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THE
PENDING POWER

A HISTORY
OF THE EFFORTS OF CONGRESS TO
CONTROL EXPENDITURES

BY
LUCIUS WILMERDING, JR.

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PREFACE

FROM the founding of our government down to the present time everyone has understood and accepted the proposition that the right of granting supplies of money to the Executive and of appropriating them to the several branches of the public service belongs exclusively to Congress. This is one of those maxims of state that have ceased to be subjects for discussion and have become articles of faith. But how has Congress exercised its right? What means has it taken to enforce it? Has the application of its power provoked any disturbances, reactions, and agitations which Congress has not intended? And how has the Executive comported itself vis-à-vis the rules which Congress has laid down? Has it been careful to keep expenditure within the channels of appropriation or has it sometimes transgressed them in the interests of administrative convenience or national necessity? Has it ever substituted the interpretation of the law for the law itself? These are questions of the highest importance. But in respect of them our ideas are vague: no methodical inquiry has been made, hardly a few partial soundings. To attempt answers to them is the object of the present history.

The first chapter of Part I proposes the very important question, whether circumstances do not sometimes occur which make it a duty in officers of high trust to assume authorities beyond the appropriation laws. It shows, by a collection of instances, that such circumstances repeatedly occur and that, when they do, the unwritten laws of necessity, of self-preservation, and of the public safety have been deemed, by liberals and conservatives alike, to control the written laws of appropriation. The next eight chapters deal primarily with ordinary expenditure. They show that the doctrine of specific appropriations—the doctrine that the public money should, except in extreme cases, be applied only to the purposes and within the amounts voted—was early established in theory but not in practice. They examine the efforts of Congress to compel obedience to the appropriation

laws by means of inhibitions imposed before expenditure takes place, particularly by the itemization of appropriations. And they come to the conclusion that these efforts have been, in large measure, self-defeating.

The four chapters of Part II recount the efforts of Congress to ascertain, after the event, how the departments have executed their trust. They analyze what has been done in this direction through financial reports, through investigations by the so-called expenditure committees of the House of Representatives and the Senate, and through the General Accounting Office. And they come to the conclusion that these parts of the machinery of retrospective control, while not self-defeating, have been ineffective.

The whole work therefore presents a problem for solution. How can Congress make real as well as nominal its right to control the expenditure of the country? No answer to this question is attempted, for it has seemed inadvisable to mix argument with history. To invite debate over the solution of the difficulty might be to prejudice the book's main purpose, which is to demonstrate, beyond the possibility of debate, that a difficulty exists. But I hope in some future book—after I have completed my *History of the Accounting Offices*, a work upon which I have been engaged for many years—to present my views on this subject.

The narrative is drawn almost entirely from contemporary sources—the records of debates in Congress, the reports of committees and the executive documents, the opinions of the Attorneys General and the decisions of the accounting officers, court decisions, the autobiographies and writings of our leading statesmen, and, of course, the statutes. Insofar as possible it is told in the very words of the actors on the scene.

I owe acknowledgments to Mr. William H. McReynolds, Administrative Assistant to the President, who first turned my studies in this direction; to Mr. Edward F. Bartelt, Commissioner of Accounts, who encouraged me to prosecute them; to Maj. Walter O. Woods, former Treasurer of the United States, Mr. A. L. Peterson, Assistant Commissioner of Accounts, Mr. A. E. Buck

of the Institute of Public Administration, Mr. Walter Stewart of the Institute for Advanced Study, Professor Harvey Mansfield of Yale University, and Mr. Walter Lippmann, each of whom read the book in manuscript and aided me with his advice. I am under a special obligation to Professor Mansfield who has undertaken the arduous task of seeing the book through the Press while I am otherwise engaged. Finally, I am deeply indebted to the Hon. South Trimble, Clerk of the House of Representatives, and to the Hon. Henry Morgenthau, Jr., Secretary of the Treasury, for permission to search the manuscript papers of the House of Representatives and of the Treasury Department respectively.

LUCIUS WILMERDING, JR.

Washington, D.C.

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PART I

THE EFFORT TO CONTROL BEFORE EXPENDITURE

CHAPTER I

THE PUBLIC SAFETY AND THE WRITTEN LAW

Salus Populi is an unwritten Law, yet that doth not hinder but that it is sometimes very visible; and as often as it is so, it supersedeth all other Laws which are subordinate Things compared.

George Savile, FIRST MARQUESS OF HALIFAX, *Political Thoughts and Reflections*.

THE general injunction of the Constitution is that "no money shall be drawn from the treasury but in consequence of appropriations made by law." The meaning of the clause is clear. It was long ago explained by Secretary Hamilton as being exactly equivalent to this other clause—"No money shall be drawn from the Treasury, but for which there is an appropriation made by law." In other words, before money can legally issue from the Treasury for any purpose there must be a law authorizing an expenditure and designating the object and the fund:

The design of the Constitution in this provision was, as I conceive, to secure these important ends,—that the *purpose*, the *limit*, and the *fund* of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for an *object*, to an *extent*, and *out of a fund*, which the laws have prescribed.¹

What are we to make of this constitutional injunction and of the many statutory provisions which reinforce and corroborate it? Are we to say that the laws governing expenditures are absolutely inviolable, that no circumstance whatever—no cataclysm of nature, no risk of invasion, not even invasion itself or insurrection—can justify the Executive in varying the appropriation of public money which Congress itself has directed? Are the laws of appropriation of higher obligation than the laws of necessity.

1. Alexander Hamilton, *Works*, ed. by Henry Cabot Lodge (G. P. Putnam's Sons, New York, 1885), VII, 86-87.

does not appear that anyone really held any other view. Findley, one of the most emphatic of the proponents of the resolutions, specifically conceded the point:

I will admit that an Executive officer, pressed by some urgent and unexpected necessity, may be induced to depart from the authorized path of duty, and have great merit in so doing. This may be the case with the General of an army or the Admiral of a fleet, and, though more rarely, even with a Financier. But in such emergency, the officer so acting will embrace the earliest opportunity to explain the matter and obtain a justification, whilst the recent feelings arising from the occasion advocates his cause in the public mind. Has the Secretary done so in the present instance? No: his conduct has been the very reverse.⁵

It was said in this debate that Hamilton had confessed that a strict adherence to appropriations, in certain cases, would be pusillanimity. "He preferred no doubt the public good, which he thought he had in view, to a strict compliance with the appropriation laws." This allegation was made by Page in reprobation of Hamilton's conduct, but its accuracy is beyond question. A letter from Hamilton to McHenry written in 1799 sets out the same thesis:

The disbursements, finally, must no doubt be regulated by the laws of appropriation; but provisory measures will often be unavoidable, and confidence must sometimes be reposed in an after legislative sanction and provision. This has been the course in times past, and it must always be the case. A different plan will arrest and disorder all the wheels of public service. The theory of no system can be invariably pursued with liberal [? literal] strictness.⁶

The Republican principles, as is well known, were in matters of appropriation much more austere than those of the Federalists. But they did not extend to a denial of the right of the Executive, under certain circumstances, to transcend the laws of appropriation. When, for example, the executive government in 1793 authorized the advance of money for the support of the French fugitives from Santo Domingo, Jefferson and Madison

5. 3 *Annals*, 922.

6. Hamilton, *op. cit.*, VI, 258.

did not denounce the proceeding as not warranted by the "lexicon of Government money uses" or as a blow "at the root of representative government."⁷ On the contrary Jefferson as Secretary of State associated himself with the President and the other members of the Cabinet in taking freely on themselves the risk of an unauthorized aid when delay would have been denial; and Madison on the floor of Congress condoned this action.⁸ The weight of this example will be appreciated when it is remembered that not only was there no appropriation to cover this expenditure but that Jefferson and Madison both denied the constitutional authority of the Congress to make such an appropriation. Here then is an instance in which the leading Republicans asserted in an emergency not only a right to transcend the laws of appropriation but to do so without regard to constitutional scruples.

The general principles of the Republicans in matters of appropriation were well brought out in the report of a committee appointed in the beginning of Jefferson's administration to "examine and report, whether monies drawn from the Treasury, have been faithfully applied to the objects for which they were appropriated, and whether the same have been regularly accounted for, etc." While severely criticizing the conduct of the Federalists and charging many of them with specific violations of law, the members of this committee recognized the possibility that certain exigencies might arise which would justify an irregular course of action:

Although the committee will not say that there are no cases in which a public officer would be justified in applying moneys appropriated to one object, to expenditures on another, yet they are of the opinion that, in every deviation, the necessity for the application ought to be for some obvious benefit to the United States, and, in every such case, a disclosure thereof to Congress ought to be made, at the next session which should immediately thereafter ensue.⁹

7. The phrases are Comptroller General McCarl's.

8. See Thomas Jefferson, *Writings*, ed. by H. A. Washington (Washington, 183-54), IV, 20, 40; and 4 *Annals*, 171.

For American State Papers, *Finance*, I, 753.

Giles signed this report and undoubtedly subscribed to its views. Indeed, a few months before, he had put forward an identical thesis on his own account. Declaring that he had never been and never could be satisfied with the conduct of former Secretary Hamilton "for breaking down the great barrier of appropriation," he continued:

As to the imperious circumstances, mentioned by gentlemen, which compelled a violation of appropriations, he agreed in the necessity which might sometimes exist; but when such a violation occurred, the causes of it ought to be truly imperious, and ought to be stated immediately to Congress, who was the only judge of the propriety of the measure, and not the man who had usurped their decision.¹⁰

Gallatin, too, it may be shown, admitted that the Executive might occasionally act upon its own responsibility. Discussing McHenry's accounts in 1798, he remarked: "The Secretary of War was not justified in expending more in these contingencies than was appropriated. *except in case of necessity. . .*"¹¹ Nor did he hesitate to act upon this principle when he himself held executive office. In 1807, for example, when naval appropriations ran short and the object of expense seemed important, he wrote to the Secretary of the Navy stating that he would be willing to direct the Collector at Baltimore to make the necessary advances, *relying on the sanction of Congress if the existing appropriations were not sufficient*, and leaving it to future discussion whether the expense should be charged to the Navy or Diplomatic Department:

I was the more decided in my opinion from the consideration that if, in this instance, we pleaded want of funds as an apology for having

10. 11 *Annals*, 324.

11. 8 *Annals*, 1317. (Italics supplied.) It is significant that the appropriation act which McHenry was alleged to have violated contained a proviso that the sums granted should "be solely applied to the objects for which they are respectively appropriated." This proviso had been placed in the act by Gallatin himself. I point this out lest anyone argue that, in enacting the proviso, Congress was seeking to deny the right of the Executive, even in cases of clear necessity, to overstep the boundaries of appropriations. It will appear in the next chapter that Congress was seeking only to restrain the Executive in cases of ordinary expenditure.

omitted any proper measure, it would be replied that Congress ought then to have been called at an earlier period.¹²

As for Jefferson, in 1807 after the attack on the *Chesapeake* made war with England appear a possibility, he conceived it to be his duty to make certain purchases of a military character although no appropriations had been made for the purpose. These purchases he reported at the next session of Congress in the following words:

The moment our peace was threatened I deemed it indispensable to secure a greater provision of those articles of military stores with which our magazines were not sufficiently furnished. To have awaited a previous and special sanction by law would have lost occasions which might not be retrieved. I did not hesitate, therefore, to authorize engagements for such supplements to our existing stock as would render it adequate to the emergencies threatening us, and I trust that the Legislature, feeling the same anxiety for the safety of our country, so materially advanced by this precaution, will approve, when done, what they would have seen so important to be done if then assembled. Expenses, also unprovided for, arose out of the necessity of calling all our gunboats into actual service for the defense of our harbors; of all which accounts will be laid before you.¹³

The *ex post facto* sanction which he asked was in due course given.¹⁴

12. Gallatin to Jefferson, September 2, 1807. Albert Gallatin, *Writings*, I, 357.

13. J. D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, I, 428.

14. Not, however, without some gibes from John Randolph and the Federalists on Jefferson's alleged deviation from Republican principles. Smilie having defended the administration on the ground that to have called a session of Congress to sanction these expenditures in advance would have been to incur an expense unjustified by the end, Randolph exclaimed: "If the expense of convening Congress were to be made a pretext for acting without its authority, we might as well give the Executive a power of attorney at once to legislate for us. He scouted such an idea. It would have been better to have convened Congress at the expense of half a million, than that a single cent should have been drawn out of the Treasury without a previous appropriation by law." 17 *Annals*, 852. It is prudent rather than necessary to remind the reader that quotations from the *Annals* do not give the speakers' exact words but the reporter's summary of them. This accounts for the curious alternation in the use of the first and third personal pronouns.

Even after he left office Jefferson continued in the same opinion. In 1810 a certain J. B. Colvin, an officer of the State Department, undertook to write the volume of Wilkinson's *Memoirs* relating to the treason of Burr and desired to justify the principles upon which Jefferson had approved the conduct of Wilkinson at New Orleans. He propounded to the former President these questions: "Are there not periods when, in free governments, it is necessary for officers in responsible stations to exercise an authority beyond the law—and was not the time of Burr's treason such a period?"¹⁵ To this letter Jefferson replied, giving affirmative answers to the specific queries. He then continued with the subjoined observations:

Further to exemplify the principle, I will state an hypothetical case. Suppose it had been made known to the executive of the Union in the autumn of 1805, that we might have the Floridas for a reasonable sum, that that sum had not indeed been so appropriated by law, but that Congress were to meet within three weeks, and might appropriate it on the first or second day of their session. Ought he, for so great an advantage to his country, to have risked himself by transcending the law and making the purchase? The public advantage offered, in this supposed case, was indeed immense: but a reverence for law, and the probability that the advantage might still be legally accomplished by a delay of only three weeks, were powerful reasons against hazarding the act. But suppose it foreseen that a John Randolph would find means to protract the proceeding on it by Congress, until the ensuing spring, by which time new circumstances would change the mind of the other party. Ought the executive, in that case, and with that foreknowledge, to have secured the good to his country, and to have trusted to their justice for the transgression of the law? I think he ought, and that the act would have been approved. After the affair of the *Chesapeake*, we thought war a very possible result. Our magazines were illy provided with some necessary articles, nor had any appropriations been made for their purchase. We ventured, however, to provide them and to place our country in safety; and stating the case to Congress, they sanctioned the act.¹⁶

15. Library of Congress. Jefferson MSS.

16. Jefferson, *op. cit.*, V, 543. The case stated as hypothetical was real. See Henry Adams, *History of the United States of America*, III, *passim*.

Jefferson's conclusion was that there are occasions when the great officers of government have an undoubted right to "mis-apply" the public moneys, for, said he, it is incumbent on those who accept of great charges to risk themselves on great occasions, when the safety of the nation or some of its very high interests are at stake.

An officer is bound to obey orders; yet he would be a bad one who should do it in cases for which they were not intended, and which involved the most important consequences. The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives.¹⁷

An analogous doctrine is to be found in a letter from President Jefferson to Isaac Briggs, Surveyor of the Lands of the United States south of the State of Tennessee, who had been authorized to explore the best route for a road from Washington to New Orleans, and whose expenditures had exceeded the appropriation to that object. The letter is dated May 25, 1807, and forms a part of the printed documents which accompanied a bill for the relief of Briggs, reported by the Committee of Claims. The relevant sentence is this:

Gentlemen who say they will never sanction an expenditure made without a previous law, will leave their country exposed to incalculable injury in those unforeseen occurrences where the voluntary sacrifices of virtuous citizens might save the public interest, if the prospect of indemnification were not shut out.¹⁸

If these testimonies, to which many others of similar import might be added,¹⁹ be accepted as authoritatively defining the

17. Jefferson, *op. cit.*, V, 544. He did not, however, carry his principles to the case of persons charged with petty duties nor to any case where the consequences were trifling or time allowed of a legal course. "In these the example of over-leaping the law is of greater evil than adherence to its imperfect provisions."

18. 18 *Annals*, 1976.

19. As, for example, from the debate on naval appropriations in 1807 Smilie declared himself in favor of specific appropriations and against the practice of drawing money from the Treasury without appropriation previously made. "but every gentleman knew that there were cases in which this form must be dis-

powers of the Executive, we arrive at the following conclusion. There are certain circumstances which constitute a law of necessity and self-preservation and which render the *salus populi* supreme over the written law. The officer who is called to act upon this superior ground does indeed risk himself on the justice of the controlling powers of the Constitution, but his station makes it his duty to incur that risk.²⁰ As for Congress, when expenses are incurred without its sanction, it is discretionary with it to approve or disapprove the conduct of the officer concerned. If it approves, a bill is passed to cover the expenditure; if it disapproves, the officer must bear the loss or the disgrace.

It has sometimes been held that this view of the responsibilities of the high officers of government was repudiated by Congress in 1809 and that from that year we must date a new era—one in which the rule of *salus populi* was supplanted by that of uncompromising obedience. In support of this contention it is usual to quote a provision of an act of that year which declares that "the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other"; and to remark that after the passage of that act instances in which executive officers throw themselves on the justice of Congress abruptly cease. From the language of the act it is inferred that Congress meant to prevent a repetition of just such actions as that which Jefferson took in 1807; from the subsequent omission of executive officers to report their misappropriations it is concluded, not indeed that there were no misappropriations, but that misappropriations were recognized by the Executive as being unjustifiable.

pensed with." 17 *Annals*, 826 G W Campbell thought that the taking of money from an appropriation to one object and applying it to another might be admitted in an emergency, "which might also warrant the Executive in incurring expenses not authorized by law" *Ibid*, 829 These were supporters of Jefferson. But the Federalists, Upham, Gardenier, and Dana, entertained no other view: the safety of the nation was the supreme law. Even John Randolph, who denounced the administration as attempting to cover the looseness of its practice by the austerity of its principles, voted for the appropriation—though with the reluctance which he would have felt in paying a gambling debt to a swindler or the expenses of an unprofitable and disgraced servant *Ibid*, 825.

20. The foregoing expressions are taken from Jefferson's letter to Colvin

Now if it were true that the act of March 3, 1809, was passed to repudiate the rule of *salus populi*, we might expect to find some evidence of that fact in contemporary documents, whether in the record of the debates leading up to its passage or in the writings of him whose boldness for the public good had received so signal a rebuke. No such evidence, however, is to be found. The *Annals of Congress* are silent. Jefferson, explaining the principle of executive responsibility in 1810, seems unaware that in the preceding year he had signed a bill based on premises diametrically opposed to that principle. Nor can we anywhere else discover an intention on the part of Congress to impose novel restraints on executive action. It may therefore be that there was no such intention. And indeed, as will be shown in a later chapter, the point at issue when the act was passed was not whether the discretionary powers of the Executive should be limited but whether they should be enlarged. The meat of the act was not the section proclaiming the inviolability of the appropriation laws but a proviso to that section authorizing the transfer of balances from one head of appropriation to another during the recesses of Congress. The section by itself changed nothing and added nothing: it merely reaffirmed what everyone had admitted to be the rule of government spending since the theories of Gallatin had gained the supremacy over those of Wolcott. It was declaratory of old law and not introductive of new law.

What *was* introductive of new law, though scarcely of new practice, was the proviso authorizing transfers. For many years past, even during Jefferson's administration, some at least of the departments had presumed upon occasion to mingle their appropriations, but they had never been able to cover their presumption with the cloak of congressional approval. The proviso of 1809 removed that difficulty. But it did even more. It ushered in a period of laxity in the control of government spending during which the Executive discovered so many legal or quasi-legal means of varying the appropriation of public money that it almost never found itself compelled to resort to an admittedly illegal means. During this period the power of acting in undeniable opposition to the law fell into disuse but it was not abandoned. It

remained as a reserve to be drawn upon when all ordinary modes were exhausted.

Of this fact we can adduce a most remarkable example. I refer to the occasion at the beginning of Lincoln's administration on which the President authorized and directed the Secretary of the Treasury to advance, without requiring security, \$2,000,000 of public money to John A. Dix, George Opdyke, and Richard M. Blatchford, of New York, to be used by them in meeting such requisitions as should be directly consequent upon the military and naval measures necessary for the defense and support of the government. For this action there was no warrant whatever in law, but by taking it and other actions like it Lincoln conceived himself to have saved the government from overthrow. His justification was that he had acted under a law higher than the statutes. "There was," he told Congress, describing the situation of the government at the outbreak of hostilities,

no adequate and effective organization for the public defense. Congress had indefinitely adjourned. There was no time to convene them. It became necessary for me to choose, whether, using only the existing means, agencies, and processes which Congress had provided, I should let the Government fall at once into ruin or whether availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity. . . . The several Departments of the Government at that time contained so large a number of disloyal persons that it would have been impossible to provide safely through official agents only for the performance of the duties thus confided to citizens favorably known for their ability, loyalty, and patriotism.²¹

21. Richardson, *op. cit.*, VI, 77-79. Professor Harvey Mansfield, upon whose advice I have cited this instance, comments upon it as follows: "Three aspects of this transaction especially deserve note. In the first place, advances to private citizens, without special legislative authority, were specifically prohibited in Lincoln's day by a statute of some forty years' standing. In the second place, there was no indication at all at the time the advance was made that the payments it would cover were for objects previously appropriated for. In the third place, and most extraordinary, was the fact that Lincoln's first acknowledgment of the transaction came over a year after the event and long after there had been ample opportunity for a disclosure to Congress. The new Congress elected with Lincoln in 1860 was not in session when hostilities broke out. The advance

And so the President, with the approval, as it would appear, of his constitutional advisers, the heads of all the departments, directed the advance of public moneys to unofficial persons in clear violation of law.

In the light of these considerations we must conclude that the doctrine of *salus populi* was *not* repudiated in 1809 but was maintained in its full integrity at least until after the Civil War. But what of the later period? In Chapter VI we shall see that between 1868 and 1874 Congress set itself the task of reëstablishing the practice of specific appropriation. One by one it closed up the loopholes through which the departments had contrived to escape the full rigors of the law. Did it also declare against the right of the Executive to transcend the law in cases of extreme urgency? By reading political speeches as if they were logical documents, by interpreting every blast at the loose practices of the spending departments as a puff for the theory of uncompromising obedience, and by a generally judicious—I will not say judicial—choice of evidence, one might perhaps build up a tolerable case for the affirmative. But it would be a legal rather than a historical argument. The historian will find it more profitable to examine what rule was actually followed when the silent variation of appropriations was no longer permissible. Approaching the problem from this angle we find, as we might *a priori* have expected to find, that when the urgent cases could not be met by stretching the law they were met by breaking it.

To enumerate all the occasions subsequent to the Civil War upon which the high officers of government dared to incur expenses unknown to Congress when such action seemed indispensably necessary for the public good—and having incurred

here spoken of was only one of a series of wholly unauthorized steps he took. He did not summon Congress into special session until July, and that session lasted only a month. The disclosure above quoted was not made until the first regular session of that Congress was five months old, and until the House of Representatives, which had learned of the event unofficially, had passed a resolution of censure. The incident teaches, then, not only that the President may be under a moral duty to disregard the law, but also that the duty of prompt disclosure is one addressed to the President's conscience alone. I would only add that the incident suggests the need for a Congressional audit of accounts, for if discovery were certain disclosure would certainly be prompt.

them, dared to report them—would be a tedious and unprofitable task. A few instances may, however, be given.

Here is one in which President Grant, Secretary of State Fish, and Secretary of the Navy Robeson were all involved. In November, 1873, after the *Virginus* affair, it seemed likely that the United States might find itself at war with Spain. The navy was unprepared. Robeson was therefore directed to place it on a war footing, *Grant and Fish assuring him that Congress would legalize any overdraft on his appropriations.*²² Accordingly, Robeson took measures to put every available ship in condition for immediate duty, ordered all ships within reach to proceed to Key West, enlisted men to supply and fill up the vessels, and accumulated materials, provisions, and supplies for their maintenance and support and ordnance, ammunition, and all weapons of naval warfare for their use. These expenditures had not been foreseen by Congress and were consequently unprovided for; they were met from the regular appropriations which were therefore soon depleted. On December 8 Robeson asked that these appropriations be replenished. He presented his case to Congress in straightforward language:

The circumstances which have constrained the Department to this unusual activity and consequent expenditure are known to you and to the country. The fact that they occurred during the recess of Congress made it necessary that I should myself assume the responsibility of prompt action, relying upon the wisdom and justice of the people and their representatives for support.²³

Robeson's expectation of justice was not disappointed. On December 31, 1873, he received his acquittance, the President signing an act appropriating \$4,000,000 to the Navy Department.²⁴ It was to this act that Representative Blount referred when, some years later, he said:

Sir, I do not hold that there are no emergencies in which an officer may not exceed an appropriation. We all remember that at the time of the

22. Allan Nevins, *Hamilton Fish* (New York, 1937), p. 675.

23. Secretary of the Navy to Speaker of the House, December 8, 1873. 43d Cong., 1st sess., H.Doc. 9, p. 1.

24. 18 Stat. 1. See also 2 *Congressional Record*, 179-185

troubles with Spain the Secretary of the Navy enlisted fifteen hundred additional men for the Navy. When Congress met that action was submitted, and was justified on the ground of threatened war with Spain.²⁵

Passing over a few decades we come to the administration of Theodore Roosevelt. At about midnight on April 18, 1906, the War Department was notified by General Funston of the San Francisco earthquake and fire. Secretary Taft did not hesitate to act. Orders were immediately sent to General Funston to render all assistance possible, and from the night of the eighteenth all the available stores of the army were used for relief purposes. For this appropriation of army stores there was no warrant in law, but it was done on the assumption that the action of the Department would be ratified by Congress, in accordance with precedents in similar cases.²⁶ The aggregate value of the stores taken—misapplied, if we would use a technical term—was about \$1,492,000. In due course an appropriation was made by Congress, part of which the Secretary of War was specifically authorized to use "for the purpose of replacing by purchase such subsistence, quartermaster's and medical supplies" as had been furnished by Taft from the stores of the army.²⁷

Finally, we may mention a case arising during the administration of President Coolidge. By a letter of October 2, 1926, the President—Congress not being in session—authorized, or rather directed, the Secretary of Agriculture to use every facility of his Department to meet the needs of the destitute farmers in the storm-stricken areas of Florida and for this purpose to use such funds of his appropriations as would not interfere with the Department's current operations. In accordance with this instruction of the President, Secretary Jardine, after consulting with General Lord, the Director of the Budget, made advances to Florida farmers in the amount of about \$253,000 for the purchase of seed, fertilizer, and other items out of the appropriation for the eradication of the foot-and-mouth and other contagious diseases of animals, 1924-27, a clear diversion of appropriated

25. Speech, February 25, 1880 10 *Cong Rec* 1120

26. Taft to Roosevelt, April 21, 1906 (40 *Cong Rec* 5660)

27. 34 Stat 828 See also H F Pringle, *The Life and Times of William Howard Taft*, I, 285.

moneys from one purpose to another. On January 5, 1927, the President laid the facts before Congress, asking that the action taken be validated.²⁸ The Senate was immediately agreeable, but in the House a few members stood in opposition. "There was not," said Representative Byrns,

the slightest authority of law for doing that. The money was appropriated by Congress for a specific purpose. Merely because there was a million or more dollars in that fund did not authorize the President of the United States or the Secretary of Agriculture to use that fund for purposes other than those provided by Congress. If that sort of practice is to be pursued, then Congress may just as well cease its function in undertaking to designate where money shall be spent and resort to the practice of appropriating a great lump sum of \$4,000,000,000 or more and leaving it to the executive departments to say how it shall be expended.²⁹

The statement is strongly worded, but what is to be noted is that neither Byrns nor any member who agreed with him was willing to take the position that misapplications were never justified, should never receive *ex post facto* sanction; each contended only that the case of Florida was not one of true necessity. "I would not object," said the chief objector, "if it had been necessary to relieve suffering or save life. But this was not the case. It was a loan for the future, not to relieve a present emergency—a business proposition, not an act of relief in time of an emergency."³⁰ Representative Garrett repeated these remarks in other words: "Ah, if human life had been at stake there and numbers of people had been threatened with destruction we might strain the point, but when it comes to a purely business transaction in the loaning of money for the purpose of purchasing seed I cannot acquiesce." On the other side, the emergency was insisted upon and many precedents were urged.³¹ By act of February 28, 1927, the ac-

28. 69th Cong., 2d sess., H.Doc. 626.

29. 68 Cong. Rec. 2978.

30. *Ibid.* (Representative Byrns).

31. On the question of precedents the following colloquy is worth noting:

"Mr. Wood . . . I want to call your attention to some of the late cases. The Secretary of War made a loan of this character directing expenditures for the repair of damages caused by floods in Arkansas, and in providing sanitary measures in Pueblo, Colo., approved in the second deficiency act of March 30, 1922; also the action of the President in directing the use of Army supplies for

tions of the Secretary of Agriculture were approved and ratified, and the accounting officers of the government, i.e., Comptroller General McCarl and his subordinates, were directed to allow the appropriate credits in the settlement of the accounts of the disbursing officers of the Department of Agriculture.³²

From these prerogative instances we must conclude that the law of necessity still stands. The opinion that the executive departments must obey the appropriation laws even though some marked evil result to the country or some marked advantage be lost, is wrong. The high officers of the government, and a fortiori the President, have a right, indeed a duty, to do what they conceive to be indispensably necessary for the public good, provided always that they submit their action to Congress to sanction the proceeding.

We come now to a different subject of inquiry—the right of executive officers to transcend the law in cases of mere convenience and to do so without notice to Congress or risk to themselves. The next eight chapters trace, period by period, the efforts of Congress to establish the doctrine that—*except* in cases of indispensable necessity—the executive departments are under an absolute obligation to observe the laws making specific appropriations of money; they show that these efforts have taken the form of a progressive limitation on executive discretion; and they explain the origin and development of the various compensatory devices by the use of which the Executive, while formally admitting the principle of Congressional control, has succeeded in relaxing the severities of its application.

the relief of sufferers from storms and floods at Corpus Christi, Tex., also in the second deficiency act approved March 20, 1922; the action of the United States in directing the issuance of farming supplies for the relief of sufferers from the Japanese earthquake in 1923, which was approved by Congress in 1925.

"Back in 1913, under the Wilson administration, an act was passed extending aid through various appropriations, and funds appropriated for the improvement of rivers and harbors were diverted from that appropriation for the purpose of relieving sufferers from floods in Mississippi.

"Mr. Chindblom. Were those all ratifications after expenditure?

"Mr. Wood. Every one of them was a ratification after the expenditure. There are many such precedents going back to the very beginning of our Government." (*Ibid.*, 1979.)

32. 44 Stat., Pt. II, 1251.

CHAPTER II

GALLATIN AND THE STRUGGLE WITH WOLCOTT: 1789-1801

THE first three acts "making appropriations for the support of government"¹ were written in very comprehensive terms. The act relating to the year 1789 contained but four heads of expenditure and is so brief that it may be quoted in whole:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids.²

1. Acts of September 20, 1789, March 20, 1790, February 11, 1791 (1 Stat. 95, 104, 190.) These were, of course, not the only appropriations passed during these first years. The expenses of Indian treaties, of foreign intercourse, of interest on the debt, of debt reduction, of protection of the frontiers, of the mint establishment, and of various other objects were provided for in special acts. A list of all appropriation acts passed between the establishment of the government and May 8, 1792, will be found at 3 *Annals*, 1258.

2. By the "civil list" were meant the salaries and contingent expenses of the whole government including those of the War Department.

Under contingent expenses "are comprehended firewood, stationary, together with printing work, and all other contingent expenses for the two Houses of Congress, rent and office expenses of the several Departments, viz. Treasury, State, War, and of the General Board of Commissioners, and Paymaster General." Joseph Nourse, Register of the Treasury, January 5, 1790. See A.S.P., *Finance*, I, 35.

By the "department of war" were meant the military as distinct from the civil expenditures of the government.

The second act was more prolix, containing as it did a considerable number of appropriations to meet specified demands; but its major appropriations were only five: the civil list, the department of war, the invalid pensions, the expenses of Congress,³ and the contingent charges of government.⁴ The third act was again brief, listing but four heads—the usual ones for the civil list, the department of war, and the invalid pensions; and another for the aggregate of the specified demands enumerated in the estimates of the Secretary of the Treasury.

Senator Maclay seems to have been the first to object to this mode of making appropriations. In his *Journal* under date of March 22, 1790, he writes:

The appropriation bill was now reported, with a very trifling amendment indeed; to divide a sum of about a hundred and ninety dollars between our doorkeeper and the doorkeeper of the Representatives. The momentum of a spittle would have been as effectual to stop the flowing of the sea as any effort to check this bill. The appropriations were all in gross, and to the amount of upward of half a million. I could not get a copy of it. I wished to have seen the particulars specified, but such a hurry I never saw before. I did not see the bill in the hands of any of the members, but they might have had it for aught I know. I really fear the committee gave themselves little trouble about it. The moment it was through, General Schuyler and Mr. Morris called for it on the third and last reading, for they said the Secretary wanted to make remittances to Europe. They got what they wanted, and thus we had done with it.

This mode of doing business cannot last long. All evils, it is said, cure themselves. Here is a general appropriation of above half a million dollars—the particulars not mentioned—the estimates on which it is founded may be mislaid or changed: in fact, it is giving the Secretary the money for him to account for as he pleases. This is certainly all wrong. The estimate should have formed part of the bill, or should have been recited in it.⁵

It is, however, an erroneous inference, or one put forward for political effect, to suppose that, because of the generality of the

3. These had been estimated in the civil list, but Congress took them out in order to make the appropriation unlimited in amount.

4. See p. 23, n. 7, for the purpose of this appropriation.

5. *The Journal of William Maclay* (New York, 1927), pp. 215-216.

expressions used in these acts, the Executive had unlimited discretion to apply the public funds in any amounts or to any objects which might be comprehended under the broad headings. The contradictory is the case. In the first place moneys could be applied only to authorized objects of expense and these were usually, if not invariably, set out in laws distinct from the appropriation acts. In the second place the bulk of expenditure—in other words that part of it which was for salaries and wages—was controlled by general laws prescribing the number of officers and the rates of pay; for example, there could be no more than five associate judges of the Supreme Court nor could any one of them be paid more than \$3,500 a year. In the third place the appropriation acts were understood to be mere summations and endorsements of the estimates submitted by the Secretaries of the Treasury and War Departments; these estimates were, in effect, integral parts of the appropriation acts, and they were set out in considerable detail.⁶

That Hamilton regarded himself bound by something more than the totals contained in the appropriation acts may be sufficiently proved by the following passage in a communication addressed by him on March 1, 1790, to the House of Representatives:

The Secretary further begs leave to observe, that occasions occur from time to time, which fall under no stated head of expenditure; for which provision in some mode or other, is necessary. A circumstance, at present existing, may serve as an example. There are persons who have been for some time associated in the practice of counterfeiting the securities of the United States, in a way which renders detection difficult, and has been productive of numerous impositions on individuals. The apprehension and punishment of these persons is, evidently, a

6. The Acts of 1790 and 1791 specifically tied the estimates to the appropriations. The Act of 1791, for example, expressed the matter as follows: "Be it enacted . . . that there be appropriated the several sums and for the several purposes following, to wit: A sum not exceeding \$299,276.53, for defraying the civil list as estimated by the Secretary of the Treasury in the statement number one, accompanying his report to the House of Representatives of the sixth instant. . . ." Similar references to statements two and three limited the application of the appropriations for specified demands and for the department of war.

matter of serious public concern, and the necessity of being able to offer rewards for that purpose, is apparent; but the want of a provision for it is an impediment. Whether the appropriation of a moderate sum, for such cases, to be disposed of under the direction of the President of the United States, would not be a proper measure, is humbly submitted to the wisdom of the House.⁷

That Washington and Jefferson entertained the same view of the limits of their authority is shown by a similar document sent to the Senate and House in 1792:

An article of expense having occurred in the Department of Foreign Affairs, for which no provision has been made by law, I lay before you a letter from the Secretary of State, explaining the same, in order that you may do thereon what you shall find to be right.—G. Washington.⁸

The first general appropriation act to specify the several purposes for which the moneys were appropriated, instead of appropriating sums in gross with a reference to the Secretary's estimates for particulars, was that for the service of the year 1792. The phraseology adopted was as follows:

Be it enacted, etc., That for the service of the year 1792, and the support of the Civil list of the United States, including the incidental and contingent expenses of the several Departments and officers thereof, there shall be appropriated a sum of money, not exceeding three hundred and twenty-nine thousand six hundred and fifty-three dollars and fifty-six cents, that is to say: . . .

and there followed an enumeration of the general heads of the Secretary's estimates with a specific sum assigned to each. The same formula was applied to the military expenditure, which was divided under twelve heads. The House was responsible for this change in form, in which the Senate concurred.⁹

7. A.S.P., *Finance*, I, 38. In consequence of this suggestion Congress in the annual appropriation act for 1790 authorized the President to draw from the Treasury a sum not exceeding \$10,000 to defray the contingent charges of government.

8. A.S.P., *Foreign Relations*, I, 131. The expense alluded to was incurred for the relief of a number of American sailors impressed in England to serve in the British Navy.

9. 3 *Annals*, 228.

The precedent established by this act was confirmed the next year. The appropriation bill for the year 1793, as sent from the House to the Senate, specified all the items of each sum granted to the War Department. But the Senate amended the bill in such a way as to condense the whole into one aggregate sum.¹⁰ This amendment occasioned some debate in the House. It was observed—the record does not state by whom—that by thus making one sweeping grant, the particular items would be kept from view so as to render any future inquiries into the application of the public moneys extremely difficult. And it was said further that the amendment left too much discretionary power in the hands of the Secretary of War,

for although it would be expected that he should apply the money to each particular object of the many expressed in the estimate by him furnished, yet if they were not also specified in the law, he would not be obligated to pursue this conduct: in fact he might apply the whole to a few of the objects, perhaps to only one, and leave all the others unsupported.

Against this view it was objected that the items had already been examined and discussed in the House and that, as the total was not altered by the Senate, there could be no danger in concurring with the amendment. Finally, by a majority of one vote, it was decided not to concur. The Senate receded from its position and the bill as enacted carried the particular items.

The construction and practice of the Treasury relative to acts appropriating money were for the first time questioned by Mr. Giles, who on February 27, 1793, introduced a series of resolutions to which reference has been made in the preceding chapter. Of these the third was in the words following:

Resolved, That the Secretary of the Treasury has violated the law, passed the 4th of August, 1790, making appropriations of certain moneys authorized to be borrowed by the same law, in the following particulars, viz.: First, by applying a certain portion of the principal

10. Perhaps two sums: "There was no limitation of specific sums mentioned in the Senate's amendment but the sweeping total of \$963,000, and \$30,000 for contingencies—nearly a round million." *Ibid.*, 890.

borrowed to the payment of the interest falling due upon that principal, which was not authorized by that or any other law, etc.¹¹

The transaction which gave rise to this motion may be explained as follows. The general receipts of the government were by law divided into two funds—the foreign and the domestic—each of which was appropriated to certain specified uses. In particular, the instalments on debts owing to France and Holland were to be paid from the foreign fund, but the interest on those debts, or rather on such of them as were incurred after 1791, was to be paid from the domestic fund. It happened on a certain occasion that a sum of money was due abroad for interest, which, according to law, ought to be paid from moneys arising from the domestic revenues, and that at the same time the United States had an offer to make a payment on the French debt by sending a supply of provisions from America to Santo Domingo. In this situation Hamilton, instead of sending money from the United States to France in order to pay the interest and instead of drawing money from France to the United States in order to buy the provisions, substituted the one sum for the other. "He committed," said Barnwell, "the great crime of directing the money borrowed, and already upon the spot, to be applied to the payment of the interest due, and has taken the sums applicable to the payments of that interest, which was already here, and made use of it to pay the Debt due to France in the produce of the United States."¹²

This transaction was strongly defended by Barnwell and others on the ground that if any violation had occurred, it was only of the dead letter of the law. For the Secretary to have remitted moneys abroad to pay the interest and to have drawn bills to bring the foreign funds here, would, they said, have been the height of absurdity. Was there any necessity for this complex operation, for the expense of remittance, the probable loss on the sale of bills, the loss of interest while the money was in transit, when the whole matter could be negotiated by the simple and economical mode pursued? So far from this arrangement being a ground of censure, had the Secretary pursued any other mode he would have been animadverted upon with great severity; he would have been accused of ignorance of his duty, and every loss

11. *Ibid.*, 900.

12. *Ibid.*, 910

incidental to the transaction would have been charged to his account.

The proponents of Giles's resolutions took another view of the transaction and labored hard to prove that it was not a mere transposition of moneys to prevent the sending of them backward and forward but that it was an absolute diversion of appropriated money and consequently a violation of the law making the appropriation. The Congress, however, was not convinced, and the resolution was negatived by a large majority.¹³

In the next session of Congress further light was thrown upon the practical construction given by the Treasury to the appropriation laws. The Baldwin Committee, appointed at the instance of Giles to examine the whole machinery of the Treasury Department, in their report of May 22, 1794, explained the manner in which, under certain conditions, appropriations were anticipated.

It has occasionally happened that the omission or delay of appropriations by law, renders it impossible to satisfy, in regular course, demands upon the treasury, which have been incurred pursuant to law, and the satisfying of which is essential to the public credit and service.

In such cases, the course has been for the Secretary of the Treasury to request informal advances by the banks, to the persons to whom the payments are to be made, to be reimbursed when provision is made by law. The accounts of such advances are distinct from that of the Treasurer, and the advances are reimbursed, when provision is made by law, by warrants upon the Treasurer.¹⁴

13. Gallatin, in his *Sketch of the Finances of the United States*, says that it was since demonstrated by official statements that that resolution was strictly and literally true; but the transaction, he adds, was to a certain degree rather a want of form than a substantial violation of the appropriation law.

14. A.S.P., *Finance*, I, 284. This or a similar practice was continued during the whole of Washington's and Adams' administrations. Gallatin in a letter of March 1, 1802, to Nicholson, the Chairman of a Committee of Investigation, wrote: ". . . a custom had, till lately, prevailed, to pay moneys out of the Treasury, on a simple letter, addressed from the Secretary to the Treasurer, which payments have, afterwards, been covered by warrants, instead of being grounded, according to law, on those warrants. And, in some instances, moneys have been thus informally paid by the Treasurer, or advanced by the Bank of the United States, before an appropriation had been made, by law, to cover the expense for which the money had thus been advanced. In every such instance, the payment had been authorized by a subsequent appropriation, and covered by a warrant, grounded on the appropriation. It must, also, be observed,

To this practice no objection was made by the Committee and, since several of its members were very hostile to Hamilton, it may perhaps be inferred that they regarded the anticipation of appropriations as unexceptionable.

that, in some instances, moneys are advanced by the collectors of the revenue, out of the public moneys in their hands, and before the same have been drawn in the Treasury. The two principal objects of expenditure, to which this exception to the general rule applies, are the expenses incident to the courts of the United States, other than those for salary, namely, those for jurors, witnesses, fees, safe-keeping of prisoners, and contingencies, which are advanced by the collectors of the customs, to the marshals, and those incident to the ordinary support and repairs of light-houses, buoys, and piers, which are, also, generally defrayed out of the public moneys, in their hands, by those collectors, or other revenue officers, under whose superintendence those establishments are placed. In those instances warrants issue as if the moneys expended had been previously drawn into the Treasury, and, afterwards, paid out of the same to the revenue officers, in order to enable them to defray the expense." *Ibid.*, 755-756.

The anticipation of appropriations having been referred to in the Committee's report as an "irregularity," Wolcott, Hamilton's successor as Secretary of the Treasury, made the following reply. "The instances, in which monies have been advanced by Banks, or applied by Collectors, to the public service, have been in cases where the expenditure was authorised by Law, and (when no appropriation existed) where the public faith effectually obliged Congress to make such appropriation. I can now recollect but one exception, in a case of urgent necessity, of no great amount, and which was in a few months sanctioned by Law:—It has frequently happened that protracted debates on important questions or other causes, have delayed the provisions for the current service, for several months, after the commencement of the year;—the delay was frequently very inconvenient, and always increased the labor and responsibility of the officers of the Treasury;—the manner, in which payments were made in such case, was perfectly understood—I believe I am not mistaken, in my recollection, that the compensations of the members of the legislature itself, have sometimes been thus informally advanced. Is it not the extreme of rigour, at this period, when the Committee are doubtless satisfied that the future operations of the Treasury will not be influenced by precedents, deemed liable to exception, to describe a well known usage, which has been productive of no injurious consequences, and which was founded on a respectful confidence in Congress, by the offensive appellation of an 'irregularity'?" Oliver Wolcott, *An Address to the People of the United States* (Hartford, 1802), p. 17.

The practice does not appear to have been wholly abandoned even in Jefferson's administration. John Randolph, speaking in 1807, said that "when a head of a department wants money, purchases may be made upon credit, with an understanding at the banks and with the purchaser that the notes are issued for the service of Government. Discounts are obtained and the United States pay the difference, in the price of the commodity. Here, although the money has gone out of the bank, it is, in legal phrase still in the Treasury, until Congress meet and pass an appropriation law, when having been paid to take up the notes it marches again out in official costume and parade." *17 Annals*, 852.

During the autumn of 1794 the question of specific appropriations was again raised. This was upon the occasion of the insurrection in the western counties of Pennsylvania. Although the President of the United States had been authorized to call out the militia to suppress insurrections, no moneys had ever been appropriated for that object. In this situation the heads of the several executive departments, with the exception, it is said,¹⁵ of Edmund Randolph, who was then Secretary of State, concurred in the opinion that the sums appropriated for the service of the War Department were applicable to the expenses of the militia. The militia were accordingly called out in October and their expenses were defrayed from War Department moneys until the last day of December when an act was passed covering them by an *ex post facto* appropriation.

On December 1, 1794, Hamilton communicated to Washington and to the Speaker of the House of Representatives his intention to resign the office of Secretary of the Treasury on the last day of January next. On that day, accordingly, he renounced his official position. The gentleman whom the President had determined to nominate as his successor was Oliver Wolcott, Jr., the then Comptroller of the Treasury—a man, according to Hamilton, of “undoubted intelligence, probity, and good principles with regard to public credit.”¹⁶ The nomination made, Wolcott took office February 1, 1795.

From this date to the close of President Adams' administration the construction given by the Treasury Department to the appropriation laws was almost, if not quite, uniform. And this uniformity, it may be noted in passing (the fact will presently be proved), was maintained in spite of variations in the wording of the appropriation laws themselves and of repeated and declared efforts of Congress to upset it. From 1795 to 1801 it was not upon the will of Congress that the application of the public moneys depended but upon the rules of interpretation which Wolcott had formed with a just regard, as he put it, for the welfare of Congress and the people.

15. By Wolcott, whose testimony is not always reliable when it concerns Randolph.

16. Hamilton to Willink, etc. January 31, 1795. *Works*, Lodge ed., VIII, 333.

These rules of interpretation varied with the nature of the expenditure. Some objects Wolcott regarded as proper for specific appropriations; others he thought should be appropriated for in gross. Nor was he at all affected by the attempts of Congress to determine for itself in which category the several objects belonged. If by the influence of a Gallatin, a Madison, or a Giles the national assembly were induced to subdivide appropriations so as to produce an inconvenient complexity in the public accounts or an embarrassment to the public service, Wolcott saw his duty plainly: he corrected the mistake so far as possible by Treasury construction.

What were these rules of interpretation which supplemented and in some instances supplanted the law? Gallatin has supplied the answer:

It seems to have been generally understood, that the whole of the moneys, appropriated for the annual support of the army and navy, respectively, were to be considered as making but one general appropriation for each of those two objects; and that the sums, thus appropriated, were indiscriminately applicable to every distinct object of expenditure embraced under those two general heads.

The appropriations for the Indian department, and those made generally for fortifications, have, also, been mostly blended with those of the War Department. But it seems, though it is difficult to reduce the practice, heretofore established, to any uniform and certain rule, that the appropriations, in relation to the purchase of cannon, arms, ammunition, and military stores, to the purchase or leasing of foundries and armories, and to the fortifications of certain designated harbors, and, also, those in relation to the purchase of land with growing timber, or of timber, to the erecting of two docks, to the purchase or building of twelve vessels, to building and equipping three ships, not less than thirty-two guns, to the building of ten galleys, to the building six sloops of war, and six seventy-four gun ships, to the safe keeping of French prisoners, as well as those respectively made during the last session of Congress, for completing six seventy-four gun ships and the public navy yards, docks, and wharves, and for erecting marine barracks, have been considered as distinct from each other, and from all other made in relation to the army and navy, respectively.

The appropriations made in relation to the public debt, to the civil department, to domestic expenses of a miscellaneous nature, (such as

the mint establishment, light-houses, census, &c.) and to foreign expenses, have been generally considered as constituting, for each distinct object of expenditure, embraced under each of those general heads, a specific distinct appropriation, the amount of which was applicable only to that specific object for which it was appropriated.¹⁷

Congress seems first to have been put on notice of the Treasury's construction of the laws making appropriations for military expenditure in February, 1795. At the time of Wolcott's elevation to the Secretaryship of the Treasury Department (February 1, 1795), Fitzsimons of Pennsylvania was chairman of a committee appointed to consider the estimates and prepare bills for making appropriations for the War Department. Some question appears to have arisen in connection with the fitting out of a naval armament as to the continuance in force of an appropriation beyond the year for which it was voted. On the one hand it was urged that last year's provision automatically extended to this and that an attempt to vote the money again was a useless proposition: on the other, it was said that the provision did not extend but that the unused money must be carried forward as surplus revenue and that a new act was requisite to reappropriate it.¹⁸ As a result of the discussions on this subject Fitzsimons wrote to Wolcott inquiring whether a surplus appropriation for the military establishment for one year could be considered as a proper object of deduction from the estimate of the succeeding year. To this inquiry Wolcott on February 25 communicated the following official answer:

17. A S P., *Finance*, I, 755. This analysis seems to have been accepted by Wolcott himself, who in *op. cit.*, p. 7, cites it to disprove an assertion made by the Nicholson Committee in their report of April 20, 1802. This Committee had said that "the appropriations for the army and navy, respectively, have been considered as constituting but one general fund for each of these objects, although, in most of the laws making appropriations, a variety of heads of expenditure were distinctly specified"—a declaration not wholly supported by Gallatin's letter (to which the Committee referred as a voucher) inasmuch as Gallatin had mentioned as general appropriations only those made for the *annual* support of the army and navy and had enumerated a variety of others, in relation to both the War and Navy Departments, which he expressly admitted to have been considered as specific.

18. 4 *Annals*, 1250. The identification of an unexpended balance of appropriation with surplus revenue is a curious but common error; it is, however, irrelevant to the point here at issue.

The Secretary of the Treasury respectfully informs Mr. Fitzsimons, of the House of Representatives, that the question proposed by him has never been fully decided by any law, or by the practice of the Treasury.

It has been usual for the Legislature to grant appropriations for the military service, on estimates of the probable yearly expense, and hitherto the yearly expenditures, at the Treasury, have been referred to the appropriations for the same year with the exception, however, of such expenditures as were susceptible of an application to some precise part of a general appropriation.

By far the greatest part of the expenditures for military purposes are, however, unsuceptible of such a minute distribution, as are appropriations for other objects, and of course the expenditures for the military Department are kept under more general heads: for instance, certain sums are granted for pay, rations, forage, clothing, transportation, etc. It would be very difficult, if not impracticable, to issue money under these several heads: and if it were to be attempted, excessive appropriations and advances would become necessary, and an extraordinary risk would be incurred by the public. It has been my opinion, that the appropriations for mere military purposes, ought to be general grants of such sums, as are from time to time deemed requisite for the public service, to be issued according to exigencies, and applied and accounted for according to law: and, in this point of view, a surplus appropriation for one year, becomes a fair subject of deduction from the estimate for a succeeding year.

As you have mentioned the question, I shall be glad if some measure can be adopted, which will express the sense of the Legislature upon the subject.¹⁰

Several years later, when the Treasury's construction of the appropriation laws was under severe attack, Wolcott reverted to this letter of February 25, 1795, as containing within it a complete explanation of the reasons justifying that construction:

If with a full knowledge of the events, which have since occurred, I were to prepare a communication to protect myself against such a report, as that under consideration, it would be impossible for me to express my ideas with more precision, than in the terms, which were adopted in this official note. I am greatly deceived if the reasons, briefly assigned, for the practice of the Treasury, do not afford a conclusive

10. Quoted from Wolcott, *op. cit.*, p. 9.

justification. It was stated that such expenditures, as were susceptible of application to a precise part of a general appropriation, were so applied; but that other expenditures were referred to more general heads. . . . Upon the principle of appropriating distinct funds, it would be necessary to provide, not only against contingencies of a general nature, but against contingencies, in relation to each subordinate branch of the service. It might of course happen, that two millions of dollars, granted under twenty distinct heads, would be found a less efficient and useful fund, than one million of dollars, subject to a general application. The result is, that the practice of the Treasury was alike conducive to order and economy.²⁰

At the time no particular notice appears to have been taken of Wolcott's letter to Fitzsimons. No modification was introduced into the laws governing the application of appropriated moneys, except that in the act making provision for the public debt a clause was inserted that no appropriation for the current service should continue in force for more than two years after the year in which it was made, unless a longer duration was specially assigned by law. Even this limitation, as Wolcott points out, originated in a recommendation of Hamilton's.²¹

20. *Ibid.*, p. 10.

21. The eighth proposition in Hamilton's Report of January 10, 1795, on the public credit read as follows: "That, in regard to any sum which shall have remained *unexpended* upon any appropriations other than for the payment of the interest of the funded debt and for the purposes of the sinking fund, for more than two years after the end of the calendar year in which the act of appropriation shall have been passed, such appropriation shall be deemed to cease and determine—and the sum expended upon it shall be carried to an account to be denominated 'The Surplus Fund.' But no appropriation shall be so deemed to have ceased or determined, till after the year 1795, unless it shall appear to the Secretary of the Treasury that the object of such appropriation has been fully satisfied, in which case, it shall be lawful for him to cause to be carried the unexpended residue thereof to the account aforesaid."

Upon this suggestion he remarked: "This is to terminate an embarrassment which has been experienced. Appropriations are frequently made for objects, the extent of which is not precisely known, or in a degree casual. To leave them indefinite, as to time, is sometimes to tie up, unnecessarily, a portion of the public funds, which may, ultimately, not be wanted at all for the purpose of the original appropriation.

"It will do away this inconvenience, and promote perspicuity in the treasury accounts of appropriations, if an ultimate period is fixed when each appropriation shall be deemed to have ceased. Should further appropriations appear

The silent ratification by Congress of the practice of the Treasury relative to these laws did not long continue. On December 7, 1795, at the opening of the Fourth Congress, Albert Gallatin, "the Frenchified Genevan,"²² as his political enemies were later pleased to call him, took his seat as one of the Representatives of Pennsylvania, a place which he was to hold continuously until 1801 when he was appointed Secretary of the Treasury. By his own account he determined to devote himself to two principal questions—constitutional construction and the finances.

With Gallatin the Federalists had had some previous experience. Elected in 1793 to the Senate as the colleague of Robert Morris, he had lost no time in moving a resolution calling upon the Secretary of the Treasury for an elaborate statement of the debt as due on January 1, 1794, together with a number of other statements and accounts, including summary statements of the actual receipts and expenditures, for each calendar year from the commencement of the present government to the last day of December, 1793. These last-mentioned statements were to distinguish the moneys received under each branch of the revenue and the moneys expended under each head of appropriation; to state the balances of each branch of the revenue remaining unexpended on the last day of the year; and to specify separately such balances as were on that day in the Treasury and such as were uncollected or in the hands of any banks, officers, or other persons. This resolution, introduced January 8, 1794, was laid over until the twentieth when it was adopted. On February 10 a reply was received from Hamilton stating the difficulty of compiling the information demanded with the clerks at his disposal, representing the interruption it would cause in the daily routine of the Department, and deprecating the practice of such unexpected demands. On the eleventh this letter was referred to Gal-

necessary for the same objects, new estimates can be presented, and new appropriations made.

"The designating an account with a denomination known in the laws, to which the surpluses are to be carried, will facilitate future legislative dispositions of the resulting fund. It is, however, essential to the system of public credit, that this should be with the exceptions contained in the proposition "

22. So he is called in a resolution of the town of Gloucester quoted, in part, by Adams, *op. cit.*, IV, 414.

latin, Ellsworth, and Taylor, for consideration and report. There the matter ended, for on February 28, Gallatin, a resident of the United States for thirteen years, was expelled from the Senate on the grounds that he had not been nine years a citizen. Hamilton made no further effort to supply the information called for.²³

Gallatin, as has been said, took his seat in the House on December 7, 1795. On the twenty-first of the same month he called up a resolution which he had laid upon the table a few days before for the appointment of a standing committee of ways and means. The motion being agreed to *nem. con.*, fourteen was fixed upon as the proper number, and the committee appointed.²⁴ Presently Wolcott, desiring, so he intimates, a formal ratification by Congress of the Treasury construction of the appropriation acts, wrote to this committee presenting the question of specific appropriations. This letter, or report, was accompanied by an estimate for the service of the War Department and concluded in the following terms:

To Prevent Future Misconception, and for the immediate information of the Committee, I think proper to observe, that by far the greatest part of the expenditures, for the Military Department, are found, by experience, to be unsusceptible of that particular distribution, which

23. An indirect allusion to these resolutions is contained in a letter from Hamilton to the Senate on another subject, dated February 22, 1794. In this Hamilton, defending himself against the supposition that he had been guilty of undue delay and negligence in furnishing a certain paper to the Senate, animadverts on the interruptions which his work had suffered by reason of "unexpected, desultory, and distressing calls for lengthy and complicated statements, sometimes with a view to general information, sometimes for the explanation of points which certain leading facts, witnessed by the provisions of the laws and by information previously communicated, might have explained without those statements, or which were of a nature that did not seem to have demanded a laborious, critical, and suspicious investigation unless the officer was understood to have forfeited his title to a reasonable and common degree of confidence." This letter is endorsed by Gallatin in a later hand—"complaints of unnecessary calls, alluding indirectly to certain resolutions, founded on my motion, calling for explanatory statements which were never furnished." Henry Adams, *Life of Gallatin*, p. 116 n.

24. 5 *Annals*, 150. The members were William Smith, Sedgwick, Madison, Baldwin, Gallatin, Bourne, Gilman, Murray, Buck, Gilbert, Isaac Smith, Blount, Patten and Hillhouse.

is observed in the issues of monies for other objects—of course it has been the usage of the Treasury to open the accounts, with the War Department, under more general heads. Unless this mode of proceeding is continued, excessive appropriations and advances will be necessary, and an extraordinary risk will be incurred by the public.

It follows, that appropriations, for military purposes, ought to be considered as general grants of such sums, as the public service is found to require, to be issued according to exigencies, and applied and accounted for, according to law.²⁵

A few days after this letter was received, the appropriations for the military and naval establishments being under consideration in Committee of the Whole, it was proposed to fill up the blank for the subsistence of the officers of the army with \$68,480. Gallatin, believing this sum excessive, moved to reduce it to \$45,606, and in support of this motion he offered among other reasons the following:

Whilst he was up, he would mention another reason. It would apply, also, to the rations of non-commissioned officers and soldiers, one-third part of the estimated amount of which will be proper to be deducted, if his motion was carried. He should not have been anxious about this matter but for one thing. He would remind the Committee of a letter which had been written by the Secretary of the Treasury to the Committee of Ways and Means, in which it will appear that although they made specific appropriations for each head of expense relative to the Military Establishment, yet, those appropriations had been considered as a general grant for that department. The consequence of this was, he said, that if more was granted for any particular purpose than was necessary, the surplus might be expended for any other item in the Military Establishment: therefore, when \$70,000 were voted for the Indian department, if the Executive wanted to apply a larger sum for that purpose, they thought they had a right to appropriate to it any excess of appropriation beyond the expenditure for subsistence, or any other of the items for which more might have been voted than was necessary; so that there was no check to the expenditure, except the aggregate amount of all the moneys appropriated for the Military Establishment, and, for that reason, he hoped his motion would be agreed to.²⁶

25. Wolcott, *op. cit.*, p. 11.

26. 5 *Annals*, 1476.

After some debate the original motion was put and negatived, 34 to 31, and then Gallatin's to fill the blank with \$45,606 was put and carried.

In this debate some defense of Wolcott's general position was attempted by a Federalist member of Congress in the following words:

It had been hinted, in the course of the debate, that the appropriations should be more specific as to the immediate object, but, in his opinion, an alteration of that kind might operate most ruinously. Would it not be absurd to confine the appropriation so strictly to the article itself, that if the provisions or tents of the Army should be destroyed by flood or by fire, they could not be replaced, but the Army must remain without any covering, even though there should be a sufficient surplus or saving from other articles?

It was a happy circumstance, that, in all such cases, there was a liberty of discretion given to make use of the surplus arising from any other appropriations under the same general head, to supply such unexpected wants.²⁷

On June 1 Gallatin, who was obviously dissatisfied with this mode of construing the laws, moved a resolution which was agreed to in these words:

Resolved, That the Secretary of the Treasury be directed to lay before this House, within the first week of the next session of Congress, a statement of the moneys expended for the Military Establishment for each calendar year, from the establishment of the present Government to the 1st of January, 1796, distinguishing the sums expended under each head for which specific appropriations were made; and also a statement of the expense attending the expedition of the militia to the Western counties of Pennsylvania under the several heads for which specific appropriations were made.²⁸

In the evening of this day the Speaker adjourned the House until the next December. Wolcott immediately set to work to *answer the call for information*. But in the autumn of the year, before a report could be made, Gallatin committed to the press a volume compiled principally from public documents and entitled

27. *Ibid.*, 1481.

28. *Ibid.*, 1409.

A Sketch of the Finances of the United States. In this work Gallatin passed some very severe strictures on the practice of mingling appropriations:

The appropriations heretofore made for the military establishment have been subdivided into a number of separate heads, making specific and distinct appropriations for the pay of the army, for its subsistence, for clothing [&c.] . . . and it was supposed that the moneys thus distinctly appropriated were respectively applied to the specific objects, for which they were appropriated. It, however, appears, by a letter from the Secretary of the Treasury of May, 1796, that by far the greatest part of the expenditures for the military department are found by experience to be unsusceptible of that particular distribution which is observed in the issues of moneys appropriated for other objects, and that appropriations for military purposes ought to be considered as general grants of such sums as the public service is found to require, to be issued according to exigencies, and applied and accounted for pursuant to law.²⁹

He then went on to say:

It would seem that if those appropriations are considered by the Treasury Department as general, of which grants, to be issued according to exigencies, that or some other Executive Department is to judge, and if, therefore, the moneys specifically appropriated to one head of service are applied to another head, they are not applied and accounted for pursuant, but contrary, to law. Such a mode is undoubtedly liable to great abuses; it deceives the Legislature, who, when appropriating one hundred thousand dollars for the defensive protection of the frontiers, did not think that the Treasury would assume a power to apply them to the quartermaster or any other department. It deprives the Legislature from any control, not only over the distribution of the moneys among the several heads of service, but even over the total sum to be expended. For the million and a half of dollars appropriated for the annual support of six thousand men, the nominal establishment, may be spent in the same time, and in fact has actually been expended within fourteen months for the 3,500 men who constituted the effective establishment. The same abuse has, for a considerable time, prevailed in England, where it has, at several periods, been taken notice of, and did lately produce a motion of impeachment against the Ministers.

29. Gallatin, *Writings*, III, 116-117.

But Gallatin did not take the view that afterwards prevailed among the proponents of specific appropriations, namely, that every minute object of expense should be anticipated and provided for separately. "It is impossible," he wrote,

for the Legislature to foresee, in all its details, the necessary application of moneys; and a reasonable discretion should be allowed to the proper executive department. The most proper way would perhaps be not to enter into so many details; not to make specific appropriations for every distinct head of service, but to divide the general appropriation under a few general heads only, allowing thereby a sufficient latitude to the executive officers of government, but confining them strictly, in the expenditure under each of those general heads, to the sum appropriated by law.

Having thus set out his opinion of the practice of mingling appropriations and his opinion of the proper mode of combining in practice the principle of specific appropriations with the exigencies of the public service, Gallatin next adverted to the propriety of spending money on objects authorized by law but for which there were no appropriations. The militia expenditures of 1794 were, he maintained, in this category:

Another irregularity has once taken place upon an extraordinary occasion. Although the President of the United States was authorized to call out the militia in order to suppress insurrections, no moneys were appropriated for that service. When the western insurrection took place, until Congress had covered the expenditures of the expedition by an appropriation made only on the 31st of December, 1794, the expenses were defrayed out of the moneys appropriated for the military establishment. Yet even the principle by which the specific appropriations for the several objects of the military establishment have been considered as a general grant for the whole could not authorize the application of a part of that grant to the expenses of that expedition. No farther discretion had been claimed by virtue of that principle than that of indistinctly applying the whole sum appropriated by law to any of the objects enumerated and specified under distinct heads in the law itself. But, as the militia called out to suppress an insurrection make no part of the military establishment, the expenses attending such a call were not amongst the various objects enumerated in the

law making appropriations for the military establishment. . . . The moneys drawn from the Treasury on that occasion were paid out of a fund appropriated for other and distinct purposes; they were not drawn agreeable to the Constitution, in consequence of any appropriation made by law. It might be a defect in the law, authorizing the expense, not to have provided the means; but that defect should have been remedied by the only competent authority, by convening Congress. The necessity of the measure may in the mind of the Executive have superseded every other consideration. The popularity of the transaction may have thrown a veil over its illegality. But it should by no means be drawn hereafter as a precedent.

On December 9, 1796, in obedience to the resolution moved by Gallatin on June 1, Wolcott submitted four statements exhibiting the appropriations and expenditures for the War Department from the establishment of the government to the close of the year 1795. These statements with explanatory observations by the Register of the Treasury and the Accountant of the War Department were printed for the use of Congress, and, according to Wolcott, fully confirmed the representations in his reports of February 25, 1795, and May 17, 1796.³⁰

In an apologia published in 1802 Wolcott specifically asserts that the subsequent actions of Congress were to be construed as sanctioning his conduct:

On the 16th of December, 1796, a Committee of Ways and Means, consisting of sixteen members, was appointed. . . . Mr. Gallatin was one of this Committee; he had just published a volume, in which the practice of the Treasury had been represented as illegal; three distinct reports had placed the controverted question, completely in the view of the Legislature; yet notwithstanding these circumstances, the appropriations were made according to established precedents; and no intimation was given that the Legislature considered the construction of the Treasury, as illegal, or in any manner, improper.³¹

This statement should not, however, be taken at face value; the records show that the appropriations for the year referred to (1797) were *not* made according to established precedents. On January 31, 1797, when the civil appropriations were under con-

30. Wolcott, *op. cit.*, p. 13.

31. *Ibid.*, p. 14.

sideration in the House, Gallatin moved to amend the resolution reported by the Committee of Ways and Means. The way in which this resolution read was that, for certain purposes, "there be appropriated a sum not exceeding —, viz " He proposed to strike out these words and insert in their place "the following sums be respectively appropriated, viz."

The reporter's account of the debate which ensued is as follows:

Mr. G. said his object in this amendment was, that each appropriation should be specific; that it might not be supposed to be in the power of the Treasury Department to appropriate to one object money which had been specifically appropriated for any other object. He did not know, he had never investigated the subject, whether, as to the Civil List, appropriations had ever been mixed, or whether it was understood they might be so mixed; but they knew it had been officially declared that so far as related to the Military Department, the items had been totally mixed: for instance, if the estimate for clothing or any other item fell short, the officers of the Treasury did not think themselves bound by that particular appropriation, but had recourse to other items, for which larger sums were granted than there was occasion for. Such construction of the law, Mr. G. said, totally defeated the object of appropriation, and it was necessary, therefore, so to express the law that no color for such a construction should be given. The amendment he proposed would have this effect.

Mr. W. Smith said, the amendment proposed was not of importance at present, as the particulars were entered only upon the Journals. These did not go into the law to be passed, for though all the items were entered upon the Journals, in the bill they were lumped in the aggregate. But as one gentleman had brought up the subject, it was necessary that the House should consider it, and say whether it was not proper, when appropriations were insufficient under the head of expense. In cases of emergency it would [?not] be proper that the Treasury should be so limited as not to take money from another head of expense, where there was a surplusage. This was a thing done heretofore, and the House knew it had been done in the Military Establishment. In the Quartermaster's department, in particular, the expenses might exceed the sum appropriated, and, as the services must be performed, or the military service cease, therefore, the Treasury judged they might make use of the surplus of any other head of expense to make good this

deficiency. He knew not how the business could be otherwise done with convenience. With respect to the Civil List Establishment, it was of a more certain nature; most of the salaries were established by law, and therefore they could be ascertained to a certainty.

Mr. S. said he did not mean, however, to oppose the motion at present; but when the bill was brought in, it would be necessary to determine this principle, and say whether, if an appropriation fell short Government must stop rather than touch the surplus of any other appropriation.³²

Whether this debate was continued when the bill was brought in does not appear; but Gallatin's amendment was accepted by both Houses of Congress, as a reference to the act as finally approved will demonstrate.³³

In the act making appropriations for the military establishment even greater changes were introduced as a result of Wolcott's disclosures. It had been usual for the House to appropriate from \$30,000 to \$40,000 for the Hospital Department though the expense had never exceeded \$7,000—the surplus being applied by the Executive to other purposes; now, on Gallatin's motion, the appropriation was reduced to \$10,000, "which was fifty per cent more than had ever been expended for the purpose."³⁴ A more significant variation from previous practice was introduced when the sums necessary for the Quartermaster's Department, the Indian Department, bounties, and all the contingent expenses of the War Department were voted as an aggregate sum instead of as separate items. The reasons for making the appropriations in this shape were not, as might be supposed, founded in a desire to extend the executive discretion but in a determination to limit it. It was thought that, by allowing a certain latitude to the War Department in the matter of contingent expenses, Congress would be justified in expecting the expenditure of money to be confined to the specific objects for which each sum was appropriated. This was made perfectly clear by Gallatin in answering the objections of Venable, who wanted the items for

32. 6 *Annals*, 2040–2041.

33. 1 *Stat.* 408. The word "viz." appears as "that is to say."

34. 6 *Annals*, 2321.

contingencies stated separately. The reason, he said, which induced the Committee to put them in one sum was to obtain the very object which Venable had in view.

It would be recollected that they had had a letter from the Secretary of the Treasury, in which he said that the appropriations for the Military and Naval Establishments were considered as general grants of money; and, though they were to be accounted for according to law, yet it was the practice of the officers of the Treasury not to consider each appropriation as specific, but the whole as a general grant of money. This practice was making the law a mere farce, since the officers of the Treasury did not consider themselves as at all bound by the specific sums. He therefore concluded it to be proper to pass the law in such a manner as to confine the expense to the appropriation for the different items. It was said to be impossible to carry the law into execution on this principle. It was said there were a number of contingent expenses which could not be exactly ascertained, and that therefore it was necessary the officers of the Treasury should have a certain discretion given them to make use of the surplus of any item for which more than was necessary had been appropriated. He believed the uncertainty here mentioned existed, and therefore it had been concluded to be best to put the contingent articles together in one sum, in order to give bounds to the discretion of the Department.³⁵

These several alterations would alone be sufficient to establish the error of Wolcott's assertion that "the appropriations [for 1797] were made according to established precedents; and no intimation was given that the Legislature considered the construction of the Treasury, as illegal, or in any manner, improper." But in the act just referred to there is even more positive proof. Not only were the several sums required for the military establishment "respectively appropriated" to the enumerated objects of expense, but at the end of the enumeration these words were added: "which sums shall be solely applied to the objects for which they are respectively appropriated."³⁶

35. *Ibid.*, 2322.

36. 1 Stat. 508. Thomas H. Benton, *Abridgment of the Debates of Congress*, makes it appear that this limitation applied only to the appropriation for finishing the frigates. I mention this because the passage in Benton has recently been introduced in evidence before a Senate Committee. 75th Cong., 1st sess., Hearings before the Select Committee on Government Organization on S. 2700, p. 382.

This amendment, like all the others, was sponsored by Gallatin. In the debate thereon the opponents of the innovation used rather contrary arguments. William Smith made his usual remarks:

He wished, as much as the gentleman from Pennsylvania, to confine the expenditure to the sums appropriated; but the provision for some objects might fall short, while others might have a surplus, which he thought ought to be made use of to supply deficiencies in cases of emergency. Ever since the establishment of the present Government, the whole appropriation for the Military Establishment had been considered as an aggregate fund out of which any of the objects of that establishment might be paid for; but the expense of each object was now to be confined to the specific appropriation. He was afraid, however well this might look in theory, it would be found very mischievous in practice. He wished the gentleman would amend his proposition by adding, "so far as may be consistent with public exigency;" this would restrict the expenditures, except in unforeseen cases of emergency, to provide for which some latitude of discretion ought to be left to the Executive.³⁷

In this argument Smith was supported by Harper and Kittera who foresaw that very serious inconveniences might arise to the service if there were no power to have recourse to other funds in the case of an appropriation proving deficient. Sitgreaves, however, took a precisely contrary view:

Mr. Sitgreaves did not see the necessity or propriety of the amendment of his colleague, when the House had distributed the appropriations amongst the different objects; as the amendment, he conceived, meant nothing more than that the Department should not expend any more than the sum appropriated for the different items, which they had no right to do if there were no amendment. Heretofore, when appropriations were made in a mass, the Secretary of War did not feel himself bound to govern himself by the estimate which he had given in, but by particularizing the different items, the former evil was corrected.

37. 6 *Annals*, 2349-2350.

38. "Mr. Kittera thought the amendment a bad one. Suppose, said he, a boat should be overset with tents in the lake, or a magazine blown up, the losses could not be repaired, because, though there might be surplus sums in the Treasury from other items in the establishment, yet, if this amendment prevailed they could not be touched. He thought this would be the effect; he was against innovations."

In answer to these arguments Gallatin remarked that if the facts were indeed as stated by Sitgreaves there would be no need for his amendment, but the Treasury Department had not acted upon the principle which he had stated.

They had, notwithstanding the distribution of the appropriation, thought themselves at liberty to take the money from an item where there was a surplus and apply it to another where it was wanted. And when this was objected to, as taking from the Legislature their appropriating power, they answered that the Legislature had entered so much into detail that they could not attend to their directions. They had, last session, made the appropriations more specific than at present, yet the Secretary of the Treasury, in a letter written to the House during this session, said, "that it was well known to have been a rule since the establishment of the Government, that the appropriations for the Military Establishment were considered as general grants of money, liable to be issued to any of the objects included under that Department." Therefore, unless this amendment was introduced, it would leave the power as before. In order to make the business more easy, all the contingent expenses were appropriated in one sum.

Gallatin's amendment passed the House without difficulty, 54 members voting for it. But on the evening of March 3, in the last hours of the Congress, the bill was returned from the Senate with an amendment proposing to do away with the restriction. A debate thereupon ensued, which turned upon the constitutionality and expediency of specific appropriations.³⁹ In the end it was decided by a vote of 52 to 34 not to concur with the Senate amendment. The Senate accordingly receded from its position and the bill became law in the form recommended by Gallatin.

It is to be observed that this law was no more successful than any other in confining the War Department to the sums specifically appropriated for each head of expenditure. On January 29, 1798, Secretary McHenry in transmitting his estimates for the next year revealed a deficiency of \$114,000 in the appropriation of 1797 for the subsistence of the noncommissioned officers and privates of the army and a probable deficiency of \$50,000 in the gross appropriations which had been made for contingencies.

39. 6 *Annals*, 2358-2361.

Under this latter head, moreover, it later transpired that he had had no hesitation in placing items which by no stretch of the imagination could be said to belong there. One of these, for example, was for the pay of an inspector of troops and garrisons at a salary of \$60 a month—an officer perhaps necessary but nowhere authorized by law; another was for the pay of an engineer of the fortifications of the United States at a salary greater than that of the Secretary of War.⁴⁰

When these palpable violations of the military appropriation act came to light, voices were raised in Congress against them. Gallatin declared that

the deficiency of last year of \$50,000, which the gentleman had mentioned, ought not to have taken place. The Secretary of War was not justified in expending more in these contingencies than was appropriated, (except in case of necessity,) otherwise the Secretary of War, and not Congress, regulated the expenditure of money. It would be necessary to inquire into this business, and except some pressing necessity could be shown for going beyond the appropriation, he should consider the Secretary of War as highly blameable for having done so, as the appropriation is the only check which the Legislature has over the contingent expenses.⁴¹

Samuel Smith spoke with almost equal severity:

Unless Congress can get the Secretary of War to understand what they mean by appropriations; if, instead of confining the expenditure of money to the purposes for which it is appropriated, he employ it in building ships of war and fortifications; they may vote \$500,000, and still be called upon to supply deficiencies.⁴²

But it does not appear that any action was taken to visit punishment upon the Secretary of War.

In connection with the inquiry by the House of Representatives into the nature of these deficiencies Wolcott had occasion to prepare and transmit to that body a statement exhibiting in

40. 8 *Annals*, 1556. The engineer, it appears, was engaged for three years but after he had been some time in service was given \$2,000 over and above his pay to relinquish his contract.

41. *Ibid.*, 1317-1318.

42. *Ibid.*, 1544-1545.

detail every warrant drawn upon the Treasurer with the purpose for which it was issued. Knowing, however, that the sums issued to subordinate agents had not been, and could not be, invariably applied to the purposes originally contemplated, he accompanied the accounts with the following observations:

It is not in my power to class the expenditures incurred in the Quarter Master Department, under particular heads, as many of the accounts are unsettled. I have, however, given a detail of the purposes, for which the monies were required, as expressed in the Warrants to the Treasurer.

But though I have done all in my power to confine the expenditures within the limits of the specific appropriations, I am confident, that results will appear on the settlement of the accounts, very different from the accounts, detailed in my office. Of the monies advanced under the head of subsistence, supplies have been purchased, which have been issued to Indians;—Stores destined to one use, at the time of purchase, have been applied to another; the Public Agents, especially those at a distance from the seat of government, are frequently governed more by the real, or apparent urgency of the service, than by considerations, which have reference to the form of their accounts.

I mention these things to prevent future misconstruction of my conduct, and that there may be a due understanding of the circumstances, under which the account, now presented, has been framed.⁴³

The alterations in the manner of phrasing the appropriations, though Wolcott did not remember them in 1802, were at the time very vexing to him. "The management of the Treasury," he wrote to Hamilton on April 5, 1798, "becomes more and more difficult. The Legislature will not pass laws in gross. Their appropriations are minute; Gallatin, to whom they yield, is evidently intending to break down this department, by charging it with an impracticable detail."⁴⁴

43. Wolcott, *op. cit.*, p. 14. The same point was made a few months earlier by the Accountant for the War Department: "It is impossible to note with any precision, the probable application of the moneys unaccounted for. In stating the above estimate, I have noted the items for which the moneys were originally advanced, but from former settlements it may be ascertained that they are not always applied to the objects first intended." A.S.P., *Finance*, I, 544.

44. George Gibbs, *Administrations of Washington and Adams* (New York, 1846), II, 45.

But relief was at hand. At the time that this complaint was made a bill was on its passage in the House of Representatives which had been previously reported by the Committee of Ways and Means, of which Gallatin was a member. This bill, making appropriations for the military establishment for the year 1798, contained the principle for which Gallatin contended; it particularized a number of distinct heads and enjoined that the specific sums mentioned in the bills should be solely applied to the objects for which they were respectively designated. Having passed the House after a very considerable debate⁴⁵ on the principle involved, it was sent to the Senate. There it was amended to consolidate all the appropriations, amounting to \$1,411,798 (including \$200,000 already appropriated on account), under one head: to increase certain of the sums set out in the supporting schedule; and to strike out the words, "which sums shall be solely applied to the objects for which they are respectively appropriated." It is said that two Senators only, Tazewell and Mason, voted against this last amendment. On reconsideration the House, after a debate in which much the same arguments⁴⁶ were used as on the previous occasion when the subject was up, agreed to the Senate amendments and thereby, so Wolcott later con-

45. The records do not substantiate Wolcott's assertion that the bill passed the House "without debate on the principle in question, and, as I presume, without observation of the new clause." *Op. cit.*, p. 15. The debate is reported at 8 *Annals*, 1542-1545, 1554-1557.

46. It was argued "in favor of the [first] amendment, by Messrs. Sewall, Dana, Dayton, and Sitgreaves, that the specification of the appropriations would embarrass the proceedings of the War Department, and might, in some cases, be attended with great inconvenience and injury to the service, particularly in the event of any unforeseen accident. On the other hand, it was argued by Mr. Gallatin that heretofore the want of this specification had been very evident, and that without it there could be no check against the expenditure of any appropriation made by this bill, as, if more money should be wanted under one head of expense than was appropriated for it, it would be taken from another, to which more had been appropriated than might be necessary for that object, so that the distinct estimates became useless, and the whole might as well be appropriated in one sum. Mr. Harper took a middle course, and wished the amendments of the Senate to be disagreed to, in order to produce a conference, in which he said a less particular specification might be agreed upon than had been agreed upon in this bill, which he had always been opposed to as being too particular; but he was far from wishing the appropriation to be left at large, as proposed by the Senate." *Ibid.*, 1874.

tended, "expressly and understandingly sanctioned the construction and practice of the Treasury."⁴⁷

From this time to the close of the Adams administration no further attempts were made by Congress to alter the Treasury's rules of interpretation or the practice of the spending departments. When the Republicans took office in 1801 the transfer of appropriations was recognized as settled custom, proper though illegal. "It had been the custom," explained a strong Federalist member of Congress, "in cases where money was wanted for one [object of expense], though appropriated to another, under the same department, to take it from the latter and to apply it to the former. This was illegal; but its being the custom palliates it."⁴⁸ An act passed only two days before the inauguration of President Jefferson illustrates to what extent the theory of specific appropriations had been abandoned. This act appropriated for the use of the War Department the gross sum of \$2,093,000; it then listed seventeen heads of expenditure, specifying for each a particular sum, but these sums (so we are told by Samuel Smith) were never considered as a restraint upon the Department. There was no head for contingent expense: "that [said Smith] was included in the sweeping clause, under which the whole sum appropriated might have been applied to contingencies."⁴⁹

On the last day of December, 1800, Wolcott resigned his office. If his conduct as Secretary of the Treasury be reviewed, it will be perceived that in relation to the appropriation laws his policy was to temper the efforts of Congress to limit (in what he considered an undue degree) executive discretion in the application of public moneys. That such was his intention he did indeed specifically avow. "The truth is," he wrote in 1802,

that all reasonable means were exerted to confine the expenditures within the particular estimates, and that according to a construction never disputed at the Treasury, it became necessary to open a number of accounts, in the offices of the Secretary and Comptroller of the Treasury, beyond what was useful. Different views of the same subject by various Committees, and especially the persevering efforts of indi-

47. Wolcott, *op. cit.*, p. 15.

48. 11 *Annals*, 320 (Representative Bayard).

49. *Ibid.*, 1245.

viduals of the party now in power, to limit the operations of the Executive Departments, by minute subdivisions of appropriations, continually tended to produce an inconvenient complexity in the public accounts, and to paralyze every branch of the public service. It was the duty of the Treasury, so to interpret the Laws, as to counteract this tendency as much as possible:—I contend that the interpretation, adopted in practice, was, at all times, reasonable, that a different interpretation would have been unreasonable, and frequently have entirely defeated their operation. It is, however, a sufficient and unanswerable defence of the practice of the Treasury and the other Departments, that it was at all times publicly avowed, and well understood, and deliberately sanctioned by Congress.⁵⁰

50. *Op. cit.*, p. 8. The error contained in the last sentence of this paragraph has been pointed out.

CHAPTER III

THE ERA OF JEFFERSON: 1801-1809

THE question of specific appropriations was not again agitated until 1801 when Jefferson succeeded to the Presidency and Gallatin became his Secretary of the Treasury. In November of that year the President communicated to Gallatin a draft of his first annual message to Congress with a request that the latter favor him with his comments. In his reply Gallatin seized the opportunity to bring forward his favorite doctrine:

There is but one subject not mentioned in the message which I feel extremely anxious to see recommended. It is, generally, that Congress should adopt such measures as will effectually guard against misapplication of public moneys; by making specific appropriations whenever practicable; by providing against the application of money drawn from the Treasury under an appropriation to any other object or to any greater amount than that for which they have been drawn; by limiting discretionary powers in the application of that money, whether by heads of Department or by any other agents. . . . The great characteristic, the flagrant vice of the late Administration has been total disregard of laws, and application of public moneys by the Departments to objects for which they were not appropriated.¹

Jefferson was impressed by these suggestions and incorporated them in this his first communication to Congress:

In our care, too, of the public contributions intrusted to our direction it would be prudent to multiply barriers against their dissipation by appropriating specific sums to every specific purpose susceptible of definition; by disallowing all applications of money varying from the

1. Albert Gallatin, *Writings*, I, 68. In an outline for specific appropriations which he sent to the President at about the same time he suggested *inter alia*:

"1. Specific appropriations for each object of a distinct nature, and one to embrace for each Department all contingencies, including therein every *discretionary* expenditure.

"2. Each appropriation to refer to a calendar year, and the surplus remaining unexpended after having satisfied the demands on the appropriation for *that* year to be carried to the surplus fund; that is to say, to cease." *Ibid.*, I, 73.

appropriation in object or transcending it in amount; by reducing the undefined field of contingencies and thereby circumscribing discretionary powers over money. . . .²

The inference was, of course, that the Federalists had misapplied and wasted the public funds.

Hardly was the ink dry upon this message when Hamilton took up the gage in a series of letters signed "Lucius Crassus." Number XI dealt with the sentences quoted.³ Nothing, he conceded, was more just and proper than the position that the Legislature ought to appropriate specific sums for specific purposes; but nothing was more wild or of more inconvenient tendency than to attempt to appropriate "a specific sum for each specific purpose, *susceptible of definition*." Taking a familiar example, transportation of the army, he proceeded to show that oats and hay for the subsistence of horses were each susceptible of definition and so, by the terms of the message, should be appropriated for separately; but what, he asked, if, as frequently happens, more than a sufficient quantity of one article be provided and not a sufficient quantity of the other? Are the horses to starve because the officer who is to make the provision cannot divert money from one appropriation to another? And, mayhap, is the army to starve also by a failure in the means of transportation? Such a view he deemed an excess of theory possible only in a man enveloped all his life in a speculative mist. Nor could the objection be surmounted by appropriating for forage, for not only would this be an abandonment of the principle set out in the message but it would be only a partial cure to the evils of such a principle. Suppose, for example, that the badness of the roads were such as to break down the wagons more quickly than anticipated and so exhaust the appropriation for repairs, and suppose that at an earlier period of the campaign the consumption of forage had been less than was calculated so that there was a surplus in the appropriation; if, said Hamilton, in such a case the public agent could not use the surplus to supply the deficiency, the motions

2. J. D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, I, 329.

3. *Works*, Lodge ed., VII, 256 f.

of the army might be suspended and famine and ruin produced. "This analysis," he continued,

might be pursued, so as to prove that similar evils are inseparable from a much more qualified application of the principle in the Message, and to demonstrate that nothing more can safely or reasonably be attempted, than to distribute the public expenses, into a certain number of convenient subdivisions or departments; to require from the proper officers, estimates of the items, which are to compose each head of expense; and after examining these with due care, to adapt the appropriations to the respective aggregates; applying a specific sum to the amount of each great subdivision:—the pay of the army; military stores; quartermaster stores, etc.. etc. This, with even more detail than could be well executed, has been uniformly done, under the past administrations of the present government from the very beginning of its proceedings. More will, in the experiment, be found impracticable and injurious; especially in seasons and situations when the public service demands activity and exertion.

In like manner Hamilton maintained that the former practice of the government had corresponded with the rule, taken in its true and just sense, of "disallowing all applications of money, varying from the appropriation in object or transcending it in amount." Did anyone allege or insinuate the contrary? Hamilton challenged him to name the instance in which money had been issued from the Treasury for any purpose which was not sanctioned by a regular appropriation, or which exceeded the appropriated amount; or where there was an expenditure of money allowed that was not strictly within the limits of such an appropriation, "except, indeed, upon the impracticable idea of minutely separating, and distinguishing the items, which form the aggregate of some general head of expenditure."

There was, however, a difference between the issuing of money from the Treasury and its ultimate application. In the latter he admitted that minor irregularities had occurred but these were in his opinion unavoidable.

It is likewise material to have it well understood that, generally speaking, the distinction between the appropriations for different objects can

only be strictly observed at the Treasury itself; which can easily take care that more money shall not go out for any purpose than is authorized by law; and can see that this money is fairly expended by the proper officer, in conformity with the general spirit of the appropriation prescribed by the law. But it is in most cases impossible for the officer, charged with a particular branch of the public service, to separate nicely in the details of expenditure, the different funds which may have been placed in his hands. Thus (still drawing our examples from the military department, where the danger of misapplication is always the greatest) if several sums be placed in the hands of the Quartermaster-General, for different objects, he must, of necessity, distribute a large proportion of them among his principal deputies, and these again among subordinate agents. Unless this distribution be pursued through the remotest ramifications, down to the moment of final expenditure, it is evident that it must fail throughout; and it is no less evident that it cannot be so far pursued. But to this, the accountantship only would be an insuperable obstacle; it would require in every the most inferior agent, a profound knowledge of accounts, and would impose, both on principals and subordinates, the duty of keeping such a multiplicity of them, as, if even practicable, would exhaust the funds issued for the public service, in mere clerkship. Another most mischievous consequence would ensue. The exigencies of the public service are often so variable, that a public agent would frequently find himself full-handed for one purpose, empty-handed for another, and if forbidden to make a transfer, not only the service would suffer, but an opportunity, with very strong temptation, would be given, to traffic with the public money for private gain; while the business of the government would be stagnated by the injudicious and absurd impediments of an over-driven caution.

Happily [he concluded] it is not very material that the principle of distinct appropriations for separate objects, should be carried through all the details. The essential ends of it are answered, if it be strictly pursued, in the issuing of money from the Treasury, and if this department be careful that the principal lines of discrimination are not transgressed.

Hamilton seems also to have supposed that the theory of Jefferson's message plainly contemplated that in no case should the *actual money* appertaining to one fund be expended for the purposes of another, though each fund might be sufficient for its ob-

ject, and though there might be an appropriation for each object. Such a shifting of funds, it will be remembered, had formed the basis for Giles's resolutions of 1793. "This," said Hamilton,

is another excess of theory; which, with a *full treasury*, would often disable the government from fulfilling its engagements, and from carrying on the public business. To execute this plan, consistently with the exigencies of national expenditure, would probably require, in ordinary, a triplication of the revenues, or a capital necessary for the whole amount of that expenditure, and would very often lock up from circulation large sums, which might be of great importance to the activity of trade and industry. Such are the endless blessings to be expected from the notable schemes of a philosophic *projector*! Strict to a fault, where relaxation is necessary; lax to a vice, where strictness is essential!

As to reducing the field of contingencies, Hamilton insisted that the limits had been sufficiently narrow for the situation of the government in the scenes through which it had passed, "comprehending for a great part of the time Indian wars and foreign hostilities. . . . Certainly, if viewed on a proportionable scale, the extent appears to have been as moderate as could have been desired, and no blame can justly attach to the administration on this account."

Now what is remarkable about this attack is that the views expressed by Hamilton on the subject of specific appropriations are not essentially different from those which were uniformly held by Gallatin. He has no quarrel in the abstract with the doctrine of specific appropriations: "Nothing is more just or proper than the position that the legislature ought to appropriate specific sums for specific purposes." He says merely that appropriations should not be subdivided to an inconvenient degree.

In all matters of this nature, the question turns upon the proper boundaries of the precautions to be observed; how far they ought to go; where they should stop; how much is necessary for security and order; what qualifications of general rules are to be admitted to adapt them to practice and to attain the ends of the public service. It is certainly possible to do too much as well as too little; to embarrass, if not defeat

the end intended, by attempting more than is practicable; or to overbalance the good by evils accruing from an excess of regulation. Men of business know this to be the case in the ordinary affairs of life. How much more must it be so, in the extensive and complicated concerns of an empire? To reach and not to pass the salutary medium is the province of sound judgment.⁴

This is precisely the view which Gallatin adopted in his *Sketch of the Finances*, published while he was still in Congress.⁵ It is precisely the view which he asserted long afterward in a fragmentary memorandum on his Congressional service:

The Legislature cannot enforce true economy otherwise than by making *specific* appropriations. Even these must be made with due knowledge of the subject, since, if carried too far by too many subdivisions, they become injurious, if not impracticable.⁶

Jefferson, too, can be shown to have subscribed to this opinion. In a controversy with Gallatin over his power to make a certain payment not included in the estimates he remarked that Congress was aware that too minute a specification has its evil as well as a too general one; and again that "the Legislature has thought that to cramp the public service by too minute specifications in cases which they could not foresee, might do more evil than a temporary trust to the President, which could be put an end to if abused."⁷

The plain fact is that Hamilton in the "Letters of Lucius Crassus" has constructed for the express purpose of refutation a doctrine of specific appropriation which neither Jefferson nor Gallatin, nor indeed anyone else of the period, held.⁸ If we ask why he did so, the explanation is doubtless this: The implication of President Jefferson's message was that the Federalists while in power had failed to reach that "salutary medium" of specific appropriations which was the "province of sound judgment"; in refuting this censure, Hamilton found it advisable to suggest that

4. *Ibid.*, VII, 256-257.

5. See p. 38 above.

6. Henry Adams, *Life of Gallatin*, p. 157.

7. Thomas Jefferson, *Writings*, IV, 529, 533.

8. Reference is made only to contemporary opinion. It is well known that the doctrine ascribed by Hamilton to Jefferson later obtained a wide following.

the rival politicians were aiming at an ideal perfection which never was and never would be attained in reality.

While this controversy was going on, a Select Committee of the House was considering the same subject. On December 8, 1801, the day after the opening of the Seventh Congress, Nicholson moved that the Secretary of the Treasury be directed to lay before the House an account of all the moneys received by Timothy Pickering, the former Secretary of State, together with his account of disbursements and his vouchers for the same. This motion gave rise to some debate on the subject of specific appropriations in which it was urged that while it was very probable that in Pickering's department there had been occasionally some exceeding of appropriations, yet every man acquainted with the public business knew that the public service would have suffered had not this been the case. "Most members," said Griswold,

knew how often this had happened, and how often Congress had justified, and granted afterwards this excess of appropriations; laws cannot always touch contingencies. It had often been the case in the office of the Secretary at War; Congress afterwards made up the expenditure, the excess appearing fairly and necessarily applied; so it may have been in the office of the Secretary of State."

The motion was postponed until December 14. On that day Nicholson rose and observed that some ideas expressed in the previous debate on this subject had induced him to modify his motion. He recognized that such a motion ought not to point at any particular officer but should extend to all officers superintending the disbursement of public moneys. He proposed there-

9. 11 *Annals*, 315. An example of a misapplication in the State Department is given by Bayard in another place: "Mr. B. said, he would illustrate his ideas by stating what had come to his particular knowledge. According to one of the stipulations made between the United States and Spain, a boundary line was to be run between the United States and the possessions of Spain, for which \$60,000 were appropriated. The act of running the line was in execution, unfinished, and our commissioners in the wilderness, when the appropriation run out; and this was during the recess of Congress. What was to be done? Were we to disappoint a foreign Government and stop the whole business? No. There being money appropriated to the department for other purposes, more than was required, the Secretary of State applied it to this purpose." *Ibid.*, 323.

fore that a committee be appointed to inquire and report (among other things) whether moneys drawn from the Treasury had been faithfully applied to the objects for which they were appropriated. After a considerable discussion this motion was carried without a division and Nicholson, Griswold, Giles, Hastings, Jones, Bayard, and Elmendorf were named to the committee.

On January 19 Gallatin wrote to Nicholson enumerating the objects of inquiry for his committee. At the end of this letter he suggested: "You may write me a letter asking generally for information on those subjects, or if you prefer a less methodical arrangement and to put more pointed queries, I have written some on the next page, which, I believe embrace all those objects." Among these pointed queries two related to the question of specific appropriations: (1) What construction has been put on the appropriation laws by the Treasury Department, and by the several agents or departments to whom moneys are advanced? (2) Have moneys been always paid by the Treasury and applied by the agents or departments in conformity to the laws authorizing expenses and making appropriations for the same?¹⁰

Two days later Nicholson duly propounded to Gallatin the questions which he desired to be asked, and on March 2 Gallatin sent in his answers.¹¹ He began with an analysis of the construction which had hitherto been placed by the Treasury on the appropriation laws, from which he concluded that if that construction "shall be considered as having been correct, it is believed that moneys may be said to have been *drawn from the treasury* in the manner prescribed by law, only in consequence of appropriations made by law." His answer to the question relating to the final application of moneys once drawn was less equivocal: there had been cases where the heads of departments had abused their discretion. He instanced in particular the accounts of Timothy Pickering as Secretary of State:

It is evident from the account itself, and from a sketch stated by Mr. Kimbal, late clerk in his department, that, although he drew the moneys from the treasury, under distinct appropriations, he did not

10. Gallatin, *op. cit.*, I, 75

11. A.S.P., *Finance*, I, 754-757.

sufficiently attend to these, in the application of the money, but has, in many instances, applied the sums drawn under one head, to another head of expenditure, and has, therefore, in some cases, spent less, and in others more, than was authorized by law.

This, it will be noted, was not a charge of malversation but of technical misappropriation. With the exception of two items suspended for want of vouchers or disputed by the parties, Pickering was admitted to have accounted for all the public moneys received by him, so far as to show that the whole had been applied for public purposes.

Having answered these and the other questions of the Committee, Gallatin passed to an examination of the principal deficiencies in the existing system of financial control. They were, he thought, comprehended under three broad heads:

The most apparent defects in the present arrangement, seem to be, in relation to the drawing public moneys from the treasury, a want of specification in the several appropriations, defined by law with such precision, as not to leave it in the power of the Secretary of the Treasury to affix an arbitrary construction, and to blend together objects, which might be kept distinct, without any inconvenience; in relation to the expenditure of moneys, drawn from the treasury, the want of a proper check in the War and Navy Departments, which might prevent the expenditure of money, either for an object unauthorized by law, or beyond the sums appropriated by law; and in relation to the accountability of persons entrusted with public moneys, the delay and other inconveniences arising from the manner in which the moneys advanced for those two Departments are now accounted for.

To supply these deficiencies he submitted a number of proposed reforms. In relation to the first he suggested (1) that the accumulated balances of appropriations for the War and Navy Departments, made before the present year and remaining unexpended, should cease and determine, except so much thereof as might be required to defray any expense incurred before the present year; and (2) that it be enacted by a general law that every distinct sum appropriated by any law for an object distinctly specified in the law should be applicable only to that object. "But," he continued,

as laws can be executed only so far as they are practicable, and unavoidable deviations will promote a general relaxation, it will be expedient, in the several appropriation laws, especially for the War and Navy Departments, not to subdivide the appropriations, beyond what is substantially useful and necessary.

These suggestions, it will be noticed, were almost identical with those which he had previously submitted to Jefferson.

In relation to the other two categories of defects he proposed certain alterations in the system of administrative accounting, the consideration of which must be postponed to another volume.¹² One, however, may be noticed in this place: he recommended that no credit should be allowed by the accounting officers in the settlement of the accounts of individuals, "except for expenses authorized by law, and to the amount appropriated for the same."

On April 8 the Nicholson Committee reported a bill designed to carry out these objects, but for one reason or another the bill was never debated and went over as unfinished business. Probably, says Henry Adams, the resistance of the Navy Department prevented its adoption.¹³ The bill was accompanied a few weeks later by a report in which the Nicholson Committee insinuated, though they did not expressly state, that moneys had been drawn from the Treasury in a manner other than that prescribed by law; and in which they positively asserted that, in a number of instances, the public moneys, after being advanced to agents, had not been applied to the objects for which they were appropriated and had not been regularly accounted for.¹⁴

This report, founded, it must be said, on rather *ex parte* proceedings,¹⁵ drew forth a reply from Wolcott in the form of a pamphlet with the somewhat pretentious title of *An Address to the People of the United States*. In this Wolcott accepts as his major premise the principles expressly asserted by the Nicholson Committee. These principles were

12. See my (projected) *History of the Accounting Offices*, the chapter on "Military and Naval Disbursements, 1789-1817."

13. Adams, *op. cit.*, p. 299.

14. A.S.P., *Finance*, I, 752-754.

15. There was no hearing; no counterstatement was admitted; the minority of the Committee were not consulted. Wolcott, *op. cit.*, p. 4. 11 *Annals*, 1256.

that there are two previous requisites, which are necessary to justify the expenditure of public money, and without which no legal expenditure can be made: First, that the expenditure for the object to which it is applied should be authorized by Law; and secondly, that an appropriation should be made to cover that authorized expense.¹⁶

Well understood and properly applied, said Wolcott, these principles were unquestionably correct; the only question therefore was how the principles ought to be applied. With his answer to this question we are already sufficiently familiar. He closed with a denunciation of his political rivals:

All candid men will perceive, that *principles never recognized, and always disavowed*, are, with the utmost rigor, applied to *past* transactions of an administration, *which has retired*—to the transactions of a period, of *great difficulty, when preparations of all kinds, for the public defence, were progressing with activity*: they will, at the same time, perceive, that the *future* application of the *same principles*, in a period of *profound quiet*, and in respect to reduced establishments, is DEPRE-CATED¹⁷ by the *present administration*;—the justice of the public will not permit, that men, who have served their country, in conspicuous stations, should be dishonored for a course of conduct, which their successors have *proposed to pursue*, under a change of the most *unessential forms*: it must pronounce, that the Report of the Committee is founded on a fallacious and untenable principle; that the repeated and explicit representations to the Legislature, which have been recited; the tacit approbation, which may be inferred from their silence, during several successive years, and the formal sanction of both houses of Congress, to propositions, which expressly involved the question under consideration, afford a complete justification of the former administration.¹⁸

While these controversies were raging or brewing, Congress found itself called upon to come to a practical decision with reference to the form of the appropriation laws to be passed for the service of the year 1802. It was decided to revert to the mode of

16. Wolcott, *op cit.*, p. 6.

17. Wolcott had reference here to Gallatin's remarks on the impolicy of subdividing appropriations too minutely.

18. P. 16. The suppression of facts which characterizes Wolcott's apology may again be noted.

1797; that is to say, to appropriate "respectively" to the several objects of expense. Nor was any other mode ever adopted during Jefferson's term of office.

Both political parties now accepted the *doctrine* of specific appropriations without much cavil. But in respect of the *practice* of that doctrine their positions were reversed. The Republican leaders began to emphasize the need of caution in subdividing the objects of expense. "We want specific appropriations," said Nicholson,

but when we specify we ought to take care that we do not go too far. Though the President has recommended our making appropriations more specific than they have heretofore been, he did not affirm to what length, in his opinion the specification should extend. But he had seen that great abuses had taken place, and therefore recommended measures to correct them.¹⁹

On the other hand the Federalists, hoping doubtless to embarrass the administration, sought to push the specification to ridiculous extremes.

For example: On April 25, 1802, when the bill making appropriations for the military establishment was before the House, Griswold moved to divide an item appropriating \$48,000 for the Department of the Quartermaster General and for contingencies. Nicholson thereupon undertook to explain the reasons why these two objects, for which separate estimates had been submitted, were united:

The present mode of appropriation was not unusual. It was so made in 1797. What has hitherto been the usage? To consider the whole appropriation as a general fund from which money might be drawn as the

19. Speech, April 25, 1802. 11 *Annals*, 1246. The remarks of Gen Samuel Smith in the same debate are, to say the least, lukewarm in support of the doctrine: "For myself, I would just as lief have the old as the new system. I have great confidence in the heads of departments. I should have been well pleased that each head of department should have returned an account specifying the amount expended on each item, that we might be enabled to see where the sum appropriated was exceeded. But I found that the President had recommended specific appropriations. I found a majority of this House for it. I therefore acquiesced."

Secretary of War pleases. The law has heretofore lumped in gross the whole sum allowed for military service. But this bill adopts a new plan. It specifies particularly the several payments to be made. But in the quartermaster's department, where it is absolutely necessary to allow some discretion, it has been thought best to blend these two items to make the Secretary responsible. This has been done to prevent abuses.²⁰

But Griswold would have none of this argument. He replied in effect:

I know the former course was different. Sums appropriated were considered as grants of money to the department, to be applied to military services under law. This course is now complained of. I confess I do not feel great confidence in the course now pursued. But I am willing to try it, and to allow that if it succeeds, it will be a very fortunate and desirable thing. It is for this reason that I wish to pursue all through the plan according to the report of the Secretary.²¹

This led Smith into the following remarks:

The gentleman is very candid. He says that he does not like this specific appropriation, and yet he is for carrying it so far as to render it impossible for the department to move! It is, however, but fair, that when a new experiment is made, it should be tried in conformity to the ideas of its friends; it is not fair that those inimical to it, should oppose it with hostile ideas. The gentleman says, it will be a good thing if it succeeds. Let him, then, suffer it to be tried. If he permits its friends to go

20. *Ibid.*, 1244.

21. The expressions of the Federalists were not always consistent. Dana a few days before argued ably the case for a general contingent fund: "I will explain," he said, "my ideas with respect to specific and general appropriations. With regard to the Navy and Army, no man can predict the occurrence of calamities, when either is in actual service, whether we shall have a battle, and what shall be the event of it. And though it be admitted that there may be some estimate of the cost of a given force, yet when this expense is applied to particular objects, it is difficult to ascertain the precise sum required for each; the true way, therefore, is, in a state of war, to give a general sum, and suffer the specific appropriations made by Congress to designate the general ideas of the Government. But then it is necessary to have a contingent fund for each article. Now, I would prefer a specific sum for a general contingent fund, to one for each specific article." *Ibid.*, 1202. But it will be understood that Dana was attempting to increase the appropriations for the Navy Department, with him a favorite object of expense.

on their own way, then if it fails to succeed, he may say: I warned you against it, and the blame is altogether yours. Not so, if the mode is altered by him; for he will himself then be responsible.

The difference in the caption of the appropriation laws, together with the recommendation in the President's message, is said to have operated so that, ever after, the officers of government considered themselves bound not to exceed the amount appropriated to each specific object in the law,²² a remark which was probably not intended to be applied beyond Mr. Jefferson's two administrations. Let us see if this was so.

In the Treasury Department certainly great care seems to have been taken to prevent illegal withdrawals of money from the Treasury and to confine the application of moneys withdrawn to the objects and within the amounts prescribed by the acts of appropriation. Gallatin, in 1809, reviewing his conduct of the Department in answer to an inquiry from a committee of investigation, positively asserted that

the advances made by the Treasury have in no instance exceeded the appropriations for each specific object; and that, so far as relates to the expenditure of the monies advanced, which is under the direction of this Department, there is no instance within my knowledge in which the agents have exceeded or blended the appropriations.²³

In the other departments a less nice care was exercised in the control of expenditure. The Secretary of the Navy did indeed say in a circular sent in 1803 to the navy agents that he had commenced and would progress in the expenditures "under the determination not to exceed either of the particular sums appropriated."²⁴ But in 1802 he had already violated this rule, having provided stores and advanced two months' pay to the men of the *John Adams* in spite of a defective appropriation.²⁵

22. Speech of Samuel Smith, December 28, 1810. 35 *Annals*, 806.

23. Gallatin to John Randolph, June 23, 1800. Treasury Department, Letters and Reports to Congress, E, V, 232. The old-fashioned use of commas should not lead the reader to suppose that the Treasury Department directed the expenditure of any department other than itself.

24. A.S.P., *Finance*, II, 350.

25. This transaction, coming so soon after his recommendation on the subject

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I know the former course was different. Sums appropriated were considered as grants of money to the department, to be applied to military services under law. This course is now complained of. I confess I do not feel great confidence in the course now pursued. But I am willing to try it, and to allow that if it succeeds, it will be a very fortunate and desirable thing. It is for this reason that I wish to pursue all through the plan according to the report of the Secretary.²¹

This led Smith into the following remarks:

The gentleman is very candid. He says that he does not like this specific appropriation, and yet he is for carrying it so far as to render it impossible for the department to move! It is, however, but fair, that when a new experiment is made, it should be tried in conformity to the ideas of its friends; it is not fair that those inimical to it, should oppose it with hostile ideas. The gentleman says, it will be a good thing if it succeeds. Let him, then, suffer it to be tried. If he permits its friends to go

20. *Ibid.*, 1244.

21. The expressions of the Federalists were not always consistent. Dana a few days before argued ably the case for a general contingent fund: "I will explain," he said, "my ideas with respect to specific and general appropriations. With regard to the Navy and Army, no man can predict the occurrence of calamities, when either is in actual service, whether we shall have a battle, and what shall be the event of it. And though it be admitted that there may be some estimate of the cost of a given force, yet when this expense is applied to particular objects, it is difficult to ascertain the precise sum required for each; the true way, therefore, is, in a state of war, to give a general sum, and suffer the specific appropriations made by Congress to designate the general ideas of the Government. But then it is necessary to have a contingent fund for each article. Now, I would prefer a specific sum for a general contingent fund, to one for each specific article." *Ibid.*, 1202. But it will be understood that Dana was attempting to increase the appropriations for the Navy Department, with him a favorite object of expense.

on their own way, then if it fails to succeed, he may say: I warned you against it, and the blame is altogether yours. Not so, if the mode is altered by him; for he will himself then be responsible.

The difference in the caption of the appropriation laws, together with the recommendation in the President's message, is said to have operated so that, ever after, the officers of government considered themselves bound not to exceed the amount appropriated to each specific object in the law,²² a remark which was probably not intended to be applied beyond Mr. Jefferson's two administrations. Let us see if this was so.

In the Treasury Department certainly great care seems to have been taken to prevent illegal withdrawals of money from the Treasury and to confine the application of moneys withdrawn to the objects and within the amounts prescribed by the acts of appropriation. Gallatin, in 1809, reviewing his conduct of the Department in answer to an inquiry from a committee of investigation, positively asserted that

the advances made by the Treasury have in no instance exceeded the appropriations for each specific object; and that, so far as relates to the expenditure of the monies advanced, which is under the direction of this Department, there is no instance within my knowledge in which the agents have exceeded or blended the appropriations.²³

In the other departments a less nice care was exercised in the control of expenditure. The Secretary of the Navy did indeed say in a circular sent in 1803 to the navy agents that he had commenced and would progress in the expenditures "under the determination not to exceed either of the particular sums appropriated."²⁴ But in 1802 he had already violated this rule, having provided stores and advanced two months' pay to the men of the *John Adams* in spite of a defective appropriation.²⁵

22. Speech of Samuel Smith, December 28, 1819. 35 *Annals*, 806.

23. Gallatin to John Randolph, June 23, 1809. Treasury Department, Letters and Reports to Congress, E, V, 232. The old-fashioned use of commas should not lead the reader to suppose that the Treasury Department directed the expenditure of any department other than itself.

24. A.S.P., *Finance*, II, 350.

25. This transaction, coming so soon after his recommendation on the subject

The idea that the departments other than the Treasury had less rigorous notions than Gallatin in matters of expenditure is strongly corroborated by a letter from the latter to George W. Campbell, under date of February 4, 1809, making suggestions for improving the accountability of disbursing officers. After proposing a new mode of drawing warrants and rendering accounts in the War and Navy Departments, he says: "That rule . . . will . . . in conformity with the constitution, prevent the application of public moneys to other objects than those for which they have been appropriated."²⁶

The inference contained in this statement, so far as it reflects upon the Navy Department, is, it may be here pointed out, irrefutably confirmed by a statement submitted shortly thereafter by the Secretary of the Navy himself to Senator Giles. A bill being before the Senate in which it was proposed, in conformity with a suggestion originally advanced by Gallatin in 1802, that no credit should be allowed to disbursing agents "except for expenses authorized by law, and for the amount appropriated for the same," Smith entered a letter of protest:

Under such restrictions no agent would make a purchase, or, indeed, incur any expense, without having money in hand to meet it, because he could not know the exact state of the appropriation out of which such expense was to be paid; or, if he knew the unexpended balance of each appropriation, he could not know what dispositions the Department might have made respecting such balances; he would, therefore, never make a purchase without having in hand, money of the appropriation under which such purchase would fall.²⁷

And Smith went on to describe the ill effects of such an eventuality upon the public welfare. Whatever may be thought of the arguments advanced, they seem at least sufficient to establish the

of specific appropriations, proved very mortifying to President Jefferson. In a letter to Gallatin he writes: ". . . perhaps I see too strongly the embarrassment of the defective appropriation. Would it be possible to put the extra advances on the footing of a debt incurred, the arrearages of which might be covered by a future appropriation?" Gallatin, *op. cit.*, I, 100.

26. A.S.P., *Finance*, II, 335.

27. *Ibid.*, II, 348.

fact that, when Smith wrote, it was customary in the Navy Department to admit credits to disbursing agents for expenses unauthorized by law or in amounts greater than those for which appropriations had been made.

As for the Department of State, it will be sufficient to refer the reader to the controversy between Madison and Jefferson on the one hand and Gallatin on the other over the accounts of Dr. Stevens to prove that the last-named was the stricter constructionist.²⁸

If the only abuses of appropriation laws had been those perpetrated by accident by the several disbursing officers of the departments, it might truly be said that in Jefferson's administration the essential ends of specific appropriations were answered. But such was not the case. Speaking in 1819 of the practice during these first years of Republicanism, Gen. Samuel Smith, the brother of Robert Smith, Jefferson's Secretary of the Navy, found it proper to say:

This new mode was beautiful in theory, but was attended with great inconvenience and public injury in practice. No estimate can provide for unforeseen occurrences. No man, when he undertakes repairs to a ship can estimate what they will cost. The consequence was that Congress had occasion to pass laws . . . to provide for deficiencies.²⁹

In other words, the departments, or some of them, spent their appropriations at whatever rate seemed proper to them and then came to Congress with requests for additional grants. Congress, like the ancient British parliaments, "might grumble and protest, but the money was exhausted, the need was indisputable, and they found their hands forced."³⁰

The worst offender in this respect was Robert Smith. The writings of Gallatin are full of references to the extravagances and loose practices of this man. But Gallatin did not deem it advisable to demand his removal. Once in 1803 he addressed a long

28. An account of this controversy is given in my (projected) *History of the Accounting Offices* in the chapter on the "Jurisdiction of the Accounting Officers, 1789-1817."

29. 35 *Annals*, 806.

30. R. G. Hawtrey, *The Exchequer* (London, 1921), pp. 8-9.

letter to Jefferson on the navy estimates, closing with a strong remonstrance on the conduct of the Department; and in 1805 he renewed his complaint:

On this subject, the expense of the navy greater than the object seemed to require, and a merely nominal accountability, I have, for the sake of preserving perfect harmony in your councils, however grating to my feelings, been almost uniformly silent, and I beg that you will ascribe what I now say to a sense of duty and to the grateful attachment I feel for you.³¹

John Randolph, the leader of the old Republicans and perhaps the ablest man in Congress, having passed into opposition over the Yazoo business and the Two Million Act, felt no compulsion to maintain a silence, grating or otherwise. When in 1806 the bill making appropriations for the support of the navy was brought to debate, he took the occasion to express himself with great plainness. As Chairman of the Committee of Ways and Means he moved on April 10, 1806, to fill the blank for contingent expenses with \$411,950. Objection was made to the size of the sum and the want of specification. To this he replied that he was as much in the dark as the gentleman as to the items of contingent expenditure and that he should not have moved to fill the blank with so large a sum but from the conviction that, whether Congress provided the money or not, it would be spent and an additional appropriation made the next session. The appropriation bill under present circumstances was a mere matter of form; the items of appropriation might as well be lumped together and a million dollars appropriated. "If we cannot restrain the expenditures of the Navy Department within the sum annually fixed, after giving as much as is asked for, is it not the idlest thing to attempt to restrain them by giving less?"³²

31. Adams, *op. cit.*, p. 294. Smith appears to have been incompetent rather than vicious. Randolph, writing to Gallatin in 1805, observes that "the nation has had the most conclusive proof that a *head* is no necessary appendage to the [naval] establishment." *Ibid.*, p. 330. In 1809, when it was proposed to make Gallatin Secretary of State and Smith Secretary of the Treasury, the former remarked that he could not undertake to carry on both departments at once and asked Madison to leave him where he was. *Ibid.*, p. 389.

32. 15 *Annals*, 1000.

A few days later in an attempt to secure the repeal of the salt tax Randolph argued that the only check on extravagance was to reduce supplies within the limits of needs; no reliance could be placed on the appropriation check. "Appropriations," he exclaimed,

have become a matter of form, or less than the shadow of a shade, a mere cobweb of defence against expenditures. You have fixed limits, but the expenditure exceeds the appropriation; and those who disburse the money, are like a saucy boy who knows that his grandfather will gratify him, and over-runs the sum allowed him at pleasure. As to appropriations I have no faith in them. We have seen that so long as there is money in the Treasury, there is no defence against its expenditure.³³

In order to understand the course followed by the departments in incurring deficiencies, it will be found instructive to take a particular instance and follow it through from start to finish. For this purpose a deficiency appropriation to cover an excessive expenditure upon the south wing of the Capitol may be selected. The act, passed April 25, 1808, is cited as an example of such deficiency by Gen. Samuel Smith and the instance may therefore be considered as peculiarly favorable to the Executive.

It must at the outset be understood that the moneys appropriated for public buildings and the ways between them were, from 1802 on, placed by the President in the hands of the Superintendent of Public Buildings, to be disbursed under his direction and accounted for with the Treasury Department. In the execution of this agency the Superintendent was necessarily obliged to rely very much, in certifying and attesting claims for materials and workmanship and in so regulating the operations that the cost of the work should be commensurate with or within the limits of the appropriation made to cover it, on the Surveyor of the Public Buildings, an officer not recognized by the law but employed and appointed by the President alone as the principal architect to design, direct, and combine the whole into one general system and see to its execution; and also to form contracts

33. *Ibid.*, 1063.

with the different subordinate mechanics and with other persons for the various materials wanted in the progress of the work.

In constructing the south wing of the Capitol, the Surveyor, as we find from a committee report on the subject,

keeping mainly in view the more appropriate duties of his own profession, that of executing the work in a style and character which should do honor to his art, and that of accomplishing it also within a time more limited than had been anticipated in the earlier part of the season, appears not to have been impressed with the probability (if, indeed, it should be considered as coming within his province to be so, or to guard against such impropriety) that the expenditure would exceed the general appropriations for the different objects of the public work, till it had actually happened so on a principal one, or was certain to do so to a considerable amount.³⁴

This overexpenditure was not discovered until the close of the year 1806, when, after the appropriation for that year had been wholly disbursed and the accounts of the Superintendent made up, it was found that a considerable portion of the appropriation for 1807 (which was understood to be adequate only to cover the works of that year) had been used to meet the claims of prior years. Perceiving that the then unexpended balances would be insufficient to effect the contemplated objects of the season, the Superintendent informed the Surveyor that he (the Superintendent) would pass no accounts which exceeded the appropriations, as such would certainly be disallowed at the Treasury; he gave him also a view of the funds and invited his attention thereto, from time to time, so as to avoid unauthorized debts by exceeding the appropriations, "which would not only be a violation of a principle of Government which could not be too sacredly regarded, but would also be in contravention of the strict and often repeated injunction of the President of the United States, never to let the cost of the work of any season exceed the amount of the appropriation."³⁵

At this stage of the business the Surveyor laid a statement of the case before some of the principal mechanics and a number of

34. 18 *Annals*, 2791.

35. *Ibid.*, 2793.

them, to whom the greater part of the excess was likely to be due, voluntarily came forward and agreed to progress with the work at their own risk in the fullest confidence that Congress would not receive the benefit of their labor without remuneration and that, under the circumstances, an appropriation would in due time be made to indemnify them. The result was that by the time Congress had assembled deficiencies of \$51,000 had been incurred.

When these facts came to the attention of President Jefferson he transmitted to both Houses of Congress a message pointing out that the appropriations had been much exceeded by the cost of the work done but suggesting no particular course of action.³⁶ This report was referred to a committee of which Stanford was the chairman. The committee on April 5 presented a bill making an appropriation of \$51,000 to cover the unauthorized expenditure; no report accompanied the bill inasmuch as the committee thought that the reporting of a naked bill was "the shortest and best way of getting rid of a bad business."³⁷

There was little chance that the appropriation would be defeated, but Randolph in the debate on the subject denounced the theory that a private agent, for as such he regarded the Surveyor, could bind the government to make appropriations.³⁸

Fifty thousand dollars have been expended on this Capitol beyond the appropriation for that purpose. If you make good this deficit, you may also for five hundred thousand or five million dollars. The officer has gone into an immense expenditure, which is in every point of view illegal and unjustifiable. It is enough for us to make good the expenditures which the Executive chooses to incur for the public good on his own responsibility; but to make good what a private agent has expended, I will never consent. If this is done, there is an end to appropriation laws. This expense has been incurred, not by the Executive, not by the Head of a Department, but by a somebody whom we do not know. . . . Whosoever has done this thing must be responsible to the United States. Take a plain case. You employ a workman to build a house for one thousand pounds. He chooses for some reason to lay out

36. Richardson, *op. cit.*, I, 448.

37. Stanford's remarks, 18 *Annals*, 1974.

38. *Ibid.*, 1973-1974.

more without consulting you. He alone is responsible to those whom he engages; you have nothing to do with the extra expense.

If the bill was agreed to, said Randolph, all control over the expenditure of public moneys must be considered abandoned:

The sum in question is not a great thing for this great nation; but, as Hotspur says, "in a matter of account I would cavil at the ninth part of a hair." Fifty thousand dollars is a smart item in an account. It is more than the whole expense of some State governments. Our chief resources are cut off, and it behooves us to husband our means as carefully as possible. Though the sum is not so great, yet the precedent is of infinitely greater consequence than five millions of dollars.

He therefore moved to reject the bill.

After some debate it was decided not to reject but to recommit the bill, in order to get a complete report of the circumstances surrounding the deficiency. On April 21 Stanford, from the committee to whom this bill was recommitted, reported that, upon the whole, the committee had not been able to discover that the sacred principle of the Constitution, which enjoins that no money shall be drawn from the Treasury but in consequence of appropriations made by law, had been at all violated. A debt had been incurred and the public faith in a manner pledged beyond the real amount of actual appropriation, but the whole had happened in such circumstances as to form an apology not slight in its nature and the force of which, it might be presumed, the House would at once see. They therefore begged leave to report the same bill which they had before reported.³⁹

The bill was brought to its final reading on April 25, the last day of the session. Randolph opposed it at some length "on account of its infringing, as he conceived, every principle of the Constitution and the law; for if this were to be permitted, they might as well open the Treasury and dismiss their accounting officers at once."⁴⁰ A defense was entered by Holland, Stanford, and Smilie.

39. *Ibid.*, 2792.

40. *Ibid.*, 2276. A somewhat similar instance occurred in the Navy Department in 1806. On April 12 J. C. Smith moved to recommit the bill making naval appropriations for the purpose of restoring the provision for completing the marine barracks at the City of Washington. The motion having been carried, it

The question was then taken and the bill passed, 73 to 8. It was approved by the President on the same day.

In the beginning of 1809 a transaction took place so remarkable in character that it immediately became a subject of conversation in both Houses. This was the allowance to General Wilkinson of a claim for rations in spite of an explicit provision of law that the pay of brigadier generals should be \$2 25 a month, "which shall be his full and entire compensation, without a right to demand or receive any rations," etc.⁴¹

On February 13 Hillhouse, denouncing this allowance, introduced into the Senate a resolution that a committee be appointed to report what further regulations were necessary to check the allowance and payment of extravagant claims or unreasonable accounts and to prevent the improper expenditure of public moneys.⁴² The resolution was adopted on the fourteenth and Giles, Hillhouse, and Crawford were chosen.⁴³

was observed by J. Clay that since the House had agreed to strike out the provision for completing the barracks it had been found that more money had been applied to this purpose than had been appropriated and that it had been drawn from the private funds of one of the officers under an understanding with the head of the Department; he moved therefore to restore the item and to appropriate for it \$3,500. No objection was offered to this proposal but Leib said that "he was not very fond of making appropriations in this way—for particular officers to run into unauthorized expenditures, and then to call on Congress to make good the deficiency. Is this a provision for completing the house for the commandant? Is that the marine barracks? If not, then under what appropriation is it made? Is it under that of contingencies? Look at the buildings at the navy yard; is all this expense incurred out of the contingent fund? If it is not, it is not authorized by law. He did not know that he should make any objection to this item; but he thought it full time to check this loose mode of procedure." 15 *Annals*, 1018-1019. In answer to these remarks, Nelson denied that any misapplication had taken place: "The estimates were made, the money appropriated; and when, in the application of it, either from the rise of materials, or other unexpected circumstances, they found a particular object unfinished, was it right to suffer it to be exposed to the weather, and not done for the want of a few thousand dollars; and like a young spendthrift, only half build his house, and let it fall in ruins?" What the old Republicans would have said to these arguments had they been advanced six years earlier, the reader may be left to conjecture.

41. 2 Stat. 133. The case is discussed at length in my (projected) *History of the Accounting Offices*; see the chapter on "Jurisdiction of the Accounting Officers, 1789-1817."

42. 19 *Annals*, 352.

43. *Ibid.*, 387-388.

In the meantime Randolph was attacking the same transaction in the House. On February 3 he secured the appointment of a select committee to investigate Wilkinson's accounts.⁴⁴ But the more general inquiry into the subject of accountability seems to have been left to the Committee of Ways and Means, who, when the appropriations for 1809 were under consideration, unanimously agreed that it would be proper to add to the bill regulations to guard the expenditure of the public moneys.⁴⁵

Presently bills were introduced in both the Senate and the House for amending the acts establishing the Treasury, War, and Navy Departments, the House bill being tacked on to a bill making appropriations for the support of the military and naval establishments. Originally the provisions of these two bills were substantially the same, being founded, it would appear, on a communication from Gallatin to the Chairman of the Ways and Means Committee dated February 4, 1809.⁴⁶ But the Senate, being much under the influence of the Smith faction or, as Gallatin called them, the Ruling Party, was induced by the Secretary of the Navy⁴⁷ to modify its bill in such a way as to render it comparatively ineffectual. The House stuck to the original plan.

The appropriation bill passed the House on February 27, its first five sections containing the provisions for regulating the expenditures. It went to the Senate, where, according to Gen. Samuel Smith, offense was taken that such a subject should be connected with an appropriation bill.⁴⁸ The sections in question were therefore struck out, and the Senate passed its own bill instead.

On March 2 the House proceeded to consider this action. The question was taken on agreeing to the amendment of the Senate to the appropriation bill; it passed in the negative by a vote of 73 to 3. The House then took up the Senate bill to amend the several acts for the establishment of the Treasury, War, and Navy

44. *Ibid.*, 1331.

45. *Ibid.*, 1554.

46. A.S.P., *Finance*, II, 335.

47. Robert Smith's letter will be found in *ibid.*, II, 348. His principal objection was to the clause: "Nor shall any credit be allowed to either of them [agents], except for expenses authorized by law, and for the amount appropriated for the same."

48. 35 *Annals*, 806. General Smith was a Senator in 1809.

Departments. Alston moved that it be rejected, and the motion was carried—51 to 26.

The last day of the session was now arrived and the appropriation bill seemed in a fair way to be lost. The Senate insisted on its amendment; the House, on its refusal to agree. In the evening conferees were appointed with the result that the appropriation bill was separated. The Senate passed a bill substantially the same as the five sections in contest between the two Houses, and the House receded from its refusal to permit these sections to be struck from the appropriation bill.

Such was the origin of that celebrated law of March 3, 1809, which many persons very erroneously have supposed to be the perfection and coping stone of the Jeffersonian system of specific appropriations. It contained many provisions but only two need detain us here. The first was an injunction, now part of Section 3678 of the Revised Statutes, that "the sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other." The second, introduced as a proviso to the first, gave the President of the United States authority, during the recess of Congress

on the application of the Secretary of the proper department, and not otherwise, to direct, if in his opinion necessary for the public service, that a portion of the moneys appropriated for a particular branch of expenditure in that department, be applied to another branch of expenditure in the same department, in which case a special account of the moneys thus transferred, and of their application, shall be laid before Congress during the first week of their next ensuing session.

Crawford, writing in 1817, gives an extraordinary account of the causes which led to the adoption of these provisions:

Antecedent to that period [March 3, 1809] the appropriations were, by some of the Departments, considered as an aggregate sum to be applied, without distinction in their accounts, to every branch of service embraced by the appropriation. In the Navy Department, for instance, there was but one account opened in the Treasury books, because the requisitions made by the Department were drawn for the Navy De-

partment generally, and the sums thus drawn were applied to the naval service, without regard to the amount which had been specifically appropriated for the different branches of the service within that Department.

In changing this practice, the necessity of giving the power to transfer from one head of appropriation to another, according to the exigencies of the service, was foreseen. This power was given to the President; and in order to furnish to Congress the information which it was deemed essential to possess, every transfer of appropriation, together with the application of the money so transferred, was required to be communicated to Congress during the first week of their session thereafter. If no transfers were made, Congress knew the maximum applied to each head of appropriation. If transfers were made, they obtained information equally interesting and useful to them in providing for the wants of the succeeding year. The transfers disclosed to them those branches of the service, in each Department, where the appropriations had been redundant, as well as where they had been deficient. They obtained, without injury, a knowledge of the application of the sum transferred, as well as of the sum originally designated for that object. This was the desideratum intended to be obtained by the adoption of that measure.⁴⁹

This statement, while very positively made, is nevertheless instructive only as it illustrates the degree to which persons in high office will distort history for the purpose of proving a special point. Crawford was anxious to show that the power to transfer appropriations from one head of expenditure to another was part and parcel of the doctrine of specific appropriations.

John Randolph has given a different account and one more consonant with the known facts. Speaking in 1819 on the provision of law permitting transfers, he remarked that it struck him with some unpleasant recollections which he could neither suppress nor conceal:

It was now just twenty years since he first had the honor of a seat in this House. At that time, the persons of the political description to which he had conceived himself to belong, were contending against great abuses and mal-administration generally, but particularly in the fiscal concerns of the State. By the exertions of that party, seconded, he pre-

49. 30 *Annals*, 420-421.

sumed, by the good sense and patriotism of the people of this country, a great revolution was effected in the Government. Among the first recommendations of the Chief Magistrate who succeeded in consequence of it, was that of holding the officers of the Government down to the strict administration of their duties. This, Mr. Randolph said, was one of the cardinal principles on which the old Republican party came into power. He did not wish to revive party feeling by what he should say; far from it—what he was now speaking of was history. Mr. Jefferson—he hoped it was not out of order to name him—came into power, recommending, among other reformatations of abuse, a strict adherence to appropriations. It was in the very last night of his political life, about midnight, that that law, which had just been quoted, was put on the statute book. I did consider it at that time, said Mr. Randolph, as a sort of death-warrant to the principles upon which he came into power, so far as they were connected with that provision. And how came that law upon the statute book? At that time, he said, there were two great rivals for power and interest; one of whom might be considered the ascendant in the Senate, and the other not less so here. That law, Mr. Randolph suggested, was a sort of propitiation from one to the other—a compromise of differences between these two personages.⁵⁰

He said also that he spoke from personal knowledge when he said that there existed at the time, on the part of Albert Gallatin, “the most decided repugnance to the provision respecting transfers of appropriations.”⁵¹

If all the circumstances surrounding the passage of this act be assembled and weighed, it will probably be found that the provision confining the application of public moneys to the objects and amounts specified in the law reflected the influence of Gallatin and was merely declaratory of what, supposedly at least,

50. 35 *Annals*, 787–788. In the same debate Randolph says: “At the moment when he [Jefferson] was about to retire from office, the two Houses had presented him with a bill, clothing him with a power which he not only did not wish to have, but which he had publicly and solemnly said ought not to belong to any Executive. It would have been highly proper in him to have refused his signature to that act. But might it not be supposed that, at the last moment of his political service, when he would have been more than human had he not been agitated by a variety of passions, the provision in question had escaped even his keen sight?”

51. *Ibid.*, 822.

was existing practice, and that the provision allowing transfers to be made by the President during the recess of Congress reflected the influence of Smith and sanctioned what was perhaps already being done covertly.⁵² It is known that the two men were in opposition on the bill, for on March 2 Alston said on the floor of Congress that he was authorized by the Secretary of the Treasury to state that the difficulties urged by the Secretary of the Navy against the proposed plan did not exist and that the forms for carrying the bill into effect were already provided.⁵³

52. Smith would seemingly have liked the power of transfer to have been given without restriction in time. A.S.P., *Finance*, II, 340. But the passage is not conclusive.

53. 19 *Annals*, 1554.

CHAPTER IV

THE GROWING LAXITY: 1809-1820

WITH the advent of Madison's administration the insistence of Congress on the doctrine of specific appropriations was much diminished. In a flooring speech delivered in 1810 Matthew Lyon of Kentucky, an extreme democrat, who had by now passed into the opposition, railed at his colleagues:

I confess that I do not understand that kind of republicanism that changes its doctrines with a change of power. I like that steady republicanism which will, when in power, practise the principles and doctrines advocated by Republicans out of power. What principle has been more zealously proposed and advocated, and oftener reverberated in the public ear, than *specific appropriations*; and yet how is that principle scouted now by self-styled Republicans, when in power and called to act upon it! . . . Republican gentlemen forget all their high-sounding professions in favor of the Republican doctrine of *specific appropriations*, and shelter themselves under a custom which they say was in practice under the Administration of those who made no such professions, as if they acknowledged themselves that their former professions are now to go for nothing.¹

Madison's whole administration was taken up with war or the preparations for war and the debate over specific appropriations faded into the background or disappeared entirely. While the appropriation acts contained numerous heads of expenditure, many more than in the earlier years, they caused the departments no inconvenience inasmuch as the power of transferring moneys from one head to another was freely exercised. Indeed, the departments went further and reverted to the old Federalist practice of mingling appropriations by executive interpretation. A report submitted to the Senate in 1816 by the Secretaries of

1. 21 *Annals*, 1361-1362.

the four great departments states in a note that "by late regulations, the pay and clothing appropriations [for the army] are in fact considered as one appropriation."² There is no comment, no explanation of how the "late regulations" could be reconciled with the law, but simply the bald parenthetical statement of fact.

By the end of 1816 the disregard in practice of the limitations imposed in the appropriation laws reached so high a pitch that it attracted the attention of Calhoun. Accordingly, on December 30 he offered for consideration the following resolution:

Resolved, That the Committee of Ways and Means be instructed to inquire into the expediency of repealing so much of an act, entitled "An act further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments," passed the 3d of March, 1809, as authorizes the President of the United States to transfer appropriations.³

Calhoun supported the propriety of his motion by remarking briefly

on the evils—great evils, he said—which resulted to the public interests from the practice, particularly in the War Department, of permitting funds to be diverted from one object of appropriation and applied to another. He urged the necessity of applying a remedy, and that was to compel in the Departments a rigid adherence to specific appropriations.⁴

The resolution was presently agreed to.

On December 31 Lowndes, the Chairman of the Committee of Ways and Means, wrote to Crawford, the Secretary of the Treasury, asking his opinion of the proposal. It seems that the suggestion was made that to compensate for the withdrawal of the power of transfer the heads of appropriation would be reduced in number and the discretion of the Executive correspondingly enlarged.

To this letter Crawford replied on January 1, objecting strongly to the proposal:

2. A.S.P., *Miscellaneous*, II, 398.

3. 30 *Annals*, 374.

4. *Ibid.*

By reducing the heads of appropriation, the necessity of exercising the power of transfer will, no doubt, be considerably diminished. During a period of peace, and after the Naval and Military Establishments have remained for a considerable time without alteration as to organization or force, it is probable that it will be but rarely exercised. It is believed, however, that a full consideration of the subject will lead to the conviction that the power ought to be retained in peace as well as in war. A change in our relations with a foreign State, during the recess of Congress, which would render it prudent to concentrate the regular force in any section of the country would increase the expense of the Quartermaster's department beyond the regular appropriation. Expenses incurred under such circumstances must generally be discharged as they are incurred. This could not be effected without the power of applying the redundancies of other appropriations to meet the deficits produced by such an emergency. . . . Without this power, the War and Navy Departments would be compelled to make ample estimates for every branch of the service, as a deficiency in any one might be productive of serious consequences. The idea that economy will be enforced by repealing the provision will, I am confident, be found to be wholly illusory. Withdraw the power of transfer, and the Departments will increase their estimates. In some branches of the service there will be redundancies, in none will there be deficiencies. These redundancies, continuing from year to year, will be more likely to excite to profusion in those branches of the service than if they were transferred to the appropriations which were insufficient. The law, as it now stands, furnishes those whose duty it is to appropriate the money and superintend its application with all the information which is necessary to the execution of that high trust. By reducing the heads of appropriation, the labor of keeping the accounts of the Treasury, as well as of the other Departments, and in the settlement of accounts, will be greatly diminished. This reduction, however, as before stated, will not supply the place of the power of transferring from one branch of the service to another.⁵

Crawford recognized, however, that these arguments, while they might be applied to the current expenses of the land and naval forces authorized to be kept in service during the year, could hardly be extended to cover objects of expense more or less permanent in their nature. He accordingly suggested that the ap-

5. *Ibid.*, 421.

propriations for arming the militia, for the armories, for arms and military stores, and for the permanent increase of the navy might with propriety be exempted from the operation of the transfer power.

A similar correspondence between the Chairman of the Committee of Ways and Means and the Acting Secretary of War revealed that, besides other instances of transfers of the moneys appropriated by Congress from the objects to which they were intended to other objects not contemplated, the money appropriated to the construction of arsenals had in part been applied to the repairing of arms and erecting accommodations for the quartermasters.

On February 17, 1817, Calhoun called the attention of the House of Representatives, in Committee of the Whole, to this correspondence and denounced the practice of transfer in the strongest terms:

These might be proper objects of expenditure. This was not the point of his censure. He objected that the money had not been applied to the objects for which it was appropriated. It was a sheer abuse of power, not justified by the existing laws, as lax as they unfortunately are on this point. The law authorizes a transfer (under the immediate direction of the President) of the money appropriated, from one object to another object also authorized; and in every instance, in which it is not done by his authority, or in which it is applied to an object not authorized, or where there has been a transfer of appropriation from an object, without there being a surplus of the sum appropriated to that object, he conceived it to be an abuse. The further we progress in this business, the more apparent is the necessity of abolishing the whole power of transfers. It has and will continue to introduce confusion and abuses in the disbursements of the public money. He regretted that the Committee of Ways and Means had not acted on the resolution which he introduced on this subject at an early period of the session; and, as late as it was, he hoped that they would report before its termination.

Abuses of this kind could not be permitted without endangering the Constitution; it was their nature to grow, and what was embezzlement at first would become right in a few years; hence

Congress must be vigilant and suppress the first symptoms of abuse.

We have the sole power to raise and apply money. It is the sinew of our strength. Not a cent of money ought to be applied, but by our direction, and under our control. How stands the fact? We are told that most extensive and superb stone barracks, sufficient to receive two thousand troops, have the last year, been erected near Sackett's Harbor, though not a cent was appropriated to this object. It is even reported to have been done without the consent of the War Department. It is further stated that a military road is constructing from Detroit to Ohio. The barracks and road may be proper; if the soldiers are to be employed on them, it is much better than an idle garrison life. In fact, he knew not how the military can, in peace, be better employed than in constructing of such roads as may be useful in war. It was not to the thing itself that he objected. He censured the application of the public money to such objects, without ever submitting the question to Congress. It is an evil that cannot be tolerated, unless we are ready to become mere cyphers.

Some members conceived a cure to be impossible but not he, Calhoun. What was to be done? In the first place he conceived it to be indispensable that the appropriations be made in many respects more specific; he rejoiced to see the Committee of Ways and Means commence this system in the Ordnance Department and hoped they would extend it to the Quartermaster Department and other heads where the appropriation was general. "But," he continued,

specific appropriations were of no avail, under our present system of transfers. If that power of dispensing with law is to continue, he would be adverse to any estimates, but would put the gross amount of revenue under the direction of the President, to be used as he thought proper. It is then indispensable, that the right of transferring, or rather dispensing with appropriation, be repealed and prohibited.⁶

Calhoun's suggestion that the proviso of 1809 be repealed was

6. *Ibid.*, 956-959. He recommended also that the year of appropriation and the year of expenditure be made to coincide, and that the Committees on Expenditures should descend into the details of the accounts. But these are subjects reserved until Part II.

not, in the end, adopted. However, on March 3, 1817, an act passed in which it was declared that nothing contained in the Act of 1809 should be construed to authorize the President to direct any sum appropriated to fortifications, arsenals, armories, customhouses, docks, navy yards, or buildings of any sort, or to munitions of war or to the pay of the army or navy, to be applied to any other object of public expenditure.⁷ This act was of course sufficiently agreeable to Crawford, especially as by an act of the next year it was not made to apply to appropriations made for the support of the military establishment previous to January 1, 1817.⁸

It cannot, however, be said that this legislation was very effective in restoring respect for the system of specific appropriations. Clay, speaking in 1819, relates this anecdote:

Some years ago it had been the custom, now abolished, to use in this House a beverage in lieu of water for those members who preferred it. A member of the House said he was not in the habit of using this sort of substitute for one of nature's greatest and purest bounties, but would prefer something stronger. The officers of the House said they should be glad to gratify him, but did not know how they could with propriety pay for it out of the contingent fund. Why, said the member, under what head of appropriation do you pay for this syrup for the use of the members? Under the head of stationery, the officer said. Well, replied the member, put down a little grog under the head of fuel, and let me have it.⁹

Specific appropriations were a subject for jest—even among Congressmen.

It might be supposed that the flexibility allowed to the Executive by the Act of 1809 was sufficient to have justified on the part of Congress an expectation that the departments would confine their expenditures at least to the aggregate sums appropriated for their use. If this expectation existed it was doomed to disappointment. In 1819 a practice was discovered far more reprehensible than the mere transfer of appropriations from one head to another. This was the bringing forward of unexpended bal-

7. 3 Stat. 390.

8. *Ibid.*, 406. (Repealed May 1, 1820.)

9. 33 *Annals*, 456.

ances from the appropriations of former years and using them to supplement the appropriations of the current year where the latter might have fallen short.

It will be recollected that the Act of 1795, passed at the instance of Hamilton, had provided with certain exceptions that any sum remaining unexpended upon any appropriation for more than two years after the expiration of the calendar year in which the appropriation act was passed, was to go to the surplus fund. It is also to be understood that the moneys appropriated for the use of the War and Navy Departments were prior to 1822 drawn from the Treasury by warrants of the Secretary of the Treasury countersigned by the Comptroller, and placed to the credit of the Treasurer, as agent or banker of those departments, who disbursed them on warrants drawn by the Secretary of War or of the Navy, as the case might be, countersigned by the proper Accountant or, after 1817, by the Second Comptroller. This mode of disbursement, it was now discovered, had been utilized to defeat the purposes of the Act of 1795. For by a convenient interpretation of that act a distinction had been drawn between appropriations unexpended on the books of the Treasury proper and appropriations unexpended on the books of the Treasurer as agent. Only the former were considered subject to cancellation through the machinery of the surplus fund.

The effect of this construction of the law was to place considerable sums of money under the control of the Secretaries of War and of the Navy beyond the amounts annually appropriated for the service of their departments. This was particularly true after the cessation of the War of 1812, for, peace having come unexpectedly, large balances were left in the hands of the Treasurer, as agent for the War and Navy Departments, from the appropriations which had been made to conduct a vigorous campaign in 1815. The existence of these funds made it not always necessary for these departments to rely on Congress for grants.

It was not until late in 1819 that the attention of Congress was drawn to these facts by a rather remarkable accident.¹⁰ The

10. Randolph, however, had noticed as early as 1810 the failure of these departments ever to return to the Treasury the unexpended balances of their

circumstances are as follows: On March 3, 1819, at the last hour of the last session of the 15th Congress, acts were passed for the suppression of the slave trade and for the punishment of the crime of piracy; but no appropriations were made for the extra services required to be performed. The President was in a dilemma: he might decline to execute the laws, alleging the defect of appropriation, or he might fit, arm, and man the requisite vessels and trust that Congress would afterward appropriate the money necessary to carry into effect its own laws. He chose, as it was said, the more magnanimous part and assumed a responsibility. Now it was clear to the Secretary of the Navy that the estimates for the current year, if applied to these objects, must fail in meeting the expenditures for which they were originally intended; but at the same time, the duty being regarded as imperative, no effort was spared to execute the duty imposed on the Executive. Among other things the ship *Cyane* was repaired at an expense (since she was very rotten) almost equal to building anew a ship of her class.¹¹ The result, as it had been anticipated, was that early in the summer the appropriation for the "Repairs of Vessels" was found to have fallen short. In this emergency the President was induced to replenish the deficiency by the exercise of his transfer power. On August 25 he ordered the Second Comptroller of the Treasury to transfer to the appropriation for repairs sums aggregating about \$129,000, these to be taken not from excesses in the appropriations for the current year but from sundry old balances remaining unexpended on the books of the Navy Department. Among these may be mentioned those for "Repairing, etc. the frigates *Chesapeake*, *Constellation*, and *Adams*," and for "Building Vessels of War on Lakes Ontario and Champlain," which were balances of several years' standing.¹²

appropriations: "If it be true, as alleged, that dead men tell no tales, it must be also true that they can draw no rations. But I can demonstrate, however true in common sense, that is not true in the Treasury, for there never has been an instance of one dollar refunded in the Army or Navy for persons not in place, although the estimate is always made up on the supposition that the complement of men is complete and full." 21 *Annals*, 1615.

11. 35 *Annals*, 108; 16th Cong., 1st sess., H.Doc. 10.

12. A copy of the President's order is printed in *ibid.*, 12.

This warrant of transfer, being alluded to in a letter from the Secretary of the Navy to the Chairman of the Committee of Ways and Means explanatory of the expenditures of appropriations for the naval service during the year 1819,¹³ immediately became an object of interest to the members of the House. One of these, Storrs of New York, remembering that the Act of 1795 required that all unexpended balances of transfers remaining in the Treasury should after two years be carried to the surplus fund, requested Gen. Samuel Smith (now the Chairman of the Committee of Ways and Means) to explain by what construction of the law the power had been conveyed to the President of bringing up these old balances and creating from them a fund to be expended during the current year.

Smith in reply pointed to the provision in the Act of 1809 applicable to the transfer of appropriations and a debate was commenced on this subject in which Storrs, Smith, Mercer, Floyd, Lowndes, and Randolph took part. When the discussion was adjourned it was with the understanding that the Chairman of the Committee would communicate to the House such information on the subject as might be obtained by application to the proper departments.¹⁴

13. *Ibid.*, 10.

14. 35 *Annals*, 804. Lowndes' views on the subject of mingling appropriations were very similar to Wolcott's: "It would be obvious to the House, he said, on a little reflection, that one of two things must be done: there must either be allowed to some authority of the country the power of transferring appropriations from one object to another, or, in respect to all objects depending on contingencies, on the fluctuation of the market, the appropriations must be made to an amount much larger than at the time of making them may appear necessary. Congress must, if no power be given to transfer appropriations, appropriate, in all such cases, not what is necessary now, but what may be necessary in the greatest possible fluctuation of the market. To insist upon a precise estimate of the amount each branch of the public service may require for a year ensuing, is to insist upon a degree of accuracy not to be expected. If a strict adherence to the letter of appropriations was required, Congress would be under the necessity of leaving the amount of appropriations for specific objects larger than necessary, and of greater amount than ought to be placed at the discretion of the Government. A proper jealousy on the part of this House to prevent the diversion of public money from the objects for which it is appropriated, could not but be salutary; but some power of transferring appropriations is necessary, and being necessary, it appeared to him the power was now as well lodged as might be." *Ibid.*, 780. Yet Lowndes was a Republican.

Accordingly the next day, December 28, Smith attempted a defense of the particular transfer which had caused the discussion. Referring to the mode of disbursing moneys appropriated for the use of the War and Navy Departments, he explained that all unexpended balances in the Treasury Department went after two years to the surplus fund; those in the hands of the Treasurer of the War and Navy Departments did not—they were applied as wanted for the public service.

I again repeat that the uniform practice under those laws has been to consider all moneys drawn by the War and Navy Departments from the Treasury, and deposited with their treasurer, as taken completely out of the purview of surplus fund, and, until entirely expended, subject to the President's power, under the act of 1809, to transfer the unexpended balances to any other object in the same department, for the public service.¹⁵

In proof of these statements he offered three documents, to wit, the instructions of the Second Comptroller to the Accountants for the War and Navy Departments outlining the alterations in the mode of keeping the accounts necessary to carry into effect the provisions of the first section of the Act of 1809; a letter from the Secretary of the Treasury on the operations of the surplus fund, and some remarks of the Secretary of the Navy on the subject of transfers. These documents will be found in No. 18 of the House Documents of the 16th Congress, 1st session. One of them (the second) may be quoted here:

TREASURY DEPARTMENT.

27 December, 1819.

Sir: In reply to your letter of this date, requesting me to state whether the moneys appropriated for the Naval, or other service, which have been drawn out of the Treasury, and deposited with the Treasurer of the United States, as agent of the Navy Department, have been subsequently repaid into the Treasury, or considered under the control of the Secretary of the Treasury, I have the honor to state, that, money which has been placed in the hands of the Treasurer of the United States, for the use of the War and Navy Departments, is never by him

15. *Ibid.*, 807.

repaid into the Treasury, and is not considered under the control of the Secretary of the Treasury. Repayments into the Treasury are frequently made, by the officers of those Departments, of moneys placed in their hands for disbursement, but such repayments are considered as increasing the funds applicable to the service of the Department for which they were originally appropriated, and have, it is believed, never been carried to the surplus fund.

I have the honor to be,

Your most obedient servant,

WM. H. CRAWFORD

Hon. Smith Thompson,
Secretary of the Navy.

Having cited these documents, Smith conceived that he had entered a sufficient defense of executive practice. He complacently asked:

Has the construction given to those laws by the Executive been erroneous? Of that every gentleman will determine for himself if it has. Congress has had it every year presented to their view; it has not been kept a secret; a report of those unexpended balances, in the army and navy, has annually been before every member, and the statement printed, showing those items (which caused the present discussion) as balances unexpended for the last three years, decreasing annually, according as they were in part transferred to some other object of public service. The whole subject has been faithfully reported to Congress; no objection having been made, no notice taken, Congress did negatively approbate the construction given to the law. At all events, no censure can attach to the present head of the Navy Department. He has conducted his department agreeably to the rules prescribed by the Comptroller, and to the practice which had uniformly prevailed. If another and different construction be considered more advantageous to the public interests, a law to remedy must be enacted.

But Storrs was unwilling to accept this explanation. He had recently, he said, had occasion to examine the mode in which appropriation accounts were kept, and he was therefore not surprised to learn of the extraordinary interpretation which had been given to the power of transfer. He had determined at the earliest opportunity to bring the subject before the House that,

after a full knowledge of the evasion of the law of 1795, the evil might be corrected. But he was surprised to learn that repayments into the Treasury had been carried back to the credit and been considered as increasing the funds of the departments for whose use the original appropriations had been drawn out. "The original introduction of such a practice was justified by scarcely a semblance of authority."

He then continued with an analysis of the laws quite contrary to that advanced by Smith:

The law of 3d March, 1795, provides that, in regard to all sums remaining unexpended upon any appropriations, (except those relating to the public debt, or where a longer duration was specially assigned,) for more than two years after the expiration of the calendar year in which the act of appropriation shall have passed, such appropriation shall be deemed to have ceased and been determined, and the sums so unexpended shall be carried to the surplus fund. The proviso to the first section of the act of March 3, 1809, authorizes the President, in the recess of Congress, to direct that a portion of the moneys, appropriated for a particular branch of expenditures, be applied to another branch of expenditure in the same department. The chairman of the committee now informs us that the practice has been, that the moneys appropriated for the use of the army and navy are respectively drawn from the Treasury, on the warrant [requisition] of the heads of the departments, and placed in the hands of the Treasurer of the United States, as agent for the respective departments; that, when once drawn out on these warrants, such moneys are no longer considered as in the Treasury; and, although large balances of these appropriations may remain unexpended for any indefinite length of time, are deemed to be exempt from the operation of the law of 1795, but may remain in the Treasurer's hands for years, subject to be brought forward under the power of transfer, and collected into a fund for the use of the departments, as exigency or convenience may require. This practice, said Mr. S[torrs], so far from being consistent with the object and execution of the law of 1795, is directly opposed to its manifest intention and spirit. The distinction between balances in the Treasury and in the hands of the Treasurer, is totally unwarranted by the statute. It does not relate merely to balances remaining undrawn by warrant from the Treasury; its terms are general and unqualified, and include any sum remaining unexpended, without

reference to its intermediate transmission to the departments, or to any regulations which might be adopted in the mode of keeping the public accounts. After two years, these balances cannot be reached by the power of transferring appropriations; for the letter of the act expressly declares that after that period such appropriations shall be deemed to have ceased and determined. No such appropriations, therefore, exist, on which the power of transfer could operate. The practical effect of the administration of the finances, under the system which has been thus introduced, has rendered the law of 1795 little else than a dead letter. If gentlemen will examine, they will find that, while for several years past large balances have been brought forward and expended, the product to the surplus fund, from the source of unexpended appropriations, has been scarcely an item of the account. The framer of the law of 1795 could never have conceived its practical inutility by this perversion of its spirit. So pertinaciously has the error been persisted in, said Mr. S., that I have been informed that a former Secretary of the Treasury, on a consultation with him by one of the heads of department, relative to the disposition of large balances, which at one time had accumulated, answered, that he knew of no method by which they could be legally or regularly brought back into the Treasury, and that the only way in which they could be disposed of, was to disburse the moneys, *volens volens*, for the uses of the department. It is the duty of the House to interfere and check the abuses to which such a system tends. In the hands of a profligate and corrupt administration, (and we have no reason to believe that we shall hereafter be exempt from the common lot of nations), the accumulation of these funds may enable them successfully to defy even the power of Congress. For one, I will trust no administration with pecuniary resources beyond the annual appropriations voted by this House. There are many considerations which might be urged, and I hope successfully will be, against the practice which is now developed, when this subject shall be brought before us for legislation immediately in relation to it.

In support of these arguments Henry Clay now raised his mighty voice:

The law of the land required, in regard to appropriations, that those which remained unexpended for two years should be carried to the credit of the surplus fund, and thus be brought again within the power of the Legislature. Was it ever contemplated, he asked, by the Con-

gress who passed that law, or in the expectation of any member of the House, that this law would be evaded, by withdrawing the fund from the power of the Treasury, and placing it in the hands of the Treasurer, and thus reserving to a particular department, or to the Executive branch of the Government, the power to apply this money at its pleasure, within the limitation only that it be applied to some object consonant to the character of that for which it was originally appropriated? But was it not more strange, if possible, that whilst by this transfer from the Treasury to the Treasurer of the Fund, it was withdrawn from the former, still, under another provision of law, it is yet in the power of the Treasury Department, and by a transfer is subjected to its disposal? By being withdrawn from the Treasury under one statute, it would have been thought to have been equally taken out of its reach under the provisions of any other statute. But this, it appeared, was not the practice of the Treasury. He was far from intimating, or thinking, that any serious abuse existed, except that of the statute, which certainly ought to be repealed or modified.

The silence of Congress on this subject, he said further, was not to be construed as consent, since perhaps not ten members had any knowledge of the practice.

These remarks suggested a collateral topic. Such transfers, said Clay, were bad enough, but the exceeding of appropriations was equally to be condemned. Had it occurred but in a single instance, he should not perhaps have noticed it, but there was a habit of transcending the law which ought to be protested.

Are we to lose our rightful control over the public purse? It is daily wrested from us, under high-sounding terms, which are calculated to deceive us, in such manner as appears to call for approbation rather than censure of the practice. So extended was the practice, he said that there is scarcely an officer, from the youngest menial in the service of the Government, upwards, that does not take upon himself to act *upon his responsibility*.

Where, he asked, was the difference between drawing money from the Treasury without previous appropriation by law and incurring obligations for which Congress was morally bound to appropriate? The difference was in name only. And Clay called upon the members to say whether they did not feel themselves

constrained to make good these deficiencies and to authorize *ex post facto* what they would have denied *a priori*.

The discussion of this subject was continued until sunset but nothing was concluded.¹⁶ Finally Lowndes submitted two resolutions, which were adopted the next day in a modified form. One called upon the Committee of Ways and Means

to inquire into the expediency of providing, by law, that any moneys, although "ordered for the use" of the Department of War or of the Navy, by warrant from the Treasury, which shall remain unexpended in the hands of the Treasurer for more than two years after the expiration of the calendar year in which the act of appropriation shall have been passed, shall be carried to the surplus fund, as they would be if not ordered for the use of such departments, excepting always such moneys as may be appropriated for a purpose for which a longer duration is specially assigned by law.

The other called upon them to investigate the desirability of requiring the Secretary of the Treasury to add to his estimates each year a statement or estimates of all the unexpended balances of appropriations, whether in the Treasury or in the hands of the Treasurer as agent of the War and Navy Departments, which might be subject to the disposition of the Executive during the current year.¹⁷

Having adopted these resolutions, the House, in Committee of the Whole, resumed its discussion of the bill making additional appropriations for the navy. Storrs moved to amend it by inserting a new section:

And be it enacted, That the sums appropriated by this act shall be solely applied to the objects for which they are respectively appropriated, and to no other, notwithstanding the authority vested in the President of the United States by the first section of the act, entitled "An act further to amend the several acts for the establishment and regulation of the Treasury, War, and Navy Departments, passed on the 3d day of March, 1809."¹⁸

This amendment was agreed to, 68 to 59.

16. *Niles' Register*, XVII, 303.

17. 35 *Annals*, 820, 821.

18. *Ibid.*, 822.

The Committee then rose and reported the bill to the House as amended, and, the question being on agreeing to that amendment, a further debate ensued. In this Brush argued, in extenuation of the existing practice, that the Act of 1795 applied only to *balances remaining in the Treasury* because, forsooth, the Secretary of the Treasury could have no official knowledge of the condition of moneys withdrawn from the Treasury on the requisition of the proper department and remaining unexpended in the hands of the Treasurer as agent:

Such moneys were not then unexpended in the Treasury. Drawn out, they were in a course of expenditure, as much so as if paid over to any subordinate officer—the paymaster, for instance—of either department, to be disbursed in payment to the Army or Navy. If a balance remained unexpended in the hands of a paymaster, could the Secretary carry that to the surplus fund? How should he know the fact, and the amount? The Secretary adopted the correct principle of considering the money expended when thus drawn from the Treasury; and the practice of disbursing the same, as agent of the departments, upon their orders, was convenient and administrative, according to the spirit and letter of the law. He could not officially know that money, or any portion of it, remaining in his hands, as such agent, was unexpended. The law did not authorize him so to consider it. The expenditure could only be known in the department to which the money belonged. It would be expended by engagements made or debts contracted, though not actually paid, in fulfilment of such engagements, or to the satisfaction of such debts, being bound for that object. It is impossible, therefore, the Secretary of the Treasury could know when the money was expended, or what remained unexpended, otherwise than by the warrant in virtue of which it was drawn from the Treasury. With that, his responsibility and duty terminated, and his authority and control over the money ended.¹⁹

He objected also to the proposal to alter the policy and practice in a particular case, in relation to *one* department, as implying a reflection upon that department and the Executive:

That expenditures have exceeded appropriations, is not a new thing, peculiar to this department; it has, perhaps, happened with all, and

19. *Ibid.*, 824.

been frequent in the Government for many years; known to the Legislature, and not hitherto complained of. Why now select this department for this precision in legislation—this extraordinary circumspection? Acts of the last Congress, passed late in the session, intended to provide efficient means to suppress the slave trade and piracy, by authorizing the Executive to use the naval force of the country for that object, were made for the public good; and it was expected the duties enjoined by them would be performed. The expenditures which make this appropriation necessary, have been occasioned by that service, to which adequate means were not provided or furnished by the Legislature, and the fault lies with them if there be any. The faith of the nation may be considered pledged to provide the ways and means for this expenditure. I am disposed to meet this duty and perform it in the usual way, and shall vote against the amendment.²⁰

But Storrs would not admit the propriety of these conclusions. To the objection that the restriction might be construed to imply censure on the Navy Department he said that he trusted the House would never from mistaken notions of delicacy decline to interfere, should it become necessary to check abuses or correct the misconstruction of laws.

To whom does the honorable gentleman suppose the departments to be responsible, unless to the House of Representatives, at whose will they were created, and at whose pleasure they exist? At what tribunal would he have them answer for the public expenditure unless to this House? Are they clothed with such attributes that the House should refuse to exercise its right of controlling the disbursement of the public money in deference to their official sanctity? Would the gentleman wish us to forbear the exercise of our ordinary power of legislation lest the sensibility of the departments should be excited? The only course by which we can insure their respect is the firm and independent discharge of our duty to the nation. Even the agents to whom the execution of our laws is intrusted instead of respecting us for our servility to their views, would justly laugh at us for our tame subservience. Whatever may be the effect of our legislation, or whatever inference may be derived from it, this House he hoped would do its duty whenever a fit occasion was presented for reform in any branch of the Government.²¹

20. *Ibid.*, 825.

21. *Ibid.*, 826.

As for Brush's contention that the public faith was pledged to make good the excess expenditures of the Navy Department, he said that he was of a very different opinion.

It is true, that it has become fashionable to disburse the public moneys without appropriation, and then claim its sanction by the passage of a law of indemnity, to cover the excess of expenditure; but the public faith, in the only true and appropriate sense of the term, is pledged in none of these cases. We have so often been told of this sort of pledge of the public faith, that I am tired of hearing this perversion of terms reiterated in our ears. The funds of this nation can, in no sense whatever, be pledged by any power of the Government, except with the previous concurrence of this House. All expenditures without our consent are unauthorized. Not even the Executive, much less the heads of departments, are vested with authority to prejudge the application of the public money. It is time, I fear, that we should travel back to the Constitution. The House of Representatives are the immediate guardians of the Treasury, and we have lately had too many of these dangerous appeals to this House to sanction anticipated objects of expenditure. Our power will soon be frittered away, and our Constitutional discretion become merely ideal and visionary, if we listen tamely to this sort of doctrine. We are not sent here to record the edicts of the other branches of the Government, but to express the public will. The disposition of the public moneys is lodged exclusively in our hands, and to us has the nation confided the trust of protecting its revenue and resources against the designs or the abuses of power. We only can lawfully direct their application; and the safety of the nation depends on our faithful and vigilant discharge of that duty.

When the question was taken on concurring with Storrs's amendment as agreed to in the Committee of the Whole, it was decided in the negative—80 to 59.

The debate on the military appropriation act for this year (1820) was largely concerned with another abuse, namely, the practice of the departments of making contracts in anticipation of appropriations to fulfill them. "I protest," said one member, against the practice of permitting the Heads of Departments to legislate for Congress, and to pledge the funds of the Government to any extent at their pleasure. As a general principle, contracts ought not

to be made by officers of the Government but under the authority of law. . . . Contracts ought not to be made in anticipation of appropriations hereafter to be made; because circumstances might arise in the following year to prevent Congress from appropriating anything. Nearly such a state of things indeed now existed. In time of war, necessity might justify a departure from a rigid adherence to this rule; but in time of peace there was nothing to justify it.²²

Clay was of the opinion that Congress should interpose to stop this abuse. The practice of exceeding expenditures was not, he said, confined to one department but the disease had pervaded all departments; unless the House should, on some occasion, withhold an appropriation in some case where an expenditure had been made without authority the evil would go on to the subversion, if not of the Constitution, of all law on the subject. And he constantly repeated the idea that the money appropriated ought to be considered the limitation of the power of the Executive to make contracts.

The defenders of the opposite view seem to have had difficulty in replying to these arguments. But they fell back on what might be termed the prescriptive right of the executive departments to bind the Legislature to make appropriations, and on the necessity of the particular item in the appropriation bill which gave rise to the debate, namely, the item for erecting fortifications. These were necessary because "large specks of war" were visible on the horizon and the cities of America would be demolished unless the work was done without delay. Presently the blank was filled with \$800,000.

The defeat of Storrs's amendment to the navy appropriation bill and of the attempt to withhold the appropriation for fortifications did not, however, end the discussion of these subjects. On January 12, 1820, Samuel Smith, from the committee to whom Lowndes' resolutions had been referred, had reported a bill in addition to the several acts for the establishment of the Treasury, War, and Navy Departments. This bill, as subsequently amended, became law on May 1.²³ It was an attempt to put an end to some of the abuses which had been brought to light.

22. 36 *Annals*, 1620, 1621.

23. 3 *Stat.* 567.

The Act of 1820 contained three distinct sets of provisions: those relating to the operations of the surplus fund; those relating to the transfer of appropriations from one head of expenditure to another; and those relating to the incurrence of expenditures without authority of law. To these may be added some provisions of a miscellaneous or minor nature.

By the first section of the act it was made the duty of the Secretary of the Treasury to cause to be carried to the account of the surplus fund any moneys appropriated for the War or Navy Departments which might remain unexpended in the Treasury or in the hands of the Treasurer as agent for those departments, whenever he should be informed by the Secretaries of those departments that the object for which the appropriation was made had been effected. And it was made the duty of the Secretaries of the War and Navy Departments "to cause any balance of moneys drawn out of the Treasury, which shall remain unexpended after the object for which the appropriation was made shall be effected, to be repaid to the Treasury"; such moneys, when so repaid, were to be carried to the surplus fund.

The effect of this section was to extend the purview of the Act of 1795 to *all* moneys remaining unexpended "after the object for which the appropriation was made had been effected," whether in the Treasury proper or in the hands of the Treasurer as agent. But it went further. It permitted money to pass to the surplus fund *at any time*, even *within two years* from the expiration of the calendar year in which the appropriation act was passed. This last innovation, if such it was, does not, however, seem to have the importance which Berrien later attached to it.²⁴

The second section of the act reached the case of moneys remaining in the hands of the Treasurer as agent after the two-year period, the object of which had *not* been effected. This provided that

whenever any moneys, appropriated to the Department of War, or of the Navy shall remain unexpended, in the hands of the Treasurer, as agent of either of those Departments, for more than two years

24. 2 *Opinions of the Attorney General*, 443.

after the expiration of the calendar year in which the act of appropriation shall have been passed, or to which it refers, it shall be the duty of the Secretary of such Department to inform the Secretary of the Treasury of the fact, and the Secretary shall thereupon cause such moneys to be carried to the account of the surplus fund;

but with a proviso that when an act making an appropriation should assign a longer duration for the completion of its object, no transfer of any unexpended balance to the account of the surplus fund should be made until the expiration of the time fixed in such act.²⁵

The third section is of an occasional nature. The fourth declares that nothing contained in the Act of 1809 shall be construed so as to allow any appropriation whatever for the service of one year to be transferred to *another* branch of expenditure in a *different* year; and it absolutely forbids any transfers of appropriations after they have been placed in the hands of the Treasurer as agent. Henceforth transfers could be made only while the money was still technically in the Treasury, between different heads of expense in the same year, and between the same heads of expense in different years.

The fifth section further restricted the liberty of transfer, for it amended the act to declare

that the President shall be authorized to direct a portion of the moneys appropriated for any one of the following branches of expenditures in the Military department, viz.: for the subsistence of the Army, for forage, for the medical and hospital departments, for the quartermaster's department, to be applied to any of the above mentioned branches of expenditure in the same department; and that the President shall be also further authorized, to direct a portion of the moneys appropriated for any of the following branches of the Naval department, viz.: For provisions, for medicine and hospital stores, for repairs of vessels, for clothing, to be applied to any other of the above mentioned branches of expenditure in the same department.

25. "The Secretary of the Treasury," says Berrien, "was thus to be officially informed that these moneys were in the hands of the agent of the War or Navy Department, and authorized and required, without the further intervention of the Secretary of War, or of the Navy, to transfer them to the surplus fund." *Ibid.*, 446.

And it closed with the injunction that "no transfers of appropriation, from or to other branches, shall be hereafter made."

The sixth and seventh sections related to the incurrence of unauthorized expense. The Secretaries of State, Treasury, War, and Navy were enjoined not to make contracts except under a law authorizing the same or under an appropriation adequate to its fulfillment; and the purchase of land was forbidden except under a law authorizing such purchase. An exception was allowed in the case of contracts for the subsistence and clothing of the army and navy and contracts by the Quartermaster Department which might be made by the proper Secretaries.

The eighth section, almost in the wording of Lowndes' second resolution, made it the duty of the Secretary of the Treasury to furnish the Congress with certain statements relative to the amounts of money at the disposition of the executive government during each year.

This act did not, of course, prevent deficiencies from arising through too rapid a rate of expenditure and Congress continued to be called upon for supplementary appropriations to cover them. Indeed, when deficiencies were incurred the blame was generally placed upon Congress for its niggardly grants rather than on the executive departments for their extravagant expenditures. Discussing a deficiency of \$70,000 incurred by the War Department in one item of the appropriations for the year 1821, Samuel Smith, the Chairman of the Ways and Means Committee, defended the Secretary of War in the following remarkable terms: "He had asked one hundred and seventy thousand dollars the last year for the purpose, and only one hundred thousand was granted; and hence, it was not extraordinary if a deficit should be found."²⁶ It is noteworthy, however, that the bill for supplying the deficiency was introduced as a bill making partial appropriations for the subsequent year, a subterfuge which deceived very few but perhaps indicates a certain embarrassment on the part of the Secretary of War.²⁷

26. 38 *Annals*, 629.

27. See Randolph's speech (*ibid.*, 637) and his letter to Dr. Brockenbrough quoted in Garland, *Life of John Randolph*, II, 156-157.

CHAPTER V

THE LAW AND THE PRACTICE: 1820-1868

THE struggle between the executive departments and the Congress for the control of expenditure now entered a phase very troublesome to describe but withal very important to understand as illustrating the principle, so well stated by Burke, that the extreme of rigor leads to the extreme of laxity. The *apparent* course of this struggle is shown in the statute books by a series of enactments (generally in the form of provisos to appropriations) extending to the year 1860, in which the authority of the President to mingle appropriations was limited, regulated, or extended, as the influence of the Executive in Congress waned or waxed. But its *real* course must be sought in the obscure regions of administrative practice.

During the decade following the passage of the Act of 1820 the system of specific appropriations collapsed owing to a combination of adverse circumstances, chief of which were the real deficiencies in many important heads of appropriation, the delays of Congress in passing the annual appropriation bills, and the impossibility of estimating with accuracy the needs of the service under the numerous heads of appropriations established by law. Let us examine each of these difficulties in turn.

Several heads of appropriation *never* lasted out the fiscal year; they were, so to speak, chronically deficient. For this there was a simple explanation. Although appropriations were made for specific years, it was not the practice of the departments, save in exceptional instances, to confine the payments out of the appropriations for any one year to the accounts accruing during that year. It happened therefore that, when a deficiency once arose under a specific head of appropriation, unless it were repaired by Congress, it became permanent, communicating itself from year to year *ad infinitum*; each year's appropriation, though sufficient

for the needs thereof, was prematurely exhausted in the payment of last year's deficiency.¹

Other heads of appropriation became deficient between the close of one fiscal year (December 31) and the passage of the next fiscal year's appropriation bills—an event which did not ordinarily occur until February of the short session of Congress or April of the long. During these two to four months, recurring annually, the departments were (in Secretary Southard's expression) "left with funds previously appropriated, and must, of necessity, permit expenditures not yet legally authorized." Some of the appropriations, though large enough to meet the demands of the year to which they related and of preceding years, could not stand the additional strain thus placed upon them.²

But probably the principal cause of deficiencies was the necessity of estimating under heads of appropriation too numerous in relation to the rational objects of expenditures. From Senator Tazewell we learn that, since Jefferson's time, the specification of appropriations had been extended "until it embraced items which were almost too insignificant." "The principle of specific appropriations," he aptly observed, "had thus been carried too far."³ The effect of splintering the estimates has been well described by the Navy Commissioners in relation to that department of which they were the ministerial heads:

The estimates upon which the appropriations are founded are prepared with all the care and accuracy of which the fallible judgment of man will admit. Yet, after all, they are but *estimates*: and until it shall be given us to foresee the events of futurity, the fluctuations in the markets of the world, and the casualties of the ocean, we shall never arrive at precise accuracy in our calculations as to the expense of a navy employed in every known sea, and experiencing the vicissitudes of every known climate. A degree of accuracy, sufficient for practical purposes, may be gained; and this is all that can be reasonably expected. Yet, even in this case, it will be found that some items

1. Amos Kendall to John Branch, November 30, 1820; A.S.P., *Naval Affairs*, III, 379.

2. Annual Reports of the Secretary of the Navy, 1825 and 1833; A.S.P., *Naval Affairs*, II, 101; IV, 357.

3. 8 *Register of Debates in Congress*, 781 (April 13, 1832).

in the estimate are too low, others too high; but take the whole together, and they may prove sufficient.⁴

Consider then the situation of the departments at the extremities of each fiscal year. Many, perhaps most, of the appropriations were exhausted; the operations dependent on them could not be suspended; excess expenditure must be incurred. "Suppose," said the Navy Commissioners, stating a hypothetical case which well illustrates the point,

suppose a ship is about to be equipped for important service, and there should be large balances under all the appropriations except that for ordnance, which is exhausted; under the law, however urgent the necessity, not a cent could be drawn from either of the redundant appropriations for the purchase of arms. It was surely never the intention of Congress that a vessel-of-war should be sent to sea without being, in all respects, thoroughly prepared to defend the honor of her flag; yet in the case supposed she could not be properly prepared, without violating the law of appropriations. Similar embarrassments would arise from a deficiency in either of the other appropriations, from or to which transfers are forbidden. Thus the law, in gaining an object of diminutive value, when contrasted with its main design (*the employment of ships of war*), would, if literally observed, defeat the intentions of Congress.⁵

Such were the arguments advanced to justify the proposition that in certain circumstances the violation of the appropriation laws may be the lesser of two evils. That they were valid is almost self-evident, and can certainly not be doubted by anyone who has perused and digested the prerogative instances collected into one view in the first chapter of this book. We cannot, however, entertain a similar opinion as to the *modes* in which the law was violated; these were reprehensible in the extreme. For what we have greatly troubled ourselves to show is that, if public officers are to violate the law, they must violate it publicly. Let them, in cases of indispensable necessity, assume a responsibility, but let them report that fact, as promptly as may be, to Con-

4. John Rodgers to John Branch, November 23, 1820; A.S.P., *Naval Affairs*, III, 400.

5. *Ibid.*, III, 401.

gress and so throw themselves upon the justice of the controlling powers of the Constitution. To violate the law may sometimes be right; to conceal the violation is always wrong.

Yet concealment was the order of the day. Let us examine by way of example the practices of the Navy Department, for in this, perhaps above all other departments, it proved difficult or impossible to confine the expenditures to the amounts severally appropriated by law. Of the fact of irregularity there can be no possible doubt. The Navy Commissioners, writing in 1829, freely confess that "the principle which confines the application of navy appropriations to the particular objects for which they are made . . . has . . ., in numerous instances, been violated in practice," and declare themselves "fully satisfied that the intention of the law of 1809, in its provisions as to the application of the specific appropriations, has never been carried into full effect in any one year since its enactment."⁶ And the newly appointed Fourth Auditor, also in 1829, asserts that "millions of money have been expended in the Navy Department for purposes other than those for which it was appropriated."⁷

6. *Ibid.*, III, 400.

7. Kendall to Branch, November 30, 1829; A.S.P., *Naval Affairs*, III, 378. Similar testimonies may be found in the same collection at III, 366, 824; IV, 9, 47, 133. Inferential proof, valuable because strictly contemporary, may be found in certain observations submitted by the Navy Commissioners to Secretary Thompson in 1821 (*ibid.*, III, 371) and in a circular of 1828 (*ibid.*, III, 370), both of which were intended to promote regularity but both of which failed of effect (*ibid.*, III, 366).

The failure of the American system of specific appropriations was alleged in the House of Commons against the proposal of Sir James Graham to estimate the naval expenditure of England so as to square with the sums voted. "The attempt which the right hon. Baronet was now about to make, had been made in America, and abandoned as impracticable. The American Congress was even more jealous with respect to expenditure than was the House of Commons, and yet they had abandoned the schemes which the right hon. Baronet was now about to try. It appeared from the report of the Secretary of the American Navy made to Congress last year that such was the fact. . . . He repeated that the right hon. Baronet would find the change he meditated quite impracticable; the Americans had done so and the American auditor of accounts had said that they must take enough to cover all contingencies." Speech by Sir George Clark, February 25, 1831. But the scheme of Sir James Graham differed from the American scheme in that it provided a means whereby the House of Commons might investigate how far the actual expenditure under each head conformed with each estimate.

At first it was the practice of the Navy Department, when appropriations ran out of funds, to supply their deficiencies by "borrowing" from the redundancies of other appropriations. When, for example, navy agents or pursers asked for money under an exhausted head the Secretary sent it under other heads which were not exhausted, with the object, and sometimes with positive instructions, that it be applied to other than its legitimate purposes. Later, when the general appropriation bills were passed, the advances or borrowings were repaid.⁸ This mode was admirably adapted for hiding irregularities, for, as we shall have occasion to explain in Part II of this book, the reports of expenditures received by Congress were based not on expenditures by disbursing officers but on issues to them. For example: an agent asks for \$10,000 under "pay of the Navy," which is exhausted; it is sent to him under "provisions," which is redundant; it is intended to be applied, and it actually is applied, to "pay"; yet on the Second Comptroller's books it is charged to "provisions," and, under that head, is reported to Congress.⁹ Thus it was that the reports ostensibly comparing expenditures with appropriations actually conveyed no information at all. On the surface all was regular; beneath there was nothing but confusion. Indeed, so many and so complicated had been the transfers, the refundings, the advances under wrong heads and so forth in the Navy Department that the Fourth Auditor in 1829 despaired of *ever* ascertaining the true state of the appropriations: "The skein can never be unraveled, and the only remedy for the past is to cut the knot."

8. Repayments were made in one of two modes. Either a sum of money was sent to a disbursing officer under one head of appropriation with instructions to deposit it in bank to the credit of the Treasurer of the United States under another. Or transfer and counter-requisitions (as they were called) were issued in the Treasury to pay the debt and adjust the agent's account. In the one case the only purpose of drawing money from the Treasury was that it might be paid back under another head of appropriation. In the other case no money was drawn from the Treasury, but the matter was arranged by warrants of fictitious payment and repayment, the disbursing officer in favor of or upon whom they were drawn remaining wholly ignorant of them. Some expressions in a letter from the Navy Commissioners (*ibid.*, III, 367) permit the inference that money borrowed was not always refunded.

9. The example is Kendall's.

The practice of borrowing in anticipation of appropriations was continued in full force until about the time of Jackson's election to the presidency. But, beginning in November, 1828, it was replaced, or partially replaced, by another—the practice of deferred payment. During the last months of Samuel Southard's secretaryship and during the entire secretaryships of John Branch and Levi Woodbury the Navy Department seldom resorted to illegal transfers in order to meet its excess expenditure; instead, it simply refused to pay its bills. When calls were received upon exhausted heads of appropriation, the Secretary, instead of paying them out of redundant heads, suspended them until after January 1 or until after the passage of the next year's appropriation bill (whichever was the latest) and then paid them out of the next year's appropriations.¹⁰ Payments postponed for want of funds were not, however, reported to Congress.

Here again we must remark the concealment. If postponed payments had been noted on the accounts and brought prominently before the attention of Congress, we should have to admit that, whatever its practical consequences may have been, the new system was in principle at least superior to the old. In the circumstances, however, we must notice that the irregularity consisted in *incurring* expenditure which had not been authorized by Congress and that the postponement of payment did not in fact keep the expenditure within the limits sanctioned by Congress but served only to hide the fact that those limits had been exceeded. In this view it may be thought that, when liabilities had matured in excess of the appropriations voted, the irregularity was increased rather than diminished by not defraying them when incurred.

It is not to be supposed that executive officers *liked* to violate the appropriation laws or to refuse payment on demands justly due. We find therefore in the dozen years following the passage of the Act of 1820 a whole series of suggestions for removing the causes of deficiencies or for mitigating their effects. Wipe the

10. Kendall to Branch, December 14, 1830; Secretary Woodbury to Michael Hoffman, Chairman of the House Naval Committee, December 20, 1831; A.S.P., *Naval Affairs*, III, 825; IV, 47.

slate clean of old debts by appropriating for arrearages; advance the date of making appropriations, make interim appropriations for a quarter or half the year prior to January 1, let the fiscal year begin on April 1 instead of January 1, authorize the President to make necessary transfers from one head to another during the interim between the close of the fiscal year and the passage of the appropriation bills;—these were some of the plans urged upon and partially adopted by Congress. But the major proposals required in effect the total abandonment of the system of specific appropriations. Let us examine them, first as set out by the Navy Commissioners, second as set out by the Fourth Auditor.

On November 13, 1829, John Branch, Secretary of the Navy, anxious to improve the organization of his department, asked the Navy Commissioners for such observations as might appear to them to belong to the occasion. The latter replied on the twenty-third with a lengthy analysis in the course of which they raised very squarely the question whether the system of specific appropriations was capable of being enforced. Their answer, though couched in affirmative terms, was in the negative:

The Commissioners will not say that it is utterly impracticable to carry this system literally into effect. If Congress were to make the appropriations sufficiently large to guard against every *possible* contingency, and to ensure an adequate amount, under each head, to meet every *possible* expense arising under that head; and if all the agents were so thoroughly acquainted with their duties, as to be able at all times to decide correctly as to the specific heads of appropriation to which each and all of the numerous articles required should be charged; then, if the Department would take care to keep in the hands of all the disbursing agents a balance under each and every head of appropriation, so as to enable them promptly, and in good faith, to redeem all the public engagements at their respective agencies, a literal execution of the law might be expected. But would Congress make excessive appropriations? No enlightened friend of the navy would make such a proposition. And experience fully shows that disbursing agents, even those most accustomed to navy business, will occasionally misapprehend instructions, and unintentionally pay accounts out of the wrong appropriation. And we would observe, that

the absolute necessity of keeping balances in the hands of the agents, under each appropriation, would make the aggregate of balances so large as to form a serious objection. In no case would it be expedient; in some cases it might be unsafe to entrust such balances even to bonded agents, for they would generally far exceed the amount of their bonds.¹¹

What then was to be done? The Commissioners suggested, among other things, that the heads of appropriation for the naval service be reduced to five;¹² that the power of transferring from one appropriation to another, as the exigencies of the service might render necessary, be committed to the President, and that, at the commencement of every session of Congress, reports be made showing the expenditures of the year and the various objects to which the moneys appropriated had been applied.

On November 30 the Fourth Auditor, replying to a somewhat similar request from Secretary Branch, propounded a somewhat similar argument and plan.¹³ To be sure, the Fourth Auditor was loud in his denunciation of the political officers of a preceding administration and insisted that the fault was in the men rather than in the system. But while he asserted that the system was practicable, he admitted that the interposition of Congress was necessary; arrearages must be paid up; liberal estimates must be made under each head to meet unexpected emergencies; a balance must be kept under each head in the hands of every disbursing officer, even though this meant magnifying the aggregate at his disposition and multiplying the chances for fraud and defalcation. This was as much as to say that the system was practicable if Congress would do what was wholly impracticable. Realizing this, Kendall proposed what he considered to be a better plan. Let the Department present specific estimates, but let the Congress appropriate in gross; require the Secretary to account annually for the sums expended under each head of his

11. *Ibid.*, III, 400.

12. Secretary Southard had on at least two occasions anticipated this recommendation. Annual Reports of the Secretary of the Navy, 1825 and 1827; *ibid.*, II, 101; III, 53.

13. *Ibid.*, III, 375-381.

estimates. This plan, which might be studied with profit even to-day, would, thought Kendall, obviate all the departmental difficulties and at the same time keep Congress informed of every deviation of expenditure from estimate.

These proposals, though duly transmitted to Congress, led for the moment to no reform. The Department therefore continued to meet its difficulties by its new method of incurring excesses and then refusing (temporarily) to defray them. Presently the evil consequences of this practice became evident. On the one hand the claimants against the government were wrongly treated. Their outstanding demands were for the most part "for services and supplies of a highly useful character, such as money advanced abroad to assist our absent vessels, on implicit faith placed in the credit, justice, and punctuality of the government, and such as expensive journeys in the performance of important duties, the passages of seamen, and the labor and tools at yards, as well as fuel for forges and vessels";¹⁴ to refuse payment of these demands when presented was very unjust. On the other hand the government itself was subjected to embarrassments often peculiar and aggravated. Some of these have been detailed by Secretary Woodbury:

In the case of bills of exchange drawn abroad, chargeable to the appropriations already exhausted, the public faith . . . is sometimes in danger of being violated; our credit in foreign countries becomes injured; and the Treasury, as actually happened during the past winter, is exposed to large losses, if the holders choose to resort to protests and claims for the mercantile rate of damages.¹⁵

Perhaps as a result of these difficulties Congress, beginning in 1832, began to relax its legal severities. An Act of June 3 of that year, limited, however, in duration to the close of the second session of the 22d Congress, gave the President, on application of the Secretary of the Navy, authority, whenever in his opinion the unforeseen requirements of the public service might require it, "to direct that a part of the money appropriated for a particular

14. Woodbury to Hoffman, December 20, 1831; *ibid.*, IV, 47.

15. Annual Report of the Secretary of the Navy, 1833; *ibid.*, IV, 357.

branch of the naval service be applied to another branch"; all such transfers were to be promptly reported to Congress.¹⁶ Two years later (June 30, 1834) another act renewed this power permanently but limited its operation to the period of time intervening between the close of the year and the passage of the new naval appropriation bills.¹⁷

In respect of other departments, too, the Congress now began to grow lenient. In 1836, for example, the President was authorized, under the restrictions of the Act of 1820, to mingle the appropriations for fortifications when, in his judgment, the public interest should require it.¹⁸ And in 1838 and succeeding years it was provided that there should exist in the President and Postmaster General the same power to transfer appropriations as existed in the President and the head of any other department.¹⁹

In one year, 1842, the executive influence so far prevailed as to secure an enactment by Congress allowing all the surplus of any appropriation for any object, under the direction of the head of the proper department, to be applied to supply the deficiency of appropriation for any other branch of expenditure in the same department or office.²⁰ And though a week later this and all other acts permitting transfers were repealed insofar as they related to the Navy Department,²¹ the latitude permitted by the Act of 1842 persisted for a decade in respect of all other departments.²²

In 1852 the pendulum swung the other way. In the Naval Appropriation Act passed on August 31 of that year²³ a provision was inserted repealing all acts or parts of acts allowing transfers of appropriations for the navy. This provision was struck from the bill in the Senate as superfluous in view of the like provision in the Act of August 31, 1842. But it was restored in conference between the two Houses.²⁴ The Navy Department had been

16. 4 Stat. 558.

18. 5 Stat. 78-79.

20. Act of August 26, 1842, *ibid.*, 533.

21. *Ibid.*, 581. For the fiscal year 1843 a limited authority was given to the President to direct transfers in the Navy Department; *ibid.*, 651.

22. 40th Cong., 2d sess., H.Rep., 14.

23. 10 Stat. 104.

24. *Congressional Globe*, 32d Cong., 1st sess., pp. 2444, 2404.

17. *Ibid.*, 742.

19. *Ibid.*, 223, 348, 380.

given some latitude of transfer by special legislation passed during the War with Mexico.²⁵

The same provision was inserted in the Army Appropriation Act of the same date,²⁶ but with this difference. The Senate, supposing that it would be inconsistent with the proper management and support of an army in the field to withdraw the power of transfer altogether from the President, secured the addition of a clause that nothing in the section should be so construed "as to prevent the President from authorizing appropriations for the subsistence of the army, for forage, for the medical and hospital departments, and for the quartermaster's department, to be applied to any other of the above-mentioned branches in the same department." This proviso was intended by its sponsors to put the War Department on the footing of the law of 1820, "cutting off," said Senator Hunter, "the powers of transfer granted under the act of 1842: under which, in my opinion, all the difficulties have had their origin."²⁷

Even more indicative of the new temper of Congress was the provision introduced into the Civil and Diplomatic Appropriation Act, also passed on August 31.²⁸ This was to the effect

that where any moneys shall have remained unexpended upon any appropriations by law . . . for more than two years, after the expiration of the fiscal year in which the act shall have been passed, all and any such appropriations shall be deemed to have ceased and been determined and the money so unexpended shall be immediately thereafter carried under the direction of the Secretary of the Treasury, to the account on the books of the Treasury denominated the surplus fund, to remain like any other unappropriated moneys in the Treasury.

Exceptions were made of the appropriations for the payment of

25. In 1848, for instance, Congress reappropriated \$1,500,000 of unexpended balances and authorized the President, on the application of the Secretary of the Navy, to transfer any portion of these balances from one head of appropriation to another, requiring him to lay before Congress at each session a special account of the moneys transferred.

26. 10 Stat. 107-108.

27. *Cong. Globe*, 32d Cong., 1st sess., p. 2429.

28. 10 Stat. 98.

interest on the funded debt, for the payment of interest and reimbursements according to contract of any loan or loans made on account of the United States, and for moneys appropriated to a purpose in respect of which a longer duration was specially assigned by law. All this was substantially a repetition of the language of Section 16 of the Act of March 3, 1795, establishing the surplus fund. But it was reinforced by the following unusual words: "It shall not be lawful, for any cause or pretence whatsoever to transfer, withdraw, apply, or use for any purpose whatever, any moneys carried as aforesaid to the surplus fund without further and specific appropriations by law."

It happened, however, that, as in the case of the Act of 1820, Congress did not secure by these laws so substantial a victory over the Executive as might at first be supposed. Take the law last cited; an example will make clear the mode of its avoidance.

On June 8, 1853, the Paymaster General of the Army wrote to Elisha Whittlesey, the First Comptroller, stating that he understood an opinion prevailed in the Treasury Department that under the operation of Section 10 of the Act of August 31, 1852, making appropriations for the civil departments, the balances of pay appropriations under the Army Appropriation Act of March 3, 1851, must go to the surplus fund. This, said the Paymaster General, would greatly embarrass the Pay Department and render it necessary to call upon Congress to reappropriate. Would not the Comptroller, therefore, give careful consideration to that section, to see if the clause, "as likewise moneys appropriated for a purpose in respect to which a longer duration [than two years] is specially assigned by law" would not exempt these balances of pay from reverting to the surplus fund? And he suggested to the Comptroller certain arguments to support this view.²⁹

In due time the Comptroller passed the question along to James Guthrie, the Secretary of the Treasury, and he, on June 18, handed down a decision interpreting away, as it must seem, the section of law referred to by the Paymaster General. The act,

²⁹. Treasury Department, Fair Copy Book, Series "A B," Vol. II (1853), No. 50.

he held, could result in no embarrassment to the pay of the army and navy or to the completion of any work or service for which annual appropriations were made. Why? Because, forsooth, it was the practice of the Treasury in keeping the accounts of appropriations for the pay of the army and navy and annual appropriations to a particular service or object "to charge the expenditures to the first appropriation, adding each subsequent appropriation to the balance of the appropriation unexpended, considering the first appropriation just expended." Under this operation, continued Guthrie, "there never can be any unexpended appropriation remaining after two years unless the appropriation of a year should exceed all the expenditures for a service or object for the two succeeding years."³⁰

How this technicality of bookkeeping procedure was to be reconciled with the constitutional prohibition against making appropriations for the support of armies for a longer term than two years, nowhere appears. Under this construction the only unexpended balances which the lapse of time could carry into the surplus fund were those for specific objects which were intended to be completed within two years.

Another case may be cited in illustration of the Treasury's construction of the laws, this being of particular interest as it exposes the attitude of the Comptroller. In the decision just referred to Guthrie had held that the term "unexpended" as used in the acts relating to the surplus fund meant money in the Treasury not applied to the object for which it was appropriated for the two years after appropriation, and that consequently unexpended balances could not be applied to payments "on contracts theretofore made on account of the service or object and not adjusted or perhaps not performed." To the First Comptroller this construction appeared far too rigorous and on September 13, 1853, he wrote again to Guthrie as follows:

What signification is to be given to the word unexpended? Is the money not actually paid to be carried to the surplus fund? If so, the accounts must be settled within the two years or soon thereafter, for

30. Treasury Department, Set Z, No. 1, *Awards and Decisions*, p. 23.

the act is, "immediately after two years," that which "is unexpended, shall be carried to the surplus fund," and until the accounts are settled, it is not ascertained what remains unexpended. . . . If the rigid construction is put upon the act, that no money can be paid after the two years (exclusive of the fiscal year) from the date of appropriation, then every contract must be limited to said two years, and must be settled within that time, notwithstanding the service has been performed and the money has been drawn from the treasury. The public service cannot endure this restriction.³¹

It was his opinion that a loose construction of the law was justifiable, so that if a contract was made and the work was in progress the money would be "expended" in the contemplation of the law to the amount stipulated to be paid or the expenses to be incurred. If the rigid construction were insisted upon, the Comptroller warned that the law would be evaded "by taking the money from the treasury, where it is safe, and placing it in the hands of officers of the army and navy and of disbursing officers near the close of the two years." This was, of course, the old expedient so strongly criticized in 1819 in connection with the operations of the Treasurer as agent of the War and Navy Departments. "This expedient," wrote the Comptroller, "has been heretofore resorted to, to the injury of the officers having the money, and to the public service."³²

Impressed by these arguments, Guthrie on September 23 reversed his previous decision and declared that "unexpended" meant only "unobligated."

In relation to an appropriation where the object is contracted for to be paid out of the appropriation and the work is being done but not completed, it will be just to Congress to consider the money not unexpended but applicable to the payments on account of the contracts for the object until Congress shall declare that the appropriation, in

31. Treasury Department, Fair Copy Book, Series "A B," Vol. II (1853), No. 64.

32. *Ibid.* The abolition of the agency of the Treasurer in 1822 had made the provisions of the Act of 1820 obsolete insofar as they related to this abuse. They were not extended to cover the case of disbursing officers until after the Civil War.

all cases, is within the meaning of that act unexpended and to go to the surplus fund.³³

The Treasury's idea of the meaning of Section 10 of the Act of 1852 was corroborated in 1854 by two opinions of the Attorney General. In one of these it was held that an appropriation or a balance thereof, made in any year for any *continuous contract or other service* of the government, might be applied to the same service during the succeeding or any subsequent year, and did not lapse into the surplus fund until the particular object was consummated. Conversely, according to the synopsis of the opinion,

whenever, in any given year, the appropriation for a particular service proves deficient, a balance, remaining of the appropriation for the same service in a previous year, may be drawn upon to supply the deficit; or rather the balance of the preceding year commences the service of the new year, and is expended before any question arises of the new appropriation; and thus, at the end of each year, the true unexpended balance is only what remains unexpended of that single year's appropriation.³⁴

This was as much as to say that the unexpended balances of the appropriations for the annual service of the departments need never be carried to the surplus fund. And indeed the Attorney General specifically stated that if, by reason of death, suspension, or vacancy, the appropriations in and for a given year for the pay of the officers of the navy, or of the Secretary of the Navy himself, or of any of the clerks in his Department, should prove to be in excess, the balance was applicable to the same continuous object during a subsequent year.

In the second opinion the Postmaster General was advised, by a like reasoning, that it was proper for his Department "in each successive year to begin by expending any balance on hand of the appropriation of the previous year, and thus to carry forward to the succeeding year only the balance of the next preceding

33. Treasury Department, Set B, No. 9, *Cabinet and Bureaus*, p. 46. It is difficult to conceive what language could be clearer than that already and repeatedly used by Congress.

34. 7 *Op.* 1.

one." In this way no question need rise of possible transfer to the surplus fund, for "unless the balance of a previous year exceed in amount the whole expenditure of the present year, no balance of two or more years will ever exist."³⁵

This construction of the law is one that Wolcott might have envied. An equally lax interpretation appears to have been given to the provisions relating to transfers between appropriations and to the making of contracts in advance of appropriations. John Sherman in his *Recollections* relates that in his maiden speech, delivered May 27, 1858, he cited the abuses and usurpations of the executive departments in diverting specific appropriations to purposes not authorized by law:

I said: "The theory of our government is, that a specific sum shall be appropriated by a *law* originating in this House, for a specific purpose, and within a given fiscal year. It is the duty of the executive to use that sum, and no more, especially for that purpose, and no other, and within the time fixed." I pointed out cases where the departments assumed the power to transfer appropriations made for one purpose, to other purposes in the same department. Another abuse by the executive departments was the habit of making contracts in advance of appropriations, thus, without law, compelling Congress to sanction them or violate the public faith.³⁶

Indeed, in the years immediately following the close of the Mexican War Congress was called upon to vote enormous sums as deficiencies which they had refused as original appropriations. In 1850 the deficiency appropriation was \$2,800,000; in 1851 it was \$2,500,000. In the next year it more than doubled, reaching nearly \$5,500,000. In the following year it fell to less than \$2,500,000, but only because, as Sherman did not hesitate to say, "each party had been obliged to bid for favor in the presidential election, by doing what parties often preach but seldom practice—exercising a little economy." In 1854 the deficiency appropriation was \$3,700,000; in 1855 it was \$5,100,000; and in 1856 it was over \$5,500,000.³⁷

35. *Ibid.*, 17.

36. John Sherman, *Recollections* (Autograph ed.), I, 155.

37. *Cong. Globe*, 35th Cong., 1st sess., p. 1501.

The control of Congress over the public expenditure was in this manner rendered nugatory, and the deficiency bill, which in its origin, so it was alleged, had been intended to provide for small and unavoidable excesses of expenditures above appropriations, was perverted from its true purpose and changed into a confirmation of extravagance and disregard of law. "It is vain," said Sherman,

for us to attempt to limit the expenses of Government, if when, after due consultation with the Executive Departments, we have determined the amount we are willing to sanction, the Executive may exceed the limit as far as it pleases, and call upon us to approve the excess, under the name of a deficiency. The Departments first send in their estimates; your Committee of Ways and Means considers them, sometimes reduces them, and but too often merely registers them; Congress itself then deliberates upon them, and the result finally is that by solemn legislative enactment the voice of the people and of the States determines how much shall be spent, and for what purpose. But then the Executive Departments, which have to execute these laws, in utter disregard of them, and at their own mere discretion, contract obligations vastly beyond their authority, spending moneys they never asked for, which were never granted, or which were even refused, and we are summoned by all the ties of party allegiance, and public faith, and governmental necessity, to pay the bills, and sanction the violations of law.³⁸

"What," he continued, expatiating on the theme,

becomes of the legislative power; where is its control over the Treasury if the limits it fixes for expenditure are thus habitually neglected and overstepped? When *deficiencies* are thus constantly recurring, thus constantly growing, thus enormously large, surely it is time for Congress to interfere, and reclaim some share in the finances of the country! If Congress has fixed the expenditures at \$50,000,000, or any other sum, and arranged the taxes, the ways and means, to meet them, is it competent for the Executive Departments, without regard to the law, to spend five, ten, or fifteen million dollars more, and then call upon us to sanction their course, under the name of deficiencies? It would seem that the whole Government is ultimately to be carried on under the title of deficiencies.

38. *Ibid.*

Notwithstanding the efforts of Sherman and others Congress did nothing at this time to correct any of the abuses alleged. But in 1860 an act was passed repealing Section 23 of the Act of August 26, 1842.³⁹ (This was the provision of law giving the department heads an almost unlimited power of transfer.) The effect of the repealing act taken in conjunction with other provisions of law was to prohibit all transfers from one appropriation to another, except for subsistence and forage and in the commissary and medical departments of the army; the discretionary powers of all other departments were entirely withdrawn.⁴⁰

The war between the States now caused a temporary cessation of the efforts of Congress to hold the executive departments to specific expenditures under specific appropriations. The result was as might have been expected. All the old abuses were revived in an aggravated form. In every department the appropriations for the current year were freely mingled, and, if these were still deficient, they were supplemented by the unexpended balances of previous appropriations without much regard to the objects for which the latter had originally been made. All legislation on the subject of transfers and the use of unexpended balances appears to have been forgotten with the exception of the proviso in the Act of 1809 permitting the President to authorize a portion of the moneys appropriated for a particular branch of expenditure in one department to be applied to another branch in the same department. "There is nothing in the world," said Senator Grimes in 1868,

under the act of 1809, to prevent the Secretary of War, if he can obtain the consent of the President to that effect, from transferring an appropriation for the improvement of a river or harbor in the West

39. 12 Stat. 103.

40. *Cong. Globe*, 36th Cong., 1st sess., p. 3108. This act as passed by the House contained a provision that "no part of the amount appropriated by any act of Congress, shall be transferred to or used for any branch of expenditure than that for which it may be specifically appropriated." But the Senate, feeling that the soldiers must be fed and clothed wherever they might be, struck out this provision and the amendment was agreed to by the House. The original draft also forbade the use of money appropriated for one fiscal year in another fiscal year; but the Committee of Ways and Means struck out this provision. P. 2282.

to the construction of a fort on the Atlantic coast. The President can, under that act, transfer any appropriation from any one branch or bureau of the War Department, or of the Navy Department, or of the Treasury Department, to the prosecution of any other work in another branch or bureau of the same Department.⁴¹

That subsequent legislation might exist to prevent such transfers seems not to have occurred to him.

In one instance the Treasury Department, under the proviso to this Act of 1809, used nearly \$69,000 of an appropriation for the extension of the Treasury to buy furniture for certain of its offices. Concerning this transaction the Chairman of the Senate Committee on Appropriations could only say that it was an irregularity "such as the committee think ought not to be authorized."⁴² Yet the Act of 1820 forbidding such a transfer still stood on the statute books.

The Navy Department, although it had been forbidden, once in 1842 and again in 1852, to mingle its appropriations, took advantage of the war to regain its former power and, combining it with the power to carry forward unexpended balances, effectually freed itself from Congressional control. "It made no difference," said Senator Sherman in 1870, speaking of the war and postwar years,

whether Congress appropriated for the construction of vessels in the Navy or not: because if that fund was exhausted, or no appropriation was made for it, they could use the unexpended balances of appropriations for other heads of expenditures in the Navy Department. This practice went on day by day.⁴³

Thus the period to which this chapter has been limited ended as it had begun with the complete collapse of the system of specific appropriation. Law and practice once more stood in opposition, the one prescribing the extreme of rigor, the other permitting the extreme of laxity.

41. *Ibid.*, 40th Cong., 2d sess., p. 722.

42. Senator Morrill, *ibid.*, p. 503. Among the offices refurnished were those of the Second Comptroller, the First Auditor, the Third Auditor, the Fourth Auditor, the Fifth Auditor, and the Sixth Auditor, six of the nine watchdogs of the Treasury. *Book of Estimates*, 1868-1869, p. 4.

43. *Cong. Globe*, 41st Cong., 2d sess., p. 993.

CHAPTER VI

THE ANGER OF CONGRESS: 1868-1878

THE attention of Congress was first drawn to the abuses committed under the supposed sanction of the proviso to the Act of 1809 by a singular incident. This incident was explained to the Senate in January, 1868, by Senator Morrill, the Chairman of the Committee on Appropriations, in the following words which, it will be observed, contain both exposition and argument. He said:

It will be seen in the report of the Secretary of the Treasury, embracing the Quartermaster General's estimates, that there was no appropriation asked for the current year for the quartermaster's department. They seemed to rely upon a balance in that department of \$19,139,000 as adequate; but it turns out that at the same time they really contemplated the expenditure of some \$46,000,000. Where was it to come from? Why, they were to obtain it by the exercise of the authority of this proviso in the act of March 3, 1809. It will be remarked that the proviso only authorizes such a transfer when Congress is not in session. If an emergency arises when Congress is not in session, then, under that act, the President of the United States may authorize such a transfer. But the Quartermaster General, anticipating the exercise of that authority, it will be seen, asked for no appropriation, and so far as Congress or the country is concerned the presumption would be that he is running his department from the balance in his hands of \$19,000,000. Where was he to get this fund from? It was said he was to get \$15,000,000, which he puts down in this way, and which has been really transferred to the quartermaster's department and used—"transfer appropriation, warrant No. 60"—that is all the reference made to it—for \$15,000,000 which the quartermaster's department has used up. If you look to "transfer warrant No. 60" it will be found to be a sum theretofore appropriated for the recruiting service, and which was left on hand for that service, but which, after the adjournment of Congress, was, under the exercise of the power of this proviso, transferred to the quartermaster's department and has been expended.

It will be noticed that the law provides that it shall be the duty of the department the first week of the session to make a specified return of the transfer to Congress, how it was appropriated, and from whence it came, but the only information the Quartermaster General communicates to Congress is: "Transfer appropriation, warrant No. 60, \$15,000,000," giving no information whatever to the uninitiated, to the ordinary sense. Then it was contemplated that there would be \$13,115,979.75 from a balance of an appropriation for collecting, drilling, and organizing volunteers. The Quartermaster General made an application, as I understand, for the transfer of that sum; but failing to get that transferred he is obliged to make an application to Congress for a deficiency. The deficiency arises out of the considerations to which I have referred. The committee think that is an irregularity, to say the least of it.¹

The occasion for this speech, as the reader will have deduced from the concluding words, was the reporting to the Senate of a bill to make up to the Department of the Quartermaster General the sum which it had expected to receive but had not received from this old appropriation for militia purposes. The bill passed the House without difficulty but in the Senate it ran into trouble. The attitude of that body toward the incident described by Senator Morrill was well expressed by Senator Grimes:

I, as one member of the Committee on Appropriations and as a member of this body, thought that it was the duty of the Department to estimate from the start, and inform the House of Representatives and Senate exactly what they wanted, and not go back to an old appropriation made three or four years before for a specific purpose, and have that transferred from the purpose for which we appropriated it in order to carry on another branch of the Government.²

The result of this attitude was that the Committee on Appropriations reported the deficiency bill with an amendment wholly repealing the proviso in the Act of 1809 which permitted the President to mingle appropriations for different objects. This amendment caused some discussion in Committee of the Whole in the course of which Senator Sherman had occasion to point out, what

1. *Cong. Globe*, 40th Cong., 2d sess., pp. 562-563.

2. *Ibid.*, p. 722.

does not seem to have been clearly apprehended, that the Act of 1809 was but one of many acts authorizing transfers. Senator Morrill thereupon offered to amend the amendment by adding the following words: "And all acts and parts of acts authorizing such transfers be, and the same are repealed." This change was agreed to. Presently the bill was reported to the Senate as amended, and the question was taken on concurring in the amendments. Senator Trumbull now rose and remarked that, as it was the intention "to cut up by the roots this discretion that has been exercised by the Departments of using money appropriated for one purpose for another," he was not entirely satisfied that the amendment as adopted by the Committee of the Whole would accomplish that object. He then offered the following words to be added to that amendment: "And no money appropriated for one purpose shall hereafter be used for any other purpose than that for which it is appropriated." This suggestion was accepted by the Senate, so that the bill as finally passed contained as its second section the amendment originally proposed by the Committee on Appropriations, plus Senator Morrill's amendment, plus Senator Trumbull's amendment, all designed though in varying language to effect the same object.

What is remarkable about the debate on this bill is the little emphasis which was placed on the inconvenience which the public service might suffer in the event of the power of transfer being taken away. The possibility was indeed noticed, but only by Sherman in the following words:

The Senate should distinctly understand that this is dealing with a very difficult question, and it may be a very embarrassing one. It may create a great deal of trouble in the management of the Departments not to have the power to transfer from one head of appropriation to another, and within certain limits that power is right enough; but still, as I know it has been abused, and cases have been brought to my attention where the abuse has been gross and scandalous, I am rather inclined to think that we had better cut up the whole system, and then allow them to present cases where transfers are proper.³

It may be noted in passing that the House at first refused to

3. *Ibid.*, pp. 561-562.

concur in the Senate's amendment to the deficiency bill, but when that body refused to recede, the House yielded, and on February 12, 1868, the act forbidding transfers became law.⁴ The reason for nonconcurrence was not that the House disagreed in principle with the Senate, but that it thought the subject required more extended and more carefully revised legislation than ought to be tacked on a deficiency bill.⁵

4. 15 Stat. 36. President Johnson did not sign the act.

5. 40th Cong., 2d sess., H.Rep. 14. On February 28 the House passed a bill for the better custody of public moneys which they thought in every way superior to the Senate amendment to the deficiency act. The provisions of the House bill are of some interest and, as explained by Representative Butler, may be recorded in a note: "The first section provides that all acts and parts of acts which authorize the President or Secretary of any Department to transfer the moneys appropriated for a particular branch of that Department to another branch of expenditure in the same Department be, and the same are hereby repealed.

"The second section provides that whenever, by sale of property of the United States appertaining to any Department of the Government, or by the payment of dues to the United States appertaining to any Department of the Government, or by other means whatever, any moneys or valuable securities for the payment of moneys shall have been paid over or come into the possession or under the control of any Department or any officer thereof, the same shall not be expended except in pursuance of appropriations made by law; but all such moneys, specifically and without any deduction whatever, shall be paid into the Treasury of the United States, and carried to an account on the books of the Treasury denominated the 'surplus fund,' and such securities shall be deposited with the Treasurer of the United States, to be disposed of according to law; and the Treasurer shall annually report to Congress all the sums of moneys and securities, and whence received, under the provisions of this section.

"The third section provides that whoever, being an officer, commissioner, or agent of the Government for the expenditure or disbursement of public money upon any public work or in any public employment whatever, shall expend or attempt to authorize any expenditure or contract for the expenditure of public money, either directly or indirectly, over and beyond the appropriations made by law for such work or employment or any part thereof, shall be liable to the penalties provided in this act, and, in addition thereto, shall be held individually liable to any person injured or who shall have performed any service or made any outlays under the unauthorized acts or directions of such officer, commissioner or agent.

"The fourth section provides that whoever shall offend against any of the provisions of this act, or of any other act for the transfer, custody, disbursement, or disposition of public money or other public property, for offenses against which no other penalty has been prescribed by law, shall be punished, on conviction, by fine not exceeding \$10,000, and imprisonment not less than one year nor more than twenty years, and shall thereafter be ineligible to any place of

The Act of 1868 put an end, in theory at least, to two abuses: the mingling of current appropriations and the diversion of the unexpended balances of old appropriations to purposes for which they had not been originally intended. But the act did not prevent the executive departments from supplementing their current appropriations with the unexpended balances of appropriations made in prior years for the same purpose. This was the next abuse to be corrected.⁶

It is to be understood that during the war hundreds of millions of dollars were appropriated by Congress which, when the war ended, were not needed. These balances of appropriations, instead of being canceled by transfer to the surplus fund, remained on the books as "a large and forgotten fund which could be used for a great variety of purposes without the special notice of Congress."⁷ On June 30, 1868, for example, they totaled well over \$156,000,000 of which nearly \$105,000,000 were in the War Department.⁸

The evils of permitting such balances to exist on the books were well explained by John Sherman in a speech delivered in the Senate on May 10, 1870:

This is a subject of far more importance than probably Senators are aware of; and the imperative necessity for some provision in regard to it grows out of a condition of affairs that has sprung up only since the war. There were on the 30th of June last balances of unexpended appropriations made during and since the war of \$102,390,159.67. We annually appropriate by the appropriation bills enough money to carry on the operations of the Government during the year; but these balances of old appropriations are carried to new accounts. There are also placed to the credit of those accounts the new appropriations,

trust or profit under the laws of the United States." *Cong. Globe*, 40th Cong., 2d sess., pp. 1504-1505. The bill died in committee in the Senate.

6. We might note in passing an Act of July 25, 1868, forbidding executive officers to enter into contracts for public improvements for sums larger than those appropriated. 15 Stat. 177.

7. James A. Garfield, "National Appropriations and Misappropriations," being a paper contributed to the *North American Review* for June, 1870. *Works*, II, 749.

8. George S. Boutwell, Secretary of the Treasury, to B. F. Butler, January 24, 1870. *Cong. Globe*, 41st Cong., 2d sess., p. 796.

and thus the fund to be drawn upon is nearly twice as large as the appropriations. Hence there were last July in the various Departments to the credit of the various heads of appropriations, \$102,390,-159. Last year we appropriated for the same heads of expenditure \$111,733,000. That was all that was required really for the expenses of the Government in the opinion of Congress; but the truth is that by lapping over or continuing the old appropriations and adding them to the new, there was to be drawn from, a fund of \$206,101,000. I hold in my hand the official statement of balances and appropriations on the 30th of June last. There was in the Department of War more money to the credit of that Department than was appropriated last year. There were \$41,548,477 of unexpended appropriations there, and by the mode of keeping the accounts they can expend money during the present fiscal year that was appropriated years ago when the circumstances were very different.⁹

Sherman's great ambition, ever since the war, had been to *carry the unexpended balances of appropriations to the surplus fund and begin again "with new sheets."* Upon one occasion he declared it to be his opinion that at the end of every fiscal year, with some few exceptions, all the balances of appropriations then unexpended ought to be transferred to the surplus fund and then the annual appropriation made for each branch of expenditure ought to be placed to the credit of that branch, and no money drawn from the Treasury except in pursuance of that appropriation. Such, he maintained, but without citing authority, was the old practice. Besides, he continued, an appropriation of money for more than two years for the army and navy was a violation of the Constitution, and the appropriation of money for a distant future was a violation of good principle: "The English government dare not and would not attempt it. No Government in England would be maintained that would undertake to expend three years after the appropriation money that was in the annual budget." What he proposed, in short, was that the United States adopt the English plan.

Each year the budget as made up by the chancellor of the exchequer states exactly how much money he wants for every item of expendi-

9. *Ibid.*, p. 3328.

ture during the year, and appropriations are made in accordance with that budget, and there is no power to exceed it. If the ministry are compelled to take money without an appropriation they have to call upon Parliament for a bill of indemnity, and that process is gone through with frequently.¹⁰

Sherman's opportunity came in 1870. In the beginning of that year it was discovered that the Navy Department had contracted an expenditure for the construction and repair of vessels in the navy yards of more than twice the amount appropriated by Congress, had employed more than double the force authorized, and consequently in the middle of winter had found its appropriation for the purpose exhausted. Here was a clear case of an executive department embarking on a course of expenditure not sanctioned by Congress, and it did not fail to arouse comment. Nor was Congress much mollified by the explanation that the Department had intended to make up the deficiency by a transfer from some \$17,000,000 of balances left over from previous appropriations for other purposes, but had discovered too late that the power of transfer had been taken away by the legislation of 1868.¹¹

This particular mistake was corrected to the satisfaction of the administration by an appropriation of \$3,000,000 to supply deficiencies in the expenditures of the Bureau of Steam Engineering and of the Bureau of Construction and Repair, and by the covering into the Treasury of an equal amount of unexpended balances in other bureaus of the Navy Department,¹² a device which enabled the supporters of the Department to claim, no matter how preposterously, that the extra expense was costing the government nothing.

But Congress now determined that such abuses would be tolerated no longer. On February 24 Henry L. Dawes of Massachusetts, Chairman of the House Committee on Appropriations, moved to add to the legislative, etc., appropriation bill the following section:

And be it further enacted, That whenever any moneys appropriated

10. *Ibid.*, p. 993.

11. *Ibid.*

12. 16 Stat. 68.

for the use of any Department or bureau, or for any purpose, shall remain unexpended for one year after the expiration of the fiscal year in which the act appropriating the same shall have passed, it shall be the duty of the person having in charge the disbursement of said appropriation to inform the Secretary of the Treasury of the fact; and the Secretary of the Treasury shall thereupon immediately cause said unexpended balance of appropriation to be covered into the Treasury to the credit of the surplus fund, unless it be in said act of appropriation otherwise provided; and all such sums shall be covered into and restored to the Treasury, whether they shall stand to the credit of any bureau in the proper books of the Treasurer of the United States, or have been placed to any other account, or are under the control of any officer or agent of any Department.¹³

This sweeping amendment was, in a sense, a restatement of the principles of the surplus-fund legislation of 1795, 1820, and 1852. But it went further by reducing from two years to one the period of grace during which unexpended balances might be used after the expiration of the fiscal year during which the appropriation act was passed,¹⁴ and by bringing for the first time within the purview of the surplus fund the unexpended balances in the hands of disbursing officers. The amendment was agreed to by the House.

When the appropriation bill of which this amendment was a part was received by the Senate it was referred to the Committee on Appropriations. This Committee, while sympathizing with the purposes of the House, did not think that the section was spe-

13. *Cong. Globe*, 41st Cong., 2d sess., p. 1552.

14. Grammatically construed, this amendment would bring into the surplus fund all balances remaining unexpended on June 30 of each year, leaving nothing to carry into execution existing contracts or to pay existing liabilities—for after 1842, when the present fiscal year was adopted, the appropriation acts were generally passed prior to the beginning of the year for which they were made. Thus the expiration of the fiscal year in which the act was passed was the beginning of the fiscal year to which it related. The Senate understood the amendment to mean exactly this, p. 3328. But Dawes seems clearly to have intended the balances to remain available for one year after the close of the fiscal year for which the appropriations were made. "The object," he said, "is to strike a balance about once in two years. It is proposed by some to strike the balance every year, but it is possible that such an arrangement might sometimes embarrass the Department." *Ibid*.

cific enough to accomplish the object intended. The chief difficulty in the way of bringing unexpended balances into the Treasury was, so they stated, the ignorance of the Secretary of the Treasury as to the amount of the balances available for transfer to the surplus fund; they undertook therefore to prescribe precisely what should be done by the different departments in order that the Secretary of the Treasury might gain the requisite knowledge. On May 10 they proposed to the Senate, as in Committee of the Whole, that the Dawes amendment be struck out and in lieu of it four new sections inserted.

The plan of the first three of these sections was as follows: (1) on the first of June in each year, that is to say, one month before the expiration of the fiscal year, the Secretary of the Treasury was to transmit to the head of each department a statement of the balances of appropriations for the service of his department which should appear by the books of the Treasury Department to be unexpended at that time; (2) within fifteen days of the receipt of this statement the department head was to cause to be certified thereon how much of each unexpended balance would be required to meet outstanding liabilities properly chargeable thereto and how much thereof might be carried into the general Treasury; and was to return the statement to the Secretary of the Treasury; (3) thereupon the Secretary of the Treasury was to issue a warrant directing all amounts which the department heads might have declared to be unneeded, to be charged to the proper appropriations and credited to the general account of appropriations. The fourth proposition of the Committee on Appropriations, and the only one to be finally enacted into law, was designed to carry all unexpended balances to the surplus fund at the end of the second year, whether the department heads should wish to retain them or not. The phraseology of the section was as follows:

And be it further enacted, That all balances of appropriations which shall have remained on the books of the Treasury, without being drawn against in the settlement of accounts for two years from the date of the last appropriation made by law, shall be reported by the Secretary of the Treasury to the Auditor of the Treasury whose duty

it is to settle accounts thereunder, and the Auditor shall examine the books of his office and certify to the Secretary whether such balances will be required in the settlement of any accounts pending in his office; and if it shall appear that such balances will not be required for this purpose then the Secretary may include such balances in his warrant, whether the head of the proper Department shall have certified that it may be carried into the general Treasury or not. But no appropriation for the payment of the interest or principal of the public debt, or to which Congress may have given a longer duration of law, shall be thus treated.¹⁵

When these amendments were debated in the Senate, the first three were severely criticized by Senator Sherman. They would not change the existing practice because the department heads would invariably report that the entire balance, no matter how large it might be, was needed to meet existing obligations. Indeed, the heads of the departments were not the proper officers to determine what moneys were needed to meet the expenses incurred or to satisfy contracts; that could be done only by the appropriate accounting officers of the Treasury. Sherman proposed therefore in lieu of the Committee's first three propositions the following amendment:

That all balances of appropriations contained in the annual appropriation bills, and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year or to the fulfillment of contracts properly made within that year; and such balances not needed for the said purposes shall be carried to the surplus fund: *Provided*, That this section shall not apply to appropriations known as permanent or indefinite appropriations.¹⁶

The effect of this amendment would be to confine the use of unexpended balances after the expiration of the fiscal year to two classes of expenditure: "first," explained its sponsor, "where the expenditure has accrued during the fiscal year, but the money has not been paid out till after the year expires; second, to the satisfaction of contracts made during the fiscal year but not fully

15. *Ibid.*, p. 3327.

16. *Ibid.*, p. 3328.

satisfied until after the fiscal year." Furthermore the amendment would make the amount to be carried to the surplus fund not a matter of estimate by the head of a department, but of judicial inquiry by the proper Auditor and Comptroller.

After some debate Sherman's amendment was accepted by the Senate as a substitute for the first three propositions of the Committee on Appropriations. On July 12 it became law, together with the fourth proposition of the Committee on Appropriations quoted above.

In addition to these two provisions the Act of 1870 contained a section forbidding any department to spend, in any one fiscal year, any sum in excess of appropriations made for that year, or to involve the government in any contract for the future payment of money in excess of appropriations.¹⁷

Prior to that time acts of Congress had been passed which expressly or constructively imposed upon the executive department of the government duties involving the expenditure of money for which no appropriations had been made, and from the existence of those duties it was inferred that the power to incur the necessary debts also existed. To cut off all such inferences and assumptions was the evident purpose of the section of law referred to.¹⁸

In 1872 pursuant to the provisions of this act, the sum of \$146,000,000 was covered into the surplus fund at one time; in a single bureau it was found that the unexpended balances of appropriations amounted to some \$36,000,000—these were the accumulations of a quarter century.¹⁹

An Act of 1872 may be mentioned in this place as supplementary to the Act of 1870. This enacted that all proceeds of sales of old material, condemned stores, and other public property should, with a few exceptions, be covered into the public Treasury.²⁰ The reason for this legislation is explained in a report of

17. Sec. 7 (16 Stat. 251). This became Sec. 3679 of the Revised Statutes.

18. Secretary of the Treasury John Sherman to Speaker Randall, December 14, 1877. 45th Cong., 2d sess., H.Doc. 27, pp. 1-2. Cf. 14 *Op.*, 109.

19. Garfield, *op. cit.*, II, 749. The reader will understand that this was not real money but unused spending authority.

20. 17 Stat. 83.

the House Committee on Appropriations dated February 4, 1868:

Very large amounts, exceeding tens of millions of money, have come into the hands of the War and Navy Departments from the sales of public property rendered useless, or too expensive to keep for future use, by the return of peace. Portions of this money have been used by the heads of these departments for the purpose of carrying on the operations thereof.²¹

With the passage of the Act of 1870 Congress supposed that it had closed the last loophole through which the Executive might escape its control. "I assure the Senate," said Sherman,

that I have examined this matter carefully, and the effect of the amendment which I propose will be to carry all the balances of the annual appropriations, at the end of the fiscal year, over to the surplus fund, unless in the opinion of the accounting officers, as will be shown by the vouchers furnished them, the amounts are needed for two specific purposes for the service of the previous fiscal year. Then section six of the amendment proposed by the Committee on Appropriations will carry all the balances to the surplus fund absolutely at the end of the second year. I think with these two propositions we shall get rid of the unexpended balances on the Treasury books.²²

Four years of practice were to demonstrate how ill-founded were these hopes. Hardly was the Act of 1870 placed upon the

21. 40th Cong., 2d sess., H.Rep. No. 14, p. 2. Information elicited from the War Department with great difficulty in 1872 revealed to Congress that, since June 30, 1865, the total amount received by the Department of the Quartermaster General in excess of its appropriations was just under \$108,000,000; of this all but \$2,277,000 had been spent. See remarks of Senator Beck (10 *Cong. Rec.*, 1581-1582). It is understandable that he exclaimed: "One hundred and five millions of dollars used by the Quartermaster's Department alone in excess of the appropriations made by Congress, and spent by that officer to pay the debts of the Department, as he saw fit to call them! That one hundred and seven millions never appeared as part of the money of the people from the day it was appropriated during the war to buy the cattle, mules, horses, wagons, and other things that were afterward sold to produce it, but it remained standing as money belonging to the Department till paid out to suit themselves. So the Secretary of the Navy made a like report in 1872, showing that \$74,000,000 had been received from the sale of ships and other material by his Department."

22. *Cong. Globe*, 41st Cong., 2d sess., p. 3329.

statute books when the Attorney General, at the request of the Secretary of War, handed down an opinion nullifying for all practical purposes Section 6, upon which Sherman so confidently relied. No need, said the Attorney General, to surrender the unexpended balance of an appropriation after two years; to arrest the operation of the act it is but necessary to draw upon the appropriation before the expiration of the two-year period and this will automatically extend its duration for another two years; nor is it necessary to make a large withdrawal: "The fact that a balance has been drawn against within two years since the last appropriation, reserves it from the operation of this section, no matter how large the balance may be or how small the amount may be which has been drawn against it."²³

Under this construction of the law appropriations were kept open indefinitely and were drawn upon to pay long-accrued or past-due claims, many of which were fraudulent or allowed by the accounting officers on *ex parte* showings. Indeed, it was freely charged on the floor of Congress, somewhat hyperbolically no doubt, that hundreds of millions of dollars were every year taken wrongfully from the Treasury.²⁴

Accordingly, in 1874 Congress once more attempted to effect the object which it had failed to effect by the legislation of 1795, 1820, 1852, and 1870. On June 20 it passed a statute, the fifth section of which provided

that from and after the first day of July 1874, and of each year thereafter, the Secretary of the Treasury shall cause all unexpended bal-

23. 13 *Op.*, 290.

24. 2 *Cong. Rec.*, 3392. Representative Beck severely censured this construction of the law: "A construction has been given to that provision upon which a great deal has been said, that when they could draw upon the appropriation for any purpose whatever they could keep the money out of the Treasury, and in accordance with that construction which is unwarranted under the law, or any possible construction of it, and is a clear perversion of the language, you will find, if you will turn to the Book of Estimates, that the sum of \$52,000,000 that was appropriated specifically for the year 1871, two whole fiscal years having elapsed before the beginning of this year, is still being drawn upon. The Postmaster-General himself, as you will see on page 237, drew \$500,000 out of that appropriation after the 1st of July and before the 1st of September of the present fiscal year."

ances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury: *Provided*, that this provision shall not apply to permanent specific appropriations, appropriations for rivers and harbors, light-houses, fortifications, public buildings or the pay of the navy and marine corps, etc."²⁵

"This law," wrote Bolles in 1886, "no department has yet been able to surmount or tear down."²⁶

The fact is that the Act of 1874 had the good fortune to receive, shortly after its passage, a rigorous construction from the Treasury Department. On March 10, 1877, President Hayes appointed John Sherman Secretary of the Treasury. Soon after entering upon his duties his attention was called to the payment of old claims from that class of appropriations denominated in the Revised Statutes "permanent annual appropriations"; the occasion was the receipt by his office of a requisition of the Secretary of War (No. 2834 of March 21, 1877) for \$1,742 in favor of Malachi V. Plank and others, based upon a report of the Third Auditor, allowed and certified by the Second Comptroller; the claim was an old one which, if valid, had accrued on June 1, 1873.

After a careful consideration of the subject, Sherman came to the conclusion that this claim, even if it had been properly allowed by the accounting officers, which was doubtful, was not a proper charge on the appropriation from which it must be paid, inasmuch as the balance of that appropriation had been covered into the Treasury. Citing a number of acts passed since the close of the war to limit and control the action of officers in passing accounts, he remarked that

In the several laws referred to, it was clearly the intention of Congress to establish a public policy that would confine accounting officers to the adjustment or payment of claims accruing for services rendered, or duties performed, or property purchased, or contracts accruing during a limited period, and to the adjustment of the accounts of dis-

25. 18 Stat. 110.

26. Albert S. Bolles, *The Financial History of the United States from 1861 to 1885* (New York, 1886), p. 530.

bursing officers, the general design being to cut off the allowance and payment of long-accrued or past-due claims.²⁷

This policy he thought to be so wise that every executive officer ought to contribute to maintain it. He then continued:

The Treasury Department is admirably organized to pass upon accruing demands upon the government and upon the accounts of disbursing-officers. All its machinery and checks are adapted to this duty, and no serious complaint has been made, or is likely to be made, of the proper discharge of this duty. But when claims long past due are presented upon *ex parte* evidence to officers who have no means of calling witnesses, no powers to cross-examine them, no modes of testing the sufficiency of testimony or its credibility, none of the safeguards of an open court of justice, the passage of fraudulent claims is unavoidable. Congress has by law provided a Court of Claims, where, within a limited period, all demands founded upon contracts may be presented and openly tried and decided. If this remedy in any case should be insufficient, claimants can appeal to Congress, which may grant either a new trial in the courts, or a reexamination in the departments, or directly furnish such relief as it deems right and proper. The Treasury Department is not a Court of Claims, and the reason for withholding the ordinary powers of such a court became apparent to Congress by actual errors that had occurred.

So much for generalities. The specific question before the Secretary was whether the claim of Malachi V. Plank and others might be paid under the proviso to Section 5 of the Act of 1874, which excepted from the operation of this section, among other things: (1) permanent specific appropriations and (2) contracts existing June 20, 1874. As to the latter, Sherman had no doubt. The contracts meant to be excepted were continuous and subsisting contracts requiring acts to be performed, and not contracts broken or ended or matured into accrued liabilities. Any other construction would defeat the manifest purpose of the act and permit the payment of the French Spoliation claims, or claims growing out of contracts during the Mexican War or the War of the Rebellion. As to the former, Sherman was equally free from doubt. There was, he maintained, a wide difference between a

27. 45th Cong., 2 sess., H.Doc. 27, p. 8.

permanent specific appropriation and a permanent annual appropriation. A permanent specific appropriation was one like a private bill, where nothing was left to executive officers for examination or inquiry except to identify the party or to comply with some specific duty pointed out by the act itself. A permanent annual appropriation contemplated that a liability would accrue in the future, from time to time, and that when it accrued it might be paid from the Treasury, subject to the same general laws as to time, place, and manner, that applied to other annual appropriations; such were the appropriations for the expenses of collecting the revenues, and for the interest of the public debt—in fact, all those contained in Sections 3687, 3688, and 3689 of the Revised Statutes. To expand an exception in favor of permanent specific appropriations to cover all permanent appropriations would, Sherman held, defeat the plain intent of the law and open the door to all sorts of abuses.

Any other construction of the act would defeat its object. Money would be taken from the permanent annual appropriation for horses and steamboats lost in the public service, and applied to pay for horses lost twenty years ago; money would be taken from the appropriation for collecting the customs, and used for the payment of claims that accrued twenty years ago, and for the interest thereon. Thus old claims would be paid out of permanent annual appropriations, and would be barred neither by lapse of time nor by adverse decisions, while current appropriations would be covered into the Treasury.

And so he decided that permanent annual appropriations came within the purview of the Act of 1874 and instructed the departments to that effect in a circular dated April 20, 1877.²⁸

28. *Ibid.*, pp. 9-10. Assistant Secretary French, it may be noted, fought vigorously against this interpretation, particularly as it affected refunds. Among his objections the following is of particular interest: "Congress has refused appropriations for objects clearly requiring them, as for payment of judgments of the Court of Claims and for the Army and in part for the Navy, and may refuse any appropriations asked for this purpose. Should Congress neglect to grant the appropriations, the Secretary must elect to abandon his construction or delay these payments indefinitely to the great dissatisfaction of the mercantile community." Treasury Department. Misc. Secretary's Correspondence, January 20, 1876, to May 10, 1877, p. 426.

In one respect, however, this decision was latitudinarian, for the availability of appropriations was fixed at three rather than two fiscal years, the period of limitation being supposed to commence at the end rather than the beginning of the year for the service of which the appropriations were made. This was hardly what was intended by the framers of the act, as appears from the following colloquy:

Mr. Randall. I wish to put an inquiry to the chairman of the Committee on Appropriations: When do the two years spoken of in this section commence? Is it at the beginning of the fiscal year, when the credits of the various accounts commence, or two years after the 30th day of June?

Mr. Garfield. It commences from whatever date the appropriation is available. If we make an appropriation for the fiscal year beginning next July, then it takes effect two years from that date.

Mr. Randall. Then it would take effect July 1876.

Mr. Garfield. Yes, sir.

Mr. Randall. That is to say, the money would be covered into the Treasury then?

Mr. Garfield. Yes, sir.²⁹

These remarks were made in the House on April 25, 1874, and suggest that by executive interpretation appropriations are now available for one year more than the period originally intended by Congress.

The Attorney General seems also at this time to have been a strict constructionist. In an opinion dated August 10, 1877, he advised the Treasury Department that

although funds have been paid from the Treasury into the hands of disbursing-officers, if they have not been paid out, or have not been expressly set aside for the payment of debts which have been ascertained and determined, when the time arrives at which the unexpended balances of appropriations lapse into the Treasury, it will be the duty of the disbursing officers to repay such funds, that they may be carried to the surplus fund and thereafter covered into the Treasury.³⁰

29. 2 *Cong. Rec.*, 3393.

30. 15 *Op.*, 358.

This was as much as to say that the substantial command of the law could not be evaded by permitting disbursing officers to make payments from moneys retained in their hands after the date when the balances in the Treasury could no longer be used.

Some latitude, however, continued to be exercised by the Treasury in interpreting the act of 1868 forbidding the mingling of appropriations. The appropriation acts of these days, it is to be understood, were long, detailed, and circumstantial, every head of expenditure being broken down into a number of subheads and a specific sum assigned to each.³¹ But the Treasury, by what the opposition in Congress termed a usurpation of power, frequently undertook to merge these subheads into a single appropriation for the general head. How this was done was clearly explained by Second Comptroller Brodhead in his testimony before a Congressional committee sitting in 1872. Asked of what the appropriation for the Bureau of Construction and Repair for the year 1869-70 consisted, he replied that it was made up of thirteen items—so much for expenses of receiving ships, so much for preservation of iron-clad vessels, etc., etc. "But," he continued, "the committee is unquestionably aware that the Secretary of the Treasury prescribes the mode of opening all these accounts for the bureaus. . . . The Secretary of the Treasury, in his appropriation warrant to the Comptroller of the Treasury and the Register, merged all these items into one appropriation of \$4,480,000 to the credit of the Bureau of Construction and Repair." So far as the accounting officers were concerned, he concluded, "in settling the accounts we never refer to those items, which are supposed to be merely in the nature of estimates going to make up the whole, so long as the total remains undrawn."³²

31. The reader should notice a change made about this time in the mode of appropriating for contingencies. Until 1874 the custom had prevailed of appropriating considerable sums under the head of "contingent expenses," the disbursement of which was left to the discretion of the executive departments. But in one of the annual bills of 1874 "all these appropriations were carefully classified and definite amounts were granted for different specific purposes, so that the sums left to be expended at the discretion of bureaus of departments were greatly reduced." (Garfield, *op. cit.*, II, 750.)

32. *Cong. Globe*, 42d Cong., 2d sess., p. 2348.

In 1883 this same practice was still being followed. "The accounts," wrote Comptroller Lawrence in this year,

kept with appropriations in the warrant division of the office of the Secretary of the Treasury and in the office of the First Comptroller, and the accounts of disbursements in the office of the Register of the Treasury, are stated under *general heads* of appropriation named in appropriation acts, and not under specific heads.³³

Furthermore, disbursing officers, by usage, did not present separate abstracts of expenditures under each specific head of appropriation but embraced all expenditures under the one general head. The consequence was that the accounting officers, if they wished to ascertain whether the amount appropriated for any specific object had been exceeded, were forced to separate and classify the original vouchers, a task requiring much care and labor and therefore not always performed.

Accounts have been finally settled, in which the aggregate disbursements did not exceed the aggregate appropriations, but in which the disbursements for specific objects have, in some cases, exceeded, and, in others, been less than, the appropriations therefor. In this way money appropriated for one specific object has been disbursed for another, totally different.³⁴

The occasion for these remarks by Comptroller Lawrence was his discovering that the appropriations for the Freedmen's Hospital and Asylum for the year 1881-82 had been mingled. He determined at once to put an end to the practice. Accordingly he decided that disbursing officers, who were presumed to know the appropriation acts, must thereafter return with their respective quarterly accounts separate abstracts for each specific object of expenditure, accompanied by vouchers showing the specific heads of expenditure charged. The penalty for exceeding appropriations was to be disallowance.

33. 4 *Decisions of the First Comptroller in the Department of the Treasury*, 139.

34. *Ibid.*, p. 142.

CHAPTER VII

THE FIGHT AGAINST DEFICIENCIES: 1879-1917

WITH the passage of the Acts of 1868, 1870, and 1874 the theoretical pretensions of the executive departments to mingle appropriations and to bring forward the forgotten balances of former years were completely overthrown. Only one escape from the rigidities of the system of specific appropriations as then developed was left to them. This was the incurring of coercive deficiencies. Congress would allow to the departments what it thought to be ample for the needs of the year, the departments would spend it in, say, nine months, and Congress would be placed in a position where it would be in effect compelled to make a supplementary appropriation. As one member said: "Under the law they [the departments] can make these deficiencies, and Congress can refuse to allow them; but after they are made it is very hard to refuse to allow them."¹

A single instance will illustrate the practice. Shortly after the opening of the second session of the 46th Congress, that is, in December, 1879, the Postmaster General sent to the House of Representatives a communication asking an appropriation of \$2,000,000 in addition to the \$5,900,000 already granted for inland mail transportation on the star routes. This communication occasioned considerable surprise, for every dollar of money which the Department had asked for the service of previous and the current fiscal years had been granted by Congress, yet here was a request for 34 per cent more than had been asked. It was decided to investigate.

The results of investigation were disturbing. It was found that the request was not a mere proposition to enlarge the star service in the future; only \$300,000 was asked for that purpose; the balance, \$1,700,000, was needed to meet existing commitments, the Department having entered into contracts requiring a rate

1. 39 *Cong. Rec.*, 3687 (Representative Hemenway).

of expenditure which would exhaust the appropriation about the beginning of April. Here then was a seeming violation of Section 3679 of the Revised Statutes, forbidding a department to spend more in any one fiscal year than was appropriated for that year or to enter into contracts for the future payment of money in excess of appropriations. The Postmaster General and the Second Assistant Postmaster General were called upon for an explanation. They presented the following extraordinary defense. They had not yet spent money in excess of their appropriations, nor would they do so; if Congress failed to appropriate the \$1,700,000 needed to fulfill their contracts, they would annul those contracts, pay the contractors one month's pay as usual in cases of reduction or termination of contract, and stop the mails; the country might be inconvenienced, but Section 3679, Revised Statutes, would be inviolate.

The arrogance of the argument did not pass unnoticed. On February 25, 1880, Representative Blount rose in his place and reviewed the situation:

A sum of money was voted which would have enabled the Department to give better service than we had had for many previous years. The expenditure of this vast sum of money within the first half of the fiscal year, before any intimation was given to Congress upon that subject, was communicated to this House under what circumstances? When the House could not by any possibility consider the question as to what should be the service for the fiscal year; when a preceding House had determined what should be that service; when the laws of the land rightly construed held the Department down to that service. This communication was brought to us when the House was under duress as to the matter of appropriating money; when we could not consider the question as representatives of the people, having the original right to determine how much money should be expended in this manner. I say that this was done deliberately. The Postmaster-General and the Second Assistant Postmaster-General must be presumed to have intended in matters of this sort what they did.

What then, he asked, was the condition of the House? What had the Department deliberately done? It had gone on and spent the money in such a manner that if the contracts were carried out in

good faith the appropriations would be exhausted by April 10 and the service would be destroyed:

Mr. Chairman, I ask whether, in the history of this country, there ever was such audacity on the part of any departmental officer in time of peace and in the absence of any public exigency? The Postmaster-General and the Second Assistant Postmaster-General have deliberately gone on and made contracts in violation of law to the extent of \$1,700,000, and have then come to this House and pretended to submit the question whether the service should be continued for the remainder of the year; but they have deliberately submitted that proposition when we cannot refuse it without destroying the mail service of the country. I ask whether the representatives of the people of this country—whether the two hundred and ninety-three members of this House, with whom resides the power of originating appropriation bills—are to be toyed with, contemned, and despised in this manner?

To be sure there were some exigencies in which an officer might properly exceed an appropriation. When war with Spain threatened, the Secretary of the Navy had enlisted 1,500 additional men, later submitting his action to the judgment of Congress. But in the case of the Post Office there was not the slightest exigency. There was nothing but insolence.

We are mocked with the miserable, foolish sophistry that the officer responsible in this case can save himself from the operation of the statute by destroying the mail service of the country; and we are expected to accept such a statement. Destroy the mail service of the country? Annul every contract in the land! Say to the contractors on ten thousand routes "You relied on our faith; we entered into contract with you; all that you could reasonably expect was that when the public interests of the country might require it the Government should annul this service; but now with a ruthless hand, with utter disregard of the interests of the public service, we propose to annul those contracts, to bankrupt you, in order that we may clear our guilty skirts by saying we have not spent more money than was appropriated.

Why, sir, such a proposition deserves the indignation of the House.²

2. 10 *Cong. Rec.*, 1129.

Blount was not the only man to condemn the Department in this fashion. Others in both House and Senate expressed similar views. But it was a case of Hobson's choice; the service could not be stopped; the appropriation must be made. The Second Assistant Postmaster General was not far wrong when he gave the newspapers of the country to understand that there might be complaints, that committees might criticize, that the press might carp at his action, but that he would have his money. The deficiency appropriation was granted in time to save the mails.

It was said during the debates on this bill that this was the first instance in which the will of Congress had been openly defied by an executive department. It was not however the last. As we have seen above, the incurring of coercive deficiencies was the only escape left to the departments from a too rigorous system of appropriation. It became, therefore, the object of each department head and, more particularly of each bureau chief to establish as a system what had been begun as an anomaly. The records show that in this effort they succeeded. During the next quarter century (1880-1905) their disregard of Congressional action upon their estimates became habitual and finally came to be taken as a matter of course. Soon it could be said that the departments had become the appropriating authorities and that Congress had sunk to be the mere register of their determinations.

Only in theory did Congress remain supreme. Nominally it retained the right to scrutinize the estimates and to grant less than was demanded; but as a practical matter the exercise of this right was unavailing. The departments governed their expenditures by the amounts of the estimates rather than by the amounts of the grants. If in any case less were granted than was estimated, the department or bureau affected, instead of revising its plans for the coming year to bring them within the financial limits of the reduced appropriation, continued them without change in perfect confidence that Congress would appropriate supplementary sums when they were requested rather than stop the service. One member of Congress said when the abuse was finally noticed:

We find that whenever we cut down or when generally we cut down the amounts estimated for any given object to what, in the judgment of Congress, is ample provision for a given and specific work, those in charge of bureaus arbitrarily proceed to expend amounts under the appropriations as though their estimates had been allowed in full, giving no attention to the mandate contained in the appropriation determined by Congress. And then what happens? At the next session of Congress they come here with either an anticipated or an actual deficiency, and to our questions why, with good management, they could not have kept their expenditure within the limits set by Congress, they give us general and unsatisfactory reasons, but always wind up with the statement that unless this deficiency be allowed the work of the Government in relation thereto must stop.³

Several circumstances facilitated this arrogation of power by the departments. One of particular importance was the political practice, common throughout the period, of underappropriation. In 1879 it was described by Garfield:

One of the vicious party devices too often resorted to for avoiding responsibility for extravagance in appropriations is to cut down the annual bills below the actual amount necessary to carry on the government, announce to the country that a great reduction has been made in the interest of economy, and after the elections are over, make up the necessary amounts by deficiency bills.⁴

Twenty-seven years later Representative Livingston testified to the continued existence of the practice:

The Departments are not alone to blame for the custom that has grown up, of overreaching appropriations made by Congress. Since my connection with the committee, fifteen or sixteen years, we have often encouraged rather than discouraged deficiencies. It was a well-recognized fact for years that if we wanted to make an impression of economy, or if we had a short session and were in a great hurry, we cut appropriations rather than investigated them and said: "Oh, well; they could go to the Senate or they could come in with a deficiency." It was understood in the Departments that they could come with a deficiency, and the custom has grown up until it has become a part of our system.⁵

3. 40 *Cong. Rec.*, 1273 (Representative Littauer).

4. Garfield, *Works*, II, 750.

5. 40 *Cong. Rec.*, 1281.

So common was the practice of making partial appropriations that in some instances it became habitual for the departments to estimate and for Congress to appropriate on what might be called the installment plan. Year after year, for example, the District Commissioners estimated the annual cost of fuel for the District schools at \$45,000; year after year they came to Congress for a deficiency appropriation of \$30,000.⁶ That there should be a recurrent two thirds' deficiency on this appropriation occasioned no surprise or unfavorable comment in Congress. Only if the deficiency had been more or less than \$30,000 would the expenditures of the Commissioners have seemed worthy of investigation. The deficiency was as automatic as the original estimate.

The fact that in some cases the departments were not expected to regard the appropriation acts but were given to understand that deficiencies would be made up when the occasion suited served as a screen to the fact that in other cases the departments were disobeying a law which was intended to be obeyed. But it is not to this cause alone that we must attribute the easy victory of the executive over the legislative power. We must notice now the gradual disintegration of the Congressional machinery of appropriation.

Prior to the Civil War the Committee on Ways and Means had jurisdiction over both the levying of taxes and the appropriation of revenues. Presumably this was on the theory that those who were charged with maintaining a certain head of water in the reservoir should have some control over the outflow from the

6. Representative Tawney in January, 1906, quoted from the testimony of the Commissioners on this point: "Mr. West. If you will glance at the figures furnished in the bill, you will see that for the last five years Congress has appropriated the same amount for fuel for the public schools—\$45,000. The custom has grown up of continuing the estimates at the same amount—\$45,000—and coming to Congress for a deficiency.

"Mr. Littauer. Do you submit \$45,000 always?

"Mr. West. I think that is the way it is done. I will ask Mr. Courts.

"Mr. Courts. Yes; the estimate runs in that way.

"Mr. West. It has grown up as a custom, not that \$45,000 will foot the bills, but that amount is put in at the outset, and then we come to Congress for a deficiency." (*Ibid.*, 1289.)

Representative Fitzgerald stated that the deficiency estimate was invariably \$30,000. (*Ibid.*, 1288.)

sluices.⁷ But in 1865 the functions of the Committee on Ways and Means were divided and jurisdiction over the appropriation bills was transferred to the newly created Committee on Appropriations. This in itself may have been a mistake, but worse was to follow. In 1876 a change was made in one of the rules of the House by which any general legislation germane to a bill might be in order if it retrenched expenditures. The rule as presently construed resulted in putting a great mass of legislation upon the appropriation bills and in so overloading the committee in charge of them as to render it impossible for its members to devote sufficient attention to the details of the appropriations proper. The consequence was as foreseen by Garfield: the rule broke down the Committee on Appropriations and dispersed the annual bills to several committees, so that the legislation on that subject was not managed by any one committee nor in accordance with any general or comprehensive plan. In 1880 the Committee lost control of the Agriculture Appropriation bill; and in 1885 Congress deprived it of jurisdiction over the appropriation bills relative to the Army, the Navy, Indian Affairs, Foreign Affairs, and Rivers and Harbors.⁸ Thus it came about that instead of one road into the Treasury—and that a thorny one—there were seven or eight primrose paths and “as many byroads as there were members of these appropriations committees.”⁹ The predictions of Representative Randall came true: the distribution of the bills led to continually increasing appropriations and made it more and more difficult to keep expenditures within the limits of receipts; the grasp which the Committee on Appropriations alone could keep upon the purse strings was relaxed; the spending committees, having intimate and for the most part cordial relations each with a particular department, launched out into an unrestrained competition for appropriations, the one striving to surpass the other in securing greater recognition and more money for its special charge. In these circumstances it is

7. The metaphor is Lord Welby's.

8. The immediate cause of this action seems to have been a wish to break the power of Representative Randall.

9. Representative Tawney.

not surprising that executive dereliction passed almost unnoticed and that the department heads and bureau chiefs came to look upon themselves rather than upon Congress as the ultimate arbiters of expenditure. To make confusion worse confounded, requests for deficiency appropriations were referred not to the committee which had passed upon the original estimates but to the Committee on Appropriations.

Representative Burton was, perhaps, the first member of Congress forcibly to call attention to the breakdown of Congressional control over appropriations and to denounce the practice of coercive deficiencies. Speaking on March 15, 1904, he said:

The increase of deficiency appropriations is to be noted. Supplemental or deficiency budgets are quite common in all countries. It must be conceded that they are undesirable and dangerous to the best ordered administration. Under our parliamentary methods, however, there is an additional danger. A committee or subcommittee may frame a bill for a branch of the public service and seek to secure economy and at the same time sufficient provision for the public functions in question. Afterwards, the amounts recommended and adopted by Congress may be exhausted by some Department of the Government, expenses may be applied for purposes or to an extent which the committee would not have approved, yet another committee or subcommittee not equally familiar with the subject may promptly provide the amount.¹⁰

Nothing was done at the time to correct the situation but a year later Representative Hemenway, Chairman of the House Committee on Appropriations, after consulting Senator Hale, proposed an amendment to Section 3679 of the Revised Statutes which he thought would end for all time the pretensions of executive "understrappers"¹¹ to ignore the determinations of the Congress and to spend more than was appropriated. This proposition after some debate was adopted by Congress substantially in its original form. It amended the section to read as follows:

No Department of the Government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that

10. 38 *Cong. Rec.*, 3295.

11. The word is Senator Hale's. 40 *Cong. Rec.*, 9786.

fiscal year, or involve the Government in any contract or obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made for the fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent undue expenditures in one portion of the year that may require deficiency or additional appropriations to complete the service of the fiscal year; and all such apportionments shall be adhered to except when waived or modified in specific cases by the written order of the head of the Executive Department or other Government establishment having control of the expenditure, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and all such waivers or modifications, together with the reasons therefor, shall be communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month.¹²

The Anti-Deficiency Act, as this section of law came to be called, was not an immediate success. It was all very well to require apportionment of all general and miscellaneous appropriations by monthly allotments or otherwise and to enact that the apportionment be not waived or modified except in specific cases by the written order of the department head; it was excellent to insist that all waivers and modifications, together with the reasons therefor, be reported to Congress. But these provisions alone did not suffice to hold executive officers to their duties. The heads of departments soon discovered that they could obey the letter of the law and evade its spirit. The method was simple: A

department head desiring to incur a coercive deficiency merely waived the apportionment and reported the matter to Congress, giving as his reason that he needed the money. The explanation was legally sufficient, for the law did not define the grounds upon which the waiver might be exercised.

The avoidance of the law was substantial. In 1906 it was found that the requests for deficiencies were almost as great as in 1905. Angry words were now heard upon the floor of Congress. The most forceful speech was made by the new Chairman of the House Appropriations Committee, Representative Tawney. It was, he said, neither right nor just, nor contemplated under our system of government, that the heads of executive departments or the departments themselves should themselves fix the standard of public expenditure; that was the function of Congress; it should not be usurped:

When Congress makes an appropriation for the public service, or for any specific branch of the public service, the administrative officer charged with the duty of expending that money should, in the interest of economy and in the interest of the public service, so apportion that appropriation as to meet the ordinary conditions and demands of the service throughout the entire fiscal year. In that case there would be no deficiencies and, in my judgment, the public service would not suffer.

But what if the appropriation were really insufficient and if in consequence of that fact the public service were to suffer? Tawney's answer was abrupt—the administrative officers would not be to blame; Congress would be responsible.

Heretofore they have not allowed Congress to assume this responsibility. They have gone on and expended their appropriations upon the basis of their estimates and their judgment as to what the public expenditure should be and then come to Congress and tell us that unless they can get a deficiency appropriation the public service will inevitably suffer. Under stress of that kind we have been heretofore practically coerced into making appropriations for the deficiency or to provide the money for the remainder of the fiscal year.¹³

13. 40 *Cong. Rec.*, 1316-1317.

The logic of the argument seemed compelling. Various suggestions were brought forward as to how the evil described might be corrected. Some of these, together with the reasons which induced their rejection, may be mentioned. One Representative recommended that Congress refuse to appropriate for deficiencies; but since this would injure the country more than the guilty officer it was not seriously considered. Another wished to deprive the heads of departments of all discretion so that they could "expend no money for any purpose except that specifically appropriated for that particular purpose"; but it was pointed out that this was practically the existing law and that further limitations would be dangerous. A third wished to forbid waivers or modifications of the apportionment except on the written certificate of the official immediately in charge of the particular bureau or establishment for whose benefit the waiver or modification was to be made; but it was thought that this would serve merely to screen the department head from blame if the expenditures were excessive.

Finally Congress decided upon a scheme sponsored by Representative Tawney and Senator Hale. Section 3679 of the Revised Statutes was again amended. That part of the law which authorized a department head to waive or modify the apportionment whenever in his judgment it should be waived or modified was struck out and in its place the following language was inserted: "And all apportionments shall be adhered to and shall not be waived or modified, except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment." The provision requiring waivers and modifications to be reported to Congress, together with the reasons therefor, was of course retained. Various verbal improvements were also made, so that the act as finally adopted read as shown in the note.¹⁴

14. "No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. Nor shall any Department or any officer of the Government accept voluntary

Supplementing to a certain extent this law was a provision inserted in the Legislative, Executive, and Judicial Appropriation Act of June 22, 1906, which enjoined the heads of departments and other officers authorized or required to make estimates for the public service to include in those estimates all sums required for the service of the year for which they were prepared; and which forbade them to submit special or additional estimates except

to carry out laws subsequently enacted, or when deemed imperatively necessary for the public service by the department in which they shall originate, in which case such special or additional estimate shall be accompanied by a full statement of its imperative necessity and reasons for its omission in the annual estimates.¹⁵

It had been customary for the departments to send in their estimates piecemeal, as they happened to be ready, and to claim new appropriations on the grounds that they had new estimates.¹⁶

For a time the new-modeled Anti-Deficiency Act appears to

service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property. All appropriations made for contingent expenses or other general purposes, except appropriations made in fulfillment of contract obligations expressly authorized by law, or for objects required or authorized by law without reference to the amounts annually appropriated therefor, shall, on or before the beginning of each fiscal year, be so apportioned by monthly or other allotments as to prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made; and all such apportionments shall be adhered to and shall not be waived or modified except upon the happening of some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such apportionment, but this provision shall not apply to the contingent appropriations of the Senate or House of Representatives; and in case said apportionments are waived or modified as herein provided, the same shall be waived or modified in writing by the head of such Executive Department or other Government establishment having control of the expenditure, and the reasons therefor shall be fully set forth in each particular case and communicated to Congress in connection with estimates for any additional appropriations required on account thereof. Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month." 34 Stat. 49.

15. *Ibid.*, 449.

16. 40 *Cong. Rec.*, 9786 (Senator Hale).

have operated successfully. Representative Tawney in 1909 spoke of its "gratifying operation" and stated that "coercive appropriations" were no longer extorted from Congress;¹⁷ two years later in his farewell speech to the House of Representatives (March 4, 1911) he declared:

Until six years ago deficiencies were so general as to apply to practically every branch of the public service, and represented a considerable percentage of the original appropriations granted. Administrative officers did not hesitate to embark at the beginning of the fiscal year on a scale of annual expenditure fixed according to their own judgment and estimate of the needs of the public service, without reference to the amount appropriated by Congress for the year's service.

The certainty of a jail sentence, coupled with a fine, has effectually set at rest this system of "coercive deficiencies." . . .¹⁸

While Congress was thus seeking to restore executive respect for its appropriation laws, it was proceeding also toward greater and greater detail in those laws themselves. Distrustful of the administration, it sought to leave as little as possible to executive decision. "In most cases," says a contemporary report of high authority,

appropriations are made for the use of a particular service or the carrying on of a specific activity, and the act of appropriation sets forth the personnel which may be employed, the amount which may be expended for different classes of materials, supplies, and other objects of expenditure. This leaves little range for the exercise of administrative discretion.¹⁹

All this was done by Congress months and sometimes years before the expenditures were to be made.

This practice of itemization, so little consonant with the proper principles of financial control, was first challenged by the great Commission appointed by President Taft to report on the need for a national budget. After describing the nature of the practice

17. 43 *Cong. Rec.*, 3834.

18. 46 *Cong. Rec.*, 234 (Appendix).

19. President Taft's Commission on Economy and Efficiency, *The Need for a National Budget*. 62d Cong., 2d sess., H.Doc. 854, pp. 72-73.

and commenting on the tendency to pursue it further and further, the Commission on Economy and Efficiency proceeded to its denunciation. By depriving the government of the benefits of executive judgment, itemization operated to produce inefficiency and waste:

It does not make for economy and efficiency; it relieves the head of the service from responsibility in planning work and in making purchases; in many instances it forces him to purchase things not best adapted to use—forces him to purchase things at a higher price than is necessary, because he has not the power to do what his judgment dictates in the conduct of the business in hand. In other words, judgments which can be made wisely only at the time that a specific thing is to be done are attempted to be made by a Congress composed of hundreds of Members from six months to a year and a half beforehand on the recommendation of a committee which at most can have but a limited experience or fund of information as a basis for their thinking. As a result of established legislative policy the Government is thereby robbed to an extent of the benefit of well-trained technical service and of the exercise of official discretion—this on the theory that its officers are not to be trusted with the use of public funds, and therefore not to be held responsible for the exercise of judgment in the execution of the details of the business.²⁰

These drawbacks were serious enough, but in all probability the practice of itemization was also at variance with the general theory underlying the Constitution which makes Congress responsible for determining policies involving the expenditure of money and the Executive responsible for executing them:

The legislative branch has not only assumed to settle questions of policy but also, through appropriations and minuteness of detail in organic law, has deprived the executive branch (the administration) of the exercise of discretion with respect to a large part of the public business. While the purpose has been to prevent the misuse of power, the effect has been to relieve administrative officers of responsibility for waste and inefficiency in the service. The underlying motive which has transformed monarchical to constitutional forms of government has been to make the executive branch responsible. In this country

monarchy, as a form, was overthrown by revolution. This having been accomplished, the legislative branch has proceeded on a theory which has operated to make the administration irresponsible—in other words, to defeat one of the primary purposes of the Constitution.

This tendency finds best illustration in legislation through which money grants are made.²¹

What was the alternative? The views of the Commission on this point were extremely clear:

Instead of seeking to control administration through depriving it of the exercise of discretion in the transaction of public business, the recommendation of the commission is that the Congress shall definitely assign the duties which come properly within the scope of administrative responsibility and then shall prescribe such conditions and require such an accounting as will disclose promptly and accurately the results of the exercise of the executive discretion or indiscretion.²²

The manner in which this general principle would affect appropriation control in particular was carefully explained:

It is assumed that the estimates should be prepared in much greater detail than at present submitted, but that the items of appropriation will be much reduced in number; that appropriations will not go into detail further than to indicate the work to be done and the general character of expenditures authorized; that while expenditures and estimates will go into the greatest detail in showing what is the actual or prospective cost of things bought or to be bought, none of this class of items will appear in the appropriations; and that it will be left to the officer to determine the objects of expenditure to the purchase of which the funds will be applied.²³

Views such as these were not confined to experts employed by the President. In Congress, too, some uneasiness manifested itself as to the correctness of the currently accepted principles of financial control. In a remarkable speech delivered in the House of Representatives on February 28, 1913, Mr. Swagar Sherley, a

21. *Ibid.* See also p. 210.

22. *Ibid.*, p. 221.

23. *Ibid.*, pp. 211-212.

leading Democratic member of the Committee on Appropriations, after outlining an ingenious plan for improving the budget both from the administrative and the legislative side, added these words:

I believe we have to get away from the plan that I have advocated and that a great many others have advocated heretofore of detailed specifications and limitation upon every appropriation. If the gentleman heard the first of my speech, he will recall that I said in substance that we treat every executive officer as if he were a suspicious character, and he treats us as if we were a lot of numskulls who knew nothing about the needs of the service, and out of that mutual suspicion comes half the trouble. Aside from the fundamental reason of absence of responsibility to us, one reason we have had to treat him as a suspicious character is because the form of making estimates and the form of reports of work done did not give us information as to whether it was well done or not, and so, for fear it might not be well done, we have taken away discretion and tied his hands, whereas the real system ought to be to give to an administrative officer some discretion and then require accountability.²⁴

Even the most superficial comparison will reveal the fundamental identity of the views here set out and those urged by President Taft's Commission.

It does not appear, however, that Congress acted upon these recommendations. Five years later, almost to the day, we find Representative Sherley, now Chairman of the Committee on Appropriations, repeating:

The legislative end has undertaken to prevent what it thought would be abuses of power by constant limitations and by classifications and enumerations, so that our supply bills have become so detailed that the committees dealing with them and the Congress dealing with them spend days and weeks and months in consideration of details that ought not to concern Congress at all, because just to the extent that the Congress is forced to give its time annually to little details—the number of clerks, the salaries they shall be paid, and the internal organization of this bureau and that bureau—just to that extent will

24. 49 *Cong. Rec.*, 4354-4355.

it cease to have a voice in the great policies of the Government. And that is what has been happening for the past 40 years in America.

More and more Congress spends hours and days of debate touching clerks' salaries and less and less touching the great policies of the Nation. If this body, the responsible representative body in a true democracy, is to have the power it ought to have, it must have time to deal with the big things and not the need of dealing with the small things.²⁵

Sherley was speaking of the ordinary system of appropriating public moneys. We must now notice that during the war this system had been supplemented by another.

25. 56 *Cong. Rec.*, 2159.

CHAPTER VIII

EFFECTS OF THE FIRST WORLD WAR:

1917-1929

EXTRAORDINARY circumstances demand extraordinary measures. When the United States joined the war against the Central Powers, no one knew—neither the Congress nor the Executive—what total expenditure would be needed or even what the main heads of that expenditure might be. To have attempted to set out in advance the detailed objects of expense and to estimate the precise amounts to be assigned to each would have been the merest folly; indeed, it would have been to defeat by delay the very object for which the appropriations were asked, namely, the vigorous prosecution of the war.¹ The Executive insisted and Congress recognized that much must be entrusted to the current judgment and discretion of administrative officers.

The expedients adopted by Congress to give flexibility to expenditure were several. It made lump-sum appropriations; it authorized the departments to obligate the government in excess of appropriations; it permitted appropriations to be renewed or increased by reimbursement; it established revolving funds; and, what is even more remarkable, it allowed incorporated government bureaus to collect and disburse the public moneys with scarcely a reference to the Congressional appropriating power. Concerning each of these expedients it may be well to say a few words.

Lump-sum appropriations were grants of authority to expend not more than specific sums for purposes set out in very general terms. By way of illustration we may consider an act of April 17, 1917, which made, *inter alia*, the following appropriation:

For the national security and defense, and for each and every purpose connected therewith, to be expended at the discretion of the President,

1. 57 Cong. Rec., 2220 (Representative Sherley).

and to be immediately available and to remain available until December thirty-first, nineteen hundred and seventeen, \$100,000,000.²

It will be observed that in this act Congress, dispensing for the time being with its complete powers of control, granted money in gross, descending into detail no further than to indicate the work to be done and the general character of the expenditures authorized and leaving to the President the responsibility of distributing the money in the manner best calculated to meet the emergency.

Authorizations to obligate the government in excess of appropriations were incipient, or perhaps we should say inchoate, grants of money. Consider the provision in an act of November 4, 1918, giving authority to the War Department "to enter into contracts or otherwise to incur obligations" for expenses incident to military engineer operations in the field "for not to exceed \$200,000,000 in addition to the appropriations herein and heretofore made."³ Clearly this was a pledge on the part of Congress to appropriate in the future, within the limits set, for the defrayment of excess expenditure.

Reimbursable appropriations were specific appropriations authorized by Congress to be augmented by departmental receipts. Take, for example, the Army Appropriation Act of July 9, 1918. This act, after authorizing the President through the head of any executive department to sell certain war supplies under certain conditions, provided:

that any moneys received by the United States as the proceeds of any such sale shall be deposited to the credit of that appropriation out of which was paid the cost to the Government of the property thus sold, and the same shall immediately become available for the purposes named in the original appropriation.⁴

The effect of this provision, it will be observed, was to make specific appropriations indefinite in amount by permitting the addition to them of whatever moneys the Executive might choose or be able to derive from the sale of government property and supplies.

2. 40 Stat. 28.

3. *Ibid.*, 1030.

4. *Ibid.*, 850.

Revolving funds were not very different in principle from reimbursable appropriations. Employed mainly to finance activities of a business nature, they were essentially grants of working capital accompanied by authority to reëxpend the receipts of operations without the formality of reappropriation. As an example of such a fund we may take that created by the Federal Railroad Control Act of March 21, 1918; this act provided in part

that the sum of \$500,000,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers [railroads, etc.], may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control. . . .⁵

Plainly the effect of a revolving fund was to multiply the amount of the appropriation by the rate of turnover and so to render the gross sum available for expenditure not only indefinite but, insofar as the rate of turnover could be controlled, subject to executive rather than legislative determination.⁶

Incorporated government bureaus were what their title implies, administrative subdivisions of the Executive endowed with legal personality. Seven in number, they were, in the order of their establishment, the United States Shipping Board Emergency Fleet Corporation, the Food Administration Grain Corporation, the War Finance Corporation, the United States Housing Corporation, the United States Sugar Equalization Board, the United States Spruce Production Corporation, and the War Trade Board of United States Russian Bureau, Inc.⁷ All were created between April, 1917, and November, 1918, that is to say, within a period of nineteen months; all had as their object the handling of some large and unusual activity of the Federal Government; and all (with the temporary exception of the War Fi-

5. *Ibid.*, 455.

6. Secretary Glass remarks: "The device of appropriating for revolving funds developed during the war, while that of providing for the reimbursement of appropriations is of long standing. They are essentially the same in principle." Secretary of the Treasury, *Annual Report*, 1919, p. 126.

7. See n. 18 for a discussion of the previously existing Panama Railroad Company and Alaska Railroad.

nance Corporation) went into liquidation soon after the termination of the war.

These corporations, it cannot be too often insisted, were neither autonomous nor semi-autonomous companies but were government bureaus in corporate dress. They were arms, not instruments, of the Federal Government.* Consider, for example, the Fleet Corporation. It was a mere administrative adjunct of the Shipping Board. "It was officered," says the Supreme Court, "by commissioners of the Shipping Board and their nominees, and was but an operating agency of that Board."⁹ In like manner the Grain Corporation was a subsidiary of the Food Administration. This was made perfectly clear by Mr. Julius S. Barnes, its president, in an address to the Conference of Representatives of the Grain Trade in August, 1917.

It is the express desire of Mr. Hoover that the Grain Corporation be recognized and treated and spoken of only as the agency of the Food Administration itself. We want to get over to the people the idea that the Grain Corporation is not in the ordinary sense a corporation, a commercial corporation, but it simply means the agency by which the Food Administration can perform this public service imposed on them.¹⁰

The War Finance Corporation was equally public though its board of directors seems to have enjoyed a greater degree of independence than the boards of directors of the other corporations. It may best be described as a quasi-bureau of the Treasury Department. According to Secretary McAdoo, "the functions of

8. Corporations in which *all* of the directors are public officers are to be distinguished from corporations in which *some* of the directors are public officers; still more are they to be distinguished from those in whose management the United States has no voice at all (other than as a regulatory or supervisory authority). The corporations here under consideration were all of the first class—that is the justification for referring to them as incorporated government bureaus. They are not to be confounded with such semigovernmental corporations as the Federal Reserve Banks or the Federal Land Banks, nor with such private corporations as the national banks or the national farm-loan associations.

9. 250 U.S., 252.

10. Conference of Representatives of the Grain Trade, Washington, August 15, 1917, *Minutes*, p. 10.

the corporation are intimately connected with Government finance, and are therefore within the peculiar province of the Treasury Department."¹¹ The Housing Corporation was a government corporation created for the express purpose of taking over the more important powers and duties of an already existing government bureau, namely, the Bureau of Industrial Housing and Transportation in the Department of Labor. The organization and personnel of the two agencies—corporation and bureau—were identical; both were equally dominated by the Secretary of Labor. The status of the Sugar Equalization Board paralleled that of the Grain Corporation. In the words of Senator Gay it was "an arm of the Food Administration for the purpose of administering its affairs relative to sugar,"¹² The Spruce Production Corporation was merely a corporate reconstitution of the Spruce Production Division of the Bureau of Aircraft Production and, as such, was completely subordinated to the War Department. It was in a matter relating to this corporation that the Supreme Court wrote:

This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the convenience of the United States to carry out its ends.¹³

As for the Russian Bureau, it is sufficient to note that its seven directors were members of the War Trade Board, that its officers were without exception members or employees of the War Trade Board, and that its president was chairman of the War Trade Board.

To enter fully upon the reasons which persuaded Congress to prosecute its powers through these corporate instrumentalities would be needlessly digressive. A general explanation has been given by Secretary Glass:

The particular advantage (which I should rather call menace in time of

11. 65th Cong., 2d sess., S.Rep. 286, p. 10.

12. 59 *Cong. Rec.*, 443.

13. *Clallam County v. United States*, 263 U.S., 345.

peace) accruing to Government functions so organized, is the freedom which they enjoy in the expenditure of public money without the legal restrictions that the Congress has imposed with respect to the usual transactions of the Government. If these activities were sustained by specific appropriations and were required to withdraw their funds from the Treasury in the manner prescribed for other Government establishments with the same accountability both as to disbursements and receipts, there would be little or no ground for the corporate form of organization.¹⁴

Without pursuing this interesting question further, we may turn directly to an examination of the freedom of these incorporated bureaus from the ordinary forms of appropriation control. This freedom may be analyzed under a number of heads.

In the first place the corporations did not have to go annually to Congress for funds. Their initial capital, their subsequent earnings (or losses), and their borrowings constituted a revolving fund, available until exhausted. Even the subsequent appropriations made to them for purposes other than the purchase of their capital stock took on a permanent character, becoming mere additions to their working capital.¹⁵

In the second place the funds available for expenditure by the corporations during any given year were flexible in amount. By turning over their capital several times during the year they could correspondingly enlarge their expenditures. And in time of need they could always borrow additional funds.¹⁶

14. Secretary of the Treasury, *Annual Report*, 1919, p. 120.

15. This is shown by the manner of treating appropriations for the service of the Fleet Corporation.

16. For borrowing no special warrant of law was necessary. Consider, for example, the curious modes of financing the activities of the Grain Corporation. In the summer of 1918 this agency found itself short of funds. The appropriation for the purchase of its capital stock was exhausted and the Food Control Act had omitted to confer any borrowing power either on the President of the United States or on any agency created by him. In these circumstances it was decided that the corporation, *as such*, had power to secure collateral loans in the same manner as any other business corporation. Such loans were accordingly sought and obtained. When this method of providing for its requirements was found to be exceedingly cumbersome, troublesome, and unsatisfactory, Mr. Hoover suggested borrowing from the Treasury of the United States through the War Finance Corporation; application was made and \$25,000,000 was ob-

In the third place these same funds were flexible in distribution; they were not governed by laws making specific appropriations but were available for any and every purpose within the general scope of the corporate authority.

In the fourth place the disbursement of corporate moneys was not subject to any of the laws and regulations governing the disbursement of other public moneys. As Senator Warren said of the Housing Corporation: "They could spend more or less as they chose or do anything they saw fit."¹⁷

Government corporations, therefore, must be set down as the most latitudinary of the devices adopted by Congress to meet the war necessities of executive officers for financial flexibility. From an administrative point of view they were simply government bureaus financed by revolving funds and operating with the freedom of ordinary business enterprises.¹⁸

tained at 6 per cent interest. This was only five days' average requirements of the Corporation and consequently its financial difficulties remained acute. Finally, on October 31 the Corporation negotiated an advance sale of 100,000,000 bushels of wheat to the Allies at a provisional price of \$2 a bushel; on the basis of this contract the Corporation received the sum of \$200,000,000 from the British, French, and Italian governments, which in turn had obtained it as an advance from the United States Treasury. This transaction solved for the time being its financial problems. F. M. Surface, *The Grain Trade During the World War* (New York, 1928), chap. XXII

17. 58 *Cong. Rec.*, 1902.

18. Before leaving the subject of the war corporations a word should be said of the Panama Railroad Company, the model from which they were patterned. This, after the acquisition by the United States in 1904 and 1905 of its entire capital stock, had been kept in corporate organization for what its directors described as "good business reasons," but at the same time its management had been completely subordinated to the United States. This double object had been accomplished by the following proceeding: (1) The Secretary of War had qualified thirteen persons, including the seven members of the Isthmian Canal Commission, to serve as directors by selling each of them one share of stock in the company; (2) the Secretary of War had nominated and elected these thirteen persons to the Board of Directors at the annual meeting of the stockholders (April 15, 1905) by the stock vote of the United States; (3) the Secretary of War had protected his authority by taking an option for the repurchase of the shares and by retaining physical possession of the stock certificates, duly assigned and transferred, as security. The effect of this operation had been to merge the management of the railroad with that of the canal and to bring it equally under the domination of the Secretary of War. "So far as we can merge it," explained Secretary Taft in 1906, "it is merged. The directors are the members

When the war was over, these devices, as might have been expected, came under considerable criticism both in and out of Congress. Representative Good, for example, was loud in his denunciation of lump-sum appropriations:

Now that the war is over, I believe that Congress, one of the coordinate branches of the Government, should again commence to function; that it should pass upon all demands; and that the House of Representatives, which is entrusted under the Constitution with originating all appropriation bills, shall before it passes appropriation bills know the details not only with regard to the needs for which the appropriations are asked but the conditions under which the appropriations are to be expended. Now that the war is over, I am not willing to pass lump-sum appropriation bills to carry out objects, no matter how worthy, unless we understand all the facts. . . .

I do not object to appropriating this money because it is granted to the President. I am opposed to appropriating any lump sum, giving any individual, no matter who he is, full power and discretion over

of the Canal Commission; the president of the railroad company is the Chairman of the Commission, and they both are under my direction by the order of the President; so that we try to make the management as completely one as possible. And yet, as I have already said, it is sometimes quite convenient to act in the name of the company rather than in the name of the Canal Commission; and we thus accomplish things that are legal and proper, the authority of which might, perhaps, be questioned if we acted as a commission." 50th Cong., 2d sess., S Doc. 401, p. 11. In 1912 Congress authorized the dissolution of the Isthmian Canal Commission and in 1914 the President, by Executive Order, established a permanent organization under the name, The Panama Canal. But the two legal entities, the one a government department under the supervision of the Secretary of War, the other a New York corporation, remained indissolubly connected. The Railroad was managed precisely as if it were a bureau of the Canal. It was a perfect model for the war corporations.

Another corporation of the same type, also antedating the war corporations, is the Alaska Railroad purchased and completed by the United States under authority contained in an act of March 12, 1914. The operation and control of this railroad have been placed by Executive Order in the Secretary of the Interior. Its governmental character is clearly indicated in an opinion of Attorney General Stone's:

"It is apparent . . . that the Alaska Railroad is not a common carrier subject to the provisions of the Interstate Commerce Act but is in fact an arm of the Federal Government, purchased and completed from public funds, and performing a governmental function" 34 *Op.*, 236. While its legal status differs, for reasons which need not be entered into here, from that of the Panama Railroad Company, its administrative status is essentially the same.

its expenditure. By the very nature of things, the President, because of his multitudinous duties, can not investigate the expenditure of such vast sums that have been entrusted to his care. He has been compelled to turn these matters over to subordinates and bureau chiefs. When the history of this war is written men will be shocked to learn how hundreds of millions of dollars were utterly wasted, and most of the waste came through lump-sum appropriations. Now that the war is over, we should profit by our experiences during the war and appropriate money only when we know all the facts for which the appropriation is sought, and we should make detailed appropriation in a manner so that the fund can not be spent for any other object than that for which it was expressly appropriated.¹⁹

The Secretary of the Treasury, Mr. Carter Glass, luminously pointed out the defects of reimbursable appropriations and revolving funds. "By such appropriations," he wrote in his 1919 report,

the revenues of the Government affected never became unconditionally available to meet general expenditures, but are appropriated automatically for special purposes without further control by the Congress and without new consideration of the merits of the additional expenditure. These appropriations by their very nature tend to produce expenditures which, if considered anew, might not be authorized by the Congress. . . . To appropriate receipts accruing to the Government in this manner for special purposes takes the money just as truly out of the Treasury as if directly appropriated in specific sums, but at the same time conceals the real extent of the appropriation involved. I feel very strongly that, in general, the receipts of the Government should be covered into the Treasury unconditionally without being affected by any special trust or purpose, and that, so far as may be, expenditures of the Government should be made pursuant to direct appropriation of the Congress.²⁰

Nor did Secretary Glass ignore the subject of government corporations:

19. 57 *Cong. Rec.*, 1341. Even during the war objections were sometimes made to carrying the principle of lump-sum appropriations to extremes. An interesting debate finds Representatives Fitzgerald, Sherley, and Gillett in agreement that Congress should not abdicate its powers and appropriate wholly in the dark. 55 *Cong. Rec.*, 1553-1554.

20. *Annual Report of the Secretary of the Treasury*, 1919, p. 127.

These concerns become, primarily, spending agencies without the restrictions and obligations imposed by law upon Government establishments or those imposed by invested capital upon private corporations which are to be tested by profits earned. They stand alone, therefore, without tests or standards; without regulations or responsibility imposed by Government authority or by individual holders of their securities; and without other guaranty of integrity and efficiency than may be derived from the selection of their officers, who may be given an arbitrary power over their affairs. . . . Nothing promotes so rapidly an atmosphere of laxity as a removal of the legislative restraints long and zealously imposed by the Congress with respect to appropriations from the public funds or a weakening of the established requirement that public moneys shall be deposited in the public treasury and withdrawn only in consequence of legislative authorization.²¹

Imbued with the spirit of these criticisms, Congress began soon after the Armistice to diminish the scope of executive discretion. It ceased appropriating in lump sums;²² it canceled appropriations and authorizations totaling many billions of dollars;²³ it repealed that part of the Army Appropriation Act of July 9, 1918, which permitted the re-use of departmental receipts;²⁴ it placed the war corporations in liquidation, with the single exception of the War Finance Corporation, which was continued in active life until January 1, 1925, to aid in the task of reconstruction.

One law demands particular notice as illustrating the new temper of Congress. By the Third Deficiency Appropriation Act, approved July 11, 1919, the United States Housing Corporation was ordered to cover its unexpended balances and its future revenues into the Treasury of the United States and "the proper authority" was directed to submit to Congress detailed estimates of appropriations for the Corporation's expenses for the fiscal

21. *Ibid.*, pp. 130-131, 132.

22. In 1935 Senator Byrnes prepared a catalogue of acts giving the President power to expend lump sums. The last act on the list was dated February 15, 1919, and was a grant of \$100 millions to be used at the discretion of the President as a revolving fund to relieve starvation in Europe. 70 *Cong. Rec.*, 2073.

23. As in the case of the "Sherley cut"; 40 *Stat.* 1169-1174.

24. *Ibid.*, 1173.

year ending June 30, 1920, and for each fiscal year thereafter.²⁵ This provision of law destroyed the financial autonomy of the Corporation and made it as dependent on Congress for funds as any ordinary bureau. It was intended by Congress that this should be so. "We are following the plan," Senator Warren explained, "which I think the Senator [King] approves. Instead of having a revolving fund and allowing the use of left-over balances, and so forth, the corporation officials are compelled to put their money into the Treasury, and we appropriate it out."²⁶

Congress after the war was much stricter than Congress during the war. But it would be a mistake to assume that it ever quite succeeded in restoring its prewar system of specific appropriations. Loose methods of granting supplies had been begun as a matter of administrative necessity; they were continued, at first as a matter of political convenience, and later as a matter of habit.

Consider the year 1920. A new President was to be elected and the Congress was in political opposition to the old President. In these circumstances it seemed the part of political wisdom to pretend a legislative reduction of the executive estimates. Accordingly, Congress *seemingly* appropriated about a billion dollars less than it actually intended should be spent. The manner in which the expenditure was to be reconciled with the appropriation was clearly described by Representative Byrnes of South Carolina during the next Congress.

The explanation, of course, is that prior to the last election, in order to mislead the people as to the amount of money that was being appropriated, the Congress departed from the settled policy which had heretofore controlled its appropriating committees, and instead of appropriating directly for each department the amount of money the Congress thought was needed for its activities, resorted to a system of indirect appropriations authorizing the expenditure of money through reappropriations, revolving funds, and from the proceeds of the sale of Government property.²⁷

25. 41 Stat. 55-56.

26. 58 *Cong. Rec.*, 1950. Similar action was not taken with respect to the other war corporations, probably because it was felt that their functions were temporary and that they themselves would soon cease to exist.

27. 61 *Cong. Rec.*, 1596.

Political expediency is not, however, a full explanation of the continuance of those practices during the postwar period. Much weight must be given to habit, for even after the election of a Republican President in 1920 the "indefensible system" was continued. In spite of the warnings of the Secretary of the Treasury²⁸ and the efforts of the Director of the Budget²⁹ the Congress continued to appropriate for revolving funds and to permit the reimbursement of appropriations. In May, 1922, we find S. Parker Gilbert, Undersecretary of the Treasury, still hoping for the repeal or restriction of the "various outstanding authorizations for revolving funds and other indirect appropriations, including perhaps some authorizations for the use of unexpended balances."³⁰ And in November of the same year we hear Representative Byrnes complaining that the system was still unreformed.³¹ Presently interest in the question of revolving funds and reimbursable appropriations lapsed. They remained on the statute books as a legacy from the past to be entered upon when the need for them should again arise.

In the matter of incorporating government bureaus Congress was more strict. Between the close of the war and the beginning of the depression only one purely governmental corporation was created. In 1924 the Inland and Coastwise Waterways Service, a division of the War Department, was incorporated by act of Congress and renamed the Inland Waterways Corporation, its government and direction being entrusted to the Secretary of War.³² The primary object of this reform is easily ascertained. In his 1923 report to the Secretary of War, Colonel Ashburn, chief of the bureau, had stated with considerable elaboration

28. "Reduction of appropriations, moreover, will not of itself be effective to reduce expenditures unless at the same time Congress avoids or controls measures which result in expenditure without an apparent appropriation. Reappropriations of unexpended balances, revolving-fund appropriations and appropriations of receipts, and other indefinite authorizations of expenditure have in the past been responsible for hundreds of millions of dollars of actual cash outgo" Secretary Mellon to the Chairman of the Committee on Ways and Means, quoted by Representative Byrnes, *ibid*

29. Charles G. Dawes, *The First Year of the Budget of the United States*, pp. 29-30, 64, 110.

30. Gilbert to Dawes, May 17, 1922; quoted by Dawes, *op. cit.*, p. 224.

31. 63 *Cong. Rec.*, 340.

32. 43 *Stat* 360

that he could not operate the facilities of the service as required by law, i.e., as if they were privately owned, so long as the service itself was subject to the hazards and delays of Congressional appropriations, both annual and deficiency;³³ and he had made much the same point to the House Committee on Interstate and Foreign Commerce in his testimony relative to the bill for creating the corporation.³⁴ That this view was accepted by the Committee appears from its report:

At present the Secretary of War is limited in his expenditures by the appropriations that are made for the barge-line service. He is not allowed by law to incur a deficit nor can he borrow money to meet current expenses even in case of an emergency. . . . It is for the purpose of getting away from these restrictions . . . that this bill is favorably reported by the committee with a recommendation that it pass.³⁵

The readiness of Congress to agree to this recommendation is perhaps partly to be explained by the representations of the Committee that the Corporation would enjoy only a limited life. If at the end of five years it had not demonstrated the feasibility of water transportation, its activities were to be discontinued; if on the other hand its operations were successful, its facilities were to be sold to private interests.

While the system of specific appropriation was being modified under the pressure of war, the departments were putting new life into the system of coercive deficiencies. The appropriations for the ordinary services of the government being still too numerous in relation to the objects of expenditure to permit of good administration conjointly with a strict observance of the spirit of the law, the departments again resorted, or resorted more than

33. *Annual Report of the Chief of the Inland and Coastwise Waterways Service*, 1923 (mimeograph), pp. 3, 10, 12.

34. 68th Cong., 1st sess. Hearings before the Committee on Interstate and Foreign Commerce on H.R. 6647, p. 102.

35. 68th Cong., 1st sess., H.Rep. 375, pp. 5-6. The matter omitted refers to the secondary advantage of escaping from the bureaucratic regulations governing the receipt and disbursement of public moneys "which are often not in accordance with plain business principles and necessity."

usual, to the device of over-rapid expenditure.³⁶ As early as May, 1919, Representative Good told his colleagues what they well knew, that the Anti-Deficiency Act was but little observed. Indirectly he threatened the delinquent departments.

Hereafter when departments come before the Committee on Appropriations and ask for a deficiency they must show that they have scrupulously observed the statute and have not set out at the beginning of the fiscal year to create an organization that will result in a deficiency and thus require large sums to meet the deficiency.³⁷

A month later the subject was noticed in the Senate. Smoot and others denounced the departments and suggested that to stop the practice it would be necessary for Congress "at some time to have backbone enough to say not one dollar of deficiency will be appropriated." Warren, however, had a truer view of the difficulties involved.

Of course, the Congress can allow such amounts or not, as it may deem proper, but a disallowance means to take away that which belongs to the servants of the Government and others who have earned the money for services or furnished commodities for which they should be paid.³⁸

By 1921 the Anti-Deficiency Act was a dead letter. Representative Blanton asserted that every single department of the government habitually violated the law:

Every department during the last four years has exceeded the appropriations that Congress has seen fit to allow it for carrying on the work of its various bureaus. Every one of them exceeds the appropriations, and it will be remembered that the late distinguished minority leader, then the majority leader, our lamented friend, Champ Clark, called attention to the fact that, although Congress placed this criminal law upon the statute books, there had been no proceedings

36. W. F. Willoughby, writing in 1918 of the "present system of itemizing appropriations," remarked that one of the results of this failure to give flexibility to its appropriation system is the extent to which resort *has* to be had to deficiency appropriation acts. *The Problem of a National Budget* (New York, 1918), p. 53. (Italics supplied.)

37. 58 *Cong. Rec.*, 403-404.

38. *Ibid.*, 900.

under it, with no action taken against anyone; and he asked the distinguished chairman of the Appropriations Committee [Mr. Good] why it was that they had not proceeded against some of these department heads when they brought in big deficiency estimates and asked Congress to provide them. I will say to my good friend that the great trouble is this: The two departments that spend the most of the money, the War Department and the Navy Department, have a way of using sums that we appropriate for certain purposes, using them for other purposes for which Congress does not provide them, and for which Congress does not intend that the money shall be spent. Then they let deficiencies occur with respect to the pay of the men in the Army and Navy, knowing that Congress must provide the funds with which to pay these men.³⁹

Representative Green expatiated on the theme that the department heads rather than Congress controlled expenditures. A loose practice begun and tolerated because of the war had been continued into time of peace:

We got so accustomed to the law not being enforced during the war that department heads have since been violating it with impunity. The law forbidding the creation of deficiencies should be enforced, and if it is not strong enough to stop this pernicious practice, which has been costing the Government hundreds of millions of dollars every year, then there is no subject for which there is so much need of congressional action.⁴⁰

Other Representatives furnished similar testimonies to the fact that coercive deficiencies were the order of the day.⁴¹

From remarks in the Senate the same conclusion must be drawn. Senator Smoot declared that while the departments might properly incur deficiencies in emergency matters they had construed an emergency matter to mean the payment of employees in an ordinary bureau or division of the government. "There is nothing left of the law," he continued. "With the construction that has been placed upon it, we might just as well repeal it as to have it on the statute books."⁴² Senator King took the same view:

39. 61 *Cong. Rec.*, 996.

40. *Ibid.*, 1077.

41. E.g., Temple and Warren, *ibid.*, 1858, 2088.

42. *Ibid.*, 661.

There must be some plan adopted to prevent the Government from being committed by officials not authorized so to do to the payments of hundreds of millions of dollars. These obligations are incurred, and then the departments complacently send in their bill and demand that Congress legalize their illegal acts.⁴³

These statements were inspired by the fact that there were already (April 26) applications for deficiency appropriations to the amount of \$330,000,000 pending before the Committee on Appropriations, and by the expectation that these applications would be nearly \$500,000,000 by June 30, the last day of the fiscal year.

During the debates on the Budget and Accounting bill the hope was frequently expressed that that bill, when enacted, would put an end to deficiencies, coercive or otherwise. The strengthening of the budget system and the reconstitution of the accounting offices, together with a reform of the rules of the House dealing with the manner of handling appropriation bills,⁴⁴ were counted on to correct the evils of the past. "We have found during the last Congress," said Representative Temple,

that the spending agencies have very largely overrun the amounts given to them, intrusted to them to be expended. Heads of departments appointed since the 4th of March are not responsible for what was done by their predecessors, but they come to us and tell us that they are in trouble. Rather than paralyze the Government, we make deficiency appropriations. In my judgment, there will be a great deal less of that under the new system. We shall have better-prepared estimates. We shall have a more carefully thought-out program for the year's work, because the President will now have in the budget bureau the machinery which will enable him to perform the duties imposed upon him by the Constitution. We shall have more careful supervision of the expenditures, because of the work of the Comptroller, and I believe, under the new rules of the House, adopted a

43. *Ibid.*, 662, W. F. Willoughby tells us that apparently the penal provisions of the Anti-Deficiency Act were never invoked nor did the departments even open up any systematic system of allotment accounts in compliance with its provisions. *The National Budget System* (Baltimore, 1927), p. 100.

44. The appropriation committees had in 1920 been reintegrated.

year ago, we shall have a better handling of the appropriation bills than under the old system.⁴⁵

The Budget and Accounting Act of 1921 did not, however, contain any provisions especially designed to prevent deficiencies.⁴⁶ It merely transferred to the President certain responsibilities formerly placed upon the department heads and the Secretary of the Treasury. An act of June 22, 1906, previously referred to, had enjoined the department heads to include in their regular estimates all sums needed for the service of the fiscal year and had forbidden them to submit supplemental estimates except to carry out laws subsequently enacted or in cases of imperative necessity; in cases of imperative necessity the department heads were to accompany their requests with a full explanation of the circumstances and a statement of the reasons for omitting the items from the annual estimates.⁴⁷ In 1916 this act had been supplemented by another forbidding the Secretary of the Treasury to transmit to Congress estimates not conforming

45. 61 *Cong. Rec.*, 1858. Cf. the remarks of Representatives Andrews and Good, *ibid.*, 906, 1000. Representative Green was almost alone in suggesting that the bill "will not hold down the department heads; it will not prevent them from going ahead with expenditures which necessitate deficiency appropriations, nor will it strengthen the laws which now forbid the creation of deficiencies. Those laws appear to be insufficient, but if we are to have any real economy these matters must be controlled by this House." *Ibid.*, 1076.

46. Unless Section 312 (c) be considered such. This provided that "the Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law." As originally proposed by Representative Graham on October 21, 1919, the section required the Comptroller General specially to report to the Congress "every expenditure or contract made by any head of a department in any year in excess of the appropriation to such department and in violation of law." Graham's declared object was to bring promptly to light every infraction of the *anti-deficiency* law, "so that Congress may take notice of it and act upon it or pass it by, as it deems proper." The Senate incorporated the amendment in its proposed substitute for the Good bill, but changed the wording to apply to expenditures and contracts made by disbursing officers. The language finally adopted was that agreed on by the Conference Committee, which vouchsafed no explanation of the change. Whether or not it was intended to prevent deficiencies is a question of small importance; on the failure of the Comptroller General to implement the law, see p. 272 n.

47. 34 Stat. 448.

with these provisions.⁴⁸ The Budget and Accounting Act of 1921 superseded these laws. It provided that "the President from time to time may transmit to Congress supplemental or deficiency estimates for such appropriations or expenditures as in his judgment (1) are necessary on account of laws enacted after the transmission of the Budget, or (2) are otherwise in the public interest"; and required him to accompany such estimates with an explanation of their necessity, including the reasons for their omission from the budget.

It does not appear that the new budget system did in fact cure the abuse of deficiencies. It is true that many efforts were made to that end. An Executive Order issued early in President Harding's administration "discountenanced" deficiencies.⁴⁹ The first budget regulations extended the practice of setting up general reserves of appropriations from the War Department to all departments.⁵⁰ A Treasury Department circular issued December 21, 1921, required that the Budget Bureau, and through it the President, be notified of the apportionments and waivers of apportionment made by the departments.⁵¹ But these efforts were not wholly successful. From 1923 to 1926 inclusive there is said to have been a marked reduction in the number and amount of deficiency estimates,⁵² but in 1927 we find Senator McKellar, in language reminiscent of 1921, calling attention to the remarkable growth of deficiencies and declaring that "so long as the department officials know they can run to Congress for a deficiency bill they will abuse the system."⁵³ In 1929 A. E. Buck, a leading authority on budgetary matters, remarked that, although the operation of the budget system had tended to reduce deficiency appropriations, they were by no means eliminated.⁵⁴ And in a later work the same writer stated:

48. 39 Stat. 830.

49. Harding quoted by Dawes, *op. cit.*, p. 109.

50. Dawes, pp. 22-23. On the preëxisting system in the War Department see the evidence of General Lord before the Select Committee of the House on the Budget. *National Budget System*, p. 262.

51. Dawes, *op. cit.*, pp. 150-160.

52. *Annual Reports of the Director of the Budget*, 1923, p. 27; 1924, p. 26; 1925, p. 10; 1926, p. 11.

53. 68 *Cong. Rec.*, 2367.

54. A. E. Buck, *Public Budgeting* (New York, 1929), p. 487. Cf. p. 394.

The budget and accounting act of 1921 also failed to meet the situation, so deficiency appropriations are still a problem. The departments and establishments find ways of incurring expenditure obligations which later necessitate their asking Congress for such appropriations. As a rule, Congress cannot, or does not, refuse to grant them, regardless of the effect they may have on budgetary balance. At times this practice reaches a dangerous point. During the fiscal year 1930-1931, for example, the aggregate deficiency appropriations reached 10 per cent of the total national budget for that year.⁵⁵

During the hearings on the national budget system held in 1919, the question of how far the principle of specific appropriation should be pushed in practice was considered on several occasions. The opinion was widely expressed that Congress, perhaps by necessity,⁵⁶ had proceeded to inconvenient extremes and that it would be wiser to allow the departments greater freedom. Three plans of reform were put forward which, though they came to nothing, deserve our attention. The first was a proposal to create a consolidated fund for contingencies. The second was a recommendation that, under certain conditions, transfers be allowed between appropriations. The third was a suggestion that the number of appropriations be reduced.

Governor Philipp of Wisconsin stood sponsor to the first plan. In a paper which he sent to the Chairman of the Select Committee on the Budget he outlined a reform which he had instituted in his own state and which, he declared, had saved the state large

55. A. E. Buck, *The Budget in Governments of Today* (New York, 1934), p. 222. The figures must be understood to include supplemental appropriations as well as true deficiencies.

56. It is sometimes difficult to know whether an argument is put forward for logical or psychological reasons, whether it is intended to inform or to placate the hearers. That itemization was, under existing circumstances, a necessary evil was asserted by W. F. Willoughby, before a committee of Congress:

"I think the practice that has grown up in Congress of itemized appropriations in a great many cases has been due to the fact that that was the only method that Congress had of control. I think it is the function of Congress to control. But on account of our faulty system of estimates, our system of accounting, and on account of the fact that Congress does not get the information before it in a way to enable it to exercise control, it has adopted the policy of itemization as the only way in which they can control administrative officers."

National Budget System, Hearings before the Select Committee on the Budget, House of Representatives, 66th Cong., 1st sess., p. 65.

sums of money. This was, in brief, to make no appropriations for contingencies to the several departments but to appropriate an unlimited sum for contingencies to a board consisting of the Governor, the Secretary of State, and the State Treasurer:

It was the custom in Wisconsin, and no doubt it is in many States today, to give each department of government a contingent appropriation. The purpose was to give a sum of money to each department of the State with which it might meet any emergency that might arise that could not be foreseen by the legislature at the time the general appropriation was made. . . .

I regarded this system as an invitation for extravagance and caused the legislature of this State to create an emergency board, consisting of the governor, the secretary of state, and the state treasurer, to which was appropriated a sum sufficient, which in this State means a sum without limit. Instead of making contingent appropriations to the departments, authority was given to the emergency board to provide any department of state that found its operation account insufficient with the necessary funds to carry on its operation until the next appropriation was available. The money that is necessary can be secured from the emergency board only after a hearing, at which it must be shown that the emergency actually exists.⁵⁷

Of the second plan the principal backer was Franklin D. Roosevelt, the Assistant Secretary of the Navy. It was his opinion that transfers of appropriations within a department should be permitted subject to the necessity of the department head's obtaining the approval in each instance of a committee of Congress:

Now, in any budget system which is instituted, I believe there should be some provision by which we could transfer money from one appropriation to another in the same bill, perhaps with the approval of a committee of some kind in Congress, but without the necessity of getting definite legislative congressional action by both Houses. That takes too long. . . . I would not give authority to the Secretary of

57. Extract from the address delivered by Gov. Emanuel L. Philipp of Wisconsin, at the session of the National Conference of State Purchasing Agents of the United States, held at Madison, August 27, 28, 1919. *National Budget System*, p. 728.

the Navy or the Secretary of Agriculture to transfer funds all alone. I would require him to come up to some joint committee of Congress and get authority before he made the transfer; but I would not require him to come to both Houses and get congressional authority.⁵⁸

For the scheme of consolidating appropriations there were many advocates. W. F. Willoughby, for example, thought that "it would be very desirable to appropriate under more general heads."⁵⁹ Samuel McCune Lindsay expounded the evils of a segregated budget by reference to the experiences of the State of New York.⁶⁰ Comptroller Warwick expressed the hope that the time would come when "estimates and appropriations would be in less detail than they are now."⁶¹ Swagar Sherley remarked that "all of your detail does nothing except to force Congress into a consideration of little things that are beneath its dignity."⁶² And Franklin D. Roosevelt advocated that the appropriations for each bureau be consolidated under one lump sum, based on the detailed estimates.⁶³ It was represented by many witnesses that the reform of the budget system would permit such consolidations to be made without diminishing in the slightest degree the control of Congress over expenditure. According to one of them:

I believe one of the greatest advantages that is going to come from a budget system is that it is going to give Congress another method of control other than that of itemization. If they have this system of accounting and the whole technique of the budget before them they will get it into such shape that they will control it without specifying to the extent to which they do now. Now, take your lump sum appropriations, where you grant the appropriation in a lump, my experience is that in every case it is abused by the administration. If you provided for a system where the lump sum appropriation had to be accounted for under certain heads and the original estimate would have to be accompanied by a detailed statement of supporting data as to the personnel they expected to employ and how they expected to expend the money, then the committee on accounts would come in

58. *Ibid.*, pp. 650, 653.

59. *Ibid.*, p. 64.

60. *Ibid.*, p. 175.

61. *Ibid.*, p. 257.

62. *Ibid.*, p. 397.

63. "Memorandum for Mr. Roosevelt re Budget" by Commander G. P. Auld of the Supply Corps, *ibid.*, p. 676. See also p. 666.

and see how they lived up to it. If Congress had that machinery I think they would be in a better position to appropriate under more general heads, although keeping the accounts just as rigid as they are now. Then, instead of the committee bothering itself as to what should be the salary of the keeper of a vaccine station, it could concentrate itself on the really important features of the appropriation.⁶⁴

Of these three plans only the last seems to have received serious consideration in Congress. The first, perhaps because it was presented *in absentia*, perhaps because it proposed to create an unlimited fund, was not brought to public discussion; the second was dismissed with the comment that it would be "a very unwise policy."⁶⁵ But the third attracted considerable attention. Representative French, for example, in a set speech delivered October 18, 1919, in favor of H.R. 9783, the Budget and Accounting bill, wholly endorsed the remarks of those advocating consolidated appropriations and intimated that consolidations would follow the passage of the bill.⁶⁶ Lump-sum appropriations, he said, were in theory superior to itemized appropriations:

Ordinary business economies could be practiced in purchasing supplies and in employing help. Employees could be readily shifted from one department to another as work was heavy or light. An \$1.800 clerk could alternate between two offices and handle the work admirably under a lump-sum arrangement, while under an itemized arrangement two clerks at \$1.800 each would be employed oftentimes and each do about half work. And so in other ways that a business man would devise.

Unfortunately experience had demonstrated that the lump-sum system would not be faithfully executed by all the bureau chiefs:

Favoritism is shown; unequal and even widely different compensation for the same work is paid; ambitious heads of divisions overreach in extending the activities under them beyond all bounds; these and other evils make dissatisfaction among employees and among division

64. Willoughby, *ibid.*, p. 65.

65. Representative Madden, *ibid.*, p. 660. See also the remarks of Representative Garner, p. 653.

66. 58 *Cong. Rec.*, 7101.

heads. In spite of economies that are disclosed under faithful heads of divisions, the extravagances and overreaching ambitions of unfaithful heads neutralize all good and produce an exceedingly large balance of wrong. To correct these wrongs and protect the public, Congress has been compelled to itemize in large degree the matters for which funds shall be spent.

The solution of the difficulty was to be found in the proposed budget system. When the bill before Congress was enacted into law it might be possible to extend "the lump-sum appropriations idea . . . , the good being attained and the evils eliminated. The comptroller general would be the first to discover abuses, and the budget bureau would have a second check."

It is perhaps in the light of such arguments as these that we are to understand Section 205 in the Budget and Accounting Act as finally passed. This authorized the President to transmit to Congress for the fiscal year ending June 30, 1923, an alternative budget "prepared in such form and amounts and according to such system of classification and *itemization* as is, in his opinion, most appropriate."⁶⁷

It was not, however, in connection with the Budget and Accounting Act, 1921, that any improvement was made in the direction of consolidated appropriations.⁶⁸ The act to be noticed in this regard was the Classification Act of 1923.⁶⁹ This law, approved by the President March 4, 1923, but not to go into effect until July 1, 1924, divided the departmental activities into services and grades based on the duties and responsibilities of the work; established a Personnel Classification Board to allocate civilian employees in the District of Columbia to the proper classes; and assigned to each grade a schedule of pay rates. The object of the law was to establish a system of equal pay for equal work and, more generally, to make duties and responsibilities, rather than favor and chance, the basis of remuneration.

67. 42 Stat. 21. (Italics supplied.)

68. Section 205 was employed in actuality not to bring about a reduction in the number of appropriations but to redistribute the contents of the several appropriation bills. Dawes, *op. cit.*, 5 n.

69. 42 Stat. 1488.

The first appropriation bills to be considered by the Committee on Appropriations after the passage of this act were those for the fiscal year beginning July 1, 1924. Considerable study and thought were given by the Committee to the method to be pursued in making appropriations for salaries under the new law and finally it was decided to recommend appropriations by the lump-sum method. Representative Madden explained the matter to the House:

The object has been from the start to do justice not only to the Treasury of the United States but to the people who are employed by the United States, and it will result—the recommendation which we make will result—in eliminating from the appropriation acts specific appropriations for specific services. That is, statutory salaries can no longer exist with any degree of safety under the act. We shall be compelled to appropriate in lump sums. If we do not appropriate in lump sums we will not permit the new law to function fairly the first year. Lump sums I have always objected to in the past. I have objected to them because the heads of departments had unlimited power to fix any salaries they pleased. But the situation is entirely changed by this classification act. The department heads no longer will have that authority. Salaries are fixed, and must be paid in accordance with the new law. They will be uniform.⁷⁰

Though some members, especially Representative Blanton,⁷¹ objected to this change of policy, the House and Senate agreed to it and passed the appropriation bills in the form suggested. The precedent then became custom. When in December, 1924, the first appropriation bill for the fiscal year 1926 was brought in, Representative Blanton denounced its form:

When the attempt was first made in the last session to provide lump-sum appropriations in the appropriation bills for the present fiscal year I raised the question with the chairman of the Committee on Appropriations as to whether or not that was going to cease with the session that adjourned last June, and whether or not we could expect in succeeding years a return to the wise policy of having appropriations specified in particular in these bills. The gentleman indicated

70. 65 *Cong. Rec.*, 791.

71. *Ibid.*, 1163.

that it was necessary last year because the new classification had not been worked out. That excuse does not exist now. There is no excuse whatever for a continuation of the lump-sum policy, and it ought not to be permitted to exist any longer.⁷²

Representative Cramton, however, replied that the system was "a necessary adjunct, a necessary effect of the reclassification act."⁷³ Representative Byrns of Tennessee spoke to the same effect.⁷⁴ And the Chairman of the Committee on Appropriations stated flatly: "It is impossible to make other than lump-sum appropriations under the classification law. There is but one remedy, and that is to repeal the law."⁷⁵ A year later, on the next batch of appropriation bills, Representative Blanton registered his "usual and annual protest against these vicious lump-sum appropriations,"⁷⁶ and Representative Madden returned the same reply.⁷⁷

Apart from this single instance, however, the system of itemization prevailed. During the 'twenties occasional suggestions were made that the number of appropriations be reduced, but these were not taken. The Comptroller General, for example, in his 1923 report, using the Navy Department and Indian Service as illustrations, declared that "due largely to the lack of any other effective control, it has been attempted to control expenditures by increasing the number of appropriations and by making appropriations for particular objects of expenditure in a manner which has little relation to effective control through a modern accounting system."⁷⁸ In his 1924 report he referred to "the exces-

72. 66 *Cong. Rec.*, 155. For the basis of Blanton's grievance see Madden's speech of January 10, 1924, which certainly in various phrases permits the inference drawn by Blanton; and see Byrns's speech of January 31, 1924, in which he says: "I agree with the gentleman (Mr. Blanton) that after the reclassification becomes effective . . . it will be possible, it seems to me, to present an appropriation bill that will indicate how many clerks in this grade and that class shall be employed." 65 *Record*, 1761.

73. 66 *Cong. Rec.*, 155.

74. *Ibid.*, 970.

75. *Ibid.*

76. 67 *Cong. Rec.*, 1361.

77. *Ibid.*, 1363.

78. *Annual Report of the Comptroller General of the United States*, 1923, p. 27. He said further: "In an attempt to control expenditures through detailed appropriations, Congress has set up for the Indian Service something like 2,000 different appropriations. However, a considerable proportion of these are consolidated by

sive number of appropriations”⁷⁹ and in his 1925 report he suggested that “the activities of the governmental establishments should be analyzed and the expenditures required carefully classified, and the appropriation therefor should be for comparatively large lump sums with such limitations as to the uses thereof as Congress may deem necessary.”⁸⁰ It is uncertain, however, whether the Comptroller General really intended that the discretionary authority of the departments should be increased. In his 1928 report he congratulates Congress that it had adopted his recommendations with respect to the National Park Service,⁸¹ but an examination of the act to which he refers⁸² reveals that the consolidation of appropriations was merely on the Treasury’s books; the National Park Service was required in its expenditures to follow subheads of appropriations as detailed as the previous appropriations. In his 1930 report he recommended that Congress give “legal sanction to the minute details given in the Budget”—a course which, had it been adopted, would have eliminated almost all departmental discretion in expenditure.⁸³

the Treasury Department under one heading. The methods used involve a multiplicity of cash accounts and transactions by appropriations which tend only to confuse the real issues and accomplish no good purpose.”

79. *Ibid*, 1924, p. 10.

80. *Ibid*, 1925, p. 11.

81. *Ibid*, 1928, p. 27.

82. 45 Stat. 233-238

83. *Annual Report of the Comptroller General of the United States*, 1930, pp. 14-15. “For the avoidance of administrative embarrassment” Mr. McCarl suggested that “it would be necessary to provide an interchangeable percentage of the amount appropriated under any particular item.”

CHAPTER IX

EFFECTS OF THE GREAT DEPRESSION: 1929-1941

THE 'twenties were years of strictness in the history of the system of specific appropriations. By contrast the 'thirties were years of looseness. Yet it would be a mistake to treat the period of the depression as a sort of economic counterpart of the period of the war. All the latitudinary devices employed during the war were, it is true, revived during the depression; an even greater grant of authority—the right to transfer appropriations—was for a time conceded to the Executive; resort was had to coercive deficiencies. But nevertheless the freedom of the Executive from Congressional control has been less complete in the later than in the earlier period. Though the legislation of the depression has given the Executive a wide and indeterminate liberty of action for the public good, much has been left in subordination to legal restraints and much that has been granted has subsequently been hedged about with limitations and restrictions.

Let us begin with the renovation and reproduction of the devices employed during the war years to disembarrass emergency expenditure. Moneys have been voted in huge lump sums, revolving funds have been set up, government corporations in unprecedented numbers have been established. In 1929, for example, \$500,000,000 was appropriated by Congress as a revolving fund for the purpose of making loans to coöperative associations of farmers and to stabilization corporations. While this particular program was superseded in 1933 by that of the Banks for Coöperatives, other revolving funds for other purposes were later set up; for example, loans were made to railroads by the Public Works Administration through a similar machinery. As illustrations of lump-sum appropriations we may mention in particular the Emergency Relief Appropriation Acts of 1935, 1936, and

1937, by which nearly nine billion dollars was made available for relief and work relief to be used, with very few limitations, in the discretion and at the direction of the President. Or we may take the similar acts of 1938 and 1939 by which more than four billion dollars was appropriated directly to the several departments, permission being granted to increase the departmental appropriations, if necessary, by transfers from the appropriation to the Work Projects Administration. Or we may cite the Public Works Administration Act of 1938 which in very general terms appropriated almost a billion dollars under three heads of expense. The list of government agencies placed in corporate organization since the beginning of the depression is long. Among the more important we may name, in the order of their establishment, the Reconstruction Finance Corporation, the Regional Agricultural Credit Corporations, the Tennessee Valley Authority, the Home Owners' Loan Corporation, the Federal Deposit Insurance Corporation, the Federal Surplus Commodities Corporation, the Commodity Credit Corporation, the Electric Home and Farm Authority, the Federal Farm Mortgage Corporation, the Export-Import Bank, the Federal Savings and Loan Insurance Corporation, the RFC Mortgage Company, the United States Housing Authority, and the Federal Crop Insurance Corporation. One or two of these agencies have been placed in liquidation, others will be placed in liquidation in the future, but still others are clearly intended to be permanent departments or bureaus of the government. This last fact should be remembered: it is what places the depression corporations in a different light from the war corporations; doubtless it is what has suggested to Congress and to the President that they should be brought under stricter control.

In 1932 a grant of discretion unknown to the war years but nevertheless with a very long history was made by Congress to the Executive. The circumstances were briefly these. The appropriations for the fiscal year 1933 had in a spirit of economy been severely and, it must be added, indiscriminately cut. The effect, as Congress soon realized, was to leave some bureaus "practically high and dry" and others "with more money than is

indispensably necessary for them to function." It was feared that unless the situation were remedied there would be "chaos in the departments" and that the efficiency of the government service would be destroyed. The statement of the difficulty suggested its solution:

If cuts have been made injudiciously or if they have been made without reference to merit or if they have been made blindly, manifestly there must be in the hands of some one some degree of discretion to transfer these appropriations from one bureau to another to temporarily tide them over until Congress can remedy the situation.¹

For this solution there was a current precedent. For twenty years past the Agricultural Appropriation Act had carried a proviso granting to the Secretary of Agriculture authority to use interchangeably for fire protection and other unforeseen contingencies up to 10 per cent of the total amount appropriated for the maintenance and general administration of the national forests.² In the present instance appeal was made to this precedent, and on June 30, 1932, Congress, in the first economy act, made its grant of power:

Sec. 317. Not to exceed 12 per centum of any appropriation for an executive department or independent establishment, including the municipal government of the District of Columbia, for the fiscal year ending June 30, 1933, may be transferred, with the approval of the Director of the Budget (or, in the case of the War Department and Navy Department, with the approval of the President), to any other appropriation or appropriations under the same department or estab-

1. 75 *Cong. Rec.*, 9260 (Representative Williamson).

2. The reason for this proviso was given by the committee which originally recommended it: "The allotments to the individual forests are based upon normal seasons and conditions; but it is impossible to forecast with accuracy the needs of each individual forest. Frequently unusual circumstances arise or abnormal seasons occur which make it unnecessary or unwise to expend on certain forests the amounts allotted to them. At the same time some other unusual circumstance may increase the need for funds on other forests. It is therefore necessary that the Secretary be allowed some latitude in expending the funds provided for the maintenance and protection of the forests." 63d Cong., 3d sess., H.Rep. 1255, p. 13. Other precedents might have been found in the Interior Department Appropriation Act with reference to the Reclamation Service and the National Park Service.

ishment, but no appropriation shall be increased more than 15 per centum by such transfers.³

The provision was not enacted without objection. Representative Vinson of Georgia insisted that Congress was losing control of 15 per cent of the amount of money appropriated to each and every department of the government:

If this provision stays in the bill, instead of being in the interest of economy, it is in the interest of extravagance, because no longer will Congress have the right to itemize the appropriations and say how each and every dollar shall be spent. We will confer upon these departments this right, which is a thing that the Navy Department and the War Department and every other department have been seeking for years—to say how the money shall be allocated instead of having it allocated by the Congress.

Has the time now come when Congress no longer wants to exercise its right and its jurisdiction with respect to the distribution of the various appropriations? This is not in the interest of economy, but is in the interest of extravagance.

Representative Byrns supported the same view of the provision:

I have felt very keenly about this section, because I know that the departments of this Government for many years have wanted to do this very thing—to secure interchangeable control of at least a portion of the appropriation. . . .

I am opposed to letting the heads of departments and the Director of the Budget legislate with reference to these appropriations. We carried on the War involving billions of dollars, and no such interchangeability was undertaken or placed into law.

On the other side it could only be argued that no other course was possible in practice:

I wish [said Representative Williamson] you would look at the situation as it actually exists. The Senate has made a 10 per cent flat reduction in many appropriations, and has done so more or less blindly. This has left some bureaus practically high and dry. It has left other bureaus with more money than is indispensably necessary for them

3. 47 Stat. 411.

to function. The only way the matter can be handled and adjusted upon a sensible and businesslike basis is to allow some transfer of appropriations, and leave it in the discretion of the head of the department. Unless this is done, we are going to have chaos in the departments and the efficiency of the Government service will be destroyed.

Representative Ramseyer made the same point:

This is emergency legislation; it is for one year only; and it is to enable the departments to function, to meet situations such as was created in the Interior Department appropriations when this Congress cut the appropriation flat 10 per cent without designating what activities in that department were to be affected, and unless the heads of departments, with the approval of the Director of the Budget, have a right to make some transfers, some functions of government may break down altogether.

The victory of Messrs. Williamson and Ramseyer in this debate is possibly to be attributed in part to the fact that, "out of an abundance of caution" the committee reporting the bill had written in a proviso (which was adopted by Congress) that a statement of all transfers made under the section should be included in the budget for 1935 and a statement of all actual and contemplated transfers in the budget for 1934.

The transfer authority thus granted to the Executive was renewed by Congress for the fiscal years 1934 and 1935 with one partial exception. By an act to maintain the credit of the United States, approved March 20, 1933, Section 317 was amended to forbid transfers from appropriations for public works to appropriations for personnel unless the personnel was required for public works. The interpretation of the Director of the Budget (or, in the case of the Navy and War Departments, of the President) was made conclusive as to the definition of public works.

Since 1935 this general power of transfer has not been renewed. The explanation of its discontinuance was given by the Committee on Appropriations in its report on the Second Deficiency Appropriation bill, fiscal year 1935, as follows:

While there is no doubt that such authority is a convenience to the

departments and establishments at times when Congress is not accessible to pass upon the need for funds for purposes which may be considered pressing, it cannot be denied that the authority to augment one appropriation from another is permission to expend funds which otherwise might not be expended without that authority. The Committee has therefore abandoned section 317 of the original economy act and whatever authority for transfer of funds will exist in the fiscal year 1936 will be such as is provided by other law.⁴

In the matter of consolidating the heads of appropriation Congress, except in its grants for emergency purposes, has taken a very rigid position. An incident which occurred in 1934 exhibits its attitude. In that year Senator Hayden, with the knowledge and approval of the Budget Bureau, persuaded the Senate to adopt an amendment to the permanent appropriation repeal bill which read as follows:

In addition to the regular estimates the President is authorized to submit to the Congress, for the fiscal years 1936 and 1937, in the annual budget for any department, independent establishment, bureau or office, estimates of appropriations in alternate form whenever in his judgment such action would result in greater economy and efficiency in the control and use of public funds.⁵

The object of the provision was to permit the Budget Bureau to bring before the House some concrete recommendations looking toward the diminution of the number of appropriations. In the House of Representatives, however, the amendment was met with a blast of denunciation. Representative Hastings said:

This is the most dangerous plan that has ever been presented to Congress in the 18 years that I have seen service here. It practically seeks to destroy the legislative will of Congress as to all appropriations. . . . If the plan is adopted the Committee on Appropriations may

4. 74th Cong., 1st sess., H.Rep. 1261, p. 231. The Committee added: "In a few instances transfer authority up to 10 per cent exists between appropriations of a bureau. No general transfer authority exists for any entire department. Wherever in the past the circumstances in any particular bureau have been such as to justify the need for such a provision it has usually been considered in connection with the regular annual bill providing for the specific bureau."

5. 78 Cong. Rec., 11121. It was said in the House that the amendment was sponsored primarily by the Indian Bureau; *ibid.*, 11305 ff.

as well fold up its tent and close its doors and confer upon the various departments and the heads of divisions the authority to use the money appropriated in a lump sum in any way they choose. .

The attack was successful and the Senate amendment was quietly dropped from the bill by the Senate and House conferees. The point to be emphasized in regard to the incident is not that Congress opposed the consolidation of appropriations but that it would not even permit recommendations for consolidation to be brought before it.

In respect of lump-sum appropriations Congress now exercises a control greater than it did during the war. It does not indeed set out the objects of expenditure more elaborately in emergency than in war grants, but it obtains prompter and more specific information after the close of the accounting period as to what the expenditure has been. Pursuant to law the President submits annually to Congress a report exhibiting the expenditures and operations under the emergency relief appropriation acts and under the Public Works Administration Appropriation Act of 1938. The information provided in these reports—which are prepared by the Bureau of Accounts in the Treasury Department, as the agency charged with the disbursement of the funds and with the maintenance of a system of accounts regarding them—is very full. For instance, the report for 1939 shows the distribution of the money appropriated for relief and work relief by: (1) acts of Congress; (2) limitations imposed by Congress for various classes of work; (3) governmental agencies through which expenditures were made; (4) states in which work was done; (5) types of work; (6) objects of expenditure; (7) monthly and yearly trends of expenditure. These reports, although retrospective in character, furnish Congress with a means of control which is by no means to be despised. A current accounting for past expenditure, necessary and desirable in itself, is in relation to future expenditure the next best thing to a production of detailed estimates. When the latter cannot be had, the former takes on a new importance.⁷

6. *Ibid.*, 11396.

7. On this subject see E. F. Bartelt, *Accounting Procedures of the United States Government*, chap. iv.

In some matters the President rather than Congress has taken the lead in diminishing the scope of departmental discretion. In 1933 he moved to compel obedience to the Anti-Deficiency Law. On June 10, acting under powers granted to him in an act of the preceding March 20, he issued Executive Order No. 6166, Section 16 of which transferred from the department heads to the Director of the Budget the functions of making, waiving, and modifying apportionments of appropriations. The Executive Order, not having been disapproved by Congress, became law sixty days from its promulgation. The reason for the reform was explained by Senator Robinson of Arkansas in these words:

Section 16. Apportionment of appropriations: The functions of making, waiving, and modifying apportionments of appropriations were established by the Antideficiency Act, which considerably antedated the Budget and Accounting Act. They are clearly matters of budgetary control. *At the present time they are exercised in a rather perfunctory manner* and it is believed that the intent of Congress as expressed in the Antideficiency Act will be more fully realized by the proposed transfer.⁸

Whether these hopes will be justified by the event it is too early to say. In a period of emergency, when budget estimates are constantly being upset by unforeseen circumstances, it is impossible to arrive at any final conclusion. In view, however, of the well-known attitude of all finance departments toward extravagance in the public expenditure this transfer of power may tentatively be considered as promising in normal times a more rigorous regard of appropriations. But it would be too much to expect the total disappearance of deficiencies. Cases of necessity will still occur, and these will be the more numerous so long as the executive departments are bound in the strait jacket of too inflexible a system of appropriation.

Even more interesting than the attempt to control deficiencies have been the efforts of the President and of Congress to bring within the ambit of the Congressional appropriating power all those agencies of the government which, like the medieval kings, "lived of their own." The first step in this direction was taken in

8. 77 Cong. Rec., 5616. (Italics supplied.)

1934 when an estimate of the administrative expenses of the Reconstruction Finance Corporation was included in the Federal Budget for the fiscal year 1935 and estimates of its direct expenditures and of its expenditures from funds allocated by Congress were included in an accompanying budget statement. This beginning was followed up in 1935 by the introduction in the 1936 budget of so-called annexed budgets. The innovation was explained as follows in the President's budget message:

Annexed budgets are set up for the major self-supporting or self-contained units of the Government, namely the Post Office Department, the Reconstruction Finance Corporation, the Tennessee Valley Authority, and the District of Columbia. The use of such budgets permits the receipts and expenditures of each of these units to be clearly and completely presented in gross figures and in balanced form, as has not hitherto been done. By following this method, the net figures for each unit, which may be either appropriation needs or surplus receipts, are calculated and then carried to the General Budget Summary. Thus the financial requirements of these units are definitely tied into the general budgetary plan. The annexed budgets are therefore not in any sense independent or multiple budgets but simply integral parts of the Government's general Budget.⁹

The annexed budget for the Reconstruction Finance Corporation included not only estimates of receipts and expenditures for its direct operations and estimates of its administrative expenses but also supporting statements showing estimates of the receipts, expenditures, net expenditures, and means of financing the Commodity Credit Corporation, the Export-Import Banks of Washington, the Federal Farm Mortgage Corporation, the Federal Home Loan Banks, the Federal Housing Administration, the Home Owners' Loan Corporation, and the Regional Agricultural Credit Corporations.

Coincidentally with the introduction of annexed budgets the President made an effort to bring some of the agencies then exempt from the control of the Budget Bureau within the jurisdiction of that office. At his request (informally conveyed through the Secretary of the Treasury) the Senate Committee on

9. *The Budget of the United States*, 1936, pp. xiv-xv.

Banking and Currency placed in a bill for extending the functions of the Reconstruction Finance Corporation a section which read in part as follows:

No obligations, contingent or absolute, shall be incurred for the expenditure or other disposition of funds heretofore, hereby, or hereafter appropriated, or otherwise obtained for the carrying out of functions of the Reconstruction Finance Corporation unless within estimates of such obligations and expenditures approved by the Director of the Budget.¹⁰

The balance of the section authorized the Secretary of the Treasury to maintain on the books of the Department such accounts as might be necessary to give full force and effect to this provision. An identical section except that it applied to the Home Owners' Loan Corporation, the Federal Savings and Loan Insurance Corporation, and the Federal Housing Administration, was under like circumstances included in a bill to amend the Home Loan Bank Act, the Home Owners' Loan Act, and the National Housing Act. These provisions, had they been enacted into law, would have limited the availability of funds authorized by Congress to such amounts as the Director of the Budget might consider proper. They failed, however, to command the enthusiastic support of the agencies to be controlled, and died in committee. Nor was serious consideration given at the time to a suggestion by Senator Couzens that the operating budget, as contradistinguished from the loan budget, of the Reconstruction Finance Corporation be presented to the Bureau of the Budget.¹¹

The next step was also taken by the President of the United States. In the summer of 1935 he issued three Executive Orders¹²

10. 74th Cong., 1st sess., S. 1175. "This section was inserted at the request of the Secretary of the Treasury. It places in the Director of the Budget determination of the expenditures which shall be made by the corporation notwithstanding the availability of funds authorized by Congress." 74th Cong., 1st sess., S.Rep. 21, p. 7.

11. *To Extend the Functions of the Reconstruction Finance Corporation*, Hearing before the Committee on Banking and Currency, United States Senate, 74th Cong., 1st sess., S. 1175, pp. 24-25.

12. Executive Orders Nos. 7126, 7150, 7174.

in which he recognized a distinction between the administrative expenses and the other expenses of agencies not dependent for funds on Congressional appropriations. Singling out the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, the Federal Savings and Loan System, the Federal Savings and Loan Insurance Corporation, the Federal Housing Administration, the Farm Credit Administration, the Federal Farm Mortgage Corporation, the Federal Deposit Insurance Corporation, the Federal Surplus Relief Corporation, the Export-Import Bank of Washington, the Second Export-Import Bank of Washington, the Reconstruction Finance Corporation, the Electric Home and Farm Authority, the Agricultural Adjustment Administration, the Commodity Credit Corporation, the Federal Coördinator of Transportation, the Federal Emergency Administration of Public Works, the Federal Emergency Relief Administration, the National Recovery Administration, and the Tennessee Valley Authority, from among those government agencies which had operations not subject to the Budget and Accounting Act of 1921, he requested them to submit to the Director of the Budget, at such times and in such manner as he should prescribe, estimates of amounts to be expended each fiscal year for administrative purposes; and he requested them not to incur, from and after September 15, 1935, any obligation for administrative expenses unless estimates for such expenses should have been approved by the Director of the Budget. Furthermore, he instructed the Director of the Budget to apportion the amounts to be made available for administrative expenses in monthly allotments; and he requested the agencies to adhere to all such apportionments unless waived or modified by the Director of the Budget upon the happening of some extraordinary emergency or unusual circumstance.

Carrying forward this same idea in his budget message of January 3, 1936, the President recommended to Congress

. . . that Section 3679 of the Revised Statutes be amended so as to bring all agencies of the Government, including Government-owned and Government-controlled corporations, within the authority of the

Director of the Budget with respect to apportionments of appropriations and of other funds available to them.¹³

While this last recommendation has not to date (1943) been accepted by Congress, it followed directly from the President's Executive Orders that the agencies named therein were brought, like the regular branches of the government, under the financial authority of the Budget Bureau; they remained, however, outside the appropriation control of Congress. This anomaly was in part removed in 1936. On May 8 of that year Mr. Buchanan directed the attention of the House of Representatives to Section 7 of the First Deficiency Appropriation bill, 1936. This contained the following language:

Notwithstanding any other provision of law, none of the establishments or agencies named in subsection (b) of this section, shall after June 30, 1937, incur any obligations for administrative expenses, except pursuant to an annual appropriation specifically therefor by Congress.

The establishments and agencies referred to were the following: (1) the Federal Home Loan Bank Board; (2) the Home Owners' Loan Corporation; (3) the Federal Housing Administration; (4) the Federal Farm Mortgage Corporation; (5) the Federal Surplus Commodities Corporation; (6) the Export-Import Bank of Washington; (7) the Second Export-Import Bank of Washington; (8) the Reconstruction Finance Corporation; (9) the Electric Home and Farm Authority; (10) the Commodity Credit Corporation; (11) the Federal Emergency Administration of Public Works; (12) the Federal Savings and Loan Insurance Corporation; and (13) the RFC Mortgage Company.

Mr. Buchanan was himself the author of this provision.¹⁴ His explanation of its purpose therefore carries great weight.¹⁵ "This

13. *The Budget of the United States*, 1937, p. x.

14. See *Independent Offices Appropriation Bill for 1938*, Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 75th Cong., 1st sess. The provision was drafted by the Bureau of the Budget and informally handed to Mr. Buchanan.

15. 80 Cong. Rec., 6944.

provision," he said, "brings them within the jurisdiction of the Congress and makes them come to Congress with regular estimates and ask for the money necessary to administer their respective corporations or organizations." It was, he continued, a first step in subordinating these agencies to the control of Congress:

The second step is to make all the money they receive payable into the Treasury and then if you want to create a special fund, you can do so, but require them to come to Congress for all appropriations, not only for operating expenses, but for their loans, if they are making loans, or doing anything else. Let the representatives of the people know what they are doing, because if we continue in this way we will have a government not by Congress, but a government by corporations, and God forbid we should ever have that.

The section in question was adopted by the House. It then went to the Senate where it was amended by the addition of a proviso irrelevant to our present inquiry. On June 22, 1936, it became law.¹⁶

Pursuant to this act estimates of appropriations for the administrative expenses of the agencies and corporations named were included in the 1938 budget.¹⁷ The reform was viewed with satisfaction by the President who remarked in his budget message:

Such of the emergency agencies and corporations as may be continued by Congress should have all of their expenditure requirements made subject to the same scrutiny that is given by the Bureau of the Budget to the expenditure requirements of the regular departments and establishments; and I recommend that a provision to that effect be included in any future legislation for the continuance of any such agency or corporation.¹⁸

16. 49 Stat. 1647-1648

17. It is important to note that in submitting estimates of appropriations for their administrative expenses in the regular manner these agencies are required in their justification to lay their full programs before the Appropriations Committee. Thus the Committee is at all times in a position to make recommendations to Congress regarding anticipated programs.

18. *The Budget of the United States*, 1938, p. viii. For reasons upon which it is unnecessary to enter here these appropriations of corporate funds are dis-

With these attempts of the higher Executive to bring the lower Executive under its control, and coincidentally under the control of Congress, we must bring this part of our history to a close. Throughout the foregoing chapters it has been our partial object to bring clearly into light the principles, or, as it would be more correct to call them, the conventions which govern the appropriation of Congressional grants. By way of summary, these may be set out under three heads. I. It is the exclusive right of Congress to specify the several objects to which the grants for the year may be applied and to limit the amounts which may be applied to each object. II. It is the duty of the Executive, *except* in cases of urgent necessity, to apply the Congressional grants only to the objects and within the amounts voted. III. In cases of urgent necessity it is the duty of the high offices of government to risk themselves for the public good and, having transcended the appropriation laws, to throw themselves upon the justice of Congress. Of these conventions the first has been recognized as valid throughout the course of our independent history: in this book it has been treated as axiomatic. The second, though challenged by Wolcott and his school, has been taken for granted, at least in theory, since the days of Jefferson. Only the third has been prejudiced by some recent doubts—doubts, however, which could arise only in quiet times and then only in minds not fully alive to the responsibilities of executive government.

Ideally these three conventions make up the system of specific appropriation. In practice, however, the system has been subjected to many modifications. By permitting transfers between appropriations, by authorizing the use of departmental receipts without limitation of amount, by creating governmental agencies which operate wholly or partly outside the ambit of the appropriating power, and by other means, Congress has at various

tinguished from appropriations of moneys in the Treasury of the United States by being denominated "authorizations." The technical nature of the distinction has been indicated by the Committee on Appropriations as follows:

"These authorizations are in no sense appropriations, but are limitations upon the amount of funds already available to the agencies concerned which may be expended by them for administrative expenses." 76th Cong., 1st sess., H.Rep. 23, p. 2.

times and in varying degree loosened its control over the separate appropriations. Coincidentally, the Executive, by mingling appropriations, by bringing forward the unexpended balances of former appropriations or backward the anticipated balances of future appropriations, by incurring coercive deficiencies, and by other methods, has taken, not always with warrant of law, a power (more or less limited) to vary the appropriation directed by Congress itself.

To demonstrate this discrepancy between the ideal and the real systems of specific appropriation—but, more particularly, to elucidate its causes—has been the primary purpose of Part I which we are now concluding. Something of the difference must no doubt be attributed to the carelessness of Congress in protecting its own rights and something more to the stubborn obstinacy of executive officers who (like Jefferson's Secretary of the Navy) pay lip service to the financial supremacy of Congress while disregarding it in practice. But the major difficulty lies deeper. It is to be found in the real embarrassments which result when the specification of appropriations is carried to an extreme incompatible with the needs of administration.

The purpose of specific appropriations is to limit the quantity of power which may be abused. But it is a mistake to believe that this purpose can best be subserved by an indefinite multiplication of appropriations. Hamilton, as it will be remembered, said that in matters of this nature the question turns upon the proper boundaries of the precautions to be observed. It is, he said, certainly possible to do too much as well as too little; to embarrass if not defeat the end intended, by attempting more than is practicable; or to overbalance the good by evils accruing from an excess of regulation. Gallatin made statements of a similar tenor, holding that, while the Legislature cannot enforce true economy otherwise than by making specific appropriations, even these must be made with due knowledge of the subject, since, if carried too far by too many subdivisions, they become injurious, if not impracticable. Jefferson pointed out that too minute a specification has its evil as well as a too general one.

The foregoing chapters demonstrate by an appeal to history

the truth of these propositions. Step by step they trace the increasing specification of appropriations—a specification which perhaps even in Jefferson's time had overpassed "the salutary medium." Step by step they trace the accompanying development, inside and outside the law, of those compensatory devices which give the Executive in practice a latitude which Congress would deny it in theory. The whole story leads to the conclusion that the multiplication of appropriations, far from securing to Congress that completeness of financial control which is, so to speak, its constitutional birthright, has served only to make the law less certain and to satisfy Congress with the name, rather than the substance, of power.

It behooves us now to turn to the second part of our inquiry. Beginning once more at the first years of our present government, let us follow the several attempts of Congress to control expenditures, not in prospect, but in retrospect.

PART II

THE EFFORT TO CONTROL AFTER EXPENDITURE

CHAPTER X

THE DIFFICULTY SEEN: 1789-1842

SPEAKING in 1809 in the House of Representatives on his motion that a committee be appointed to investigate whether any advances had been made illegally to the unspeakable General Wilkinson,¹ John Randolph had occasion to express himself in the following terms:

Among the duties—and among the rights, too—of this House, there is perhaps none so important as the control which it constitutionally possesses over the public purse. To what purpose is that control? The mere form of appropriating public money, unless this House rigorously examine into the application of the money thus appropriated; unless the House examine if the amount of appropriation is exceeded by the expenditure; or if it be misapplied, that is, if money appropriated for one object be expended for another; unless we do this, sir, our control over the public purse is a mere name—an empty shadow.²

It is the object of the several chapters of Part II to trace historically the efforts of Congress to inform itself of the executive transactions and to analyze the degree to which these efforts have been successful or unsuccessful.

The idea that Congress ought to inquire into the expenditure of appropriations was first broached in 1791. On the second day of December in that year the House of Representatives resolved itself into a Committee of the Whole House on the bill making appropriations for the support of government for the year 1792. Josiah Parker of Virginia thereupon observed that the sum contemplated to be granted by the bill was nearly twice what had been granted for a former year and said that he conceived it was

1. ". . . the only man I ever saw who was from the bark to the very core a villain." Randolph to Nicholson, June 25, 1807; quoted from Henry Adams, *John Randolph* (New York, 1808), p. 219.

2. 19 *Annals*, 1330-1331.

the duty of the committee who reported the bill to have examined into the expenditure of the former appropriations; he therefore called on them for information.

This call began an interesting debate.³ Representative Lurance declared that it was not the business of the committee reporting the appropriation bill to inquire into past expenditures but to examine the estimates and report a bill for future expenditures. This was indeed strictly the fact, but Lurance went further, asserting categorically that when the former Congress made grants of money for particular purposes it necessarily relied on the honor of its officers that it would be expended agreeably to appropriation.

To this Parker replied that he did not doubt but that the members of the committee had done what they thought their duty but his wish in rising was to provoke an inquiry into the expenditure of money theretofore appropriated. He had no doubt of the integrity of the officers into whose hands the money was entrusted, yet he thought it was the duty of the representatives of the people to inquire in what manner the money of their constituents was expended.⁴ He did not know that any money had been improperly applied by any of the officers of government but he conceived it his duty to inquire. As soon as the inquiry was made and the information obtained, he was ready to grant every requisite supply, because he was confident that these inquiries, once made, would never be neglected, and a habit would follow to look into the expenditure of all public appropriations.

These remarks were warmly seconded by Gerry and Giles, the first of whom presented a more or less definite plan for arriving at the desired goal:

He conceived it to be the duty of the House to make some such inquiry, and he hoped the committee would rise to give time to collect

3. 3 *Annals*, 221-227.

4. Cf. Montesquieu, *L'Esprit des Lois*, Book XI, chap. vi: "But if, in a free state, the legislative power ought not to have the right to arrest the executive power, it has the right and it ought to have the means of inquiring into the manner in which the laws which it has made have been executed." I owe the reference to G. C. S. Benson, *Financial Control and Integration*, p. 5 n.

this information. He wished the House would make it a rule that every Executive should, at each session, lay before the House an account of the expenditure of all the money passing through their hands. The people depended on their Representatives for a scrutiny into the expenditure of the public money. He wished, at present, that a committee should be appointed to examine into the expenditure of all former appropriations, and that a rule should be established to apply for the future, and procure regular accounts from every branch of the Executive Department. The effect of this, in the end, would be to increase the confidence of the people in those officers, by bringing the rectitude of their official conduct to full evidence, and would be the best guard against the embezzlement of public money, should we be less fortunate in future in the choice of Executive officers. If some such plan as this was not adopted, the Representatives would have no more idea of the money expended than the people themselves, and the people no more than if their officers were in the moon.

The idea that executive officers should be called upon at stated times for their accounts was applauded by Giles, who also took the occasion to reprobate a suggestion of Laurance's that members could seek for information at the accounting department of the Treasury. It was more proper that officers should be called upon to bring their accounts to the House.

To Gerry's plan some objections were now offered, these being founded principally on the idea that the report of the Treasurer was the fullest information that need be received. Barnwell remarked that neither the members of the House nor a committee of it could possibly examine into the minutiae and items of every public account: the Comptroller, Treasurer, and Register were the proper officers to do this. If any member of the House was dissatisfied with any particular charge received at the Treasury, he could either call at the department and examine into its propriety or call on the floor for information. This, of course, was a mere repetition of Laurance's suggestion.

At this point Madison entered the debate. He too seems to have entertained an exaggerated notion of the value of the Treasurer's report. Joining with Parker, Gerry, and Giles in their desire for information, he nevertheless proposed a plan of accounting and scrutiny entirely different from Gerry's:

It was true[he said] that the Representatives of the people were the guardians of the public money, and consequently it was their duty to satisfy themselves as far as possible of the sources from which money flowed into the Treasury—how that money was applied—under what authority—and to inquire, at different times, what balance actually remained in the Treasury. This, he conceived, could best be done by appointing a committee periodically to examine the books of the Treasurer, see what balance appeared on the face of them, and inquire whether that balance was really in the Treasury. He mentioned the practice of the former Congress, to appoint four committees to inspect the operations of the four Departments under them. These Departments, however, now belong more to the Executive; but still, as the Representatives, were, by the Constitution, made the guardians of the public money, they had a right, and it was their duty, to inspect the operations of the Treasury Department. This right could not be conveniently exercised, in his opinion, by the whole body, but it should be done by a detachment from it, who would report the necessary information. This mode of proceeding was usual. He instanced the practice of the British House of Commons, and of several State Legislatures. Even if these inquiries procured no more information than was obtained by means of reports from the different officers of Government, yet being made by the immediate Representatives of the people, they would give more satisfaction.

The fallacy of Madison's plan, as Gerry observed, was that the Treasurer's accounts generally stated sums of money paid to individuals without mention of the particular objects to which they were meant to be applied. From them, therefore, one could not trace the connection between expenditures and appropriations.⁵

5. The following information concerning the Treasurer's accounts may be thought of some interest: "Now, Mr. Chairman, in 1780 a law was passed requiring the Treasurer of the United States to send to Congress annually copies of all his accounts settled by the First Comptroller of the Treasury. He transmitted them without classification, indexing, or recapitulation, and this report was printed until 1889—100 years. The last one cost \$6,500. The report for 1889 was printed in 1891 by order of the Fifty-first Congress. Its preparation took the whole time of two clerks in the Treasurer's Office. These reports have been utterly worthless ever since they were issued in 1780, and have undoubtedly cost the Government hundreds of thousands of dollars. When they were first printed they covered not more than three or four pages. They have increased in size until the report of 1889 covered nearly a thousand printed pages. Not long ago the clerk of one of the committees went to Amzi Smith, superintendent of the Senate document room, and asked him for a copy of one of these re-

Eventually the views of Gerry prevailed. On this and succeeding days he and others offered several motions for obtaining annual and regular statements of the receipts and expenditures of all public moneys and for a due examination of such statements. These, or some of them, were presently referred to Gerry, Dayton, and Barnwell, "that they do examine the matter thereof, and report the same, with their opinion thereupon, to the House." On December 22 this committee reported two resolutions. These were debated on December 30, and one of them, after some modification, was agreed to as follows:

Resolved, That it shall be the duty of the Secretary of the Treasury to lay before the House of Representatives, on the fourth Monday of October in each year, if Congress shall then be in session, or if not then in session, within the first week of the session next following the said fourth Monday of October, an accurate statement and account of the receipts and expenditures of all public moneys, down to the last day inclusively of the month of December immediately preceding the said fourth Monday of October, distinguishing the amount of the receipts in each State or District, and from each officer therein; *in which statements shall also be distinguished the expenditures which fall under each head of appropriation, and shall be shown the sums, if any, which remain unexpended and to be accounted for in the next statement, of each and every of such appropriation.*⁶

The other, which was disagreed to by the House, was in these words:

ports. Smith disappeared, and returned after half an hour with the volume saying: 'I have been here over thirty years, and you are the first man that ever called for a copy of this work.' " Speech of Mr. Cummings in the House of Representatives May 2, 1804. 26 Cong. Rec., 4344

6 3 *Annals*, 302 (Italic, supplied) The original resolve, it may be noticed in passing, required the submission of accounts in January instead of October. The change is to be attributed to the influence of Hamilton: "It was made (as I presume from the result) satisfactorily to appear to a Committee of the House of Representatives, who were charged during the last session with framing a direction to the Treasury for bringing forward an annual account of Receipts and Expenditures, that the course of public business would not admit of the rendering of such an account in less than nine months after the expiration of each year, in conformity to which idea, their report was formed and an order of the House established." Hamilton's Report to the House, February 4, 1793. *Ibid.*, 1200.

Resolved, That a committee or committees be thereupon appointed by the House to examine the said statement and the accounts connected therewith; and to make their report concerning the same to the House; and that this be considered a standing order.⁷

Had this second resolve, the existence of which has not, I believe, been hitherto noted, been adopted, the history of Congressional control over government spending might have been very different. For a committee charged with such specific duties might soon have discovered the means of performing them. As it was, provision was made for the submission of appropriation reports but not for their scrutiny by a committee.

For a decade Congress contented itself with receiving these reports of expenditures—or, to speak more correctly, of Treasury issues⁸—and made no effort to establish a regular system of scrutiny. Occasionally, to be sure, special committees were appointed to investigate the application of public moneys but what these committees could accomplish was extremely limited. According to a member of one of them:

Five months were scarcely sufficient to enable the committee to unfold the papers, which they were assigned to examine. In five years they could acquire but an imperfect knowledge of the several accounts on the files of the different offices. Upon a vast subject our time has been occupied with very small details. We have looked into half a dozen accounts, and discovered a few questionable expenditures. But as to the application of the millions, drawn from the Treasury, for the service of the different departments, it is still covered with the dust of the offices.⁹

Nor was the situation much improved when at the beginning of the 7th Congress an attempt was made to substitute a per-

7. House Papers, Reports of Committees, Vol. I (MS.).

8. The reports were made up on a basis of Treasury warrants. These warrants seldom represented final payments to public creditors; generally they were advances to contractors or disbursing officers. In the case of military and naval expenditures they were even further removed from final payments, being advances to the Treasurer of the United States as Agent for the War or Navy Departments. For a full explanation of the mode of disbursement at this period see my (projected) *History of the Accounting Offices*.

9. Remarks of Bayard, Federalist member of the Nicholson Committee, May, 1802. 11 *Annals*, 1282.

manent for a sporadic system of scrutiny. At this time (January, 1802) the powers of the Committee of Ways and Means were materially enlarged and it was made the general duty of that committee, by the standing rules of the House,

to examine into the state of the several public departments, and particularly into the laws making appropriations of moneys, and to report whether the moneys have been disbursed conformably with such laws; and, also, to report, from time to time, such provisions and arrangements, as may be necessary to add to the economy of the departments, and the accountability of their officers.¹⁰

The failure of this committee to discharge the functions thus sought to be imposed upon them will be adverted to below.

The difficulty was, of course, that committees of Congress, standing or select, could not constitute themselves courts for the audit of accounts. The time of the individual members was too much taken up with the making of plans for the future to allow of much examination of the transactions of the past; the members were too ignorant of the subject of accounts to scrutinize them effectively; and the accounts themselves were involved in an impenetrable obscurity.

What then was to be done? Dimly and partially Bayard perceived the answer. Speaking from his experience on the Nicholson Committee,¹¹ he said:

I must confess that, according to my view, a committee is altogether inadequate to the task assigned to the Committee of Investigation. In my opinion, the business belongs to the Secretary of the Treasury,

10. *Ibid.*, 412. "This power was ingrafted on the previous powers of that committee, from a bill that originated with the committee usually styled the Committee of Investigation. The bill was introduced to destroy the two offices of the Accountants of the War and Navy Departments; and the title of it was transfused into the standing rules of the House." Nicholson's remarks. 13 *Annals*, 629.

11. This committee was appointed in December, 1801, "to inquire and report whether moneys drawn from the Treasury have been faithfully applied to the objects for which they were appropriated, and whether the same have been regularly accounted for; and to report, likewise, whether any further arrangements are necessary to promote economy, enforce adherence to legislative restrictions, and secure the accountability of persons entrusted with public money";—duties precisely similar to those subsequently assigned to the Committee of Ways and Means.

or, if you distrust him, create a standing commission, with powers equal to the object. We were charged to examine into the accounts of all the public money, which had ever been drawn from the Treasury. Our duty confines us the greater part of the day to the floor of this House. How was it possible for a committee of seven, having everything to learn, with the fragments of their hours, to accomplish an object which would require the regular work of years? I conceive the subject, if gentlemen have serious impressions with respect to it, should be sent to the Secretary of the Treasury. He has already more knowledge relative to it, than a committee would acquire during a whole Congress; and if any important discoveries are to be made, it may safely be trusted that he will bring them to light.¹²

To those who understand the proper status of an auditor the suggestion that the Secretary of the Treasury, himself an executive officer, should audit the executive transactions on behalf of Congress, will appear of doubtful merit. Yet it cannot be denied that Bayard glimpsed a great truth—even though through a cloud, as it were, of misunderstanding. For he saw the necessity of audit, and he saw that an audit could be had only through the creation of some permanent machinery “with powers equal to the object.”

At the time no heed was paid to Bayard's suggestions. Presently the attention of Congress was directed to another difficulty. It was discovered a posteriori, what ought to have been obvious a priori, that the statements rendered by the Secretary of the Treasury pursuant to the Resolution of 1791 were deficient in content. In particular it was observed that they showed only the aggregate sums issued from the Treasury for the use of the War and Navy Departments, respectively, the detailed issues being recorded not on the books of the Register but on those of the War and Navy Accountants. To correct this defect an act passed in 1809 directed the Secretary of War and the Secretary of the Navy severally to report to Congress on the first of January of each year a distinct account of the expenditure and application of all such sums of money as might have been by them respectively drawn from the Treasury in virtue of the appropriation acts of the preceding year.¹³

12. 11 *Annals*, 1282.

13. 2 Stat. 535.

The reform was not successful, for, "as if by the most singular fatality the whole system was intended to elude all the vigilance and sagacity of Congress," these accounts were directed to be made up as of the thirtieth day of September next preceding their rendition. Thus, while Congress appropriated for the calendar year, the fiscal year began and ended on September 30. The consequence was that the annual accounts rendered by these departments to Congress fell three months short of the appropriations for the ensuing year and at the same time extended back and included three months' disbursements of the appropriations made two years before the rendition of the account. Hence it was impossible to compare the annual expenditures with the annual appropriations or to discover the balances of appropriations remaining at the end of the year.¹⁴

The duties imposed on the Committee of Ways and Means in 1802 were continued in them for a period of twelve years. It is clear, however, that the Committee did not perform them. Consider, by way of proof, the remarks of J. G. Jackson on Randolph's motion of May 24, 1809, that a committee be appointed to inquire how far moneys appropriated since March 4, 1801, had been faithfully applied:

Mr. J. G. Jackson expressed his coincidence in the opinion that it was the duty of the House of Representatives to inquire rigorously into the disbursement of public moneys. He thought it was the duty of the House of Representatives to raise a committee every year to inquire into the subject, and thus to take evil by the forelock, if any existed.¹⁵

Consider further the observations of John Taylor on the same occasion:

Mr. Taylor said he should not have risen but that the observations which had fallen from different gentlemen seemed to have looked everywhere but within the walls of the House. When, said he, we are about to inquire whether an Administration has done right or wrong,

14. These remarks are condensed from a speech by Storrs delivered in the House December 28, 1819 35 *Annals*, 810.

15. 20 *Annals*, 71.

whether money appropriated has been honestly applied to the purposes for which it is appropriated, we seem to have forgotten that we also have to look into our own conduct, to review especially, according to the powers vested in the Committee of Ways and Means, their acts. We are about to inquire not only into the conduct of the Administration proper, the Executive and Heads of Departments, but also whether the committee of this House having the care of money concerns have done their duty. I like the motion the better for it. I am unwilling to institute a stricter scrutiny into the conduct of the other departments than of our own; and if the rat-catchers of former sessions have not caught the animals, we will turn in and not only ferret out the rats but hunt the lazy cats who let them live.¹⁶

The inference is plain: the Committee of Ways and Means had not kept clean the Augean stable.¹⁷ had not swept with the besom of scrutiny every part of the government.

In 1814 Congress sought to remedy this situation by dividing the duties of the Committee of Ways and Means and transferring that part of them relating to the examination of past expenditure to a standing Committee for Public Expenditures, created especially for receiving them. The necessary resolution was introduced by Eppes, who argued in its support that the Committee of Ways and Means, of which he was chairman, was too overburdened properly to consider this part of its business.¹⁸ The resolution was passed by the House on February 26, 1814.

In 1816 a more elaborate attempt was made to secure Congressional scrutiny of the expenditures of the government. On February 28 Henry St. George Tucker proposed that the standing rules and orders of the House be amended so that six standing committees might be appointed on so much of the public accounts and expenditures as related to the Department of State, the Treasury Department, the Department of War, the Department of the Navy, the Post Office, and the Public Buildings, respectively. It was to be the duty of these committees to examine into the state of the accounts and expenditures respectively submitted to them and to inquire and report particularly

16. *Ibid.*, 71-72.

17. So Randolph had styled the executive departments.

18. 27 *Annals*, 1627, 1605.

Whether the expenditures of the respective Departments are justified by law;

Whether the claims from time to time satisfied and discharged by the respective Departments are supported by sufficient vouchers, establishing their justness both as to their character and amount;

Whether such claims have been discharged out of the funds appropriated therefor, and whether all moneys have been disbursed in conformity with appropriation laws; and

Whether any and what provisions are necessary to be adopted to provide more perfectly for the proper application of the public moneys, and to secure the Government from demands unjust in their character or extravagant in their amounts.¹⁹

And it was moreover to be the duty of the committees

to report, from time to time, whether any and what retrenchments can be made in the expenditures of the several Departments, without detriment to the public service; whether any and what abuses at any time exist in the failure to enforce the payment of moneys which may be due to the United States from public defaulters or others, and to report, from time to time, such provisions and arrangements as may be necessary to add to the economy of the several Departments and the accountability of their officers.

On March 30 these resolutions were called up for consideration. They were opposed by General Smith of Maryland, who insisted that not much good could flow out of the measure. There were already, he said, an Accountant of the War Department and an Accountant of the Navy Department, and a Comptroller over them and now committees of Congress were to be appointed over the whole to inspect accounts after the money had been paid away; besides, it would be impracticable for the committees to act efficiently unless they sat all year. But the motion was advocated by Tucker, Desha, Stanford, Wright, and Lowndes, by whom it was argued that

the experience of other States, particularly Virginia, proved the utility of such committees; that they were also found extremely beneficial and useful in England; that clamors and suspicions had gone abroad,

and though they might not be well founded, still they rendered the inquiry necessary; that if anything was wrong in the public accounts, the Government ought to know it and the evil be corrected; that if the committees only entered into a general, and not a minute and detailed investigation of those accounts, much good would still result from it, as it would tend to correct frauds, or errors, if any; that it was the duty of this branch of the Government to inspect the money concerns, and see that they were correctly and faithfully conducted.²⁰

These latter sentiments prevailed; the resolutions were agreed to; and six committees, each consisting of three members, were appointed.

In the next year it was made the duty of the six committees on expenditures:

To inquire whether any offices belonging to the branches or departments, respectively, concerning whose expenditures it is their duty to inquire, have become useless or unnecessary, and to report from time to time on the expediency of modifying or abolishing the same; also, to examine into the pay and emoluments of all offices under the laws of the United States; and to report from time to time such a reduction or increase thereof as a just economy and the public service may require²¹

20. *Ibid.*, 1298. Cf. the report of the Committee on Expenditures in the Navy Department, February 28, 1821: "It was hoped, when the Committee of expenditures was subdivided, and one appointed to examine into the faithful application of the public moneys in each great department of the government, that results the most beneficial would grow out of the measure; and that unauthorized expenditure and wasteful extravagance, whether existing with the higher or subordinate agents of the government, from the certainty of detection, would be impeded in their secret march." 16th Cong., 2d sess., H.Rep. 67, p. 1.

21. 30 *Annals*, 996. The creation of these six committees proved very confusing to the original committee on public expenditures, as appears from the following excerpt from their 1822 report: "The committee state, that, very soon after the commencement of the present session, it was convened for the purpose of taking its duties into consideration: that it was not a little puzzled in coming to a decision upon the question of what are the duties of the committee. The rule of the House, to be sure, presents a very extended field for inquiry; many very important subjects, by classes, are embraced; but subsequent rules provide for the appointment of six standing committees and prescribe to them duties, severally which, when taken collectively, may, perhaps, occupy every ground upon which this committee could move." 17th Cong., 1st sess., H.Rep. 100, p. 1. The report stated further what the Committee actually did. It decided to in-

—duties looking toward economy and efficiency in expenditure rather than regularity.

In spite of these reforms Congress remained unable to discover to what degree the Executive was following the appropriation laws. The accounts of the War and Navy Departments, where misapplications were most numerous, were, as we have seen, not made up in a manner to permit a comparison to be made between annual appropriations and annual disbursements. Nor were the committees on expenditures able in practice to make such an examination as would reveal the desired information.

In 1817 these two defects were noticed by Calhoun in a speech denouncing the law and practice of mingling appropriations.²² After declaring that the right of transferring, or rather dispensing with, appropriations should be repealed and prohibited, he continued:

In the next place, the year for the appropriation and for expenditure should coincide. As it now stands, the appropriation is made for the year commencing the first of January, and the expenditure, for what is called the fiscal, commencing the 1st of October. The effect is, that we can never, without great labor, compare the appropriations of money to an object, with the expenditure. They both ought, in my opinion, to be made for the fiscal year; and, if we will insist that the accounts of expenditures be fully made up and laid before us early every session, it will of itself do much to reform.

But this was not enough. He continued:

We must proceed one step further. The committees appointed at the stitute an inquiry into the state of the laws by which the several executive departments were organized with a view to ascertaining whether any imperfections existed. To this end it wrote to the various department heads but received no answers worthy of being reported. Accordingly the Committee for a time did nothing. Presently, however, it was induced by certain occurrences to enter into the examination of the mode by which individual claims against the government not cognizable by the accounting offices of the Treasury were settled; of the mode of erecting forts by contract; and of the provisions of law relating to the recovery of debts due the United States. On each of these subjects the Committee reported; but it is obvious that they were all three irrelevant to the main object of the Committee's creation.

22. 30 *Annals*, 050.

last session, on expenditures, must go to the respective officers, and descend into the details. This is indispensable, and it ought to be their duty to report the state of the expenditure fully to this House. He regretted that they had not done so this session. If these steps be pursued, and if the members of this House will turn their displeasure against any officer, from the highest to the lowest, who permits abuses, a great and immediate reform must be the immediate effect. We shall, then, no longer hear of arrearages, and accounts unsettled for years. Abuses will thus be corrected in the infancy and the purity of our institutions preserved.

These remarks at the time bore no fruit. But in 1819 Representative Storrs of New York took up the attack. As the system was then organized, he declared, all satisfactory examination of the appropriation accounts seemed to be denied to the keenest sagacity or the most penetrating ingenuity. The accounts, he said, should be so kept and rendered that every member could easily understand and comprehend the whole system; they should be reduced at least to such simplicity that not only might the appropriations for one year be precisely compared with the expenditures of the same year but the expenditure under each appropriation might be traced. This, he continued, could not be done so long as the accounts of expenditures of successive years were continually running into each other.

Storrs, as will be understood, was speaking of the War and Navy appropriation accounts transmitted to Congress under the Act of March 3, 1809. But he did not fail to pay his respects to the general statement of receipts and expenditures transmitted to Congress under the resolution of 1791:

There was, indeed, one document, which was distributed annually to the members of the House, by which the amount drawn from the Treasury on warrants in each year might be determined— he referred to the book of receipts and expenditures —but even the partial light furnished by this book was of no use; for, unfortunately, it was distributed some two or three years after the expenditures had been completed. The latest which he had received, comprised, he believed the expenditures of the year 1817. It might have been of some aid, had it been distributed to the members of a former Congress; but,

to this, the *Almanac* of that year might have been laid on our tables with about as much practical utility.²³

As a result, perhaps, of these representations a section was included in the Act of May 1, 1820, "an act in addition to the several acts for the establishment and regulation of the Treasury, War, and Navy Departments," making it the duty of the Secretaries of War and of the Navy

to lay before Congress, on the first day of February, of each year, a statement of the appropriations of the preceding year, for their Departments, respectively, showing the amount appropriated under each specific head of appropriation, the amount expended under each, and the balance remaining unexpended, either in the treasury, or in the treasurer's hands, as agent of the War or Navy Departments, on the thirty-first December preceding . . .²⁴

Two years later a change in the mode of controlling War and Navy disbursements brought the information in the Secretary of the Treasury's general statement of appropriations and expenditures into a near-correspondence with that contained in these departmental statements. An Act of May 8, 1822, abolished the agency of the Treasurer for the War and Navy Departments and required that all moneys appropriated for the use of those two departments be drawn from the Treasury by warrants of the Secretary of the Treasury (countersigned by the First Comptroller and registered by the Register²⁵) upon the requisitions of the Secretaries of War and of the Navy, respectively, countersigned by the Second Comptroller and registered by the proper auditor. Subsequent to the passage of this act the only difference between the departmental and the Treasury statements was that the former were based on War and Navy requisitions while the latter were based on Treasury warrants, that is to say, on transcripts of those requisitions.²⁶ The statements were alike in that

23. 35 *Annals*, 811.

24. 3 Stat. 567. (See U.S.C. Title 5, Secs. 215, 466.)

25. These words were not in the act, but were considered by Secretary Crawford as being implied.

26. "These warrants are, therefore, mere transcripts of the requisitions." Comptroller Anderson to Secretary McLane, November 17, 1832. After the

none of them showed the final expenditure of the sums drawn from the Treasury by warrants or requisitions—an omission which rendered them equally useless as aids to the investigation of the *application* of the public moneys.

As for Calhoun's second recommendation, that the committees of expenditures enter into a detailed examination of the executive transactions, nothing was done, either at this or at any other time. The fact is that, with no machinery of audit, such an examination was impracticable.

This disability was recognized by the Committees themselves. In 1819, for example, the Committee on the Public Accounts and Expenditures of the Post Office, after attempting to examine in detail all contracts with mail carriers, the various charges allowed, and the items of expenditure, was compelled, although reluctantly, to abandon the project:

They were convinced, from research, that to examine the immense mass of receipts and other vouchers, offered for their inspection, to compare them with the corresponding entries in the books of the office, and make the necessary computations, could only be effected by many months' vigilant attention and labor. This part of the inquiry, therefore, which your committee had marked out for themselves was abandoned as impracticable.²⁷

Similarly, in 1821 the Committee on Expenditures in the Navy Department reported that the performance of its duty in conformity with and to the extent required by the rules of the House had been found impracticable:

To investigate the various subjects referred to them, to enquire minutely into the expenditure of all public moneys appropriated for the naval service, and to ascertain whether these expenditures have

passage of the Dockery Act in 1894, even this slight difference vanished, but the War and Navy statements continued to be submitted. From Mr. Graesle of the Treasury Department I learn that, up to and including the fiscal year 1934, they were printed in the *Annual Reports* of the Secretaries of War and of the Navy, respectively. Since 1934 the War Department statement has been submitted to Congress in manuscript form but not printed; the Navy Department statement has been printed in a separate (departmental) document but has not been submitted to Congress.

27. A.S.P., *Post Office*, p. 64.

been made with economy, and in strict conformity with the objects of Congress, in making them, would require greater time and research than could be bestowed by any committee, without a total abandonment of all legislative duties. Indeed, the investigation of any considerable item of expenditure, when pursued in all its details, would be a work of time and labor.²⁸

And again, in 1828 the Committee on the Public Accounts and Expenditures of the State Department frankly reported its inability to enter into a critical examination of the justness of the multiplied items in the accounts subject to its scrutiny.²⁹

The failure of these committees to function as expected induced a variety of suggestions for reform, three of which deserve mention.

In 1821 the Committee on Expenditures in the Navy Department, in the report above referred to, proposed the establishment of a committee of Congress which should be authorized to sit during the recess:

After the adjournment of Congress they could, uninterruptedly, pursue their investigations under every head of appropriation, in all the various branches of expenditure. And it cannot be doubted, but that, if abuses do exist, they would be able to detect them, and by information thus elicited would have it in their power to propose such measures as might be necessary to add to the economy of the departments and the accountability of their officers. It is confidently believed, that much money might be saved annually to the public coffers, by the labors of a faithful and zealous committee, who would examine minutely for themselves, and who, without favor, fear, or affection, would expose to public view and public indignation, the peculators of the Treasury, if any such there be.³⁰

More particularly, such a committee would examine whether the expenditures of the several departments were in every particular justified by law and whether the claims from time to time satisfied and charged by the several departments were supported by sufficient vouchers.

28. 16th Cong., 2d sess., H.Rep. 67, p. 1.

29. A.S.P., *Finance*, V, 998.

30. *Ibid.*, V, 2.

In 1828 the Committee on Public Expenditures brought in a report in pursuance of a resolution of the House of Representatives instructing them to report

whether it is compatible with their other duties to enter upon that sort of rigid examination necessary by comparing, with the several laws making appropriations, the disbursements under them, and the vouchers in support of them, according to the spirit of the sixty-fifth rule of the House, and the objects in said resolutions specified; and also to report, if necessary, what further provisions and arrangements are wanted to add to the economy of the Departments and the accountability of their officers.³¹

In this document they attempted, *inter alia*, to define the distribution of duties which it would be expedient to make between themselves and the six standing committees. For themselves they chose to examine into the laws making appropriations and to ascertain: (1) whether the money thus appropriated had been drawn from the Treasury for the specific object designated in the law making the appropriation; (2) whether any more had been drawn than might have been authorized by the law; (3) whether the money had been drawn on the requisition of proper officers of the departments for whose use the appropriation might have been made. This would leave to the six standing committees on the particular departments the task of ascertaining (4) whether each department had properly applied the money thus placed at its disposal; (5) whether the vouchers for its disbursements were regular; and (6) whether the expenditure had been made with due regard to economy and in good faith for the public service. It was hoped and believed by the authors of these suggestions that under this distribution of duties such an examination might be made into the expenditures of the public moneys of the nation as would insure a just economy in the several departments and a proper accountability of the officers of the government.³²

Finally may be noticed the suggestions of Levi Woodbury,

31. *Ibid.*, V, 845.

32. It will be remarked that the Committee on Public Expenditures proposed

Secretary of the Treasury. Reporting in 1834 on a plan for reorganizing the Treasury, he stated that, in spite of all the obstacles which then existed to prevent the smallest sum from being taken out of the Treasury without the previous authority of Congress, it was still possible through a combination of officers or through an accident for public moneys to be improperly withdrawn. To guard against this he recommended that Congress, by a standing law, require a periodical examination, by a joint committee of the two Houses, annually appointed, into the acts, proceedings, and condition of the several executive departments and the offices connected therewith, in relation to the receipt and expenditures of public money. He went on to say:

That examination going beyond the form and records, beyond the face of all the accounts kept, and even the publication, required by the Constitution, of the receipts and expenditures of all public money, should, in a special manner, whenever the slightest suspicion exists, extend to a close inquiry into the settlement itself, of any accounts; the occasion for any allowances, the rules and extent of all discretionary expenditures; the evidences of the actual amount of money in the Treasury; and any other circumstance which would tend to detect error, or lead to salutary improvements in any of the existing laws.³³

None of these plans, it is to be observed, was adopted; nor does it appear that any of them was seriously considered by Congress. Yet they are of interest as showing at this period both the need for and the nonexistence of a real system of legislative scrutiny.

In 1840 a move was made to abolish the dormant Committee on Public Expenditures. On March 5 George N. Briggs, from that committee, reported the following resolution:

to reserve to themselves the easiest and the least important part of the examination and to assign to the six standing committees the most difficult part and the only one of real significance. For overexpenditure, not overdraft, is the trespass against Congress; the latter may be adjusted; the former may not. Besides, it is evident that the whole of the appropriations may be drawn from the Treasury with all the forms of legality, and yet the whole, after withdrawal, may be misapplied.

33. 23d Cong., 2d sess., S.Doc. 6, p. 12.

Resolved, That, the duties originally assigned to the Committee on Public Expenditures, by the rules of the House having since been transferred to other committees, and the said Committee on Public Expenditures having no duties to perform, the rule for its appointment be abolished.³⁴

This proposal led to an interesting debate.

The members of the Committee, arguing for its dissolution, declared themselves unanimously of the opinion that their functions had ceased. One of them, Hiland Hall, sought to show that the rule defining the powers and duties of the Committee had been in effect repealed and that the duties had been transferred to and distributed among the six committees on expenditures in the several departments of the government which were created and added to the list of standing committees on March 30, 1816: "He could find no jurisdiction in that committee which had not been transferred to those six committees. This committee had not made a report since the year 1822. . . ."³⁵ Briggs, the Chairman of the Committee, regaled the House with "some amusing statements to show the perfect oblivion to which everything connected with this committee, save its name alone, had been consigned."³⁶ Others took a similar view. In short, it was contended that the Committee should be discontinued: (a) because it had done nothing, and (b) because it had nothing to do.

The conclusion was not, however, acceptable to the majority of the House. Caleb Cushing, denying that the powers of the Committee had been transferred or annulled, declared that because there had been neglect before was no argument that the Committee should be abolished now.³⁷ John Quincy Adams thought that "if the committees on the expenditures of the several departments should do their duty, they would be auxiliary to the general Committee on the Public Expenditures and would enable them to make more satisfactory reports than have ever been made."³⁸ Inviting attention to a book of receipts and expenditures, he suggested that

34. *Cong. Globe*, 26th Cong., 1st sess., p. 239.

35. *Ibid.*, p. 338.

37. *Ibid.*

36. *Ibid.*, p. 319.

38. *Ibid.*, p. 352.

if the Committee on Public Expenditures had taken up the document which he held in his hand . . . they might have saved millions of dollars. They might do so even now, late as it was in the session; and if they did their duty the country would have reason to rejoice if the House should refuse to abolish the committee.³⁹

But the most elaborate speech against Briggs's resolution was delivered by Isaac Leet.⁴⁰ Beginning with a lawyer's argument to show that the powers of the general Committee on Public Expenditures were more extensive than those of any of the six committees on the expenditures of the several departments and were coequal with those of all of them combined, he gradually warmed to his subject:

All appropriations of whatever kind, must, according to the Constitution, receive the sanction of this House; not one dollar can be applied to any purpose, by any officer of Government, except in pursuance of law, in the passage of which this House must of necessity have a voice. Vast sums are annually received and disbursed by the different departments. Millions flow into and out of your Treasury every year. The people look to the Legislative branch of the Government to extend their aid, at all events, in preventing abuses, and in correcting such as may creep into the management of the public treasure, in any of the various ramifications of the business of the Government. What, sir, shall we be told that there is nothing for the Committee on Public Expenditures to do?

The ready response was that there were the Treasury Department, the Navy Department, the Post Office Department, the War Department, each of them handling millions of dollars a year: "Will not all these vast and magnificent fields furnish sufficient ground for a committee, however experienced, however learned and laborious, to explore?" Surely they will, said Mr. Leet, and sarcastically continued:

In this view of the subject, I would most respectfully and anxiously inquire, in the language of the resolution, why will you *abolish* one of the most important committees, which has been raised for the purpose of having and exercising a supervisory power over all the affairs of

39. *Ibid.*, p. 350.

40. *Ibid.*, pp. 348-350.

State, so far as expenditures are concerned? Why deprive ourselves, by a kind of suicidal act, of the main instrument which the Constitution of our country has placed in our hands for accomplishing these great purposes?

What if the Committee had done nothing? Perhaps there was nothing to do—nothing which seemed to call for investigation. But the nonexistence of abuses was no argument for doing away with the Committee.

Destroy your committee, and you will at the same time lose every particle of moral influence which the having a standing tribunal, which can look into the various branches of Government, whenever it chooses, is calculated to give the House. Sir, I would, keep the committee; I would preserve this board of visitors, in order that every Administration, in time to come, may at all times keep its "house in order," not knowing "the day nor the hour when they may be called upon to give an account of their stewardship."

And so he concluded that he could not vote for abolishing the Committee or justify such a vote to an honest and enlightened constituency:

Would they be satisfied with my telling them there was no necessity for this Committee on Public Expenditures? Would they agree that the *only* committee, which had a jurisdiction commensurate with all the departments of Government; which could march into any of the places where the public treasure was kept, and detect abuses, if any prevailed; would they, I say, agree to have that committee abolished? I think not.

The great majority of the House agreed with Leet, Adams, and Cushing, and Briggs's resolution was rejected by a vote of 148 to 6. Thus the Committee was saved against its will—a fact of no great significance in itself but interesting as showing the realization on the part of Congress of the political need for some symbol of legislative scrutiny of the executive accounts.

During the 27th Congress the Committee on Public Expenditures indulged in a great show of activity. From the time of its establishment until 1842 it had submitted seven reports: it now submitted twenty-two. But even so, it made no pretense of thor-

oroughly examining the transactions of the departments. In one report it declared—

that, from the immense appropriations which have been made for the last seven years, and the large amounts of money expended under them during that time, it would be utterly impossible for a committee of this House, with the short time daily allowed to them, to make anything like a detailed examination, as contemplated by the rule defining their duties.⁴¹

The best it could do was to investigate the more important disbursements and, from time to time, present the results to Congress with a view “of securing economy in the management of the Government, and of preserving a strict accountability of officers who are charged with the management of the public money.” This was something less than was needed.

After the expiration of the 27th Congress the Committee on Public Expenditures seems to have relapsed into its former inactivity. But it dragged on its existence for forty years, during the course of which it submitted thirteen reports.

Why, it may be asked, did not the Committee on Public Expenditures or the six standing committees, unable to audit the accounts themselves, employ the services of the comptrollers and auditors of the Treasury Department to that end? The answer is simple: because it was precisely these officers whose actions were frequently under investigation. Commenting on a case of flagrant unfaithfulness on the part of a disbursing officer, the Committee on Public Expenditures remarked “the want of a proper vigilance” in the accounting officers of the Treasury.

It is in vain that laws are enacted to prevent defalcations, by holding disbursing agents to a strict accountability, unless the officers, whose duty it is, shall enforce those laws. If their provisions are disregarded by the accounting officers of the Treasury, they will be by those entrusted with the public funds. If the sentinel who is placed over the Treasury be not vigilant, what security have the people? If he nods upon his post, will depredators sleep?⁴²

41. 27th Cong., 2d sess., H.Rep. 458, p. 1.

42. *Ibid.*, H.Rep. 453, p. 1.

In another report the same Committee, remarking that it was not the province of the accounting officers of the Treasury to dispense the equity of the government unless authorized to do so by a law of Congress, suggested that in the making of a certain allowance the daily visits of a popular Vice-President had had a more persuasive influence with the accounting officers than the strength of the testimony by which the claim was sustained.⁴³ In still a third report it complained that the accounting officers had placed no check upon the will of the contracting and disbursing officers: "Whatever has been expended seems to have been allowed, and thus the discretion of a subordinate officer has given law to the scrutiny of a higher officer."⁴⁴

In short, the committees on expenditures did not utilize the service of the accounting officers as Congressional auditors because they did not trust them. That the persons who had made the final determinations of the amounts due might also be the best persons to report to Congress on the correctness of those determinations is one idea that seems not to have occurred to the Congressmen of these times. This was a fallacy reserved to the twentieth century and to the authors of the Budget and Accounting Act of 1921.

In 1842 an improvement was made in the system of accounts by the passage of an act defining and establishing the fiscal year.⁴⁵ The first section of this act, which is still in force, provided that on and after July 1, 1843, the fiscal year of the Treasury of the United States, in all matters of accounts, receipts, expenditures, estimates, and appropriations, should commence on July 1, and that the report and estimates required to be prepared and laid before Congress, at the commencement of each session, by the Secretary of the Treasury in obedience to the acts of September 2, 1789, and May 10, 1800, should relate to the fiscal year. The third section enacted that the statements of receipts and expenditures required to be published annually should, on and after July 1, 1843, be prepared and published for the fiscal year. This reform, the declared intention of which was to bring

43. *Ibid.*, H.Rep. 454, p. 6.

44. *Ibid.*, H.Rep. 458, p. 17.

45. 5 Stat. 536.

the fiscal year into correspondence with the commercial year, had been recommended by Levi Woodbury, as Secretary of the Treasury, and was supported by him as Senator from New Hampshire, in 1842. It should be noticed in passing that the statements of receipts and expenditures referred to in the act were not, as might be expected, transmitted to Congress at its first regular session following the close of the fiscal year to which they related but at some subsequent session.

The debate on the continuance of the Committee on Public Expenditures and, to a less degree, the establishment of the fiscal year are turning points which invite a backward glance at the attitude of Congress toward the problem of retrospective control during the years to which this chapter has been limited. One point stands out. Congress knew that it could have no control without scrutiny. It knew that the appropriation of the public moneys to the various branches of the public service was a mere form unless it were soon followed by a careful examination of the results of expenditure. That Congress failed to invent the necessary machinery for achieving its object—that the reports which it required were inadequate and untimely, that its committees on expenditures were inefficient for the purposes of their creation—is a fact of subordinate importance. The truth which we must carry with us is that Congress saw the difficulty which obstructed its control.

We are now about to enter upon a period when that perception will disappear, when Congress will become so careless of the past that it will no longer insist upon the production of appropriation reports nor seek through its committees to compare expenditures with appropriations, when whatever investigative energies it still possesses (these will be at times not inconsiderable) will be directed toward ends other than the maintenance of retrospective control. Three quarters of a century are to pass before Congress will again understand, briefly and partially, that without knowledge of the executive transactions its control over expenditures is "a mere name—an empty shadow."

CHAPTER XI

THE DIFFICULTY IGNORED: 1842-1921

THE period with which this chapter is concerned begins with a blank of thirty-odd years in which no incident deserves recording, other perhaps than the appointment in 1860 of a standing committee on so much of the accounts and expenditures as related to the Interior Department and in 1874 of a similar committee on so much of the accounts and expenditures as related to the Department of Justice.¹ The indifference of Congress to the problem of retrospective control was reflected in the inactivity of its expenditure committees—and this, in turn, was almost complete. In a report of the Committee on Expenditures in the Department of Justice submitted to the House of Representatives in the closing days of the 43d Congress it was said of the several committees and of the rule defining their duties that:

An inspection of the records and the annals of Congress discloses the fact that, in the nearly sixty years intervening since the authority for their creation, only 31 reports have been presented, responsive to the very rigid requirements of this rule; and, as it was predicted at the organization of these committees, those reports have been general and cursory. There has never been any effort it would seem, to keep them up regularly year by year. They have almost of late years, fallen into disuse.²

When investigation was desired, it was the custom of the House to appoint a select committee for the purpose rather than to refer

1. *Cong. Globe*, 36th Cong, 1st sess., p. 1209; 2 *Cong. Rec.*, 677. The Department of the Interior was established in 1849; the Department of Justice in 1870.

2. 43d Cong., 2d sess., H.Rep. 278, p. 3. The number of reports submitted by the committees is here much understated, as appears from the index to McKee's compilation of committee reports. But an examination of the reports actually submitted will convince anyone that the Committee was substantially correct in its estimate of their value.

the subject to the appropriate standing committee on expenditures.³

It is not until a decade after the close of the Civil War that the thread of our story reappears in the web of history. The idea of the committee from which we have quoted above was that the committees on expenditures "should be active and not dormant." Already—the year was 1875—events were shaping to make them so. For some years the frauds and immoralities of the postwar boom years had been rising, as it were, to the surface of politics and obtruding themselves on the public view.⁴ The Credit Mobilier scandal in 1872, the "back-pay steal" or Salary Grab Act in 1873, the Sanborn Contracts scandal in 1874, the Whiskey Ring scandal in 1875 were disclosures of corruption and of low official morality which excited the interest and indignation of even a postwar electorate. In the midst of these revelations⁵ had come the tumultuary elections of 1874 and a gain by the Democratic party of almost 100 seats in the House of Representatives alone. Consider then the political situation in December, 1875, when the 44th Congress assembled for their initial session: There was great popular interest in official corruption; the House of Representatives was controlled by the Democratic party for the first time since the days of Buchanan; the Republican administration of President Grant was still in power; and just around the corner lay the elections of 1876 with their prize the Presidency itself. This was a conjunction of circumstances which made investigation inevitable; and inevitably investigation came.

On January 5, 1876, Representative Morrison, Chairman of

3. See, on this practice, the complaints of Representative Edwards. *Cong. Globe*, 37th Cong., 1st sess., pp. 160, 230.

4. Allan Nevins justly remarks that "it is an illusion to think of 1875-76 as the scandalous years. They were merely the years in which the great scandals of the earlier period were dragged to light." *Hamilton Fish* (New York, 1937), p. 640. Nevins gives a good account of these scandals in the work cited and in his *Life of Abram S. Hewitt*.

5. Many of them were due to the efforts of Republicans. The Sanborn contracts were investigated by the strongly Republican Ways and Means Committee. The Whiskey Ring was exposed by Benjamin H. Bristow, Grant's Secretary of the Treasury.

the Committee on Ways and Means, sent to the Clerk a resolution proposing that certain of the more important committees of the House be instructed to examine into the conduct of the different branches of the public service and, what is of more interest to our present inquiry, that the committees on expenditures in the several departments be instructed

to proceed at once, as required by the rules of the House, to examine into the state of the accounts and expenditures of the respective Departments submitted to them, and to examine and report particularly whether the expenditures of the respective Departments are justified by law; whether the claims from time to time satisfied and discharged by the respective Departments are supported by sufficient vouchers, establishing their justness both as to their character and amount; whether such claims have been discharged out of funds appropriated therefor, and whether all moneys have been disbursed in conformity with appropriation laws; whether any, and what, provisions are necessary to be adopted to provide more perfectly for the proper application of the public moneys and to secure the Government from demands unjust in their character or extravagant in their amount; whether any, and what, retrenchment can be made in the expenditures of the several Departments, without detriment to the public service; whether any, and what, abuses at any time exist in the failure to enforce the payment of moneys which may be due to the United States from public defaulters or others; and to report from time to time, such provisions and arrangements as may be necessary to add to the economy of the several Departments and the accountability of their officers; whether any offices belonging to the branches or Departments, respectively, concerning whose expenditures it is their duty to inquire, have become useless or unnecessary; and to report, from time to time, on the expediency of modifying or abolishing the same; also to examine into the pay and emoluments of all officers under the laws of the United States; and to report, from time to time, such a reduction or increase thereof as a just economy and the public service may require.

This, it will be observed, was a mere recital of the duties required of the committees by the resolves of 1816 and 1817. But Morrison's resolution went further. It provided also that

for the purpose of enabling the several committees to fully comprehend the workings of the various branches or Departments of Government, respectively, the investigations of said committees may cover such period in the past as each of said committees may deem necessary for its own guidance or information, or for the protection of the public interests, in the exposing of frauds or abuses of any kind in said Departments; and said committees are authorized to send for persons and papers, and may report by bill or otherwise.⁶

Without noticing this enlargement of the powers of the committees the House on January 14 by unanimous vote agreed to the resolution.⁷

The effect of Morrison's resolution was to turn the House into a sort of grand jury or, as Fernando Wood preferred to call it, "a grand inquest of the nation." "Why, sir," said Representative Hale, reviewing the period,

almost the entire business of the House was given up to what was called investigation. The mania spread to all the committees of the House. I believe the old and dignified Committee of Ways and Means was, with its regular duties to discharge, infected with this disease for investigation. . . . Sir, I believe that the only committee in the last House of Representatives that did not get into the investigating mania was the Committee on Appropriations.⁸

The political consequences were unfavorable to the Republican party. With authority to summon witnesses and call for papers the Democratically controlled committees drew a dragnet across the departments. The catch was not perhaps as great as might have been expected—the little fish got through and the big ones broke the net—but one man at least, General Belknap, the Secretary of War, was exposed to public view as a man engaged in the sale of government offices. His resignation, impeach-

6. 4 *Cong. Rec.*, 268.

7. The Republicans later explained their failure to protest as follows: "There were certain specifications made by the newspapers, and rather than it should be said that, pending a political contest, we objected to or stifled investigation, members on this side of the House consented." Representative Hale, January 10, 1878, 7 *Cong. Rec.*, 272.

8. *Ibid.*, 272, 273.

ment, and the manner of his acquittal⁹ profoundly affected public opinion and undoubtedly played a part in the elections of 1876, which resulted, it will be remembered, in the return of a Democratic House, in further Democratic gains in the Senate, and in the near, if not actual, election of Tilden to the Presidency.

It is worth noticing that Clymer, the Chairman of the Committee on Expenditures in the War Department, ascribed the success of his committee entirely to the possession of the extra powers conferred upon it by Morrison's resolution: "I will say to you, if that committee had not been armed with the power of subpoena and attachment, that crime, that disgrace and dishonor would never have been exposed in at least one Department of the Government."¹⁰

This new mode of inquiry was, of course, very agreeable to the Democrats. Accordingly, soon after the new Congress assembled in October, 1877, Representative Glover moved a resolution identical with Morrison's resolution of the preceding Congress.¹¹ This, having been referred to the Committee of Ways and Means, was reported back on December 14 in substantially the same form, except that the committees were to be further authorized to sit during any recess which might occur during the session. A storm of protest immediately arose from the Republican side. Garfield, Hale, and others now discovered an extreme sensibility for the precedents of the House and the feelings of executive officers. "Nobody," said Hale,

objects to these committees in the exercise of their regular powers, going on here in Washington and investigating, as they will be given

9. Thirty-seven Senators voted to convict, 25 to acquit—a two-thirds vote being necessary for conviction. Of those who voted not guilty, 22 said they did so because they believed the Senate had no constitutional right to convict a public officer on impeachment proceedings instituted after he had left office; 2 maintained that bribery within the meaning of the statute had not been sufficiently proved; only 1 cast his vote without comment. The Senate proceedings will be found in the *Congressional Record*, Vol. IV, Part 7. George F. Hoar gives a good account of the case in his *Autobiography of Seventy Years* (New York, 1903), I, 364-368.

10. 7 *Cong. Rec.*, 273.

11. 6 *Cong. Rec.*, 262.

full leave and license to do, these Departments, which are doing their best at this time to conduct aright the affairs of the Government. But if it is sought now and here, before the recess, to give these extraordinary powers to them to go to other places and to call for persons and papers, powers never before possessed by these committees, excepting during the last Congress—and that should teach us not to grant these powers now—then it may as well be understood that it will be resisted.

Others might be willing to endow these committees with unusual powers to “follow up, and nose around, and harass” the faithful heads of departments, but the Republican minority was not:

Let me say while I am up that I do not object to the most thorough and complete investigation with the ordinary powers which have been employed for that purpose for years. I say that the experience which we got in the last Congress of the effect of giving these extraordinary powers to committees, the things they did and sought to do beyond what should have been done, taught me a lesson that I should never consent to any such extraordinary power being given again. And it is not for the purpose of stopping fair, open, square investigation; nothing of the kind.¹²

These objections, reinforced by parliamentary tactics of a dilatory nature, procured the postponement of the resolution until after the Christmas recess, but in the end it was adopted and the disputed powers were given to the committees.

Already, however, public interest in executive corruption was on the wane. No topic could compete with the disputed election of 1876; and, when the eminently respectable President Hayes entered upon his office, the expectation of future integrity drew a veil, at least partially, over the evil doings of the past. In Congress, too, a weariness of investigation was developing. The indiscriminate inquiries of the House committees had themselves aroused some disgust, and now that the great political crisis was over it seemed to many that the old rule should be restored, namely, that “investigation should be conducted by committees with some let and hindrance to their powers” or, to put the mat-

12. 7 *Cong. Rec.*, 229-230.

ter more frankly, that there should be no investigation at all, save only of specific charges.

Perhaps nothing better illustrates the change in the attitude of Congress toward the business of inquiry than an incident unrecorded in political histories. I refer to the suppression of the report from the Committee on Expenditures of the Treasury Department commonly known as Glover's report. John Sherman, the Secretary of the Treasury concerned, gives us the following account of the affair in his autobiography:

He [Glover] came to the department and every facility was given him for examination. He was allowed experts to aid him in the work, and continued the investigation for two years until the close of the Congress. His committee incurred much expense, but was unable to find that any of the public money had been wasted or lost. His report, submitted in the closing days of Congress, was not ordered to be printed. Subsequently, on the 15th of April, 1879, after Mr. Glover had ceased to be a member of the House, a petition from him was presented asking that his report be printed, which was referred to a committee, but they did not seem to think the report of much consequence, as they did not recommend it be printed.¹³

The public records, however, tell a very different story. According to these it appears that on March 3, 1879, being the last day of the 45th Congress, the House of Representatives, without a dissenting voice, ordered the printing of the report, together with the testimony taken by the Committee. Representative Conger thereupon made a motion to reconsider the vote just taken. This motion was pending when Congress adjourned. The Clerk of the House now discovered a parliamentary scruple; holding that he had no power to have the publication made while the motion to reconsider was pending, he declined to execute the order of the House. Consequently on April 15, 1879, Glover, as stated by Sherman, petitioned the new House of Representatives that his report be printed. On June 20 the Committee on Printing, to whom the petition was referred, reported out a resolution

that the order of the House of Representatives March 3, 1879, for the printing of the report of the Committee on Expenditures in the Treas-

13. John Sherman, *Recollections* (Autograph ed.), II, 658.

ury Department with the accompanying evidence, be executed, and that said report and evidence take their place in the series of reports of the committees of the House in the Forty-fifth Congress.

Conger hastily objected on a point of order to the consideration of this resolution and eventually secured its withdrawal—but not before the House had been given some idea of the contents of Glover's report. From the Republicans they learned that the report was "an unseemly thing to issue from the House of Representatives"; from the Democrats they discovered that "it is full of meat, and it hurts the other side of the House." There the matter rested until January 8, 1880, when the Committee on Printing again brought in their resolution to print. But on January 13 this was recommitted. Finally on May 12 the Committee on Printing reported a resolution that they be instructed to inquire further into the subject—which resolution being adopted, Glover's report dropped from view.¹⁴

The incident is curious not only because it illustrates an apathy in Congress on the subject of inquiry but more particularly because it suggests that the reports of these committees on expenditures were looked upon not as legislative but as political documents.

The 44th and 45th Congresses were the only ones in which the committees of the House were, in advance, before any case was alleged, empowered to send for persons and papers. In the 46th Congress no resolution similar to Morrison's or Glover's was so much as introduced. This circumstance did not, however, immediately terminate the investigations of the committees on expenditures. Some of them at least remained for a time fairly active—so active that Woodrow Wilson, writing in 1884 shortly after the Committee on Expenditures in the Department of Justice had exposed the infamous "star-route" frauds, was led incautiously to observe that "it would seem that the supervision exercised by Congress over expenditures is more thorough than that which is exercised by the Commons in England."¹⁵ But the weakening of the stimuli to activity gradually had its effect. The

14. The report is said to have been printed in the *New York Sun* in 1879.

15. Woodrow Wilson, *Congressional Government* (1913 ed.), p. 175.

reports of the committees fell off first in quality, then in quantity; finally they ceased altogether. During President Cleveland's last Congress (the 54th) the committees between them made but one report; during the next four Congresses, none.¹⁶

The interlude of energy was over. What shall we say of it while it lasted? Shall we say that Congress for once, however briefly, was possessed of an instrument of scrutiny "with powers equal to the object"? Unfortunately we cannot do so. Wilson, who thought highly of them, was forced to admit that "though these Committees are so many and so completely armed with powers, indications are not wanting that more abuses run at large in the departments than they, with all their eyes, are able to detect."¹⁷ The remarks of the 43d Congress' energetic Committee on Expenditures in the Department of Justice declared the same truth:

In response to the first duty enjoined by the 103d rule, your committee would say that it is very difficult, if not almost impossible, for any committee, in the limited period of a Congress, to determine either whether the expenditures in the respective Departments are justified by law; whether the claims, satisfied and discharged, are supported by satisfactory vouchers, both as to character and amount, and whether such claims have been discharged out of funds appropriated therefor; and whether all moneys have been disbursed in conformity with appropriation laws.¹⁸

A similar intimation is to be found in the desultory statements of the 52d Congress' Committee on Expenditures in the State Department:

A strict and thorough scrutiny of each and every item of expenditure has not been possible. Yet the committee has gone over the accounts in a general way, viewing the vouchers and scrutinizing in some cases

16. The reference is to printed reports. I have not ascertained how many reports (if any) were submitted but not printed.

17. Woodrow Wilson, *op. cit.*, pp 177-178. These indications were that the Senate, though without similar permanent committees, had sometimes "discovered dishonest dealings that had altogether escaped the vigilance of the eight House Committees"; and that these eight had occasionally, "by special effort," brought to light transactions "which would never have been unearthed in the ordinary routine course of their usual procedure"

18. 43d Cong., 2d sess., H.Rep. 278, p. 4.

more carefully. In no case has the committee been able to detect an improper or unauthorized expenditure. But in some instances we have found the expenditures to exceed the annual appropriation and others to fall short of it. Your committee, however, would not be understood to certify to the entire correctness of the many accounts. But they simply say that, so far as they have been able to discover from the means of investigation accessible to them, no improper expenditure seems to have been made.¹⁹

The contemporary testimonies seem conclusive. But even if we did not have them we should be compelled to assert the inability of the committees thoroughly to scrutinize the executive transactions. From the point of view of mere machinery the committees were as inefficient as they had always been. They could elucidate particular misfeasances to which their attention was directed by departmental informers or which were accidentally uncovered in the application of the muck rake; but any examination of the detail of accounts was quite beyond their competence. It is only necessary to notice that no accounts were regularly submitted to or referred to them; and, what is equally important, that they were not served, as for example the Public Accounts Committee of the House of Commons is served, by a great public department whose principal duty was to aid them continuously and regularly in the audit of accounts.²⁰ Without these and perhaps other mechanical aids the establishment of a real system of Congressional scrutiny and retrospective control was, *a priori*, impossible.

19. 52d Cong., 2d sess., H.Rep. 2016, p. 1. The passage is curious in that it suggests how indifferent Congress had become to a strict adherence to the appropriation laws.

20. That accounts should be required of the spending departments was suggested by at least one committee: "Each department," wrote the Committee on Expenditures in the Interior Department, "should also by law be required to furnish annually a statement in detail of the disbursements of its several bureaus. . . . Neither the Interior Department nor any bureau thereof now furnishes such statements and it will readily be perceived that the advantages to be derived therefrom would be of inestimable value in directing legislation and controlling public expenditures." 45th Cong., 3d sess., H.Rep. 180, p. 5. The idea of creating an officer comparable to the English Comptroller and Auditor General to serve as the acting hand of the committees on expenditures seems to have occurred to no one.

We must now notice, what is very remarkable, that Congress seems hardly to have desired the establishment of such a system. To this very period of greatest activity must be referred a singular change in the concept of the House of Representatives as to the proper functions of its committees on expenditures. I do not refer particularly to the discovery that they could be made effective political engines for the gathering of campaign materials, nor even to the idea that their principal object was to investigate and report on particular allegations of malversation. I have reference rather to the budding notion that their inquiries should be directed toward the future rather than the past and that they should be instruments of anticipatory rather than retrospective control.

When the committees were first established it had been clearly understood that they were primarily and directly concerned with approved expenditure and with seeing that the intentions of Congress had been carried out in the proper manner: that they were only indirectly concerned with the question of whether the provision made by Congress was or was not excessive. Now, however, the emphasis was reversed. The idea arose that the committees were not so much interested in past regularity as in future economy. To compare promise with performance was well enough in its way, but it was troublesome, indeed impossible, for a committee to do; and after all was it not locking the stable door after the horse was stolen? Far better to compare performance with request and, profiting by the knowledge thus gained, to reduce the estimates.

Evidence of this change of view may be found in the records of the debates in Congress. Representative Buckner, for example, supporting the resolution originated by Glover, argued in 1878 as follows:

The main and primary object of the resolution is that we may find some means by which to cut down expenditures in the various Departments of the Government. I understand that is the principal, the prime object; others may be subsidiary to it, but that is the chief object.²¹

21. 7 *Cong. Rec.*, 275.

But still stronger evidence is to be found in the singular recommendation made in 1879 by the Committee on Expenditures in the Interior Department that the rules of the House be amended so as to give the committees on expenditures charge of the annual estimates of the several departments. This was to be done by referring the annual estimates to them for examination and report to the House—the reports so made to be referred to the Committee on Appropriations. It was argued that this reform would divide the work of the Committee on Appropriations and

enable the Committees on Expenditures in the State, War, Navy, Treasury, Post-Office, and Interior Departments, and Department of Justice, to exercise a control and direction over the government disbursements which would tend as well to securing a proper economy in expenditures as to compel a more careful accountability by the heads of the respective departments and their chiefs of bureaus.²²

It is not too much to say that the rise of this new concept of the theoretical duties of the committees on expenditures marks an epoch in the history of accounting for public moneys. The earlier Congresses knew what they wanted but not how to get it; the later Congresses knew neither.

Returning now to a stricter chronology, we must notice the final dissolution of the standing Committee on Public Expenditures, established in 1814. In the year 1879 the Committee on Rules, reporting a comprehensive plan for the revision of the rules, recommended among other things that Rule 85, prescribing the duties of the Committee on Public Expenditures, be dropped entirely, and that this committee be no longer appointed. In support of their recommendation they argued that the committees on expenditures in the several departments were separately required to do with the accounts and expenditures of each department what the Committee on Public Expenditures was required to do with all:

It follows, of course, without argument, that the last-named committee cannot "examine into the state of the several public departments" as thoroughly as a committee appointed specially and solely

22. 45th Cong., 3d sess., H.Rep. 189, p. 5. The suggestion was not adopted.

to examine into the accounts and expenditures of a particular department.²³

The House agreed with these representations and presently the standing Committee on Public Expenditures ceased to exist.²⁴

At about this same time the Senate, which had hitherto had no standing committee on expenditures, began to consider the creation of such a body. In 1882 Henry Gassaway Davis proposed the appointment of a Committee on Expenditures of Public Money with powers to sit during the recess of the Senate and to send for persons and papers in all cases. The Committee on Rules, to whom Davis' resolution was referred, not thinking it just

to set afloat a committee which in times of great party excitement might serve, and serve very improperly, partisan purposes, which might sit in the recess and give out evidence to the public when the Department or officer affected would have no power to answer, or to meet, or to direct, or to guide the inquiry,²⁵

were unwilling to grant the general authority asked for, but satisfied as to the expediency of creating such a committee, presently reported a resolution in the following terms.

Resolved, That there shall be a Committee on Expenditures of Public Money, composed of seven Senators, who shall consider such measures tending to economy in public expenditure as shall be referred to it, and conduct all investigations into the expenditure of public money which shall be ordered by the Senate.²⁶

23. 46th Cong., 2d sess., H.Rep. 24, p. 11.

24. The new rules were adopted March 2, 1880, and went into effect March 8 of the same year; it was provided, however, that no standing committee should be abolished during the current (46th) Congress. The Committee on Public Expenditures was revived as a Select Committee by the House of Representatives of the 47th Congress; then it quietly expired. We may notice at this place that Rule 103, prescribing and defining the duties of the committees on expenditures in the several departments became a clause in Rule XI. We may notice also the establishment in 1889 of a Committee on Expenditures in the Department of Agriculture; the department had been created in 1862 (12 Stat. 387).

25. 13 Cong. Rec., 1883 (Senator Hoar).

26. *Ibid.*, 1824.

This resolution was debated at some length, the principal argument offered in its favor being that the Committee on Finance, the Committee on Pensions, the Committee on the Judiciary, and other important and hard-worked committees would be much relieved if particular inquiries which related merely to the lawfulness and to the economy with which money was expended in a particular department could be transferred to a committee of this kind.²⁷ Even Hale of Maine, now translated to the Senate, approved of the proposal:

I have had some experience, and some members of the Committee on Appropriations have had, during the present session, alluded to by the Senator from Massachusetts, where a resolution for investigation into the expenditures of a particular fund was referred to the Committee on Appropriations, evidently nobody believing that the general work of that committee would be much interfered with or interrupted by the new work, whereas the result has been that for three months almost the entire time of that committee, not allowing it to attend to any other duties, has been consumed by that investigation, a subject-matter that might very properly have gone to just such a committee as the Senator from Massachusetts has now moved.²⁸

Nevertheless the enemies of the proposal secured its postponement.

Presently, however, the Committee on Appropriations, investigating certain departmental expenses as mentioned by Senator Hale, uncovered some very considerable irregularities, not to say frauds, in the accounts of the Treasury Department. They found that the contingent fund of that Department

had been spent in repairs on the Secretary's private residence, for expensive suppers spread before the Secretary's political friends, for lemonade for the delectation of the Secretary's private palate, for bouquets for the gratification of the Secretary's busiest allies, for carpets never delivered, "ice" never used, and services never rendered; although these were secrets of which the honest faces of the vouchers submitted with the accounts gave not a hint.²⁹

27. *Ibid.*, 1883 (Senator Hoar).

28. *Ibid.*, 1884.

29. This is the summary of the results of the investigation given by Woodrow

As a result perhaps of these disagreeable revelations the Senate of the next Congress established for the first time a standing committee to investigate the expenditures of the executive departments. This was the Committee on Expenditures of Public Money "to consist of seven Senators, which shall consider such measures tending to economy and public expenditures as shall be referred to it, and conduct all investigations into the expenditure of public money which shall be ordered by the Senate, unless the Senate shall otherwise direct."³⁰ It was the expectation of the Rules Committee that this would become one of the important committees of the Senate.³¹

The expectation was disappointed. In 1889 the appointment of the committee, which seems never to have reported on any subject, was discontinued, so much of the rules as prescribed its duties was repealed, and its place was taken by a newly created standing Committee on the Organization, Conduct, and Expenditures of the Executive Departments, consisting of nine Senators.³² This new committee acted for a time as a sort of pneumatic tube for bringing the reports of the Dockery Commission to the attention of the Senate. Then it retired to a slumber terminated only by its death in the year 1907.

In 1894 an event took place of little practical importance as regards accountability but yet worthy of notice. This was the discontinuance of the preparation and publication of the annual statement of receipts and expenditures required to be issued by the standing order of the House of Representatives of December 30, 1791, and the substitution therefor of a statement which did

Wilson, *op. cit.*, p. 178. It might be added that the expenses of the Sherman Campaign Committee, a political committee for the advancement of the Secretary's candidacy for the presidential nomination of 1880, were also partially met from this fund. The mode was to falsify the vouchers: stationery for the Campaign Committee being charged up as "file holders"; sugar, lemons, etc., as "candles"; eau de cologne, as "friction matches"; etc. See 47th Cong., 1st sess., S.Rep. 265. In the interests of fairness it ought to be stated that the investigating committee did not accuse Sherman of complicity in these frauds. Sherman in his *Recollections* declares himself innocent, that is to say, ignorant of what was being done in his behalf.

30. *Senate Journal*, January 11, 1884. For the 50th Congress the membership of this committee was increased to eight.

31. 15 *Cong. Rec.*, 231 (Senator Frye). 32. *Senate Journal*, March 12, 1889.

not require the connection to be shown between appropriations and disbursements. The circumstances were these.

On December 7, 1893, the Acting Secretary of the Treasury transmitted to the House of Representatives the Register's *Book of Receipts and Expenditures* for the fiscal year ended June 30, 1891.³³ The House for the first time in its history did not order it to be printed. On February 9, 1894, Secretary Carlisle, perhaps taking this omission as an indication that the *Book* was no longer desired, directed that its preparation and publication be discontinued.³⁴

The resolution of 1791 having been declared obsolete by order of the Secretary of the Treasury, it behooved Congress to require the submission of other financial reports. This was not difficult to do. Since 1873 a statement had been published informally by the Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the Treasury under the title of *A Combined Statement of Receipts and Disbursements (apparent and actual) of the United States*.³⁵ This showed the same information as the receipts and expenditures portion of the Register's *Book*,

33. The tardiness of the statement had long been the object of criticism. In 1872, for example, the Chief Clerk of the Treasury Department remarked of it: ". . . as this is published nearly two years after the expenditures are made, it becomes of very little service to Congress in connection with the estimates." Report of J. H. Saville to the Secretary of the Treasury, December 15, 1872 (4 *Cong. Rec.*, 673). He might better have said that it was of very little service for any purpose whatever. In the next decade it fell even further behind. In a report made to the Register in 1887 by one of his subordinates it is boasted that during the preceding two years the annual statements of the receipts and expenditures "making octavo volumes of nearly 400 pages, double columns" had been completed and published for the years 1881, 1882, 1883, and 1884; the report also says that the statement for 1885 was "nearly completed" and that that for 1886 was "well under way." 50th Cong., 1st sess., S.Rep. 507, Part 2, p. 179. The inutility of these dilatory documents may readily be imagined.

34. Secretary to the Register of the Treasury, February 9, 1894. Press Copies, Series "B," Vol. XX (Treasury MSS.) This course had been recommended to him by the Chairman of the Joint Commission to Inquire into the Status of the Laws Organizing the Executive Departments (Representative Dockery). 53d Cong., 2d sess., H.Rep. 637, p. 15.

35. On January 4, 1873, Secretary Boutwell in compliance with the request of the Chairman of the Committee on Appropriations (Garfield) transmitted to that Committee a statement of receipts and expenditures by appropriation heads for the year ended June 30, 1872. Similar statements were thereafter prepared.

but being made up on the basis of warrants issued rather than drafts paid, it was susceptible of prompter publication than that document. Already the Dockery Commission was urging that it be made a regular report and that it include the Post Office Department. Accordingly the Congress by act of July 31, 1894, provided that

it shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post Office Department, designating the amount of the receipts whenever practicable by ports, districts, and States, and the expenditures by each separate head of appropriations.³⁶

The effect of this act was to make the *Combined Statement* an official report. But it had also a further effect; it deprived Congress for the first time since 1791 of an official statement showing the connection between appropriations and disbursements. The *Combined Statement* showed the heads of appropriations but neither their amounts nor their balances—only the expenditures under them.

For several years the only information available to Congress on this subject was another informal publication of the Treasury Department known as *A Statement of Balances, Appropriations, and Expenditures*. This, like the *Combined Statement*, had been prepared for many years in the Division of Warrants, Estimates, and Appropriations, and was taken over after the passage of the Dockery Act by the Division of Bookkeeping and Warrants.³⁷ Its content was essentially the same as the third portion of the Register's *Book of Receipts and Expenditures*; that is to say, it showed in tabular form the unexpended balances of appropriations at the commencement of the year, the appropriations available for expenditure within the year, the respective amounts expended and carried to the surplus fund, and the balances remaining at the close of the year. In 1912 this report was united

36. 28 Stat. 210.

37. Printed copies of this statement exist for the years 1880 to 1884 inclusive; and again for 1893 and subsequent years.

with the *Combined Statement* and the title of that document changed to *A Combined Statement of Receipts and Disbursements, Balances, etc.*

These various statements, it may be observed in passing, were a great improvement on those formerly submitted under the standing order of 1791. But this improvement, being due to their currency rather than their content, was confined solely to their usefulness in connection with the estimates. Congress seems not to have made any attempt to use them in connection with the investigation of past expenditures. Nor in fact were they at all suitable for that purpose. It is only necessary to remind ourselves once more, in case we have forgotten it, that the disbursements recorded in them were not true expenditures but were merely Treasury issues. These issues seldom represented final payments to public creditors; for the most part they were advances to disbursing officers. As such they might never be spent at all, or if spent, they might be applied to objects other than those for which they were ostensibly issued. It is plain, therefore, that, for the purpose of showing whether the Executive had or had not misapplied the public moneys, the new statements, even when they attempted to relate expenditures to appropriations, were as unserviceable as the old.

During the first two decades of the twentieth century the idea that Congress should inquire into the expenditure of public moneys for the purpose of enforcing financial regularity seems almost to have vanished from sight. In the House new committees on expenditures were formed; in the Senate the committee system was reconstructed; but the additions and alterations were purely formal: neither Congress nor its committees were imbued with the spirit of scrutiny.

Consider first the history of the House committees. Their situation in 1900 is tersely described by Woodrow Wilson in the preface to the fifteenth edition of his book: "The auditing committees on the several departments . . . have now for some time exercised little more than a merely nominal oversight over executive expenditures."³⁸

38. Woodrow Wilson, *op. cit.* The preface is dated August 15, 1900

In 1905 the Committee on Expenditures in the Department of Commerce and Labor was first appointed; but the event was mere routine.³⁹ The Department had been created in 1903.

In 1906 an attempt was made to rouse the committees to action. This took the form of a resolution reported to the House that the Committee on Expenditures in the Department of Agriculture be authorized to examine, so far as that Department was concerned, all the matters referred to in paragraph 42 of Rule XI⁴⁰ and, for that purpose, to send for persons and papers. In the preamble to this resolution it was noticed that the Committee had made no examination of the expenditures in the Department for a number of years, that such an examination was now necessary in the interests of the public service, and that it could not be had unless authority therefor was conferred on the Committee. The resolution itself occasioned no debate; but Representative Williams in approving it expressed a hope that "the other committees on expenditures in the several departments will wake up to the fact that they have a very important work to do":

The most important committees of this House, if they do their duty, for the purposes of economy and honesty of administration, are the committees on expenditures in the several departments. I am glad that this particular Committee on Expenditures is taking this step, and I hope it will be imitated by the other committees on expenditures in the other departments.⁴¹

The hope was vain. The resolution was agreed to, but it had not the effect expected. The Committee did indeed submit a lengthy report, but this was accompanied by the usual apologies for its incompleteness and imperfection:

While the time at their disposal has been so short as to make it impossible for them to make an examination of the expenditures of the

39. 40 *Cong. Rec.*, 296. In 1913, after the division of the department, this committee was succeeded by two committees—one for Commerce, the other for Labor. 50 *Cong. Rec.*, 1784.

40. This was the paragraph defining the duties of the committees on expenditures.

41. 40 *Cong. Rec.*, 6573.

Department of Agriculture, within the scope of the rule giving them their authority, exhaustive and complete, we have made as thorough an examination as has been practicable under the circumstances.⁴²

The other committees, far from "waking up to the fact" that they had a very important work to do, continued in their slumbers.

During the succeeding years the inutility of the committees was occasionally noticed. In 1909, for example, Senator Bourne, writing in the *Outlook*, stated: "These various House Committees appear to be clothed with ample power to supervise expenditures, but as yet satisfactory and practical results have not come from their creation."⁴³ In 1912 Representative Hamlin, epitomizing the work done by his own Committee on Expenditures in the State Department, declared that the Committee had done "practically no work whatever for nearly thirty years," as a result of which neglect many loose practices had grown up in the department.⁴⁴ In the same year President Taft's Commission on Economy and Efficiency wrote to the same effect. Noticing that in 1816 the House of Representatives had "laid considerable emphasis on the necessity of Congressional examination of the expenditures of the various services to which appropriations were

42. 59th Cong., 2d sess., H.Rep. 8147, p. 1. The committee mentioned the worthlessness of the departmental financial reports: "We found that since and including the Forty-ninth Congress the lists of the expenditures of the Department of Agriculture have been regularly furnished and printed as a public document . . . although practically no call has ever been made for the document, and it is of substantially no public value. . . . For this purpose, beginning with the Forty-ninth Congress and finishing with the Fifty-ninth, the sum of \$31,175.75 has been expended by the United States Government without, in our judgment, being of any substantial value.

"The list, as it has been heretofore furnished, was of practically no use. House Document No. 448, Fifty-ninth Congress, first session, cost to print and bind \$5,306. It was simply a transcript of the cash book of the Agricultural Department and was a mass of unclassified, unrelated, heterogeneous figures. It was no doubt a literal compliance with the law requiring the list of expenditures to be filed, although the law was apparently drawn by some one who perhaps knew what he wanted, but did not appear to be able to express it in legislative language. This mass of unrelated and unclassified material composed a volume of 584 printed pages. It was worthless as a basis for investigation."

43. *The Outlook*, October 9, 1909 (reprinted 45 *Cong. Rec.*, 2010).

44. 48 *Cong. Rec.*, 11847.

granted," they remarked that as a matter of fact the House had made little use of committees on expenditures:

. . . expenditure committees have existed for years with full power to do everything necessary to fully inform the Congress with respect to economy and efficiency of public expenditures. The relative futility of the efforts of these committees has been such as to cause them to become inoperative, except occasionally as the controlling power in Congress may shift from one party to another, thus giving to the incoming majority reasons for giving unfavorable publicity to the acts of the party represented by the minority.⁴⁵

True, the committees had recently been active, but their activity, while unusual, was not of the kind required:

When employed they have commonly been regarded as instruments of the Congress to ferret out suspected maladministration rather than for systematic consideration of expenditures or for rendering assistance to the Committee on Appropriations in determining what are the facts available about any of the subjects which are referred to them by Rule XI above quoted.⁴⁶

Such were the contemporary notices of the House committees on expenditures during the years immediately preceding the entry of the United States into the first World War. During and after that war the story is much the same. Discussing these committees in 1918, Representative McCormick had occasion to remark:

Under the present rules these nine committees are given the authority to make investigations, but their duties are not made mandatory. They are compelled to do nothing, and they generally do nothing. Even should they desire to investigate the accounts of a given department they have no organization to accomplish the purpose. These committees now, in fact, have no functions. They have died as a

45. 62d Cong., 2d sess., H.Doc. 854, pp. 30, 220-221.

46. *Ibid.*, p. 39. The Commission on Economy and Efficiency seems to have had the idea that the committees on expenditure should act primarily as adjuncts of the Appropriations Committee, and secondarily as Public Accounts Committees. This was the reverse of the idea of those who first established the committees.

natural result of governmental evolution. In the early days of the Government, when the departments were small and could all be housed in one large building, it was possible perhaps for a legislative committee to examine and intelligently criticize the expense accounts of the executive. But now the task is so complicated and so stupendous that only the most modern and efficient methods of accounting and audit can accomplish the desired result. Such investigations as these committees have undertaken in the past have been chiefly of a political nature, the motive being party advantage rather than improvement of departmental methods of expenditure of public funds or of consistently and regularly controlling departmental expenditures.⁴⁷

Representative Magee, addressing the House a year later, briefly if inelegantly referred to the committees as "ornamental barnacles."⁴⁸

The testimonies are conclusive. Should, however, further proof be desired of the inefficiency of the committees it may be found in the circumstance that when, in 1919, Congress decided to investigate the expenditures of the War Department during the period of the World War it referred the subject not to the Committee on Expenditures of the War Department but to a committee appointed especially for the purpose. This course was urged by the Chairman of the Committee on Expenditures named for reasons retailed to the House as follows:

The Committee on Expenditures in the War Department found itself confronted with a very great work, and believing that the work should be thoroughly done did not feel like undertaking it with the standing Committee on Expenditures in the War Department.⁴⁹

In the Senate the story of futility was much the same. In the year 1907 the Committee on Organization, Conduct, and Expenditures of the Executive Departments, dormant from its

47. 65th Cong., 2d sess., H.Doc. 1006, p. 35. McCormick's idea of the efficiency of the earlier committees was exaggerated.

48. 57 *Cong. Rec.*, 4021. The *Syracuse Post-Standard* on September 24, 1918, remarked editorially: "The chairmen of the 11 committees working independently do not take their duties very seriously, but they all have fine committee rooms."

49. 58 *Cong. Rec.*, 640.

tion of public moneys; the security of the Government against unjust and extravagant demands; retrenchment; the enforcement of the payment of moneys due to the United States; the economy and accountability of public officers; the abolishment of useless offices; the reduction or increase of the pay of officers.⁵⁹

The amendment died in committee.

In 1919 the old complaints were again brought forward. Senator Simmons, speaking at the hearings on the national budget system, said of the expenditure committees: "We have one for practically every department and none of them even meets."⁶⁰ And Senator McCormick declared: "I am chairman of one, but I do not know the names of my colleagues."⁶¹

Let us pause now to sum up the results of this chapter. One central fact emerges. From 1843 or thereabouts to the period of the first World War Congress completely ignored its duty rigorously to examine into the application of appropriated moneys. I use the word "ignored" in its primary sense: it was not so much that Congress neglected or repudiated its duty as that it knew not what its duty was. During these years no Gerry rose to warn his colleagues that a committee should be appointed to examine into the expenditure of all former appropriations and that a rule should be established to procure regular accounts from every branch of the executive department. No Randolph premonished the House that without some such arrangement its control over the public purse would be a mere name, an empty shadow. No Calhoun, no Storrs, no Adams reinforced these admonitions with his own cautionary remarks. The truth is that the subject was never brought to debate. It was simply not thought of.

Everything that happened during these years reinforces this conclusion. The sole official statement showing generally the connection between appropriations and Treasury issues was discontinued by executive fiat and no similar statement was de-

59. *Ibid.*, 2924.

60. *National Budget*, Hearings before the Committee on Consideration of a National Budget, U.S. Senate, 66th Cong., 2d sess. on H.R. 9783, Part 1, p. 194.

61. *Ibid.*

manded by law or resolution to take its place. The committees on expenditures, set up originally to look into the detail of the executive transactions, were allowed to serve partisan rather than constitutional ends—and no one noticed the difference. With respect to the scrutiny of expenditures ignorance and apathy prevailed.

have around these appropriations as to the manner of their expenditure are some very complicated laws for the purpose of preventing embezzlement.⁷

The statement of the difficulty was clear. But what was Congress to do? For an answer contemporary opinion turned first and instinctively to England.

In England the notion that parliamentary control depends on complicated checks imposed before expenditure takes place had long been abandoned. A truer vision had seen that the best security for the faithful application of the public money is to be found in a correct system of public accounts, in an early audit of the expenditure after it has been incurred, and in an examination by Parliament itself of the results of that audit.

Let the system be based on confidence in the government, and let the controlling and responsible department of the state have full freedom of action; simplify the machinery; make the system of public accounts as comprehensive, uniform, and exact as possible; and extend the control of the audit board, not to obstruct the current business of the government, but to verify the regularity of the whole of their accounts, and of their financial proceedings.⁸

Such were the principles upon which the Exchequer and Audit Departments Act, 1866, the charter of the English financial system,⁹ was based. Fifty years of experience under the act had served only to confirm their correctness.¹⁰

7. *Ibid.*, 987.

8. The language is Mr. William Anderson's, to whom perhaps more than to anyone else (unless it were to Mr. Childers) the public was indebted for the Exchequer and Audit Departments Act, 1866. *Report from the Select Committee on Public Monies*, 1857, Appendix 1, p. 570.

9. It is so referred to by T. Gibson Bowles, M.P. *Report from the Select Committee on National Expenditure*, 1902, Evidence, 1206.

10. The Treasury, as early as 1872, reported that the effect of the act had "been to introduce an obedience to regulation and a responsibility such as were not previously known." *Treasury Minute*, 14 August 1872. The Committee of Public Accounts, noticing "the admirable results, as evidenced by the Public Accounts, of the arrangements introduced by the Exchequer and Audit Departments Act of 1866," referred to the statute as "epoch-making": "The striking contrast, from the point of view of financial regularity, between the period antecedent and the period subsequent to that measure shows it to have been, in its peculiar field, an epoch-making statute." 3d Rep. 1896, par. 16.

The adaptation of the English system of audit and scrutiny to American institutions was a solution to the problem confronting Congress too obvious to escape attention. Accordingly we find it much recommended. For example, in the closing days of the 65th Congress Representative Swagar Sherley, proposing the establishment of a joint commission on financial methods, declared himself in favor of "an independent audit, subject to the control of Congress and not to the administrative branch of the Government. That," he continued, "was the great reform that Gladstone put into the parliamentary procedure of England. It is the one thing that is essential in order to keep Congress advised of expenditures without compelling it to look to a lot of details. . . ." ¹¹ Representative McCormick was more specific. A bill ¹² introduced by him at the same Congress, "to provide for an independent audit of the departmental accounts, and for other purposes," was deliberately patterned from the English Exchequer and Audit Departments Act. So too was a bill introduced in the next Congress by Representative Frear. ¹³

At the hearings held in the autumn of 1919 by the House Committee on the Budget the idea was advanced by several important witnesses that Congress, imitating the House of Commons, should create a system of retrospective control. The step was recommended by L. F. Loree, president of the Delaware and Hudson Company:

The most important phase of legislative control occurs *after* the money has been spent under its authority. This phase is substantially neglected by the American Congress, and such auditing as takes place is executive; that is, it is in charge of those who have made the expenditures. Congressional control over the budget should be supported by the creation of an auditing committee, the chairman of which ought not to be a member of the party in power. This committee should meet frequently, should be free in its criticisms, and should have a permanent staff under the auditor general. It should scrutinize expenditures, not only in order to ascertain whether there has been conformity to the ratified budget, but should look into efficiency and economy in letting contracts for purchase of supplies, the construction

11. 57 *Cong. Rec.*, 4608.

12. 65th Cong., 2d sess., H.Doc. 1006, p. 7.

13. 58 *Cong. Rec.*, 1701.

of public works, and other matters of administration involving expenditures. In the case of unexplained irregularities the committee should be empowered to refuse to sanction payments of money. The auditor general should be absolutely independent of the Treasury Department and of all executive control. He should have substantially life tenure of office, and his duties should be clearly defined by statute. It is not proper that the executive branch, which spends the money, should also audit the accounts.¹⁴

Mr. Stimson, Secretary of War during President Taft's time, made a similar suggestion:

You ought to have more power. You ought to have more machinery. At present you have a committee, an investigating committee on the War Department, and one on each of the other departments, and that committee merely acts now and then; but you have to do it not by having a corps of trained investigators who have their eye on the job right through the year, but having sessions now and then, and by calling the Secretary before it, and calling other officials before it, and examining them without assistance. I do not think that is sufficient. You ought to have somebody who will perform the same function of scrutiny and care and investigation for you that is performed in Great Britain by the controller and auditor general.¹⁵

At the Senate hearings (held after the passage of the Good bill by the House) Dr. Nicholas Murray Butler also advocated an audit of expenditures—to be made not on behalf of some extraneous department but on behalf of Congress:

I would rewrite the provisions of the House bill (H.R. 9783) by providing for a public auditor instead of a comptroller general, to be the head of an accounting department to report to the Congress and to be under the authority of the Congress. I suggest the establishment in both Senate and House of a committee on public audit, and believe it would be advantageous if the custom were instituted of having a member of the legislative minority designated to act as chairman of this committee. Care must be taken not to let the public audit develop into a source of purely political criticism and attack. It should

14. *National Budget System*, Hearings before the Select Committee on the Budget, House of Representatives, 66th Cong., 1st sess., p. 295. (Italics supplied.)

15. *Ibid.*, p. 644.

be strictly a business office to inform the Congress as to whether the moneys that had been appropriated had been expended not only in accordance with law but wisely and well. Waste and extravagance which might escape detection at the time when appropriations are made would almost certainly be detected in the public audit.¹⁶

During the debates in the 66th Congress on the merits of H.R. 9783, prototype of the Budget and Accounting Act, 1921, the same solution to the problem of Congressional control *seemed* constantly to be put forward. Indeed, almost everything that was said seemed predicated on the idea that Congress was establishing in the Comptroller General an officer who would be to it what the English Comptroller and Auditor-General was to the House of Commons. Thus Representative Good, delivering the initial speech for the bill which bore his name, spoke as if the Exchequer and Audit Departments Act had been his model:

That act is a monument to the statesmanship of William E. Gladstone. It contains essential elements not found in our system, and it is contended by many who have studied budgetary legislation in the United States that by a similar law Congress would correct the evils resulting in the waste and extravagance of public funds. Indeed, there are those who think we should go no further at all at the present time than to provide for an independent audit and control of expenditures. The British exchequer and audit departments acts of 1866 converted the nominal control by Parliament into a real control, and it has withstood the strongest tests that have been brought against it during the more than 50 years that this act has been a part of their statutory law.¹⁷

According to Good the functions proposed to be given to the accounting department were

similar in many respects to those of the office of the comptroller and auditor general in Great Britain. . . . If the comptroller and auditor general of the British House of Commons is the "real guardian, on behalf of the House of Commons, of the purse of the nation," the

16. *National Budget*, Hearings before the Committee on Consideration of a National Budget, U.S. Senate, 66th Cong., 2d sess., p. 74. Note the implication that the bill, as drafted, did *not* provide for a public auditor.

17. 58 *Cong. Rec.*, 7084.

comptroller general provided for under this bill will become the real guardian of the Treasury of the United States.

Other Congressmen spoke in similar terms. Representative Byrns, asserting that the audit provisions of the Good bill were based on "the practice followed by every other great nation in the world," indicated that audit was to be the Comptroller General's only duty:

The comptroller general or assistant comptroller general have only to do with the auditing of accounts. In other words as the gentleman from Iowa [Mr. Good] expressed it in the course of his remarks a few moments ago, they make a post-mortem examination of the expenditures made by the Government. Now, it was the thought, and I am sure the gentleman will agree, that Congress, which makes the appropriations, should have the ultimate control of the expenditures; and the only way to do that was to provide that Congress should have independent officers to make report as to how the money was expended.¹⁸

Representative Hawley, whose special function it was to explain the parallel between the existing British and the proposed American systems of financial control, spoke as if the usefulness of the Comptroller General was to be primarily that of a parliamentary auditor.¹⁹ Representative Parrish echoed the remarks of Representative Good:

In the history of the English Government you will find that the expenditures were made at random, more or less in a way similar to ours, for a great number of years, and then William E. Gladstone came forward . . . and under his leadership there was created the system of exchequer and audit, which has stood the test . . . for more than 50 years. . . . Now is the time in the history of the American people that some great man can come forward, as Gladstone did in England. . . .²⁰

The implication of these statements is obvious, and if we inquired no further into the matter we should certainly have to as-

18. *Ibid.*, 7091.

19. *Ibid.*, 7138.

20. *Ibid.*, 7204.

sume—as, for example, W. F. Willoughby assumed—that in respect of its prime purpose

the Budget and Accounting Act represents a close analogy to the famous Exchequer and Audit Departments Act, 1866, of Great Britain, which created the office of Comptroller and Auditor General and for the first time provided for the audit of public accounts by an officer directly responsible to Parliament.²¹

We might even suppose that the system created by the one act was modeled on the system created by the other.

Neither assumption would be correct. With respect to the second it is sufficient to point out that the Budget and Accounting Act, or that part of it which dealt with the accounts, was drafted in the office of Comptroller Warwick²² and that that officer claimed little knowledge of the English system of public accounts and no interest in adapting it to American uses. From testimony given by him after the main lines of the bill were fixed, we learn:

Mr. Hawley. You are acquainted with the English system of a controller and auditor general?

Mr. Warwick. I am just slightly acquainted with it. I am not acquainted with the details. I think our system in this country can be so changed as to fit the conditions of this country better than any

21. W. F. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* (Baltimore, 1927), p. 17. As early as June 8, 1910, the *New York Times* informed its readers that "the system suggested by Mr. Good follows the lines of the British system."

22. Harvey C. Mansfield, *The Comptroller General* (New Haven, 1930), p. 68. Daniel T. Selko, *The Federal Financial System* (Washington, 1940), p. 426. Evidence of Lewis Meriam at Hearings on Reorganization of the Executive Departments (March 31, 1937), Joint Committee on Government Organization, 75th Congress, p. 315. Representative Andrews, an ex-Auditor of the Treasury, supplies a contemporary testimony: ". . . I was impressed with this idea, that the present comptroller was in conference with Mr. Good, the chairman of the special committee, throughout all of the drafting of that law, and that this law has been determined in its bearings, in large measure, by that fact. . . . Mr. Warwick and Mr. Good were the men who worked that thing out down at the bottom of the mine." *Accounting Offices, Treasury Department*, Hearings before Subcommittee of House Committee on Expenditures in the Treasury Department, 67th Cong., 1st sess., Part 2, p. 116 (June 21, 1921).

system they have in England. I mean that their system fits their conditions and our conditions are considerably different.²³

To this quotation may be added the following colloquy between Representatives Luce and Madden:

Mr. Luce. Mr. Chairman, in the hearings on this subject there was frequent quotation from authorities upon the English system, and all the inference is that this system before you was borrowed from and modeled upon the English system.

Mr. Madden. That is not true, though. We did not model it on anything except the facts in the case.²⁴

Mr. Willoughby's assumption is less precise and therefore more difficult of refutation, but it is equally wrong. If we look to the act itself rather than to the professed intentions of its proponents, it will become apparent that there is nothing but a formal, perhaps only a nominal, correspondence between the Comptroller General and his supposed analogue. The notion that the Comptroller General audits the accounts on behalf of Congress can be maintained only by a metaphysical subtlety—only by identifying the vice-gerent of Congress with Congress itself; the plain fact is that the Comptroller General audits the accounts on behalf of himself alone.

The truth of this assertion emerges from a study of history. Prior to 1921 there were in the Treasury Department certain officers called accounting officers, whose duty it was, among other things, to receive and examine all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States were concerned, either as debtors or creditors.²⁵ Six of these officers were denominated Auditors and between them they examined (besides the accounts of individ-

23. *National Budget System*, p. 246. The Good bill (H.R. 1201) had already been drafted and introduced in the House. Its provisions, modified but not substantially altered, were carried through the various bills subsequently attached to the name of Good until they were finally enacted into law in 1921.

24. 58 *Cong. Rec.*, 7292.

25. This is the language of R.S. 236. It should be observed, however, that the jurisdiction of the accounting officers did not generally extend to claims other than those arising *ex contractu* or by operation of law.

uals not public officers) the accounts of all persons charged with the collection or disbursement of public funds. The seventh was the Comptroller of the Treasury, whose principal duty was to construe the laws governing the disbursement and application of public moneys but who occasionally—sometimes on appeal, sometimes on his own motion—revised the accounts previously examined by the Auditors.

There was thus an audit (sometimes a double audit) of accounts. But—and this is what should be especially noted—the audit by the accounting officers was not an audit for Congress. The accounts when audited were not submitted to Congress. They were declared before and passed by the accounting officers themselves, who were required by law not only to receive and examine but to “settle and adjust” them.

The significance of this fact cannot be overemphasized. It is what distinguishes the pre-1921 Treasury audit of accounts from the English parliamentary audit. In England the audit of the Comptroller and Auditor-General was designed to serve purposes which were parliamentary rather than administrative; its object was to supply the House of Commons with the means of maintaining its constitutional control over the appropriation of the parliamentary grants rather than to furnish the Treasury with the means of maintaining its statutory control over detailed expenditures. In the United States the opposite was the case. The accounts were examined by the accounting officers, not that the results of the audit might be reported to Congress but that the accounting officers might settle them themselves. Audit was a mere incident to settlement and it is to settlement that we must look if we would understand what the accounting officers really did.

Settlement, in the technical jargon of the Treasury, has always meant (and still means) the final administrative determination of the balances due to or from the United States on accounts between itself and its debtors or creditors. The definition is important. Let us therefore examine it more closely, assembling for the purpose some evidences from periods widely disparate in the history of the accounting system.

We may begin with some remarks by Representative Griswold, delivered in the House in May, 1802. He was speaking against the report of the Nicholson Committee, of which he was a minority member:

The first object which has received the animadversion of the committee, is the expense of removing the Executive officers and their clerks from Philadelphia to the seat of Government. This expense, which amounted to \$32,872.34, the committee say, "was drawn from the Treasury and expended without any legal authority." This is a strong expression, and ought to be very clearly supported, to justify the committee in uttering it. Let us, however, examine the authority under which the money was drawn from the Treasury, in consequence of a decision of the accounting officers of that department, and it will not be doubted but that the law has made it the duty of those officers to decide this very question; nor will it be contended that the decisions of the accounting officers, fairly and honestly made, are not a sufficient justification for the payment of all public accounts. How, then, can the committee say that these moneys were paid without any legal authority, when it is certain that these accounts of expense were regularly presented and allowed by the tribunals who were authorized and directed by law to decide upon them? I should ask the committee, under what other authority than the decisions of the accounting officers, can money, in strictness, ever be legally paid at the Treasury? It is not, certainly, in the power of the House of Representatives to audit the public accounts, or to reverse the decisions of the accounting officers, much less are a committee of the House clothed with any such powers. If the committee, instead of deciding over the head of the regular tribunals, had told us the whole truth upon this point—if they had explained the power of the Treasury Department, and stated the fact, that this department had regularly admitted and paid the accounts, it is certain that the opinion which they have reported would have appeared without any foundation; and although it might remain a speculative question with individuals, and some might be of opinion that the decision of the Treasury was right, and others might believe it to be wrong, yet all parties would concur in the opinion that the decision was conclusive, and money paid in consequence of it, was paid under a legal authority.²⁶

This quotation, while it contains an inadmissible proposition,

namely, that every expense passed by the accounting officers is *ipso facto* duly authorized, sufficiently shows that the final administrative decision was made by the accounting officers.²⁷

Passing now over some seventy-five years we come to the opinion of the Court of Claims in the case of *McKee v. United States*. Here we find the following sentences.

The Comptrollers of the Treasury are neither contracting nor disbursing officers. Within the proper functions of their offices they are above the review of the highest executive authority, and their decisions are subject to only judicial revision. . . . In the case of disbursing officers the policy of the Government has been to acknowledge no payments as made on its behalf save those which were authorized by law. If an officer makes a mistake of law the payment is disallowed when his accounts come in for settlement, and charged to him as if the money were still in his hands. *But the business of the Comptrollers is to determine what payments shall or shall not be made on behalf of the United States.* These functions of office were a part of the wondrous birth of the Treasury system, and have remained unchanged from the foundation of the Government to the present time.²⁸

To which we may add the remarks of Judge Richardson in the same case:

To some extent, therefore, the Comptrollers are *quasi-judicial* officers, and like judicial and other officers who are charged with the exercise of discretion and judgment, and unlike ministerial officers, they are not personally liable for the correctness of their decisions when acting without fraud and in good faith.²⁹

27. From Nicholson's speech in rebuttal the same conclusion may be drawn: "The committee saw no reason, for saying these accounts were passed at the offices of the accounting officers, because it must be well known, that no account could be paid until it had been so passed. The only question which occupied the committee, was, to inquire whether the money so paid was duly authorized. Whether, for instance, one officer for breaking a looking-glass—another a piece of china, etc.—another to receive his house rent—another get his expenses paid, to come here to look after a house, and his tavern expenses while here, were the expenses within the meaning of the law above quoted? Facts of these kinds appearing to the view of the committee, they were bound to express an opinion upon them, for they did not think the accounts were legally passed." *Ibid.*, 1267-1268.

28. 12 Ct. Cl., 532-533. (Italics supplied.)

29. *Ibid.*, 554.

Finally we may refer to a definition made by the Supreme Court in 1915:

The word "settlement" in connection with public transactions and accounts has been used from the beginning to describe *administrative determination* of the amount due. . . . The words "settled and adjusted" [as used in the Act of March 3, 1817, c. 45, sec. 2] were taken to mean *the determination in the Treasury Department for administrative purposes of the state of the account and the amount due*. . . . We should not say, of course, that instances may not be found in which the word "settlement" has been used in acts of Congress in other senses, or in the sense of "payment." But it is apparent that the word "settlement" in connection with public contracts and accounts, which are the subject of prescribed scrutiny for the purpose of ascertaining the rights and obligations of the United States, has a well defined meaning as denoting *the appropriate administrative determination with respect to the amount due*.³⁰

The facts emerging from this long digression are clear. The primary function of the Treasury accounting officers in relation to expenditure was administratively to decide what payments to admit or reject as definitive charges against the appropriations; in the exercise of their discretion they were accountable to no one;³¹ there was no audit of their settlements, either on behalf of Congress or of anyone else.

Now the question arises: Did the Budget and Accounting Act, 1921, in any way alter this state of facts? Before answering let us examine the principal reforms made by the act. These, analytically considered, were four. The act consolidated the six auditing offices of the Treasury Department into a single office; it united the consolidated office with the office of the Comptroller of the Treasury; it separated the resultant office (the General Accounting Office) from the Treasury Department and estab-

30. *Illinois Surety Co. v. Peeler*, 240 U.S. 219, 221. (Italics supplied.) Cf. the parenthetical definition by Mr. Chief Justice Waite in *Cooke v. United States*, 91 U.S. 399: ". . . to settle and adjust, that is to say, to determine upon the validity of, any claim against the government."

31. Unless it were, as Comptroller Mansur once said, "To God and my country, under my sense of honor and justice, according to the laws of the land." Mansur to the Secretary of the Treasury, August 21, 1803 (Treasury MSS.).

lished it as an independent department; and it gave the heads of the office (the Comptroller General and Assistant Comptroller General) a tenure independent of the President's removal power.

What shall we say of these reforms? We may notice in the first place that at least three of them were of native origin. The idea of consolidating the auditing offices was not derived from a study of English institutions; it had been advocated for more than a decade as a return to the early American system of one Comptroller and one Auditor—for example, the Auditor for the Post Office Department had recommended it in 1910,³² and the recommendation had been repeated in 1912 by President Taft's Commission on Economy and Efficiency.³³ The union of the auditing offices with that of the Comptroller of the Treasury was an improvement suggested in a later report of this same Commission as part of their plan for creating a central bureau of administrative control under the President.³⁴ The separation of the accounting offices from the Treasury Department was a corollary to this plan and had also been widely urged as an independent reform.³⁵ Only the proposition with respect to tenure was novel and perhaps based in some degree on a supposed English model.³⁶

In the second place, we must notice that all four reforms were wholly irrelevant, whether taken separately or together, as a solution to the problem of establishing an audit for Congress. To consolidate the six auditing offices of the Treasury was no doubt a valuable amendment: it brought the settlement of accounts and claims under one supervision; it prevented diversity of ruling

32. Memorandum for the Secretary of the Treasury by M. O. Chance, November 23, 1910 (Treasury typescript).

33. 62d Cong., 2d sess., H.Doc. 670, App. 4.

34. 62d Cong., 3d sess., S Doc. 1113, App. 2.

35. See, for example, *National Budget System*, p. 243, and the bill (H.R. 551) introduced by Representative Andrews in the 60th Congress.

36. Andrews and Timme, Auditors for the Treasury Department and State Department, respectively, had, however, suggested judicial tenure for the accounting officers in 1903. And Comptroller Tracewell had hinted at the idea in his 1911 report. The Commission on Economy and Efficiency disapproved Tracewell's suggestion, nor did Comptroller Warwick recommend it (see *National Budget System*, p. 248).

upon the amount and character of evidence required to establish a demand for payment or for credit; it obviated conflicts of decision upon questions of law; it allowed a better division of labor and the adoption of more uniform methods than was possible under the old sexpartite system of settling accounts. But none of these advantages had anything to do with Congressional audit. To consolidate the office of the Comptroller with those of the Auditors was an innovation of more doubtful worth: it eliminated the last vestige of that revisionary settlement of accounts by an officer independent of the Auditor which Hamilton regarded as essential to the integrity of the accounting system, but it created nothing new; in particular it did not establish a Congressional audit. Equally beside the mark was the provision separating the accounting officers from the Treasury; the mere relocation of the accounting department neither added to nor subtracted from its functions. As for the provisions protecting the tenure of the Comptroller General, they too were impertinent. The founding fathers had supposed that the power of the President to remove the officers whose business it was to examine and settle the public accounts was a beneficial power; its use, or the mere threat of its use, would (so they hoped) be sufficient to obtain a proper and early settlement and prevent the dangerous effects of inattention and corruption on the one hand and of delay, insolence, and tyranny to individuals concerned in such accounts on the other. The authors of the Budget and Accounting Act saw the matter in a different light; the system of accountability was imperfect because the President could remove the accounting officers; no one would venture to demand a voucher or disallow a claim when the consequence might be dismissal from office; there could be no rational expectation of preventing fraud in the public disbursement when the only efficient witnesses of public delinquency were dependent for their official existence upon the very power that was interested in concealing its own corrupt conduct. This difference of opinion is instructive but what did it have to do with an audit for Congress? The novel idea that the President of the United States is more likely to be corrupt than the Comptroller General would have a bearing on

the question we are now investigating only if the Comptroller General had been established as a true analogue of the English Comptroller and Auditor-General, that is, if he were a legislative auditor.

But he was not a legislative auditor. He was what his predecessors had been before him, an administrative controller, charged with the audit and *settlement* of accounts. The act did not change the basic duties of the accounting department but transferred them from several officers to one: the very terms of the statute provide that "all powers and duties now conferred or imposed by law upon the Comptroller . . . or the six auditors of the Treasury . . . shall . . . be vested in and imposed upon the General Accounting Office. . . ." Collecting and disbursing officers rendered their accounts to the Comptroller General as they had previously rendered them to the Auditors; he (or his subordinates) audited and settled them; from him the accountable officers received or did not receive their acquittance. The Supreme Court wrote of the Comptroller General precisely as it had written of previous accounting officers:

The question of the jurisdiction of the Comptroller General is not a question as to bookkeeping merely. The decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the Government. . . . Save in cases where resort is had to the courts, therefore, the Comptroller is the *final arbiter as to the legality of expenditure*.³⁷

Nor did the Comptroller General deny that he and he alone made the final administrative determination of the amount due:

The duties of the General Accounting Office relate specifically to the settlement of all claims and demands by or against the United States and the adjustment of accounts in which the United States appears as debtor or creditor. These duties necessarily involve the uses and availability of appropriations; and while in the performance of these duties, particularly in view of the present system of Government disbursements, the action taken is not initially by the General Account-

37. *United States ex rel. Skinner and Eddy Corporation v. McCarl*, 275 U.S. 4, n. (Italics supplied.)

ing Office but by the administrative office concerned, yet *action in the matter eventually and finally must be by the General Accounting Office.*³⁸

The situation, therefore, was from a functional view precisely the same after 1921 as before it. If the accounting officers of the Treasury were not analogous to the English Comptroller and Auditor-General, neither was the Comptroller General. The primary function of the English officer was audit; of the American, settlement.³⁹

What can be shown by a historical analysis of the American accounting offices can likewise be shown by a direct comparison of the English and American systems of control as they exist today. Pretermittting consideration of all preliminary steps, we see that in England the final administrative determination in regard to expenditure is made in the several spending departments. These departments—through departmental accounting officers—account directly to Parliament by means of a machinery established on its present basis in 1866. Their accounts go to an officer styled the Comptroller and Auditor-General, who, as the acting hand of the Public Accounts Committee of the House of Commons, passes them in review, tries them by the requirements of

38. 4 Comp. Gen., 714. (Italics supplied.)

39. Representative Steagall acutely remarked the similarity between the Comptroller General and his predecessors: "[The act] does not abolish the office of Comptroller of the Treasury. It simply substitutes for him an officer to be known as a Comptroller General, who is to perform the same duties, the salary being raised to \$10,000 a year. . . ." 58 *Cong. Rec.*, 7205. I have omitted consideration of certain additional duties given by the act to the Comptroller General on the theory that their irrelevancy is too obvious for comment. I refer to the business of keeping the personal and ledger accounts of disbursing and collecting officers, of prescribing the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States; and of reporting to Congress periodically upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers. It needs no great critical acumen to see that these bookkeeping and accounting duties had nothing to do with audit; on the contrary, they emphasized the characteristics of an administrative controller. The record shows that they were assigned to the Comptroller General out of deference to the Senate, which wanted to give the General Accounting Office a general control over *all* the accounting work of the government, not merely over that part of it involved in the audit and settlement of accounts and claims.

the Legislature, and brings to the notice of the House of Commons any expenditure that may in his opinion be opposed to those requirements. The executive departments then give such explanations as they see fit, the House of Commons pronounces the sentence,⁴⁰ and the Treasury executes it. In the United States the final administrative determination in regard to receipt and expenditure is made by the Comptroller General, and there the parallel stops. There is no system of audit in the British sense, no regular means of passing the Comptroller General's settlements in review, of trying them by the requirements of Congress, of bringing to the notice of Congress settlements unauthorized by law, or of punishing the Comptroller General for his own contraventions of law.

The only analogy which we can find in this comparison is not between the Comptroller General and the Comptroller and Auditor-General but between the Comptroller General and the sum of the English departmental accounting officers. But even this analogy disappears under scrutiny. For there is a qualitative difference between a settlement made by an officer who, from his position, is able to certify the accounts with knowledge and to bear the responsibility which that certificate entails, and one made by an officer not so qualified. Besides, we must always remember that the English departmental accounting officers are held strictly to account by Parliament while the Comptroller General of the United States is held to account by no one.

We come then to the same conclusion as before: There are no points of resemblance between the English system of retrospective control and the reorganized American system of 1921. In particular there is no analogy between the Comptroller and Auditor-General of Great Britain and the Comptroller General of the United States. The difference between them is (to borrow an antithesis from Charles Macaulay) that between an officer who reports what the government has done and an officer who decides what the government shall do.

To these remarks it may be objected that, if Congress did not

40. In practice, of course, it is the Public Accounts Committee which pronounces the sentence; but I speak here only of the general principles of the system.

change the duties of the accounting officers, it augmented them in such a way as to make the Comptroller General at least as valuable to Congress as was the Comptroller and Auditor-General to the House of Commons. An examination of the act will readily discover the clauses upon which this objection is grounded. Section 312(a) reads in part as follows:

The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make . . . to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to receipt, disbursements, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

Section 312(b) reads:

He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

And Section 312(c) reads:

The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

To which provisions we may add as a corollary Section 313 giving the Comptroller General access to information and enjoining the departments to facilitate his investigations.⁴¹

41. "All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he

That there is a certain resemblance between these additional duties and *one* of the functions performed by the Comptroller and Auditor-General in England cannot be denied. We know from a memorandum submitted to the Public Accounts Committee in 1916 by that officer that he did not confine his activity solely to reporting infractions of law; he sometimes criticized waste and extravagance as well:

The Public Accounts Committee have never considered that the Comptroller and Auditor-General is limited in his reports merely to those points which he is bound under the terms of the Act to bring to the notice of Parliament. The Committee of 1888 stated that while it is no doubt difficult in all cases to draw a distinction between questions bearing directly on audit matters and those which may trench on administrative functions, yet, at the same time, if in the course of his audit the Comptroller and Auditor-General becomes aware of facts which appear to him to indicate an improper expenditure or waste of public money, it is his duty to call the attention of Parliament to them. The Select Committee of 1902 on National Expenditure recommended the Public Accounts Committee, even more than in the past, to encourage the Comptroller and Auditor-General to scrutinize and criticize improper or wasteful expenditure.⁴²

We know also that the intent of Congress in including Sections 312 and 313 in the Act was primarily to gain knowledge of waste and inefficiency in the public expenditure.⁴³ Representative Good explained that it would be the duty of the Comptroller General

may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes."

42. *Parliamentary Papers*, 1016, xvii, Cd. 8337. It should be noted that the Comptroller and Auditor-General has not the *statutory* duty to examine into the merits of the expenditure he audits. All attempts to impose this duty on him by law have been resisted and defeated on the ground that to extend his powers in this direction might result in his passing "into a kind of supreme administrator of the country."

43. The reference here is primarily to Sections 312(a), 312(b), and 313, provisions which appeared in every version of the Good bill. 312(c) is further discussed below.

. . . to come to the committees of Congress that have jurisdiction over appropriations, expenditures, and revenues, and explain to them at all times where there is any inefficiency, where there is a waste or lack of economy; and when the committee from the bureau of the budget or the President's staff come and explain the budget, sitting right there, they are brought to face the comptroller general of the United States; and if a representative of the bureau of the budget states something that is not true, if he fails to state the whole truth the comptroller general sits there with the Committee on Appropriations as an arm of Congress and can supply the desired information. In this way the facts will come before Congress in a way that we may eliminate duplications wherever we find them, and where we find there is an excess of employees they can be eliminated, and the service will not be injured by an injudicious cut in the appropriation.⁴⁴

And again—

Congress and its committees will at all times be able to consult with officials of this department regarding expenditures and from it will be able to obtain the most reliable information regarding the use to which any appropriation has been put or the efficiency of any department of the Government. *This independent department will necessarily serve as a check against extravagance in the preparation of the budget.* Those appointed by the President and charged with the duty of assisting him in collecting data and in preparing the budget will realize that their every act and decision will come under the close scrutiny of the accounting department. If duplications, inefficiency, waste, and extravagance exist as the result of any expenditure, the President will be held responsible therefor if he continues to ask for appropriations to continue such practices. The knowledge on the part of every executive and bureau chief that such an independent and fearless department exists, and that every act and deed they perform will come under the closest scrutiny of this department, will in itself force a much higher degree of efficiency in every department of the Government.⁴⁵

44. 61 *Cong. Rec.*, 952.

45. 58 *Cong. Rec.*, 7085. (Italics supplied.) The trouble with the old system was that the committees charged with the responsibility of considering appropriation bills had but little assistance in arriving at correct conclusions. The department heads were ignorant; the bureau chiefs untruthful; the accounting officers afraid: "It not infrequently happens," said Good, "that we have in times past called the Comptroller of the Treasury before us and witnessed his dis-

The committee reporting the bill in 1921 made the same point:

The creation of this office will enable it to furnish information to Congress and to its committees regarding the expenditures of the Government. He could and would be expected to criticize extravagance, duplications, and inefficiency in executive departments. He could do this without fear of removal. Under the present plan neither the Comptroller of the Treasury nor the six auditors make such criticism. The reasons why they do not are apparent, yet opportunities for wholesome criticism abound in every department. The creation of this office will, it is seen, serve as a check . . . on useless expenditures. . . .⁴⁶

And Representative Byrns, speaking some time after the passage of the act, reminded his colleagues that

it was understood that when the Comptroller General was appointed and the budget law went into effect the Comptroller General or some of his officers would sit in with the various subcommittees on appropriations and give them information as to the expenditures of the various departments when it came to making up future appropriations for the departments.⁴⁷

The resemblance, though imperfect, is clear between these two sets of duties—the English and the American. What we must understand, however, is that it is one thing to report instances of inefficient or uneconomical expenditure and quite another to make an appropriation audit of accounts on behalf of Parliament or Congress. The Comptroller and Auditor-General calls the attention of the Public Accounts Committee of the House of Commons to waste, and indeed to every other matter arising out of his examination of the accounts which he thinks Parliament

comfiture when he was pressed with regard to inefficiency in various departments, because he knows of it. It comes to him through this auditing force, which costs the Government every year about \$3,000,000. He, of course, would be very much embarrassed if he were to sit down at the table before the Committee on Appropriations and say to that committee that the administration of which he was a part was inefficient." 61 *Cong. Rec.*, 082. The solution was to protect the Comptroller General's tenure, "so he cannot be removed if perchance he criticizes the administration of which he was a part," and then to impose upon him the duty of searching out and reporting extravagant expenditures.

46. 67th Cong., 1st sess., H.Rep. 14, p. 8.

47. 62 *Cong. Rec.*, 845.

should know; but he does so *in addition* to making an appropriation audit of the accounts as rendered, certifying to their correctness, and reporting them to Parliament. The Comptroller General is assigned a similar service for Congress, but *in lieu* of making an appropriation audit in the English sense. Inasmuch as the problem with which we are concerned is the lack of an audit which will reveal irregularities, we can see that these provisions designed to expose extravagance are immaterial.⁴⁸

One further objection remains to be examined. It may very probably be argued that, however irrelevant other sections of the act may be to the question at issue, one section at least—312 (c) quoted above—contemplates the making of an appropriation audit by the Comptroller General and the rendition of an audit report by that officer to Congress.

Again the objection is specious but unsound. Whatever may have been the intent of Congress in including this section in the act,⁴⁹ it must be plain, on a considered view of all the circumstances, that the reports submitted in compliance with it are not, and are not susceptible of being made, instruments for increasing

48. It is unnecessary to raise the very practical question, whether or not the Comptroller General has actually performed the duties thus sought to be imposed upon him. It is sufficient to note that he has not always regarded them too seriously. Representative Byrns of Tennessee, in a speech delivered almost a year after the passage of the act, remarked: "So far as we know, the Comptroller General is only engaged in auditing the expense of the Government, and no effort has been made to comply with the strict requirements of the law, which placed on him the duty to make a report to Congress and make recommendations to Congress looking to greater economy and efficiency in public expenditures as a result of his investigations. . . . He either does not know his duties or he has chosen to ignore them. Unless he performs this service, there was no reason to do away with the Comptroller of the Treasury and the six auditors, unless it was to provide him with a job at a fat salary and a long tenure." 62 *Cong. Rec.*, 845. A few days later Representative Byrnes (S.C.) exclaimed: "I have yet to learn of any activity by the Comptroller General, from which officer Congress expected so much." *Ibid.*, 2405.

49. This is a question shrouded in some obscurity. The section was not in the bill originally reported to the House but derives from an amendment offered October 21, 1919, by Representative Graham. The language of that amendment and the remarks of its sponsor suggest that what was desired was merely a prompt notification of every violation of the *anti-deficiency* law to the end that "Congress may take notice of it and act upon it or pass it by, as it deems proper." 58 *Cong. Rec.*, 7201. The wider language adopted by the Conference Committee is neither explained nor noticed in their report.

the control of Congress over the administration of the moneys provided for the services of the country. Without dwelling on the trifling character of the actual reports on the uncertain and irregular intervals of their submission,⁵⁰ or on the fact that they deal with violations of law in respect of which all necessary action has been taken, we may observe that they present a very partial view of the executive transactions. If what is wanted is an audit report of the final expenditure, of the amounts finally allowed as charges against the appropriations, how futile is it to require such a report from the very person entrusted by law with the determination of those amounts. Needless to say the reports of the Comptroller General make no mention of credits allowed by himself which an auditor independent of the General Accounting Office, having no responsibility with respect to the transactions he audits, and owing no allegiance but to Congress, might possibly regard as unauthorized.

The consideration raised in the preceding paragraph brings us at last to an analysis of the basic defect in the Budget and Accounting Act, 1921, regarded as a statute for improving Congressional control. I refer to the assignment to the Comptroller General of duties inconsistent with the duties of an auditor for Congress. Pretermittting all criticisms of the existing system based on the lack of proper accounts, on the tardiness of the audit, on the jejuneness of the reports, and on the absence of Congressional scrutiny, we may say that, even if the existing system were in every other respect perfect, this union of incompatible duties in the office of the supposed auditor would serve to render nugatory the control of Congress.

If we keep constantly before us the *definition* of audit we shall easily perceive the difficulty. An audit is *an examination made on behalf of a principal of the transactions of an agent as recorded in an account*.⁵¹ It has nothing to do with the act of the agent in

50. "Under subsection (c) a few special reports have been made, but due to the lack of any record of the number of them and the long delay which the searching of the records would require no attempt is here made to state the number." Acting Comptroller General Elliott to Representative Taber, March 29, 1937 (83 *Cong. Rec.*, 2607).

51. A. T. V. Robinson, "The Exchequer and Audit Department," *Journal of Public Administration*, II (1924), 147.

determining what the transactions shall be nor has it to do with the act of the principal in condemning the agent or in giving him his acquittance. It is simply a detective function designed to furnish the principal with independent information of what the agent has done. Now what is the effect if the functions of the auditor are in any way confounded with those of the agent or the principal? The answer is obvious: either he becomes a party to the transactions he audits (in which case his reports lose their value as corroborative evidence) or he substitutes himself for the principal (in which case the principal can hardly be said to exercise control).

In the instance of the Comptroller General the confusion of duties is carried to an extreme degree. Sometimes he is brought in by a side-wind to share the responsibilities of department heads and disbursing officers, as when he "pre-audits" a voucher or renders an "advance decision" indicating how a proposed payment will be regarded by him upon the settlement of accounts. Sometimes he decides himself what payments shall be made, as when he makes a "direct settlement" of a claim and orders it to be paid, perhaps in the very face of objections from the department responsible for administering the appropriation from which payment will be made. And always he decides in the last analysis what items shall be allowed or disallowed in the accounts of the disbursing officers.

We may regard this last-mentioned combination—of corrective with detective powers—in one of two lights. Either we may say that the Comptroller General has been vested with the legislative function of passing judgment on the acts of the executive government—in which case we are plainly denying that the function is exercised by Congress; or we may say that the Comptroller General has been made an agent extraordinary, standing between Congress and the executive departments and summing up in his sole responsibility all their separate but subordinate responsibilities—in which case we are left with the fact, upon which we have so constantly insisted, that there is no audit of the Comptroller General's settlements. However we look at the matter, we arrive at the same conclusion: that Congress, so long

as its auditor is also a controller, is precluded from the exercise of any degree of retrospective control over expenditures; a Chinese wall of ignorance stands between it and a view of the executive transactions.⁵²

That the transfer of controlling duties to the officer who was supposed to act as Congressional auditor might destroy his usefulness in that capacity seems scarcely to have occurred to those who debated the Budget and Accounting bill. The compatibility, even the identity, of the two functions seems simply to have been taken for granted. Representative Byrns, for example, immediately after his explanation that the Comptroller General would have "only to do with the auditing of accounts," was asked by Representative Welling whether the functions which it was proposed to give him differed in any great degree from those then being performed by the Comptroller of the Treasury. To this question he replied: "They are not. . . . They will embrace principally his duties and the duties of the auditors."⁵³

Among the witnesses who testified at the 1919 hearings, the same confusion of audit with control was apparent. Of all these witnesses only one appears clearly to have apprehended the distinction. That one was Henry L. Stimson, speaking from his experience as Secretary of War under President Taft.⁵⁴ He began by defining what he meant by audit:

I dislike to use the word, because the word has been used in such different senses, but I call it the work of audit, the work of investigation to see whether [the authority granted by Congress] has been properly carried out by the Executive, with a view to future budgets, or with a view to punishing the Executive if it has not been carried out properly.⁵⁵

52. It seems hardly necessary to remark that, if the Comptroller General were to report to Congress on the legality of the final allowances, his report could command no credence, the allowances having previously been made by himself

53. 58 *Cong. Rec.*, 7091.

54. The record does not bear out the assertion of the President's Committee on Administrative Management (*Report*, p. 22) that "a number of outstanding witnesses" warned against arming the independent auditor with powers other than audit; the witnesses cited (except Mr Stimson) were not talking to the point.

55. *National Budget System*, p. 620.

Next, he made his recommendation:

You ought to have somebody who will perform the same functions of scrutiny and care and investigation for you that is performed in Great Britain by the comptroller and auditor general. One thing that I think requires caution about—that is, that the function as I regard it is a post-audit function. I do not think that that man ought to be given duties which would tend toward making him share executive functions. I mean, I think that would be a diffusion of duties which would lead to trouble. In other words, I do not think he ought to have the responsibility of saying beforehand whether sums would be expended. That would simply mean the creation of a little subexecutive, a little sub-president, controlling the department.⁵⁶

Finally, upon being asked whether such an officer would possess the functions of the existing Comptroller of the Treasury, he said: "The present Comptroller of the Treasury performs rather different functions than I had in mind. He is not at all the officer that I had in mind."⁵⁷

During the debates on the bill only once was even the shadow of a doubt cast upon the advisability of clothing the proposed Congressional auditor with the controlling powers of the Comptroller of the Treasury. What is now Section 305 of the Budget and Accounting Act was then being discussed. This is the section by which the functions of settling and adjusting claims and accounts were transferred from the Treasury to the General Accounting Office. The transfer was proposed to be accomplished by the change of a single word in Section 236 of the Revised Statutes—"Treasury" was to be changed to "accounting," so that the section would read: "All claims . . . shall be settled and adjusted in the accounting department." Representative Dowell inquired, somewhat diffidently, as it would appear from the record, why this verbal change was necessary. Representative Graham was eager to explain:

Why, the very purpose of this bill is to create an accounting department that shall be independent of all the executive departments of the Government. If these accounts are to be settled in the Treasury

56. *Ibid.*, p. 644.

57. *Ibid.*, p. 645.

Department, it would maintain the old regime, whereas striking out the word "Treasury" and inserting the word "Accounting" would bring the law into harmony with the budget system.

Dowell, however, seems still to have had an uneasy feeling that the explanation was imperfect, for he immediately objected:

But in this amendment do you not add to the accounting department another duty, aside from accounting? As I understand it, under the budget system you are establishing an accounting department that has for its purpose the accounting of all accounts of all the departments of the Government. In this you put the duty upon the accounting department of settling claims both for and against the United States, entirely a different duty. Who has the accounting of that department after it has been passed upon by the accounting department? Could it not be done by the Treasury Department as well as by the auditing department to check it up?⁵⁸

His questions, however, appear to have touched no chord of understanding in the minds of those to whom they were addressed. One more perfunctory attempt was made to explain the matter to him and when that failed his further inquiries were abruptly shut off. Thus passed the single occasion at which this important problem might have been brought to debate.

This blindness of Congress, we may remark in passing, contrasts markedly with the preoccupation of English statesmen with the same problem during the years preceding the passage of the Exchequer and Audit Departments Act.

Here is what Edward Romilly, Chairman of the Board of Audit, had to say on the subject in a letter to the Select Committee on Public Monies of 1857:

The duty of an auditor of public accounts should be to pass in review the acts of an accountant, after those acts have been completed. He should ascertain whether the rules laid down for the guidance of the executive officers, in respect of the receipt and expenditure of public money, have been duly observed; and he should point out and record any deviations from those rules that may have been remarked in the course of the examination of the account under consideration. His

58. 58 *Cong. Rec.*, 7289.

functions cannot properly begin until those of the departments whose receipts and payments he has to check have ceased; i.e. until the receipts and payments have been made and recorded, and this record has been duly transferred over to him for examination.

The more strictly this duty of the auditor is confined within these limits, and the more speedily the functions of the auditor follow those of the accountant, provided the functions of the two are not allowed to interfere with each other, the greater will be the security to the public. Any interference, direct or indirect, on the part of the auditors, previously to payment being made and recorded, cannot but lessen the responsibility of the accountant. It also renders the auditor incompetent to express an opinion on acts which he has himself advised and sanctioned.⁵⁹

At the hearings of this same committee the same point was ably brought out in a colloquy between Sir James Graham who, as First Lord of the Admiralty in 1832, had initiated the first appropriation audit of accounts, and William Anderson, principal clerk in charge of the financial business of the Treasury, who had assisted him in this innovation and who would later with Hugh Childers actually draft the Exchequer and Audit Departments Act, 1866:

2022. If you gave the Comptroller of the Exchequer the right of interference after issue, with reference to expenditure and appropriation, would he not be lord over the Treasury, over the First Lord of the Treasury and the First Minister of the Crown?—He would be lord over the whole of the public departments; he would have the power to question all the expenditure, and with very limited knowledge.

2023. What would become of Parliamentary responsibility if he exercised that control; and what would be the responsibility of the Executive Government?—There would be none at all, he would really be an officer of Parliament interfering with every department.

2024. Would he not be lord paramount over the whole expenditure?—Yes: he might interfere and question every contract that was made for carrying on the public service, and every act of the Government.

59. *Report from the Select Committee on Public Monies, 1857 (2d sess.), Appendix 2, p. 53.*

2025. If he were captious and minute in his interference, would it be possible for the great departments to conduct their daily business?—I doubt whether you would find ministers who would undertake to conduct the business of those departments.⁶⁰

A similar quotation may be cited from a period just antecedent to the passage of the Exchequer and Audit Departments Act. In some observations submitted to the Public Accounts Committee of 1865, Charles Macaulay, Secretary of the Board of Audit, represented the Board as saying:

The whole of our experience as Appropriation Auditors tends to satisfy us that we ought to have no further communication with the Executive Departments than may be necessary for the purpose of obtaining information. Whatever tends to associate us, either directly or indirectly, with the pecuniary transactions of the government, cannot but tend to damage the credit of the reports in which we are required to submit those transactions to the judgment of Parliament. We conceive, therefore, that we should never be required to advise, to control, or to remonstrate. We ought not to be invited to discuss questionable points with the Departments, or to aid them in the conduct of their business. Our functions should be neither preventive nor corrective, but simply detective. We should be instructed to try the accounts and vouchers of the several Departments, by the requirements of the Legislature, and to bring under the notice of Parliament any expenditure that might in our opinion be opposed to those requirements. It may no doubt sometimes appear to us that the expenditure which it will thus be our duty to report is justifiable, or even commendable; but we should keep all such opinions to ourselves. It should be no part of our business to acquit or to condemn, but simply to report to Parliament every infraction of the law relating to the appropriation of the public money, leaving it for the Executive Departments to give such explanations as they might think fit, and for the House of Commons to pronounce the sentence.⁶¹

Severely he warned Parliament:

60. *Minutes of Evidence taken before the Select Committee on Public Monies*, 19 June, 1856, pp. 221-222.

61. *Report from Committee of Public Accounts*, 1865, Appendix 1, par. 48. Macaulay assisted Anderson and Childers in framing the Exchequer and Audit Departments Act.

It would certainly be a great mistake if in discussing the principles upon which the proposed appropriation check should be established, Parliament were ever again led to confound the functions of Auditors with those of Controllers—the functions of officers whose duty it is to report what Government has done with the functions of those whose duty it is to decide what Government should do.⁶²

Far from being lost in the mass of evidence, as were Stimson's statements to the House Committee on the National Budget System, these arguments were brought into debate on the floor of Parliament. Gladstone, the Chancellor of the Exchequer, stated them as clearly as it is possible to state them:

The noble Lord [Lord Robert Montagu] and some other hon. Members would seem to have got an idea of the possible powers of the Board of Audit which is quite erroneous. They appear to think that Board can become an efficient control over the public expenditure. But that is not the function of a Board of Audit. That Board is to ensure truth and accuracy in the public expenditure. In point of fact, it may be called, in one word, a Board of Verification. But it would be perfect presumption in the Board of Audit if it were for a moment to attempt to exercise a judgment as to any degree either of parsimony or of extravagance which the Government might be thought to be adopting under the sanction of this House. As to the proposal of the hon. and learned Member for Dundalk (Sir G. Bowyer), I confess I think it entirely impracticable and out of the question. He proposes to arm the Board of Audit with coercive powers of committal for contempt, powers of commanding the departments of Government as to what is to be done and what not to be done there. I venture to say that such a conception of a Board of Audit is wholly without precedent. Besides, the objection to it is that it would be transferring to the Board of Audit what is really the function of this House. It is in the Committee of Public Accounts . . . and in its investigations that the House will have the best security for the due, speedy, and effectual examining and rendering of the Public Accounts.⁶³

Why Congress failed to see the difference between control and audit does not perhaps at this late date admit of complete solution.

62. *Ibid.*, par. 46.

63. Hansard, Parl. Deb., 3d series, Vol. CLXV, col. 1350-1351. (March 11, 1862.)

The preoccupation of Congress with matters irrelevant to appropriation audit—with, for example, the merit rather than the legality of expenditure—has been adverted to above and may be alleged as a reason. A more probable cause is to be found in the circumstance that the English audit system, supposed model of the system prescribed by the Budget and Accounting Act, was completely misunderstood. There is evidence that many members of Congress thought that the English Comptroller and Auditor-General had powers similar to those of the American accounting officers of the Treasury—that only his tenure was different. Take Representative Hawley, principal expositor of the English system during the debates. While the subject was still being considered in committee, he remarked of the English officer:

If the auditor or comptroller-general believes it is not advisable or an excessive expenditure, he brings that to the attention of the public expenditures committee before the money is expended. It is not a case of condoning something that has happened; it gives the legislative body power to prevent something.⁶⁴

In other words, he thought that the Comptroller and Auditor-General “pre-audited” accounts—a grave error, since that officer is rigidly excluded from examining the Executive transactions until the money is finally paid away on vouchers. At another time he appears to have been under the impression that the Comptroller and Auditor-General could “disallow items when he decides the expenditure to be unauthorized.”⁶⁵ This was equally false: the Comptroller cannot disallow items; he can only recommend items for disallowance—quite a different function. But even the experts did not always keep themselves clear on this point: upon at least one occasion W. F. Willoughby, close adviser to Representative Good and author of a book on the system of financial administration of Great Britain, allowed it to be understood that the Comptroller and Auditor-General, like the American accounting officers, was charged with “the final settlement of accounts.”⁶⁶

64. *National Budget System*, p. 28.

65. 58 *Cong. Rec.*, 7138.

66. After describing the imperfections of the American accounting system he

Even those who were most clear on the facts of the British audit system do not appear to have thoroughly understood the principles upon which that system was founded. Like those of whom the prophet speaks, they saw without perceiving and heard without understanding. Mr. Willoughby, for instance, eschewing the mistake he was later to make, said in his testimony before the House Committee: "It struck me as rather remarkable that the controller and auditor-general had no power of final decision regarding expenditures such as our controller has. His functions come after the expenditure is made."⁶⁷ C. W. Collins, who had drafted the McCormick bill of 1918 and the Frear bill of 1919, also knew the facts but failed to see their significance. It was, he said, a *weakness* of the English system that the Comptroller and Auditor-General had no power to disallow irregular expenditures;⁶⁸ the proposed Comptroller General would be much more efficient:

. . . the fact that he has the power to disallow an item on presentation of the case to him would do away with the necessity to a large extent of the kind of hearings that the public accounts committee holds in Great Britain. They hold hearings there to determine responsibility and to do the other things that the Comptroller of the Treasury now has the power to do.⁶⁹

Neither Willoughby nor Collins saw that no system of administrative control, however excellent, can take the place of scrutiny

remarked: "All of these difficulties will be met by following the British system of having a single Comptroller and Auditor-General in whom will be vested the responsibility for all matters having to do with the control of Treasury receipts and issues and the *final settlement of accounts*." *The Reorganization of the Administrative Branch of the National Government* (mimeographed, March, 1921), p. 382. (Italics supplied.) The authorship of the document is claimed by Mr. Willoughby in the Preface to his book of the same title (Baltimore, 1923), p. viii.

67. *National Budget System*, p. 64. G. C. S. Benson, in his *Financial Control and Integration* (New York, 1934), p. 17, has collected some similar expressions of surprise by the same authority. It is only fair to Mr. Willoughby to state that in the revised edition of his *The Government of Modern States* (New York, 1936), p. 487, he condemns the error of confounding the duties of an auditor and those of a controller and cites the General Accounting Office as the most striking example of it.

68. *National Budget System*, p. 227.

69. *Ibid.*, p. 228.

by Congress itself of the results of executive action. Congress may pile controllers upon controllers but always there must be some last person or combination of persons, *other than Congress itself*, who will decide what payments shall be charged against the appropriations. It is upon the action of these "last persons," these ultimate administrative controllers, that Congress must place a check if it is to exercise the fact, as well as to enjoy the right, of control. To leave the power of final decision with administrative officers, with accounting officers, with whomsoever, is not to delegate control but to abandon it.

We may conclude this chapter with a summary of what has been set out at greater length above. In or about the year 1919 Congress became aware of the fact, long unnoticed, that its control over the public expenditure was incomplete. Knowing and admiring the *success* of the English system of public accounts (but misunderstanding its *methods* and *principles*), Congress sought to create, and thought that it was creating, a legislative audit. It succeeded, however, only in substituting a General Accounting Office audit for the previously existing Treasury audit. Its mistake was in transferring to its intended auditor powers of administrative control which rendered him incompetent to express an opinion upon the final settlements. That the Comptroller General was expected to act simultaneously as an administrative controller and as a Congressional auditor was not the result of a reasoned determination by Congress after weighing the arguments for and against such a combination of functions. It was something that happened because Congress failed to distinguish between the two functions and so failed to perceive the existence of any difficulty.

CHAPTER XIII

THE DIFFICULTY OBSCURED: 1921- ?

THE passage of the Budget and Accounting Act, 1921, while it did nothing to increase the retrospective control of Congress over expenditure, had the important effect of lulling Congress into a feeling of security.¹ The Comptroller General became in a sense the keeper of the parliamentary conscience. Four presidential terms were to pass before the idea would again be advanced that Congress was without an audit and that its ignorance of the results of expenditure was an evil to be corrected.

During these sixteen years but two reforms were made in the system of accounts—neither of them of prime importance in respect of the problem of Congressional audit. One had to do with the information presented to Congress in the *Combined Statement of Receipts and Expenditures, Balances, etc., of the United States*; the other with the consolidation of the several House committees on expenditures.

In the *Combined Statement of Receipts and Expenditures, Balances, etc., of the United States* for the fiscal year 1927 the Treasury Department for the first time presented the accounts of the government to Congress in such form as to show the actual expenditure under each appropriation. The previous method was to report only Treasury issues, that is to say, the sums of money paid by the Treasurer directly to claimants upon settlements by the accounting officers plus the sums of money placed to the credit of disbursing officers upon the books of the Treasurer, these last constituting the bulk (about 95 per cent) of all "expenditures." The innovation of the Treasury was to obtain from

1. Professor John A. Fairlie had warned that this would be the case. Writing in July, 1919, to the *New York Times* on the proposal to change the legal nature of the accounting officers, he said—and his words were prophetic: "But the main objection to this proposal is that it gives the impression that something is being done toward establishing a much needed machinery for scrutinizing expenditures, while in fact nothing will be accomplished in that direction." *New York Times*, July 15, 1919.

the several departments and establishments reports of the unexpended balances to the credit of disbursing officers under their respective jurisdictions at the beginning and end of the fiscal year, classified by appropriations, and, using these figures in conjunction with the warrants issued during the year, to calculate the expenditures on a basis of checks issued by disbursing officers. The figures thus arrived at were exhibited in a separate column in the *Combined Statement*. The Treasury's explanation of the reform—a reform, by the way, instituted by itself and not by direction of the Congress—is as follows:

Funds placed to the credit of disbursing officers by means of accountable warrants have been exhibited heretofore as expenditures during the period in which such advances were made. As a matter of fact, some of the money in many instances is not actually spent until the period following the one in which the advance is made, and, to some extent, not at all, the unexpended portion being returned to the appropriation accounts on the books of the Secretary of the Treasury in a subsequent period, which operates to reduce expenditures on a warrant basis for that year. The expenditures on a warrant basis, therefore, do not accurately reflect the trend of governmental expenditures since they include unexpended balances remaining to the credit of disbursing officers at the end of the year but not expenditures from unexpended balances at the beginning of the year. It may be stated, however, that the differences between the expenditures on a warrant and check-issue basis are not so material in cases where the unexpended balances to the credit of disbursing officers remain more or less constant from year to year. . . . In order to correct the situation described above and exhibit the expenditures on the best practicable basis, the several departments and establishments have cooperated with the Treasury in furnishing the unexpended balances to the credit of disbursing officers under their respective jurisdictions at the beginning and end of the fiscal year 1927, classified by appropriations. These figures, when used in conjunction with the warrants issued during this year, make it possible to include checks drawn during 1927 against unexpended balances of disbursing officers at the beginning of the fiscal year, and to exclude from expenditures all unexpended balances remaining in their hands or to their credit at the close of the year.²

2. *Annual Report of the Secretary of the Treasury on the State of the Finances, 1927*, pp. 90, 91.

The importance of this amendment in the mode of reporting expenditures should not be underemphasized: it was no little thing that Congress should receive a report of the actual payments charged against the appropriations. But neither would it do to pretend that this novel information, embedded in a document of nearly 600 pages consisting almost entirely of figures without comment or interpretation,³ has enabled Congress to exercise a greater degree of retrospective control over expenditures. It cannot learn from the *Combined Statement*—even the Treasury does not know—whether the payments reported were proper payments. That knowledge can only be derived from *audited* accounts of expenditure accompanied by the explanations of the accountant and the comments of the auditor.

The second reform was the consolidation, also in 1927, of the several House committees on expenditures. Even before the idea of creating an American counterpart of the English Comptroller and Auditor-General took hold of the mind of Congress, the creation of a committee patterned from the Public Accounts Committee of the House of Commons had frequently been urged. The Magee audit plan, which had obtained some support in 1918, was simply a proposition to abolish the standing committees of the House on expenditures in the several departments and to create in their stead a committee on public accounts empowered to investigate all governmental expenditures and to report thereon to the House.⁴ A resolution introduced by Representative McCormick in the same year had the same end in view.⁵

It is an interesting circumstance that the original version of the Good bill⁶ contained a section creating a joint committee on receipts and expenditures to consist of three Senators to be appointed by the President of the Senate and three Representatives to be appointed by the Speaker of the House. The duties of the committee were set out as follows:

3. E. F. Bartelt, Commissioner of Accounts, United States Treasury Department, *Accounting Procedures of the United States Government* (Chicago, 1940), p. 119.

4. On the Magee plan see 56 *Cong. Rec.*, 4745-4747, 11322-11323.

5. See 65th Cong., 2d sess., H.Doc. 1006, pp. 9, 34-38.

6. 66th Cong., 1st sess., H.R. 1201.

The committee shall investigate methods and procedure relating to the receipts and expenditures of the Government, including estimates, appropriations, audits, and accounts. The committee may in its report to Congress recommend changes in the present laws, rules, regulations, and practices and shall accompany its recommendation by bills or resolutions embodying such proposed changes.

The Committee was to be empowered to sit during the sessions and recesses of Congress, to send for persons and papers, to administer oaths, and to require any department to furnish information, books, documents, records, or papers, or to conduct and report to the Committee upon such investigations as the Committee might deem necessary to carry out its purposes.

During the debates which led up to the passage of the Budget and Accounting Act considerable emphasis was placed on the desirability of creating a committee of Congress which would correspond to the Public Accounts Committee of the English House of Commons. Representative Madden at one time expressed his intention to move the creation of such a committee:

If I have my way, when this legislation is completed, I shall propose the creation of a great committee of the House, to be known as the committee on expenditures, consisting of the best men in the House—because it is to be a great committee if it is created—to whom this auditor and comptroller general may report from day to day, and through that medium supply the House of Representatives and the Senate with such information as to what is being done with the money appropriated as to keep the Congress advised in connection with every step taken.⁷

The National Tax Association, through its representative, Ogden L. Mills, recommended

that a joint committee from each chamber shall be appointed to follow the expenditures of the executive departments and the money granted by Congress, with the power and duty to examine, review, and criticize every item of expenditure made, and to report to Congress annually, and at such other times as Congress, or any committee thereof, may demand.⁸

7. 58 Cong. Rec., 7003.

8. *National Budget*, Hearings before the Committee on Consideration of a National Budget, U.S. Senate, 60th Cong., 2d sess., on H.R. 9783, Part 1, p. 187.

And the National Budget Committee, consisting of John Pratt, Benjamin Strong, Paul M. Warburg, Henry L. Stimson, Joseph P. Cotton, Samuel McCune Lindsay, and Charles F. Nesbit, arguing against the provisions of the Good bill which related to the Comptroller General, declared that "the functions of Congress can be better exercised by appointing a joint examining committee with power to call for reports from the comptroller general, than by providing a system of pre-audits as called for in the Good bill."⁹

Notwithstanding these urgings Congress did nothing to establish a committee on the lines indicated. In the Senate indeed a resolution was adopted in May, 1920, to the effect that, beginning with the 67th Congress, there should be appointed a Committee on Expenditures in the Executive Departments, to consist of seven Senators. That this was to be in substitution for the committees on expenditures in the several departments appears from the following colloquy:

Mr. Robinson. Are the so-called nominal committees, that is, the committees which merely perform any functions, eliminated?

Mr. Knox. All of them are eliminated. For instance, there are 11 committees on expenditures in the various departments of the Government. Those have been consolidated in one committee, the Committee on Expenditures in the Executive Departments.¹⁰

But the new committee was not a public accounts committee. No rule defined its jurisdiction nor compelled its activity, and in practice it did nothing. A survey of its accomplishments made in 1931 by Rita Dielmann of the Legislative Reference Service showed that in the ten years of its existence it had issued two reports; it had considered four bills, one resolution, and one joint resolution; and in one case it had made an amendment. In 1940 Senator Davis, a member of the Committee, remarked that "it is true that the committee has not functioned fully, but the vast amount of work involved in the normal performance of legislative functions makes it exceedingly difficult for members of the committee to undertake projects of investigation and review and

9. *Ibid.*, p. 32.

10. 59 *Cong. Rec.*, 7716.

at the same time sustain interest and continuity in the progress of the work."¹¹ In the House no action was taken. The "atrophied little committees on expenditure"¹² were left in organization with no attempt to consolidate or reform them.

It was not until 1926 that the House began to think once more of a Public Accounts Committee. On March 24 of that year Representative Moore proposed an amendment to Rule X of the House of Representatives which would have abolished the several committees on expenditures and substituted for them a single committee of twenty-one members to be known as "the committee on expenditures in the executive departments and independent offices and establishments." To this committee, by an amendment to Rule XI, he proposed to transfer all the jurisdiction possessed by the eleven small committees and to give them in addition authority to consider matters touching the conduct of business of the several executive departments and other government agencies.¹³

This motion gave rise to some debate.¹⁴ Moore in supporting his proposal remarked upon the futility of the existing committees on expenditures and attributed their failure to their lack of integration and coördination:

Under the present plan the small committees function separately, when often a comprehensive method of procedure is needed applying to more than one department. Under the present plan none of the small committees has any relation to several independent offices and establishments which have been set up in recent years.

There is not the slightest disrespect to any of the small committees intended, but I say that ordinarily, in the nature of things, they are able to do little toward pointing the way to the general improvement of the governmental situation in testing the wisdom of legislation that applies to the administration of the laws and in making sure that the

11. Hearing before the Senate Committee on Expenditures in the Executive Departments, 76th Cong., 3d sess., p. 12. Dr. Selko of the Brookings Institution kindly furnished me with this quotation.

12. The expression is McCormick's. 50 *Cong. Rec.*, 621. The New York *Tribune* on September 23, 1918, characterized them editorially as "make-believe committees . . . carried for window-dressing purposes."

13. 67 *Cong. Rec.*, 6180.

14. *Ibid.*, 6180-6182.

theories and requirements of statutes that are enacted are fully and faithfully carried out.

It was Moore's hope that

if a strong, virile committee, endowed with the necessary powers, is brought into being, it would be in the direction of placing Congress in closer and more helpful contact with the executive branch of the Government, and better enable it to know, with respect to personnel, efficiency, and so forth, how the work of the Government is being done. Among the establishments within the scope of this contact would be the Bureau of the Budget, and perhaps it would not be going too far to claim that the creation of such a committee as is designed will in a sense round out the Budget system, which we are inclined now and then to criticize, but which I believe is here to stay.

Representative Madden, too, thought that one committee, operating through subcommittees, would be much more effective than eleven committees acting as independent entities:

The proposal suggested in the amendment offered to the rules by the gentleman from Virginia would provide a new agency to cooperate with the agency already created by the Budget. It would, of course, abolish the 11 small committees. That might not be so easy, because those who are assigned to duties on those committees would be jealous of their rights. But it would assign to duty 21 men, if the rules were amended to permit of the suggestion, who would act in conjunction with the Appropriations Committee and with the Ways and Means Committee and also with the Comptroller General of the United States. They would fill in a missing link; they would have the power to investigate, to ascertain the legitimacy of the expenditure, and ascertain whether or not the expenditure was being made according to law, whether they were being made extravagantly or conservatively, whether wisely or unwisely; and they would be able to supplement information which neither the Comptroller General nor the Appropriations Committee is now able to obtain because of the pressing business which pushes them forward to the conclusion of the problems that confront them. They would supply information which we are now unable to get and upon which I think many financial reforms might be had.

One part of Madden's speech aroused some comment. He had

said: "Unfortunately the committees on expenditures usually are manned by men of the same political faith as the administration, and they do not want to investigate their own administration. They have the power to do it if they would." This idea was taken up and repeated by Representative Connally: "The disposition of the committees at present is to refuse to investigate themselves or their own party." And by La Guardia: ". . . it is the custom, it is the practice not to incur the displeasure of one's party leaders, whether in the House or in the administration." If this was the cause of the committees' futility (rather than their lack of integration), would it not affect the work of one committee as well as of eleven? La Guardia thought it would. So did Connally and offered a suggestion: the thing to do was to appoint the majority of the committee proposed by Moore from the minority party; then, if the appropriation had been properly expended, it could find nothing wrong; if improperly expended, it would have an incentive to expose the misapplication.

Only one member seems to have attempted any defense of the existing committees. Representative Beedy, whose knowledge of the subject was so slight that he was uncertain whether he was or was not chairman of one of them, suggested that they had done nothing because they were supposed to do nothing. Answering a charge that they had not performed their duty and would not perform their duty, "except possibly to appoint a chairman and a clerk and a porter," he declared: "My understanding, and I believe I am Chairman of one of these committees, is that they have no clerks, no quarters, and the whole framework of the thing is so arranged they are not supposed to do anything." To this Madden curtly retorted: "Yes; they are to do work. They can do it if they want to do it, and if you will undertake to do it you will be supplied with the facilities to do it."

In due time Moore's proposal was referred to the Committee on Rules where for nearly two years it lay apparently forgotten. The initiative for reform now passed to outsiders. W. F. Wiloughby devoted a chapter of his book on *The Legal Status and Functions of the General Accounting Office of the National Government* to a discussion of the need for a Congressional commit-

tee on public accounts.¹⁵ The Comptroller General in his annual report for the fiscal year 1927 declared it to be "an anomaly that the executive branch of the Government should have numerous committees in both the Senate and House of Representatives to consider and report on its needs, and that the Congress, itself, should have no such committee to consider its degree of control or lack of control over public money"; he recommended the creation of "committees on accounts in both the Senate and the House of Representatives, whose function it will be to receive and consider the recommendations of the Comptroller General made in furtherance of legislative control over an accounting for expenditures of public funds, and any bills or parts of bills the enactment of which into law may affect that control."¹⁶

At the opening of the 70th Congress action was at last taken on these recommendations. On December 5, 1927, Representative Snell, from the Committee on Rules, reported out a resolution designed to sweep away the standing committees of the House which had no real work to do:

I think there is no one on either side but that will agree that it is foolish and ridiculous for us to carry from year to year 16 committees that have practically no work to do in connection with the work of the House and are only deadwood, used simply to furnish assignments to Members. The majority of the committees that we are abolishing *have not met in several years and there is no probability that there will be any work for them in the immediate future.*¹⁷

Of these sixteen deadwood committees eleven were expenditures committees. In lieu of them Snell proposed the establishment of a single committee with the same jurisdiction:

We are creating in place of the 11 expenditure committees one expenditure committee of 21 members that will have jurisdiction of expenditures for all executive departments and do all the work the whole 11 could have done. This committee will be provided with a room, a

15. Chap. xi.

16. *Annual Report of the Comptroller General of the United States*, 1927, pp. v, xii.

17. 69 *Cong. Rec.*, 12.

clerk, and everything that is necessary to do certain work that is desired to be done in connection with the work of the Appropriations Committee, and also along other various lines.

No opposition to the reform is recorded in the *Congressional Record*. On the same day that the resolution was reported it was passed. The committees referred to were abolished and a new committee "on Expenditures in the Executive Departments to consist of 21 members" was established. The jurisdiction of the Committee was set out in these terms:

The examination of the accounts and expenditures of the several departments of the Government and the manner of keeping the same; the economy, justness, and correctness of such expenditures; their conformity with appropriation laws; the proper application of public moneys; the security of the Government against unjust and extravagant demands; retrenchment; the enforcement of the payment of moneys due to the United States; the economy and accountability of public officers; the abolishment of useless offices, shall all be subjects within the jurisdiction of the Committee on Expenditures in the Executive Departments.¹⁸

In 1928 the wording of this section was amended by inserting the words "independent establishments and commissions" after the word "departments" in the first clause. The amendment was made necessary by the decision of Representative Williamson, Chairman of the Committee on Expenditures, that his group lacked jurisdiction over these agencies.¹⁹ That the Committee on Expenditures was intended by Congress to be active and not dormant appears sufficiently from the remarks of Representative Snell quoted above. Corroborative evidence is supplied by the fact that in 1928 when Congress passed an act to discontinue certain reports required by law to be made to them, they included a section especially requiring every executive department and independent establishment of the government, upon request of the House and Senate committees on expenditures, to furnish any in-

18. 69th Cong., 2d sess., H.Doc. 781, p. 305.

19. 69 Cong. Rec., 4930. It is plain that Congress from the start had intended the committee to have this jurisdiction (see remarks of McKeown and Snell, *ibid.*, 12, 4930). The mistake, if there was one, was a mistake of drafting.

formation requested of it relating to any matter within the jurisdiction of those committees.²⁰

It cannot, however, be said that the intention of Congress was wholly realized. In 1934 we find Representative Gifford explaining that during the preceding year he had been appointed, as a reward for his eleven years of service in Congress, to the Committee on Expenditures, "*which was no longer to be a merely dormant body but would probably sit much of the time.*"²¹ The inference is plain—the Committee had since its creation been inactive. Gifford accepted the assignment offered him, "since it appeared to be an important one," but was disappointed. In 1934 he complained that he could not persuade the chairman of the Committee to call a meeting—a charge which the chairman answered by challenging him to produce evidence of fraud requiring investigation. In 1935 he again called attention to the failure of the Committee to function: "Last year the committee did not investigate expenditures in the executive departments; it was apparently not thought wise to look into the expenditures of the administration."²² In 1937 he remarked that, except in small matters, the Committee had functioned very little.²³

The activity or inactivity of the Committee is, however, of considerably less importance than its place in the scheme of financial control. Here the point to be understood is that the Committee is not really a public accounts committee. It does not attempt a general scrutiny of expenditures but leaves that task to the Comptroller General. So much is clear from the remarks of its chairman, Representative Cochran. Replying in 1934 to a suggestion by Representative Snell that there was an obligation on the Committee to look into certain expenditures, he exclaimed: "Is the Committee on Expenditures expected to go from department to department and ascertain the amount of money that is spent and what it is spent for? That is what we have the General Accounting Office for. . . ." ²⁴ Two years later Cochran

20. 45 Stat. 996.

21. 78 Cong. Rec., 1180. (Italics supplied.)

22. 79 Cong. Rec., 233.

23. *Reorganization of the Executive Departments*, Hearings before the Joint Committee on Government Organization, March 8, 1937, p. 147.

24. 78 Cong. Rec., 1193.

made it doubly plain that the Committee simply investigated specific complaints brought to its attention; it did not dispute the jurisdiction of the Comptroller General nor seek to investigate the correctness of his settlements:

The committee has taken the position that the Office of the Comptroller General of the United States and the General Accounting Office were established by the Congress for the purpose of seeing that the Government agencies carry out the will of Congress.

It cannot be disputed that the Comptroller General of the United States is a representative of the Congress and not a representative of the executive branch of the Government.²⁵

Whatever advantages may accrue to Congress from the work of a committee which acts coördinately with rather than above the Comptroller General, it is evident that they are other than those which might flow from the work of a public accounts committee.

We may conclude this chapter and our history with an examination of the ideas in respect of an audit for Congress advanced during 1937 and 1938 by the proponents of the unsuccessful Reorganization bill, 1938. On January 12, 1937, President Roosevelt, with a commendatory message, transmitted to Congress the report of the Committee on Administrative Management, a body appointed by himself March 20, 1936, to inquire into the whole subject of administrative management in the executive branch of the government and to suggest the means of improvement. The greater part of this report treated of matters outside the scope of our present inquiry—i.e., with administrative reorganization, personnel management, planning management, the White House staff, budgeting and administrative fiscal control—but one section dealt with the General Accounting Office and with its administrative head, the Comptroller General.

Primarily, the President's Committee, in keeping with their terms of reference, viewed the problem of the General Accounting Office from an *administrative* standpoint. Accepting without question the propriety of its controlling functions, they doubted only the advisability, and indeed the constitutionality, of vesting them in an officer not subject to the check of the President's re-

25. 80 Cong. Rec., 10756.

moval power. It was right that accounting systems, forms, and procedures should be prescribed and supervised by a central authority; it was right that the final settlement of all claims and accounts in which the United States was concerned should be made in a single department; it was right that Treasury warrants should be countersigned, advance decisions given, pre-audits made; but it was wrong that these functions, administrative in character, should be performed by an authority independent of the President. Let them therefore be transferred, or rather restored, to the Treasury Department.

If these had been the only ideas advanced by the President's Committee with respect to the General Accounting Office, we should have passed by their report unnoticed, for they would have amounted only to a proposal to return to a system essentially similar to that which prevailed prior to 1921—a system which, as we have already seen, did not provide an audit for Congress. But the Committee did not limit themselves to a view of the administrative difficulties arising from the "unsound and unconstitutional division of executive authority" between the branch of government headed by the President and that headed by the Comptroller General. Remembering, or supposing, that the intent of Congress in creating the General Accounting Office had been to establish the machinery of an independent audit, they saw the problem of that office partly from a *legislative* standpoint. It is this aspect of their report that compels our attention.

The Committee began by defining the term, audit, as they would use it in connection with an audit for Congress:

An audit is an examination and verification of the accounts after transactions are completed in order to discover and report to the legislative body any unauthorized, illegal, or irregular expenditures, any financial practices that are unsound, and whether the administration has faithfully discharged its responsibility.²⁶

Next they set out the fundamental principle of a legislative audit—that it should not be intermixed with executive control:

26. President's Committee on Administrative Management, *Report*, p. 21.

A true audit can be conducted only by other officers than those charged with the making of decisions upon expenditures. No public officer should be authorized to audit his own accounts or financial acts and decisions. The maximum safeguard is provided when the auditor is entirely independent of the administration and exercises no executive authority.

This principle had not been sufficiently attended to by those who framed the Act of 1921:

Although the title of the Budget and Accounting Act indicates that the principal purpose was to provide a budget system and "an independent audit of public accounts," the distinction between "control" and "audit" was confused in the act. It placed certain control functions, as well as the auditing function, in the Office of the Comptroller General, who was thus made both a "comptroller" and an "auditor."

As a result there had been, *and could be*, no audit for Congress.

The General Accounting Office has failed to achieve an independent audit of national expenditures. It has not supplied the Congress with the comprehensive information concerning the financial administration of the Government which an audit should render. The Budget and Accounting Act provides that the Comptroller General shall report to the Congress the results of his audit and his investigations into the financial transactions of the Government and states that he "shall specifically [*sic*] report to Congress every expenditure or contract made by any department or establishment in any year in violation of law." Except in a few isolated cases the Comptroller General has not carried out this provision of the act. He has rarely called attention to unwise expenditures or unsound fiscal practices. Since the present arrangement delays the final settlements of accounts, in some cases for as long as 3 years, it is impossible for the Comptroller General even to complete his audit of any fiscal year in time for it to be of any material value to the Congress.

The fundamental reason why the Comptroller General has failed to provide the Congress with a complete, detailed, and critical audit of the fiscal accounts of the Government, however, is the anomalous and inconsistent position of his office.²⁷

27. *Ibid.*, p. 24.

The only solution was to create an officer with the independence of the Comptroller General but without those duties which made that officer incompetent to act as an Auditor General—an officer who would examine the results of executive action and report all illegal or improper transactions to Congress.

The Executive . . . should be held to account through an independent audit made by an independent auditor who will report promptly to the Congress his criticisms and exceptions of the actions of the Executive. Based upon these reports the appropriate committees of the Congress may call upon an executive officer to explain his conduct and if it has been characterized by illegality or impropriety, the Congress can take the necessary corrective steps and safeguard the future.²⁸

Such in broad outline were the opinions in respect of audit expressed by the President's Committee on Administrative Management and transmitted by him to Congress.²⁹ The President's message was received on January 12; in due course committees were appointed to consider its subject matter, hearings were held, reports were made, and bills or parts of bills were prepared, the intent of which, in the language of the House Committee on Government Organization, was

to strengthen the Budget and Accounting Act, 1921, by amending it so as to carry out what your committee believes to have been the original intention of the Congress in enacting that act, namely, to provide the Congress with an independent audit of the receipts and expenditures of the Government by an agent directly responsible to Congress.³⁰

In the end, to be sure, nothing was accomplished. The Re-

28. *Ibid.*, p. 50.

29. The details of the plan are sketched on page 25 of the *Report*. The bill drafted by the Committee to implement their plan (together with a hostile analysis thereof) will be found at 83 *Cong. Rec.*, 4380-4385, title III being the part relevant to control and audit. It is useless in this place to inquire whether the system proposed by the Committee would in practice have realized their intent.

30. 75th Cong., 1st sess., H.Rep. 1606, p. 1; also 75th Cong., 3d sess., H.Rep. 2033, p. 19.

organization bill, 1938, title III of which would have established an independent Auditor General and a Joint Committee on Public Accounts, was passed by the Senate but recommitted by the House; and when, in 1939, a modified Reorganization Act was adopted, the provisions relating to audit were omitted. Yet it is not without interest to gather into one view the ideas of the legislative proponents of Congressional audit insofar as they may be deduced from the committee reports and from the debates in Senate and House. They may be set out under three heads.

I. The advocates of reform were satisfied that there was, in fact, no audit for Congress. The Senate Committee on Government Organization, after declaring that the Comptroller General's primary function (as the framers of the Budget and Accounting Act conceived it) was to notify to the Congress every illegal and improper expenditure, stated:

It is well known that the results have not been as anticipated. The Congress today is no better informed about the financial transactions of the Government than it was prior to 1921. Since the Comptroller General was vested with final authority and control over fiscal transactions, he has preferred to take the matter in his own hands and to make the executive departments responsible to him rather than to the Congress. During the entire history of the Budget and Accounting Act, there has been no report to the Congress, such as a board of directors of a private business would expect and receive from an auditor adequately summarizing and reporting upon the financial transactions of the preceding fiscal year. Nor has the Congress received reports of illegal and improper expenditures whereby it could take the necessary steps to prevent such action in the future.³¹

The House Committee on Government Organization took the same view:

The failure to provide the Congress with information concerning the fiscal transactions of the Government through an independent audit of receipts and expenditures was the principal criticism of the former system which led the Congress to reorganize the auditing and accounting functions of the United States in the Budget and Accounting Act,

31. 75th Cong., 1st sess., S.Rep. 1236, p. 13.

1921. . . . The committees of Congress considering that act believed that they were setting up a system under which the auditing officer, the Comptroller General, being independent of the executive branch of the Government, would report to them any irregular, illegal, or improper expenditure of, or failure to account for, public funds. It is well known that this has not resulted.³²

On the floor of Congress this truth was iterated and reiterated. According to Senator Byrnes:

When I listened to the debate over the proposed accounting act in 1921 I said: "At last we will have an audit that will inform the Congress about the money that is spent." Instead of that we know nothing about it. We have no means of knowing.³³

According to Senator Schwellenbach:

The fact of the matter is . . . that we have not a Comptroller General who provides any information to the Congress, or is of the slightest use to the Congress. We are acting under a delusion and a snare if we think we have someone who represents us. . . . He just does not represent us, and does not do the Congress of the United States the slightest semblance of good.³⁴

According to Representative Vinson:

The Comptroller General under the present set-up has never made an audit to the Congress of the United States. He has never made an audit of any kind to the Congress. Last year he filed a printed annual report, but for 5 years before that he did not even print the report, and his report is not an audit.³⁵

II. There was general agreement that the error in the existing system of legislative control was one of law rather than of persons: even with the best will in the world the Comptroller General could never be an Auditor General. The Senate Committee took note that it was not by chance that Congress had not received the reports which it might expect of an auditor:

32. 75th Cong., H.Rep. 1606, p. 2; H.Rep. 2033, p. 20.

33. 83 Cong. Rec., 2508.

34. *Ibid.*, 2663.

35. *Ibid.*, 4592.

Your committee is convinced that under the present system the Congress cannot expect to secure this information in the future. The reason is apparent. The functions of current control and audit need to be placed in separate officers. No man can audit his own books. No man can audit financial transactions which he has participated in or authorized. To vest executive authority involving current financial control in an auditing officer is to destroy the independence and therefore the value of the audit. No official can be expected to criticize his own decisions, his own records, or his own settlement of accounts.³⁶

This was also the view of the House Committee:

The reason has been that under the Budget and Accounting Act the Comptroller General, the auditing officer, was vested also with executive control functions, namely, the settlement and adjustment of accounts and claims and the rendition of advance decisions involving the expenditure of public funds. Under this arrangement, the Comptroller General was placed in the anomalous position of being required to settle and adjust accounts and claims and then to report to the Congress his criticism of his own settlements and adjustments.

Obviously, the officer authorized to exercise the functions of settling and adjusting accounts and claims and rendering advance decisions involving the expenditure of public funds should not be permitted to audit his own settlements and adjustments. Under such an arrangement it is impossible for the Congress to obtain an independent audit of the settlement and adjustment of accounts and claims.³⁷

On the floor of Congress emphasis was placed on the several duties of the Comptroller General which were inconsistent with an audit for Congress. For example, Senator Byrnes pointed out that in respect of every claim against a government department settled *directly* (i.e., before payment) in the General Accounting Office there was no review whatever of the Comptroller General's decision:

Who audits these claims settled by the Comptroller General? Nobody on the face of the earth audits the claims settled by the Comptroller General unless it be said that he audits them himself. . . . Would any business give to one man the power to make a settlement, and

36. S.Rep. 1236, p. 13.

37. H.Rep. 1606, pp. 2-3; H.Rep. 2033, p. 20.

then audit the settlement himself? The answer is no, for it would not be good business. Neither is it good government.³⁸

Representative Vinson brought the same argument to bear in respect of the Comptroller General's functions of advance decision and pre-audit:

The reason we did not get the independent audit and cannot get it under existing law is because the man who performs the executive function in balancing the books, giving preaudits and advance decisions, which are certainly executive functions, will not report to the Congress that he ever made a mistake. In other words, when the Comptroller General acts, when he gives a preaudit or an advance decision that money can be spent or money cannot be spent, he is not in position to criticize his own act. Mr. Henry L. Stimson, in a letter submitted for the RECORD by Mr. TABER day before yesterday, written in April 1937, presents the same thought, that this man who performs a legislative function is criticizing his own acts as an executive; consequently the Congress does not know of the illegal or erroneous O.K. of the expenditure of money.³⁹

Senator Schwollenbach applied the argument more generally against the whole range of the Comptroller General's nonauditorial duties—against his function of settlement after payment as well as against his function of settlement before payment. Analyzing the error of the existing system he quoted, *inter alia*, from a letter by George P. Auld, chairman of a special committee of the American Institute of Accountants appointed to study the proposed legislation:

A comparable situation [wrote Mr. Auld] would be found in a corporation if the controller of accounts were to be made independent of the president; if he were then to be granted additional executive powers over other operating departments and, on top of that, were

38. 82 Cong. Rec., 32. The following colloquy is also of interest:

"Senator Byrnes. . . . if he makes a mistake, it will be buried within the four walls of his office, and not a human being will know whether it was right or wrong, a mistake or fraudulent. Is that right?

"Senator Minton. Mr. President, who audits the accounts of the Comptroller General in the settlement of this large number of claims?

"Senator Byrnes. He audits them himself." 83 Cong. Rec., 2509.

39. *Ibid.*, 5093.

to audit all transactions after their consummation. Or, the other way around, we may imagine the independent public accountant who audits the corporation's books being empowered to direct the account keeping and settlement of claims against the company, and further given a veto over operating acts and methods connected with planning and procurement.⁴⁰

III. The friends of reorganization were united in the opinion that the solution of the difficulty was to be found in the establishment of an independent auditor. The Senate Committee put the matter as follows:

The only way in which the Congress will be able to secure a truly independent audit of the financial operations of the Government, and to be informed of acts which are unauthorized or improper, is through the establishment of an independent auditor, divorced from any responsibility for control.⁴¹

The House Committee reported that the remedy was "to segregate the functions of settlement and adjustment under one officer and the functions of reviewing and criticizing such settlements and adjustments and reporting thereon to the Congress in another officer and thus provide the Congress with an independent audit."⁴² In the Senate and House those who saw some utility in a Congressional audit rang the changes on the same recommendation.

What objections were offered to those ideas? It is not easy to say. The opposition to title III of the Reorganization bill was directed more against the proposal to "restore to the Executive complete responsibility for accounts and current financial transactions" than against the proposal to "establish accountability of the Executive to the Congress by providing a genuine independent postaudit of all fiscal transactions by an Auditor General."⁴³ Audit was unimportant, except of course as an incident to settlement; control was the thing. According to Senator

40. *Ibid.*, 2662. The letter was printed in the *New York Times*, February 6, 1938; it may be found at 83 *Cong. Rec.*, 2623.

41. S.Rep., 1236, p. 13.

42. H.Rep. 1006, p. 1; H.Rep. 2033, p. 19.

43. The language is that of the President's Committee, *Report*, p. 52.

Bailey: "The whole effort here is to destroy the power of Congress to have a man checking the expenditures of public money. It is checking rather than auditing—control, not bookkeeping—that is involved."⁴⁴

Much of the argument turned about a false issue. It was represented, however preposterously, that the existing system of General Accounting Office control operated to *prevent* misapplications of the public moneys—a proposition which, if true, would make an audit for Congress, indeed any audit, unnecessary. Some members, like Representative Plumley, thought that the Comptroller General secured regularity in the accounts by examining every demand against the government before payment:

In the third place—and this is a matter to which I have given a great deal of time and study—I feel strongly that Congress should retain its direct control of public funds and expenditures through the maintenance of an independent Comptroller General. The only way this can be assured is by the preaudit of accounts for expenditures of public funds, as at present, instead of a postaudit, and I am, therefore, unalterably opposed to the proposed changes involved in the plan to emasculate the office of the Comptroller General.⁴⁵

Others, like Senator Byrd, attributed the Comptroller General's imagined power to his partial control of Treasury issues:

Mr. President, let me emphasize again the issue before us: Shall we continue to have the Comptroller General with the power to prevent an illegal expenditure before it is made, or shall we abolish the power that he now has, and give to an Auditor General, responsible to Congress, only the power to post audit; in other words, to audit an expenditure after it is made, and report the result to Congress? That is the issue. Stripped of all technicalities, the issue is whether we shall continue the Comptroller General with the power that he now has to prevent an illegal expenditure with the machinery that has been given him, the authority to countersign warrants before the money is avail-

44. 83 Cong. Rec., 2746.

45. *Ibid.*, 4573. In point of fact only 3½ per cent of the government annual expenditure is pre-audited. Nor is *any* voucher pre-audited without the consent of the department concerned. Senator Byrnes has gathered into one view the evidence of the General Accounting Office refuting the allegation that the office pre-audited all, or indeed many, vouchers. *Ibid.*, 2624-2625.

able, or whether we shall provide merely for a post auditor to audit the disbursement of money after it is spent.⁴⁶

Neither group saw that, *even if* the pre-audit of vouchers and the countersignature of warrants could do the impossible, to wit, forestall improper actions on the part of administrative and disbursing officers, they could not guarantee proper actions on the part of the Comptroller General himself. If executive officers can err, so can accounting officers.

Not every opponent of title III of the Reorganization bill pretended that the Comptroller General did, or could, prevent illegality. Many recognized that his primary functions were not preventive but detective and corrective. Yet even they could not see the necessity for creating a new and independent Auditor General. They did not indeed absolutely reject the arguments of the advocates of an audit for Congress. They admitted that some regular report of illegal expenditures ought perhaps to be made to the House and Senate; they admitted that such a report was not now made; but they took the position that the present Comptroller General, *protected by his present immunities*, was the officer to make it. Representative Taber, for example, remarked:

Frankly, if the Comptroller General is continued as an independent officer I do not believe there would be any need for establishing an Auditor General. I believe a few simple amendments requiring presentation to the House of an annual audit of the expenditures of the departments and of the agencies, together with a definite report as to the claims that have been audited by him, including a report as to those violations of law on the part of the departments which he has discovered during the year, would accomplish all of the needs of the situation.⁴⁷

The argument, it will be observed, assumes as a premise, though it does not explicitly assert, the infallibility of the Comptroller General. In order to employ it against the specific points

46. *Ibid.*, 2504. The countersignature of warrants controls the issue of money from the Treasury to disbursing officers; it does not control the payment of money by disbursing officers to public creditors. Issue may be regular: payment irregular.

47. *Ibid.*, 4582.

brought up by the advocates of an *independent* audit for Congress, we must be prepared to assert that the Comptroller General can do no wrong. Does Senator Byrnes say that nobody audits the Comptroller General's *direct* settlements? We must answer that no audit is necessary, since those settlements are bound to be correct. Does Representative Vinson say that in rendering advance decisions and pre-auditing vouchers the Comptroller General becomes a party to the transactions he audits? We must claim that as a merit; by substituting his unflinching wisdom for the precarious judgment of department heads and disbursing officers, he renders an *independent* audit unnecessary; his own audit, directed toward finding out whether his advice has been taken or rejected, will fill the bill. Do committees of the Senate and of the House of Representatives say that no man, by whatever tenure he holds his office, is competent to criticize his own final settlement of accounts? We must reply that there is no occasion for criticism: what the Comptroller General has disallowed, he has rightly disallowed; what he has allowed, he has rightly allowed.

From these views and counterviews some conclusions may be deduced. The supporters of title III of the Reorganization bill were unwilling to entrust the final settlement of accounts to the unchecked discretion of any officer whatever; they wanted indeed a double check—that of the President's removal power and that of an independent audit of the settlement. Their adversaries, on the other hand, were satisfied to rely wholly on the character and competence of the Comptroller General; they alleged that the President would use the threat of his removal power, not to protect the public, but to defraud them; they insisted that an audit of the Comptroller General's settlements would be redundant.

The failure of the Reorganization bill in the House of Representatives marks no epoch in the history of the accounting system.⁴⁸ It does, however, bring our history to a close. No later at-

48. For an acute analysis of *why* the bill failed see Lindsay Rogers, "Reorganization: Post-Mortem Notes," *Political Science Quarterly* (June, 1938), LVIII, 161-172. The bill was not defeated on its merits but on extraneous, i.e., political grounds.

tempt has been made to supply Congress with the means of examining into the application of the public moneys, nor does it seem likely that any will be made in the near future.

The results of Part II may be briefly summarized. Wholly negative, they may be reduced to the statement that Congress has not now, and has never had, any practical means of ascertaining after the event whether its financial authority has been respected or infringed.

The reports of appropriations, expenditures, and balances which, since 1791, have in one form or another been presented to Congress have never been efficient instruments of retrospective control. Until 1927, indeed, they did not even pretend to report the final application of the public moneys but recorded only issues from the Treasury, most of these being issues to disbursing officers. But even now the information given is not much more serviceable for the purpose of comparing promise with performance. There is, and can be under the present system of procedure, no certainty that the expenditure reported is within the ambit of the appropriation, that the proper administrative sanctions have been obtained, and that the terms of every governing statute have been observed. The reports—which, it is to be noticed, are in no sense of the word appropriation *accounts*—are unaudited.

The Congressional committees on expenditures have been inefficient for the purposes of their creation. Without appropriation accounts upon which to bottom their work, without an Auditor General to assist and advise them, without any regular procedure of scrutiny, they have not been and cannot be organically in touch with the executive and departmental system.

The efforts of Congress to take over, for its own purposes, the auditing machinery of the Treasury have likewise failed. By transferring to the Comptroller General those powers of the Treasury accounting officers which were inconsistent with a Congressional audit, Congress succeeded in creating a new and very powerful officer—an officer perhaps unknown to the Constitution—but it left itself unprovided with an Auditor General. The Comptroller General decides what payments will be or will not

be allowed as definitive charges against the appropriations, but he is hardly in a position to report on the propriety of his own decisions.

We must conclude then that the attempts of Congress to arm itself with the machinery of retrospective control have altogether miscarried. Congress has not yet succeeded in devising a system of procedure stringent enough to render efficacious its unquestioned right to control the public expenditure. I say procedure, for it seems clear that what is needed is not a new right but a prompt and searching remedy.

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