the forest industries.

To implement this program, the state foresters recommended federal legislation for cooperative work. Direct action projects, however, would not start in a state until the state is ready to finance its share and to administer the work. Federal legislation should also provide for field assistance by the U.S. Forest Service on major projects, and federal research facilities and technicians without compelling the state to match expenditures for such services.

The state foresters urged that present federal legislation be liberalized to permit the distribution of forest tree planting stock for all forestation purposes and that the authorization for these purposes be increased commensurate to the size of the tree planting program.

POINTS OF AGREEMENT

Although the major areas of disagreement at the Congress may appear large, it is significant that the areas of agreement were even larger. These may be summed up as follows:

That adequate fire protection be extended to all forest lands, regardless of ownership; and that more effective measures be employed to protect forests from insects and diseases.

That a coordinated, nation-wide educational campaign be conducted to bring about adoption of programs needed to insure effective forest management and utilization.

That there be a vigorous expansion of advice and technical service to the four million owners of small forest properties, and that similar assistance be given to the smaller conversion plants in the wood-using industries.

That tree planting activities be expanded to reforest the 75,000,000 acres of non-restocking and poorly stocked forest land.

That the "Tree Farms" and "Trees for Tomorrow" movements initiated by private owners be intensified through systematic efforts by trade associations, farm organizations, and other agencies.

That forest cooperatives among small landowners be encouraged where they give promise of promoting improved forest management.

That inheritance and estate tax laws be amended so that payment can be made in installments; that the states take steps to relieve forest owners from any disproportionate burdens now imposed by general property taxes.

That long-term forest credit and insurance facilities be made available as an incentive to forest management.

That forest research programs be reoriented and enlarged, with emphasis on finding outlets for the profitable use of low-value tree species.

That intensive forest management be applied upon old growth forests in federal and other ownerships so as to forestall losses from decay and insects by removing mature and decadent trees.

That federal agencies act immediately to carry out the provisions of sustained-yield laws involving the cooperative management of publicly-owned and privately-owned lands.

That the conservation of water, grazing, recreational, and wildlife values be given their proper weight and recognition in any plan dealing with the management of forest lands.

If one were to ignore the controversial issues and develop a forestry program based on those points of agreement briefly stated above, such a program, receiving full support of government, industry, labor, and other conservation groups, would do much to increase the productivity of the nation's 650,000,000 acres of forest land. In fact, many proponents of

these activities believe that if these measures were given support by all agencies concerned there would be little need to pursue further solutions to the areas of disagreement. On the other hand, it is recognized that unless immediate steps are taken to effect far-reaching improvements in the handling of the forest resource, the nation will be unable to meet the high demands for wood and wood products without seriously impairing future economy and security.

The Forest Resource Appraisal, completed by The American Forestry Association in July, shows that 72 per cent of all saw timber in the United States is situated west of the Mississippi River upon 35 per cent of the commercial forest land. Eastern forests are chiefly young stands in various stages of development, from which the mature timber has been taken over a period of many years. To sustain high rates of production, the report points out, all western areas of old growth must be opened up, while in the East as a whole less than the annual growth should be harvested each year in order to build up permanent growing stocks everywhere to the standards set by the more progressive management.

Following the Congress, the Board of Directors of The American Forestry Association, as announced in advance of the three-day meeting, began at once to study the suggestions and proposals presented, together with the findings of the Forest Resource Appraisal and the recommendations of the Higgins Lake Committee, preparatory to drafting for submission to the American people a post-war program of forest land development, which in its judgment would represent the best thought and information that can be brought to bear upon the subject. The resulting thirty-point program for American forestry was sent to the members of the American Forestry Association in February and received a 98 per cent vote of approval. It is now proposed to organize an American Forestry Council through which interested individuals and agencies will participate actively in translating this program into concerted national action.



97. THE TRANSPLANTABILITY OF THE TVA [1]

THE success of the Tennessee Valley Authority has been phenomenal. As a result many believe that the economic and social ills of all river valleys will be magically cured if Valley Authorities are designed for them. Professor Pritchett here outlines the reasons for the success of the TVA; some of the problems that would arise if the

[1] C. Herman Pritchett, *Iowa Law Review*, Vol. 32, January, 1947, pp. 327–338. All footnotes omitted.

TVA pattern were to be applied to the Missouri Valley; and a possible solution of the administrative problems of valley development.

MOST people are now prepared to admit that the Tennessee Valley Authority has been a success. It is hard to dispute that since 1933, the whole face of the region in which the TVA operates has been changed for the better. The energies of its streams have been harnessed, and their destructive potentialities largely brought under control. A "Great Lakes of the South" has been created with tremendous possibilities for recreational development of the area. The immense amounts of power made available at low rates have been responsible for new industries, new patterns of rural living. Educational and demonstration activities have resulted in materially transforming an exploitative agricultural system into one which conserves and promotes both natural resources and human values.

From one point of view, indeed, the TVA may have been too successful. One might well ask, after watching the scores of bills which have been dropped into the congressional hopper since 1933 seeking the creation of similar regional authorities for almost every river valley in the United States, whether the authority device had not been oversold. How many of these bills, one may wonder, have been based on a real understanding of the authority plan? To how many people is the TVA more than a slogan? It was against an unthinking overenthusiasm for transplantation of the Tennessee Valley formula to other areas that Secretary Ickes was fulminating in 1944 when he warned that problems of regional development could not be solved "merely by lighting a candle and intoning, 'TVA, TVA, TVA.'"

THE TVA IDEA

First of all, it is necessary to understand the basic elements in the authority device. David E. Lilienthal considers that there are three essentials in the TVA idea: "(1) a federal autonomous agency, with authority to make its decisions in the region; (2) responsibility to deal with resources, as a unified whole, clearly fixed in the regional agency, not divided among several centralized federal agencies; (3) a policy, fixed by law, that the federal regional agency work cooperatively with and through local and state agencies."

The authority thus differs in several important ways from the regular pattern of federal departmental administration. The basis on which departments are normally established is that of major purpose or function. They are given a single major function to perform, and a wide jurisdiction in which to perform it. Thus the Forest Service is responsible for carrying out its program of forestry development and protection over the en-

tire nation. The jurisdiction of a federal major-purpose organizational unit may of course be less than nationwide, as in the case of the Bureau of Reclamation which operates only in the arid western half of the country, or the Bonneville Power Administration, which carries on its power distribution operations in the Columbia River region. But in such instances the program is still a single-purpose one, with no responsibility for or control over other governmental programs affecting the same area.

The result of the functional plan of organization is that in each geographical area such action programs as the federal government may determine to undertake are in the hands of separate federal bureaus or agencies, each concentrating upon its own field of specialized interest and sharing no responsibility for the program or operations of its neighbors, with whom, in fact, its relations may be those of competition or rivalry rather than cooperation. The approach to regional problems is thus uncoordinated, piecemeal, and segmented.

It is precisely this characteristic of the federal government's action programs in the Missouri Valley, which have been entrusted to such bitter antagonists as the Army Engineers and the Bureau of Reclamation, that has led to the demand for a Missouri Valley Authority. For the regional authority reverses the normal departmental pattern. It is a multiple-purpose agency with jurisdiction limited to a particular geographical area, within which it has broad powers to plan and operate a comprehensive and unified program of resource development. Instead of land and water and forests and minerals and transportation being split up among separate agencies, each jealous of its own domain, the authority can include and interrelate all these elements in its plans. Thus it avoids and ignores the lines which regular federal agencies must draw. If there are conflicting claims, as for water use, they can be adjusted within the confines of a single agency which has a responsibility to the region as a whole, and do not become a bone of contention over which separate administrative agencies quarrel.

But it is not only the multiple-purpose, omnicompetent quality of the regional authority which distinguishes it from the regular government agency. Equally important is the fact that the control and direction of the authority are exercised within the region, in contrast to the normal Washington-dominated bureaus. It is true that regional or field offices are customarily maintained by federal bureaus, and that these locally-situated officials may well appreciate the special problems of their regions and seek to adapt the general national policies of their bureaus to local needs. But these officials are responsible to a bureau chief in Washington, and he takes orders from his department head, so that final decisions may be made on the basis of paper knowledge and by officials motivated principally by a desire to maintain nationally uniform procedures and policies.

A centralized federal bureau is also going to have to fight inherited routines and patterns of thought if it makes significant use of other federal agencies and local government institutions in the various regional programs which it administers. In contrast, a regional authority set up as a corporate entity, outside the regular departmental system, has an unusual opportunity to plan a development program on the basis of regional needs. Its center of gravity lies within the area. Free from departmental jealousies, preconceptions, and administrative routine, it can develop an original approach to the satisfaction of regional needs, can bring a wide variety of functions within the control of a single operating organization, and can hope to secure the cooperation of other public agencies in its program.

Although not one of the characteristics listed above by Lilienthal as an essential value of the authority idea, the adaptability of the regional authority to the administration of self-supporting enterprise functions has been amply demonstrated by TVA experience. Free from the traditions, limitations, and timidities of normal departmental programs and methods, the TVA has been able to build up a gigantic power system, to plan and construct distribution lines, to work out policies on rates, and in general to conduct a large-scale business operation with a considerable measure of managerial freedom. It is difficult to see how a successful operation of this sort could be conducted under more constrained circumstances.

Such freedom, of course, brings its responsibilities as well as its opportunities. As an autonomous financial unit, separate from any other government agency, the authority is forced to stand on its own financial feet and make its own decisions as to rates and other financial matters with the knowledge that it is directly responsible to Congress and to the public for maintaining a satisfactory financial record. Because financial tests can be applied to a government operation which proceeds under these circumstances—tests which are not relevant to ordinary government spending activities—a public authority can be released from some of the financial controls which have to be applied to regular government agencies.

Another aspect of the TVA's administrative freedom has been its exemption from the regular civil service laws. Operating simply under a requirement to select its employees on the basis of "merit and efficiency," the TVA has made what is in many respects the best record in effective and non-political personnel administration ever achieved by a government agency in this country.

THE MVA PROPOSALS

The principal legislative proposals for establishing an MVA seek to follow the pattern developed in the Tennessee region in all these respects.

S. 555, as introduced in the 79th Congress by Senator Murray, provided for a unified approach to the planning, development, and control of the water resources of the Missouri Valley. It proposed to set up a single organization, which would see the whole valley as a single problem. No longer would separate departmental agencies be identified with separate sections of the valley, nor could the problems of the different sections be handled by the dubious method of establishing spheres of influence within which each agency would proceed according to its own predilections. The MVA would have to develop and place before Congress a plan which it could defend as constituting the most effective utilization and the fairest possible division of water resources among the various uses and sections that could be devised.

A unified approach would also be achieved in carrying out the plan as developed and approved, and in making the basic decisions with respect to water management and control. The unity typified by a single boss for a single valley might well be instrumental in fostering notions of cohesiveness and cooperation among the people of the different sections of the valley. The authority would furnish an object lesson in the values of taking a wider view, and supply a core around which larger regional loyalties could form. It would dramatize the fact that it is all one river, and that the factors which seem to divide the different sections of the valley are less significant than those which unite them.

The MVA plans have sought the goal of decentralized administration by such means as the provision in S. 555 requiring the MVA to "maintain its principal office at a convenient place in the territory in which its activities are conducted," working in and with the valley. The bill did not require that the three members of the MVA board should be residents of the area, an arrangement which would probably be undesirable since there is a national interest and responsibility involved. But it did set up an advisory committee to assist the board in the discharge of its duties, this committee to include nine persons resident in the area, three each representing the interests of agriculture, commerce, and labor. The committee was to meet in the area not less than once a year, and to receive the annual report of the board. The bill summarized the regional emphasis of the authority philosophy by directing the MVA to "utilize to the fullest possible extent the advice, assistance, and cooperation of the people of the region, and their public and private organizations—local and state. . . ."

Finally, S. 555 sought to give the MVA a degree of corporate administrative freedom sufficient to permit the effective handling of its enterprise functions and business responsibilities. It was not required to turn over all its revenues to the Treasury, but only the net proceeds from its operations after the deduction of all necessary expenses and the withholding of

sums for operating capital and new construction. It was given the right to determine its own system of administrative accounts, permitted to have the final word with respect to expenditures questioned by the General Accounting Office, authorized to settle claims brought against it, and exempted from regular civil service requirements.

The MVA plan has thus been founded on the proposition that the regional authority plan which has achieved such notable success in the Tennessee Valley can operate with equal effectiveness in the Missouri Valley. If this proposition is to be denied, it must be either on the ground that there were special circumstances in the TVA experience which enabled it to succeed there which are not present in the Missouri region, or conversely that duplicating the TVA in the Missouri Valley presents problems not previously met. Conclusions as to the transplantability of the TVA must take such considerations into account.

FACTORS FACILITATING TVA SUCCESS

The non-transferable factors which helped to promote TVA success are both personal and organizational in character. The influence of President Roosevelt in the formative years of the TVA was incalculably great. It was his imagination which saw in Muscle Shoals not merely an "opportunity for the Federal Government to do a kind turn for the people in one small section," but rather a chance to experiment with "national planning for a complete river watershed" on a scale that "touches and gives life to all forms of human concerns." While his contacts with the Authority were intermittent, his interest and leadership constantly influenced the direction of the TVA program, dramatized its achievements, and heartened the organization to withstand the attacks made upon it.

Likewise the two great chairmen of the TVA board, Arthur E. Morgan and David E. Lilienthal, though they proved to be mutually incompatible, made contributions of the greatest significance to the TVA. Morgan infused the organization with an idealism, a social consciousness, a resolute resistance to political influences. Lilienthal supplied a somewhat more practical and balanced idealism, a driving energy, an inventively fertile mind, and a compelling devotion to democratic and cooperative procedures. The MVA would be fortunate to find two such talents for its board of directors.

Time, place, and circumstance played an important role in the TVA record of achievement. The emergency conditions prevailing in 1933 had prepared the way for an experiment in planning, had made Congress willing to delegate unusual measures of responsibility to administrative agencies, and had relaxed the normal controls over expenditure of funds.

Depression and poverty had dissolved the suspicions and the reluctance that might have been the regional reaction to the incursion of these Yankee-Greeks bearing gifts.

The TVA, with an area four-fifths the size of England stretched out through seven states and comprehending diverse conditions of climate, agriculture, economy, and social life, was nonetheless set in a relatively compact and manageable region, especially when compared with the sprawling mass of the Missouri Valley. In the Tennessee region comparatively few other federal resource development agencies had established themselves on a firm basis. The Department of Agriculture was of course carrying on its agricultural and forestry programs there, and the Corps of Engineers was operating Wilson Dam, maintaining its navigation program, and getting the construction of Wheeler Dam under way. But there was no irrigation or reclamation work, no extensive federal land holdings, few Indians. Thus the TVA's problem of working out its relations with other federal agencies was a relatively uncomplicated one.

The fact that the TVA was the only regional authority on the scene likewise facilitated its operations. There was no problem of coordination with the possibly competing activities or demands of authorities in adjacent regions. Because of the fact that the TVA was the only one of its species, the President could spare the time necessary to advise on its policy or settle its internal disputes, Congress was willing to give it unusual privileges, and the departments did not object to yielding some of their responsibilities to it. It had the advantages of being an only child.

FACTORS COMPLICATING MVA STATUS

A realistic appraisal of the factors relevant to the success of an MVA must immediately recognize that the political milieu is now much less favorable than that in which the TVA got its start. The political temper is, for the time being at least, unreceptive to plans for planning or increased governmental activity. There is no support from a dynamic president. The region involved is one which has been most vociferous in devotion to the neo-Republican doctrine of states' rights, and it has been easy to present the regional authority proposal as a threat to the existing federal-state balance of power. The governors of the states in the area have sought to demonstrate that no change in prevailing patterns of federal resource development programs is needed. The two federal agencies most intimately concerned with water control in the area have concluded a treaty of alliance and mutual assistance aimed at preventing the establishment of an MVA.

Congress, moreover, is at present scarcely in the mood, even in the unlikely event that it would approve an MVA bill, to write into such legis-

lation the types of freedom in program planning and in administration that aided so materially in the accomplishments of the TVA. Congress has indeed already passed the Government Corporation Control Act of 1945, under the restrictive provisions of which a corporate MVA would have to operate, so that much of the speed and flexibility of TVA administration would be simply unobtainable under present legislative standards.

Apart from the changed political climate, there are administrative considerations which would considerably complicate the operations of an MVA. It would be set down in a tremendous geographical area where many strong single-purpose federal agencies, well-rooted in the region and strongly supported from Washington by department chiefs and influential congressmen, are already operating. If a truly regional approach to the problems of resource development is to be worked out, the regional authority must mold these existing departmental programs into an integrated plan of operations. For this result a choice of tactics is available; as the saying goes, the MVA can either beat 'em or join 'em.

The former policy would require the ousting of these bureaus from the region, and assumption by the MVA of sole responsibility for administering the programs they now carry on—affecting reclamation, river development, navigation, power, the public lands, grazing, and other federal resource interests in the region. Such a step would probably have few advocates, not only because of its obvious political inexpediency, but also because of the scrapping of the special competence developed by the existing bureaus in their respective fields, and because of the challenge which such a regional sub-government would constitute to the prevailing pattern of national administration.

But the policy of "joining" the MVA and the bureaus has its own drawbacks. Under such a plan, presumably the bureaus would continue with much the same functions, but would operate under the directives of the MVA in accordance with its over-all plan for the valley. This arrangement would make MVA principally a planning organization, its operating responsibilities perhaps being limited to the field of power distribution. Acting largely through others, would its program hit the Missouri Valley with the impact that was felt in the Tennessee Valley from the TVA program? And would these old, established agencies accept without a fight planning decisions of the MVA which might conflict with their own notions of river development?

The TVA experience demonstrates that it is possible for a regional agency to cooperate with single-purpose federal bureaus, but there can be little doubt that such a program of cooperation would be harder to arrange under the conditions prevailing in the Missouri Valley. S. 555 appeared to leave the way open for the MVA to adopt either the solitary

or the cooperative policy. By that bill the President was given power to transfer to the MVA all water control projects in the Valley. But on the other hand the Authority might, "if in its judgment the interests of economy and efficiency will be secured thereby," construct or operate any of the projects called for by the basic plan "through, or in conjunction with, other departments and agencies of the United States, or in conjunction with States or subdivisions or agencies thereof. . . ." Thus the Authority could, if it chose, perform its channel improvement work through the Army Engineers, and carry on irrigation activities through the existing Bureau of Reclamation setup.

Whether to beat 'em or to join 'em is not the only administrative dilemma posed by the MVA proposal. A problem which is perhaps even more difficult concerns the degree of independence from executive controls which the MVA can be permitted to enjoy. The TVA pattern calls for a status entirely outside the departmental system, control responsibilities being vested directly in the President. This characteristic has been regarded as one of the most important factors in preserving the regional integrity of the authority and guaranteeing that regional considerations will dominate in the decisions of the agency. This is the heart of the decentralization, the "grass roots" approach, about which Lilienthal has written so persuasively. Is there any reason why an MVA should not be given similar independence?

There is a reason why this suggestion tends to give pause to persons concerned with over-all federal organization. The independence of the TVA could be dismissed as a special case, but if a second authority is set up on the same pattern, then it begins to become a habit—a habit which has some bad features. A regional authority free from departmental control either will or will not be effectively supervised by the President. If it is not supervised, then it constitutes an area of irresponsibility operating without executive control. It might be guided by pressures and opinions in the region, perhaps channeled through the advisory committee provided for by S. 555. But the authority would have a national as well as a regional responsibility. Congress might keep the MVA under its supervision, especially in connection with its budget and its major regional plans and projects, but administrative supervision and control are not tasks which Congress is fitted to perform.

On the other hand, if the President does undertake to discharge the responsibilities that fall upon him in connection with such an independent agency, the affairs of the MVA must compete with the thousands of other duties which make the Presidency the hopelessly overworked office that it now is. In the crowded budget of his time the President must find a few odd moments to consider the problems of a three-man board located, per-

haps, in Omaha—not a fortunate situation for the development of effective administrative relationships.

If it is agreed that effective control by the President is impossible under such conditions, and if it is admitted that there must be some coordination of the work of an authority organized on a regional principle with the programs of the regular federal operating departments across whose respective fields of jurisdiction it cuts, then some thought must be given to providing for such coordination at a level lower than that of the President's office. Particularly would this need seem to be urgent if additional authorities were set up, which might very well, in the pursuance of the interests of their respective regions, develop competitive or conflicting policies which would need prompt attention from a common superior. Former Secretary of the Interior Ickes took the position that in the absence of some central departmental control over regional authorities there would be "confusion and overlapping and headlong adventures in every direction without any central guidance or policy enforced upon all." His candidate for the agency to supply this central guidance was naturally the Department of the Interior. Others saw this suggestion as merely a tactic for capturing the entire development program.

Other suggestions have been heard that the head of a department not so directly concerned with operating programs in the watershed development field, such as the administrator of the Federal Works Agency, might be in a better position to serve as a neutral coordinator. Or possibly coordination through a single department head is too simple, and consideration should be given to a more complicated arrangement, under which various federal agencies would assume coordinating responsibilities for one particular function in each watershed. For example, the Federal Power Commission might be given responsibility over power rates and accounting, while the authority agricultural program would be cleared with the Department of Agriculture.

DEPARTMENTAL REFORM AS AN ALTERNATIVE

The more closely this organizational problem is examined, the more it appears that there is no entirely satisfactory method of blending omnicompetent regional organizations in with single-purpose units organized on a national basis. It may well be concluded that the case for the independent regional authority rests not so much on its own inherent strength as on departmental failure to integrate developmental programs at the regional level. It is consequently of the highest importance that every encouragement be given to improving departmental achievements along this line. William Pincus has recently suggested the possibility of gathering together on a national scale the scattered functions and activities con-

cerned with natural resources development around the nucleus of the primary tools which Congress placed in the hands of the TVA—water use and control and incidental power development—and placing them in a revamped or new federal department. Such an organization, Pincus suggests, "might avoid the necessity for exposing this nation to all the problems which the uncoordinated development of various regions would inevitably create in both the administrative and economic fields."

Another suggestion along this same line comes from Charles McKinley, who proposes that existing federal water and power agencies could be brought together in a reconstituted Department of the Interior, thus preserving the traditional functional pattern of national administration, but with the department so set up as to give "as large a degree of regional autonomy to its field representatives as the need for regional variation, celerity of design and construction, and efficient operation might require." Even under this plan, however, he recognizes that related regional functions would still be in the charge of other departments, such as the Department of Agriculture, so that a consistent and comprehensive regional program would still need to be fused and put into effect against the familiar jurisdictional obstacles to cooperative administrative operations. Some approximation to common regional boundaries and bureau and departmental field headquarters would also be required.

Departmental reorganizations of this more heroic sort will be correspondingly hard to engineer, so that attention must also be given to experience with various coordinative devices employed under existing departmental arrangements. But until the tide for departmental reform begins to run more strongly than it has in the past, the temptation to use the short-cut to regional integration offered by the valley authority will remain a strong one. As one advocate of the device has said: "The valley authority reaches into Washington and puts a big piece of the whole federal government right down into each regional area." It is the most readily available and immediately promising method of breaking through the compartmentalization of federal resource development programs and producing a unified, dynamic attack on regional problems.

There is a price to be paid, however, for its speed and its concentration. There is a real chance that regional autonomy will be achieved at the expense of national control. Regional concentration can develop into a narrow sectionalism. The administrative freedom claimed for a regional authority may extend so far as to undercut executive responsibility. Ways must be found to prevent the valley authority from developing the defects of its virtues, for these are the real limits on the transplantability of the TVA.

98. THE INDUSTRY CAPITALISM FORGOT [1]

THE United States faces an appalling housing shortage, yet the housing industry generally is making little headway in increasing its rate of construction. One factor that seriously handicaps the industry in any attempt to speed up is its archaic organization. The staff of *Fortune* here explains the causes for inefficiency and high cost in the industry and describes the activities of two builders who have had some success in meeting these problems.

TO ANYONE unfamiliar with the housing industry, the incredible news of 1947 is that home construction is in the doldrums. In the first five months of the year, in spite of the worst housing shortage since the James River landing, the industry showed no appreciable gain over 1946 except in the price of its product, which advanced enormously. In 1946 every conceivable shortage and, by testimony of builders, every obstacle that a willfully evil bureaucracy could design stood between the homeseeker and a house. Now materials are comparatively plentiful, government regulations are only a vestige—and the industry is perilously close to falling on its face.

A student of the housing industry would not be surprised. The industry has been behaving like this for the last thirty years. When it was returned to private management after World War I, with the inspiring task of providing "Homes for Heroes," it met the challenge by inflating the cost of an ordinary five-room house 40 per cent in less than twelve months. Thereupon the volume of new construction fell off by two-thirds. Costs fell, and between 1921 and 1925 there was a marked recovery. In these five years four million houses were built. But costs rose again, and after 1925 the volume of residential building went into a ten-year decline. In 1935, after five years of depression, costs had fallen by perhaps 25 per cent; output was down 75 per cent from the 1925 peak. In 1936 and 1937 a promising recovery brought a 20 per cent increase in costs in twenty-four months. During World War II the housing industry became a semi-public enterprise and last autumn, after it had clamored for the opportunity, it was turned free to provide houses for veterans. This time there was no corny talk about heroes.

The most recent challenge has been met in what by now must be called the normal manner. Prices of residential building materials went up 23 per cent (October, 1946, through March, 1947); wage rates between 5 and 6 per cent. There is no exact information on the average increase in the cost of a finished house—estimates range from 15 to 50 per cent for the six-

[1] *Fortune* (August, 1947), Vol. XXXVI, No. 2, pp. 61; 64–67; 167–170. Reprinted by special permission of the Editors. Copyright by Time Inc. All footnotes omitted.

month period. From January through May of this year, 300,000 new permanent houses were completed and only 280,000 begun. During the same months of 1946 an estimated 276,000 houses were started. The slight gain in "starts" in 1947 as compared with 1946 was the result, not of the heroic efforts of the industry, but of a heroic revision of the figures by the U.S. Government.

The first reports for 1947 showed a decided lag in the number of new houses getting under way as compared with 1946. In June the picture brightened overnight when several thousand starts were subtracted from the estimates for 1946, and several thousand others were simultaneously added to the estimates for 1947. On the strength of the 1.6 per cent increase in starts over 1946, as shown by the revised figures (the margin of error in the statistics is about twice that large), Housing Expediter Frank H. Creedon issued a press release warmly congratulating industry, labor, and his own office on "an outstanding job." Since all housing statistics are on the subjective side and lend themselves admirably to manipulation, the sleight of hand that made Mr. Creedon so happy could be defended. Unfortunately it could not alter the basic facts, which are that residential construction is bumbling along at a volume a little better than halfway between the depression low and the peak of the early twenties (when industrial output as a whole was less than half as large as now), and that there is no clear evidence of an upward trend. Any reasonable schedule for filling the nation's housing needs would call for at least twice as many houses as are now being built, at prices a whole lot lower than now.

Any industry that functions as badly as the housebuilding business must have some really distinguished ailment. It has often been called a monopoly, which it is not. Every town, village, and hamlet in the U.S. has at least one housebuilder who is beholden to no one except God and an unbelievably inefficient system for building houses. Currently there are at least 100,000 of these entrepreneurs. But while the housing industry is subject to no general monopoly control, neither is it competitive. The individual builder produces an individualized product tailored either to the whim of a particular customer, or, if he is a speculative builder, to the demand of a limited clientele. The price, more often than not, is cost plus what the market will bear. The builder has nothing in common with the wheatgrower, the classical exemplar of pure competition, who supplies a homogeneous commodity to a nationwide market; and he has nothing in common with the automobile manufacturer, who must survive in a constant struggle to improve quality, add new gadgets, forecast the public taste in fenders, and outdo competitors in merchandising skill.

In the world of housebuilding the terms competition and monopoly have no meaning. Both words gained currency after the industrial revolution, when competition, rather than custom and law, began to govern the

relations between people who produced things to sell, and when capitalism displaced and destroyed the handicraft system of the medieval guilds. Housebuilding, however, is the one great sector of modern society that has remained largely unaffected by the industrial revolution. Recognition of the feudal character of the housing industry is essential for understanding its sorry performance in the past and assessing its chances for improvement in the future.

Prior to the industrial revolution the leading figure in the small industry of the time was the master craftsman. He operated from a cottage or an insignificant shop; it was his skill and experience rather than his capital and organizing ability that qualified him for his leadership in production. He was assisted by journeymen and apprentices, to whom he was less an employer than a foreman. His relations to his employees, to his fellow producers, and to his customers were governed partly by the ordinances of his guild, and partly by a code of ethics to which he and his fellow craftsmen subscribed. The aim of this regulation was stable prices, stable quality, stable income—in sum, a settled life. Since nothing could be more unsettling than competition, it was rigidly exorcised.

Professor Henri Pirenne, a distinguished Flemish historian, has noted that the guilds "established working hours, wages and prices, [prohibited] advertising of all kinds, determined the number of tools and of individuals to be employed in each shop, appointed supervisors responsible for constant and inquisitorial inspection . . . No one was allowed to injure another by improving the methods of production in such a way as to allow him to produce more rapidly and at less cost. Technical progress was seen as disloyalty." Only a few changes are required in this summary of guild organization to make it entirely applicable to the housebuilding business in the U.S. today. Advertising, as it happens, is not prohibited. The regulation of working hours and wages, which in medieval Ghent was the function of the master craftsman and his fellow guildsmen, is now handled by the building-trades unions. The authority of the unions, where they are strong, is just as great as that of the guilds. Technical progress is still deemed undesirable, and, subject to many local exceptions, the unions prohibit the use of spray guns for painting, outlaw the wheelbarrow, insist on plastered walls, limit the amount of plaster that can be applied in a day, and keep the energetic man from laying too many bricks. Many (perhaps most) builders string along, for, like the guild masters, they would be uncomfortable, if not irretrievably lost, in a world where radicals were always introducing new methods. They have combined with the unions to write many of the guild rules into municipal law.

There is little formal price fixing in the housebuilding business, but it isn't necessary. If wage rates, labor productivity, and techniques of construction are all regulated, the labor cost of a given structure will be about

the same whoever builds it. A price cutter is almost invariably a man with lower costs. There might be a loophole that would permit cost and price cutting if a large builder were able to buy lumber, cement, or other supplies in volume at discounts. This loophole has been plugged by a firm code of ethics that requires all suppliers of building materials to quote uniform prices to all customers, even to such big builders as the U.S. Government itself. (In 1943 the Navy called for bids on cement for delivery to eighteen different points from Portland, Maine, to New Orleans. It received a total of 206 bids, 203 of which were identical.) More important, no individual guild member, large or small, is premitted to buy at wholesale prices. In accordance with what has been called the "bucket-brigade" system of distribution, manufacturers sell only to jobbers, jobbers only to local retailers. Builders and unions cooperate in boycotting manufacturers who, to borrow the not inappropriate language of bureaucracy, are guilty of a violation of channels.

Given uniform wage rates, comprehensively regulated labor output, plus uniform materials costs, only a genius could build a better house and sell it for less. The danger is not great.

Although every participant in the industry—builder, supplier, and worker—has managed to make himself secure against the inroads of the competitive marauder, the result, paradoxically, has been security for no one. That is the great misfortune of the industry as compared with its medieval antecedents. The guild masters lived in a settled orderly world where the lives of others were as comprehensively regulated as their own; today's housebuilder and his unions and suppliers live in a dynamic society in which their rigid defenses against cost and price reduction are an anachronism that exposes them to the most exaggerated effects of the business cycle. Residential building in the U.S. is a feast-and-famine industry, because only in times of general feasting will customers pay the prices on which—come feast, come famine—it rigidly insists.

THE IMPORTANCE OF SIZE

The greatest thing that ever happened to improve man's material welfare was the overthrow of feudalism by capitalism—the lifting of what Alfred Marshall, the great Cambridge economist, called "the cruelty of the yoke of custom and rigid ordinance." This is not a partisan view. Even Karl Marx said of capitalism that it "has been the first to show what man's activity can bring about. It has accomplished wonders far surpassing Egyptian pyramids, Roman aqueducts, and Gothic cathedrals . . . during its rule of scarce one hundred years, it has created more massive and more colossal productive forces than have all preceding generations together." The essence of capitalism is capital, for that is what provides workers with

machinery, equipment, and materials so that they may exert themselves in a regular, repetitive way with maximum assistance from mechanical power. The process requires, above all else, that the individual business unit be reasonably large; no one ever knowingly made a large investment for a small output.

The most striking evidence of housebuilding's resistance to capitalism is its small scale. In 1938 the average urban builder of single-family dwellings produced three and a half houses. His gross turnover did not exceed $25,000 and his own investment was under $3,000. And the average builder was considerably larger than the typical builder. Eighty-six per cent of all prewar builders built two houses or less a year, and 60 per cent built only one. There are fewer one and two-house builders now and the industry approaches large-scale operations with the operative builder who puts up fifty to a hundred houses a year. Some of them have done a good job in raising quality and lowering costs; in certain areas, most spectacularly in southern California, they are producing houses in promising volume. However, such builders, like the two examined later in this article, are the extreme exception. The President of the National Association of Home Builders, accredited lobby of the industry, told a congressional committee not long ago that housebuilding in the U.S. was an outstanding example of "small business in action." He was undoubtedly right (there might be some quibble over the phrase "in action"). He could also have added that every important disorder in the industry is directly traceable to its picayune scale. Here is the case.

(1) Students of the industry have reported, *ad nauseam*, that its production methods are archaic. These consist of a succession of unconnected handicraft operations by masons, carpenters, electricians, plumbers, plasterers, and painters. While labor productivity (output per hour) in all American industry has about doubled in the last forty years, many responsible authorities are prepared to argue that in residential construction it has actually declined. But any kind of assembly-line production that keeps individual workers busy on the same operation is possible only when many houses are being built simultaneously. Only then can men move steadily from one job to the next, or do the same job while the work moves in front of them. For building one or a half dozen houses at a time, the present system is probably as efficient as any.

(2) The builder, instead of taking full responsibility for the production of a house, delegates authority to a dozen or more subcontractors. As a result, the masonry subcontractor is at the mercy of the framing subcontractor, who may be two or three days to two or three weeks late getting on the job, and usually is. The plasterer must wait on the plumber and the painter on the plasterer. The result is an intricate formula for chaos. But this "putting-out system," to borrow the terminology of medieval

woolen manufacture, was not invented by the builder purposely to bankrupt his customers, as many customers suspect. Rather, it is the natural and intelligent way in which a small businessman adapts himself to a big job. Since his capacity for management is limited, he delegates some of his responsibility to a mason, some to a master plumber, some to an electrical subcontractor, and so forth. He shares their capital and splits risk with them. Without subcontractors he would do a worse job than now.

(3) The building-trades unions, particularly in the metropolitan areas, limit output, outlaw technological progress, keep labor productivity low, and engage in dreary and costly bickering among themselves. But the building-trades unions are inherently no stronger nor more closely knit than, say, the United Automobile Workers. In rural areas and small towns, they are by no means completely organized. But power is a relative concept—much depends on the opposition. The power of Walter Reuther is counterbalanced by the power of Charles E. Wilson of General Motors, and all of Mr. Reuther's ideas on what constitutes a fair day's pay or fair day's work must be bargained out. Management in the auto industry made an issue out of the wildcat strike, the counterpart in many ways of the jurisdictional strike, and forced the union to improve its discipline. Mr. Hutcheson of the carpenters (*Fortune*, April, 1946) and his elderly men face no such power on the other side of the table—at most their business agents have only to contend with a loose alliance of local builders. Accordingly, they are able to dictate wages and working rules with little hindrance; when they renew their ancient quarrel with the sheet-metal workers, the only recourse of the employer is to tell the customer or the public about their combined misfortune. The building-trades unions are arbitrary and inefficient because the employers are too small and therefore too weak to have an effective labor policy and make it stick.

(4) The system of procuring materials is fantastically expensive. Building houses is a manufacturing operation, yet these "manufacturers" buy their materials at retail. Retailers in turn are supplied by jobbers, who in turn are supplied by the manufacturers of bathtubs, plywood, wallboard, and building paper. Before the manufacturing of a house begins, there is already a markup of 75 to 100 per cent and sometimes more on the manufacturer's cost of production. Then manufacturing begins.

Yet this arrangement was not specifically designed to bilk the home buyer—admirably as it accomplishes the result. A business that consists of 100,000 little builders must be supplied by retailers. The man who builds one $11,000 house a year requires about 400 individual items. His largest purchase, which is lumber, comes to only about $1,600. The hundred smallest items he buys aggregate no more than $500. Were a myriad of small builders all to buy direct from the original supplier, costs would be

far higher than they are now. For direct buying to be economical, builders must be much larger than they are.

(5) Finally, there is the recurrent tendency for the cost of a house to pass out of sight whenever customer demand is strong. Again size is a factor. The small builder cannot resist the unions and their ancient practice of getting while the getting is good. Such mass purchasers as Sears, Roebuck, General Motors, or R. H. Macy can resist any exploitive tendencies of their suppliers. The small builder has no chance of doing so. The speculative builder, when he sells his house, has no choice but to conform to the classical rule of the real-estate market, which is to charge all the traffic will bear. It is not for any man who builds one house a year, or ten or twenty, to assume the mantle of industrial statesmanship and try to "stabilize" the market. It would be equally appropriate and equally ineffective to ask George Jensen of Starkweather, North Dakota, to lower his price in order to stabilize the world market for spring wheat.

In the light of the foregoing analysis the search for reform in the housebuilding business becomes primarily a search for large-scale operations. Efficient house production requires firms big enough to mobilize capital and organize production in systematic, repetitive operations. They must be big enough to assume full managerial responsibility instead of dividing it with subcontractors; to oppose strength to strength in dealing with labor; to buy supplies in quantity; to counter the rapacity of the suppliers of building materials; and to take the responsibility for making a fair price to the customer.

The hypothesis that size is the answer is one that can be tested. There are a few large-scale builders in the U.S.—a considerable number on the West Coast, and a scattering in metropolitan areas throughout the country. Two such builders are examined here: one of them a well-established builder of conventional houses on Long Island, the other an imaginative though still unproved newcomer to cheap houses, who has converted from air bases in the Pacific to homes in Baltimore.

THE LEVITTS OF LONG ISLAND

Forty minutes from Manhattan on the Long Island North Shore, neighboring the spacious, moss-green estates of Jock Whitney, William S. Paley, and Harry Sinclair, is the firm of Levitt & Sons, Inc., of Manhasset. Its President, and the eager prophet of any revolution that may be under way, is William Levitt, one of two sons—the other is an architect. The Levitts are the biggest private housebuilders in the eastern U.S., and Bill Levitt has publicly announced that they are the best. Last year they produced 1,200 houses for a gross turnover of about $12 million; this year 3,000 houses are projected or in production for an expected $24 million. During the week

of May 12, when the real-estate sections of the New York newspapers were crowded with stories about the slump in home building and sales in the New York area, Levitt sold 126 houses, the best week in the firm's history.

The basic Levitt product is the four-room bungalow. No one would call them beautiful—or spacious, or elegant. A number of tricks are performed with the eaves and roof line, and they are shingled or painted in a variety of colors, but they are basically as alike as Fords. The house stands on a concrete slab and is radiant heated—copper coils carrying hot water are buried in the concrete floor. Its price, with a well-equipped kitchen—steel cabinets, sink, stove, refrigerator, and Bendix washing machine—ranges from $6,990 to $7,850, depending on location. Two thousand of the $6,990 houses that will be built this year will be rented to veterans for $60 a month, and for these there is now a waiting list of 10,000. This is the 1947 model. The 1946 house had two stories, five and a half rooms, cellar, and garage, and sold for just under $10,000. When Levitt began to suspect that the 1946 house cost more than most people were willing to spend, he lost no time in bringing out his new model.

The $6,990 house represents a great deal of money for a very small house. However, it is perhaps two thousand dollars cheaper than any other houses available in volume in the neighborhood—and, compared with most, it has an edge of a thousand or two in value when size and equipment are considered. Also, unless Levitt & Sons has developed eleemosynary tendencies, from which it has been singularly free in the past, there is at least $1,000 profit in every house. To cut prices by $1,000 or more and make $1,000 is a considerable feat—which Levitt performed by breaking through every one of the restrictions that bind and protect the ordinary member of the guild.

In the first place Levitt has capital. The firm started operations in 1929, when Abraham Levitt, the founder, a self-made lawyer, foreclosed mortgages on some real estate and built houses on the property to get out from under. It took a long while to sell the houses but, in the process, he was badly bitten by the building bug. During the thirties the firm developed a number of subdivisions, most of them with houses in the $12,000-to-$20,000 class. Its proudest achievement, a $10,500,000 development near Manhasset, called Strathmore, is covered with huge, rigorously conventional brick castles, and includes a clubhouse and swimming pool, and a massive modernistic shopping center. They made money. In the early years of the war the firm got its first experience with low-cost housing when it built 2,350 rental units for the Navy in Norfolk. When this was completed, Bill Levitt, originally a lawyer like his father, did a two-year tour of duty with the Seabees. He discounts the value of this experience in fairly characteristic fashion. "That little branch of the Navy that had the

pleasure of my company learned much more about building from me than I did from them." He returned to a firm that had capital, a comprehensive engineering, supervising, and sales organization, and an appetite for doing business in a large way.

The Levitt method of building a house is outlined in pictures on page 63 [omitted]. Its distinctive feature is the precutting of everything that goes into the house. Trucks roll away from the Levitt shop by the Roslyn, Long Island, railway siding, loaded with rafters, studding, and roof sheathing all cut to length. The proper number of pieces are dumped off in front of each bungalow, along with the wallboard, paint, shingles, and the nails to put it all together. Assembly is principally a matter of fitting and nailing; a Levitt carpenter is a handy man with a hammer but he rarely uses a saw. According to high Levitt doctrine, the economy with which precut materials, all fitting together compactly on a truck, can be moved to the site offsets any savings that might come from extensive prefabrication. Only staircases, plumbing assemblies, window frames, and other subassemblies that are easily transported are prefabricated.

The price of this orderly, factory-like flow of materials is an enormous inventory of materials on hand, in process, or in neat piles by the bungalows awaiting assembly. Currently that inventory runs to about $4 million. Investment on a similar scale runs through the entire operation. The trench for the foundation and footing of a house is excavated by a trenching machine, which in itself is a simple lesson in building economics. The machine costs $7,000, and the foundation of a single house occupies it for only twenty-seven minutes. Obviously it takes a good many houses to make this gadget worth while. Similarly, back of the concrete slab, which is installed with a labor cost of about $55, is a $200,000 fleet of Transit-Mix trucks.

Investment on such a scale is far beyond the reach of the ordinary builder who dreams of mass production, and it presents problems for the big operator as well. The Levitts got over this hurdle because they had money to start with and, on the strength of this and their product, have a line of credit with the Bank of the Manhattan Co. This, then, can now be put down as a theorem: if the housebuilding business is going to have its revolution, big gobs of money will be necessary not only for financing the sale of the finished product but also for financing the building operation itself.

Levitt uses subcontractors and lots of them. Site preparation, the slab, framing, finishing, plumbing, painting—in fact every operation on the site except the sale of the house—are subcontracted. Levitt's subcontractors, however, do not work for anyone else; most of them are graduates of the Levitt organization. Their fee is set not by bidding but by negotiation, and they are subject to the supervision of the firm's own project engineers and superintendents, who maintain close control over all operations.

Thus, while preserving one of the most sacred forms of the guild, Levitt has eliminated its substance. The subcontracting system has been turned into a device for putting foremen on an incentive plan. The make-or-break problem for Levitt, or any other large builder, is to keep labor productivity up and costs down *on the site*. On July 1 at Levitt's Island Trees project, 1,600 men were at work on 800 houses in various stages of completion. Some twenty-six operations were in progress, from grading the site to shining up the kitchen sinks and bathtubs of finished houses. Many of the men were out of sight: the chances for delay, lost motion, and simple soldiering on the job were terrific. Levitt's adaptation of the subcontractor system leaves the firm in full control but gives every one of its straw bosses a direct financial interest in keeping the men moving.

Levitt's approach to the building-trades unions is to ignore them. Neither the firm nor any of its semi-subcontractors has any union contracts. Mechanics get prevailing wages and work a five-day week, with the interesting proviso that Saturday and Sunday on a Levitt project are the days that it happens to rain. The unions have not reciprocated Levitt's indifference, and for about seven months of 1945 and 1946 they kept a picket line around the firm's projects. It did not interfere greatly with production, and sundry boycotts were equally ineffective. Everything is peaceful now, and one reason is that in Nassau County, Bill Levitt is something of a hero to what, in that upper-crust neighborhood, passes for the common people. G.I.'s who want houses, and their wives who have heard that in the old days one couple to a bedroom was maximum, consider Bill Levitt a heaven-sent answer to the housing shortage, a judgment Bill himself shares. When the Hempstead Town Board showed some reluctance about revising its building code to permit Levitt's cellarless construction, nearly 800 veterans and their families jammed the town hall to help him demand the change. Each week he gets a basketful of admiring mail. In a letter to a local paper, the wife of an Air Forces veteran said recently, "Too bad there aren't more men like Levitt & Sons . . . I hope they make a whopper of a profit."

With some of the senior citizens of the county, and with the local builders' association, which recently expelled him from membership, Bill Levitt is less popular. In fact, both he and his houses are frequently described with adjectives that would be equally applicable to a bad case of the hives. Bill Levitt professes to be mystified by this lack of affection from his own colleagues in the industry. He says that he has tried Listerine, Arrid, and Lifebuoy with no apparent increase in his social acceptability. His price cutting and press-agentry may have something to do with it, although in a free-enterprise economy these are not supposed to make anyone unpopular.

The next handicap of the housebuilding business—the tortuous manufacturer-jobber-retailer distribution chain—is no handicap whatever to

Levitt. He buys everything at prevailing prices from a local building-materials dealer called the North Shore Supply Co. All the guild conventions against direct dealing with the manufacturers are respected: other builders do not boycott the manufacturers who supply Levitt as they might be tempted to do if he bought direct. But again appearances are deceptive, for Levitt & Sons is the sole owner of the North Shore Supply. This means that at least one of the markups that go to pyramid building costs has been eliminated It is another exhibit—if any more were needed—in the case for the big builder. North Shore Supply last year had a total turnover of about $4 million: ownership of such properties is hardly possible for the man with $200 to $2,000 in capital.

Ownership of North Shore Supply has other advantages. An independent dealer supplying Levitt might have been boycotted during Levitt's labor troubles last year. Had the dealer yielded and cut off Levitt's supply, operations would have stopped. Because he owned his own supplier, Levitt's position was secure.

Levitt has not been able to do very much about the high cost of building materials, although one can imagine that a battery of twenty such concerns all pounding at lumber companies and rockboard, roofing, and plumbing-supply manufacturers might accomplish something Even here there has been progress. In June the firm opened its own lumber mill at Blue Lake, California—previously it had held an interest in West Coast mills but only for the sake of securing its supply. The Blue Lake mill not only eliminates the manufacturer's markup on about 30 per cent, by value, of the materials going into the Levitt houses, but makes it possible to precut the lumber at the mill, and the ship studs, joists, rafters, and sheathing direct to the building site without passing it through the Roslyn shop.

The disputed point about Levitt's house is its quality. It is regularly asserted that the firm substitutes salesmanship for craftsmanship. The Levitts *are* salesmen. The conventional "Cape Cod" design, coupled with the elegantly modern kitchen, represents a well-thought-out plan for catching the most attention of the most women. The $229 (retail value) Bendix washing machine, which, like all the rest of the kitchen equipment, goes with the house and also gets under the mortgage, is worth twice its price for the way its stirs the acquisitive impulses of the average bride. It is a poor week when Levitt houses aren't featured in at least one full-column story in the New York newspapers. When *Life*, early last spring, featured a modern low-cost house, somewhat resembling an underprivileged rabbit hutch (at $7,000), Bill Levitt denounced *Life*'s architect and editors and offered to build the house for $2,000.

Levitt's critics, whose capacity for both fury and slander is impressive, say that everything from the Bendix to the publicity is cover for rotten masonry, green lumber, inferior workmanship, and a singular lack of re-

spect for the feelings of the neighbors. The last charge may be valid. For the rest there is no evidence that Levitt's bungalows are inferior in workmanship to those of the surrounding operative builders. To be sure, they are cellarless, have composition instead of hardwood floors, and are finished with dry, i.e., rockboard, walls, instead of plaster. These features, however, are prominently advertised by Levitt as part of the break with tradition that both improves the livability of the house and makes mass production and lower cost possible.

BYRNE AT BALTIMORE

For pioneering a capitalist revolution, the Levitts have some marked advantages. They are experienced housebuilders, well established in a community that, at the right price, has an almost unlimited demand for houses, and they have money. The Byrne Organization of Washington, D.C., except for some prewar experience in orthodox residential construction, has none of these advantages. Nevertheless, it is conducting a remarkable experiment in low-cost housebuilding. Levitt shows that the revolution is possible; the Byrne Organization, though it has still to prove itself, shows what it takes for anyone starting from scratch.

Byrne Organization is the dressy cognomen for a collection of peripatetic Texans who, for the last thirty-five years, have been building whatever needed to be built from Cuba to Wake Island. The founder and head is John E. Byrne, a ruddy-faced, outspoken ex-cowpuncher; his general staff includes his son, John E. Byrne, Jr., Melton L. Bass, his operations manager, Mrs. Winifred Shelton, Vice President and Treasurer, who distinguished herself during the war by bossing a $38-million construction project for the Navy in Norfolk. As with Levitt, the war gave Byrne an almost pathological dissatisfaction with anything small. The firm participated in a $325-million contract for naval air bases in the Pacific and a procurement contract for the Navy, which bought $628 million worth of construction materials and equipment. At the end of the war Byrne was moving in behind the Seabees to take over unfinished work as the latter moved on to combat areas. He is currently at work on Kwajalein, Johnston, Midway, and in Hawaii.

A good 75 per cent of the brains and energy of Jack Byrne and his men is now concentrated on the village of Glen Burnie, Maryland, five miles from the edge of Baltimore on the road to Annapolis, and within convenient driving distance of Bethlehem's Sparrows Point mill and the industrial outskirts of South Baltimore. There on one site, which will have a shopping center, theatre, and other community facilities, Byrne is producing 1,200 houses, for an aggregate sales value of $8 million. There will also be some 100 rental apartments. At Harundale, as the development is called,

houses are now being finished at the rate of between ten and fifteen a day.

Byrne's basic house, which sells for $6,950, is slightly larger than Levitt's —962 square feet of finished floor space as compared with 750, three bedrooms instead of two—although it has no attic. Like Levitt's bungalow it stands on a radiant-heated slab, but unlike Levitt's house it is of highly unconventional materials. The walls are of welded steel-frame construction, lathed and plastered on the inside. The exterior is stucco, composition shingle, or painted aluminum clapboard. The roof is of welded steel-truss construction covered with wood sheathing and asphalt shingles. The whole house could be turned over and dropped without its being appreciably damaged. Nevertheless, when finished, it is surprisingly orthodox in appearance. Both house and community are most attractive.

Like Levitt, Byrne has had to finesse the handicaps that restrain the ordinary builder, and like Levitt he has been able to do so because he is big. He operates open shop at Harundale without contracts, although on other construction projects, where he has been able to get guarantees of uninterrupted production, he has contracts. For ordinary building materials, Byrne has been big enough to negotiate direct purchase contracts with suppliers, although this has usually involved a rake-off to local building-materials dealers, and on numerous occasions he has had to resort to local sources of supply for items that he could not procure wholesale. He buys a good deal of unorthodox material—steel and aluminum in particular—where there are no guild channels to be respected.

The core of Byrne's system is the inexpensive temporary shop—at Harundale it consists of nine huge Quonset huts—adjacent to the site. Byrne agrees with Levitt that the unsolved and insoluble problem of prefabrication in one central factory is how to ship a house or any substantial part of it at reasonable cost; by locating his fabricating plant next door to the building site, Byrne believes he has side-stepped this problem. With some planning, he thinks the shop can be moved from one site to another at small cost —a mobile "package" shop is even possible.

A significant advantage of site fabrication is that an operation can be shifted from the shop to the field or vice versa as experience shows where it can be done cheaper. Byrne has done a good deal of experimenting of this sort, which has left him with a strong bias in favor of shop operations. Almost invariably the better scheduling of materials, the use of jigs and power tools, closer supervision of labor, freedom from interruptions by the weather, and the better utilization of materials (scraps of roofing that would be discarded on the site can be used in the shop) have favored the shop operations. A gable end of aluminum clapboard that cost $5.60 to erect in the field cost only $1.15 when put on in the shop. The complete assembly of copper coils for the radiant heating, the plumbing assembly, walls, partitions, and the complete roof down to shingles and chimney are

now all put together in the Quonset huts. The roof section, which weighs over four tons, is hauled on a specially built trailer to the site, where a power crane drops it on the walls. Within minutes after it is in place, a welder has fused it to the walls.

Because he has a large and experienced organization, Byrne has been able to dispense with subcontractors. Apart from a special subcontracting arrangement with a painter with whom he has long been associated, everyone on the job works for Byrne. This represents something of an achievement in the case of an item like plumbing, on which the guild rules are especially strict. A plumbing-supply house that sold direct to a small builder, in violation of the rule that only master plumbers can buy plumbing supplies, could ordinarily expect to be boycotted by every plumber in the district. The preliminary result of Byrne's system, as with Levitt's, is a supply of substantial small houses at a price a thousand dollars or more below the market. Like Levitt's it is uniquely tied to large-scale operations —Byrne estimates that his present system could not be used for fewer than 300 houses at a time.

THE QUESTION OF MONEY

Unlike Levitt, who, to the considerable regret of his competitors, is as well established as the Long Island Rail Road, Byrne is not yet out of the woods. For one thing, it remains to be seen how people will take to Byrne's house. The FHA, after painfully protracted investigation, has given it full approval, and during the first six weeks after sales opened, seventy-six were sold. However, customers have to be persuaded that the unconventional construction is good, and Byrne, like most contractors, is inexperienced in the merchandising techniques that would win it public acceptance—compared with Bill Levitt's adept press-agentry he functions in what amounts to an atmosphere of total secrecy. Moreover, Harundale, perhaps like any new venture, has had to go through a shakedown stage when costs were obstreperously inclined to get out of hand. Finally, Byrne has yet to lick the problem of financing.

Housing finance in the U.S. is a looking-glass image of the industry it serves. It assumes that the builder has little or no capital of his own and would misappropriate, or at least misuse, anyone else's money if he had the chance. The builder ordinarily gets his construction money in what are called "progress payments." There are no hard-and-fast rules, but usually he gets 25 per cent of what will eventually be the mortgageable value of the house when the land is purchased, or sometimes when the foundation is laid. He gets a further advance when the house is "roughed in," another when the roof is on, and a fourth when it is finally completed. Under this system the lending agency's commitment never much exceeds the value of

the work in place; at no time is the builder exposed to whatever temptation or carelessness might grow out of the possession of ready cash. The small builder can survive under this system: as fast as he receives money from the bank he passes it along to his mechanics or suppliers (from whom he usually buys on a thirty or sixty-day account), and he may bridge any financial fissures that open by some highly dexterous check kiting.

For Byrne or any similar builder, this system is worthless. Before the first foundation was laid at Harundale, Byrne had invested $750,000 in an inventory of lumber, steel, and other building materials, $350,000 in trucks, bulldozers, power tools, jigs, and other equipment, and $150,000 in his temporary shops. For this he must have working capital. The progress payments will not do.

Harundale is being financed by Allied Building Credits (A.B.C.), which was established in 1935 by the Weyerhaeuser Timber Co. to underwrite home construction and repair, and, more than incidentally, to help make a market for lumber. In 1945 it was acquired by Transamerica Corp., partly with a view to financing home construction in the Byrne manner. Unfortunately for Byrne and others like him, A.B.C. is returning to orthodox underwriting. What Byrne does in the future depends first of all on whether Harundale proves out. What he, or any similar builder, does depends also on ability to find a lot of money.

An examination of two builders can hardly provide a final verification of the hypothesis that the hope of the housing industry lies in larger-scale operations. But what size can accomplish is at least significant. Both Byrne and Levitt have been able to break through the guild controls that bind the average builder. They are large enough to afford a management that actually manages and to evade the tollgates where the rest of the industry pays tribute to its antique distribution system. By building several hundred houses at a time, they are able to use power equipment and the production-line methods that, since the time of Adam Smith, have been the basis of capitalism's claim to superior efficiency. If the result is not yet a cheap house, there is reasonable indication that this is the route by which cheap houses will have to come.



CHAPTER XX

Social Welfare

99. WHY *SOCIAL* SECURITY? [1]

How the demand for social security measures arose in the United States is clearly shown in this selection. The shift in the pattern of life of the individual and the family grew out of the economic revolution, which transformed a small agricultural country into an enormously complex industrial nation. The greatly changed conditions of life brought equally changed social relationships; the role of government became different in the interrelated industrial society from that in the agricultural. Although the viable conditions changed for each family, whether it was on the farm, in the metropolis, or in the county seat, the influence of ideas that had originated in the old and departed way of life continued. The struggle to keep the governmental order in harmony with the actual structure of society remains a constant challenge. Social security of various sorts, for example, workman's compensation, old age pensions, and unemployment insurance, bridges the gap between the old secure way of life and the new insecure existence.

THE musket over the fireplace once stood for security in American homes. It meant game for the pot. It gave protection against unfriendly beasts and Indians. It was a first defense against hunger and danger in the new land.

Probably no families in the world ever have been as self-reliant as the Americans who wielded their muskets in the Colonies and on the frontier. They literally made their own living, for a family had little or nothing except what its members could do and make. A large family was an advantage, since then there were many hands to plant and weed and harvest, to chop wood, to carpenter, to spin and dye and weave, cook and sew. A widow with children was a matrimonial prize.

[1] Mary Ross, Social Security Board (1945). Illustrations omitted.

Our Thanksgiving celebrates the security of the colonists. Our turkeys are the descendants of the wild turkeys their muskets brought down; our cranberries, of the cranberries they found in the bogs. Our pumpkins, potatoes, and onions still commemorate the good harvest the Pilgrims gathered in 1623.

For 250 years and more many American families, like the first colonists, measured their security in terms of the things they could make and do for themselves. As the frontier stretched westward, covered wagons carried with them the habits and ideals that had conquered the wilderness at Jamestown and Massachusetts Bay.

Now automobiles plunge in days over the trails that a scout on horseback or a wagon could travel only in months, and airplanes cross the continent in a single hop. The ways in which American families live have changed as swiftly as the ways in which they travel.

Within the lifetime of people still living, the frontier has all but vanished. Change is so obvious that we are likely to take it for granted. It has come so quickly that it is hard to realize what it means to us who live today.

In the following pages, print and pictures outline some of the changes that have brought us to days when we reach for a pay envelope, not a musket, to get our food and protect our homes.

WORK MOVES TO THE CITY

As late as 1890, more than a third of the Nation's homes were on farms. Country families are bigger than city families. Hence it was not until 1920 that the census found a greater number of people in the towns and cities than on farms and in villages. Today the farms have only about a fifth of the homes and less than a quarter of the population. In hardly more than a generation we have ceased to be predominantly a nation of country people.

Boys and girls left the farms because the road of opportunity led to the city. Not so many hands were needed on the farms. Machines were taking over work that muscles once had done. Science taught more efficient ways to use the land. Up to 1870 the farms had more than half the Nation's workers, not counting children. By 1940 they had less than one in six.

Farm efficiency has grown rapidly in recent years. Production per acre increased nearly 20 per cent between 1910 and 1930. Production per worker increased 40 per cent.

Young people from the farms went into the factories and mines. They helped build the railroads and the cities. There seemed no end to new jobs in the rapidly developing Nation. From 1870 up to 1910, each census found a larger percentage of the population "gainfully occupied."

As factories turned out more goods, more people were needed to sell them

and to finance the making and selling. Since 1900 literally millions of men and women have found jobs in these fields—as salespeople, stenographers and clerks, telephone and telegraph operators, wholesale and retail dealers, bookkeepers, cashiers, and accountants, insurance agents, commercial travelers, stockbrokers, and bankers.

And as invention and science multiplied the output in one field after another, more of our energy could be turned into jobs which have to do with services, rather than things. There has been a growing number of restaurant and lunchroom keepers, janitors and elevator operators, barbers and manicurists, doctors, dentists, and trained nurses; of librarians, teachers, and other public servants; actors, authors, and artists; lawyers, chemists, and technical engineers.

Some of these added jobs represent services which families formerly had done for themselves at home. Others reflect our rising standards of living —more and better education, better health, more leisure, greater comfort and convenience in daily living.

MAKING A LIVING AND MAKING MONEY

The life in all these many occupations differs in one way from that of the farms where once most Americans made their living.

Today we do [not] make a living. We buy it. We make money, and that money mostly determines the kinds of houses we live in, the food we eat and the clothes we wear, the security and independence we look to in hard times, sickness, and old age.

Even in the Colonies, of course, some things were bought and sold. Paul Revere was a silversmith as well as a soldier. But the colonists used money chiefly to buy the luxuries of those days, such as Paul Revere's porringers, or fine furniture, or tea, coffee, and spices.

Many Americans lived as did a New England farmer who wrote in his diary:

"My farm gave me and my whole family a good living on the produce of it and left me, one year and another, one hundred and fifty dollars, for I never spent more than ten dollars a year, which was for salt, nails, and the like. Nothing to eat, drink, or wear was bought, as my farm produced it all."

On the farms of our grandparents where soap and candles were made and hogs butchered for the smokehouse, a family still made a considerable part of its living without using money. Even today, an important part of the "income" of farm families comes in the things they raise and make for themselves.

But farmers, too, now must have money. They need it for the kinds of things we no longer make at home and also for the modern tools of their

trade—for machines and gas and oil to run them with, for commercial fertilizers, for radios to follow weather and market reports.

In the towns and cities, money is the means of existence from day to day.

The home of a pioneer family was a little world in itself. Members of the family were their own farm and factory workers, butchers, bakers, and barbers; policemen and firemen; often their own doctors and nurses, and sometimes their own teachers as well.

As one of these occupations after another has gone out from under a family's roof, it has become possible for us to have more goods and services than a family can produce for itself. But most of a family's chance to have them depends on its ability to buy a living.

A FAMILY NO LONGER IS A FIRM

It is common to hear young people discussing when they can afford to marry and have children. That question would have astonished young people on the frontier.

A young man then could hardly afford *not* to marry. He needed a wife as a business partner, children as helpers. In early New England not only spinsters but bachelors were under a cloud. Bachelors, in fact, were regarded with suspicion. Usually they had to live where the court told them to. Single people had to attach themselves to a family to get a chance to work for their living.

Both the children and the old people earned their place at the family table.

As we have shifted from a land economy to a money economy, the work of the young and the old no longer has the same value in helping a family to make its living.

Children need more schooling. Once they learned from their chores, while doing the family's business, many of the things they needed to know as adults. Now work at home fails to give them the background they need for jobs in business, trades, and professions. State by State, we agreed that children must go to school.

Change in the work done at home and in our knowledge and standards of child care made children almost a luxury to a family, instead of an economic asset. Families are smaller, especially in the cities. There are fewer sons and daughters to care for the old people of future years.

Old people, like children, have lost much of their economic value to a household. Most American families no longer live in houses where one can build on a room or a wing to shelter aging parents and aunts and uncles and cousins. They no longer have gardens, sewing rooms, and big kitchens where old people can help make the family's living.

Old people were not "dependent" upon their relatives when there was

need in a household for work they could do. They have become dependent since their room and their board cost money, while they have little to give in return. Now they need money of their own to keep the dignity and independence they had when their share in work was the equivalent of money.

The shift of work away from homes also explains the work of girls and women today. Women have always worked for their living. When work left the home, they followed it into factories and offices. By 1930 the census found a quarter of all the girls and women "gainfully occupied," not including housewives working without pay for their families.

Studies of employed women have shown again and again that they, like men, get jobs in order to support themselves and their families. In other words, they, too, have shifted from making a living to making money. It is among native-born white American women that the habit of wage work has grown up so rapidly.

Married women, like single women, find it necessary to work for wages. Between 1900 and 1930 the percentage of married women at gainful work increased six times as rapidly as that of single women of the same ages. Many married women carry the double job of housewife and wage earner. Here again, studies show that they do it because their families need their money. Most of the work of wage-earning women represents not women's rights but women's duties.

During our lifetime it has become increasingly difficult for a family to pull together and go into business for itself in one way or another.

For years there was good land to the westward to be had for the taking. Homesteading was an outlet for the sturdy and ambitious. In towns, family shops and businesses were carried on with relatively small amounts of capital.

There is no more free land on which a living can be made. A farmer needs machines as well as skill and grit if he is to compete in the market. In the towns and cities, modern methods of production and merchandising have greatly increased the experience and capital needed to go into business and stay in business.

Individual enterprise, which so often meant family enterprise, now plays a minor part in earning our national income. Including the farmers, only about one in five of the gainfully occupied works for himself. As a people, we no longer work as individuals or families, but as employees.

LIFE IS SAFER, BUT LIVING LESS SECURE

The safety of life has never increased as rapidly at any time on record as in the past 50 years.

Take Massachusetts, for example, where there are records over a long period. A baby born in Massachusetts in 1789 had, on the average, an expectation of a life of about 35 years. In the next century the expectation of life at birth increased about 8 years; babies born in Massachusetts in 1890 had before them a life expectation of 42.5 years for men and 44.4 years for women. But between 1890 and 1930 those averages grew to more than 59 years for men and more than 62.5 for women. The gain in the 40 years following 1890 was twice as great as that of the whole century preceding.

This gain in average length of life has come almost wholly from success in saving the lives of babies, children, and young people. More of us live to reach middle age and old age. At the same time the birth rate has been declining. The result of these changes is that old people form an increasing percentage of the population.

While life became safer, the chance to earn a living became less secure. The growth of employment in basic industries began to slow up. Machines and improved methods made it possible to increase output without increasing the number of workers needed to produce it. Then, for the first time, one important field of work after another reached its peak in employment and began to decline—began to use a smaller number of workers.

Agriculture's *share* in the total employment of the Nation had been going down since 1870, but each census up through 1910 counted a larger *number* of agricultural workers. In the census of 1920 and the census of 1930 the number of workers was smaller. In 1930 there were 600,000 fewer farmers and farm workers than there had been 20 years before.

A similar change came in mining. Efficiency was growing. In 1930 two soft-coal miners could turn out as much as three had done in 1900. The peak in the census record of mine workers came in 1920. In the 10 years that followed, industrial activity was expanding, and new mine workers were needed for the gas wells and oil wells. But by 1930 the total number of miners had dropped by 100,000.

All through the prosperous years of the 1920's there were fewer workers on the pay rolls of factories and steam railroads than there had been at the start of the decade. In 1930 the average number of factory workers was 1,500,000 less than that in 1920. The average number of employees of steam railroads had dropped by 500,000.

A man no longer had the same chance to continue through his working years in the occupation he had learned as a boy. The new openings in trade and the service occupations and professions often made specialized demands which workers from the older industries found it hard to meet. It was not likely to help a jobless miner, for example, to learn that more barbers were being employed.

This shift in occupations was particularly difficult for older men. From 1890 on, an increasing percentage of the men of 65 and over was reported as unoccupied.

With the census of 1920 a more general change appeared. In that year and in 1930 the reports showed a drop in the percentage of all men and boys of 16 and over in gainful occupations. In spite of the increasing employment of girls and women, these reports found a decline in the proportion of all Americans of 16 and over in gainful occupations.

Work has been shifting from place to place as well as from occupation to occupation. Manufacturing was declining in New England, for example, at the time when the growing automobile industry pushed it upward in the Central States. Often families must move to follow jobs or find them.

Americans always have moved in search of a living. The older migrations, however, were likely to be those of people who expected to found a new home, settle down, and grow up with the town. The quick shifts of recent years have split up families. They have weakened the old ties of kinship and neighborliness on which a family used to rely. The loss of neighborliness and the increasing size of stores and factories have weakened the personal ties between workers and their employers.

As work has become specialized, we also have developed occupations in which the demand for work shifts from season to season.

On family farms work was, and is, seasonal, in the sense that each season has its particular demands. But indoors and outdoors, there is something useful to be done each month of the year. The season for wood cutting comes when the fields are bare; for sewing, before or after pantry shelves are stocked with jellies and preserves.

But when factories began to turn out the clothing that families once had made during the spring and the fall sewing, factory workers entered jobs in which they were likely to be employed for only part of the year. A cutter or a machine operator may be an expert at his own job, but he finds it is hard to earn in some other way when the factory slows down or closes.

All these changes in the kinds and places and time of work have made the demand for workers changeable and uneven. As a result, many workers —especially industrial workers—often have been without jobs even in boom times.

The Committee on Economic Security found that in the years 1922–29 an average of 8 percent of our industrial workers were unemployed. In the best of those years, nearly 1,500,000, on the average, were without jobs.

When hard times came, further millions lost their chance to earn a living. By 1932 and 1933 industrial unemployment had risen to about 39 percent. That meant two industrial workers out of five—10,000,000 or more in all.

The word "unemployment" was not used in English dictionaries before 1888. "Unemployable" came into use only a year earlier.

As far as we can look back, men and women, of course, had lost one way of earning their living and had to find others. Groups of workers, like the hand weavers, had seen their work taken away by machines. But it is only recently that we have realized that there could be a widespread situation—*even in good times*—*in which* large numbers of people who needed to work and wanted to work had no chance to do so.

It was not until machines had knit our lives closely together in industry and trade that unemployment could weigh down families throughout a community or a nation. Only recently have we realized that the requirements of work have become so specialized and exacting that at any one time some people cannot get any paid job.

In our present money economy, unemployment became a common hazard of family life like the epidemics which swept our cities three or four generations ago. The livelihood of families can be cut off as quickly and unexpectedly as their lives once were cut off by typhus, yellow fever, or cholera.

Unemployment is like a contagion also because it spreads. When a big factory shuts down, its whole neighborhood and city suffers. The livelihood of all who have been selling their goods and services to those wage earners is affected—storekeepers, landlords, doctors, barbers, owners of movie houses, and, in turn, the workers whom they employ and those who produce the goods they sell. When large numbers of people in one part of the country are without earnings, families on farms and in cities hundreds of miles away may find their living less secure.

Science and invention have given ordinary people ease and comfort and variety of which even rich people of earlier civilizations did not dream. A pair of fine stockings once was a present for a king or queen. But this progress has a price. It demands that we use our ingenuity to keep families independent, now that their living hinges on the judgment, skill, and good luck of many other people as well as of themselves. We have shown our ingenuity in making machines and scientific discoveries. The job now is to adapt our common life to the changes that came with our progress.

FAMILY SECURITY AND SOCIAL SECURITY

The words "social security" have become popular in the last ten years. Actually the right and duty of a community to protect its members is as old as the records of men. Primitive tribes have rules and customs to assure the safety of all.

Even pioneer American families, of course, relied on each other for help in trouble and emergencies. Barn raisings and corn huskings, which have lasted down to our times, are a survival of years when a household

asked the neighbors' help in an emergency, knowing it would give its help when its turn came.

But communities did not rely wholly upon the willingness of people to help each other. They did not rely wholly even on the willingness of families to support their own members. The common law of England, for example, lays down the duties husbands and wives owe to family support.

Under later circumstances we have found many of the older family laws oppressive, such as the laws which restricted the right of a woman to her earnings, or her right to hold or will property, or to make decisions about her children. Those laws, however, were intended for the protection of families in the circumstances which existed when the laws were made. They held a family together as an economic unit.

The great English commentator, Blackstone, wrote: ". . . even the disabilities which the wife lies under are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England."

In the Colonies, drawing their traditions from England, a husband was obliged by law to support his wife in the manner justified by his circumstances. He was liable for the debts she had contracted before her marriage, as well as later ones. She had a right to inherit part of his estate when he died. In these ways, law and custom, as well as affection, protected the security of persons least able to get security for themselves.

Since a living was made in families, it was through families that a community made and enforced its security measures.

Many of these measures remain with us today. The security of children, wives, and aged parents does not depend on the willingness of their family to support them. It is written into our laws and enforced daily in our courts. It is a form of social security, because as a society we see to it that members of a family give this support when they can, whether they wish to or not.

SECURITY IN HEALTH AND SAFETY

As cities have grown up we have taken another series of steps for social security by banding together to pay for certain kinds of protection that no one family can provide for itself. We have police and fire departments, for example. We make fire laws governing the kinds of buildings that people may build in safety to themselves and their neighbors. We support public health departments. We set up traffic regulations to protect safety of life on the highways and streets.

We also have taken steps to aid helpless people who need a kind of care or an amount of protection that few families can provide for themselves. As our increasing scientific knowledge showed the need and the way,

we built hospitals for the mentally sick and for people with tuberculosis. We made laws and opened clinics and special schools for crippled children.

At first these measures to help unfortunate people dealt chiefly with those who were dangerous to others, such as mental patients and people sick with communicable diseases. More recently we realize that it is public economy as well as kindness to make sure that other disabled people get care, since often they can recover enough to earn a living for themselves. It is cheaper to cure them than to care for them for years in institutions.

About forty years ago we began to realize that security in health and life must follow people out of their homes and into the factories.

Our greatest success has come in making life safe for children.

Up to about 1900 many children had gone along with their elders into the factories. In 1900 nearly a fifth of all the 10-to-16-year-old children were at work. This was a larger percentage than had been found in any previous census year.

Then State after State decided that factories were not places for children. Laws were passed to restrict child labor and to specify the conditions under which children might work, if at all. At the same time other laws made it compulsory for children to have more chance to go to school and stay in school. In 1930 less than one-twentieth of the 10-to-16-year-old children were in gainful work.

We have not yet lifted by any means all the burden of harmful labor from the shoulders of children, but most of it is gone. And in the twentieth century we have come far toward achieving what some of the colonists set themselves as a goal: the right of children to the security of an education. In 1932 President Hoover's Committee on Recent Social Trends declared that the fact that half the children of high-school age were in the high schools was "evidence of the most successful single effort which government in the United States has ever put forth."

In the past half century many States have passed laws to promote health and safety in work for adults as well as for children—laws governing hours of work, night work, dangerous work, and the like. These are conditions which workers no longer can control for themselves as they could when they worked at home.

SECURITY OF LIVELIHOOD

And in some ways we have taken steps toward assuring not only health and safety in work but also the money to which working families must look in order to buy their living.

When children were taken out of factories and put in school, it was obvious that some families suffered from the loss of the children's earnings. This was especially true in families where the father was incapacitated or dead. Widows with children were no longer a matrimonial prize.

In 1911, two States passed laws to give small money allowances to needy mothers, so that they could keep their children at home rather than put them in an institution. By the beginning of 1935, 45 States, Alaska, Hawaii, and the District of Columbia had mothers'-aid laws on their books.

Other laws looked to the earnings of adults.

By 1911 a majority of the States had passed laws establishing minimum wages for employees on public works.

By 1910 a tenth of the States had free public employment services. This kind of service was later established by many of the other States, and Federal interest in it dates from 1918.

In 1911 the State of Washington passed a workmen's compensation act. In the next ten years similar laws were enacted by more than forty other States. These laws required employers to insure their employees against injury. Under them the cost of industrial accidents, and to some extent the costs of sickness due to work, have become a part of the running costs of industry.

Under the old common law, injured workers had a right to try to collect damages from their employers. The workmen's compensation acts established a more just and orderly way to give workers what the common law admitted as their due.

Starting in the 1920's, many States took steps to provide some security for another large group of their people—the old people who were in need and who probably would never be able to earn their own living again. Alaska has had a law since 1915 to aid old residents in the Territory who are in need. By 1935, there were 28 States, as well as Alaska and Hawaii, which had such laws.

This wave of laws to pay regular allowances to needy old people did not come by accident or imitation. It came because of the growing percentage of old people in the population and the inability of the old to work for their living. Old age was becoming an increasingly serious problem to old people and their families and their towns and counties.

Most of the allowances given to old people under State laws alone were very small. Even so, they have helped many old people to stay in their own homes and to keep their self-respect when they share the homes of others. Giving allowances has been cheaper as well as more humane than caring for old people in poorhouses.

Regular assistance was not provided for all the needy aged or all the needy mothers and children even in the States which had passed such laws. Under some of the State laws a county chose whether or not it would take part in the State plan. When county and State funds ran low, even eligible applicants remained on waiting lists for months or years.

Mothers' aid and old-age allowances are not "pensions" in the sense in

which we generally use that word. Widowed mothers and old people do not get assistance just because they are widowed or have reached a certain age. They must show that they are in need.

This kind of assistance is a modern way of meeting an old responsibility. It recognizes the obligation of our Government to provide basic security for these people who cannot earn it for themselves; and it offers a more just and orderly way of meeting that responsibility.

It is a better method than those which States and towns and counties long have used, such as giving baskets of food or tons of coal, or building orphanages and almshouses. It gives needy people a greater chance to choose how they will live. It provides them with what all of us now need to keep our freedom and self-respect—money for their own use.

One social historian has called measures like these social inventions. They are ways we have invented to fit our social life to the changes brought by mechanical and scientific inventions.

Unemployment compensation is a social invention which was first applied in the United States when Wisconsin passed its unemployment compensation law in 1932. Such a law differs from the kind of assistance just mentioned. It is like workmen's compensation—a form of social insurance. As workmen's compensation protects wage earners from the costs of accidents to life and limb at work, so unemployment insurance insures them against some of the costs of the accident of having no job at all. It is not charity or relief, but a means of preventing the need for relief. Like other kinds of insurance, it distributes the cost of a risk—in this case loss of wages—among large numbers of people and over a long period of time, instead of leaving the individual worker with a burden greater than he can bear.

For some time, people had realized that the same principle—social insurance—might well be applied to the problem of old-age security. This also had become too big a risk for individuals or families or even State governments to meet single-handed.

SAVING FOR A RAINY DAY

Our expression "saving for a rainy day" recalls the times when families stored wood in the shed and food in the cellar and pantry for seasons when it was difficult or impossible to go out to fetch them. Why do they not store money in the bank now for the time of unemployment or old age when wages stop?

There is an answer to that question in a study made by The Brookings Institution of family incomes and savings for one of our richest years, 1929, and in a later study made by the Office of Price Administration for the war year 1942. "Savings" in these studies include not only money put in

the bank but payments on mortgages, life insurance premiums, and the like.

The Brookings Institution found that in 1929 families with incomes under $1,000 spent, on the average, more than they received. They drew on past savings or got outside help or went into debt. Families with incomes of less than $1,000 represented a fifth of all the families of the Nation in 1929.

Families with incomes of $1,000 to $1,500 kept even, on the average, but saved little, especially in the cities, where everything had to be bought and living costs were higher. These families represented another fifth of all families in that year.

Families with $1,500 to $2,000, accounting for nearly another fifth of the families, saved a little as a group, but not much. The reason is not hard to find. At 1929 prices, the study pointed out, a family income of $2,000 "may perhaps be regarded as sufficient to supply only basic necessities."

Thus in the rich year 1929, three-fifths of the families in the United States could put by nothing or only a little for the hard times that were coming. More than 85 percent of all the family savings in that year belonged to the richest tenth of all the families, those with income of $4,600 or more.

By 1942, the pressures of war had forced total family income in the United States far higher than in 1929. But the pattern of family income and saving shown by the OPA study was not very different.

In 1942, more than one-fifth of the families had money income of less than $1,000 and, as a group, were in the red for the year. About half the families had less than $2,000 in money income.

Total family savings in 1942, like total family income, had greatly increased, partly because of wartime pressures and partly because it was hard or impossible to buy things like automobiles and refrigerators. But again, nearly all the saving was done by families in comfortable circumstances. The half of the families with less than $2,000 made less than 3 percent of all the family savings. About 58 percent of all the savings, on the other hand, belonged to the richest 10 percent of the families, those with money income of $5,000 or more.

Should families have saved more than they did?

Even low-income families today are likely to regard as necessities things which their parents may have done without, such as running water, electricity, haircuts, movies, a greater variety in clothing and diet. It costs more to be sick. Medical care is better and therefore more expensive. An employee who loses time from his job because of sickness often loses pay and sometimes loses the job as well.

But what would happen if all families did save as much as they could by doing without all but the barest necessities?

The families who now save little—those with low and moderate incomes —make up a large share of the markets on which our living depends. In 1929, 71 percent of all the families and in 1942, 62 percent, were under the $2,500 mark. Their spending is necessary to hold up the fabric of trade and industry on which the living of the Nation depends.

When a large part of the population cuts down spending, that fabric sags, and workers and others feel the weight of hard times. That is what happened in the early years of the depression when fear and necessity made people stop buying.

There seems no question of the willingness of American families to save when their incomes approach a comfortable level. But the evidence of this study shows that most families, and especially the families whose risks are greatest, have little to look to when a rainy day comes. Their security lies in the steadiness of their earning and the safety of what savings they are able to make for the years when they no longer can earn.

When trade and industry brought people together in towns and cities, it no longer was safe for each house to have its own well. The safety of the whole town made it necessary to have a town water supply.

The safety of all of us now depends also on regular earning and spending. Unless many people are buying what others are producing and selling, earnings are less, jobs are fewer, and all of us have less chance to earn. The well-being of families depends on the ability of other families to buy.

Family security, in short, once dependent on work done at home, has followed the work of the family out of the home. Social security is no longer home-made.

THE SOCIAL SECURITY ACT

The Social Security Act of 1935 grew out of these changes in American life. It brought together our past experience in meeting insecurity. It also set up a bulwark against some of the newer kinds of insecurity which threatened large numbers of us in this twentieth century. After 4 years' experience with the law, Congress extended and strengthened it in 1939.

Several parts of the act apply to people whose troubles we have recognized for many years—those who are too young or too old to earn, and those who are physically handicapped. The act authorizes Federal grants of money to help the States to give public assistance to needy old people, needy blind people, and children who have lost support or care because of the death, disability, or absence of one or both parents. The Federal Government meets about half the cost of the monthly payments the States make to these needy people. The act also authorizes grants to the States to help them provide services for child welfare, for crippled children, and for the health of mothers and children.

These parts of the Social Security Act use our national resources to help all the States do better what most or all of them had already undertaken to some degree. Nearly all the States are taking part in all these programs.

In addition, the act set up two entirely new national systems of protection against insecurity caused by loss of earning power. These systems cover millions of the men and women who depend on their wages to buy their living and consequently suffer when they are out of a job or too old to work. They cover nearly all jobs in factories, offices, mines, mills, stores, and other branches of industry and commerce—about half of all employment in an average week in ordinary times. In general, they do not cover work on farms or domestic service in private homes or any kind of government employment or work for certain charitable and other nonprofit organizations—such as schools and churches—or the jobs of people, like farmers and storekeepers, who have their own business and work for themselves.

In the Federal-State system of unemployment insurance, the Federal Government makes grants to States to pay the cost of administering the State's unemployment insurance law. Within 2 years after the Social Security Act was passed by Congress, every State and Alaska, Hawaii, and the District of Columbia had an unemployment insurance law. Under this system, now in full operation throughout the United States, industry and business share part of the costs of unemployment which formerly fell upon workers alone. Employers, and in a few States workers as well, make regular contributions under the State law to pay benefits to people who are able to work and available for work but cannot get a job for which they are fitted.

Under the laws of the States, whether or not a worker can draw unemployment benefits and, if so, the amount he gets and the number of weeks for which he can get it if he does not find a job depend generally on the amount of work he has had in employment covered by the State law and what he has earned in such jobs. The weekly benefits paid to unemployed workers generally replace half or less of what they would have earned. Though workers still carry a large part of the loss involved in being jobless, the benefits help them to keep on buying their living until they can find work again. In this way unemployment insurance also benefits business, which depends on what workers buy.

Unemployment insurance helps workers to bridge gaps between jobs. It is equally important to help unemployed workers find new jobs. Together these two protections—job insurance and job-finding service—make up our employment security program. Local offices of the United States Employment Service help workers to find jobs and employers to find workers, without charge to either. A worker who is receiving unemployment benefits must report to the employment office each week and

must take any suitable job that is offered him or have his benefits stopped.

The employment security program helps to steady the income of wage earners during their working years. The Social Security Act also helps workers to build up an income for themselves and their families in old age or for the family if the worker dies.

In 1935, the act established a Federal old-age benefits system to pay benefits to retired wage earners after they reached the age of 65. Under the 1939 amendments, this system was broadened to include insurance protection to the family as well. Now it is called old-age and survivors insurance.

Under this Federal system, monthly benefits are paid to insured wage earners after they reach 65 years of age and stop work, to their wives at age 65, and to their children under age 18. When an insured wage earner dies, whatever his age, monthly benefits are paid to his family; that is, to his young children, to his widow at age 65, or at any age while she has a child in her care; or to his aged dependent parents if he leaves no widow or child. When no survivor is eligible for monthly benefits at the time of the wage earner's death, a lump-sum death payment may be made.

The amount of the benefit that is paid to a worker or to a member of his family depends on his past wages in jobs that come under this law. Workers and their employers contribute equally to the trust fund from which benefits are paid. Until 1946, as the law now stands, each pays one cent for every dollar of wages from jobs covered by the system.

Federal old-age and survivors insurance is different from the public assistance paid to needy old people and dependent children by the States with Federal help. Public assistance is paid to people who are in need and are otherwise eligible under the State law. People have a right to assistance only if they are in need. In contrast, insurance benefits are based on the worker's past wages and are paid regardless of any other savings or income the worker or family may have. These benefits help to *prevent* need. Through this insurance, millions of workers are building up a definite income which the United States Government will pay to them when they are old or to their families if they die.

Thus the Social Security Act helps to provide some income to people who are little able or unable to earn. In one way or another, the cost is spread over large numbers of people to provide some security for those of their number who are unfortunate at any one time. The act is a foundation on which all of us, working together, have begun to build security against risks which very few of us can meet alone. As time goes on and as we learn by experience, these protections may be further broadened and strengthened.

What we want today is what Americans have always wanted and worked for. The colonists and frontiersmen wanted independence and oppe-

tunity for themselves and their children. They wanted to make their own living and to take an active share in the life of their times. All that has changed today is the way we take to get these things. Our security is the security of the whole people.

100. FOR FEDERAL AID TO EDUCATION [1]

THIS and the following selection present the arguments for and against federal aid to education. The federal Constitution does not delegate power over education to the national government; any federal assistance, therefore, must be extended through indirect routes, such as federal grants-in-aid The success of democracy as a form of government depends on the judgment of a majority of the people Does universal education of a certain standard contribute to developing judgment? That it is assumed to make this contribution is one of the explanations for universal free public education. Yet there is a wide disparity between the possible educational expenditures of the different states and some evidence that, below a certain level of expenditure per pupil, the educational product is poor. Should the federal government equalize the caliber of free public education? Mr. Freeman bases his argument that it should on the need for a high level of education in the country as a whole. The need is not now met because the poorer states are proportionately richer in numbers of children than in money. Mr. Freeman firmly opposes centralized control over education, but he specifies that federal aid must be available to states on the basis of need, and that the money must be spent without racial discrimination.

THE basic principle which must govern our policy in this matter is that education is of national concern. In fact it is of world concern, although we still have to develop the necessary organization and procedure to deal with it on a world-wide scale.

The nation must make sure that a high level of education is provided for all its citizens in order, first, that they may have the intelligence to discharge their responsibilities as citizens, and, second, that they may be competent workers in the diverse and often intricate occupations of our modern, complicated, industrialized society. The attainment and preservation of freedom within nations, and the achievement of harmonious relations between them, demand the utmost in the intellectual, moral, and spiritual development of every individual.

[1] Frank N. Freeman, *State Government* (journal of the Council of State Governments), January, 1948, Vol. XXI, No. 1, pp. 14 ff.

It will take time for backward lands to approach this ideal; there is no excuse for the richest nation in the world to delay maximum progress toward its realization beyond the time necessary to enact the required legislation.

The necessity to insure a high level of education throughout America does not rest wholly on altruistic considerations. Perhaps justice, humanitarianism, and religious sentiment are more powerful motives, and sounder ones, than self interest. Selfishness permits a weighing of narrow gains against narrow losses and always leaves the balance in doubt. It produces a grudging response, inadequate to the need, in contrast to the free outpouring that springs from genuine fellow-feeling. However, there are cogent considerations of self interest which are perfectly plain, and deserve to be set forth.

Two clear and evident facts demonstrate the interest of each section in the educational level of every other section. These are the enormous migration characteristic of our population and the influence exerted by each section on federal legislation.

It is estimated that four million persons moved from one state to another each year from 1930 to 1940. There is no way by which a state or a community which has provided well designed and equipped buildings, engaged well educated and devoted teachers, developed a rich program, and carried most of its youth through high school and a third or more through junior college, can prevent its adult population from being diluted by an infiltration of masses of people who lack these advantages. The Pacific states, among others, know too well what it means to have their cities overwhelmed by youths and adults whose knowledge and standards have been obtained in schools that were housed in shacks, under teachers with meager training and a salary below that of an untrained laborer, with a program reduced to the bare bones, and extending hardly to the end of a short term elementary school.

The meager education provided by the poorer states is not a matter of choice. Some states simply do not have the money to provide a decent education. Consider, for example, the contrast between one Southern state and California. The figures are for the period just before the war. California spent $125 per pupil in elementary school and high school; the Southern state in question spent less than $25, or one fifth as much. Is it any wonder that the army recruits in the first World War from that state made an average score of only 36 on the Army Alpha test? This was just half the average score of the highest state, Oregon The average teachers' salary in the two states presented almost as wide a contrast, $2,350 in Oregon as against $550 in the other. Note that there were as many salaries below $550 as above in the Southern state I am now citing.

I have said that its low expenditure for education is not a matter of

choice. It is due to the fact that this state has too many children and too few dollars. It has 550 children for every 1,000 adults while California has 875, or half as many. In other words, the Southern state has twice as many children to educate. It is no wonder that, in relationship to population, it has less than half as many youth in high schools. With twice as many children, its people have less than one third as large a per capita income, about $200 as compared with about $700 in California. Out of their meager income they spend half again as large a per cent for education, 6.54 per cent against 4.02 per cent in California. The children suffer, the citizens suffer and the whole country suffers the penalty of wretchedly poor schooling in the low income state—not because its people do not choose to provide better schooling, for they devote one sixteenth of their income to it, but simply because they are rich in children and poor in dollars.

Although the state just cited is the extreme case, many other states are unable, because of lack of sufficient wealth, to provide children with the kind of education the nation should secure to its citizens.

The most prominent ostensible argument against federal subsidy for education is the danger of central control. If such control followed subsidy, I, for one, would consider the gain bought at too high a price. No official in Washington, or even in a state capitol, can have the intelligence necessary to administer the schools in each community of the nation. Some of us saw this system as it operated in Japan and found the leading Japanese educators themselves repudiating it. The schools must represent the people and not a group of experts. The people must even be privileged to make their own mistakes. The control of their schools is a prime means of educating the parents and citizens themselves. School and community must be in harmonious and intimate cooperation. True education is self education, and this is true of communities as of individuals. Hence, federal support must be scrupulously safeguarded against bringing with it federal control, or even serving as a means of establishing state control.

Here may I digress, and perhaps seem to weaken my argument, by admitting that this principle has been in some measure violated, in my judgment, in the federal subsidies for vocational education. In some states, at least, the state plans have been so set up and administered as to permit the state officials in charge of disbursing federal funds to control the education of teachers, the appointment of teachers, and the determination of the program of instruction. This control, exercised by state officials by virtue of their right to disburse federal funds, is a clear departure from the principle of local control of schools. It is justified, when justification is attempted, by the assertion that local officials do not appreciate the importance of vocational education, and need the whip of subvention which

may be given or withheld to spur them to maintain a desirable program. But this argument could be used to justify a state or federal authority in imposing on the community any program that it thought wise. The assumption is that the officials in the state or national government know what is best for the local community. To put this assumption into practice inevitably leads to the control of education by a bureaucracy. It is this which is feared by the opponents of federal subsidy and it must be avoided if we are to preserve the American way of life.

The authors of the bills that have recently been introduced into Congress are aware of the danger of federal control and have included provisions which prohibit such control being exercised. It is possible, I believe, by enacting such provisions, and by specifying the way in which the subsidies are to be distributed, to achieve the purpose of raising the level of education in the states with inadequate resources and not endanger local control.

To accomplish its end, the money must, of course, be distributed on the equalization principle. That is, poor states must receive more, in proportion to their population of school age, than rich states. A formula must be set up, including the factors of wealth and school age population, according to which the money is to be dispensed, thus safeguarding the impartiality of the distribution.

A second principle essential to the purposes of federal support of education is that the money shall be used to educate all the children of the state without discrimination as to race, color, or creed. Support for their education is to be provided to the children and youth as citizens of the nation. As such they have equal claim and enjoy equal rights. The states must not be free to divert the federal money to the education of privileged classes of children and youth.

This is not a violation of states rights. It is merely the assertion of the right of the nation to dispose of its wealth in accordance with the principles on which the nation is founded.

A provision was inserted in an earlier bill requiring also that the states should apportion their own funds without distinction as to race, color, or creed. This is a different matter. However desirable it may be to secure equal treatment of all persons throughout the nation, there is a limit, in our form of government, to what the federal government may do to accomplish this desirable end. To control the way the states apportion their own funds is to exceed this limit. A federal subsidy cannot legitimately be used as a club to effect such control.

A controversy is running high throughout the nation as to whether it violates the principle of separation of church and state to use public funds for the purpose of supplying auxiliary services, such as transportation and non-sectarian textbooks, to children in parochial schools. The Supreme

Court has ruled in the New Jersey case that state funds may be so used. Federal funds should, I believe, be confined to the support of *public* education.

A final question is whether federal subsidy should be given to support designated types of education or whether the states or local communities should be left free to apply it to the types of education they may choose. We have precedent, of course, in the subsidies of designated types of education in the support by the federal government of vocational education in the fields of agriculture, industry and commerce. Should this policy be continued or should a different policy be adopted?

In my judgment the appropriation and apportionment of federal funds for the support of education should leave the local community free to designate the types of education to which the funds shall be applied. Neither the federal government, nor the state government, I believe, should determine what types shall be thus supported.

To say that the federal government shall not designate the types of education which shall be aided by federal subsidies is simply to apply the principle of local control. It is to assert that local citizens and local officials are in a better position to know the kind of education their communities need than are officials or legislators in Washington. Furthermore, lobbies representing special points of view on special interests can more easily influence federal legislation than influence thousands of school boards throughout the country. It is easier, also, for a government to prostitute a school system and use it to partisan ends when the control of the schools is centralized. To designate the specific purposes for which funds are to be used is one step toward centralization.

The local determination of the types of education to be supported may seem inadequate at two points. It may be thought not to provide sufficiently for national educational needs and security.

True, account must be taken of needs on a national as well as on a local scale. One may question, however, whether there is such a thing as a national need that does not appear at various local points. Furthermore, the need must be met at the points where it occurs. If there is necessity for industrial education it will appear in Pittsburgh, Detroit, Chicago, San Francisco, and Los Angeles. Here also the need must be satisfied. We should not expect it to be met by schooling in Asheville, Colorado Springs, or Santa Barbara. Similarly, agricultural education should be emphasized more in states like Iowa, Missouri, or California than in states like Massachusetts or Rhode Island.

There is a better way to lead states and communities to realize more clearly and face more adequately the educational needs they should endeavor to meet, and that is by the collection and dissemination of information on these needs. This may properly be done on a national scale by

both government and professional educational agencies. The Office of Education is such an agency, which fortunately has been better supported and better organized in recent years to perform its task.

The national defense, is, of course, a responsibility of the federal government. Education for national defense must therefore be supported by the federal government either in institutions maintained by it or in those which are designated by it and act as its agents. This is a special case.

I have tried to support the position that the nation must see to it that all its citizens are given an adequate education, and that to do so it must equalize the support of education throughout the length and breadth of the land. The wealth of the nation, and the children and the youth of the nation, are distributed so unevenly and in such disproportion that some regions have a surplus of wealth to support their schools and others have a tragic deficiency. The function of the government is to redistribute the wealth and to equalize the opportunity. This does not carry with it the duty of controlling the education which it supports. The principle of local control remains valid and should be safeguarded in all its aspects. Control should be exercised by the federal government only to secure equality of opportunity to individuals as well as to regions. The purpose of a subvention is to secure both to regions and to individuals their right to the full development of their human resources, to the end that they may make the greatest possible contribution to the common life of the nation and of the world.



101. AGAINST FEDERAL AID TO EDUCATION [1]

IN THIS argument against federal aid to education Mr. Chatters raises several practical questions. How is non-discriminatory expenditure of money to be assured? How is it possible to give federal money only to the states that need it? How can political pressures making equalization impossible be eliminated? Will not partisan politics creep into the nationalized school systems in spite of legislative safeguards? In the passion for equalization, where are the rewards for individual initiative? Mr. Chatters feels that there are at present no satisfactory answers to his questions.

FEDERAL aid for education is upheld by many good arguments. But its proponents always seem to have reservations. They have wishful hopes that the states will do their part financially; that federal funds will be used regardless of race or color; or that federal aid will be used only for

[1] Carl H. Chatters, *State Government* (journal of the Council of State Governments), January, 1948, Vol. XXI, No. 1, pp. 15 ff.

free public schools. These doubts and reservations are not met by valid arguments but by unfounded optimism. Since federal aid to education may be such a serious threat to our democratic government, *every one* of the objections set forth in this article should be met *before* such aid is extended to elementary and secondary education. The case is too critical to permit gambling on the result.

The immediate issues are financial since there would be no pressure for federal aid if all states could or would make available the money for a scale of education fairly uniform throughout the United States. But even more basic issues are involved because of the opportunity presented for federal domination of the educational system. Is it possible to provide substantial federal grants for free public education that will equalize educational opportunity, that will compel each state to assume its fair share of the cost, that will guarantee against racial discrimination, and that will be fool-proof against federal domination? And if this question can be answered in the affirmative, is the experiment worth the gamble?

Federal aid money should be used only for free public schools. I shall pass by the arguments for and against this contingency because the question involved will be decided on other than rational grounds. But it does seem more consistent with traditional American principles to take every possible precaution for the continued separation of church and state. Furthermore, the states which have proportionately large numbers of non-public school pupils are also, with one exception, other than the states with the lowest educational expenditures. Quite generally the states with the largest non-public school attendance are those which would contribute most heavily through federal taxes to a scheme for federal grants to education. Such states include Illinois, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Wisconsin. If aid to non-public schools is needed, it appears that the states containing the largest proportion of non-public school students are able to aid them from state resources, provided their state constitutions and statutes permit.

The states should use federal aid funds, if granted, to provide educational opportunity, equal in fact, for all children regardless of race or color. Unless this is done the group for which federal aid is most greatly needed will not benefit from it. The fifteen states in greatest need of financial aid for education are Mississippi, Arkansas, Alabama, Georgia, South Carolina, Tennessee, North Carolina, Kentucky, Virginia, Florida, Maine, Texas, Oklahoma, Louisiana and West Virginia. Many of these states are popularly believed to restrict the right to vote on account of color or race. This belief prejudices the case for federal educational aid. Some who otherwise would support it will hesitate. They will want to know that schools of equal quality for all will be made available. And they will have honest doubts that the rather general distinctions made on

account of color will be relaxed solely to permit equal educational opportunity. The fact that the legislation authorizing federal aid will require no discrimination will not be self-executing. Will the states assume the responsibility for the literal observance of the law? If the law is not observed will the federal government take any more aggressive action than it does now to enforce the Fifteenth Amendment to the Constitution? The need for better education for all races in a limited number of states is the greatest argument for the whole scheme of federal aid to education. The case for aid can be conceded only when there is absolute assurance that its primary purpose will not be thwarted by continued discrimination. Can such a guarantee be given?

Only states unable to support free education should receive federal aid. Federal aid should be used only to equalize educational opportunity between the poorer and the richer states Otherwise, the cost will be out of proportion to the gain. In other words, it is reasonably economical to grant federal funds only to the states which cannot meet minimum requirements. However, the history of federal aid and the political aspects connected with it seem to indicate that no federal-aid bill will be passed which does not grant funds to all the states. Although proportionately larger sums would go to the poorer states than to the wealthier ones, a distribution of this kind would automatically grant large sums to those states which already are able to support more than a minimum program of education.

The only possible excuses for federal aid to the financially competent states must be based on expediency and politics. If more money is needed in the financially competent states, it should be provided from state funds. Then the federal government would be required to make educational grants only to the states that stand low in economic strength. Grants to all the states add greatly to total federal government spending to accomplish a result—equalization—that could be brought about at far lower cost by aiding only those states which are alleged to be subnormal in economic resources for the support of education.

There is another argument for giving federal aid only to the most needy states, and in an amount not greater than their deficiency below a minimum level. Federal aid programs which provide grants to all states may mean large sums to states where financial ability is high, or the grants may be low where financial ability is low, or they may be in proportion to need. All three of these conditions have appeared in practice to date. Therefore, if *equalization* of expenditure and educational opportunity is being sought, it can be obtained by grants only to the needy states.

Little doubt exists, however, that the plea for federal aid is not alone for the purpose of equalization but also, is designed to increase spending

for education in *all* states. To the extent that federal aid goes to states that are financially competent, the real necessity of each state doing its part is evaded, and legislators escape the burden of raising more state or local taxes for education. If more money is to be spent for education in the financially competent states, then the decision to raise and spend that money should be made by legislators and citizens of those states.

Before one can concede the case for federal aid to elementary and secondary education, he must admit that education is more important than any other function of state and local governments and that federal financial aid is needed for education more than for any other function or activity. Are we prepared to say that education is more important than health, than fire protection or police protection? Does anything demonstrate that crime is less prevalent in the states which already support an educational program far above the minimum than in states with lower standards? Is federal aid for education more necessary in the poorer states than federal grants which would raise the general level of health there? From the standpoint of economics and democracy both, might it not be just as valuable for the poorer states to have money available for a more extended system of vocational education alone, and in this way raise both the economic level and the social status of the poorer part of the population? Federal aid to education should be granted only when it has been clearly demonstrated that such aid will, as claimed, cure the many economic, social and political ills of the body politic which are alleged to come from a deficiency in education.

The case for federal aid would be stronger if professional educators could demonstrate that they had tried to find educational methods which would produce better education at lower costs. Have they tried to find new ways of teaching, to the end that the job can be accomplished less expensively? Or, has all their energy been devoted to seeking more money per pupil, better buildings, and a reduction of the teacher load?

There must be complete assurance that the federal government will have nothing to say about the conduct of the local schools even though the grant-in-aid funds are subject to many conditions and computed by complicated formulae. Obviously, some regulations will be required, and some group in the federal government to police the spending of the federal funds. Obviously, also, there must be some controls over the use of the money. All of the bills introduced for federal aid recognize this. Just where will the control end and who will determine the exact nature and extent of the control over local schools? Although it is true that there may be no direct control, there may nevertheless be weighty influences.

For instance, the United States Commissioner of Education in a recent speech, according to the *New York Times*, "called upon educators to make a more determined and successful effort to create in American youth

a zeal for American democracy in the interest of national strength and security." Is it not possible that under other conditions a different Commissioner of Education might take equally forcible steps to urge some other kind of educational program, opposite to that cited above? The entire history of grants-in-aid, of all kinds, indicates that, even though there may be no direct interference from the body which grants the aid, a great deal of influence may still be brought to bear on the entire function for which aid is given.

Closely related to this is the requirement that there be absolute guarantees to prevent any federal agent or agency from having anything to say, at any time in the future, about educational policy or curriculum. If the states themselves have found it necessary and desirable, in making educational grants, to insist on uniform or minimum standards of education, and if they have said what the curriculum should contain, then is it not highly probable that the federal government would insist on certain standards of education in the event that it contributed as much as one billion dollars per year, or even less? Is it not probable that these standards would tend to affect state and local educational policies and practices? The probability of direct and immediate federal domination of the educational system may be remote. But experience seems to indicate that federal influence will inevitably follow federal grants—for better or for worse.

The states and individuals who promote either federal or state grants fail to stress the fact that those who are aided must make some sacrifices and some choices. Are there expenditures within the needy states, for either public or private purposes, that could be sacrificed as a partial aid to education? Here is an example that may illustrate the point. Suppose investigation should show that the states most in need of federal grants-in-aid for education also had high per capita expenditures for hard liquor. Would it be reasonable to ask the people of those states to donate part of their liquor money to education before seeking aid from other states? If needs are so great, would it not be reasonable for some states to accept grants for education in lieu of grants for other purposes?

The path that leads to equality is alluring. The bloom of the roses hides the thorns along the first part of the journey. The road is down hill all the way and no effort is required to travel along it. But in pursuing the path toward equality, it may not be possible to stop short of the precipice which borders on the loss of democracy and freedom. Some incentive must be left for men who desire to struggle uphill, along a thorny lane, toward freedom and opportunity.



102. "PROGRAM FOR ACTION" IN THE REPORT ON HIGHER EDUCATION [1]

FOR many years the federal government has concerned itself with some phases of higher education. The Morrill Act of 1862, for example, gave federal assistance to agricultural and mechanical colleges. Much more recently the "GI Bill of Rights" provided financial aid to assist many veterans through college, and by the same token helped the universities and colleges finance the enormous expansion programs entailed by the presence of the veterans. To study the continuing role of the federal government in higher education, President Truman appointed a commission. A year and a half after its appointment the commission made public its extensive report, a striking feature of which was the statement that the number of college students should be doubled by 1960 in order to furnish America with the trained leadership it could well use The commission found that higher education tended to be available on the basis of wealth and social position rather than on the basis of ability. Believing that higher education should be made more widely available, it recommended that no tuition should be charged for the first two years in public collegiate institutions, and that for the remaining two or more years fees should be reduced. More federally supported scholarships should be provided. The great cost of making its recommendations effective should be borne by the federal government and the states; the money would be well spent in making the United States truly a land of equal opportunity.

TO MEET the needs and demands for higher education in America, the President's commission recommends that immediate steps be taken to put the following program into effect:

1. Public education through the fourteenth year of schooling be made available, tuition free, to all Americans able and willing to receive it, regardless of race, creed, color, sex or economic and social status.

For this purpose the commission recommends that the program of education at this level be expanded and improved. This should be done both in existing institutions and through much more extensive development than at present of strategically located community colleges and technical institutes with soundly conceived curricula, so as to provide opportunities for a wide variety of general and vocational education for post-high school youth and adults. These proposals are discussed in detail in the volumes of the commission's report, "Establishing the Goals" and "Organizing Higher Education."

[1] Report of President Truman's Commission in the Report on Higher Education, *New York Times*, February 2, 1948.

2. Student fees in publicly controlled institutions be reduced.

Many young people with the ability to profit for higher education are denied the opportunity to receive it because of low family income. One-half of the children under 18 years of age in 1945 were in families whose money income was $2,530 or less in that year, and more than a third were in families with incomes of less than $2,000.

Low family income coupled with steadily rising educational costs presents a well-nigh insuperable barrier to many qualified students. By 1946 the average increase in fees over the 1938–39 level totalled almost 30 per cent and other costs, such as board and room, had advanced even more sharply.

LOWER FEES SOUGHT

Since the commission believes this trend must be reversed if the educational needs of the nation are to be met, it is recommended that the publicly controlled institutions, at the earliest possible time, eliminated all tuition and other instructional fees in the thirteenth and fourteenth year and reduce their fees for instruction beyond the fourteenth year to the level for the academic year 1938–39.

The commission is particularly concerned with the high charges assessed in certain professional schools operated under public control. While the commission does not recommend that fees be eliminated beyond the fourteenth year in the publicly controlled institutions, it does believe strongly that they should be leveled off at a point which does not raise unduly an economic barrier to study.

It is recommended, therefore, that the publicly supported institutions maintain a fee beyond the fourteenth year adequate only to insure on the part of the student a sense of meaningful personal participation in the cost of his education.

While recognizing the necessity for the privately controlled institutions to maintain a balanced budget, the commission is disturbed by the high fees assessed by such institutions and the continuing tendency toward further increases. The fees, in many instances, are so high as to eliminate almost completely the enrollment of students from low-income families, unless the institution accompanies such practices by a wide and generous program of scholarships and grants-in-aid to competent and needy students.

The serious political, social, and educational implications of the economic barrier created by student fees are discussed in detail in the volume of this commissions report, "Equalizing and Expanding Educational Opportunity."

FEDERAL SCHOLARSHIPS ASKED

3. Immediate steps be taken to establish a national program of Federally financed scholarships and fellowships as a means of removing further the economic barrier and enabling our most competent and gifted youth to obtain for themselves and for society the maximum benefits to be gained from higher education.

Not only is it important for the welfare of the nation that adequate low-cost opportunities for higher education be made available to all the people of America, but it is of utmost importance that the nation's most-talented youth be encouraged and given the opportunity to continue their education to the fullest extent possible.

For this reason the commission advocates:

(1) That a continuing Federal appropriation for undergraduate scholarships be established beginning with $120,000,000 in 1948–49 and continuing each year for the succeeding five years in an amount sufficient to provide scholarships for 20 per cent of the non-veteran undergraduate enrollment.

(2) That in addition to existing Federal fellowship program a new program be established for graduate students through the appropriation of sufficient funds to provide 10,000 grants of $1,500 each in 1948–49, 20,000 grants in 1949–50, and 30,000 grants in 1950–51, 1951–52, and 1952–53.

(3) That before 1953–54 the program of scholarships and fellowships be re-examined with a view to expanding it.

On the basis of the anticipated enrollment in 1948–49, the granting of scholarships to 20 per cent of the non-veteran undergraduate enrollment would provide assistance to some 300,000 students. This would be in addition to the 10,000 fellowships also proposed for the first year of the program.

As described in Volume II, the Federal Government has already initiated a number of scholarship and fellowship programs. This commission recommends that at the earliest possible time the administration of all such programs be unified under a single agency; and that grants for scholarships and fellowships be made generally available rather than for study in specified areas. It should be emphasized, however, that the program of aid recommended by this commission is to be in addition to all funds appropriated and available under existing legislation for scholarships and fellowships.

FOR GRANTS TO STATES

4. Federal aid for the current operating costs of higher education be provided, beginning with an appropriation of $53,000,000 in 1948–49 and

increasing annually by $53,000,000 through 1952–53, for the purpose of assisting the states in maintaining and expanding publicly controlled institutions of higher education in accordance with the program recommended by this commission.

This commission estimates that the cost of its recommended potential program for higher education if fully realized will be $2,587,000,000 in 1960. Assuming that privately controlled colleges and universities will maintain in the future a total enrollment about equal to their enrollment in 1946–47, it is estimated that the cost of the proposed program to be financed in institutions under public control will be $2,081,000,000 in 1960. On the basis of estimated income available from local governments, greatly expanded appropriations by state governments, reduced student fees and miscellaneous sources, it must be planned to meet a deficit of $638,000,000 in 1960.

To erase this deficit by that date and to move immediately toward the full realization of the proposed program, this commission recommends that the Federal Government appropriate for the fiscal year 1948–49 an amount equal to one-twelfth of the deficit to be planned for, and that the appropriation be increased each year by $53,000,000 until and including 1952–53.

It is recommended that the Federal appropriations be allocated to the states on an equalization basis, in accordance with an objective formula designed to take account of the relative needs of the states for higher education and their relative abilities to finance those needs.

Prior to 1953–54 the amount of Federal aid needed and the method of allocation should be reexamined and, if necessary, expanded and revised.

PROVISION FOR FACILITIES

5. Federal aid for capital outlay be provided through an annual appropriation of $216,000,000, beginning with the fiscal year 1948–49 and continuing through 1952–53, for the purpose of assisting the states to meet the needs for adequate physical facilities for instruction in institutions under public control.

To provide adequate plant facilities for instructional purposes for the program of higher education recommended by this commission the additional physical plant will cost about $8,064,000 by 1960 (1947 dollar values and price levels), $7,758,000 of which is for institutions under public control. On the basis of a twelve-year building program, the average annual cost for publicly controlled institutions would be $647,000,000. The foregoing recommendation calls for one-third of this amount to be provided by the Federal Government, the remainder to be provided by state and local governments.

It is recommended that the Federal aid for capital outlay be allocated on an equalization basis, in a manner similar to that proposed for current operating purposes.

6. Adult education be extended and expanded, and the colleges and universities assume responsibility for much of this development.

The financing of adult education is a part of the total financial program, since it must be an integral part of the total educational services of colleges and universities.

GUIDING PRINCIPLES IN FINANCING THE PROPOSED PROGRAM OF HIGHER EDUCATION

In arriving at the recommended program for financing higher education, this commission has been guided by certain fundamental principles. These basic principles are:

1. The program of financing higher education should presuppose a sound and effective system of education for all youth at the elementary and secondary school level.

2. The plan of finance should recognize the social importance of higher education and the nation's interest in such a program.

3. The funds provided for the support of higher education should be adequate. All elements and all levels of the program should be supported adequately, or at best the program will meet with limited success.

4. The plan of finance should assure equality of opportunity. Economic barriers to equal opportunity should be nullified in favor of making ability and interest the only criteria for admission to an institution of higher education.

5. All of those responsible for higher education—individuals, communities, states and the nation—should bear an equitable share of the financial burden.

6. The plan of finance should recognize state responsibilities for higher education. It should encourage the states to plan and direct education in accordance with the best interests of the individual, the state and the nation.

7. The plan should encourage the free flow of private funds to the support of higher education. The commission does not contemplate complete public support of higher education, but rather it believes that the welfare of the nation can best be served by the continuance and vigorous expansion of private as well as public support of institutions of higher education.

8. The program of finance should emphasize the need for partnership between the Federal Government, the states and the local communities in the support of an adequate program of higher education. The role of each partner should be established in terms of the social, economic and edu-

cational welfare of the nation. Objectives in fiscal policy should be correlated with objectives in social and educational policies.

The purpose of this volume is to examine the conditions underlying the commission's recommendations for financing higher education outlined in this chapter and to discuss the problems and issues involved in arriving at these recommendations. In the chapters which follow, consideration will be given to the cost of the proposed program of higher education, the sources of income available to finance that program, and the role which the Federal Government should play in financing higher education.



103. WHO CAN GO TO COLLEGE NOW? [1]

MR. GUMMERE describes the practical problems of setting up valid standards of admission to colleges and universities. With increasing federal participation in the field of higher education (see selection 102), the impact of increased enrollment on the college is worth considering. Mr. Gummere asks specifically, "Who ought to go to college?"

THE sea is never quiet 'round Treasure Island. So said Stevenson in his best story. It is perfectly true also to say that the sea of education—its discussions, surveys, reports, arguments and testing programs—has never been more agitated and stirred than is the case today. People declare that "we are facing a new era," or "we are at the crossroads." But when was there not a new era, or when were we not at the crossroads? Perhaps in static periods such as ancient Egypt or a stretch of time in the Middle Ages. De Quincey claimed that the British universities were dead at the end of the eighteenth and the beginning of the nineteenth century. In our American civilization, however, there has been nearly always change, sometimes abrupt, reform, and we hope, progress, just as in the life of the schoolboy much depends upon the choice of a certain play at football, or the selection of courses, or some critical decision in his relationships to others, or in the trend towards a future job, or a future wife. The individual and the nation are alike at the crossroads daily. And why not?

Education has suffered because it is subject to the process of crystallization. It is continually standardized, and as continually challenged. It is not an over-all panacea; it must be fun, unmechanized, and full of zest. Professor Barzun remarked recently that the Phoenicians did not invent the

[1] Richard M. Gummere, *American College Bulletin* (May, 1947), Vol. XXXIII, pp. 322–332. All footnotes omitted.

alphabet while working on a grant from the Carnegie Foundation. Professor Whitehead says that it is an adventure. Its fetters should be thrown off, and *are* so thrown off by wise people, after the elements have been mastered. An Abelard should have his hillside crowd to harangue, an Abraham Lincoln should have his fire-shovel. Education should offer glorious irregularities, watching like an animal for interesting prey, and pouncing on every tempting fact or concept. Like an exploring idea, like the thought suggested to the young Wordsworth by the Statue of Sir Isaac Newton, we should look for

> The marble index of a mind forever
> Voyaging on strange seas of thought, alone.

If I could omit the word "NOW" that you have put into the title of this paper, I should have spoken as follows:

They tell us that 400,000 veterans have been unable this fall to enter what we call a regular college. We note also that the average college has been forced to reduce its civilian entrants from secondary school by at least 33 per cent. The draft law may possibly operate by taking out 19-year-olders, mostly sophomores, and postponing their college admission for 18 months. These three factors leave us all in a blind state for two or three years more and affect alike the veteran returning, the civilian who *can* go to college for a term or more, and the veteran of the future. So the harried and perplexed admission committees simply repeat the words of a sign over the old organ-melodeon in a mining town church one hundred years ago: "Don't shoot the organist: he is doing the best he can!" Let us therefore cheerfully and optimistically pitch our discussion at a time perhaps in 1948 or 1949, when natural laws will assert themselves, when security reigns and the atomic bomb is controlled world-widely, when there are no inflations, and when we pay our mental, moral and physical bills as soon as we have incurred the obligation.

But since "NOW" is included, I will not dodge the issue.

It is a venturesome thing for an admission chairman—one of those persons whom a boy once called the "third baseman of a college faculty" and whom I myself think of as the "utility infielder" at the hot corner of the diamond, to discuss the question, "Who *Can* Go to College?" We are not prophets, even minor prophets. And when the subject of his remarks is "Who Can Go to College *Now*?" even the umpire (if there is any umpire who can make the right decisions regularly) is at a loss. If the situation were anywhere near normal, we should be proceeding as we did before 1941, when Freshman classes were of the usual size and any satisfactory student could find a place in some satisfactory college, and usually in the college of his choice. Even up to 1945 the selection of civilian students from schools was not such a difficult matter because of the draft and because of the service trainees who were sent by the Government: apart from promissory notes

for the future, there was room for all. But since 1945 the full tide of veterans has caused a sharp reduction among the civilian entrants of this present fall term—in some colleges as much as 60 per cent, and in many state universities, for example, the acceptance of none at all outside the state itself. Consequently, the admission officer is not only no prophet, but a helpless individual like the Danish King who vainly tried to control the incoming tide. And the fact remains that this tide will stay at the flood for two more years. And, just to throw in another problem or two, we all wonder how much and how long the present 18-month draftees will be aided by the Government, what percentage of them will then seek college, and finally whether there will be in any case a permanent percentage of young men and women, greater than the prewar proportion of 20 per cent, who will proceed from the senior classes of our high schools into higher education.

This is all a matter of economic and business conditions in the United States. I do not need to remind you that while education up to the age of 16 is a fixed affair under any conditions, the ebb and flow for older students changes over a period of years. Beyond this stage education follows rather than leads the community. In fact, all schooling is colored by what the public or its leaders stand for. The cathedral schools of the Middle Ages followed the regulations of the Church. The Italians of the Renaissance prescribed a system meant for the soldier-statesman. The Rugby method of Thomas Arnold, when older boys disciplined younger boys, was an answer to the British Empire's need for several thousand responsible civil servants turned out annually to stand on their own feet in far-flung corners of the world. The sound training of the German *gymnasium*, a fine thing fifty years ago, became honey-combed with rotten propaganda by Fascist dictators. American education shows a democratic spread from the time of Andrew Jackson on, emphasizing today preparation for a job and for the ordinary duties of civic life. The recently published books by Messrs. Warner, Havighurst and Loeb emphasizes these two things—citizenship and jobs; but a review of the volume in the *London Times* Supplement asks, rightly, for more than this:

> Many of the proposals recommended by the authors for adoption in the United States are practical. To anyone in an older country who is entitled to take what may be called the evolutionary view of education, i.e., who does not regard education as a mere vocational training for "jobs," however exalted, or who believes that society is made for men, not men for society, and that the primary aim should be the full development of the unknown possibilities of the individual, the book may at times make rather depressing reading.

Science and mechanical processes have altered the ways of the classroom. Change is nothing new; but it is dictated by the world outside the school-

house rather than by the teacher himself or the college library. And the happy warriors in the battle of education are those who can retain the fundamental ideas found to be beneficial through all these changes of viewpoint, with new approaches suited to the demands of progress.

It is reasonable to say that, whatever our numerous college reports on general education may recommend, whatever the hundreds of surveys may indicate, and whatever novel ideas the educators may spring on us, the economic situation will be a vital factor: the industrial index and the stock-market prices will control the schools and the colleges. We shall have reconversion in education; we are having inflation now, with no O.P.A. in our line of work. Realists admit that it has been wise to open college training to ten per cent of the total population of our country, in contrast to the less than two per cent of prewar applicants. They approve a limited number of Government scholarships for promising and original students, in addition to Pepsi-Cola, Westinghouse, scholarships in private institutions and reduced fees in state universities. They feel that unless U.N.O. and international harmony put war out of business, it will be impossible to make wholesale grants from public funds for higher education; for our National budget cannot pile up debt for an indefinite time. They are enthusiastic supporters of a college experience at no cost for those returned men and women who have "pledged their lives, their fortunes and their sacred honor" in this crisis. They are concerned about the vast proportion of these returned veterans who are concentrating in Government, engineering, and business courses: they are worried about the lack of humanities, of variety in their choices, and pray that the supply of such concentration will not exceed the demand in a nation which requires the greatest variety of pursuits and interests. They know perfectly well that, whatever happens, there will necessarily be deflation by 1948 or 1949, and a search for some solution of the problem. Dean Gildersleeve declared recently at a meeting when complaints were uttered about the large numbers of boys and girls who were at present disappointed over inability to make college because of the numbers: "American youth may congratulate themselves that it is only a brief postponement: they should contrast their own living conditions with those in Italy, Germany, Japan and even England."

Another ghost which ought to be laid or exorcised is the belief that money can accomplish wonders. Professor Mark Jones of Princeton declared recently: "The belief that the results of education are solely dependent on the amount of money spent on it is a fantastic and a good example of the economic illiteracy which is a consequence of what is called education." There must be, in the community, the school administration, and the pupil's mind, the sort of spirit which faces economies, expects no "handouts" and believes in a balance of favor and effort. The desire must be

like that of the pioneers who had an aim which *stretched* rather than spread their ideas. They should have a plan and a policy rather than a "hunch." What effect such a philosophy would have on the enrolments of colleges for September 1947 is hard to tell. Mr. Charles F. Kettering at a college meeting a few years ago was speaking of the then great event—regular telephone communication with London. He said: "Yes, science has accomplished a marvelous thing: you can get London on the telephone. But what will you say over the telephone when you 'get' London? Will it be anything worth-while?" The recollections of many older persons can supply parallel thoughts: a business friend of mine, now retired, told me that, with all his college and graduate training, the best foundation anyone could ever have received was given him from age ten to age sixteen in a one-room country schoolhouse by a sympathetic and intelligent woman whom everybody worshipped, in a district where the hat had to be passed and where a dollar looked like a hundred dollars in terms of the present day. If we can combine our grants-in-aid, both public and private, with this spirit, the whole question is answered.

We come down then to the question "Who *Can* Go to College Now?" Leaving at this point any consideration of economic conditions, it may well be that any qualified student can be admitted to college if (a) the distribution of civilians and veterans over the 750 higher institutions of the United States is wisely handled, (b) the 33⅓ or greater percentage of increase in available dormitory and classroom space, as a temporary measure, is successful, and (c) the setting up of extension centers such as those connected with the University of Wisconsin, or auxiliary colleges like Camp Devens, or the mechanical training institutes such as those in New York State is carried out to a logical conclusion. Granted all this, the answer is favorable to any student of good promise; although he might be disappointed in the particular college to which he should apply. Then the question comes "What do you mean by *college?*" Do you mean the four-year liberal arts or engineering colleges only? Do you include the junior colleges and the new thirteenth and fourteenth grade extensions intended for veterans and for civilians from secondary school who cannot now find any other resting place? Or do you mean anything at all beyond the school stage—extension, trade school, evening classes or the special courses conducted by large firms such as the railroad apprentice shops or the promotion classes of the Telephone Company?

One feels, however, in this group and on this occasion, at an institution which prepares practically every graduate for higher education, that we mean the four-year liberal arts college or its equivalent beginning stage, as in the Chicago plan, or a regular school of engineering which makes similar demands on the 17- or 18-year-old youth. And the answer here to the question "Who can go to college now?" is possible, but is a double answer.

In your case it is "yes, nearly everybody," but not necessarily to the college of his choice until 1948. The only new idea on this whole problem which might be considered by the independent school (if any idea is really new) is wrapped up in the national situation. It is this: since, in such an institution as yours almost all the senior class is headed for some college, and since the Jeffersonian principle of selection for higher education is bound to apply in the coming years, the school itself will be called upon to do a little more preliminary screening. In other words, not only the public schools which send 20 per cent to college and 80 per cent to work, need a revision (according to the recent New York State survey); but the independent school whose diploma means 95 per cent to college in most cases, should be prepared to cut this number down to 90 or 80 per cent, with the junior college or extension classes in mind for those who do not come under the categories of eligible freshmen which I am now about to mention. The situation in the great public schools of England is such that 40 per cent only go to the universities; we shall never specify any definite proportion in the United States on account of our correct belief in the Jacksonian democratic principle. But the selective necessity, whether numbers remain at flood tide or return to normal soon, will undoubtedly be both advisable and necessary. There will for this reason be years when everyone in an independent school might think of college and years when only 80 per cent should do so; for senior classes, like the stars, differ from one another in glory. If this attempt at an answer, and this definition—what kind of a college? are anywhere nearly correct, it remains to discuss two points: first, what kind of preparation for college, and what kind of individual can the college take?

Here is where the private or, to touch the hem of Dr. Frank S. Hackett's robe, the *independent* school has a clear field. It is mainly preparatory for the very purpose we are discussing. It is free from state regulation, except for a very few rules regarding health, attendance and building specifications. It can do as it chooses with regard to religious education and spiritual guidance. Its curriculum can be managed as the faculty sees fit, not subject to any state dictation of what courses shall be taught. In this part of the United States, due to the Puritan tradition of New England, it does not suffer from any regulations as to the type of training its faculty must have undergone. Courses in teaching methods at schools of education may be tasted but need not necessarily be swallowed whole. A boy or girl who likes languages may take two of them throughout the high school years. A scientific enthusiast may limit himself to one foreign language and run the gamut of mathematics and a separate or combined view of the natural sciences. A person interested at an early stage in human institutions may drink deep at the sources of history. The vocational program, which in some schools eats up a large proportion of classroom time, can be adjusted in whatever ratio seems best for the pupil. Therefore, all talk about the

tyranny of college admission is moonshine: a pupil with a core of English (written, spoken and read satisfactorily), a modicum of mathematics, a start at some foreign language ancient or modern, an experience in social studies and science, is equipped with the basis for college admission. On this foundation the school can build for the individual's benefit, free from orders that call unreasonably for an over-balance of any one subject. Such a student *can* go to college, as far as his or her equipment is concerned. It is also possible that by September 1947 many of the men who have returned to college for the purpose of finishing for their degrees, and the new veterans who came with credits from service activity or from some other college attended before the war, may have completed their work. We should also remember that in the case of Army veterans of some length of service more than 90 per cent have been discharged and many of them settled in jobs.

Testing and examining programs, in spite of occasional criticism that under the present method there is too little estimating of accomplishment and too much emphasis on aptitude, are well adapted to present conditions. This change from the old cramming or memory type of examination is suited to the greater variety in our American schools, where 250 courses or combinations of courses have been counted up, in contrast with the six or seven of the early nineteenth century. It probably sifts and predicts better: for as the late Dr. Carl Brigham, the inventor in 1926 of the Scholastic Aptitude Test has remarked, "An agency which used to collect tickets at the gate is now expected to show people to their seats." These are important factors in such a technical age as ours. In fact, admission committees in many cases are really doctors; for education today is confused, and in some cases really sick, because of the number and variety of dishes. A recent writer has said that the school programs throughout the United States have been so jumbled up that "a severe attack of indigestion is all but inevitable." Neither special vitamins nor K rations are the remedy for such a conglomeration, but rather a generous well-balanced dish of good food.

"What kind of individual does the college want?" This is not a fair way of defining the problem: it is better to say, "What kind of individual are the liberal arts and engineering colleges suited to take? What is the type they are qualified to satisfy? Who then *can* go to these places of learning?" We take for granted reasonable physical health, and mental balance. We recognize a certain amount of natural herd instinct. And we feel that a decently comfortable financial situation is vital, so that home and academic worries, necessitating loss of sleep and anxiety, should not occur. These qualifications are necessary before one can say, "He *can* go to college." We should conclude that a student recommended by his school, reasonably successful in his examinations, and showing a real reason for desiring col-

lege, should have his ambition realized, as far as the numbers in that college permit. And furthermore, academic standing alone should *not* be the criterion. We have learned much from personality studies as to the ability of boys and girls to handle higher education. I use the word "higher" in a Pickwickian sense: I really mean "further" education. The Connecticut Survey, the Grant Study at Harvard, the pattern variations of Dr. Johnson O'Connor, and the predictive studies of various colleges, have helped us all on this question of the turnstile between senior year and freshman entrance. Purpose, judgment and decision perhaps come first. A lot of nonsense is talked about very high marks, and the brilliant student. But John Stuart Mills are few and far between; and we of the admission brotherhood are skeptical of the bright boy who is a parrot without character and without the human touch.

There are three obvious varieties of boy that every college not only should welcome, but desires to welcome. One is the able, promising, potential winner of scholarships (whether for the honor alone or honor plus money grant). This boy, successful candidate for national, regional, Pepsi-Cola, Westinghouse or university scholarship in general, is not only a person of ability, but of character and leadership. He must maintain a Dean's List average, and should not be hampered by a job in addition; for he may be an editor, or student council official, or what Dean Briggs used to call a "man of letters" (varsity letters) and he properly regards these interests as character builders for his future leadership.

The second type is one that generations have joked about—the "gentleman's C man." People have wrongly declared that his numbers should be reduced in college lists because so many earnest young men of limited means are being shut off from the privilege of higher education. But we who stand at the gates advise some serious reflection in these cases. Figures show that many of these men not only turn into constructive citizens and the most generous alumni, but also wake up to very hard work in medical or law or business schools, and in the end are found at the head of industry, finance, politics and civic service generally. "Ye shall not live by marks alone" is a proper alternative version of the Bible text. How many of us have seen a faculty committee frowning over a borderline case of someone new to the world beyond boarding school, enthusiastic over college activities or losing his head temporarily in too many social engagements, but sound at the core, slowly gathering interest and power. Such men seldom are summoned for consultation in the hygiene office: a half hour's talk with some dean or adviser, an epigram from a coach stimulating the lad to get off probation, or a course which flashes light on some future occupation—all these cases make the second type worth educating. These gentlemen ultimately wake up. They are like the young man mentioned by Mark Twain who said: "When I was 18, I was shocked at my father's blundering

ignorance. But when I was 21 I was astonished to find out how much the old man had learned in three years." The advantage of the new variety of examinations is that aptitude is more important than cramming, and the index of ability in these cases can be reckoned and prophesied. The P.R.L. ("Predictive Rank List") is easier to reach than it was in the days of last-minute summer stuffing for make-up tests or for hothouse cultivation of the plant until it faded away in an anti-climax.

There are two other varieties of candidate whom we can lump together, the one-sided person and the plain slow-coach or what their friends define politely as a "dumb-bell." At least half of these gentry are worth gambling on. The language enthusiast who cannot figure or do well in the sciences, the radio expert who can mend anything but cannot see through mathematical abstractions, the nature enthusiast who hates absolute knowledge, or the young gentleman who can talk on current affairs with charm and enthusiasm but cannot be pinned down to factual expertness—all of these are impossible to accept, but some of them will, like Abou Ben Adhem, "lead all the rest." It is with this group that the fascination of an admission officer's program reaches the heights. When the potential poet makes good and gains a joint creative and critical post on some periodical; when a lop-sided musician gets through his required work also and qualifies for the concert stage; when a gadgeteer with a salt-box mental architecture works up after graduation to a key job in some radio company, the gamble is worthy of the effort. As Sophocles remarked:

> Many are the wonders of the world
> But nothing is more wonderful than man

and, I might add, a *Freshman*. A friend of mine has said that if the batting average of the Committee on Admission in this class of applicants is 500, it would be better than either the American or the National baseball league.

One word more. "Who *cannot* come to college, now or at any other time?" First, the person who is not properly balanced emotionally, no matter how bright: for the chief need in the American college is to stand on one's own feet and make one's own decisions in a realistic world; second, the wilful waster of time, the spoiled darling who thinks only of pleasure and will take no responsibility; and third, the headless, rudderless, often unfortunate soul who has no policy and will never have one—a person who, Professor Shaler said, was characterized by "miscellaneous uselessness."

Neither the school nor the college should mechanize the processes of college preparation or admission: the examinations, even, require a human interpretation, backed always by the principal's report and an interview whenever possible. Personality and character come first; ability to do

college work often depends as much on these traits as on the brain action. Like stocks, the market value is as important as the book value.

Also, no college in these difficult days should let its standards rise artificially to keep out students whom it cannot accommodate, nor lower them when the current flows less fully. The process of selection should be a matter of all-round quality. The best men should be accepted, but the best in all three of the classifications I have mentioned or in any others which I have omitted. And so, with best wishes to this school which has served good causes so well for fifty years, we close, in the hope that we have given some indication of "Who *can* go to college"—even *now*. The sea may never be quiet 'round Treasure Island, or 'round any other island in our school and college world; but what red-blooded young man wants an eternal calm rather than a challenge, an occasional temporary setback, and an occasional three-reef gale?



CHAPTER XXI

Foreign Relations

104. HORSERADISH AND WORLD PEACE [1]

THAT all Americans want world peace and a stable international order is axiomatic. However, many Americans also desire many things incompatible with such a peaceful order. It may be they do not understand that economic nationalism makes political or economic internationalism impossible. Mr Fleming explains the effects of economic isolation upon international security and the need for economic and political cooperation among the countries of the world.

WHEN the Smoot-Hawley tariff bill was reported to the House in 1929, a reporter on his way to the telephone was intercepted by a Mid-western congressman, who seized his arm and asked, "Is the bill out of committee? Is there a tariff on horseradish in it?"

"Yes, it's been reported," the reporter answered, "and horseradish is protected."

The congressman shook hands with himself, like a boxer greeting his friends in the galleries, and cried:

"Wonderful! It's a good bill."

There is a portent for our times in the spectacle of that congressman, in fear of a few hundred horseradish growers in his district, voting patiently for high tariff schedules on thousands of other items—just to make sure that other congressmen would in return vote for his pet tariff on horseradish. The country is still full of producers of horseradish (or wool or manganese or sugar) and the Capitol is still filled with their congressmen. Nearly all of them—and their congressmen—are eager for a lasting peace, for a world security organization, and for international co-operation. They are also eager for a protected market for their own particular brands of horseradish. And they can't have both.

[1] Roscoe Fleming, *Harper's Magazine* (May, 1945), Vol. 190, No 1140, pp. 528 ff.

Many people who feel that organizing a durable peace is the overriding task of our times are inclined to forget, or to ignore contemptuously, the hundreds of Horseradish Growers' Protective Associations that wield a large share of the political power in this country. Yet these groups, each intent on building its own little storm cellar against the threat of a postwar economic hurricane, may be more important than all the diplomats in determining whether we actually get a world organized for peace.

For we cannot offer the right hand of political friendship to the world and at the same time smash it in the face with the left hand of tariffs, embargoes, import quotas, export subsidies, and all the other devices of economic isolation with which American producers of raw materials are now planning to protect themselves. Such a course would arouse more antagonism and suspicion than the political isolation into which we retreated after World War I. After all, the economic isolation expressed in the Smoot-Hawley tariff was simply a reflection of the political policy America had adopted when it repudiated the Versailles Treaty and walked away from the League of Nations. Our economic policy then was at least consistent, understandable, and nonhypocritical. After all, fair warning had been given.

But what if we speak sweet words of concord to the rest of the world—as we have already done when our delegation at the Chapultepec Conference offered on behalf of the United States a program which included equality of access to raw materials for all nations of the Western Hemisphere, reduction of trade barriers, and elimination of economic nationalism—and then, a little later, we set up economic barriers which will make the Smoot-Hawley tariff look like a low picket fence? If we do that, how long will it be before we find similar barriers built against us in retaliation? How long before World War III?

II

In spite of these obvious dangers, the likelihood of our embarking on such a course is increasing daily. America has always had a strong pressure bloc fighting for high tariffs, of course; but in the past few years it has gained new and powerful recruits from a group which traditionally had been on the other side of the fence.

Indeed, the leadership of the protectionist bloc seems to be slipping away from the industrialists who formerly led the drive for bigger and better tariffs. Today many of them have come to realize that their industries—now grown far beyond the infant stage—no longer need protection from foreign competition; on the contrary, they need the foreign markets which can come only from a general expansion of world trade. Meanwhile the producers of raw materials—the farmers, miners, fishermen, and lumber-

men—are taking up the tariff fight with the zeal of new converts. In the past they generally had opposed the tariff, because they were denied its benefits; the manufacturers had argued that infant industries needed not only tariff protection but also low-cost raw materials, kept that way by importation or its threat—and they were strong enough to make the argument stick. Since the last war, however, the raw materials producers little by little have been shoving their way inside the tariff fence. And they like it so well that they are now more eager than most industrialists to build that fence higher and tighter.

In addition, throughout much of the West—where the raw materials producers are most numerous—political isolationism has gone underground in the guise of economic nationalism. Many a former isolationist spokesman now has become an "economist." It is a handy term. Economists (except when employed by the government) enjoy public prestige, and people are inclined to take them seriously—particularly when they throw the mantle of that prestige over what people want to hear anyway.

Producers of raw materials—farmers and miners and timbermen and fishermen—are no less patriotic than any other Americans. Service stars hang in their windows, too, and the fateful War Department telegrams come to their homes. In each instance they have staged an epic struggle, under very great handicaps, to keep the materials of war flowing. They are as determined as anyone that "it shall not happen again." Their conventions are passing resolutions for international accord.

But, on the other hand, they genuinely fear that their sons may come home to a blighted country and to a jobless, hopeless future because our statesman may in some way be outsmarted by "the foreigners," who will then flood America with "foreign competition." And they are determined this shall not happen here, either.

Also, these raw materials producers are as prone as the rest of us to seek a noble excuse for self-service; they are as egocentric as the rest of the human race and as subconsciously inclined to consider that their interests are the most important. Above all, they are no more able than the rest of us to connect up their daily activities with the fate of the world.

The gospel of the new economic nationalism is being preached to them, and they are eagerly swallowing it. The ideology of the movement is embodied in a recent article in the *Country Gentleman*, which was reprinted by many thousands and is being sown throughout the farm and mining country. This ideology is being carried by speakers, too, some of whom are proving very popular, with thousands of reprints of their speeches being snatched up by eager hands.

And here, in essence, is what producers are being told:

Farmers' income, whether in good times or bad, runs about one-seventh of the gross income of the country. Since the proportion is so exact, it is

clear that the farmers' income is not a mere fraction or resultant of national economic activity but is, instead, the ultimate index, and the only mainspring of national prosperity!

Therefore our national policy—according to the economic isolationists—must be, above all else, to hold farmers' income at a high level, to see that it goes up and up, to protect it by parity legislation and a "parity tariff" (whatever that may mean). How can we lose, since the prosperity of the farmer is so essential to all of us, and since for every dollar sown in his fields and nourished by the manure of protective legislation seven dollars will spring up to bless everyone in the nation?

In this view, the trouble with the Smoot-Hawley tariff—which most economists blame for hastening the Great Depression—was not that it was too high and too sweeping, but rather that it was too little and too late. The real damage had already been done because under the "low" tariff schedules of 1925–29 farm products and other producers' goods were imported into the United States. For lasting prosperity the formula is simple: throw a tariff fence around our producers of all raw materials, supplemented by other forms of protection so high, so strong, and so tight that no competing materials can enter.

Originally the appeal was directed at farmers alone, but their political strength by itself may not have been considered sufficient. Now all producers of raw materials, especially miners and lumbermen, are being led up on a high hill to view the promised land of the protectionist New Order. The formula now becomes: The income of all producers of raw materials invariably runs about one-fifth of national income; from that point go on as above. Just build up the income of all raw materials producers through "parity prices" and "parity tariffs," and surely, swiftly, and painlessly the whole national economy will be built up to whatever towering heights of prosperity we may wish, to stay fixed there forever, with no depressions and no anxieties.

According to a quotation from an exponent of the plan, speaking not to farmers but to an important group of producers of nonferrous metals:

> You are being underpaid 50 per cent. You . . . have been underpaid $1.8 billions during the past year. Who is to blame? Haven't you asked for proper prices through your members of Congress? The farm groups were able to get parity legislation, and I would suggest that you join them, and demand parity for all raw materials. The raw material states have the votes if they will use them.

This is heady stuff. It is intoxicating to be told that your own interests are the nation's too, and that anything at all you may do to get more money is justified, because it will simply build up the whole national economy and benefit everyone. And nobody, at the moment, is offering any sobering rebuttal. Nobody has bothered to point out to the raw materials producers

that their one-fifth of the national income has no more magic to it than the fraction which goes to labor, or filling station operators, or the proprietors of hot dog stands. There are of course many groups whose incomes, in good times and bad, go up and down almost exactly in proportion with the national total; if the argument of the new producer-nationalists is valid, all we need for a boundless prosperity is to raise wages higher and higher—or perhaps to keep jacking up the price of hot dogs.

III

The raw materials producing groups never have gone along more than grudgingly with Mr. Hull's reciprocal trade agreements. Once this war is out of the way they may go along no more, nor with any other tariff policy tending to free economic intercourse among nations—if they believe it is at their expense.

Indeed, their hand may be shown earlier than that. The Reciprocal Trade Agreements Act expires this coming June, unless renewed by Congress. The growing strength of the producers' alliance may provoke at least a preliminary skirmish then. Listen to U.S. Senator Kenneth Wherry of Nebraska, who is a principal exponent of the New Economic Order in the Senate, as he spoke before the American Tariff League at New York last January 18th.

Mr. Wherry found it very sinister that Earl Browder is in favor of a huge international trade. He quoted Tom Lindner, of the Southern Commissioners of Agriculture, as saying the nation had lost $70 billions between 1934 and 1939 because it permitted the importation of $10 billion in agricultural products—the seven-to-one formula applied in reverse to our imports, you see. (Many of these imports were, of course, such things as bananas, coffee, palm oil, and quinine, which America *must* import or do without.)

Then Senator Wherry let go all out at the trade agreements as "administered by a crowd of bureaucrats heading up to the then Secretary of State [Mr. Hull] who have taken the Act as a mandate to change the economy of the United States through lowering the tariffs."

After stating that 1,227 general reductions had been made through the medium of agreements with 27 countries, "constituting a more violent revision downward of our tariff rates than any that Congress has undertaken in fifty years," he added:

"Our tariff protection is down, and we shall find ourselves at the mercy of the world, unless the Congress either scraps the whole program, or requires that the agreements be ratified by both House and Senate."

If you think such sentiments are negligible and their sponsors lack effective strength, let us recall for a moment the achievements of the silver bloc.

Senators from half a dozen of the least populous states—which produce silver, though it is of prime importance to none of them—were able at the beginning of the New Deal to erect around silver mining the most formidable wall of protection enjoyed by any economic element in the United States." Of course they didn't accomplish this all alone: they did it by coalition with the farm bloc, so that by rights the cost of the agricultural program during the past ten years should include the cost of the silver program. The nation hardly realized what had been done until it was revealed in 1942 that the powers of the silver bloc in effect included that of rigidly restricting any use of silver for industrial war purposes. The resulting outcry disturbed the senators of the silver bloc very little; they made only small and grudging concessions. They knew that the votes of the populous East could never be cast against them in their home states, while any weakening of the protection they had thrown about the silver mine operators would be equivalent to political suicide. Since the inception of this legislation the personnel of the silver bloc has changed somewhat, but whatever their party politics and their views on other subjects the newcomers are faithful to silver. And our silver policy has coincidentally been blamed abroad for much economic dislocation, with resulting distress and anger.

It may be that the silver bloc was only the advance guard of the New Economic Order. What we are witnessing now apparently is the beginning of the organization of a raw materials bloc on a gigantic scale—perhaps even on a great enough scale to defeat in Congress any postwar economic policy that does not include complete protection, horse-high, hog-tight, and bull-strong, for the domestic producers of any raw material that may by any stretch of ingenuity, or at any cost, be supplied from domestic sources. We may see the same senators who have voted for political understanding vote coincidentally for a closed economic system which will render our political pledges meaningless and even insulting so far as the rest of the world is concerned.

IV.

Everywhere you look among these producers the gospel of the New Economic Order is making converts.

Take the farmers, for instance. Congress has already pledged to the producers of numerous farm products that they will receive at least 90 per cent of parity for two years after the war—and this means not for two years after the shooting war stops but for two years after peace is formally proclaimed by a joint resolution of both houses of Congress, signed by the President. The pledge may run well beyond 1950.

Now let us look at the resolutions passed at the recent national conven-

tion of the National Grange. They endorse an "effective international organization to promote world peace," and the "development of international trade on an equitable basis." But they also demand protection for parity prices for farm products and a two-price system for crops with exportable surpluses—all the leading ones. Under such a system "the consumer would pay a price which would reflect parity, on that part of the crop consumed at home; each farmer would then be free to determine the extent to which he would produce for the world market at world prices."

You cannot make such a system work without tariff protection. Turn that plan around, go out and stare at it from beyond our own frontiers, and you will see a frowning, forbidding wall erected against the importation of any farm products into the United States while we are busy dumping our surpluses abroad to depress the markets of farmers of other lands.

The growers of beef cattle, recently assembled in national convention at Denver, urged continuance of the "sanitary embargo against the importation of meat supplies from countries having foot-and-mouth disease," an embargo directed against Argentina; and a protective tariff to "fully protect our domestic American economy."

At Fort Worth the wool growers came out for a quota on imports. The government is now buying all domestically produced wool. Australian wool, of the best grade, now overleaps the 34-cent tariff and enters the country at a price which permits it to sell at some 15 or 16 cents per pound below the $1.18 which the government is paying for the best grade (scoured) American. American wool growers say they aren't making a living even at $1.18, and as an earnest of their sincerity they have reduced flocks about 15 per cent in the past two years. There's roughly a year's supply on hand, excluding the British-owned wool here (totaling nearly as much again) which is under bond not to be disposed of in this country without prior notice.

By an import quota the wool growers mean a system which will reserve for them the entire American market, which will work down that stockpile, and which will permit the import of only a few special types of wool that cannot be produced in the United States. And the fewer the better.

Let's take a look at another large group of American producers, the miners and refiners of such nonferrous metals as manganese and copper. There is general agreement among them that the United States should stockpile strategic metals after the war. But they want to be allowed to do the stockpiling behind a protection from import competition which will enable them to work low-grade American ores; while, by contrast, the State Department wants to supplement home production with strategic metals from the outside world in order to conserve our own limited deposits of high-grade ores.

At the recent Intermountain Mining Congress in Denver, the delegates

listened politely while Charles P. Taft of the State Department spoke in favor of the latter plan, and assured them that neither the United States nor the world could indefinitely support high-cost metal producers (who are now receiving premium prices for critical metals) but that all high-cost producers would be treated alike, whether foreign or domestic.

After Mr. Taft had gone, a nonferrous metals processor brought down the house when he remarked he was glad to find out from Mr. Taft's speech that "our government after the war is going to treat Americans as well as [it treats] foreigners."

And the proponents of buying abroad for the stockpile were savagely assailed as "have-notists"—victims of a supposedly fallacious theory that America's mineral supply has been so gravely exhausted by the war that it must be supplemented from abroad. Just put the price high enough, the world was assured, and there will be plenty of American metals. The price may be three or four times as high, in some cases, as that of similar ores purchased abroad.

The nonferrous metals interests are still groping for a formula, but one suggestion put forward at Denver is probably about as far as they would be willing to go toward internationalism. This would protect domestic producers in supplying the domestic market, at prices which would return American costs and afford about a 6 per cent profit, while the government bought abroad for the stockpile at world prices. When, and only when, the American price level behind the protective wall rose above that of the stipulated formula, the government would be permitted to sell from the stockpile for domestic consumption. The cost of such a program to American industries and consumers is difficult to estimate, but it clearly would run into astronomical figures.

The New Economic Order will have powerful support from some sections of organized labor. Workers in the mines are well organized and are now making approximately twice, in wages per hour, their prewar pay. Wages of farm workers are now some 200 per cent above their prewar level.

Here are two sections of American labor (and there are undoubtedly others) which see no gains for themselves, but only losses, in a freer-trading postwar world. Day after day they are being told, in plausible-sounding terms, of the dangers of foreign competition. They are being persuaded that their job security depends upon the maintenance—at whatever cost to the nation—of the new vested interests and abnormal price structures created by the war. Nobody has yet tried to show them the other side of the picture—to prove, in specific, easily understandable fashion, that a thriving international commerce would make more jobs than it would lose.

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Perhaps it might be prudent for those who earnestly want to further the cause of world peace to take their eyes for a moment away from Dumbarton Oaks and Yalta and San Francisco and the German problem, and look instead at the problem in our own back yard. They need to make their case more pointedly and persuasively than they have yet attempted to make it. They need to convince thousands of worried, doubting Americans that international security does not have to be purchased at a ruinous price. They need to demonstrate that co-operation with other nations—political *and* economic, as it must be—will be a paying proposition for the United States, not only in terms of lives but also in terms of hard cash.

The magniloquent generalities which the State Department has been accustomed to uttering will not do the job. The farmer, the lumberman, the miner have to be shown in precise figures that a free-flowing trade between nations will mean better markets and more jobs for them.

Most of all they need some assurance that this country will not collapse into a postwar depression; that the United States can, and will, achieve something close to full employment—and that a healthy two-way international commerce is an important step toward that goal. Unless they get such assurance, they will continue to listen eagerly to the missionaries of the New Economic Order. They will go right ahead trying to build their own private breastworks against hard times, with results quite probably disastrous to all our brave hopes—which they share—for a saner, safer world.



105. PROPOSALS FOR AN INTERNATIONAL ATOMIC DEVELOPMENT AUTHORITY [1]

THE explosion of the atomic bomb on August 6, 1945, at Hiroshima presented the world with an awesome task. What international political machinery could be created to prevent the use of this fantastic new weapon for destructive purposes and yet preserve for mankind the beneficial uses to which the discovery of nuclear fission might be put? As the major possessor of atomic bombs, the United States felt a heavy responsibility for devising effective controlling machinery. In internal politics the device was the Atomic Energy Commission.

[1] Bernard M. Baruch, State Department Publication 272, No. 138 (June 14, 1946), pp. 385–345.

In the international scene the problem was more difficult to solve. The newly born United Nations organization turned over the task to its Commission on Atomic Energy, created on January 24, 1946, which consisted of the members of the Security Council and of Canada. The United States Secretary of State, Mr. James Byrnes, set up a committee under the then Under-Secretary of State Dean Acheson to study the problem and present its report to the United States representatives on the United Nations Atomic Energy Commission. The speech of Mr. Bernard M. Baruch before that commission embodied the recommendations of the Acheson-Lilienthal committee. The United States proposed the creation of an effective international control authority. As the international authority became effective, by stages the United States (1) would stop producing atomic bombs, (2) would dispose of existing bombs in accordance with the terms of a treaty setting up the commission, and (3) would give the international authority full possession of the "know-how" on the use of atomic energy. The United States proposal became the basis for the majority opinion of the United Nations. Up to 1949, however, the problem remained unsolved because of the continuing conflict between the United States and the U.S.S.R.

MY FELLOW MEMBERS OF THE UNITED NATIONS ATOMIC ENERGY COMMISSION, and MY FELLOW CITIZENS OF THE WORLD:

We are here to make a choice between the quick and the dead.

That is our business.

Behind the black portent of the new atomic age lies a hope which, seized upon with faith, can work our salvation. If we fail, then we have damned every man to be the slave of Fear. Let us not deceive ourselves: We must elect World Peace or World Destruction.

Science has torn from nature a secret so vast in its potentialities that our minds cower from the terror it creates. Yet terror is not enough to inhibit the use of the atomic bomb. The terror created by weapons has never stopped man from employing them. For each new weapon a defense has been produced, in time. But now we face a condition in which adequate defense does not exist.

Science, which gave us this dread power, shows that it *can* be made a giant help to humanity, but science does *not* show us how to prevent its baleful use. So we have been appointed to obviate that peril by finding a meeting of the minds and the hearts of our peoples. Only in the will of mankind lies the answer.

It is to express this will and make it effective that we have been assembled. We must provide the mechanism to assure that atomic energy is used for peaceful purposes and preclude its use in war. To that end, we must provide immediate, swift, and sure punishment of those who violate the agreements that are reached by the nations. Penalization is essential if

peace is to be more than a feverish interlude between wars. And, too, the United Nations can prescribe individual responsibility and punishment on the principles applied at Nuremberg by the Union of Soviet Socialist Republics, the United Kingdom, France, and the United States—a formula certain to benefit the world's future.

In this crisis, we represent not only our governments but, in a larger way, we represent the peoples of the world. We must remember that the peoples do not belong to the governments but that the governments belong to the peoples We must answer their demands; we must answer the world's longing for peace and security.

In that desire the United States shares ardently and hopefully. The search of science for the absolute weapon has reached fruition in this country But she stands ready to proscribe and destroy this instrument—to lift its use from death to life—if the world will join in a pact to that end.

In our success lies the promise of a new life, freed from the heart-stopping fears that now beset the world. The beginning of victory for the great ideals for which millions have bled and died lies in building a workable plan Now we approach fulfilment of the aspirations of mankind. At the end of the road lies the fairer, better, surer life we crave and mean to have.

Only by a lasting peace are liberties and democracies strengthened and deepened War is their enemy. And it will not do to believe that any of us can escape war's devastation. Victor, vanquished, and neutrals alike are affected physically, economically, and morally.

Against the degradation of war we can erect a safeguard. That is the guerdon for which we reach. Within the scope of the formula we outline here there will be found, to those who seek it, the essential elements of our purpose. Others will see only emptiness. Each of us carries his own mirror in which is reflected hope—or determined desperation—courage or cowardice.

There is a famine throughout the world today. It starves men's bodies. But there is a greater famine—the hunger of men's spirit. That starvation can be cured by the conquest of fear, and the substitution of hope, from which springs faith—faith in each other, faith that we want to work together toward salvation, and determination that those who threaten the peace and safety shall be punished.

The peoples of these democracies gathered here have a particular concern with our answer, for their peoples hate war. They will have a heavy exaction to make of those who fail to provide an escape. They are not afraid of an internationalism that protects; they are unwilling to be fobbed off by mouthings about narrow sovereignty, which is today's phrase for yesterday's isolation.

The basis of a sound foreign policy, in this new age, for all the nations

here gathered, is that anything that happens, no matter where or how, which menaces the peace of the world, or the economic stability, concerns each and all of us.

That, roughly, may be said to be the central theme of the United Nations. It is with that thought we begin consideration of the most important subject that can engage mankind—life itself.

Let there be no quibbling about the duty and the responsibility of this group and of the governments we represent. I was moved, in the afternoon of my life, to add my effort to gain the world's quest, by the broad mandate under which we were created. The resolution of the General Assembly, passed January 24, 1946, in London, reads:

Section V. Terms of Reference of the Commission

The Commission shall proceed with the utmost dispatch and inquire into all phases of the problems, and make such recommendations from time to time with respect to them as it finds possible. In particular the Commission shall make specific proposals:

(a) For extending between all nations the exchange of basic scientific information for peaceful ends;

(b) For control of atomic energy to the extent necessary to insure its use only for peaceful purposes;

(c) For the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction;

(d) For effective safeguards by way of inspection and other means to protect complying States against the hazards of violations and evasions.

The work of the Commission should proceed by separate stages, the successful completion of each of which will develop the necessary confidence of the world before the next stage is undertaken. . . .

Our mandate rests, in text and in spirit, upon the outcome of the Conference in Moscow of Messrs. Molotov of the Union of Soviet Socialist Republics, Bevin of the United Kingdom, and Byrnes of the United States of America. The three Foreign Ministers on December 27, 1945, proposed the establishment of this body.

Their action was animated by a preceding conference in Washington on November 15, 1945, when the President of the United States, associated with Mr. Attlee, Prime Minister of the United Kingdom, and Mr. Mackenzie King, Prime Minister of Canada, stated that international control of the whole field of atomic energy was immediately essential. They proposed the formation of this body. In examining that source, the Agreed Declaration, it will be found that the fathers of the concept recognized the final means of world salvation—the abolition of war. Solemnly they wrote:

"We are aware that the only complete protection for the civilized world from the destructive use of scientific knowledge lies in the prevention of war. No system of safeguards that can be devised will of itself provide an effective guar-

antee against production of atomic weapons by a nation bent on aggression. Nor can we ignore the possibility of the development of other weapons, or of new methods of warfare, which may constitute as great a threat to civilization as the military use of atomic energy.

Through the historical approach I have outlined, we find ourselves here to test if man can produce, through his will and faith, the miracle of peace, just as he has, through science and skill, the miracle of the atom.

The United States proposes the creation of an International Atomic Development Authority, to which should be entrusted all phases of the development and use of atomic energy, starting with the raw material and including—

1. Managerial control or ownership of all atomic-energy activities potentially dangerous to world security.

2. Power to control, inspect, and license all other atomic activities.

3. The duty of fostering the beneficial uses of atomic energy.

4. Research and development responsibilities of an affirmative character intended to put the Authority in the forefront of atomic knowledge and thus to enable it to comprehend, and therefore to detect, misuse of atomic energy. To be effective, the Authority must itself be the world's leader in the field of atomic knowledge and development and thus supplement its legal authority with the great power inherent in possession of leadership in knowledge.

I offer this as a basis for beginning our discussion.

But I think the peoples we serve would not believe—and without faith nothing counts—that a treaty, merely outlawing possession or use of the atomic bomb, constitutes effective fulfilment of the instructions to this Commission. Previous failures have been recorded in trying the method of simple renunciation, unsupported by effective guarantees of security and armament limitation. No one would have faith in that approach alone.

Now, if ever, is the time to act for the common good. Public opinion supports a world movement toward security. If I read the signs aright, the peoples want a program not composed merely of pious thoughts but of enforceable sanctions—an international law with teeth in it.

We of this nation, desirous of helping to bring peace to the world and realizing the heavy obligations upon us arising from our possession of the means of producing the bomb and from the fact that it is part of our armament, are prepared to make our full contribution toward effective control of atomic energy.

When an adequate system for control of atomic energy, including the renunciation of the bomb as a weapon, has been agreed upon and put into effective operation and condign punishments set up for violations of the rules of control which are to be stigmatized as international crimes, we propose that—

1. Manufacture of atomic bombs shall stop;

2. Existing bombs shall be disposed of pursuant to the terms of the treaty; and

3. The Authority shall be in possession of full information as to the know-how for the production of atomic energy.

Let me repeat, so as to avoid misunderstanding: My country is ready to make its full contribution toward the end we seek, subject of course to our constitutional processes and to an adequate system of control becoming fully effective, as we finally work it out.

Now as to violations: In the agreement, penalties of as serious a nature as the nations may wish and as immediate and certain in their execution as possible should be fixed for—

1. Illegal possession or use of an atomic bomb;

2. Illegal possession, or separation, of atomic material suitable for use in an atomic bomb;

3. Seizure of any plant or other property belonging to or licensed by the Authority;

4. Willful interference with the activities of the Authority;

5. Creation or operation of dangerous projects in a manner contrary to, or in the absence of, a license granted by the international control body.

It would be a deception, to which I am unwilling to lend myself, were I not to say to you and to our peoples that the matter of punishment lies at the very heart of our present security system. It might as well be admitted, here and now, that the subject goes straight to the veto power contained in the Charter of the United Nations so far as it relates to the field of atomic energy. The Charter permits penalization only by concurrence of each of the five great powers—the Union of Soviet Socialist Republics, the United Kingdom, China, France, and the United States.

I want to make very plain that I am concerned here with the veto power only as it affects this particular problem. There must be no veto to protect those who violate their solemn agreements not to develop or use atomic energy for destructive purposes.

The bomb does not wait upon debate. To delay may be to die. The time between violation and preventive action or punishment would be all too short for extended discussion as to the course to be followed.

As matters now stand several years may be necessary for another country to produce a bomb, *de novo*. However, once the basic information is generally known, and the Authority has established producing plants for peaceful purposes in the several countries, an illegal seizure of such a plant might permit a malevolent nation to produce a bomb in twelve months, and if preceded by secret preparation and necessary facilities perhaps even in a much shorter time. The time required—the advance warning given

of the possible use of a bomb—can only be generally estimated but obviously will depend upon many factors, including the success with which the Authority has been able to introduce elements of safety in the design of its plants and the degree to which illegal and secret preparation for the military use of atomic energy will have been eliminated. Presumably no nation would think of starting a war with only one bomb.

This shows how imperative speed is in detecting and penalizing violations.

The process of prevention and penalization—a problem of profound statecraft—is, as I read it, implicit in the Moscow statement, signed by the Union of Soviet Socialist Republics, the United States, and the United Kingdom a few months ago.

But before a country is ready to relinquish any winning weapons it must have more than words to reassure it. It must have a guarantee of safety, not only against the offenders in the atomic area but against the illegal users of other weapons—bacteriological, biological, gas—perhaps—why not?—against war itself.

In the elimination of war lies our solution, for only then will nations cease to compete with one another in the production and use of dread "secret" weapons which are evaluated solely by their capacity to kill. This devilish program takes us back not merely to the Dark Ages but from cosmos to chaos. If we succeed in finding a suitable way to control atomic weapons, it is reasonable to hope that we may also preclude the use of other weapons adaptable to mass destruction. When a man learns to say "A" he can, if he chooses, learn the rest of the alphabet too.

Let this be anchored in our minds.

Peace is never long preserved by weight of metal or by an armament race. Peace can be made tranquil and secure only by understanding and agreement fortified by sanctions. We must embrace international cooperation or international disintegration.

Science has taught us how to put the atom to work. But to make it work for good instead of for evil lies in the domain dealing with the principles of human duty. We are now facing a problem more of ethics than of physics.

The solution will require apparent sacrifice in pride and in position, but better pain as the price of peace than death as the price of war.

I now submit the following measures as representing the fundamental features of a plan which would give effect to certain of the conclusions which I have epitomized.

1. General. The Authority should set up a thorough plan for control of the field of atomic energy, through various forms of ownership, dominion, licenses, operation, inspection, research, and management by competent personnel. After this is provided for, there should be as little interference

as may be with the economic plans and the present private, corporate, and State relationships in the several countries involved.

2. *Raw Materials.* The Authority should have as one of its earliest purposes to obtain and maintain complete and accurate information on world supplies of uranium and thorium and to bring them under its dominion. The precise pattern of control for various types of deposits of such materials will have to depend upon the geological, mining, refining, and economic facts involved in different situations.

The Authority should conduct continuous surveys so that it will have the most complete knowledge of the world geology of uranium and thorium. Only after all current information on world sources of uranium and thorium is known to us all can equitable plans be made for their production, refining, and distribution.

3. *Primary Production Plants.* The Authority should exercise complete managerial control of the production of fissionable materials. This means that it should control and operate all plants producing fissionable materials in dangerous quantities and must own and control the product of these plants.

4. *Atomic Explosives.* The Authority should be given sole and exclusive right to conduct research in the field of atomic explosives. Research activities in the field of atomic explosives are essential in order that the Authority may keep in the forefront of knowledge in the field of atomic energy and fulfil the objective of preventing illicit manufacture of bombs. Only by maintaining its position as the best-informed agency will the Authority be able to determine the line between intrinsically dangerous and nondangerous activities.

5. *Strategic Distribution of Activities and Materials.* The activities entrusted exclusively to the Authority because they are intrinsically dangerous to security should be distributed throughout the world. Similarly, stockpiles of raw materials and fissionable materials should not be centralized.

6. *Nondangerous Activities.* A function of the Authority should be promotion of the peactime benefits of atomic energy.

Atomic research (except in explosives), the use of research reactors, the production of radioactive tracers by means of nondangerous reactors, the use of such tracers, and to some extent the production of power, should be open to nations and their citizens under reasonable licensing arrangements from the Authority. Denatured materials, whose use we know also requires suitable safeguards, should be furnished for such purposes by the Authority under lease or other arrangement. Denaturing seems to have been overestimated by the public as a safety measure.

7. *Definition of Dangerous and Nondangerous Activities.* Although a reasonable dividing line can be drawn between dangerous and nondanger-

ous activities, it is not hard and fast. Provision should, therefore, be made to assure constant reexamination of the questions and to permit revision of the dividing line as changing conditions and new discoveries may require.

8. Operations of Dangerous Activities. Any plant dealing with uranium or thorium after it once reaches the potential of dangerous use must be not only subject to the most rigorous and competent inspection by the Authority, but its actual operation shall be under the management, supervision, and control of the Authority.

9. Inspection. By assigning intrinsically dangerous activities exclusively to the Authority, the difficulties of inspection are reduced. If the Authority is the only agency which may lawfully conduct dangerous activities, then visible operation by others than the Authority will constitute an unambiguous danger signal. Inspection will also occur in connection with the licensing functions of the Authority.

10. Freedom of Access. Adequate ingress and egress for all qualified representatives of the Authority must be assured. Many of the inspection activities of the Authority should grow out of, and be incidental to, its other functions. Important measures of inspection will be associated with the tight control of raw materials, for this is a keystone of the plan. The continuing activities of prospecting, survey, and research in relation to raw materials will be designed not only to serve the affirmative development functions of the Authority but also to assure that no surreptitious operations are conducted in the raw-materials held by nations or their citizens.

11. Personnel. The personnel of the Authority should be recruited on a basis of proved competence but also so far as possible on an international basis.

12. Progress by Stages. A primary step in the creation of the system of control is the setting forth, in comprehensive terms, of the functions, responsibilities, powers, and limitations of the Authority. Once a charter for the Authority has been adopted, the Authority and the system of control for which it will be responsible will require time to become fully organized and effective. The plan of control will, therefore, have to come into effect in successive stages. These should be specifically fixed in the charter or means should be otherwise set forth in the charter for transitions from one stage to another, as contemplated in the resolution of the United Nations Assembly which created this Commission.

13. Disclosures. In the deliberations of the United Nations Commission on Atomic Energy, the United States is prepared to make available the information essential to a reasonable understanding of the proposals which it advocates. Further disclosures must be dependent, in the interests of all, upon the effective ratification of the treaty. When the Authority is actually created, the United States will join the other nations in making available the further information essential to that organization for the perform-

ance of its functions. As the successive stages of international control are reached, the United States will be prepared to yield, to the extent required by each stage, national control of activities in this field to the Authority.

14. International Control. There will be questions about the extent of control to be allowed to national bodies, when the Authority is established. Purely national authorities for control and development of atomic energy should to the extent necessary for the effective operation of the Authority be subordinate to it. This is neither an endorsement nor a disapproval of the creation of national authorities. The Commission should evolve a clear demarcation of the scope of duties and responsibilities of such national authorities.

And now I end. I have submitted an outline for present discussion. Our consideration will be broadened by the criticism of the United States proposals and by the plans of the other nations, which, it is to be hoped, will be submitted at their early convenience. I and my associates of the United States Delegation will make available to each member of this body books and pamphlets, including the Acheson-Lilienthal report, recently made by the United States Department of State, and the McMahon Committee Monograph No. 1 entitled "Essential Information on Atomic Energy" relating to the McMahon bill recently passed by the United States Senate, which may prove of value in assessing the situation.

All of us are consecrated to making an end of gloom and hopelessness. It will not be an easy job. The way is long and thorny, but supremely worth traveling. All of us want to stand erect, with our faces to the sun, instead of being forced to burrow into the earth, like rats.

The pattern of salvation must be worked out by all for all.

The light at the end of the tunnel is dim, but our path seems to grow brighter as we actually begin our journey. We cannot yet light the way to the end. However, we hope the suggestions of my Government will be illuminating.

Let us keep in mind the exhortation of Abraham Lincoln, whose words, uttered at a moment of shattering national peril, form a complete text for our deliberation. I quote, paraphrasing slightly:

> We cannot escape history. We of this meeting will be remembered in spite of ourselves. No personal significance or insignificance can spare one or another of us. The fiery trial through which we are passing will light us down in honor or dishonor to the latest generation.
>
> We say we are for Peace. The world will not forget that we say this. We know how to save Peace. The world knows that we do. We, even we here, hold the power and bear the responsibility.
>
> We shall nobly save, or meanly lose, the last, best hope of earth. The way is

plain, peaceful, generous, just—a way which, if followed, the world will forever applaud.

My thanks for your attention.



106. "THE MARSHALL DOCTRINE" [1]

IN AN address at Harvard University on June 5, 1947, Secretary of State Marshall said that the United States would be willing to assist European nations to recover their economic stability destroyed by World War II. It was to the enlightened self-interest of the United States that economic recovery take place in Europe. Neither political stability nor assured peace could exist without it. If an economic program was to be worked out, the initiative would have to come from European countries themselves, Secretary Marshall said. No assistance, furthermore, would be available to those countries that wanted to block European recovery. As a consequence of Secretary Marshall's suggestions, representatives of sixteen European countries met in Paris in July, 1947, to draft a recovery program. After extensive discussion, the United States Congress passed the Foreign Assistance Act of 1948; and the Economic Cooperation Administration was set up under Mr. Paul G. Hoffman to implement the program.

I NEED not tell you gentlemen that the world situation is very serious. That must be apparent to all intelligent people. I think one difficulty is that the problem is one of such enormous complexity that the very mass of facts presented to the public by press and radio make it exceedingly difficult for the man in the street to reach a clear appraisement of the situation. Furthermore, the people of this country are distinct from the troubled areas of the earth, and it is hard for them to comprehend the plight and consequent reactions of the long-suffering peoples, and the effect of those reactions on their governments in connection with our efforts to promote peace in the world.

In considering the requirements for the rehabilitation of Europe, the physical loss of life, the visible destruction of cities, factories, mines, and railroads were correctly estimated, but it has become obvious during recent months that this visible destruction was probably less serious than the dislocation of the entire fabric of European economy. For the past ten

[1] George C. Marshall in an address at Harvard University. Reprinted from *European Initiative Essential to Economic Recovery*, Department of State Publication 2882, European Series 25.

years conditions have been highly abnormal. The feverish preparation for war and the more feverish maintenance of the war effort engulfed all aspects of national economies. Machinery has fallen into disrepair or is entirely obsolete. Under the arbitrary and destructive Nazi rule, virtually every possible enterprise was geared into the German war machine. Long-standing commercial ties, private institutions, banks, insurance companies, and shipping companies disappeared, through loss of capital, absorption through nationalization, or by simple destruction. In many countries, confidence in the local currency has been severely shaken. The breakdown of the business structure of Europe during the war was complete. Recovery has been seriously retarded by the fact that two years after the close of hostilities a peace settlement with Germany and Austria has not been agreed upon. But even given a more prompt solution of these difficult problems, the rehabilitation of the economic structure of Europe quite evidently will require a much longer time and greater effort than had been foreseen.

There is a phase of this matter which is both interesting and serious. The farmer has always produced the foodstuffs to exchange with the city dweller for the other necessities of life. This division of labor is the basis of modern civilization. At the present time it is threatened with breakdown. The town and city industries are not producing adequate goods to exchange with the food-producing farmer. Raw materials and fuel are in short supply. Machinery is lacking or worn out. The farmer or the peasant cannot find the goods for sale which he desires to purchase. So the sale of his farm produce for money which he cannot use seems to him an unprofitable transaction. He, therefore, has withdrawn many fields from crop cultivation and is using them for grazing. He feeds more grain to stock and finds for himself and his family an ample supply of food, however short he may be on clothing and the other ordinary gadgets of civilization. Meanwhile people in the cities are short of food and fuel. So the governments are forced to use their foreign money and credits to procure these necessities abroad. This process exhausts funds which are urgently needed for reconstruction. Thus a very serious situation is rapidly developing which bodes no good for the world. The modern system of the division of labor, upon which the exchange of products is based, is in danger of breaking down.

The truth of the matter is that Europe's requirements, for the next three or four years, of foreign food and other essential products—principally from America—are so much greater than her present ability to pay that she must have substantial additional help, or face economic, social, and political deterioration of a very grave character.

The remedy lies in breaking the vicious circle and restoring the confidence of the European people in the economic future of their own coun-

tries and of Europe as a whole. The manufacturer and the farmer throughout wide areas must be able and willing to exchange their products for currencies the continuing value of which is not open to question.

Aside from the demoralizing effect on the world at large and the possibilities of disturbances arising as a result of the desperation of the people concerned, the consequences to the economy of the United States should be apparent to all. It is logical that the United States should do whatever it is able to do to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace. Our policy is directed not against any country or doctrine but against hunger, poverty, desperation, and chaos. Its purpose should be the revival of a working economy in the world, so as to permit the emergence of political and social conditions in which free institutions can exist. Such assistance, I am convinced, must not be on a piecemeal basis as various crises develop. Any assistance that this Government may render in the future should provide a cure rather than a mere palliative. Any government that is willing to assist in the task of recovery will find full coöperation, I am sure, on the part of the United States Government. Any government which maneuvers to block the recovery of other countries cannot expect help from us. Furthermore, governments, political parties, or groups which seek to perpetuate human misery in order to profit therefrom, politically or otherwise, will encounter the opposition of the United States.

It is already evident that, before the United States Government can proceed much further in its efforts to alleviate the situation and help start the European world on its way to recovery, there must be some agreement among the countries of Europe as to the requirements of the situation and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this Government. It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans. The initiative, I think, must come from Europe. The role of this country should consist of friendly aid in the drafting of a European program and of later support of such a program so far as it may be practical for us to do so. The program should be a joint one, agreed to by a number, if not all European nations.

An essential part of any successful action on the part of the United States is an understanding on the part of the people of America of the character of the problem and the remedies to be applied. Political passion and prejudice should have no part. With foresight, and a willingness on the part of our people to face up to the vast responsibility which history has

clearly placed upon our country, the difficulties I have outlined can and will be overcome.

I am sorry that on each occasion I have said something publicly in regard to our international situation, I have been forced by the necessities of the case to enter into rather technical distinctions, but to my mind it is of vast importance that our people reach some general understanding of what the complications really are rather than react from passion, prejudice, or the emotion of the moment.

As I said more formally a moment ago, we are remote from the scene of these troubles. It is virtually impossible at this distance merely by reading or listening, or even seeing photographs and motion pictures, to grasp at all the real significance of the situation. Yet the whole world of the future hangs on a proper judgment.

It hangs I think to a large extent on the realization of the American people of just what are the various dominant factors, what are the reactions of the people, what are the justifications of those reactions, what are the sufferings, what the need, what can best be done, and what must be done.



107. THE CHALLENGE TO AMERICANS [1]

IN THIS article former Secretary of State Stimson reviews the controlling aspects of the foreign policy of the United States. He reminds us that we are a part of the rest of the world whether or not we recognize that fact. Hence, we have world responsibilities. Our relations with the U.S.S.R. are a major problem. The facts are that the U.S.S.R. with its communist way of life exists and that the capitalist system of the United States also exists. A foreign policy advocated by either power that is based on the quick disappearance of the other is unreal. The U.S.S.R. teaches its people that capitalism is doomed. The United States must demonstrate to the U.S.S.R. that our economic system and our form of government are durable and that they are capable of meeting the challenges which face them. Other major aspects of United States foreign policy are the European recovery program and continued cooperation with the United Nations. In the phrase of Walter Lippmann, foreign policy is the shield and armor of the republic.

WE AMERICANS today face a challenging opportunity, perhaps the greatest ever offered to a single nation. It is nothing less than a chance to use our full strength for the peace and freedom of the world. This opportunity

[1] Henry L. Stimson, *Foreign Affairs*, An American Quarterly Review, October, 1947.

comes when many of us are confused and unready. Only two years ago we triumphantly ended the greatest war in history. Most of us then looked forward eagerly to the relative relaxation of peace. Reluctantly we have now come to understand that victory and peace are not synonymous. Over large areas of the world we have nothing better than armed truce; in some places there is open fighting; everywhere men know that there is yet no stable settlement. Close on the heels of victory has loomed a new world crisis.

Particularly to Americans the appearance of disquieting facts and possibilities has been upsetting. We are having our first experience of constant, full-scale activity in world politics. Other nations have lived for years as principals in the give-and-take of diplomacy. Until now we have been, except in wartime, on the fringe. It is no wonder that, when suddenly placed in the center of the alarms and excursions of international affairs, we are abnormally sensitive. And, of course, it does not help to find ourselves selected as chief target for the abuse and opposition of a very bad-mannered group of men who take their orders from the Kremlin. It is not surprising, then, that many of us are confused and unhappy about our foreign relations, and that some are tempted to seek refuge from their confusion either in retreat to isolationism or in suggested solutions whose simplicity is only matched by their folly. In the main, our difficulties arise from unwillingness to face reality.

It must be admitted that the elements of the new unrest appear to be unusually complex and trying. The war-shattered world must be rebuilt; the problem of atomic energy insistently demands solution; the present policy of Russia must be frustrated. But it is my belief that the American people have it well within their power to meet and resolve all of these problems. The essential test is one of will and understanding. We require a skilful foreign policy, of course, but we may have confidence that the farsighted and experienced men now in charge of our State Department know how to frame a policy. In outline the President and the Secretary of State have already set their course. They can develop their policy with success, however, only if they have the understanding support, on basic principles, of the American people.

First, and most important, Americans must now understand that the United States has become, for better or worse, a wholly committed member of the world community. This has not happened by conscious choice; but it is a plain fact, and our only choice is whether or not to face it. For more than a generation the increasing interrelation of American life with the life of the world has out-paced our thinking and our policy; our refusal to catch up with reality during these years was the major source of our considerable share of the responsibility for the catastrophe of World War II.

It is the first condition of effective foreign policy that this nation put away forever any thought that America can again be an island to herself. No private program and no public policy, in any sector of our national life, can now escape from the compelling fact that if it is not framed with reference to the world, it is framed with perfect futility. This would be true if there were no such thing as nuclear fission, and if all the land eastward from Poland to the Pacific were under water. Atomic energy and Soviet Russia are merely the two most conspicuous present demonstrations of what we have at stake in world affairs. The attitude of isolationism—political or economic—must die; in all its many forms the vain hope that we can live alone must be abandoned.

As a corollary to this first great principle, it follows that we shall be wholly wrong if we attempt to set a maximum or margin to our activity as members of the world. The only question we can safely ask today is whether in any of our actions on the world stage we are doing enough. In American policy toward the world there is no place for grudging or limited participation, and any attempt to cut our losses by setting bounds to our policy can only turn us backward onto the deadly road toward self-defeating isolation.

Our stake in the peace and freedom of the world is not a limited liability. Time after time in other years we have tried to solve our foreign problems with half-way measures, acting under the illusion that we could be partly in the world and partly irresponsible. Time after time our Presidents and Secretaries of State have been restrained, by their own fears or by public opinion, from effective action. It should by now be wholly clear that only failure, and its follower, war, can result from such efforts at a cheap solution.

We have fresh before us the contrary example of our magnificent success in wartime, when we have not stopped to count the cost. I have served as Secretary of State in a time of frightened isolationism, and as Secretary of War in a time of brave and generous action. I know the withering effect of limited commitments, and I know the regenerative power of full action. I know, too, that America can afford it—as who does not know it, in the face of our record in the last seven years?

It is altogether fitting and proper, of course, that we should not waste our substance in activity without result. It is also evident that we cannot do everything we would like to do. But it would be shriveling timidity for America to refuse to play to the full her present necessary part in the world. And the certain penalty for such timidity would be failure.

The troubles of Europe and Asia are not "other people's troubles"; they are ours. The world is full of friends and enemies; it is full of warring ideas; but there are no mere "foreigners," no merely "foreign" ideologies, no merely "foreign" dangers, any more. Foreign affairs are

now our most intimate domestic concern. All men, good or bad, are now our neighbors. All ideas dwell among us.

A second principle, and one which requires emphasis as a necessary complement to any policy of full participation, is that we are forced to act in the world as it is, and not in the world as we wish it were, or as we would like it to become. It is a world in which we are only one of many peoples and in which our basic principles of life are not shared by all our neighbors. It has been one of the more dangerous aspects of our internationalism in past years that too often it was accompanied by the curious assumption that the world would overnight become good and clean and peaceful everywhere if only America would lead the way. The most elementary experience of human affairs should show us all how naive and dangerous a view that is.

The most conspicuous present examples of this sort of thinking are to be found among those who refuse to recognize the strong probability that one of our great and powerful neighbor nations is at present controlled by men who are convinced that the very course of history is set against democracy and freedom, as we understand those words. A very large part of what I believe to be the mistaken thinking done by my friend Henry Wallace about Soviet Russia results simply from a goodhearted insistence that nobody can dislike us if we try to like them.

We have been very patient with the Soviet Government, and very hopeful of its good intentions. I have been among those who shared in these hopes and counseled this patience. The magnificent and loyal war effort of the Russian people, and the great successful efforts at friendliness made during the war by President Roosevelt, gave us good reason for hope. I have believed—and I still believe—that we must show good faith in all our dealings with the Russians, and that only by so doing can we leave the door open for Russian good faith toward us. I cannot too strongly express my regret that since the early spring of 1945—even before the death of Mr. Roosevelt—the Soviet Government has steadily pursued an obstructive and unfriendly course. It has been our hope that the Russians would choose to be our friends; it was and is our conviction that such a choice would be to their advantage. But, for the time being, at least, those who determine Russian policy have chosen otherwise, and their choice has been slavishly followed by Communists everywhere.

No sensible American can now ignore this fact, and those who now choose to travel in company with American Communists are very clearly either knaves or fools. This is a judgment which I make reluctantly, but there is no help for it. I have often said that the surest way to make a man trustworthy is to trust him. But I must add that this does not always apply to a man who is determined to make you his dupe. Before we can make friends with the Russians, their leaders will have to be convinced

that they have nothing to gain, and everything to lose, by acting on the assumption that our society is dying and that our principles are outworn. Americans who think they can make common cause with present-day Communism are living in a world that does not exist.

They are not alone. An equal and opposite error is made by those who argue that Americans by strong-arm methods, perhaps even by a "preventive war," can and should rid the world of the Communist menace. I cannot believe that this view is widely held. For it is worse than nonsense; it results from a hopeless misunderstanding of the geographical and military situation, and a cynical incomprehension of what the people of the world will tolerate from *any* nation. Worst of all, this theory indicates a totally wrong assessment of the basic attitudes and motives of the American people. Even if it were true that the United States now had the opportunity to establish forceful hegemony throughout the world, we could not possibly take that opportunity without deserting our true inheritance. Americans as conquerors would be tragically miscast.

The world's affairs cannot be simplified by eager words. We cannot take refuge from reality in the folly of black-and-white solutions.

In dealing with the Russians, both uncritical trust and unmitigated belligerence are impossible. There is a middle course. We do not yet know surely in what proportion unreasonable fears and twisted hopes are at the root of the perverted policy now followed by the Kremlin. Assuming both to be involved, we must disarm the fears and disappoint the hopes. We must no longer let the tide of Soviet expansion cheaply roll into the empty place left by war, and yet we must make it perfectly clear that we are not ourselves expansionist. Our task is to help threatened peoples to help themselves.

This is not easy. It is quite possible, indeed, that the blind reaction of some anti-Communist governments may succeed to some extent in nullifying our labors. We must make every effort to prevent such a result. Success in this task depends so much on men and circumstances that I do not venture to prescribe a theoretical solution. It is an undertaking that demands a bold and active policy, combined with skilful and understanding execution. In such an undertaking, it is only the exceptionally well-informed who may properly give advice from the sidelines.

But our main answer to the Russians is not negative, nor is it in any sense anti-Russian. Our central task in dealing with the Kremlin is to demonstrate beyond the possibility of misunderstanding that freedom and prosperity, hand in hand, can be stably sustained in the western democratic world. This would be our greatest task even if no Soviet problem existed, and to the Soviet threat it is our best response.

Soviet intransigence is based in very large part on the hope and belief

that all non-Communist systems are doomed. Soviet policy aims to help them die. We must hope that time and the success of freedom and democracy in the western world will convince both the Soviet leaders and the Russian people now behind them that our system is here to stay. This may not be possible; dictators do not easily change their hearts, and the modern armaments they possess may make it hard for their people to force such a change. Rather than be persuaded of their error, the Soviet leaders might in desperation resort to war, and against that possibility we have to guard by maintaining our present military advantages. We must never forget that while peace is a joint responsibility, the decision for war can be made by a single Power; our military strength must be maintained as a standing discouragement to aggression.

I do not, however, expect the Russians to make war. I do not share the gloomy fear of some that we are now engaged in the preliminaries of an inevitable conflict. Even the most repressive dictatorship is not perfectly unassailable from within, and the most frenzied fanaticism is never unopposed. Whatever the ideological bases of Soviet policy, it seems clear that some at least of the leaders of Russia are men who have a marked respect for facts. We must make it wholly evident that a non-aggressive Russia will have nothing to fear from us. We must make it clear, too, that the western non-Communist world is going to survive in growing economic and political stability. If we can do this, then slowly—but perhaps less slowly than we now believe—the Russian leaders may either change their minds or lose their jobs.

The problem of Russia is thus reduced to a question of our own fitness to survive. I do not mean to belittle the Communist challenge. I only mean that the essential question is one which we should have to answer if there were not a Communist alive. Can we make freedom and prosperity real in the present world? If we can, Communism is no threat. If not, with or without Communism, our own civilization would ultimately fail.

The immediate and pressing challenge to our belief in freedom and prosperity is in western Europe. Here are people who have traditionally shared our faith in human dignity. These are the nations by whose citizens our land was settled and in whose tradition our civilization is rooted. They are threatened by Communism—but only because of the dark shadows cast by the hopelessness, hunger and fear that have been the aftermath of the Nazi war. Communism or no Communism, menace or no menace, it is our simple duty as neighbors to take a generous part in helping these great peoples to help themselves.

The reconstruction of western Europe is a task from which Americans can decide to stand apart only if they wish to desert every principle by

which they claim to live. And, as a decision of policy, it would be the most tragic mistake in our history. We must take part in this work; we must take our full part; we must be sure that we do enough.

I must add that I believe we should act quickly. The penalty of delay in reconstruction is to increase the size of the job and to multiply difficulties. We require a prompt and large-scale program. The government must lead the way, but we who are private citizens must support that leadership as men in all parties supported help to our Allies in 1941. The sooner we act, the surer our success—and the less it will cost us.

The need of Europe is a challenge partly to our generosity and partly to our good sense. We have ample justification for action on either ground. It is an opportunity for the best that is in America, a chance for us to show the practical idealism on which we have with reason learned to pride ourselves.

This is the way to disappoint the Russians. But it is not anti-Russian. This is a course which must be followed not because we fear the Russians, but simply because we have confidence in ourselves.

As we take part in the rebuilding of Europe, we must remember that we are building world peace, not an American peace. Freedom demands tolerance, and many Americans have much to learn about the variety of forms which free societies may take. There are Europeans, just as there are Americans, who do not believe in freedom, but they are in a minority, and—as the Editor of this review so clearly explained in its last issue—we shall not be able to separate the sheep from the goats merely by asking whether they believe in our particular economic and political system. Our cooperation with the free men of Europe must be founded on the basic principles of human dignity, and not on any theory that their way to freedom must be exactly the same as ours. We cannot ask that Europe be rebuilt in the American image. If we join in the task of reconstruction with courage, confidence and goodwill, we shall learn—and teach—a lot. But we must start with a willingness to understand.

The reconstruction of western Europe is the immediate task. With it we have, of course, a job at home. We must maintain freedom and prosperity here. This is a demanding task in itself, and its success or failure will largely determine all our other efforts. If it is true that our prosperity depends on that of the world, it is true also that the whole world's economic future hangs on our success at home. We must go forward to new levels of peacetime production, and to do this we must all of us avoid the pitfalls of laziness, fear and irresponsibility. Neither real profits nor real wages can be permanently sustained—and still less increased—by anything but rising production.

But I see no reason for any man to face the American future with any other feeling than one of confident hope. However grave our problems,

and however difficult their solution, I do not believe that this country is ready to acknowledge that failure is foreordained. It is our task to disprove and render laughable that utterly insulting theory. Our future does not depend on the tattered forecasts of Karl Marx. It depends on us.

In counseling against policies which ignore the facts of the world as it is, I do not, of course, mean to argue that we can for a moment forget the nature of our final goal.

Lasting peace and freedom cannot be achieved until the world finds a way toward the necessary government of the whole. It is important that this should be widely understood, and efforts to spread such understanding are commendable. The riven atom, uncontrolled, can be only a growing menace to us all, and there can be no final safety, short of full control throughout the world. Nor can we hope to realize the vast potential wealth of atomic energy until it is disarmed and rendered harmless. Upon us, as the people who first harnessed and made use of this force, there rests a grave and continuing responsibility for leadership in turning it toward life, not death.

But we cannot have world government or atomic control by wishing for them, and we cannot have them, in any meaningful sense, without Russia. If in response to our best effort there comes no answer but an everlasting "NO," then we must go to work in other fields to change the frame of mind that caused that answer. We cannot ignore it.

It is a part of any practical policy that it must keep our principles out in the open. In the imperfect, veto-ridden United Nations there is now incarnate the hope of people everywhere that this world may become one in spirit as it is in fact. No misconceived idea of "realism" should induce us to ignore this living hope or abate in its pursuit. We should be foremost among those who seek to make the United Nations stronger; if the Russians will not help us, let them be forced to make their opposition clear. As a starting-point, we might simply ask for a clear ruling that there shall be no veto on the right of investigation and report.

Because the United Nations can at present be hamstrung by the obstruction of a single major Power, we will probably find ourselves sometimes forced to act outside its system. So far as possible, we should avoid this course, and we should so conduct our operations as to make it wholly clear to all the world that it is not we who choose to make the United Nations weak, and that when we act outside it we are still acting in harmony with its declared objectives. It must be our constant endeavor to conduct our policy with full and deep respect for our signed and ratified adherence to this new league which we have done so much to build. Our insistence upon world cooperation must be unremitting; only so can we deserve and win the confidence of those who, caring nothing for the politics of power,

now see only the over-riding need for peace. Both policy and principle bind us to the support of the United Nations.

It is clear, then, that in this country we are still free to maintain our freedom. We are called to an unprecedented effort of cooperation with our friends in every country. Immediately, we are called to act in the rebuilding of civilization in that part of the world which is closest to us in history, politics and economics. We are required to think of our prosperity, our policy and our first principles as indivisibly connected with the facts of life everywhere. We must put away forever the childishness of parochial hopes and un-American fears.

We need not suppose that the task we face is easy, or that all our undertakings will be quickly successful. The construction of a stable peace is a longer, more complex and greater task than the relatively simple work of war-making. But the nature of the challenge is the same. The issue before us today is at least as significant as the one which we finally faced in 1941. By a long series of mistakes and failures, dating back over a span of more than 20 years, we had in 1941 let it become too late to save ourselves by peaceful methods; in the end we had to fight. This is not true today. If we act now, with vigor and understanding, with steadiness and without fear, we can peacefully safeguard our freedom. It is only if we turn our backs, in mistaken complacence or mistrusting timidity, that war may again become inevitable.

How soon this nation will fully understand the size and nature of its present mission, I do not dare to say. But I venture to assert that in very large degree the future of mankind depends on the answers to this question. And I am confident that if the issues are clearly presented, the American people will give the right answer. Surely there is here a fair and tempting challenge to all Americans, and especially to the nation's leaders, in and out of office.

Biographical Notes

ABELL, AARON I. (b. 1903): Associate Professor of American History, University of Notre Dame. Author of *The Urban Impact on American Protestantism, 1865–1900* and contributor to *Review of Politics.*

ABRAMSON, VICTOR (b. 1906): Adviser on Financial Policy, Office of International Finance, United States Treasury Department. Member of the staff of The Brookings Institution, 1933–1940; economic advisor to governmental agencies, 1940–1947. Co-author of *The Economics of Open Price Systems,* and *Government and Economic Life,* published by The Brookings Institution. Contributor to *The American Economic Review, The Harvard Business Review, The Journal of Business* of the University of Chicago, and *Law and Contemporary Problems.*

ANDERSON, WILLIAM (b. 1888): Professor of Political Science, University of Minnesota. An advocate of the functional approach to the teaching of American government. Has likewise gained distinction by his research activities in public administration and municipal government. In addition to numerous articles his chief works are *The Units of Government in the United States, American Government,* and *Federalism and Intergovernmental Relations.*

BARNETT, VINCENT M., JR. (b. 1913): Associate Professor of Political Science, Williams College; on leave, 1948–. Presently associated with the Economic Cooperation Administration, Rome, Italy.

BARUCH, BERNARD M. (b. 1870): Business man and governmental advisor. Long known as America's "Elder Statesman." Has been consulted by numerous Administrations since the time of President Wilson. Recently United States Representative on the United Nations Atomic Energy Commission.

BEARD, CHARLES A. (1874–1948): College professor, writer, and lecturer. A leading exponent of the "new history," he sought a realistic interpretation of American Civilization. Gained early fame from his *An Economic Interpretation of the Constitution.* In recent years was an outspoken critic of the foreign policy of the Roosevelt Administration. In addition to his *Economic Interpretation* his chief works are *Economic Origins of Jeffersonian Democracy, Economic Basis of Politics, Rise of American Civilization* (with his wife), and *The Idea*

of National Interest, The Republic, and *American Foreign Policy in the Making.*

BENTHAM, JEREMY (1748–1832): English philosopher and jurist. A member of the Utilitarian School, he developed a theory for the reform of the English legal system. His chief works were *A Fragment on Government; Rationale of Punishment and Rewards,* and *Constitutional Code.*

BROMAGE, ARTHUR W. (b. 1904): Professor of Political Science, University of Michigan. An authority on local government. Author of *American County Government* and *State Government and Administration in the United States.*

BUTLER, OVID (b. 1880): Forester and editor. Executive Director of the American Forestry Association and editor-in-chief of *American Forests.* Has been a leading advocate of conservation.

CALDWELL, LYNTON K. (b. 1913): Director of Research and Publication, Council of State Governments, Chicago. Author of articles in the field of public administration and state government and *The Administrative Theories of Hamilton and Jefferson.*

CHATTERS, CARL H. (b. 1898): Executive Director, American Municipal Association, Chicago. During World War II, Chief, Public Finance Branch, Office of Military Government for Germany. Author of various pamphlets and articles on municipal finance and related subjects.

COMMAGER, HENRY STEELE (b. 1902): Professor of American History, Columbia University. Did extensive work during World War II in the War Department's Commission on the History of the War. Author of numerous books and articles and editor of the *Rise of the American Nation Series.*

CONNELLY, GORDON M. (b. 1915): Public opinion interviewer and researcher. General Manager, Field Operations, National Opinion Research Center, University of Chicago, 1947–. Director of numerous surveys and research projects on national and international issues. Contributor of many articles to *The Public Opinion Quarterly* and the *International Journal of Opinion and Attitude Research.*

CROSBY, ROBERT B. (b. 1911): Lawyer and public official. Lieutenant Governor, State of Nebraska, 1946–.

DIMOCK, MARSHALL E. (b. 1903): Formerly Professor of Political Science, Northwestern University. Assistant Secretary of Labor, 1938–40. Associate Commissioner of Immigration and Naturalization, 1940–42. Assistant Deputy Administrator, War Shipping Administration, 1942–44. Author of numerous books and articles, including *Congressional Investigating Committees, American Government in Action* (with wife), and *The Executive in Action.*

FIELD, HARRY HUBERT (1897–1946): Pioneer in public opinion research. Associated with George Gallup; assisted in founding British Institute of Public Opinion, first foreign affiliate of American Institute, and also Australian and French institutes. Director of the National Opinion Research Center from its founding in 1941 until his death. Collaborated on *Mother India;* author of *After Mother India.* Member of Advisory Board of *The Public Opinion Quarterly.*

FISCHER, JOHN (b. 1910): Editor and writer. Has held editorial positions with Harper's *Magazine* and Harper and Bros. During World War II was connected with the Board of Economic Warfare. Author of *Why They Behave Like Russians* and numerous magazine articles.

FLEMING, ROSCOE (b. 1895): Newspaperman. For many years, a roving correspondent for the Scripps newspaper chain and a contributor to *Business Week,* the London *Economist,* and the *Christian Science Monitor.*

FREEMAN, FRANK N. (b. 1880): Psychologist and university administrator. Dean, School of Education, University of California, Berkeley, since 1939. Author of numerous works on educational problems.

GILBERT, SIR WILLIAM S. (1836–1911): English playwright. Collaborator with Sir Arthur Sullivan in the production of the famous Gilbert and Sullivan light operas.

GRAVES, W. BROOKE (b. 1899): Political scientist and Chief, State Law Section, Legislative Reference Service, Library of Congress. Formerly Professor and Head of Department of Political Science, Temple University. Author of *American State Government* and contributor of articles to numerous professional journals.

GRAVLIN, LESLIE M. (b. 1903): Director of the Hartford Governmental Research Institute. First administrator under Minnesota's reorganization act of 1939; former president of the Governmental Research Association.

GRUENING, ERNEST (b. 1887): Governor of Alaska since 1939. Graduate of the Harvard Medical School. Has had a varied career as a journalist, editor, and public official.

GUMMERE, RICHARD M. (b. 1883): Educator. Chairman of Committee on Admissions, Harvard College, since 1935. Has been a teacher and headmaster, and member of the board of trustees of several Eastern preparatory schools.

HYDE, LAURANCE M. (b. 1892): Judge, Supreme Court of Missouri. Contributor of numerous articles to legal journals. The first appointee to the Missouri Supreme Court under the new plan outlined in his article reprinted in this book.

ICKES, HAROLD (b. 1874): Public official, lawyer, and columnist. Secre-

tary of the Interior under Presidents Roosevelt and Truman. Author of numerous books and articles, including *The New Democracy*, *Autobiography of a Curmudgeon*, and *Fightin' Oil*.

KROCK, ARTHUR (b. 1886): Newspaperman and editor. Washington correspondent for the *New York Times* since 1932. Awarded the Pulitzer prize for *Washington Correspondents* in 1935.

LA FOLLETTE, ROBERT M., JR. (b. 1895): Former U.S. Senator from Wisconsin. President of the Progressive Publishing Co., Madison, Wisconsin. Author of numerous articles on governmental problems.

LONG, HUEY P. (1893–1935): Former U.S. Senator from Louisiana. A controversial figure in American politics during the early years of the Roosevelt Administration. Assassinated in the foyer of the State Capitol of Louisiana in September, 1935.

LYON, LEVERETT S. (b. 1885): Economist. Chief Executive Officer, Chicago Association of Commerce. Author of numerous books in the field of economics. Has had a varied career as a teacher, public official, and business executive.

MARSHALL, GEORGE C. (b. 1880): Soldier and public officer. Chief of Staff of United States Army during World War II. Secretary of State, 1947–1949.

MARTIN, ROSCOE C. (b. 1903). Professor of Political Science and Director, Bureau of Public Administration, University of Alabama. Author of *The Growth of State Administration in Alabama*, *Urban Local Government in Texas*, and numerous articles.

MAUCK, ELWYN A. (b. 1910): Professor of Government and Politics, University of Maryland. During World War II, Chief, Reports and Awards Office, OCD. Has contributed articles to the *National Municipal Review* and other professional journals. Author of *Financial Control in the Suburban Area of New York State*.

MAVERICK, MAURY (b. 1895): Lawyer. U.S. Representative in 74th and 75th Congresses (1935–39) from 20th Texas District. Mayor, San Antonio, Texas, 1939–41. A leader among Southern liberals. Currently engaged in the private practice of law.

MAYER, MILTON (b. 1908): Teacher and journalist. Visiting Professor of Applied Religion, William Penn College. Has contributed articles to the *Saturday Evening Post* and the *Yale Law Journal* and has served as Contributing Editor to *The Progressive* and the *Negro Digest*.

MONRONEY, A. S. MIKE (b. 1902): U.S. Representative from the Fifth District, State of Oklahoma. Vice-Chairman of the Joint Committee on the Organization of Congress. Has been a leading advocate of Congressional reorganization.

MYRES, SAMUEL D., JR. (b. 1899): College professor and lawyer. Professor

of Government, Southern Methodist University since 1935. Author of articles on international relations, political parties and national government.

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