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AMERICAN NATIONAL GOVERNMENT:

Law and Practice

By _____

FORD P. HALL

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P R E F A C E

American National Government: Law and Practice is the outcome of a dozen years of experimentation in the teaching of national government at Indiana University.

The traditional approach to the study of American government is through history. American institutions are explained against the background of the American past. This is a useful approach. A political science which did not take history as its foundation would be sterile and false. But it is an approach with which the student through earlier studies is likely already to be familiar. And in the division of labor practiced in American colleges and universities, it is primarily the task of a department of history to supply any inadequacies in the student's knowledge in this field. Moreover, there is something to be said for a treatment which, for particular purposes, assesses institutional coherence not in terms of the past and the future but in respect to the contemporary relations of the parts of the structure, and employs for purposes of comparison analogous functioning structures rather than preliminary stages of the same structure. There are taxonomic as well as evolutionary studies. Indeed, if political science has a distinctive method, it seems to lie in employing historical data topically rather than chronologically, in terms of taxonomy rather than development.

Accordingly, this book undertakes to describe American government against the background of comparative government and political and jural theory, and gives relatively little attention to the problem of historical origins. A fortunate consequence of this approach is that it causes the problem of international relations to emerge into prominence, and considerable attention is devoted to this subject early in the book. For the rest, the treatment of specifically American institutions is or-

ganized, as far as seemed feasible, in terms of the analysis of functions into politics and administration; and an attempt is made to treat administration as a distinct governmental process, apart from the specific tasks with which it is charged. These tasks, however, receive extended treatment in the concluding part of the book.

This plan of treatment was introduced into the teaching of the introductory course in American government at Indiana University by Frank G. Bates, now Professor Emeritus. To Professors Bates and Oliver P. Field the authors have a general obligation derivative from long association as well as a specific debt owed them for detailed criticism and suggestions. Professors Ira Polley, Vernon Van Dyke, and John Paul Duncan read all or parts of the manuscript and made helpful suggestions. Also Royal Purcell and Richard Edwards were thoughtful and constructive in their comments. To them, to the colleagues in Government 1012, and to a generation of students the authors give thanks. For intelligent and faithful assistance in the preparation of the manuscript the authors are deeply indebted to Cecil Fritz, Mary Elizabeth Bacon, Frances Kirch, and Joan Doyle.

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PART I.

STATE AND GOVERNMENT

FOREWORD

For better or worse, people live in society and in societies; and for better or worse these societies have become organized in a form which we have named the state. It is an oversimplification to call the state a power relationship; but this is only the first oversimplification in this book. There is an inner logic about power relationships which makes inevitable certain over-all structural similarities in states. There must be superiority and subjection, which express themselves in sovereignty and law. On the other hand, a power relationship can be used for one purpose or another purpose; and it can express itself in one form or another form. History and the contemporary political scene offer us a considerable display of variety on these subjects.

The existence of every state is qualified by the existence of every other state; power is directed outward as well as downward. The security of states, and of the human beings who compose them, will remain precarious until these rival power systems are unified. As of today, all that has been accomplished has been to bring international relations within deplorably lax and inadequately implemented rules, which offer no reliable promise of peace.

The purpose of Part I of this book is to set the United States against the background of comparative government and international relations. The features which the United States has in common with other states are explained. Where alternative choices as to governmental purpose and structure exist, the range

of alternatives is briefly indicated and the choice which the United States has made is described in more detail. The character of international politics and the participation of the United States therein are considered.

The remaining three parts of the book will concern themselves exclusively with the internal arrangements and operations of the national government of the United States.

CHAPTER I

THE STATE

**The Nature of Politics—The History of the State—
The State Defined—Political Values—Political Philosophies**

THE NATURE OF POLITICS

Politics is one of the many coöperative activities in which men engage. As a general rule human coöperation is not spontaneous and undirected but requires the presence of leadership to organize and control the action. In the case of non-repetitive activities, leadership is likely to be temporary and casual; but when the activity becomes routine, the leadership, or at least the method of choosing leaders, comes to be a settled institution. The term "leadership" implies a voluntary acceptance of the leader by the followers, but there is likely to be present also some element of dominance or coercion of the followers by the leader; and when leadership becomes institutionalized the feature of dominance becomes stronger, until in some situations it is much more conspicuous than the acceptance or consent which sustains leadership in non-repetitive activities. Some writers have been so impressed with the importance of dominance that they have made it the basic principle in politics. Other students, however, have insisted that a society organized in terms simply of dominance is a master-slave rather than a government-citizen relation, and have retained consent as an essential feature of politics.

What distinguishes the coöperative activity which we call politics from other coöperative activities? Sociologically speaking, there is probably no qualitative difference. But the history of the world has produced a well-settled institutional pattern which we

call the state, a pattern of such uniformity that we can define it with some precision.¹

THE HISTORY OF THE STATE

Moral accounts of origin

Attempts to account for the origin of the state may have either of two purposes. Some theories are primarily moral arguments; they are intended to show that a particular state has a moral claim to obedience or, alternatively, that a certain state has no moral right to exist and may lawfully be overthrown. Other theories have a scientific rather than a moral object; they seek merely to establish what has occurred in the past, with no implications of praise or blame.

Frequently encountered in human history is the argument that a given state has been divinely established and is therefore entitled to absolute obedience. This of course is a moral argument rather than a serious explanation of history. Likewise the theory of the social contract has primarily a moral tone. John Locke, from whose *Two Treatises of Government* (1690) the statesmen of the American Revolution derived the social-contract doctrine, was concerned to justify the English Revolution of 1688. In the "state of nature," he said, men enjoyed certain natural rights to life and liberty, and to the property which they created by their labor. By voluntary agreement they instituted a political society to protect these natural rights. The government thus set up derives its powers from the consent of the citizens, and if it abuses these powers it no longer has a right to exist and may be overthrown.

The belief that the state was a natural outgrowth of the family was once considered to have scientific foundation but has now been abandoned. It is certain that blood relationship plays an important part in all societies, but there is no recorded case of

¹ By the word "state" is understood in political science an entirely independent political organization, not a territorial subdivision of such an organization. The subdivisions of the United States which we call states are not true states; they bear the name because from 1776 to 1789 they were, as the Declaration of Independence said, "free and independent states." The adoption of the constitution abolished them as independent states and re-created them as members of a new federal state.

a family's becoming a state. Under the name of the patriarchal theory, this explanation of the origin of the state has also been used for the purpose of moral exhortation. Sir Robert Filmer in his *Patriarcha* (1680) argued that the king was the lineal descendant of the father of the family and was therefore entitled to the obedience which children owe to parents. So persuasive did this seem to some people in the seventeenth century that John Locke felt obliged to devote the first of his *Two Treatises* to its refutation.

During the present century a number of attempts at a scientific explanation of the origin of the state have been made. The English authors Hobhouse, Wheeler, and Ginsberg, in *The Material Culture and Social Institutions of the Simpler Peoples*, first published in 1915, set forth the thesis, supported by much evidence from anthropology, that the social institutions of a people become more complex and better settled as the economic techniques by which they make a living become more complex. So a people which lives by the hunt, or by pasturage of domesticated animals, has simpler and less clear-cut institutions than an advanced agricultural community. At this later stage, articulated political institutions emerge.

Scientific
accounts

The English anthropologist Sir James Frazer in his *Lectures on the Early History of Kingship* (1905) advanced a somewhat different idea. According to Frazer, the chief difficulty encountered by primitive or simple peoples is the control of nature. It is necessary to cause, or to stop, rainfall, or to bring on a run of fish. Since magic is an accepted device for manipulating nature among simple peoples, an expert magician enjoys great prestige. He comes to represent the people in its dealings with the gods, and soon receives tribute from his fellows. Eventually he rises to the position of a king, and becomes the priest-king of his community, the head of church and state. The two offices may become separated. Perhaps the priest-king, overburdened, assigns one of his functions to a subordinate; or perhaps an invading people conquers the native population, and while reserving political rule to itself delegates the spiritual function to a represent-

ative of the natives, on the theory that the natives have already established an understanding with the local gods.

The German sociologist Franz Oppenheimer published a book called *The State* in 1907. Oppenheimer was much impressed by the feature of dominance in political society, and he chose to date the appearance of the state from the large-scale institutionalization of dominance. This occurred, according to Oppenheimer, when a group of nomadic pastoral people conquered an agricultural community and settled down as a resident class of masters, exploiting the labor of the peasant population. The pastoral people, being mobile and skilled in arms, were bound to get the better of the earthbound peasants. Evidence from Asia and Africa tends to show that what Oppenheimer described has actually happened on some occasions.²

Sequence
of state
forms

However it originated, the state was fully formed before the dawn of history. Our first written records are from the great territorial states of southwestern Asia and Egypt. These were absolute monarchies in which a virtual identification of politics and religion existed. Since they were situated in river valleys, it seems likely that the need for public works for irrigation and flood control played a part in producing the state here, as also in China. Huge though the states of Mesopotamia and Egypt were, they were eclipsed by the newer states of the Mediterranean. These were city-states, each an independent city with a small hinterland, and often under aristocratic or democratic rule. Despite their small size, the Greek cities, led by Athens, successfully defied the power of Persia (492-448 B.C.). But the political form of the city-state yielded to a new pattern of Mediterranean empire, first under Alexander the Great and his successors, then under Rome. The Roman Empire was a really impressive accomplishment in politics. Even after it had been shattered by the barbarian invasions, its ghost was kept alive by the barbarians themselves, in the Holy Roman Empire of the German Nation, whose Emperor claimed superiority over all the kings of Christendom.

² Robert H. Lowie, *The Origin of the State* (Harcourt, Brace & Company, New York, 1927), p. 21.

Actually, however, the characteristic political form of the Middle Ages was feudalism. The local feudal lord not only owned the soil but also exercised considerable political powers over his dependents. Kings were very largely at the mercy of their feudal vassals, and this situation was institutionalized in the English Parliament and the continental estates, which claimed the power to control the king. But the development of a commercial economy at the close of the Middle Ages reduced the importance of the feudal lords, and the kings were able to make themselves virtually absolute. This was accomplished, however, at the expense of an alliance with the representatives of the new commercial economy, the middle classes; and after a time the middle classes became powerful enough to stand alone. They introduced two new principles into politics, democracy and nationalism, and beginning with the French Revolution (1789-1799) Europe was convulsed by a series of wars and revolutions which attempted to make these principles the foundation of the state. Dynastic rule and feudal privilege were to be replaced by democracy. The nation, which may be defined as a group of people united by psychological or sentimental ties, usually evidenced by community of language and culture, and perhaps also of religion and blood, was to achieve political unity as well; every nation wished to be a state. After 1848, however, the revolutionary fervor of the middle classes abated. In states which had not achieved democratic institutions, it was the socialist parties of the working class that carried on the struggle for democracy. About the later history of nationalism it is much more difficult to generalize, but it seems possible that it will not be so powerful a driving force in the future as in the past.

THE STATE DEFINED

Thus the world has seen a large number of state forms. What have they in common, and what marks them off from political organizations which are not states? Of the latter, too, there has been an astonishing variety. A few examples may be mentioned. The papacy exercised a considerable amount of political power

in the Middle Ages. The military orders deriving from the Crusades, the Knights Templars, the Hospitalers, and the Teutonic Knights, were independent political organizations. The Old Man of the Mountain—this strange title was borne by the successive rulers of the secret society of the Assassins in Persia in the twelfth and thirteenth centuries—was the acknowledged sovereign of something like a state. But all these political systems lacked the principle which we consider the hallmark of the state—the principle of exclusiveness.

**Essentials
of
statehood**

The state asserts exclusive control over a clearly defined territory and makes exclusive demands upon the allegiance of its subject population. More precisely formulated, the definition runs as follows: the state consists of (1) a population (2) within a given territory, so organized as to possess (3) sovereignty and (4) government.

**1. Popu-
lation**

The people whom the state considers to owe exclusive allegiance to itself are called its nationals. There may be different classes of nationals; the United States, for example, recognizes not only the class of nationals having the status of citizenship but also non-citizen nationals owing allegiance to and receiving protection from the United States but not possessing full privileges of citizenship. The inhabitants of Guam and Samoa are non-citizen nationals; citizenship has been granted to the inhabitants of other territories by special acts of Congress. From its nationals the state demands loyalty and obedience, whether they are within or outside its territory; and it exacts obedience to its laws from aliens as well, if they come within the territory of the state.

**2. Terri-
tory**

Territory is an essential element of the state because only on the principle of exclusiveness of territory can separate states escape being confused with each other. Like the term "national," the term "territory" is susceptible of subdivision. There is first the home territory which the state considers a part or element in its own being, and secondly outside areas which are subject to and "belong" to the state but nevertheless are distinct from the home territory of the state. Such outside areas are called terri-

tries, possessions, or if they were settled from the mother country, colonies. The United States has divided its possessions into two groups: territories "incorporated" in the United States—that is to say, territories to which Congress has extended the protection of the United States constitution; and "unincorporated" territories, to which only the "fundamental" rights granted by the constitution extend. Alaska and Hawaii are incorporated territories; Puerto Rico and the other insular possessions are unincorporated.

A rather perplexing kind of dependent territory is the mandate. When the German colonies and parts of the Ottoman Empire were detached from their former owners at the conclusion of the First World War, the administration of these areas was entrusted to one or another of the victorious Allies; but the mandatory power was not supposed to own the mandate—it acted as a trustee, theoretically under the supervision of the League of Nations. In some cases, however, the mandate came to be hardly distinguishable from a possession: Japan made powerful naval bases of the mandated Pacific islands entrusted to her. It is too early to say what will happen to the trusteeships created by the new international organization, the United Nations. That some kind of international administration of territory is possible is shown by the example of Saarland, which was governed by commissioners of the League of Nations from 1920 to 1935, and that of Danzig, which was under supervision by the League until 1939.

The Anglo-Egyptian Sudan offers another curious form of dependent territory. In theory this is a "condominium" or joint rule by Great Britain and Egypt. In practice, however, Great Britain controls the territory.

The third term in the definition of the state is "sovereignty." Sovereignty is defined as the immunity which the state enjoys from outside control or interference, coupled with the possession of supreme power within the territory possessed by the state. Critics of the idea of sovereignty often point out that this definition is never realized in fact. No state can afford to ignore

3. Sovereignty

a. In fact

the outside world entirely; it must yield to pressures, or resist them, and in either case its response demonstrates that it is not immune to outside action. Nor is complete supremacy in internal matters attainable. The Roman Caesars, absolute though they were with regard to most of the population, were obliged to deal tenderly with the palace guard. Nevertheless it is obvious that a state must have a substantial independence of outside control or it will become a mere possession of the intruding state; it is obvious too that it must have no permanent rival for authority within its boundaries, or it will fall into civil war and anarchy.

b. In law This is as far as the outside observer can go in a factual description of sovereignty. The modern state itself, however, carries on the characterization of sovereignty, making the idea basic to its legal definition of itself. The argument begins with the proposition that sovereign power is indivisible. If it were divided, it would cease to exist. Where sovereignty resides in the whole people, as in the United States, it is therefore necessary to consider the people, not as an arithmetical sum of individuals, but as a "collective person," an artificial rather than a natural person, a legal corporation. This idea is a self-confessed fiction, but it offers advantages in dealing with the problem of law. In order to have a legal system, it is necessary that there be some single authority from which it derives, and which assigns to it the character of law. Only the fictitious sovereign fills this need.

**c. Law
and
morality**

If law emanates solely from the sovereign, it follows that law is the will of the sovereign, and that nothing the sovereign does not will is law. Consequently a sharp distinction must be drawn between morality and law. The sources and sanctions of moral rules are quite distinct from those of law. This is not to say that moral criticism of rules of law may not be just or profitable; it is merely to say that the rules of law continue to be rules of law despite such criticism. Herod's order for the slaughter of the innocents was no doubt immoral, but it was also undoubtedly law. The moral opinions of mankind are so various that the state cannot possibly conform to them all; and it cannot allow the valid-

ity of its enactments to depend upon the appeal they make to the consciences of the citizens. In addition to this practical objection to the incorporation of a moral content in the definition of law, the political scientist has another. He seeks to describe and classify all political behavior; he is interested in whatever exists, whether or not he approves of it. His subject of study would disappear, and all hope of a science of politics with it, if he abandoned the scientific for an ethical point of view. It is therefore accurate, if unkind, to say that law is the arbitrary will of the sovereign, and sovereignty is the capacity to make law by an act of will.

But if the sovereign is a legal fiction—and in jurisprudence it is just that—it will not be true that the sovereign directly makes the law. Rather, the government, our fourth element in the composition of the state, makes law on behalf of the sovereign. The government is that organization created by the sovereign—and here again we are dealing in fictions—to formulate and execute the will of the sovereign. It consists, therefore, of offices carrying powers and duties, and of officers chosen in such manner as the sovereign directs to execute those powers and duties.

In such fashion does the modern state describe itself. Taking as its point of departure the undeniable fact that states possess a rough and imprecise power of self-direction called sovereignty, and that this power is exercised through the government, the state erects a complete and tailored system of thought in which sovereignty becomes absolute, indivisible, and the source of law. This is done by the plentiful use of fictions, but the existence of these fictions is after all one of the facts in the situation.

POLITICAL VALUES

Although the state does not recognize that its power is conditional upon its compliance with any set of moral standards, such standards have been applied to the state as well as to all other human activities. Only a few, however, have received general acceptance in the historical tradition of western Europe in which America shares. These consist, for the most part, of the ideas

4. Government

underlying the American Declaration of Independence (1776) and the French Declaration of the Rights of Man (1789).

**Political
justice**

The first test by which the state is judged is that of justice. All agree that the state should be just, but the definition of justice is another matter. The Western tradition has partially supplied a content to the idea of justice. All governments derive their just powers from the consent of the governed, wrote Thomas Jefferson in the Declaration of Independence, and the consent of the governed is very generally regarded as the first element in political justice. Today this means that all adults, men and women, unless disqualified by some individual fault or incapacity, should participate in choosing their governors and controlling their actions.

**Legal
justice**

Another element of justice is suggested rather vaguely by the expression derived from the Greek philosopher Aristotle (384-322 B.C.), "the rule of law." The just state should practice "the rule of law"; that is to say, it should make no discrimination among its citizens but should treat all impersonally and impartially. The framers of our national constitution forbade bills of attainder and ex post facto laws, and other provisions of that instrument and of the state constitutions single out and forbid other kinds of discriminatory treatment. By itself, however, the "rule of law" does not yield a substantial content for the idea of justice, for an oppressive law might be applied impartially. It has also been argued that the uniform treatment for which this rule stipulates does injustice rather than justice, on the ground that no two problems are exactly alike, and to treat them alike is therefore unfair.

Equality

Implied in the idea of consent and the idea of the rule of law is the doctrine of equality, another political value recognized in the Declaration of Independence. The doctrine of equality does not say that all men are equally tall, or equally strong, or equally wise, or equally rich; it merely says that no man should occupy a privileged position because he is taller or stronger or wiser or richer than his neighbor. The idea was summed up by the English philosopher Jeremy Bentham (1748-1832) in the maxim,

"Each to count for one and none to count for more than one."

A closely related political value is liberty. This word has been given as many different meanings as justice. Some would define it merely as the privilege of self-government through democratic processes; some define it as an immunity, partial or complete, from public control; some believe that it is a moral capacity for personal self-direction which must be painfully acquired by the individual, perhaps with the assistance of the state through education or other means. It is sometimes said that equality and liberty are inconsistent goals, but there does not seem to be any necessary contradiction between them. Whatever liberty may be, it cannot exist for a man who is subjected to another, and so equality seems to be a precondition for the realization of liberty.

Liberty

A liberty which is highly prized is freedom of worship. This is usually taken to mean not only that the individual should be free from all coercion in religious matters but also that church and state should be rigidly separated and no particular faith be given special privileges by the state. This ideal has triumphed in the two Americas but has not had complete success in Europe.

Religious freedom

Freedom of speech is another important liberty. This liberty is esteemed not only because of its value to the individual but also because of its advantage to the state. The democratic government which is implied in the principle of consent is possible only when the people have access to full information and a variety of points of view.

Free speech

In addition to imposing these restrictions on the state in its action toward citizens, public opinion demands certain services from the state. Protection from foreign enemies, and from the unlawful attacks of fellow citizens, comes to mind at once. For a period of Western history—perhaps from 1830 to 1870—it was widely thought that this duty of protection was the only service the state owed. More recently, however, the idea that the state owes cultural benefits, such as education, and that it should alleviate the lot of the poor and unfortunate, has become prevalent. In the great depression of 1929 every major state accepted the

Duties of the state

responsibility of maintaining the economic well-being of its whole society. Today it appears that the public expects as a matter of right that the state will deal with any problem for which ordinary methods appear to be inadequate. Businessmen demand tariffs, loans, or subsidies; farmers want loans, benefit payments, and guaranteed minimum prices; workers seek minimum wages—and this only opens the list.

POLITICAL PHILOSOPHIES

The political values just described do not sum up into any compact philosophical system. There are, however, a number of such systems which have been advanced to explain the proper character and function of the state. We shall examine here those which have played an important part in recent history.

Individualism

Individualism is a point of view which appeared in England in the seventeenth century—the century of John Locke—and by the nineteenth century had become so widespread as to influence profoundly English and American thought. It found its fullest expression in Herbert Spencer's *Social Statics* (1850). According to Spencer, each individual is, so to speak, the center of a moral universe of rights and duties. Every individual owns himself, and has a moral right that this ownership shall not be infringed by others. He owns also whatever he has created by his labor. The earth and its natural resources have been supplied by God for men to appropriate, and a man acquires property by thus appropriating the fruits of the earth through the expenditure of his labor. From this it follows that no man can own the earth itself, or unimproved natural resources, because he has not created them by his labor and because such ownership would frustrate the equal opportunity of access to natural resources which God intended all men to enjoy. So much for rights. On the side of duty, Spencer recognized two obligations—to refrain from aggression against the natural rights of others and to keep one's contracts. Applying all this to politics, Spencer argued that a man can incur political obligations only with his own consent, when he voluntarily enters into the state; that he enters the state

only to protect his natural rights to person and property; and that the state cannot properly undertake any other function, or levy taxes for any other purpose.

A number of criticisms have been leveled against this scheme. The moral duty of man is too narrowly defined to satisfy Christianity or indeed any established religious system. On the practical side, individualism assumes that a society which falls very little short of anarchy is capable of surviving. That is an extension of the laissez-faire assumption of classical economics, the belief Adam Smith (1723-1790) expressed in his famous figure of the "unseen hand" which will cause everything to come out right if men will only abandon the economy to the play of "natural" forces and refrain from meddling. Neither the ideas of Smith nor those of Spencer have been given a trial, and it seems unlikely that any state will ever have enough confidence in the "unseen hand" to make such a trial.

Anarchism is a doctrine even more extreme than individualism. The anarchist makes liberty his sole principle. Political organization is evil because it practices coercion; every man should be completely free. This assumes that some other principle could be substituted for force as the basis for social organization; and indeed the anarchist believes that force introduces disorder rather than order into society—once the state, the institutionalization of force, disappears, a spontaneous free coöperation of men will appear. What the alternative principle is which is to replace force depends upon the school of thought to which the anarchist belongs. The Englishman William Godwin (1756-1836) believed that reason would teach all men to deal justly with their fellows; the French anarchist Pierre Joseph Proudhon (1809-1865) believed that a fully developed science would enable men to solve all problems without resort to force; the Russian Prince Kropotkin (1842-1921) relied upon an instinct of sociality which was at present thwarted by the state but would at once take command of society if the state were overthrown. Many other schools of thought agree with the anarchist that there is some natural organizing principle of justice in the uni-

**Anarch-
ism**

verse, but they do not have the same confidence in their schemes that the anarchist has in his.

Collec-
tivism

Persons who—most often mistakenly—fancy themselves to be individualists sometimes use the term “collectivism” to describe any political philosophy with which they disagree. This usage embraces so many conflicting systems of thought that it is little more than a term of abuse. More properly, the word is reserved for the point of view which A. V. Dicey characterized as collectivism when he introduced the word into English in his *Law and Public Opinion in England* (1908). According to Dicey, legislation in England from 1830 to 1870 had been powerfully influenced by the spirit of individualism; but after 1870 a collectivist philosophy prevailed. This new point of view was in sharp contrast with individualism. Whereas individualism taught that the state should exist only for police purposes, the collectivist would use the state actively to promote the public welfare in any way which promised betterment. To this idea Dicey attributed public education, restriction of the labor of women and children in factories, workmen's compensation laws, inspection and sanitation laws, and other types of social legislation.

So collectivism leads to the idea of the “welfare state” as opposed to the “police state” of individualism. As thus defined, collectivism breaks up into a number of distinct and even rival schools of thought, which agree on the end to be achieved but differ sharply on the means for achieving it. “Empirical collectivism” is the piecemeal method of dealing with particular problems as they arise; this, of course, is the method of the modern state. In opposition to empirical collectivism are schemes which would supply a single remedy for all social ills, usually a reform in fiscal or monetary policy, like the Townsend plan and the social-credit philosophy which flourishes in the Canadian province of Alberta. Socialism as taught by the American Socialist party, the British Labor party, and the Canadian Commonwealth Federation seeks to cure economic and social ills by instituting public ownership, first of the heavy industries and later of other

manufacturing establishments. Socialists seem not to believe that public ownership of agricultural land is necessary.

In sharp contrast to collectivism is the political philosophy of Marxism. Marxism is a term sometimes equated to communism, but this identification is likely to be misleading, for it suggests that Marxism is the exclusive property of the Communist parties, the parties affiliated with the Third International (1919-1943), and this is not true. One of the parties originally affiliated with the First International Workingmen's Association (1864-1873) still survives; this is the American Socialist Labor party. This party, the Social Democratic parties associated with the Second International, which was founded in 1889 and reconstituted after the First World War as the Labor and Socialist International, the Communist parties of the Third International, and the group called Trotskyists, are all Marxist, although each group denies the authenticity of the others.

Marxism is the philosophy evolved by Karl Marx (1818-1883) and Friedrich Engels (1820-1895). It differs from the philosophies heretofore described in that it professes to be a scientific rather than an ethical view of society. It undertakes to report the inevitable rather than to exhort to the good. It is at bottom, therefore, an interpretation of history. This interpretation makes use of the intellectual tool devised by the German philosopher Georg Wilhelm Hegel (1770-1831), the dialectic. This purported to be a key to the entire universe, but its application in the field of logic is the easiest to explain. According to Hegel the ordinary logician made a mistake in applying the principle of polarity, the principle which divides every problem into two parts, Yes and No, or white and not-white. The logician assumed that this opposition or contradiction was final; but, said Hegel, this freezes the universe, makes it static. Actually, the universe is in perpetual motion, and what is needed is an intellectual tool which moves and keeps pace with the universe. Such a tool was the dialectic. Hegel recognized the principle of polarity; the first proposition, the thesis, does indeed give rise to its opposite, the

Marxism
1. Marxist
parties

2. Deriva-
tion

antithesis. But this is not the end of the line. Logic is a dynamic process, and therefore out of the opposition of thesis and antithesis emerges a new and higher truth, the synthesis. Hegel's *Logic* begins with the thesis Being, which generates its opposite Not-Being. From this contradiction emerges the synthesis which embraces both thesis and antithesis, Becoming. The process does not stop even here, for Becoming serves as a new thesis which generates a new antithesis and yields a still higher synthesis. So the *Logic* builds in an orderly way up to God.

3. Dialectical materialism

Hegel was an idealist; that is, he believed that true existence belongs to the abstract and ideal rather than to the concrete and material. Marx and Engels took over the formal machinery of the dialectic, but the content they put into it was material rather than ideal; consequently, they called their scheme dialectical materialism. They argued that the basic stuff in the universe is material; it is material facts that work themselves out in triangular fashion through thesis, antithesis, synthesis. In human society the material stuff is the economic relations involved in production. These are the causes of all social institutions and all social events. Law, the family, the church, the state, history—these are all determined by the economic foundation of society. That foundation changes in response to the law of the dialectic. In recent history an agricultural society, feudalism, which practiced production for use, had been overthrown by a new capitalist society based on commerce and production for profit. When the economic foundation changed, the social institutions underwent a corresponding change; the state passed out of the hands of the feudal lords and into the control of the capitalists. But history does not stand still. Just as the feudal society, the thesis, generated its own opposite, the capitalist society, so capitalism would generate its opposite, a communist society. The driving force in history thus appears as class antagonism and class struggle. The communist society, however, would be the final stage in history, because it would be a classless society. The laboring class or proletariat, which would overthrow the capitalist class, would differ from the earlier victorious classes in that it

did not represent a new technique of exploitation and therefore would not generate a new oppressed class to destroy it. The state, being merely an expression of class dominance, would no longer have anything to do; in the language of Lenin (1870-1924), it would "wither away."

Marx and Engels scoffed at what they called Utopian socialists, who believed that it was possible to persuade people to become socialists and to utilize the state in order to establish socialism. The socialists believed that human will was capable of instituting a new society; but actually, said Marx and Engels, this could come only as the result of an inevitable historical process of class struggle. Moreover, the socialists completely misunderstood the role of the state in thinking that it could act as a free agent in changing society; the state was a reflection of the present class society and could not act against it.

There were a number of leaders and philosophies involved in the revolutionary movement in nineteenth-century Europe. Anarchism, headed by the Russian Michael Bakunin (1814-1876), was the chief rival of Marxism. Anarchism has not been important since the First World War. Marxism has had an involved history. The Social Democratic parties set up in the latter part of the nineteenth century were Marxist and were purportedly revolutionary. Since they believed that wars were for the exclusive benefit of the capitalist class, they were pacifist, and urged international coöperation by the working class to prevent wars. But when the First World War came, nationalism proved stronger than Marxism, and all these parties loyally supported their respective governments. They largely abandoned their revolutionary professions, and in the republics which followed the war were the strongest supporters of legality and constitutionalism. This, however, does not hold true for the Social Democratic party of Russia. The leader of the Bolsheviks, the majority faction in that party, was Vladimir I. Lenin (1870-1924). Lenin succeeded in using the party as a revolutionary instrument for the seizure of power in Russia in 1917. To distinguish his party from the Social Democrats, he gave it the name of Communist

4. Role
of the
state

5. His-
tory of
Marxism

party. In 1919 he founded the Third International to sponsor revolutionary parties over the world. After the death of Lenin a struggle for power occurred in the Soviet Union between Stalin and Trotsky. Stalin insisted that it was possible to build a communist society in Russia alone; Trotsky, that it was necessary to revolutionize the whole world simultaneously. Trotsky was exiled in 1929, and became the leader of a numerically negligible Marxist group; he remained a source of discomfort for the Soviet regime until his assassination in Mexico in 1940. The Trotskyists charge that the Soviet Union has abandoned Marxism and established a new reactionary state. Official Soviet spokesmen, on the other hand, insist that it is necessary to keep the state alive as an instrument of self-defense as long as there are hostile states in the world which threaten the Soviet Union.

Fascism

"Fascism" is a term applied to the teaching of both the Italian Fascist party and the German National Socialist party. It is not correct to say, as many do, that fascism came into being as a defense against communism. It is true that both in Italy and in Germany the support of wealthy industrialists, financiers, and landowners was necessary to the success of fascism, and this support was gained by the promise to destroy Marxism. But the numerical strength of the movement came from the lower middle classes, which were being deprived of economic independence by the development of large-scale manufacturing and merchandising establishments, and from this point of view fascism was a protest against capitalism. It was never a successful protest, for the leaders joined forces with big business and themselves became capitalists. This betrayal made necessary the suppression of all democratic institutions and the adoption of devices to divert the masses from their grievances. Among these devices were nationalism, militarism, and anti-Semitism. The fascist state, then, can accurately be described as a partnership between big business and a political machine of adventurers who shrewdly capitalized on the economic distress of the lower middle classes and to a lesser degree the peasantry.

Since fascism was essentially an opportunist movement, it had

no systematic philosophy. In general Italian fascist doctrine agreed with the contemporary arguments of the National Socialists in Germany. Both repudiated the materialism of Marxism and called themselves idealist philosophies. Not the material, but the idea, the spirit, was the decisive force in history. The function of the individual was to dedicate himself to this ideal. The ideal was, in the case of Mussolini, who dreamed of reviving the Roman Empire, the Italian state; in the case of Hitler it was a biological concept, German or Nordic blood. The sacrifice of the individual to this ideal was considered justifiable because he was only a part of a larger whole, the state or the race, as the case might be. He derived his being and his meaning from this larger whole and found self-fulfillment in surrendering himself to it.

On this basis a convenient contrast can be drawn between individualism and collectivism on the one hand and fascism on the other. The first two use the state as a means to an end, the end being the benefit of ascertainable human beings. In fascism, on the other hand, the individual human being is the means, and the end to be served is an abstraction, the state or race. Anarchism cannot be included in this analysis because it has no use for the state, either as means or as end; nor can Marxism be included, for the Marxist thinks that the state has a historically necessary role, but not a moral one.

**Systems
compared**

If one were to attempt to define the philosophy dominant in the United States, he might call it empirical collectivism, with overtones of individualism. But this description would not be quite accurate, for it assumes that the legislation characterized as collectivist was adopted because the legislators believed in a particular philosophy. The fact is, however, that in most cases the legislation was adopted merely because of pressure from politically influential groups, which were themselves concerned with private interests rather than the general welfare. There is no need to attribute this process, which goes on in every society, to any particular philosophy.

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CHAPTER 2

TYPES OF STATES AND GOVERNMENTS

The Classification of States—The Residence of Sovereignty—The Territorial Organization of Government—The Relation of Governmental Organs

THE CLASSIFICATION OF STATES

All states are alike in possessing population, territory, sovereignty, and government. They differ from each other, however, in many less vital respects. Attempts have been made, with imperfect success, to establish general types or classifications under which states can be grouped. One analysis is in terms of the residence of sovereignty—whether power belongs to one man or is shared among a few or among many. Other classifications turn on the structure of the government. Here it may be a question of the territorial organization of the government—whether the state is unitary or federal in form. Or the classification may be in terms of the character of the governmental form—whether the government is absolute or representative, and, if the latter, whether or not it practices a separation of legislative and executive powers.

THE RESIDENCE OF SOVEREIGNTY

The ancient Greeks recognized three "simple" forms of states. Political power might rest in the hands of one man, in which case the form of government was an autocracy—we are more accustomed to call this form absolute monarchy or dictatorship; or power might be in the hands of the few, in which case an oligarchy or aristocracy was the form; or it might rest with the many, in which case democracy was the form. To these three

Simple
and
mixed

simple types the Greeks sometimes added a fourth, the "mixed state," which was said to be a compound of monarchy, aristocracy, and democracy. In the eighteenth century the British constitution, in which power was in the hands of King, Lords, and Commons, was called a mixed state and was widely praised as the best possible form of government. The government of the United States, with its President, Senate, and House of Representatives, was patterned after the British model; but it is hardly necessary to say that our government is a democracy rather than a mixed state.

**Historical
occurrence**

It would not be true to say that at a given stage of human history only one of these forms can exist. Nevertheless, it does seem that one form may be more appropriate than another to a given society. Autocracy is likely to be found among nomadic peoples whose way of life makes military discipline necessary; it occurred also in the great slaveholding societies of the ancient world. The city-states of Greece and the trading cities of the late Middle Ages and modern times—those of Renaissance Italy, the Netherlands, and Germany—afford many examples of aristocracy. The feudal system was in essence aristocratic, for the king was little more than a puppet of the great landowners. Democracies appear on three occasions in history: through the overthrow of the aristocracy by the ordinary citizens in a city-state, as in ancient Athens; as a consequence of the industrial revolution in western Europe in modern times; and in countries where an abundance of cheap land makes men substantially equal, as in the period of settlement in America, Australia, and New Zealand.

THE TERRITORIAL ORGANIZATION OF GOVERNMENT

**Unitary
state**

We give the name "unitary state" to a state in which the sovereign expresses its will through a single, integrated governmental system. Every governmental unit and every governmental agency in the country is an agent of and is accountable to the national government. France and the United Kingdom of Great Britain are familiar examples of unitary states.

A confederacy can be defined as a league of sovereign states. Even though there may be some permanent international organization for consultation or joint action among the states, the relationship between the states is a treaty relationship rather than one of law. The member states remain sovereign.

Confederation

This was substantially the situation of the United States under the Articles of Confederation. Among the weaknesses of this type of union was the fact that the central organization could not act directly on the citizens of the member states; it could not tax them, or conscript them, or punish them for crime. The framers of the constitution of 1787, to obviate this difficulty, established a national government coördinate with the state governments; each, in its assigned area of competence, could act directly on the citizens. The citizens themselves had two citizenships, one in the United States and one in the member state to which they belonged.

Federation

The framers called this system a "confederate republic," and apparently did not feel that they were establishing an entirely novel form. But so we view it today, and we call it a federation or federal state. Until the Civil War, to be sure, the states'-rights party regarded the Union as a mere confederation, with the states retaining sovereignty and able to withdraw at will. But the point of view which prevailed was that of Daniel Webster and Abraham Lincoln, who argued that the federal Union was a single state, created by the sovereign people of the United States as a collective body. By the constitution this sovereign people created a national government and delegated to it certain powers; by the same instrument the sovereign adopted the thirteen states as parallel agencies of government and delegated to them other powers. The system is a single sovereign state, but the sovereign acts through two sets of governments simultaneously, the national government at Washington and the governments of the states.

1. Modern law

So a federation, or, as we call it today, a federal state, resembles a unitary state in that it has a single sovereign; but it differs from the unitary state in that it has not one but a plurality of

governments, a national government and a series of "state" governments. It resembles a confederation in having a plurality of governments, but since it is a genuine state it has only one sovereign whereas a confederation is a treaty relationship between sovereign states.

The federal form became very popular in the nineteenth century. Mexico, Argentina, and Brazil are federations, and Canada and Australia are organized on a federal pattern. It seems to be a law of politics, however, that if a federation survives over a long period of time the national government becomes stronger, eclipsing the lesser governments. Perhaps, indeed, this is necessary for survival.

2. Division of powers

In dividing governmental powers between the national and "state" governments, two formulas are possible. Certain powers may be enumerated as belonging to the state governments, and the remaining powers, the "residual powers," assigned to the national government. Or certain powers may be enumerated as belonging to the national government, and the residue assigned to the states. Canada follows the first of these plans; the United States, the second. Various provisions of our constitution—chief of them Article I, Section 8—enumerate powers granted to the national Congress. The Tenth Amendment, which was adopted to clarify the distribution of powers, states that: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." This language has given rise to the name "delegated powers" for the enumerated powers of the national government. The powers of the states are sometimes spoken of as "reserved powers"; but because this term suggests—as it was intended to do—the states'-rights philosophy, they are more often called residual powers. This latter name makes it clear that the powers of the states, like those of the national government, are derived from the national sovereign. The national sovereign, after defining the grant of power to the national government, prohibits certain actions by the states, and confers the residue of power upon the states.

3. Delegated and residual

The delegated powers of the national government fall into two groups: the express powers and the implied powers. Express powers are those expressly named in the constitution: the powers to tax, to borrow, to coin money, to regulate commerce with foreign nations and among the several states, to establish a post office and post roads, to declare war, etc. Because they are recited in this manner, they are sometimes called enumerated powers. The implied powers are granted by the last paragraph of Article I, Section 8, the "necessary and proper" clause, by which Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or office thereof." The "necessary and proper" clause does not open up new fields of national action. It merely supplies supplementary means for accomplishing the purposes recited in the express powers. So it might be said that the express powers define the ends to be achieved by national action, and the implied powers enlarge the means available to achieve those ends.

4. Ex-
press
and im-
plied

It will be observed that Congress is given the power to pass all laws necessary and proper for carrying into execution the express powers of Congress, and also "all other powers vested by this constitution in the government of the United States, or in any department or office thereof." The power to make treaties is given not to Congress but to the President and the Senate; but Congress has an implied power to pass laws putting treaties into effect. Article III of the constitution places within national judicial power "cases of admiralty and maritime jurisdiction"; this means that Congress has an implied power to enact laws to be followed by the courts in maritime affairs.

The leading case in which the Supreme Court recognized an implied power of the national government, over the vigorous protest of the states'-rights party, was *McCulloch v. Maryland* (1819).¹ Chief Justice Marshall, who gave a strong national bias to our constitutional law, ruled that Congress had the implied

5. Growth
of im-
plied
powers

¹ 4 Wheat. 316.

power to charter the Bank of the United States, because such a bank would assist in carrying out the express powers of taxing, borrowing, and maintaining an army and navy. Since that date the field of implied powers has expanded spectacularly. Under the power to carry on a war, Congress has conscripted the men and regulated closely the entire life of the nation. The most extravagant case of an implied power, however, is probably the federal narcotics legislation. Congress has no delegated power to protect public health by regulating the use of narcotic drugs; it has, however, the power to tax, and on the pretext that such regulation is necessary to collect a tax Congress has restricted the handling of narcotics to authorized persons and has forbidden the dispensing of such drugs except for medicinal purposes. The Supreme Court has upheld this police legislation as necessary and proper to the enforcement of a tax of a dollar a year on persons who produce and distribute narcotics, and has called the whole thing a revenue measure.

6. Resulting powers

Ordinarily only two types of national legislative power are recognized, the express and the implied. Justice Story, however, in his *Commentaries on the Constitution* (1833) suggested a third sort, which he called "resulting powers," "arising from the aggregate powers of the national government." They were so named because they were "rather a result from the whole mass of the powers of the national government, and from the nature of political society, than a consequence or incident of the powers specifically enumerated." He argued that a sovereign state necessarily possesses certain powers by virtue of its mere existence, without regard to any legal grant. This idea that the national government possesses "inherent sovereign powers" has received some countenance from the Supreme Court, in the statement that Congress can acquire foreign territory or exclude aliens without constitutional authorization. The Court has even ruled that the limitations of the constitution do not restrict Congress in the field of foreign relations.² But such a doctrine is contrary to the established legal theory, abundantly recognized

² *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

in other decisions of the Court, that not the national government but the people is sovereign; the national government possesses only those powers conferred upon it by the people through the medium of the constitution. It is probably wiser to regard the power to acquire territory or to exclude aliens, and other supposed examples of inherent or resulting powers, as implied powers arising from the constitutional grant of one or more express powers.⁸

In everything that has been said thus far, it is assumed that the national and state governments are coördinate, with neither superior to the other. This is a general rule with two exceptions, one legal and one practical. The legal exception is created by the "supremacy clause" in Article VI of the constitution, which states that "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Here the framers were contemplating, among other things, the problem of concurrent powers. Some of the powers assigned to the national government or to the states are exclusive; the field is clearly assigned to one government, and the other cannot invade it. So, for example, only the national government can declare war. But in many cases powers are concurrent; the area of action is one with which each government may legitimately deal. For example, both the national government and the states have the right to tax; likewise there is an overlapping area in which the national government may regulate commercial practices under its power over interstate commerce, and the state may also act under its residual powers. The supremacy clause provides that if in such a case the national constitution or a national law or treaty conflicts with a state constitution or law, the former shall prevail.

7. Supremacy clause

⁸ See W. W. Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis and Company, New York, 2nd ed., 1929), i, 89-93.

8. Supreme Court the arbiter

The practical advantage enjoyed by the national government over the states arises from the fact that the governmental agency which undertakes to settle constitutional disputes between the two is itself a national organ, the Supreme Court of the United States. Not in all, but in many cases the Supreme Court has ruled in favor of national power, just as a state court would have decided in favor of the states. The strong nationalistic tendency given to constitutional law by John Marshall has deepened in the hundred-odd years since his death.

THE RELATION OF GOVERNMENTAL ORGANS

Direct and representative democracy

Whether the state be unitary or federal, there is a further choice as to the internal governmental organization. A great variety of non-popular governments might be named—aristocracies of many sorts, limited monarchies, despotisms. But more important for our purposes are popular governments, in which the officers are chosen by and are accountable to the people. In the city-states of the ancient world the only form of popular government known was direct democracy, in which the assembled citizenry acted as the legislature of the state. This is not feasible in a large state; consequently, the practice of representation developed in the feudal states of the Middle Ages. When the nobility and clergy ceased to have any important power, the representatives of the people—in Great Britain, the House of Commons—became the real legislative organ. Direct democracy exists today only in local government, as in the *Landsgemeinde* in five of the twenty-two Swiss cantons, and in the town meeting which is still found in the New England states. The initiative and referendum, however, which originated in Switzerland in 1895 and has been widely adopted, may be called a modern substitute for direct democracy.

Functions of government

Any government, whatever its form, engages in activities of two sorts, legislation and administration. Legislation is the formulation of policy: war or peace, taxation, regulation. Administration is the execution of the policy formulated by the legislative organ. From this point of view, not only what we ordinarily

think of as the executive branch, but the Army and the courts as well are engaged in administration, for it is their task to make concrete applications of the general policies stated in the law enacted by the legislature.

Since the administration applies the law made by the legislature, it might be called a mere instrumentality of the legislature. Accordingly, the normal relation between legislature and executive might appear to be the dependence of the latter on the former, with the legislature choosing and removing the executive at will. This relationship has been practiced by revolutionary governments, as during the critical years of the French Revolution, 1793-1794. But in general modern governments have followed, in some cases in substance, in some cases only in form, the pattern of medieval government, in which the king held the executive power and was in most respects independent of the legislature. With the medieval king transmuted into an elected President, this is the so-called Presidential form of government practiced in the United States and other American republics. The Presidential executive is made legally independent of the legislature. He is chosen directly or indirectly by the voters; he cannot while holding the Presidential office be a member of the legislature; he holds office for a fixed term of years, and is not removable by the legislature except by the extraordinary process of impeachment; he is granted control of the executive power by the constitution.

Relation
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The British system represents the medieval monarchy in a state of decay more advanced than existed when the constitution of the United States was framed. The King continues to exist, as a nominal chief executive; but actual control of executive functions has been taken over by the House of Commons, and entrusted by the House to what is called the Parliamentary executive as opposed to the Presidential executive. After a general election, which normally takes place every five years, the King requests the leader of the party which has won a majority of the seats in the House of Commons to form a ministry. The majority leader thus becomes "Prime Minister"; he takes the executive

Parlia-
mentary
executive

office of First Lord of the Treasury and frames his cabinet—a slate of supporters, most of them from the House of Commons, sometimes a few from the Lords—to head various executive departments. These cabinet members are appointed by the King as a matter of course. The Prime Minister and his cabinet thereafter have two duties: administering the executive branch of the government and supplying leadership to the House of Commons in the formulation of policy. (Since 1911 the House of Lords has had no power finally to reject the measures of the House of Commons; it can suspend the enactment of a money bill for thirty days, and any other measure for two years.) The cabinet assumes a “ministerial responsibility” of two sorts. The policies of the cabinet are agreed upon by all the members in consultation, and all accept responsibility for them. Furthermore, the cabinet as a body is responsible to the House of Commons. If the House disapproves of an important cabinet policy and rejects it, or if the House passes a vote of lack of confidence in the government, the cabinet is required by constitutional custom to resign. If when this occurs an opposition to the cabinet has taken shape, and commands a majority of the House, the King invites the leader of the opposition to form a government. Or, at the request of the outgoing Prime Minister, he may dissolve the Parliament and call a new general election, even though the five-year term of Parliament has not expired.

**Pros and
cons**

This system used to be praised as the most democratic of all possible arrangements. It required the administration to justify every measure, and exposed it to the necessity of resignation or to the hazard of a general election if it failed to retain the confidence of the House of Commons. Nevertheless, the history of the last fifty years has shown certain shortcomings. It is true that under the Parliamentary system a popular vote can be forced on any question, and thus the electorate can decide on the issue at stake. But as a matter of practical fact, a popular vote is not likely to be forced on any issue. First of all, consider that the Prime Minister, as the leader of the majority party, can usually depend upon the loyalty of a majority of the members

of the House. If this resource fails, it is true that the House of Commons has the power to turn out the cabinet; but it is equally true that the Prime Minister can turn out a recalcitrant House of Commons, by forcing a general election in which each member will be obliged to defend his seat. A House of Commons is not likely to invite a dissolution by defying the Prime Minister. But the Prime Minister has still another advantage, in that he can choose the time of election. By provoking a general election at a tense period in foreign relations, when it seems unwise to change the immediate leadership, he may win a popular mandate for another five years, as Stanley Baldwin did in 1935. So, although it is usually said that the Parliamentary system means the responsibility of the executive to the legislature, the fact seems to be executive control of the legislature.

Another feature of the system is often overlooked. The King or other nominal executive in the Parliamentary scheme normally has no real power. But under special circumstances he may play a decisive part. The King of Italy brought Mussolini to power; President Hindenburg of the German republic assisted in bringing in Hitler; the President of the French republic forced out Prime Minister Reynaud in 1940 and brought in Pétain. It is not unthinkable that the King of Great Britain might some day be able to intervene in politics. The danger that the nominal chief executive may usurp power seems particularly grave in a country with a multi-party system in which no party has a majority. Since he has no competitor supported by the legislative branch, the nominal chief may begin to exercise powers he was not intended to possess. It would be a mistake, however, to suppose that the Presidential system would fare better in a multi-party state. The President in a multi-party state will necessarily owe his election to a coalition of parties, which means that he will not be directly responsible to any. From the point of view of democratic theory, this is an altogether unsatisfactory situation. Furthermore, the close coöperation of legislature and executive which alone makes the separation of powers workable is dependent upon the existence of

a party bond between the President and the majority of the legislature.

The Parliamentary system has two undeniable advantages over the Presidential system. It guarantees harmony between legislature and executive, whereas the independence of powers in the Presidential system makes governmental deadlock possible and sometimes inevitable. Moreover, the Parliamentary system implies party unity and therefore produces a party discipline unknown in the Presidential system. Party discipline is necessary in order to give the voters a choice between alternative programs, a choice which the loose party organizations of the United States hardly make possible. On the other hand, in a two-party state the Presidential system has certain virtues which are lacking in the Parliamentary system. The President is chosen in a nation-wide election, at fixed intervals which cannot be manipulated; the Prime Minister, on the other hand, takes office merely as the leader of the majority party, and is able to precipitate an election to suit his own purposes.

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CHAPTER 3

LAW AND GOVERNMENT

**The Origin of Law—Systems of Law—Sources of Law
—Topical Analyses of Law—The Method of Judicial
Decision—Legal Remedies—Legal Persons—Evaluation**

THE ORIGIN OF LAW

One of the earliest problems of social life is the settlement of disputes. Among primitive peoples this is largely an individual matter; the disputants settle the issue between themselves. There may be recourse to violence, and relatives of the parties may then be drawn in. The blood feud is the consequence. Even when self-help and violence are practiced, however, there are likely to be in the background certain assumptions as to right conduct which are acknowledged by both parties. These conventional assumptions are the forerunners of law. **Self-help**

At a fairly early stage in social development, the community begins to intervene in disputes. The elders of the tribe act as a kind of arbitration tribunal, and decree justice as between the parties. There is still no regular machinery for public enforcement of the judgment. The victor in the arbitration is left to his own resources to secure satisfaction of the verdict; but if the loser fails to acquiesce, the community is likely to withdraw its protection from him. The next step is the establishment of compulsory public process for the execution of the judgment. When the public undertakes to enforce the judgment, it assumes responsibility also for making the rules which determine what the judgment shall be. When legislation and adjudication have thus come into public hands, the state also has come into exist- **Arbitration**
Government

Imperative theory of law

ence. Law consists of the rules enacted and applied by the state.

We have defined sovereignty as an essential element of the state, and have equated law to the will of the sovereign.¹ This point of view, which treats law as a command, is called the imperative theory of law. Other views, which attribute law to some other source than sovereign will—to God, or nature, or custom, for example—have been advanced, but they are less useful for the purposes of political description than the imperative theory.

International law

Sovereign states stand in much the same position in relation to each other as do disputants in a primitive tribe which has not developed the state form. There is no international public power which regularly imposes a settlement in case of dispute. But it is so wasteful and so dangerous to allow sovereign states to have recourse to self-help that international arbitration not unlike that supplied by the council of elders in the tribe has been resorted to, and efforts are being made to convert this type of intervention into a compulsory international jurisdiction.² If this occurs, a world state will have come into existence.

In terms of the imperative theory of law, there is today no such thing as international law, for there is no world sovereign to decree and enforce the law. There are, however, conventional assumptions as to right conduct between states which may be compared to the agreed-on principles of conduct found even among primitive peoples. States in their relations with each other do in some degree observe these rules, and when a rule is violated the aggrieved state makes a claim for satisfaction. Sovereign states have incorporated many such rules in their domestic law, and enforce them in their courts. The imperative theory of law explains this situation by saying that the principle has no legal standing until it has been incorporated in the law of the state in question. On the other hand, those persons who argue that there is a real international law prescribing rights and duties to states insist that, when a national court applies such

¹ See pp. 9-11.

² See chap. 5.

a rule, its adoption is a recognition of its previous legal existence as a rule of international law.

SYSTEMS OF LAW

The Western world has known two great legal systems. The Roman law, sometimes called civil law, which was codified at the order of the Emperor Justinian in the years 529-535 A.D., has been called the most complete and systematic jurisprudence the world has ever seen. It was revived after the decline of feudalism and was widely adopted; today it is the basis of the law of western Europe and of countries colonized from the Continent, as the Latin American states and the Union of South Africa. It has left an impress in Louisiana and California. The other great system is English law, sometimes called common law, which is practiced in England, the United States, Canada, Australia, and New Zealand.

Civil and
common
law

It is often said not merely that these bodies of law differ in that they prescribe different rules, but also that they are different methods of reasoning or argument. Because Roman law found expression in an exhaustive catalogue of rules, it is thought of as in a peculiar sense written law. The judges are supposed to play a minor role in this scheme, because the law has anticipated all problems and supplied solutions. Changes in the law are expected to be introduced only by legislative action. English law, on the other hand, was a slow growth, and is still growing. It has been called "unwritten," but more properly it is known as "case law," because the judges have recourse to earlier decided cases and use them as precedents in determining the applicable rule in the present situation. This contrast, however, exaggerates the difference between the two systems. In the Roman law system, the judges also study judicial precedents; and they are not so constrained by the written law as one might suppose. English judges, on the other hand, would not admit that the process they are engaged in is really legislative; like the Roman law judges, they feel that legislation is beyond their power.

Differences
1. Code
vs. case
law

2. Criminal justice

Perhaps the most significant difference between the two systems is in the field of criminal justice. English law requires the judge to maintain impartiality between the prosecutor and the accused, and it surrounds the accused, guilty or innocent, with certain safeguards. Roman law jurisdictions employ the jury in criminal cases, but they regard the judge as a police officer whose duty it is to participate actively in discovering the guilty.

3. Administrative courts

In the nineteenth century France adopted a practice which has been widely copied in Roman law countries and has sometimes been said to be another distinguishing characteristic of the civil law. A series of administrative courts, distinct from the ordinary courts of justice, was created to deal with non-criminal disputes between the citizen and the government. In countries practicing the English system of law, such issues between citizen and government as are justiciable have traditionally been dealt with by the ordinary courts. A. V. Dicey, who had more confidence in a system of ordinary courts than in administrative courts, used the term "rule of law" to describe the English system in his *Law of the Constitution* (1885). The fact is, however, that the British Parliament has in a number of cases given to administrative authorities the power to make conclusive judgments about the rights of individual citizens. These judgments cannot be challenged in the courts—a practice which has been criticized as a departure from the "rule of law." In this country administrative officers and administrative tribunals, such bodies as the Interstate Commerce Commission and the Federal Trade Commission, exercise what is called a "quasi-judicial" power granted by the legislature, making decisions which determine the rights and duties of citizens. But the Supreme Court has ruled that the Fifth Amendment, which requires the national government to observe "due process of law," and the Fourteenth, which puts a similar obligation on the states, include in the idea of due process what Dicey called "the rule of law." The legislature can authorize the administrative agency to make conclusive determinations of questions of fact—such as whether or not a given event actually occurred—as a jury does; but an

appeal to the ordinary courts must be permitted on questions of law—such as whether or not the event came within the provisions of a statute.

SOURCES OF LAW

Law, we have said, is created by the sovereign, acting through the government. Since various governmental agencies are engaged in formulating the sovereign will, it follows that there will be a number of kinds of law, or, as some people prefer to say, a number of sources of law from which the courts may derive rules to apply in particular cases.

The constitution, as the direct expression of sovereign will, is the first source. But the United States Supreme Court in interpreting the constitution has decided cases which now stand as precedents, and these are also a part of our constitutional law. Under some circumstances one or both houses of Congress, or the President, or conceivably another officer may be called upon to give a binding interpretation of the constitution, and this also becomes a rule of constitutional law. And, since we have state constitutions as well as a national constitution, each state has its own system of constitutional law.

Constitutional law

Another sort of law is the enactments of the legislature, whether the national Congress acting in the field of its delegated powers or the state legislature exercising such part of the residual power as the state constitution allows it. These laws are commonly called statutes. On the municipal level, the city council enacts ordinances on such topics as the state constitution or the state legislature authorizes.

Statutes

The term "ordinance" is most familiar on the level of local government. Chief executives, however, the President and governors of states, possess a legislative power which is also called the ordinance power.³ Where the constitution permits, the chief executive may issue a proclamation which has legally binding force. The President or governor may issue a proclamation declaring martial law in an appropriate case. A second source of

Ordinances

³ See pp. 192-193, 206.

the ordinance power is statutes. The legislature may authorize the chief executive to make rules in certain circumstances; these will be issued either as proclamations or as "executive orders." As the legislature finds it more and more difficult to establish detailed rules for all possible contingencies in the complex modern world, it tends more and more to confine itself to the establishment of a general policy and to authorize the executive to make executive orders applying that policy. This is done also in the case of inferior executive officers, such as department heads, whom the legislature authorizes to make "rules and regulations" carrying out the general provisions of a statute.

Treaties Treaties are declared by Article VI of the constitution to rank with the national constitution and national statutes as the "supreme law of the land." Treaties therefore have a dual status. According to the imperative theory of the nature of law, treaties have no legal standing between the United States and a foreign state. But they have legal standing within our own legal system, and their provisions will be enforced by our courts, because the constitution expressly makes them a part of our domestic law. Closely resembling the treaty is the executive agreement. The President has the authority from the constitution, as chief executive and representative of the United States in foreign relations, to make certain agreements with foreign states on his own initiative, without the concurrence of two-thirds of the Senate, which is required in the negotiation of treaties. Considerably broader than the President's constitutional power to negotiate executive agreements is that conferred upon him by statute. The Lend-Lease Act of 1941 authorized the President to conclude agreements for exchange of aid with the countries fighting the Axis nations. The Trade Agreements Act, first passed in 1934 and periodically renewed, authorized the President to reduce our tariff duties on goods from countries with which he concludes agreements granting the United States similar concessions in return.

Judge-made law Thus far no justification has been given for the existence of judge-made law in our system. Yet, as we have seen, the English

system of judge-made law is said to be the heart of our jurisprudence. After the Declaration of Independence, the various state legislatures enacted that existing English law should continue to be applied; and new states entering the Union have likewise adopted the English system of judge-made law. Although common law is sometimes used as a generic name to describe the entire system of English law, common law is in fact only one branch of the system. Equity is another of equal dignity, and admiralty law might be listed as a third. We can dispose of admiralty law at once. This is the legal system for maritime matters which was originally administered by the English Court of Admiralty; incidentally, it was an offshoot from the Roman law. In this country it is practiced only in the federal courts.

It was said above that the various states had adopted common law and equity as the basis of their jurisprudence. Congress has never done this for the federal courts, for it has no delegated power to adopt a general jurisprudence; it has authority to enact statutes only on the topics enumerated in the constitution. Consequently our national jurisprudence consists only of national constitutional law, Congressional statutes, treaties, and executive agreements, Presidential and administrative proclamations, executive orders, and rules and regulations, admiralty law, and such provisions of international law as the Supreme Court has adopted. Nevertheless some cases may be decided in the federal courts by the principles of common law or equity. This occurs when a case which would ordinarily be tried in a state court is brought into the federal courts because there is present some ground of federal jurisdiction, such as the "diversity of citizenship" clause of Article III of the constitution—the clause which permits the federal courts to try cases between citizens of different states.⁴ Under these circumstances the law

Law in
federal
courts

⁴ The constitution does not grant this jurisdiction directly, but authorizes Congress to confer it upon the courts. Congress has provided that the federal courts may try cases between citizens of different states if the issue involves a sum or value at least equal to \$3000.

Common
law and
equity

Their de-
velop-
ment

as interpreted by the judges of the state which would normally have jurisdiction of the controversy is applied.

In a sense common law is more basic than equity. Rights and duties are defined by common law, and certain remedies are afforded; equity offers supplementary remedies for the enforcement of these same rights and duties in certain cases.

The common law originally developed in the English courts of common law—the King's Bench, the Common Pleas, and the Exchequer. These courts began to function in the twelfth century. The King's Bench had criminal jurisdiction, and an extensive civil jurisdiction as well; the Common Pleas dealt with title to land; the Exchequer took cognizance of certain claims for money. Between them they developed a systematic jurisprudence, fairly complete but rigid and inflexible, by the end of the fourteenth century. This inflexibility was a cause for complaint. The common law courts took no account of "equity"—of claims which appealed to conscience but had no legal foundation. The trust, for example, was a device which had originated during the Crusades. A, about to go off to the wars, would convey his property to his friend B, with instructions to administer it for the benefit of A's wife and prospective widow, C. In such a case the common law courts held that B, since he received legal title, owned the property and owed no legal duty to C. Again, the common law took no account of fraud, but upheld conveyances of property which were fraudulently obtained. The King's Council sometimes intervened to do equity in such cases; by the fifteenth century such intervention had become a regular thing and was a monopoly of the Chancellor. The Chancellor, in addition to being chief legal officer, was in this period usually a clergyman and the King's chaplain; he called himself therefore "the keeper of the King's conscience," and he converted the Chancery into a court of equity where he offered relief for the hard cases in which the common law afforded no remedy. This affronted the common law judges, and they denounced the Chancellor as a usurper and a violator of law. He replied that he did not interfere with the rules or

process or remedies of the common law. The common law in its civil jurisdiction dealt with things; it gave relief by a declaration of title to property, or a judgment for money, to be executed by the officer of the court. Such actions *in rem*, actions dealing with things, were appropriate to the common law. The Chancellor acted only *in personam*, upon the person of the defendant. He did not meddle with legal title; he merely imprisoned the person of the defendant until the defendant was willing himself to do what was conscientiously right. The controversy between the courts of common law and the Chancery was eventually settled in the seventeenth century by a compromise which is expressed in two maxims. The first deals with rules of law: *Equity follows the law*. This means that equity recognizes the same system of rights and duties as the common law. Such an arrangement was possible partly because the common law expanded its conception of rights and duties to include ideas which previously were only equitable, as by adopting a law of fraud, and also because equity abandoned its attempt to enforce all obligations of conscience and settled down to a system of rules as stereotyped as the rules of common law. The second maxim deals with jurisdiction: *Equity acts only when the remedy at law is inadequate*. A plaintiff whose claim can satisfactorily be dealt with by a judgment *in rem*—a money award, for example—cannot claim relief from a court of equity. But if a judgment *in personam* is necessary for adequate relief—such as an injunction forbidding the defendant to inflict irremediable damage upon the plaintiff—the plaintiff may bring suit in a court of equity.

Their relation

In this country the courts of common law and equity have been for the most part amalgamated. The federal courts, for example, administer both common law and equity. In only six states are there courts which are confined to the administration of equity; and nowhere does the distinction run through the whole court structure. Nevertheless the two systems of legal rules remain distinct. In a case which traditionally fell within the jurisdiction of courts of common law, the judge applies

rules from the common law and follows the common law procedure, which usually includes jury trial. In a case in which an equitable remedy is demanded, the judge follows the rules of equity, and sits without a jury.

TOPICAL ANALYSES OF LAW

Just as a pie can be cut along any one of a considerable number of diameters, so the whole area of law can be analyzed in a number of ways. Some of these analyses are useful for one purpose, and some for another.

Substantive and procedural

All law is either substantive or procedural. Substantive law includes all the rules which define legal rights and duties, capacities and obligations. Procedural law consists of those rules which describe the way in which rights and duties are enforced. The right to recover money owed to one is a substantive right; the right to have a jury decide the facts is a procedural right.

Criminal and civil

Likewise all law is either criminal or civil. In this connection civil law means, not the Roman system of law, but simply non-criminal law. A crime is difficult to define. It is not enough to define it in terms of punishment, for some civil wrongs—failure to pay alimony, for example—may give rise to imprisonment. Another test sometimes offered turns on where the power of forgiveness lies; if it lies with a private person, as the divorced wife, the wrong is civil; if it rests only with the government, as by way of pardon, the wrong is criminal. But one can owe money to the state without committing any criminal action, so that here the obligation is civil; and yet the power of forgiveness rests with the state. If we combine the two tests, and define a crime as a prohibited action which cannot be forgiven by any private person, and which will give rise to fine, imprisonment, or other punishment, we have perhaps a working definition.

Public and private

In addition to the substantive-procedural and the criminal-civil analyses of law, we can distinguish law into types in terms of the area of social life involved. So public law deals with governmental activities and offices, and private law deals with

the relations of private persons. Private law can in turn be subdivided into a number of types which correspond to the kind of relations involved. Part of our private law is organized in terms of contract, a relationship voluntarily assumed and in which a "consideration" is involved. In contrast with contract law is tort law. A tort is a violation of an obligation imposed by law rather than one voluntarily assumed. The driver of an automobile is under an obligation imposed by law not to drive carelessly, and if he injures someone by careless driving this action is a civil wrong, a tort, for which he must compensate with damages. The action may also be a crime, as this illustration shows. In addition to contract and tort, we should glance briefly at the law of status. Certain relationships carry with them automatic legal consequences. The relations of husband and wife, parent and child, give rise to duties and rights which the law attaches to the status. The liability of the master (employer) for actions of his servant (employee) is a consequence of status. It has been suggested that the increase of such legislation as workmen's compensation acts, which make compensation by the employer for injuries suffered by the employee depend upon the fact of employment rather than the law of tort, foreshadows an increasing invasion of the law of contract and tort by the law of status. A fourth area of private law is property law, which is organized into a system of rules quite independent of the rules of contract, tort, and status.

Contract**Tort law****Status****Property**

THE METHOD OF JUDICIAL DECISION

Thus far we have attempted to explain law in political terms, attributing its origin to constitutions and statutes and glossing over the initiative taken by judges in making the law. But the fact is that constitutions and statutes have no meaning in the law except that assigned to them by the courts. What guides the courts in the task of shaping law from the available sources?

The English courts developed as early as the fourteenth century a conscious method of decision which forms the basis for

Use of precedents

English and American law. The basic principle is the rule of *stare decisis*.⁵ This means that a court confronted with a problem looks for precedents or analogous cases in the reports of earlier cases, and follows the legal principle laid down in such cases. Naturally, the analogy sought is in terms of a legal analysis of the situation rather than a factual analysis. The court first determines, let us say, that the problem involved is one in the law of contract, then that it deals with fraud in the general area of contract, and then that the fraud is as to the condition of the object sold. It makes no difference that the earlier case involved a pig and the present involves a cow. This means that some of the circumstances of the earlier case are unimportant. It is also true that the court may have made in the earlier case generalizations or observations which were extraneous to the particular problem presented. Such unnecessary remarks are called *dicta*,⁶ and are not considered binding under the rule of *stare decisis*. Only the holding of the earlier case—that is, the actual decision and the reasoning necessary to support it—constitutes a binding precedent.

Escaping
prece-
dents
1. Distin-
guishing
cases

The technique for escaping precedents is quite as important as that for following them. An earlier case may appear superficially analogous but may differ in some essential fact from the present one. The court then points to the difference and refuses to follow the earlier case; this is called distinguishing the earlier case. Or the earlier case may actually be on all fours with the present, but the court may be reluctant to follow the earlier case because it disapproves of the rule laid down there. The court then pitches upon some unimportant difference in the facts and distinguishes the two cases on this basis. The reasoning of the court in the earlier case may attach no significance to the peculiarity now relied upon as a ground for distinguishing the case, but the

⁵ *Stare decisis et quia non movere*: Stand on the decisions and do not disturb what is at rest. The rule of *stare decisis*, which applies to principles of law, must not be confused with the doctrine of *res judicata*, which says that judicial determinations of fact in one case should not be reopened in another.

⁶ *Obiter dictum*: Something said in addition.

court dismisses the broader reasoning of the earlier case by declaring it to be dictum. This is easy to do because the line between holding and dictum is vague at best and can easily be shifted one way or other.

A still more drastic treatment is confining the earlier case to its facts. The court disapproves of the precedent and announces that it will never follow it except in a case in which all the facts are exactly identical. This technique, however, is little resorted to today. When a court feels so strongly opposed to the principle of an earlier case, the present practice is to announce that the precedent is overruled and will not be followed in any case. This of course does not affect the rights of the parties to the earlier dispute. The judgment as between the parties in the earlier case remains undisturbed; only the legal principle is rooted out.

When does a court feel constrained to accept earlier decisions, and when will it revolt against precedents, distinguishing or overruling an earlier case? This depends in part on the temperament of the judge and his respect for precedent; it depends a good deal on the intensity of his feelings. If he considers the principle of the earlier decision very pernicious, he is likely to seek some means of escape. Since moral views change from generation to generation, the courts are perpetually engaged in revising the law. But lawyers have a professional training which gives them a set of moral values somewhat different from those of laymen, and consequently the law reflects these views as well as those of the public at large.

Thus far we have assumed the existence of precedents to guide or control the court in deciding a case. What of a case of first impression, a case involving a point never before litigated? The technique remains much the same. If the case arises under the constitution or a statute, the intention of the framers is supposed to control. Analogous cases are sought for. These will not be close enough to be conclusive, but they will bolster the decision which the court reaches. It not infrequently happens in a case of first impression that persuasive analogies can be found on both sides. The court adopts one view or the other—ordinarily the

2. Limiting or overruling precedents

Novel cases

one which causes less disturbance to existing legal patterns, for lawyers dislike change—and establishes a precedent which will thereafter be followed in similar cases. When one traces back an impressive line of cases to its source, he sometimes finds that it takes its beginning from a case that was “bad law,” as the lawyers say—a holding which did violence to the intention of the framers of the instrument in question, or to the available analogies.

LEGAL REMEDIES

No attempt will be made here to describe the elaborate apparatus of court orders and writs that enters into procedural law. Only the more common of those remedies which have significance for government will be mentioned. When the remedy bears a Latin name, this is a word or phrase from the text of the writ in its original form. Latin was the language of English legal procedure until the eighteenth century.

Judgment In most cases the court pronounces a *judgment* which determines the rights of the parties. Since the common law does not ordinarily act upon the persons of defendants, the judgment is executed by the bailiff of the court. In the federal courts, the title of the bailiff is marshal; in state courts, the sheriff is ordinarily the bailiff.

Mandamus The writ of *mandamus* (we command) is a court order to a person, ordinarily a public officer, instructing him to perform a legal duty. The writ will not be issued, however, to control an officer in the performance of a duty which involves the exercise of judgment or discretion. The courts argue that they are competent to determine whether a non-discretionary—a so-called ministerial—function has been performed, but they cannot tell whether an order to use sound discretion has been complied with.

Habeas corpus The writ of *habeas corpus* (that you bring the body) is an order to any person who is detaining another to bring the person detained into court and justify the detention. It will lie against private persons as well as public officers, but most often it is used

against police officers to determine the legality of a detention. If no sufficient ground is shown, the person detained is discharged by the court; if there proves to be a legal cause, he is remanded to custody.

The injunction is an equitable remedy, enforceable by arrest of the person of the defendant. An injunction may be negative—an order to refrain from a threatened irreparable injury. Or it may be affirmative—an order to carry out a legal duty, performance of which can be secured only by the action of the defendant. In public life the injunction is often encountered in a suit by the government to restrain the defendant from an improper action, or by a private person against a public officer to restrain him from a proposed action alleged to be illegal. In all cases the requirement of equity jurisdiction, that the remedy at law be inadequate, must be met.

Injunction

A little attention must be given to the procedure by which the Supreme Court reviews the decisions of inferior courts, state and national. At English law, decisions at common law were most commonly reviewed by *writ of error*, and decisions in equity by *appeal*. At federal practice today, however, the procedure for review does not turn on the distinction between common law and equity. In certain cases, too complicated to specify here, the losing litigant has an absolute right to an *appeal*. In other cases, the Supreme Court exercises its discretion as to whether to review the decision of the inferior court. The litigant petitions for a writ of *certiorari* (let it be certified), and if the Court believes it should review the proceedings it instructs the lower court to certify the record of the case for review.

Means of review

LEGAL PERSONS

All natural persons are at our law legal persons; they are the subjects of rights and duties, can sue and be sued. A corporation is not a natural but an artificial person; the state, or Congress, has created a fictitious entity and authorized this entity to hold property, to engage in certain activities, to sue and be sued. Corporations, then, are legal persons because they have been en-

Types of persons

dowed with personality by the state. What of less formal groupings of people who have not taken the step of incorporation—a church, or a trade union, or a neighborhood club? Is such a group a mere assemblage of separate legal persons, or does a new legal person emerge? The courts have in some cases treated such a group as possessing legal personality, but for most purposes it does not.

**Suability
of states**

The United States and the forty-eight states are legal persons. This is implied in the constitution. Consequently they can hold property and can sue. But an old maxim of English law reads: "No suit will lie against the sovereign." The United States government represents the sovereign power and therefore cannot be sued without its own consent. Congress has consented to suit on certain claims against the federal government. Each state is also the representative of the sovereign in dealing with its own citizens and therefore cannot be sued by them without its consent. A few states have set up courts of claims and authorized them to try claims based on contract against the state, and sometimes, in varying degree, claims in tort. In other states an administrative board to audit claims has been established; in the remaining states the only recourse of an injured person is to attempt to persuade the legislature to appropriate a sum to compensate him for his injury. The immunity which states enjoy from suits holds good only against private persons, not against suits by the United States or another state. Such suits may be brought in the federal courts.

**Suability
of subdivisions**

A special problem arises in connection with the subdivisions of a state—counties and cities particularly. These represent the state and might appear to have a claim to the sovereign immunity to suit; but the courts have held that they are not exempt from suit on contracts or on torts resulting from the exercise of a "non-governmental" function. This means that if a fire engine wrecks your automobile you have no remedy against the city, because the function is governmental; but if a truck operated by the municipal utility, which although publicly owned is non-governmental, inflicts the same harm, you may sue the city.

The immunity of the United States and states to suits by private persons raises the question of how the legality of a governmental action can be challenged. Two chief ways exist. The citizen may ignore the official command, and permit himself to be sued or prosecuted; in this proceeding he will raise the issue of legality. Or, if he can show threatened irreparable harm, he may bring a suit for an injunction, to restrain the public officer threatening to carry out an action against him; this is not a suit against the sovereign, for it proceeds on the theory that the proposed action is not warranted by law and the officer is therefore a mere private wrongdoer. Other methods of challenging governmental action may exist by statute, such as the suit to recover taxes paid under protest.

Remedies
against
states

The United States and the states are not the only public corporations. Congress has authorized some fourteen thousand corporations—the American Historical Association, for example—under one or another of its delegated powers. But these are not, strictly speaking, public corporations. Better examples are the so-called “government corporations” which discharge governmental functions.⁷ The Panama Railroad Corporation and the Tennessee Valley Authority are examples of these.

Public
corpora-
tions

The states also have created governmental corporations. The most common pattern is the division of the state into a gridiron of counties, which are in turn subdivided into townships or other districts. In addition the incorporated village, town, or city is created where a concentration of population warrants it, and this legal person is superimposed on territory which makes up part or all of a township or county. In this case the two units function side by side.⁸

Local
units

In addition to this fairly regular and familiar organization there are “one-purpose” units. These may be a regular pattern of legal units coinciding with the township and city boundaries, as school districts—“school towns” and “school cities”—which

One-
purpose
units

⁷ Although these are federal agencies, they were in many cases incorporated under state laws. See pp. 340-343.

⁸ In Virginia the “county boroughs” are cities which have the status also of counties and are exempt from the counties surrounding them.

function beside the civil towns and civil cities. Or they may be encountered only in certain areas, where they have been created to fill a particular need. The laws of some states, for example, permit the creation of irrigation districts or drainage districts, which are incorporated at the request of the inhabitants of the area affected. At the instance of the federal government, the states have provided for the incorporation of housing authorities and soil conservation districts; these corporations are state-created, but they receive assistance from the national government.

In some cases one-purpose units of government have not received formal incorporation, but even so they are likely to be treated as legal persons. Consequently they can be distinguished from areas which are administrative districts but possess no legal personality, such as judicial districts, internal revenue districts, and wards and precincts for voting. Even with such administrative districts left out of account there is a multitude of governmental units in the United States—165,049, by the latest count.⁹

EVALUATION

At the conclusion of an account of any legal system, the question arises: How far is this an accurate description of what actually occurs in society; to what extent do the practices of men conform to the legal picture? The answer is by no means simple. Obviously there must be some degree of correspondence between what occurs and the legal rules, or the state tends to break down. But politically organized society can and does tolerate, and even connive at, violations of its legal description of itself. Problems of three sorts arise.

Plight of the poor

The most obvious case is the difficulty of access to justice experienced by the poor. Attempts have been made to solve this problem by allowing those who fit the technical description of "poor persons" to bring civil suits *in forma pauperis*; here the state guarantees payment of the attorney. In the federal courts and most states a defendant accused of crime has the right to

⁹ William Anderson, *The Units of Government in the United States* (Public Administration Service Publication No. 83, Chicago, 1942).

have the court assign an attorney to defend him if he cannot afford to retain one himself; but the attorney may take little interest in the defense of his client. Some states have attempted to meet the problem by hiring salaried public defenders whose sole task it is to represent accused persons in need of assistance.

A larger question is raised by the fact of widespread disobedience to particular rules of law in communities in which the rules chance to be unpopular. The national prohibition laws received scant enforcement in "wet" communities. Laws against gambling are not likely to be enforced unless sustained by a militant public opinion. The so-called "blue laws" are everywhere ignored. Such inattention to the law arouses little criticism, because no one directly receives an injury as a result. But on some occasions the dominant element in the community succeeds in nullifying a law vital to the interest of another group. During the depression landlords found it difficult to secure the eviction of tenants in distressed communities for non-payment of rent, because the judges who tried the cases were elected by the tenants and tended to sympathize with them. In the same period the holders of mortgages in agricultural states encountered obstacles in foreclosing on farmers who were unable to meet their obligations, because the state courts and officers reflected the views and interests of the farmers. In some parts of the country labor unions have not been able to secure recognition of their legal rights, or even the punishment of those who have inflicted violence upon their members. In many states Negroes have little chance of securing the observance of the rights guaranteed to them by national or state law. Of all these cases it is safe to say that a more scrupulous observance of law will be found in federal than in state courts, in part no doubt because the state courts are closer to the community in question. But most cases cannot be brought in or carried to federal courts, and in many of those remaining the expense makes the action unprofitable.

The third case in which our legal description of society breaks down results from the uncertainty of law itself. A law receives vitality only when it is put into execution by an officer or court,

Disregard
of law

Uncertainty of
law

and the interpretation put upon the law by the officer or court is therefore decisive in fixing the meaning of the law. We ordinarily think of officers and courts as carrying out the mandates of the law, but to a degree these agencies make the laws by assigning one or another meaning to them. This does not always involve deliberate distortion, for often the agency in question is obliged to choose one of several equally plausible versions of what the law is. The whole process of common-law adjudication rests on the making of these choices, which are in substance legislative in character. Moreover, when a judge makes such a choice in a case before him, this is in reality retroactive legislation, for it makes a rule apply to events which occurred when the rule was not in existence. The extent of the uncertainty of the law, and of the discretion enjoyed by the judge, is a debatable question. One distinguished author argued that there is really no law until the judge hands down his decision; all law is retroactive legislation by the judges. Statutes and judicial precedents are merely two sources of law, of which the judge avails himself at his pleasure.¹⁰ This proposition, which certainly has some foundation, is not disposed of by saying that judges "interpret" the laws, for interpretation as so used means simply legislation.

To summarize, the legal theory which postulates a system of rules enforced by government is not a perfect picture of the facts. Sometimes the rules are ignored; sometimes they are simply non-existent until the judge plucks them out of the air. In discussing sovereignty we said that the term expressed an idea rather than a fact; it was a useful fiction. In law also we must recognize a fictitious element. But just as the survival of the state requires at least some partial correspondence between the idea of sovereignty and the facts of political behavior, so too the facts of behavior must in a degree express law, or the state disintegrates.

¹⁰ John Chipman Gray, *The Nature and Sources of the Law* (The Macmillan Company, New York, 1921).

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CHAPTER 4

INTERNATIONAL POLITICS

The Western State System—The Character of Interstate Relations—The Law and Practice of International Intercourse—Sanctions and Techniques—The Objectives of International Politics

THE WESTERN STATE SYSTEM

International politics is concerned with the relations between states. The pattern of these relations is historically conditioned, and can be understood only against the background of European history.

Medieval
states

In the Middle Ages states existed, but there was no settled description of their nature or their relations with one another. A sort of appellate jurisdiction over all Christian states was sporadically asserted by the papacy, and was infrequently conceded by warring states. As we have seen, the Holy Roman Emperor of the German Nation claimed an overlordship over much of Europe—his claim rivaled that of the Pope. Many kings and princes refused to acknowledge any superior jurisdiction either in the Pope or in the Emperor. On the other hand, the relations of these kings and princes with each other were often complicated by the assertion of feudal claims between them.

Dynastic
states

The modern state system is usually dated from the Peace of Westphalia of 1648. Thereafter it was assumed that every sovereign state was the equal of every other, and that there was no overriding superior power in the world. The states of the seventeenth and eighteenth centuries were for the most part dynastic states, states organized about a royal family and playing a part in international politics simply in order to advance the interests of

that family. A great change was introduced by the spirit of nationalism, which is conveniently dated from the French Revolution (1789-1799). We have defined a nation as a group possessing a feeling of solidarity based on ethnic, cultural, or linguistic community; and nationalism is the aspiration of such a group to achieve statehood. This popular ambition largely replaced dynastic ambition as the dynamic factor in the political consciousness of nineteenth-century Europe, and its success gave us what we are accustomed to think of as the characteristically modern political form, the nation-state.

National
states

The nation-state has nationalism as a part of its content. The character of nationalism varies from state to state, as local conditions and local history vary. The nation-state also has an economic content, likewise dependent upon local conditions; it has religious and other institutional characteristics, unique in the case of each state. To discuss international politics in terms of the outer shells of states, without regard to these varying contents, is to omit factors essential to the solution of any particular problem. On the other hand, so rigid has the shell become, so uniform the conception of sovereignty, that it is possible to make about all states certain general statements which possess as much merit as most generalizations.

THE CHARACTER OF INTERSTATE RELATIONS

With considerable justification, we think of relations between states as characteristically taking the form of disputes. Disputes between states occur in a very different setting than do disputes between individual men. Both states and individual men have rules within the limits of which they deal with their fellows, but the rules governing these two areas of action are based upon different assumptions and calculated to serve different purposes. Normally, two citizens expect a dispute to be settled without recourse to force. Society has less interest in what the terms of settlement are than in securing settlement. However, if the disputants cannot agree among themselves, society has provided a means of making a settlement; the one thing its rules will not

Disputes
1. Among
men

2. Among states

permit is a resort to violence. But as between states the rules permit the use of violence in the settlement of disputes. It is assumed that conflicts of interests will be adjusted in light of the military power at the command of the disputants. Long ago, the Athenian ambassadors told the Melians: "You know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must."¹ The purpose of the rules governing interstate relations is not peace but the continued independent existence of the state.

Assumption of violence

The assumption of violence has been the basic assumption in the foreign policy of every state. It is qualified in some degree by the movement which began with the League of Nations and has been carried on by the United Nations, a movement to seek the peaceful adjustment of disputes and the solution of problems on their merits rather than in terms of power. This development will be described in the next chapter.

Balance of power

As a consequence of the postulate of violence, states seek to be strong. The process of seeking strength and maneuvering to prevent others from achieving strength provides much of the content of international relations. It is this that gives rise to the balance of power. Every state would like to be strong enough to dominate all others, but since this is impossible, at least for all but one, lesser states tend to band together against the stronger until it is outweighed. This state then seeks to gain allies, or to divide the states opposed to it. There may emerge in each camp a more powerful state, surrounded by weaker states; and two poles of strength appear. Moreover, among the smaller states there is a jockeying for position, even within a confederation of allies. Powers on the periphery of one of the groups may find it to their interest to shift from one camp to another.

The balance in history

In the sixteenth century Spain, armed with American gold and silver, was the strongest power, but Spanish ambitions were defeated and Spain became a second-rate power. France dominated the seventeenth and eighteenth centuries and under Napoleon

¹ Thucydides, *Peloponnesian Wars*, v, 90.

made a bid for European supremacy. England was the focus of opposition to Louis XIV and Napoleon and with the defeat of Napoleon emerged as the most powerful state in the world. But since Great Britain was primarily a sea and colonial power, she had no ambitions on the continent of Europe and contented herself with preventing the ascendancy of a powerful rival there. Said a clerk in the British Foreign Office in 1907: "It has become almost a historical truism to identify England's secular policy with the maintenance of this balance by throwing her weight now in this scale and now in that, but ever on the side opposed to the political dictatorship of the strongest single State or group at a given time."²

1. Britain

Part of British ascendancy rested on her early industrialization, which brought wealth and techniques to Great Britain earlier than to the continental states. But in the nineteenth century Germany became politically unified, and pushed rapidly into industrialization, partly for the military advantage this promised. Moreover, the French Revolution had introduced more than nationalism; it had introduced the national army, a people in arms. Great Britain, clinging to her navy and to the eighteenth-century tradition of a small professional army, was eclipsed as a land power; in any case, her population was too small for her to compete on these terms. British interests required her to resist the consolidation of Europe under Germany, but her resources were not equal to the task. Twice in the twentieth century the United States was obliged to intervene to prevent the reorganization of the whole pattern of world politics by a German victory.

The history of the external relations of the United States, first as a little state existing by sufferance of the great powers, then as a growing, aggressive state, and finally as the chief power in the world, illustrates the operation of the balance of power and particularly how balances develop within larger balances. While the colonies on the American continents were possessions of European mother countries, they were weights in the balancing proc-

2. United States

² Quoted by Sidney B. Fay, "Balance of Power," *Encyclopaedia of the Social Sciences*.

ess. Consequently, numerous wars—Queen Anne's War (1701–1713), King George's War (1740–1748), and the French and Indian War (1756–1763)—were fought in part on colonial soil. The Napoleonic wars were fought chiefly on the continent of Europe and did not draw the United States in immediately, but American interests were jeopardized by both antagonists. Consequently, the United States found itself chronically in conflict with both—most acutely with the French in 1798 and with the British in 1812. With the passing of Napoleon and the eclipse of effective Spanish empire, the Western Hemisphere was involved in a two-way balance, one European, the other largely American. During the century after Napoleon, British dominance depended in part on keeping the political power in the Western Hemisphere out of the hands of the opponents of Britain. Consequently, when Monroe in 1823 announced that European powers should not attempt to enter American affairs, British policy was strengthened. As the United States spread across a continent and became powerful, its interest coincided with British interest. The British tacitly counted on American power to repel any European state which might seek to augment its strength in the New World; and the United States, sometimes unaware of British management but usually satisfied with it, was practically free behind the British shield to make its own choices and develop in its own way.

Perhaps never has a power been so free of external compulsion as was the United States in the nineteenth century. During this period another balance appeared in the Americas. Latin-American states had failed to acquire great power. The Monroe Doctrine was to them the "Yankee Peril." They had the choice of attempting to create a union of strength to equal the "colossus of the North" or gravitating into its orbit. In general, they have joined with the United States. The other American states were not strong enough to organize a center of opposition to the United States by themselves; and the influence of Great Britain and the United States was in the way of calling in weight from abroad. Nevertheless, the tendency to organize against the

United States has appeared occasionally. Currently, Argentina has served as the center for opposition.

In 1917 and again in 1941, when there were genuine threats of the destruction by war of the equilibrium in Europe, the United States threw its weight into the balance. In general, the other American states, either by affirmative action in the wars or by abstention, sided with the colossus of the North. It appears, then, that the United States has participated, directly or indirectly, in the European balance of power from the very beginning. This participation has been largely if not entirely without design or awareness, but in retrospect the pattern of behavior is clear.

THE LAW AND PRACTICE OF INTERNATIONAL INTERCOURSE

Reference has been made to the rules within the limits of which states carry on their relations with each other. These rules are usually divided into two classes, rules of comity and rules of international law. Comity consists of the good manners and courtesy which states employ or should employ in dealing with each other, such as a state's giving effect within its territory to the laws of another state as an act of courtesy or good will but not because of obligation. State A may permit state B to sue a private person in its courts; state A may recognize the validity of marriages or divorces or judgments awarded by the courts of state B; state A may permit a shipmaster in its territorial waters to dispense justice on board his ship according to the laws of the state of the registry of the vessel, even though such laws are contrary to the laws of state A.

It is sometimes said that the sources of international law are custom, agreement (treaties), reason and authority. Article 38 of the Statute of the International Court of Justice, adopted by the United Nations at San Francisco in 1945, endorses these sources: treaties, custom, the principles of law recognized by civilized nations, and judicial decisions and the teachings of qualified publicists. In addition to deriving law from these sources, the Court is instructed to decide cases *ex aequo et bono*—according to the principles of equity and justice—if both par-

ties to the dispute agree. Sometimes an attempt is made to reduce the number of sources by arguing that the writings of publicists and the decisions of courts are not independent sources of international law but merely evidence as to what the custom is.

Custom becomes international law when it has become so invariable that states are generally expected to follow the rule because of a sense of obligation. A failure to follow it will be the basis for claims of right. Treaties are usually more precise in terms. A treaty between two states is called a bilateral treaty. With respect to the matters covered by it, it governs their relations at international law. A treaty among a number of states is called a multilateral treaty; there have been many of this type, and they have been the chief source of international law. Some of the great lawmaking treaties are those of Westphalia, 1648; that of Utrecht, 1713; the Declaration of Paris, 1856; the Hague Conventions, 1899, 1907; the Covenant of the League of Nations in the Treaty of Versailles, 1919; the Kellogg-Briand Peace Pact, 1928; the Argentina Anti-War Treaty, 1933; the United Nations Charter drawn up at San Francisco, 1945. Some of these treaties were statements of existing customs, the codification of preëxisting rules. The Declaration of Paris and to some extent the Hague Conventions belong in this category. Others, like the Covenant of the League of Nations, the Kellogg-Briand Peace Pact, and the Charter of the United Nations, established new principles of law.

**Status of
individuals**

Individuals do not have legal personality at international law and therefore do not have rights against states. States, however, have obligations to each other relative to their treatment of individuals, particularly when one state is dealing with citizens of another state. At international law the individual—at least before the coming into effect of the Covenant of the League of Nations and the Charter of the United Nations, and perhaps even yet—bears much the same relation to states that animals in the domestic law of the United States bear to local government. If A beats B's horse, the horse cannot sue A for damages. The horse has no

standing in court, no rights, no legal voice. B may sue A, not because of the suffering of the horse, but because of damage to B's property. Likewise, an individual has no status in international law. His state, however, may bring action of one kind or another against the state which has injured him, not because his rights have been infringed but because his sovereign has been injured.

Persons with a sense of humanity have been shocked by the bestial treatment sometimes accorded to minorities in states in which racial feeling is strong, and many suggestions for the protection of minorities have been made. These are generally of two kinds. First, it has been proposed that individuals be given a legal status vis-à-vis states. When the Statute of the International Court was being drafted in 1945, it was debated whether or not the Court should be given jurisdiction to hear cases of individuals against states. The decision was in the negative. The second proposal is that an international bill of rights be formulated. Franklin D. Roosevelt's four freedoms have been considered a possible nucleus for such a bill of rights.³ The United Nations Charter does provide an embryo right for individuals in territories being administered under the trusteeship system. Petitions (presumably by individuals) may be⁴ and have been accepted and examined by the General Assembly through the Trusteeship Council, and of course recommendations may grow out of such examinations. It may also be noted that the Charter has many references to human rights—for example: "The United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," and states administering trusteeships "accept as a sacred trust the obligations to promote to the utmost . . . the well-being of the inhabitants of these ter-

³ The four freedoms are freedom of speech, freedom of religion, freedom from fear, freedom from want; they were first stated by President Roosevelt in his message to Congress on January 6, 1941; see Philip C. Jessup, *A Modern Law of Nations* (The Macmillan Company, New York, 1948).

⁴ Art. 87.

ritories. . . ."⁵ In 1948 the Commission on Human Rights of the United Nations completed a draft of an International Declaration of Rights, which it is hoped may be adopted by the United Nations in 1949. Optimism on this score, however, would be unwise.

So much for the position of individuals at international law. The chief concern of international law is the relation between states. This subject is sometimes divided into the law of peace and the law of war.

**Law of
peace**

During periods of peace, there is a body of law in accordance with which relations are carried on. Registry and treatment of ships; the sea and rights to use it, and traffic on it; treatment of ambassadors; the making of treaties; treatment of citizens of other states—these are representative matters covered by the web of rules recognized as obligatory by all states. Basic to these rules is the assumption of legal equality of the states, the independence of all states from all external coercion. A deviation from a rule is ground for protest and a claim for reparation by the injured state.

**Law of
war**

But at any time before the anti-war treaties of recent date a state was legally able to set aside the system of law which regulated peaceful intercourse and to substitute for it the system of law which regulated the making of war. A new set of obligations then governed the relations of the states engaging in violence toward each other. These rules were concerned with such matters as the declaration of war, the treatment of prisoners, flags of truce, government of occupied territories, and respect for non-combatants. The rights and duties of non-belligerent states with regard to the belligerents were defined by the law of neutrality, which was a branch of the law of war.

**Outlawry
of war**

With the treaties which permanently neutralized Switzerland in 1815 and Belgium in 1839, there was a beginning of the limitation of power legally to engage in war. The Covenant of the League of Nations restricted the power still further, and

⁵ Arts. 55, 73; references to individuals are also found in arts. 13, 57-63, 76, and in the Preamble.

the Kellogg-Briand Peace Pact of 1928 and the Charter of the United Nations have completely eliminated the legal power or capacity to engage in war except in the case of self-defense or, under the Charter, in accordance with the purposes of the United Nations. The Kellogg-Briand Peace Pact afforded a basis in international law for the lend-lease policy adopted by the United States before its own entry into active hostilities to aid the states fighting Germany during World War II. The United States and Germany had both obligated themselves not to use war as an instrument of national policy, and the Pact contained a release from the obligation of all states toward any state which violated its pledge. Therefore when Germany began a war all other states were free to treat it as a violator. What the Peace Pact accomplished by implication, the Charter of the United Nations established affirmatively with respect to the law of neutrality. In Article 2 of the Charter all members agreed to give the United Nations every assistance in any action it might take in accordance with the Charter and to refrain from giving assistance to any state against which the United Nations might take preventive or enforcement action. It may be said, then, that the law of neutrality has been replaced by the law of partiality.

The trial and punishment of major war criminals following World War II has been the occasion of much debate. After World War I it was proposed that the German Kaiser be tried, but when the Netherlands refused to surrender him on the ground that he was a political fugitive, the project was abandoned. However, when the hostilities of World War II ceased, an executive agreement was made by which an International Military Tribunal was established for trying major war criminals. In the agreement, or Charter as it was called, the jurisdiction of the court was provided and the law to be applied in the case was delimited. The Charter provided for punishment for planning aggressive war and for crimes against humanity as well as for the usual offenses "against the law of war." It has been argued against this proceeding that individuals have not in the past been accountable for political acts at international law, and

Effect on
individuals

that this amounted to creating crimes *ex post facto*. On the other hand, it was argued that the Kellogg-Briand Pact, by rendering states legally incapable of aggressive war, automatically fixed the responsibility for such actions upon the individuals who committed them. The actions ceased to be the actions of states and became those of individual lawbreakers. Those who take this view consider the war crimes trials to be the beginning of a real and effective system of international justice.

SANCTIONS AND TECHNIQUES

General sanctions

The sanctions or means of enforcement of international law are, according to Professor Schuman,⁶ habit, expediency, good faith, and force. Since early times it has been the habit of states to recognize and observe certain rules regulating their treatment of diplomatic representatives. Seldom are these rules violated. Expediency, that is, the pursuit of a course of action because of convenience and appropriateness for securing a specific objective rather than because of attachment to moral principle, is particularly well illustrated by state behavior in wartime. Violation of a rule by state A with respect to the treatment of enemy prisoners is likely to result in retaliation against A's soldiers who are taken prisoner; therefore A will observe the rules in order to avoid injury to itself. As public opinion within a state becomes informed about international matters, there is more and more compulsion to deal in good faith with other states. Force, as a means of securing compliance with rules, has been a crude and wasteful instrument. To organize the use of force so that it actually maintains order is one of the great problems before the world today.

Particular techniques

Turning from general sanctions to particular techniques, we find that four main categories of action have been employed in settling disputes between states. The first is direct negotiation, which involves the machinery of diplomacy described in the next chapter. It ordinarily accompanies the other three sorts of

⁶ Frederick L. Schuman, *International Politics* (McGraw-Hill Book Company, New York, 1948), p. 139.

action as well. The second recourse is to collective action. One form of collective action appears in the offer of good offices by a third state to act as a mediator between states in a dispute. Another form is used when a commission of inquiry is established to make determinations on disputed facts to be used as a basis for negotiation. Conferences or congresses are also used for the purpose of making agreements or establishing controlling principles. Adjudication is the third technique. It is of two kinds: arbitration; and regular judicial procedure before a court, such as the International Court of Justice. Arbitration is characterized (1) by the parties to a dispute agreeing to submit the dispute to (2) judges chosen by them (3) who are to make a decision "on the basis of respect for law"¹ although not necessarily in strict conformance with the law and (4) the binding character of the award. Adjudication by regular judicial procedure usually involves the use of a court already established, and it means that the decisions are to be made in conformance with law. The International Court will be described in some detail in the next chapter. The fourth method of resolving disputes is self-help. However, the treaties by which states pledge themselves not to resort to war have outlawed war except for states resisting aggression or acting under the Charter of the United Nations.

THE OBJECTIVES OF INTERNATIONAL POLITICS

Earlier in this chapter we noted that states seek strength. The primary consideration of a state's existence is that it exist. Since existence can be assured only through the strength resident in the state or that which it may gain by allying itself with others, all relations are colored by the objective of securing or maintaining strength in order to maintain independence. If one accepts the independence of states as a proper standard of value, the Western state system has been fairly successful, at least for the states which have survived. But in terms of the values of individual human beings, and in terms of the values of the human race, the numerous wars and the incalculable destruction which

Independence

¹ 1 Hague Convention, 1907, art. 37.

the state system has entailed make it appear one of the less fortunate inventions of man.

Prestige

Prestige attaches to him who possesses whatever is highly coveted. Among states, prestige attaches to power. Consequently a state cannot tolerate an affront to its prestige, for the reputation for power is itself power, and must be jealously maintained. An ambassador takes affront if he is not accorded a seat at dinner befitting the dignity of his state, not because he is personally sensitive, but because acquiescence in the slight would be a confession of his state's weakness. A salute of twenty-one guns to its flag may be of more significance to an injured state than the payment of money damages.

Particular objectives

Each state has objectives peculiar to it. These are determined by many factors: by its geography; by internal circumstances, including such conditions as industrialization and the availability of raw materials; by the skill of its diplomats; and by the size and culture of its population. Here we will attempt to describe only the objectives of the United States; but it must be remembered that other states have their own objectives.

1. Territorial expansion

One of the dominant policies of the United States during its early history was territorial expansion. From a ribbon of settlements along the eastern shore, the United States pushed out to cover many times its original area. Even before the colonists achieved their independence they desired to conquer Canada and Florida. The Articles of Confederation invited Canada to join the Union. Then came the Louisiana Purchase in 1803; the War of 1812, which to westerners was an attempt to push British influence out of the Northwest Territory; the purchase of Florida in 1819; then Texas in 1844, California in 1848, and the Gadsden Purchase, embracing lands in what is now Arizona and New Mexico, in 1853. Expansion on the North American continent was rounded out by the settlement of the Oregon boundary dispute in 1846 and the purchase of Alaska in 1867. While the wounds sustained in the Civil War were being bound up, Old World powers were parceling out African lands, so that the

United States entered the race for overseas territories after most of them were preempted. For this and other reasons, American expansion was limited to the acquisition of Hawaii and the other insular possessions around the close of the century, and the Virgin Islands in 1917. In 1946 the long-time trend was interrupted when the Philippines were given their independence.

Another policy long considered fundamental to the interests of the United States was non-participation in European quarrels. It may be observed, however, that while statesmen assumed its feasibility, circumstances demonstrated its impracticability. The farewell words of Washington, warning that "Europe has a set of primary interests which to us have none or a very remote relation," and the inaugural words of Jefferson urging "honest friendship with all nations, entangling alliances with none," made the illusion of American isolation from European wars a national heritage charged with patriotism and veneration of the Fathers. But despite the desperate efforts of Jefferson's successor to remain aloof from the Napoleonic wars and Woodrow Wilson's pleading with his countrymen in 1914 to be neutral in thought as well as deed and Roosevelt's and Willkie's vowing in 1940 to keep the boys at home, the United States fought in every European war between major powers which lasted two years or more. United States sponsorship of the Kellogg-Briand Peace Pact, the development of lend-lease to the enemies of Germany, and our promise to give the United Nations "every assistance in any action" it takes in accordance with the Charter mark the end of isolationism and neutrality.

A third policy involves the relation of the United States with other American states. Part of the policy is referred to as the Monroe Doctrine. Actually, Jefferson first stated it: the United States was "never to suffer Europe to intermeddle in cis-Atlantic affairs." Professor Hershey defined the Monroe Doctrine in 1927: "In its existing form, it may perhaps be defined as the prohibition of any further acquisition, colonization, or permanent occupation of American territory, or the control in any manner

2. Isolation

3. Monroe Doctrine

a. Big
stick

of the destiny of Latin-American States, by any European Power."⁸ American statesmen have generally regarded it as a doctrine of self-defense; an increase of power by a non-American state in the American hemisphere must be prevented because that would constitute a threat to the security of the United States. Theodore Roosevelt gave it a different twist in 1904. In a message to Congress referring to the internal situation in some Latin-American countries, he said: "Chronic wrong-doing, or an impotence which results in a general loosening of the ties of civilized society, may . . . require intervention . . . and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States . . . to the exercise of an international police power." In accordance with this "police power" guardianship of American states, Roosevelt had already taken the territory for the Panama Canal; and United States armed forces were from time to time in control of Haiti, the Dominican Republic, Nicaragua, and Costa Rica. In time, however, Roosevelt's "big stick" policy and Knox's "dollar diplomacy" policy—this title was given to the tactics of Taft's Secretary of State in promoting American financial and business interests in Latin America—gave way to Franklin D. Roosevelt's "good neighbor" policy. The Platt Amendment, which permitted the United States to intervene in Cuba to preserve order, was abrogated in May of 1934. In October of 1934 the last American marines were withdrawn from Haiti; American businessmen were thus notified that their claims would not be collected by military intervention. This policy was written into agreements made between Latin-American countries and the United States at the Pan-American Conference at Montevideo in 1933 and was reaffirmed in other conferences in 1936 and 1938. It is said that the Conference of 1933 amounted to the adoption of the Monroe Doctrine by all Latin-American states, so that today all the American states, and not the United States alone, are responsible for resisting the aggression of non-American

b. Good
neighbor

⁸ Amos S. Hershey, *The Essentials of International Public Law and Organization* (The Macmillan Company, New York, 1927), p. 241.

powers. This policy has now been given expression in treaty form. It is provided in the Charter of the Organization of the American States drawn up at the Bogota Conference in 1948 that "Every act of aggression . . . against . . . an American State shall be considered an act of aggression against the other American States." The extent to which the "good neighbor" policy of Franklin D. Roosevelt has become the official policy of all the American states is indicated by the tenor of this whole Charter, but more particularly in the provision that "no State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind."⁹

A fourth policy of the United States is equality of opportunity for all states to engage in trade. It was the habit in the eighteenth century for a state to monopolize all trading with its colonies. After gaining independence, the United States began to fight monopolistic trade privileges in the West Indies and has generally followed that policy since then. This policy has appeared in different forms at different times. During Jefferson's first administration, the United States fought a short war with the Barbary states rather than pay tribute to their raiders so that American ships could ply the Mediterranean Sea. In 1914 the Panama Canal was opened to the use of all states on equal terms. Again, the United States has sought free navigation on international rivers, such as the St. Lawrence, the Rhine, the Amazon, and the Danube. The reciprocal trade program inaugurated in McKinley's administration and greatly expanded under the nurturing care of Franklin D. Roosevelt's Secretary of State, Cordell Hull, is another example of equalization of trade opportunities. Under the Trade Agreements Act of 1934, the President was authorized to negotiate bilateral agreements for the reciprocal reduction of tariffs as much as 50 percent. This authority was granted to the President for a three-year term only but has been periodically renewed. The latest renewal expires in June of 1949,

4. Equality in trade

⁹ See William Sanders, "The Bogota Conference," *International Conciliation*, June, 1948, No. 442.

but the act stipulates that agreements already concluded will remain in effect until terminated by the giving of notice by one of the parties. There are twenty-seven agreements at present in force. The agreements which have been negotiated contain a "most-favored-nation" clause. This clause stipulates that if either party to the agreement gives to a third party more advantageous terms than those granted to the other party to the agreement, such party shall immediately gain the advantage of these benefits given to the most favored nation. It was believed that the inclusion of this clause in trade agreements would lead to a worldwide reduction of tariff barriers. Still another example of the policy of equality in commercial opportunities is the "open door" policy, which expresses the hostility of the United States to its rivals' obtaining preferential trade advantages with backward countries. Notice was given that this was the policy of the United States when Secretary of State John Hay sent a circular note in 1899 to Britain, France, Germany, Russia, Japan, and Italy stating the view of the United States on conditions in China. His object was to secure agreement to the proposal that port duties, taxes, railway rates, etc. would be the same for nationals of all states. The American policy of protective tariffs was a long and persistent contradiction to the foreign policy of opposition to commercial discrimination; however, in view of the adoption of the reciprocal tariff reduction program, and the position of the United States as the chief creditor state, it seems possible that the protective tariff may play a diminishing role in the American economy.

5. Immigration

A fifth area of international policy is concerned with immigration. Two major but contradictory interests have dominated the American attitude toward aliens coming to the United States to remain permanently. The policy which favored immigration rested on several factors: the need for increasing population as rapidly as possible, pride in the country as a refuge for oppressed peoples, and the demand for cheap labor. The opposing interest also included various factors, such as the fear of alien or strange political ideas, the belief that aliens could not be assimilated, and

the demand to reduce the competition for employment. When the United States was young as a nation, the desire for immigration was predominant, but the century-old trend toward restriction has finally emerged as the controlling policy. Restrictions were first attempted by two of the states, Massachusetts and New York. One method was to tax every vessel for each immigrant brought in. This, the Supreme Court decided, was an unconstitutional burden on foreign commerce.¹⁰ Other attempts by the states met with little success and the movement to restrict transferred itself to the federal level. The first purely restrictive statute was an act in 1882 designed to exclude Chinese laborers and certain others, such as paupers and insane persons. Other restrictive laws followed from time to time. The immigration policy now in effect is made up of two parts. (1) Certain persons with specified shortcomings are excluded entirely. The statute lists more than a score of grounds for excluding immigrants because of characteristics of a personal nature. Some of those excluded are paupers; the mentally incapacitated, such as the insane and imbeciles; diseased persons, such as those having tuberculosis; criminals; polygamists; prostitutes; contract laborers; persons previously deported; anarchists and those persons who advocate the violent overthrow of the government or who the Attorney General has reason to believe might endanger the public safety of the United States. (2) Immigrants are admitted on a selective basis. This method was originated in 1921 and is called the quota system. The total immigration permitted per year is to be about 150,000 persons. This number is distributed among the various qualified nationalities according to the representation of each nationality in the United States in 1920. The wording of the statute is: "The annual quota of any nationality . . . shall be a number which bears the same ratio to one hundred and fifty thousand as the number of inhabitants in continental United States in 1920 having that national origin . . . bears to the number of inhabitants in continental United States in 1920, but the

¹⁰ *Smith v. Boston*, 7 How. 283, 570 (1849).

minimum quota of any nationality shall be one hundred."¹¹ The selection of the persons to be admitted under the quota is normally made in the country of their origin by the American consuls stationed there. This general immigration policy is supplemented by an act passed in 1948 for the admission of displaced persons driven from their homes in Europe by the events of the war. The act permits the entry of 200,000 such immigrants; their admission is to be charged against future quotas.

6. Foreign aid

The most recent and most striking innovation in the foreign policy of the United States is the program of economic and military assistance to governments in strategically located countries, such as China and Greece, on the ground of the anti-Russian character of these governments, and the European Recovery Program, which is expected to erect a barrier against the Soviet Union. This policy, dating from 1947, is defended as an application of balance-of-power tactics.

7. Other policies

Other policies which the United States has pursued at one time or another include giving relief to famine-stricken peoples, diplomatic intervention in behalf of persecuted peoples, the recognition of the government of a country actually in possession of power, the non-recognition of governments securing power through non-constitutional means, the non-recognition of territorial or other changes achieved by the use of violence. But we have said enough to indicate what the content and objectives of international politics are in terms of the behavior of one state.

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¹¹ U.S. Code, title 8, sec. 211 (b). The repeal of the Chinese Exclusion Act in 1943 and the passage of another act in 1946 applying to races "indigenous to India" places these populations in the same category as European nationalities. Other Orientals are restricted to 100 for each nationality.

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CHAPTER 5

INTERNATIONAL ORGANIZATION

**Private Organizations—The Role of Diplomacy—
Public International Unions—The United Nations—
Members and Organs—The General Assembly—The
Security Council—The Economic and Social Council
—The Trusteeship Council—The Secretariat—The
International Court of Justice—The Future**

PRIVATE ORGANIZATIONS

**Signif-
cance**

Much machinery has been developed for the purpose of carrying on international intercourse. Perhaps the largest share of the activity across national boundary lines is among private persons. While the objective in this chapter is to describe the machinery which states have provided to facilitate relations between governments, the relations between private persons resident in different states is of significance because some of the private agencies have been used as models for official organizations and because they have occasionally exercised influence over governmental action.

Examples

A Handbook of Organizations and its *Supplement* published by the League of Nations in 1929 and 1931 listed 560 private organizations, and L. C. White declared that this list by no means exhausted the field.¹ There are organizations concerned with practically the whole range of human interests. The list includes such unexpected associations as the International Federation for the Teaching of Housewifery, the World Student Federation against Alcoholism, and the International Commission for the Study of Clouds, as well as such widely known groups as the

¹ *The Structure of Private International Organizations* (George S. Ferguson Company, Philadelphia, 1933), p. 11.

International Bar Association, the International Chamber of Commerce, the International Red Cross, and the World Federation of United Nations Associations.

Structurally, these organizations fall into two chief types. The first consists of cosmopolitan associations of individuals, based upon an interest which they share. The Roman Catholic Church and the missionary organizations of some Protestant churches are cosmopolitan, as is the International Olympic Committee. Many businesses are of such scope as to be international; their shareholders, their employees, and their operations are scattered in many lands. Indeed, it has been argued that modern business, organized in the cartel system, constitutes a sort of irresponsible supranational government over those matters in which it is interested. Organizations of this type are erected on the individual as a base; over him rises a very real hierarchy of authority on the international level.

The second type of private international organization is federal. Within the separate states are organized groups which have joined in an international federation. The individual is a member of the international organization only through his membership in his national organization. Examples of such federal organizations are the Boy Scouts, Rotary International, and the International Chamber of Commerce.

The structure of the federalistic private international organizations is varied, but a great many have roughly similar frameworks. Ordinarily each organization has (1) a conference, (2) a governing body, (3) an executive committee, though in some cases the names may be different from the ones given here. The conference is the meeting of the delegates of the member organizations. It has the power to make the constitution, if there is one, to lay down general over-all policy, and to establish the agencies of the organization. Usually the conference meets only at intervals, sometimes annually, sometimes biennially or at longer intervals. The Boy Scout Associations in forty-six nation-states send six delegates from each state to the International Conference. The Conference meets every two years. It may amend the con-

Types**1. Cosmopolitan****2. Federal****Federal structure**

stitution by a two-thirds vote. But there are matters to be decided within the general limits set up at the biennial meetings. Consequently there is a governing body of nine members. In this instance the governing body is called the International Committee. It has such powers as passing upon the petitions for admission of new organizations, determining the annual registration fee so that sufficient funds will be available, and representing the Conference between its biennial meetings. The executive committee, which in the case of the Scouts is called the International Bureau, is the administrative agency of the organization. Among other things, the International Bureau handles inquiries concerning applications for membership, publicity, and the sending out of instructors to countries where no Scout organization exists.

It will be noted in later discussions that some of the public international organizations tend to develop structurally around a conference and an executive committee. If the duties of the executive committee are extensive, it frequently is assisted by a body called a secretariat, composed of persons charged with the collection of information and the performance of other duties related to the administrative activities of the organization.

**Relation
to U.N.**

These private international organizations were recognized by the framers of the United Nations Charter. The constitution of the United Nations provided for consultation by one of its organs, the Economic and Social Council, with "non-governmental organizations which are concerned with matters within its competence." By the beginning of the sixth session of the Economic and Social Council on February 2, 1948, sixty non-governmental organizations already had consultative status, and fifty more had applied.

THE ROLE OF DIPLOMACY

**International
status**

The complex system of international communication and representation known as diplomacy paved the way for the development of international machinery. Although each agent of diplomacy is a national representative, the elaborate protocol, the ceremony and code of conduct which marks out for him the

proper etiquette on all occasions, coupled with immunity from the jurisdiction of the state in which he serves, makes him subject to international standards.

It has long been the practice for heads of states to send two kinds of agents to other states. The one is chiefly charged with commercial functions; the other is a political representative. The first is the consular service. In early times, many states employed citizens of the receiving state as consular representatives, a practice not yet entirely abandoned. The United States, however, has a statutory requirement that all foreign-service officers must be United States citizens, which prevents the employment of the citizens of other states as American consuls.² There are ordinarily four ranks of consuls, although each state may establish its own classification. The usual ranks are consuls general, consuls, vice-consuls, and consular agents. Some countries also maintain language officers. A state about to send out consular officers will transmit a commission or patent for each of these officials to its diplomatic representative in the state where it wishes the consular officer to serve. The diplomatic representative will present the commission or patent to the government of the receiving state and request that an *exequatur* be granted. The *exequatur* is a permit by the receiving state to the consul of the sending state to perform whatever consular duties are specified in the *exequatur* or have been previously agreed upon in treaties between the two states. Usually a consul is permitted to perform his functions only in a given geographical district.

The functions of a consul vary, but they are primarily commercial in character. He facilitates the movement of goods, answers trade inquiries, and makes periodic reports. He is responsible for proper invoices for goods; he undertakes to see that the law of his state is observed in shipments to it, and he attempts to secure observance of commercial treaties. The ships sailing under the flag of his state deposit their papers in his office while in the port where he is stationed; seamen on such ships are under his care; and he makes quarantine inspections of vessels. He visas

Consular
service

1. Rank

2. Functions

² U.S. Code, title 22, sec. 939.

passports of persons wishing to enter his state; he maintains a register in which the names of visiting nationals of his state may be listed. Among the duties of the United States consuls as provided by statute are the following: the solemnization of marriages of American citizens; hearing the protests of United States citizens in the port where he is stationed; keeping a record of the number of vessels of his state visiting the port, with their tonnage and the nature and value of the cargoes; and caring for the estates of deceased United States citizens.

Diplo- matic service

1. Rank

Intercourse between governments is carried on through diplomatic agents.³ It is for this reason that the general function of diplomatic agents is said to be political in character. These political representatives have some international status in that rank and precedence are determined by treaty. Before such matters were settled by treaties or other understandings, the personal meetings of diplomatic agents were likely to result in irritating incidents. On the occasion of the wedding of the Crown Prince of Denmark in 1633, the question of the place of honor was so serious as to cause the Spanish ambassador to sail for home before the wedding day on the allegation of an urgent request from his own King. Whose coach should follow next after the one carrying the person of honor seemed worth fighting for in 1661. The Spanish armed servants accompanying an official coach outnumbered and outfought those accompanying the French coach in order to gain precedence. Later Louis XIV, on learning of the affair, ordered his ambassador in Madrid to secure a promise that the French would be deferred to in such matters; if he failed to secure the promise, the French ambassador was to notify the Spanish of a declaration of war.⁴ Some disputes concerning rank were brought to an end when the chief European powers came to an agreement at the Congress of

³ There are exceptions to this, such as Woodrow Wilson's visit to Paris in 1919 to negotiate the treaty to end World War I, and Franklin D. Roosevelt's numerous personal conferences with the heads of states opposing Germany and Japan in World War II.

⁴ See Ernest Satow, *Diplomatic Practice* (Longmans, Green and Company, New York, 1917), i, chap. 4.

Vienna in 1815. This agreement was added to in 1818 at the Congress of Aix-la-Chapelle. "In order to prevent in the future the inconveniences which have frequently occurred" the powers agreed to establish four ranks of "diplomatic characters": (1) ambassadors, legates, nuncios; (2) envoys, ministers; (3) ministers resident; (4) *chargés d'affaires*. The first three ranks are accredited to the head of the state—in the United States, the President—and the fourth is accredited to the Minister of Foreign Affairs—in the United States, the Secretary of State. When a diplomatic representative starts on a mission he carries with him a letter of credence. This is a formal communication addressed by the head of his state to the head of the receiving state and recounting, among other things, the name and rank of the bearer and the general object of the mission. If the agent is a *chargé d'affaires*, the letter is signed by the foreign minister and addressed to the foreign minister. On arrival at his post of duty the agent asks for an audience with the head of state—unless he is a *chargé d'affaires*, in which case he addresses himself to the foreign minister—and presents his letter of credence. *Full powers*, or authority to negotiate, are also presented when they are not contained in the letter of credence.

Each state is free to determine which rank of representative it will send to another state. Since it would appear that a state was acknowledging the superiority of another state if it sent a representative of a higher rank than it received, the usual procedure is for states to agree as to the rank of the agents which they exchange. However, before 1893 the United States, in keeping with its disdain for royalty, sent no representatives of the ambassadorial rank, since ambassadors had been historically the personal representatives only of kings. A statute in 1893 permitted the President to direct that the rank of American representatives to each state should be equal to the rank of the diplomatic agents received from that state. The failure of the United States to send ambassadors during its first hundred years should not be regarded as a commentary on the nature of the work done by American diplomatic representatives during that time, since the

2. Significance of rank

rank of an agent does not necessarily bear a relation to the importance of his mission. It is easier for an agent of high rank to gather information, since he is better able to mix with other representatives if he ranks with or above them, but the significance of his mission depends upon his instructions, not his rank. Each state is free to make its own choice of agents, but the receiving state may not wish to receive a certain person, who in that case is *persona non grata*. The custom is, in order to avoid the embarrassment which attends the refusal of an agent, to make confidential inquiries as to whether a proposed representative will be acceptable before any public announcement is made.

3. Functions

The functions of the diplomatic agent were summarized in a way satisfactory to many laymen in the definition of Sir Henry Wotton, veteran diplomat of James I of England: "An ambassador," wrote Sir Henry, "is an honest man, sent to lie abroad for the good of his country." More accurate, however, is Professor Hershey's statement: "The main duties or functions of permanent diplomatic agents are those of observation, protection, and negotiation."³

The agent's duties of observation include reporting to his government everything that could be of significance to it in the political and economic fields. His function in this respect is to be a sense organ to relay all manner of information, even that which might appear to an outsider to be meaningless, to the nerve center, his home office. These bits of information, coming in from many places, may fall into place and complete a significant picture. His function of protection involves shielding the citizens of his state against acts of injustice or illegality, defending them, explaining for them, smoothing over difficulties they may encounter through inadvertence or fault. His task of negotiation or bargaining is summarized by the American State Department in its explanation to the foreign-service officer that he "negotiates, with tact, sound judgment, and intimate knowledge of conditions at home and abroad, protocols, conventions, and

³ Amos S. Hershey, *The Essentials of International Public Law and Organization* (The Macmillan Company, New York, 1927), p. 393.

treaties, especially regarding international intercourse, tariffs, shipping, commerce, preservation of peace, etc., in strict conformity to Government instructions."⁶

In addition to these three main duties, the diplomatic agent has innumerable others, which range from serving as father confessor to itinerant fellow countrymen to acting as social sponsor for the daughters of ambitious mothers who wish their offspring to acquire European culture or a titled husband. Walter Hines Page, Woodrow Wilson's ambassador to Great Britain, described his task of interpreting America to Britain thus: "The American Ambassador must go all over England and explain every American thing. You'd never recover from the shock if you could hear me speaking about Education, Agriculture, the observance of Christmas, the Navy, the Anglo-Saxon, Mexico, the Monroe Doctrine, Co-education, Woman Suffrage, Medicine, Law, Radio-Activity, Flying, the Supreme Court, the President as a Man of Letters, Hookworm, the Negro—just get down the Encyclopaedia and continue the list. I've done this every week-night for a month, hand-running, with a few afternoon performances thrown in!"⁷

For purposes of convenience we have separated the consular activities from diplomatic functions. There are indeed differences in the work of consuls and ambassadors, but from an organizational standpoint these services have been unified in such states as Great Britain, France, and the United States. This was done for the United States by the Rogers Act in 1924, and the Foreign Service Act of 1946 continued the union of the two services for purposes of recruitment and interchange of personnel from one service to the other.

PUBLIC INTERNATIONAL UNIONS

During the nineteenth century and the first part of the twentieth, when nationalism appeared to be constantly increasing in **A start**

⁶ *The American Foreign Service*, State Department Publication No. 235 (Government Printing Office, Washington, 1931), p. 4.

⁷ B. J. Hendrick, *The Life and Letters of Walter Hines Page* (Doubleday, Page and Company, New York, 1922), i, 159-160.

intensity, there were nevertheless counterforces making for internationalism. Whether nationalism reached its zenith in the Nazi and Fascist deification of the state, and will hereafter decline, cannot as yet be conclusively determined. Should it be true that the tide of nationalism has begun to ebb, then the ensuing internationalism may well be considered to have taken form and been given its initial impetus in the early public international unions.

Definition An organization the members of which are states and which has the capacity of making decisions and carrying them out is called a public international union. The earliest is said to be the International Telegraphic Union, established in 1856. The purpose was to facilitate telegraphic communication across national frontiers. In most European countries telegraph service, like the postal service, was a publicly owned and operated enterprise. In the United States the ownership and operation of the telegraph is private, and our national government early took the position that it should not become a member of the Union, since it was not "in a position to insure the general acceptance of the principles and rules of the international telegraph conference on the part of the private companies within its territory."⁸ This Union was succeeded by the International Tele-communications Union. Under the urging of the Economic and Social Council of the United Nations, an effort is being made to improve its machinery.

Universal Postal Union Perhaps the best known of all the unions, and the one with the largest membership, is the Universal Postal Union. It was founded in 1874, although individual states had previously made treaties with each other to speed up the forwarding of mail across national boundaries. Following the example of the private unions, the machinery of the Postal Union was composed of a congress, a conference, and a bureau. The constitution of the Union consisted of an agreement called a convention, which es-

1. Structure

⁸Quoted by Paul S. Reinsch, *Public International Unions* (Ginn and Company, Boston, 1911), p. 18.

tablished the organs, their limits of power, and the fundamental principles of the organization, and a *règlement*, which among other things was largely concerned with the details of administration. Freedom of transit for letters, post cards, printed papers, commercial papers, etc., was guaranteed through the territory of all members of the Union; uniform rates for foreign correspondence were set. The practice with respect to charges is that the state in which the piece of mail is posted collects the carrying charge. It is assumed that the volume of mail going out of the country will roughly equal the volume coming in, and that payments therefore will balance costs. A notable exception arose out of the practice of missionary societies' sending large numbers of Bibles to Iran. The Persian government complained of the great cost of strings of camels to convey the stream of foreign Bibles, whereas there was no comparable volume of outgoing mail from which fees could be collected. In this case a change was made in the rules to permit the levying of a charge on incoming printed matter. Mail going through a third state is also subject to a charge, since there are no counterbalancing receipts in this case either.

As with the private unions, the Congress of the Postal Union has the power to modify the convention or constitution, subject to subsequent ratification by the member states. The Conference which was set up to deal with minor matters of policy between the meetings of the Congresses ceased to function early in the history of the Union.⁹ Such matters as the Conference was to consider are disposed of by being circulated to the national postal administrations for comment. After questions have thus been examined, they are framed in the form of propositions which are submitted to a vote by the national administrations. The administrative agency of the Union, the Bureau, is located at Berne, Switzerland. Its functions include acting as a clearing-house in the settlement of accounts connected with international

2. Powers

⁹ L. S. Woolf, *International Government* (Brentano, New York, 1916), p. 196.

postal service, collecting information of value to the service, circulating amendments to the convention, and notifying members of changes which have been adopted.

3. Policy making

Members of national postal administrations make up the personnel of the Congresses. Decisions are made in the Congress by a majority vote. While these decisions are not legally binding on the national postal administrations which perform the work of handling the mail until approved by their respective governments, in practice the administrations accept them when they are made by the Congress without waiting for national approval. Once the French representative opposed a motion and announced that he would vote against it and would refuse to accept it. It passed in spite of his opposition. The French postal administration was then faced with dropping out of the Union or changing its position. It chose to change its position. L. S. Woolf has summarized the practice of the Postal Union: "The result is that the nations of the whole world have for everything connected with the international exchange of letters . . . submitted to International Government. Each National Administration can no longer determine the rates it will charge, the matter which it will or will not receive, or the methods in which it will conduct the foreign postal service. On all these subjects the National Administration is in practice bound to accept the decisions of the majority of the Administrations adhering to the Union."¹⁰

Other unions

There are public international unions in other fields than communication—transportation, police, health and sanitation, agriculture, fiscal matters, opium control, intellectual coöperation, the handling of refugees, etc. Before World War I there were forty-five public international unions.¹¹ Their organization in a majority of cases corresponded in one way or another to that of the Postal Union. More of these were established after World War I, either independently of the League of Nations or under its aegis. Article 24 of the League Covenant, or constitution,

¹⁰ *Ibid.*, pp. 195-196.

¹¹ Paul S. Reinsch, *op. cit.*, p. 4.

provided that there should "be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent."

The experience from 1919 to 1931, during the period of increasing influence of the League, was so encouraging that the framers of the United Nations Charter decided that the new organization should rely still further on the public international unions. The Charter refers to the unions as specialized agencies. The Economic and Social Council of the United Nations, subject to the approval of the General Assembly, is authorized among other things (1) to negotiate arrangements for bringing such specialized agencies into relationship with the United Nations, and to coördinate their work; (2) to examine their administrative budgets with a view to making recommendations to the agencies; (3) to initiate negotiations for the creation of new agencies whenever that would contribute to prosperity, cultural or educational improvement, or the observance of human rights; (4) to "take appropriate steps to obtain regular reports" from them; (5) to arrange for their representation on United Nations bodies and for United Nations representatives to participate in the deliberations of the specialized agencies. -

Unions
and the
U.N.

Steps were very soon initiated to put into effect the mandate of the Charter to bring the public unions, both old and new, into relation with the United Nations. The Economic and Social Council has made agreements with nine specialized agencies, and these have been approved by the General Assembly. Agreements are in process of negotiation with other unions.

THE UNITED NATIONS

The public unions are comparatively unambitious; each deals with a narrowly limited subject. There have been only two practical attempts in modern times to establish a world agency capable of dealing with all the political problems which arise in international intercourse. The first was the League of Nations, which was established by the treaty which ended World War I; and the second is the United Nations, which grew out of the

Failure of
League

coöperation in World War II of the states opposed to Germany, Italy, and Japan and which was established by the ratification of the Charter written at the San Francisco Conference in 1945. The League of Nations was successful in performing many of the minor functions assigned to it but failed to achieve the main purpose—peace. The failure of the United States to enter the League may have played a part. No doubt constitutional weaknesses, such as the rule that no decision could be made without unanimous approval of the member states, contributed to its failure. But more serious than constitutional difficulties was the disinclination of the major states to use the League for the solution of problems arising out of political and economic dislocations. The United Nations is still young and cannot be fully evaluated, but the ultimate test for it, as for the League, will be: Will it preserve peace?

**Purposes
of U.N.**

The framers of the Charter of the United Nations envisaged keeping the peace as involving (1) extensive international co-operation, (2) the reference of disputed issues to an international judicial body, (3) the use of moral, economic, and military power to repress aggressors, and (4) the exercise of some trusteeship over subject or colonial peoples. Within the limits which were imposed by the insistence upon the maintenance of state independence, the machinery provided by the Charter is designed to accomplish these four purposes.

**Limited
power**

One essential difference between the government of a national state and an organization such as the United Nations must be clear if the nature of the United Nations is to be understood. A government has the authority to issue law which in a legal sense is compulsory on its citizens and also on the sub-governments within the state. The organs of the United Nations may make recommendations and give advice to member states and even to non-member states but, with the exception of matters related to threats to peace or overt aggression, they may not issue compulsory commands to states. Also it should be noted that the organs of the United Nations have no power to issue rules which

are obligatory upon any individuals except the employees of the United Nations.

The importance of authority in the United Nations system is both over- and under-emphasized in current discussion, as it often is in thinking about national governments. The authority of a government is sometimes thought of as being useful only as a means of dealing with malefactors. But this use of authority is not the chief task of government. It is the broad power of policy formation that is the most significant function of government. In the process of deciding what is to be done, whether in a legislature, an executive department, or an administrative board, a time comes when some plan is resolved upon. Debate stops and the wheels of government begin to turn; authority is used to put the plan into effect. Thus it is seen that from the standpoint of quantity of activity, the work of the sheriff in making arrests and carrying out the orders of a court is infinitesimal as compared to the activity of all the other officials who have laid out for them a line of action in the building and maintenance of roads, the operation of schools, the provision of safe water and fire protection, the assessment of property, the fixing of tax rates, the collection of taxes, and a multitude of other activities.

Uses of
power

In this area of the authoritative determination of policy the United Nations has no power. There are three ways by which it or its agencies may seek to influence the member states, but each of these depends upon voluntary action of the states. Advice may be given as the result of debate carried on in the agencies of the United Nations or as the result of resolutions adopted by them; treaties may be prepared which are to be signed by the United Nations and by the member states or treaties may be drafted and submitted to the states for their mutual signatures; and the United Nations may collect and publish information calculated to influence state behavior. Beyond this, no policy can be settled; debate as to the best way can be continued interminably, regardless of the extent of agreement as to the necessity

Means of
influence

of action. In international affairs, as in internal affairs, it may be that defective action is preferable to stalemate. It is certain that in the internal affairs of states the power to establish policy is vital. The question whether or not states will voluntarily act under the non-compulsive leadership of the United Nations, assuming for the moment that that leadership will be offered, remains to be answered. This problem may well be more crucial than those connected with coercing an aggressor state. In fact, if the problems of policy determination are successfully attacked, it could well be that there would be few if any occasions for the repression of aggressor states.

Members and Organs

Admission of mem- bers

The original members of the United Nations were those states which participated in the Conference at San Francisco or who signed the war agreement (Declaration of the United Nations) of January 1, 1942, and also signed and ratified the Charter. Provision is made for the subsequent admission of "all . . . peace-loving states which accept the obligations contained in . . . the Charter . . . and are able and willing to carry out . . . these obligations." New members are to be admitted upon recommendation of the Security Council and election by the General Assembly. Seven states have been admitted, to make a total of 58 members.

Principal organs

The principal organs of the United Nations according to the Charter are the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice. A Military Staff Committee, composed of the Chiefs of Staff of the five great powers or their representatives, is provided and the authority to create subsidiary agencies as needed is conferred on the General Assembly, on the Economic and Social Council, and on the Security Council.

The General Assembly

Voting rules

The General Assembly is the only one of the six organs in which all states have a position of legal equality. All member

states are continuously represented on it. A state may have as many as five representatives, but each state has only a single vote. Decisions are made either by a simple majority or by two-thirds majority—in both cases, of those present and voting. Whether or not a two-thirds majority is necessary for a decision is to be determined by the importance of the question. The Charter lists as requiring a two-thirds vote certain “important questions”—elections to the Councils, admission of new members or suspension of old ones, and recommendations with respect to the maintenance of peace and security—and provides that the General Assembly shall determine by majority vote what others are to be added to the list of “important questions.”

Historically, the principle of unanimity has been insisted upon as persistently as has sovereignty or legal equality of states. It was thought to be inherent in sovereignty. Consequently, when it is realized that the great states have relinquished the power to prevent censure or recommendations adverse to their interests, it becomes clear that the Charter registers a clear break with practice even more recent than the drafting of the League Covenant, for the principle of unanimity was written into the Covenant. Another aspect of unanimity is the principle that a state cannot be bound without its consent. This maxim of sovereignty was subjected to still further modification by the provision that the United Nations “shall insure that states which are not members . . . act in accordance with these principles so far as may be necessary for the maintenance of international peace and security.”

Majority
rule

The General Assembly is given a position of preëminent influence in the organization. All the other organs except the International Court of Justice are required by the Charter to report to it. It may make recommendations to any of the political agencies; it approves the budgets of all of them; it elects the members of the Economic and Social Council and the non-permanent members of the Security Council and the Trusteeship Council; it may initiate amendments to the Charter; it takes other action on the recommendations of the Security Council,

Relation
to other
organs

such as the admission of new and the suspension or expulsion of old members and the election of the Secretary-General. All of the organs of the United Nations except the General Assembly have specialized functions. Their powers either are specifically delegated to them by the Charter or are to be assigned to them by the General Assembly and exercised under its supervision. Powers conferred on the United Nations by the Charter and not delegated by it to any agency are to be exercised by the General Assembly as a result of its general supervisory position.

World
general
welfare

In addition to the responsibilities accruing to the General Assembly from its relationship with the other United Nations agencies, the Charter confers on it responsibility for world general welfare. This includes any matter, whether it be political, economic, or social. The words of the Charter show the all-inclusive character of this mandate: "The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification; b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Moreover, the General Assembly is specifically authorized to discuss any question related to the maintenance of peace and to make recommendations to the states concerned or to the Security Council or to both, except during the time when the Security Council is considering the dispute. The significance of this jurisdiction of the General Assembly in relation to the difficulties growing out of the veto power will be pointed to later.

Procedure
1. Agenda

The procedure of the General Assembly throws light on the nature of its work. Items which are to be on its program for discussion (agenda) are studied by competent experts of the Secretariat, so that as much information as possible will be available to the representatives of the member states. However, all member states are notified of such items two months before

the session and if they have an interest in the topics their own experts collect information. If a member state has asked that an item be placed on the agenda, its delegation to the Assembly will be responsible for the preparation of materials needed for its presentation. When the item comes before the Assembly, general discussion takes place. This discussion clarifies the limits within which action may be taken. Then the problem is referred to one of the six subcommittees of the Assembly for study and report. The competence of these committees is indicated by their names: the Political and Security Committee; the Economic and Financial Committee; the Social, Humanitarian and Cultural Committee; the Trusteeship Committee; the Administrative and Budgetary Committee; and the Legal Committee. Most resolutions submitted to the Assembly are prepared by one or more of these committees. The use of the committees and others which may be set up for drafting purposes is a practice copied from such sources as the standing committees of the United States Congress. These committees, usually referred to by their numbers, as the First Committee, etc., provide a means to secure careful drafting; at the same time, deliberation on the resolutions by the whole Assembly preserves the advantages of public discussion and the mobilization of world opinion. Items not disposed of directly by the Assembly may be referred to other organs of the United Nations for study and report, or for disposal by them.

2. Standing committees

There was an Assembly in the League of Nations; as established, it was coordinate with the Council. However, in practice the Assembly developed to a position of dominance. Professor Goodrich has pointed out that the draftsmen of the Charter codified the practice of the League.¹² The General Assembly of the United Nations is at the beginning what the League Assembly was developing into when the League system collapsed under the impact of totalitarian aggression from the outside and isolationism from within. If, then, the experience of the League

Potential importance

¹² Leland M. Goodrich, "From League of Nations to United Nations," *International Organization*, I, 3-21 (1947).

development is a signpost to point to the future development of the Assembly, it may be expected that it will continue to increase in influence. Indeed, indications to this effect have already appeared. During the early months of the United Nations the veto in the Security Council was used on numerous occasions. Some of the member states, particularly the small states, were disturbed by what they considered tactics which might destroy the usefulness of the Security Council, and also possibly arrest the development of the whole United Nations. As a result of their criticisms, a number of questions have been transferred to the General Assembly for discussion. These have included the problem of Franco Spain, the Balkans, and atomic energy. One question—that of Korea—was placed directly before the General Assembly by the United States without being raised at all in the Security Council.

**Little
Assembly**

Whereas the Security Council is always in session, the General Assembly meets yearly for a few months. In order to carry out its program of supplementing the Security Council, the General Assembly in 1947 established the Interim Committee, popularly known as the Little Assembly, to sit while the General Assembly is not in session. As in the General Assembly, each state has one vote. The Interim Committee was instructed to consider the principles of political coöperation, the veto power, and its own permanency. Already it has given advice to the United Nations Temporary Commission on Korea.

The Security Council

**Member-
ship**

Because of its enforcement powers, the Security Council has received the lion's share of attention. It is composed of eleven states. Membership on the Security Council is of two kinds—permanent and non-permanent. The five permanent members are named in the Charter: China, France, the Soviet Union, Great Britain, and the United States. This gives the great states influence commensurate with their power and prestige. The six non-permanent members are chosen by the General Assembly for two-year terms from the state membership in the

United Nations. A retiring member is not eligible for immediate reelection.

The functions of the Security Council are few and highly particularized—though dramatic. It nominates the Secretary-General to the General Assembly, which elects him, and it participates with the General Assembly in the election of judges of the International Court of Justice. It makes recommendations for admission, suspension, and expulsion of members of the United Nations. It is charged with formulating plans for the regulation of armaments. Acting chiefly through the Trusteeship Council, it is to perform the functions of the United Nations with respect to the strategic areas. Finally, it is charged with the primary responsibility for keeping the peace. The work of keeping the peace divides itself into two categories: (1) settling disputes which might endanger peace; (2) suppressing overt threats to the peace. This function is the major task of the Security Council and therefore requires further description.

Any dispute "which is likely to endanger the maintenance of international peace and security," regardless of whether or not it is between members of the United Nations, is subject to the attention of the Security Council, either on its own initiative, or at the direction of the General Assembly, or by reference of any state, member or non-member of the United Nations, or of the Secretary-General. Three kinds of action are open to the Security Council. It may call upon disputant states to settle their differences by the accepted peaceful means, such as negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, etc. Here Council intervention is for the purpose of calling attention to the desirability of a settlement. There is to be no hint as to what the terms of the settlement should be, and no judgment as to who is in the wrong. The second means is for the Council to intervene in the dispute still further and "recommend appropriate procedures or methods of adjustment." Intervention of this type is to suggest how the parties to the dispute should proceed. Still there is to be no blame or suggestion as to what the solution should be. The third

Functions

Procedures in disputes

1. Non-coercive

step authorized by the Charter, which is to be used only in the event of the failure to secure a solution by the recommendation of procedures, is for it "to recommend such terms of settlement as it may consider appropriate." Here the Council may state the terms of settlement. It will be noted that its decision as to what the settlement should be is to be given in the form of a recommendation.

2. Coercive

But whether or not any state refuses to accept a recommended solution, it is obligated not to resort to violence in order to achieve its purpose. Should the machinery for peaceful settlement fail, then the repressive powers of the Security Council may be called into use. When acting in the presence of aggression, the Security Council no longer makes recommendations; its decisions more nearly fall in the category of legal commands. The language of the Charter, however, softens somewhat the clear break with the traditions of sovereignty in which states were presumed not to be subject to commands. The words used are: "the Security Council may . . . call upon the parties" and "it may call upon the members."

Three actions may be taken by the Security Council in the presence of an overt threat to peace. First, it may specify measures for the parties to the dispute to take to prevent aggravation of the situation. A possible order might be for the armed forces of both parties to be removed from contact with each other. This was the usual practice of the League of Nations on occasions when there were threats of armed violence; compliance of the parties to the dispute with such a request did not prejudice the claims of either. Provision for this procedure was written into the Charter. Second, the Security Council may decide that political or economic sanctions or other means not involving the use of armed force will be sufficient to give effect to its decisions. Measures of this character listed by the Charter include the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations" between aggressive states and the other states of the United

Nations. Third, the final recourse is best described in the words of the Charter: "Should the Security Council consider that measures [short of the use of armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations."¹³

The voting procedure of the Security Council has been a matter of much notoriety because of the so-called veto power. Each of the eleven members has one vote. Two kinds of issues arise: those on procedural questions, which are to be decided by the vote of any seven members, and those on all other questions. Decisions on all other than procedural matters require the vote of at least seven members, and except in two cases the five permanent members of the Council must be included.¹⁴ By the "decision of San Francisco" at the time of the framing of the Charter in 1945, the major powers agreed that the question whether an issue was procedural should be treated as a non-procedural matter, so that any one of the five permanent members can take an issue out of the procedural category by so voting.¹⁵ When seven of the eleven members vote in the affirmative, and one of the five permanent members votes negatively, the latter is said to have exercised its veto power. The failure to vote has been interpreted in practice as not constituting a veto.

Voting
procedure
1. The
veto

¹³ It will be noted here that the phraseology does not make this the action of member states, but of the Security Council. In art. 24 the Security Council is made the agency to act in behalf of the states in preserving the peace, and art. 43 empowers the Security Council to make agreements with member states providing for armed forces to be put under its command.

¹⁴ The exceptions are as follows. (1) If one of the five is a party to a dispute which may endanger peace and security, that party will not vote on what action the Council shall take to secure a peaceful settlement of the dispute. The veto may be exercised when a decision as to the use of coercive action is being made. (2) If one of the five is a party to a dispute under art. 52, par. 3, which deals with the settlement of local disputes by regional agencies, it shall not vote when the decision is made to refer the question to the regional agency.

¹⁵ Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations* (World Peace Foundation, Boston, 1946), pp. 124-125.

2. Significance of the veto

With respect to the whole veto question three comments may be made. First, that the veto should have attracted so much popular attention is indicative of the extent of change in international matters which has occurred since the drafting of the League Covenant in 1919. At that time all states, large and small, were given a veto power, with minor exceptions, not only in the League Council but also in the League Assembly; by the Charter only five powers have the veto, and this only in the Security Council. Second, in view of the fact that the major function of the Security Council is the settlement of disputes and the suppression of aggressors, the other functions of the United Nations in the field of international coöperation are not disturbed by the veto. It is in the area of economic and social activity that the greatest development must take place if the objective conditions of peace are to be established. No simple mechanical arrangement in the Security Council can safeguard peace if political and economic dislocations are severe; and conversely, if the United Nations' activities in the field of international coöperation are successful, then the solution of disputes and the suppression of aggression will be successful in spite of the existence of the veto. Third, the focusing of attention on the veto in the Security Council gives an erroneous impression of the machinery provided by the Charter for immediate action in the presence of concrete disputes.

3. Avoiding the veto

The power of the General Assembly to make recommendations in all cases whatsoever is limited in only one respect, namely, that it shall not make recommendations concerning a matter over which the Security Council is at the moment exercising its jurisdiction. The exercise of the veto in the Security Council therefore opens the door to discussion in the General Assembly. There is nothing to prevent the General Assembly from making any recommendations which the Security Council may make. And such recommendations may be made by two-thirds of the members present and voting. It is not a sound argument to say that unilateral action in such matters as aid to famine regions or states in political turmoil is necessary because

to proceed through the United Nations would result in stalemate on account of the veto. The problem of the United Nations is therefore a problem not so much of organization as of finding one strong power with the desire to use the machinery provided by the Charter.

The Economic and Social Council

The Economic and Social Council is composed of eighteen members of the United Nations, elected for three-year terms by the General Assembly. The terms are staggered so that six will be elected each year. There is no restriction upon immediate reelection at the expiration of a term.¹⁶ Decisions are made by a majority of those present and voting.

**Member-
ship**

As the Security Council is the organ primarily responsible for keeping the peace, the Economic and Social Council is the specialized organ for international coöperation in the areas of economic and social activity. Whereas the General Assembly is given authority over the Security Council largely by implication, it is given direct authority over the Economic and Social Council. The Charter declares that the great purpose of the United Nations is the creation of the "conditions of stability and well-being" in which "higher standards of living" and "full employment" exist, in which economic, social, and health problems are solved, and in which "universal respect for and observance of human rights and fundamental freedoms" are achieved. The Charter vests the responsibility for promoting this purpose in the "General Assembly and under the authority of the General Assembly in the Economic and Social Council."

Purpose

The specific functions of the Economic and Social Council, which are set forth in detail and great number in the Charter, can be summarized under four heads. (1) Its chief function is the collection of information. It may make or initiate studies and reports "with respect to international economic, social, cultural,

Functions

¹⁶ Art. 67. For a detailed study of the Economic and Social Council, its position in the United Nations system, its functions, and the role it may potentially occupy see Herman Finer, *The United Nations Economic and Social Council* (World Peace Foundation, Boston, 1946).

educational, health, and related matters"; it may receive reports from the specialized agencies; and it may on its own initiative set up commissions. (2) It is concerned with activities which look to coöperation among the states with respect to matters in its area of specialization. Among other activities, it may make recommendations to member states, hold conferences among the states, and prepare draft conventions (treaties) with respect to matters falling within its competence. (3) It is to serve as a liaison among the specialized agencies, such as the Universal Postal Union and the International Labor Organization, and between them and the United Nations; it is also charged with conducting relations between non-governmental organizations and the United Nations. (4) It is to perform services for the other agencies of the United Nations, such as may be required of it by the General Assembly, the Security Council, or the Trusteeship Council.¹⁷

The Trusteeship Council

Purpose

One of the avowed purposes of the United Nations is to provide a means for safeguarding backward peoples against exploitation by the civilized peoples. The principle is established by the Charter that the "interests of the inhabitants of these territories are paramount." To achieve the "political, economic, social and educational advancement" of these peoples, a Trusteeship Council is provided for. Its membership consists of three classes of states: (1) all of those states having under their control colonial areas which have been placed under the supervision of the trusteeship system; (2) all of the permanent members of the Security Council, whether or not they administer trust territories; (3) a sufficient number of other states to insure that the number in the Trusteeship Council not administering trust territories is equal to the number administering such territories. The first two classes of members have permanent membership; the

Membership

¹⁷ The chief Charter provisions relating to the functions of the Economic and Social Council referred to above are arts. 61-71, 91.

members of the third class are elected by the General Assembly for three-year terms.

Territories which may be placed under the trusteeship system are referred to by the Charter under three headings: (1) those which were mandates in the League of Nations system; (2) those detached from enemy states as a result of World War II; and (3) any other territories voluntarily placed under the system. The transfer in each case is to be effected by agreement, presumably between the state transferring the territory to the system and the General Assembly or, in the case of strategic areas, the Security Council. The state making the transfer to the United Nations then becomes the administering authority. This function is to be carried on in accordance with the terms of the agreement subject to the supervision of the General Assembly exercised through the Trusteeship Council, in the ordinary case, or of the Security Council if the territory is a strategic area.

Trustee-
ships

The Secretariat

The Secretary-General and his staff comprise the Secretariat. The Secretary-General is appointed by the General Assembly on recommendation of the Security Council. He is the chief administrative officer of the United Nations; he appoints the permanent staff of civil servants, under regulations established by the General Assembly, and supervises them. Neither he nor his staff may "seek or receive instructions from any government or from any other authority external" to the United Nations. He is, or could be, the first citizen of the world. Professor Finer says of him: "The truly important feature of his functions is that he is to act as Secretary-General at all meetings of the General Assembly, the Security Council, the Economic and Social Council and the Trusteeship Council. He would be the administrative stem around which the political and governmental functions and administrative leadership of these bodies revolved. To them, he would bring a knowledge of all the work being undertaken by the Assembly and Councils and their committees and the com-

Secretary-
General

missions and administrative departments. He could be a momentous influence on the operation of any part of the entire machinery."¹⁸

Staff

The Charter provides for merit selection of the staff. "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible." The opportunity for securing expertness is provided in the Charter stipulation that staff personnel be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to the other organs.

The International Court of Justice

The International Court of Justice is the judicial organ of the United Nations system, but is not subject to the control of the United Nations. All members of the United Nations "are *ipso facto* parties to the Statute" of the Court, but non-members may also become parties to the Statute of the Court.¹⁹ One of the obligations of membership in the United Nations is compliance with decisions of the Court. Failure of a state to comply entitles the other party to the dispute to apply to the Security Council to make recommendations or to decide upon measures to give effect to the judgment.

Jurisdiction

The Court consists of fifteen judges elected for a period of nine years by the concurrent votes of the General Assembly and the Security Council. The Court has three kinds of jurisdiction. (1) It has jurisdiction in all cases which parties to a dispute may refer to it. (2) It has so-called compulsory jurisdiction. A state which is a party to the Statute of the Court may declare that it will accept the jurisdiction in any dispute which may arise, or it may declare that it will accept the compulsory jurisdiction of the Court in any dispute with any other state which has also ac-

¹⁸ *Finer, op. cit.*, p. 75.

¹⁹ Art. 93. The Statute of the Court is its constitution; as the states ratified the Charter as a treaty, so they at the same time ratified the Statute.

cepted the compulsory jurisdiction of the Court. If in a contentious case properly before the Court a party to the dispute fails to defend its case, the other party may call upon the Court to decide in its favor and the Court may do so. (3) It may give advisory opinions on any legal question to the General Assembly or the Security Council or other organs of the United Nations upon request. Procedure in such cases is to be the same as in contentious cases in so far as such procedure is applicable; i.e., parties in interest are to be notified, and counsel are to present oral and written arguments.

The law which the Court is to apply is prescribed by the statute: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. . . . judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law." If the parties to the dispute agree, the case may be decided *ex aequo et bono*, that is, according to the principles of equity and justice.

Law applied

The Future

At this point the question arises as to whether the United Nations will be able to keep the peace. Since it is so largely an agent of the sovereign states, the question appears to be: Will the member states of the United Nations, working through it, keep the peace? Experience with confederations like the government of the United States under the Articles of Confederation and the League of Nations, which were to perform governmental functions of adjustment and coercion but were unable to form a will of their own over and above the wills of the principals, makes the prospect for peace dreary indeed. Is there a possibility of the United Nations' developing a character and power of its own superior to any of its members? The language of the Charter and the procedures established by it have a latitude which will permit such a development. A case in point is the clause of the

Charter which has given the most comfort to the extreme nationalists: "The Organization is based on the principle of the sovereign equality of all its Members." Although this does recognize sovereign equality, it does so only at the base. A superstructure limiting the effects of sovereignty is altogether consistent with this language, and indeed the whole purpose of the Charter is to erect such a superstructure. Again, the voting procedure, particularly in the General Assembly and in the Economic and Social Council, and to a considerable extent in the Security Council, shows that states are not to be sovereign in all matters but are to yield to the desires of superior majorities. The problem of peace then becomes the practical question of whether the states, particularly the most powerful ones, the United States and the Soviet Union, can perform an act of self-abnegation by using their influence to build a government with power superior to their own in the area of interstate relations. If the great powers will abandon unilateral action and have recourse to the organization so dearly bought and so solemnly instituted at such a recent date, the hope of young men and women to live out their days in peace is not utterly vain.

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CHAPTER 6

CONSTITUTIONS

Definitions—The Scope of the Constitution—The Suspension of Constitutional Provisions—The United States Constitution—The Consequences of Judicial Review—Organic Laws—The Revision of the Constitution

DEFINITIONS

In legal theory, the sovereign power establishes the government; it does so by creating offices and prescribing methods of filling them, and by assigning powers and duties to the incumbents of the offices. In the process of making these powers precise it may enumerate prohibitions on governmental action, such as we associate with a Bill of Rights. The laws by which the sovereign thus supplies an organization to the state are called the constitution. It is apparent that these rules need not be collected in a single document, although most of the states of the modern world do have documentary constitutions. It is apparent also that where there is a written document it cannot be, and should not attempt to be, so detailed as to provide for all necessary offices. The United States constitution instituted a Congress, but left its future membership to be determined in part by statute; it created the offices of President and Vice-President, but left all inferior executive offices to be established by Congress; it gave a name to the Supreme Court, and designated its original jurisdiction, but left the actual organization of the Court and all inferior courts to Congress. The statutes which amplify the governmental system are often called a part of our "working constitution," a term which embraces the documentary constitution as well as

Docu-
mentary
constitu-
tion

Working
constitu-
tion

these supplementary measures. Also included in the working constitution are authoritative interpretations of the documentary constitution by the courts or other agencies which may be called upon to apply it; the documentary constitution, together with these interpretations, makes up the body of our "constitutional law." Finally, in the working constitution there are extra-legal elements, which cannot be attributed either to the sovereign will or to legislative or judicial authorization. Some of these extra-legal elements are merely customary, like the traditional "right" of a Senator to personal access to the President; others arise out of obvious convenience, like the President's cabinet, an institution which has never received legal recognition; still others result from absolute necessity, and of these, political parties are the best example. Political parties, although recognized and regulated by national and state laws, have more than a mere legal existence. They are voluntary associations on which we rely for choosing officers; very imperfectly they serve also in formulating policies to be submitted to the electorate and put into effect if approved.

But ordinarily when we speak of the constitution of a country we mean the documentary constitution, assuming, of course, that there is one. This enjoys legal primacy. Since it is the instrument by which the sovereign creates the government, it is beyond the reach of ordinary governmental action, and can be altered only by an exertion of the sovereign will. This extraordinary process is called amendment—unless it takes the form of revolution, which means a temporary rupture of legality.

But suppose the constitution itself assigns to an organ of the government power to change all the rules of the constitution. This organ in fact possesses sovereign power. This is the situation under the unwritten constitution of Great Britain, according to which the Parliament is legally omnipotent; it can do anything except limit itself (a statute limiting the power of Parliament would be perfectly valid, but it could be repealed by a later statute). On the other hand, Parliament is periodically dissolved, and the electorate chooses a new Parliament. This has led some

British dilemma

students to say that "legal sovereignty" rests with Parliament, and "political sovereignty" with the voters. But consider that the right to vote is conferred and can be taken away by act of Parliament; and that during the last two wars Parliament has by statute extended its own life, refusing to submit to a general election at the usual time. It was pointed out in Chapter 1 that the idea of sovereignty is useful only for certain purposes; it is clear that here we have passed the point at which it is useful.

U.S. dilemma

This particular merry-go-round does not exist in the American law, but a similar problem arises. The documentary constitution can be changed only by the process of formal amendment, which we have called an exertion of the sovereign will. But the meaning assigned to the documentary constitution can be supplied, or changed, by the authority which gives a conclusive interpretation. Since this is usually the judiciary, there is some plausibility in attributing sovereignty to it. "We are under the Constitution," said Chief Justice Hughes, "but the Constitution is what the judges say it is." The problem is not one of deliberate distortion of the constitution by the courts; it goes deeper, for with the best will in the world it is not always possible to assign indisputable meanings to words in a general document. Chief Justice Hughes also spoke of the Supreme Court as "the court of final appeal and ultimate error."

It is clear, then, that the legal picture, here as elsewhere, fails to give a perfect description of the facts. The problem is insoluble. A constitution which limits government must be defended by some governmental agency; but the Latin proverb is relevant—*Quis custodiet ipsos custodes?* Who will guard the guardians?

THE SCOPE OF THE CONSTITUTION

In what is said above it is assumed that indivisible sovereign power rests with the people of the United States, and that the governments, national and state, possess not a native but a derivative authority conferred by the national constitution. This is orthodox law. But in spite of the multitude of decisions which

establish this constitutional commonplace, there is a judicial tradition to the contrary.

It will be recalled that Justice Story's doctrine of "resulting power" held that in foreign affairs Congress possessed not merely the enumerated powers to be found in the constitution but all the authority of a national sovereign.¹ In keeping with this idea the Supreme Court has held that Congress has "by the law of nations" a power to acquire foreign territory²—a needless holding, for an implied power could easily be spelled out of the delegated powers in the constitution. The Court has likewise held that the constitution itself does not of necessity extend to territory so acquired. In a series of decisions following the Spanish-American War, commonly lumped together as "the Insular Cases," the Court distinguished between "incorporated" territory, which Congress had made a part of the United States—to such territory the full protection of the constitution extended; and "unincorporated" territory, which Congress had acquired but had allowed to remain a sort of external appendage of the United States—to such areas only the "fundamental" provisions of the constitution extended. Alaska and the Hawaiian Islands are incorporated; the other insular possessions and the Panama Canal Zone are not incorporated. Children born in incorporated territory are born "within the United States" for the purpose of citizenship acquired by operation of the Fourteenth Amendment. Congress may extend citizenship to the citizens of unincorporated territories, as was done in the case of Puerto Rico in 1917; but lacking an express act of Congress the inhabitants of unincorporated territory remain non-citizen nationals of the United States. Likewise it has been held that the constitutional requirement that duties, imposts, and excises be uniform "throughout the United States" does not apply in the case of unincorporated territories; these may be subjected to discriminatory taxes.

Congress
over con-
stitution?

Insular
Cases

¹ See p. 28.

² *Jones v. United States*, 137 U.S. 202 (1890).

It is hard to see how Congress can enjoy legal authority at American law outside the boundaries of the constitution which creates Congress and confers its authority, but this is the upshot of the *Insular Cases*. So it has been held that the requirements of grand and petit juries in the Bill of Rights do not apply in unincorporated territories. This curious doctrine is made even more bewildering by the concession that Congress must observe "fundamental" constitutional rights, of which the right to due process of law³ is one.

THE SUSPENSION OF CONSTITUTIONAL PROVISIONS

State of
siege

The framers of constitutions have not always had confidence that their creations were adequate to meet emergencies. So European and Latin-American constitutions have sometimes provided for the suspension of their provisions in time of war or insurrection. This is usually called a "state of siege" and authorizes the chief executive to rule by military power. The decision of the chief executive to declare a state of siege is not always decisive. In the Third French Republic and in the Weimar Republic in Germany the action of the executive could be overridden by the legislature; but in Brazil the legislature cannot inquire into the propriety of the President's action until he has declared the emergency at an end.

Neither the United States constitution nor that of any state authorizes a state of siege. There is no legal power in any officer or governmental agency to suspend any constitutional provision. But to make this clear, three problems must be discussed: the scope of national power in an emergency, the police power of the states, and the problem of martial law.

Implied
powers
elastic

As we have seen, the United States government possesses only those delegated powers enumerated in the constitution. No emergency can add to these powers: "Extraordinary conditions do not create or enlarge constitutional power," said Chief Justice Hughes in *Schechter Poultry Corporation v. United States*.⁴ But

³ *In re Yamashita*, 327 U.S. 1 (1946).

⁴ 295 U.S. 495 (1935).

an emergency may make it "necessary and proper" to take action for the accomplishment of one of the delegated powers which would be inappropriate in other circumstances. So the Supreme Court recently held that in time of war it was proper for Congress and the President to establish curfews in zones of military importance,⁵ and to exclude from such zones classes of persons whose loyalty could not readily be determined.⁶ In peacetime such action would be unconstitutional; it was justified only as necessary and proper for the exercise of the delegated power to carry on war.

The states are not narrowly confined to enumerated powers; as we have seen, the Tenth Amendment recognizes that they possess all powers not exclusively granted to the national government and not prohibited to them by the constitution. But the problem of emergency does arise, in connection with constitutional prohibitions. The states are forbidden by Article I, Section 10, of the national constitution to impair the obligation of contracts, and by the Fourteenth Amendment they are forbidden to deprive any person of life, liberty, or property "without due process of law." If the states were never able to impair the obligation of existing contracts, their power to protect their citizens could be limited by private contracts between any two persons. The states are so busily engaged in depriving persons of life, liberty, and property that it is clear that these actions must sometimes be in conformity with due process of law. The Supreme Court has dealt with these two prohibitions by adopting the idea of "police power," which is defined as the right of the state to protect the health, safety, morals, and general welfare of its citizens. If a state law does in fact seek one of these worthy objects, it is not an infringement of the contract clause; all contracts, even those to which the state is a party, are made subject to a subsequent exercise of the police power. Likewise a state law which takes away life, liberty, or property in order to protect the public health, safety, or morals or the general welfare

State police power

⁵ *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

does not violate the Fourteenth Amendment. Of course the Supreme Court undertakes to determine what is in fact a legitimate exercise of the police power; but in recent years it has been indulgent toward state laws. So it has held that the state may postpone mortgage foreclosures in times of emergency, despite the contract clause,⁷ and that it may fix minimum wages for women⁸ and minimum retail prices for milk⁹ where some reasonable ground for intervention exists; the "reasonableness" of the action makes it an exercise of the police power and therefore "due process of law."

**Martial
law**

It is our third problem, the question of martial law, that really raises the issue of the suspension of constitutional guarantees. Martial law raises the question of the relation of the military to the civil power. Specifically, can the President as Commander in Chief, or the governor of a state as commander of the state militia, suspend the ordinary civil law when he considers it necessary, and substitute his own commands, to be enforced by military power; and can he bring civilians to trial before a military tribunal, either on the charge of violating civil law or on the charge of violating military rules?

State courts have sometimes held that the governor may in his discretion interrupt the civil law and substitute military rule; that when he has done so he may arrest civilians without alleging any violation of law on their part, and detain them at will, until he believes that what he considers to be the "emergency" has passed; even that he may bring them to trial before military courts. Such a decision on the part of a state government can be reversed by the federal courts only if the national constitution or laws are violated. The Supreme Court in the most recent decision on this question has taken the position that the action of the governor will be upheld if it is reasonably necessary to meet a genuine emergency; but the Court will inquire into the reasonableness and, if it finds the emergency fictitious, or the means obviously inappropriate for dealing with it, will declare that the

⁷ *Home Building and Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934).

⁸ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

⁹ *Nebbia v. New York*, 291 U.S. 502 (1934).

action violates the due process clause of the Fourteenth Amendment.¹⁰

The question of the meaning of martial law with relation to the President arose in 1946 in *Duncan v. Kahanamoku*.¹¹ Congress had authorized "martial law" in Hawaii in case of "rebellion or invasion, or imminent danger thereof," and directly after the Japanese attack on Pearl Harbor martial law was declared. Nevertheless the Court held that the statute could not be construed to authorize the trial of civilians by a military tribunal when civil tribunals competent to try them were open and functioning. The meaning of martial law must be determined from American tradition; and by American tradition the military and military process have always been subordinate to civil law and civil process.

Open
court doc-
trine

It is not a clear-cut decision, but it seems to mark a turn away from the readiness with which state courts, and even the Supreme Court, in the late nineteenth and early twentieth centuries, condoned executive suspension of the civil law. It is a return to the earlier and sounder tradition of America, which found expression in the command in a number of state constitutions that "The military shall be kept in strict subordination to the civil power." It is of course proper for the executive to use military force to execute the civil laws, but to use it to suspend the civil laws is quite another matter. We must not forget that many constitutions have been overthrown by military usurpation. We have had warnings in this country when governors have used the state militia to carry an election, or to oppose the execution of federal laws, to remove political opponents from office, or to force a city council to pass an unconstitutional ordinance.¹²

Suprem-
acy of
civil
power

THE UNITED STATES CONSTITUTION

The constitution of 1787 is a brief document divided into seven articles, to which twenty-one articles of amendment have

¹⁰ *Sterling v. Constantin*, 287 U.S. 378 (1932).

¹¹ 327 U.S. 304.

¹² Frederick B. Wiener, *A Practical Manual of Martial Law* (Military Service Publishing Company, Harrisburg, 1940), pp. 161-163.

been added. Only its general character will be described here; particular provisions will be discussed in later chapters.

The text Article I is the legislative article. It declares that the legislative powers "herein granted"—words which significantly underline the fact that the national government possesses only delegated powers—shall be vested in a Senate and a House of Representatives. Article II entrusts the executive power to a President, to be chosen in a prescribed manner. Article III vests the judicial power in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish," assigns certain original jurisdiction to the Supreme Court, and describes the cases in which Congress may grant further jurisdiction to the federal courts. Article IV deals with relations between the states, and establishes certain duties of the national government to the states. Article V enumerates the permitted ways of amending the constitution. Article VI contains the supremacy clause or "supreme law of the land" clause already described.¹⁸ Article VII deals with the adoption of the constitution, its substitution for the old Articles of Confederation. Within two years of its adoption the first ten amendments were added to the constitution. These are called the Bill of Rights; they were patterned after the Declarations of Rights which a number of states had included in the constitutions they had adopted. The Bill of Rights recited further prohibitions upon action by the national government in addition to those in Article I, Section 9.

Basic principles: The constitution originally contemplated a broad popular basis for the national government but did not envisage direct election by the people of any other officers than the Representatives. The Senators were to be chosen by the state legislatures; but the Seventeenth Amendment, adopted in 1913, provided for their selection by the same electorate that chooses Representatives, those who have "the qualifications requisite for electors of the most numerous branch of the state legislature." The President and Vice-President were to be chosen by Presidential "electors" who were themselves to be selected in the various

1. Democracy

¹⁸ See p. 29.

states "in such manner as the legislature thereof may direct." For a time the state legislatures elected the electors, but eventually the choice of electors was given to the voters in every state. In addition, the Fifteenth Amendment forbade the states to limit the suffrage on the ground of race, color, or previous condition of servitude, and the Nineteenth forbade limitation of the suffrage on the ground of sex. Thus democracy has become the chief characteristic of our constitutional system.

Another feature of our system, federalism, has already been described.¹⁴ Four other ideas associated with the constitution require discussion: bicameralism, checks and balances, the separation of powers, and judicial review.

2. Federalism

Under the Articles of Confederation the national Congress consisted of one chamber, and each state had one vote in the Congress. In substituting a federation for a confederation it became necessary to rest the government more directly on population; but if this were the sole basis of representation the populous states would control the national government. By the Great Compromise, as it is called, the framers agreed that there should be two chambers, with the states represented in one on the basis of population, and equally represented, by two Senators, in the other. The fear of the small states that the large states would seek discriminatory legislation against them has proved groundless; but the less populous states have used their equal representation in the Senate to promote sectional economic interests—silver, wheat, cattle, cotton—at the expense of the more populous states.

3. Bicameralism

Another argument for bicameralism did not turn on the problem of federalism. It is the idea that if a measure must pass two chambers this will prevent "hasty and ill-considered legislation." It is not easy to discuss these questions in the abstract, without reference to the quality of the membership of legislative chambers. But it seems likely that unicameralism increases the sense of responsibility of the legislature, for it is not so easy to conceal the legislative history of bills from the public in a one-house leg-

¹⁴ See pp. 25-30.

islature. Unicameralism has the further advantage of making unnecessary the "conference committee" which compromises differences between the two houses; in bicameral legislatures this powerful body can arbitrarily, and by secret deliberations, determine the form in which legislation is to be presented to the two houses for unconditional acceptance or rejection.

4. Checks
and bal-
ances

Bicameralism was already familiar to Americans in the examples of their colonial legislatures and more particularly in that of the British Parliament, about which a notion of "checks and balances" had grown up. According to this idea, there were three members in the Parliament, the King, the Lords, and the Commons, and each had a distinct interest. The assent of all three to legislation was required; this prevented any one of the three from securing the advancement of its separate interest at the expense of the other two, and it was thought that whatever received the concurrence of all three must surely be to the general interest. This simple-minded idea had been thoroughly exploded by Jeremy Bentham in his *Fragment on Government* (1776), but it had great currency in America and helped to recommend bicameralism as well as the executive veto. The President as the counterpart of the King, the Senate, of the House of Lords, and the House of Representatives, of the House of Commons, were thought to introduce the much-touted British device of checks and balances. But it should be observed that today the justification of the intrusion of the chief executive into the legislative process does not rest entirely on this antique doctrine. The President is elected by a nation-wide vote; in a sense he represents the people more directly than legislative representatives chosen from small districts. The chief executive is regarded by the voters as the chief legislative officer, and the veto assists him to discharge this function.

5. Sepa-
ration of
powers

Checks and balances leads to the participation of the executive in the legislative process. But the separation of the executive from the legislature is another American doctrine. The separation of powers entered English political thought in the period of Civil War and Interregnum (1640-1660), and was a common-

place of political discussion in the eighteenth century. Originally it envisaged a separation of the legislative from the executive power. The purpose was the very wholesome one of insuring that government deal with persons only according to known and general rules. If the authority which executed the laws were also able to legislate, it might be influenced by friendship or enmity to contrive biased rules for individual cases. For this reason, it was argued, executive and legislative power should be in separate hands. This is an application of the idea of "rule of law" which was introduced by Aristotle.¹⁵ The introduction of the doctrine of judicial review added a third partner in the separation of powers.

As we have seen, the existence of a written constitution superior to the government poses at once the question what governmental agency shall assume the responsibility for safeguarding the constitution. Pennsylvania in 1776 and Vermont in 1777 had created Councils of Censors to scrutinize the constitutionality of legislative acts, and New York in 1777 set up a Council of Revision for a somewhat similar purpose. A Council of Revision was proposed for the national government in the Constitutional Convention but was not adopted. No specific provision was made for defense of the constitution. Probably some delegates expected that the checks and balances within the legislative branch would safeguard the constitution; this was the reliance of the British constitution at that time. Some, however, expected that the courts would assume the task; Alexander Hamilton in No. 78 of the *Federalist* took it for granted. In some states the state courts had already assumed the function of declaring acts of the legislature unconstitutional and void. The question came squarely before the United States Supreme Court for the first time in *Marbury v. Madison*¹⁶ in 1803. In that case the Court refused to put into effect an act of Congress which, it believed, exceeded the delegated powers enumerated in the constitution. Chief Justice Marshall attempted to show that judicial review of the constitutionality of legislative action was logically implied in

6. Judicial review

a. *Marbury v. Madison*

¹⁵ See p. 12.

¹⁶ 1 Cranch 137.

the very existence of a written constitution. A written constitution is necessarily superior to the acts of the legislative organ which it creates; and if there is a conflict, the constitution must prevail. When a case comes before the Court in which the Court is asked to apply a statute inconsistent with the constitution, the Court must refuse to do so. This logic has not persuaded all readers. Professor Haines asks: "If the Constitution is a law of superior obligation, on what ground does the court insist that its judgment on the meaning of the Constitution is superior to that of the legislature which has enacted the law?"¹⁷ Marshall's statement that the judges have sworn to uphold the constitution is not an adequate answer, for the members of the legislature take a similar oath.

In general, countries with written constitutions have not felt that judicial review was necessary to the survival of their constitutions. Republican Germany and Brazil, however, both, like the United States, federations, followed the example of the United States.

b. Limitations

Two qualifications of the doctrine of judicial review should be noted. The Court has no roving commission to interpret the constitution. It will pass on a constitutional question only when the issue is presented in a bona-fide lawsuit which comes within the jurisdiction of the federal courts. It would be unjudicial to express an opinion in any other circumstances.¹⁸ Moreover, the Court itself has announced that on some questions of constitutional interpretation not the Court but some other agency is the final authority. In *Marbury v. Madison* the Court said that the determination of "political questions" belonged to the President; subsequent decisions have stated that one or both houses of Congress may decide political questions in an appropriate case. No clear rule as to what converts a lawsuit into a political question has been laid down; the Court has resorted to the doctrine

¹⁷ Charles G. Haines, *The Revival of Natural Law Concepts* (Harvard University Press, Cambridge, 1930), pp. 81-82. See also his *The American Doctrine of Judicial Supremacy* (The Macmillan Company, New York, 1932).

¹⁸ See pp. 274-275.

chiefly to escape the necessity of deciding cases which were politically embarrassing, such as the validity of the Reconstruction Acts after the Civil War. Nor are political questions the only ones to fall outside the judicial monopoly. Article I, Section 5, makes each house of Congress the final judge of the "elections, returns, and qualifications" of its members; and a few other provisions of the constitution have been said to involve non-justiciable matters.

In the exercise of judicial review, the Court passes on the validity of acts of the Congress, the President, and the states. It is review by the judiciary of the actions of a coördinate legislature, together with federalism, that constitutes the unique American contribution to political practice. There was nothing novel about judicial review of executive action. In Great Britain, where the legislature is supreme, the courts nevertheless inquire into the legality of executive action. Nor was judicial review of state action unprecedented. In Great Britain the courts review the actions of subordinate legislative authorities, although not those of the Parliament. It is true that the competence of the federal courts to control the states did not gain general acceptance until after the Civil War. The states'-rights philosophy denied that the states were subordinate municipal corporations whose powers might be defined by the national judiciary. But the supremacy clause, coupled with the power of the Supreme Court to review the actions of state courts on federal questions, seems to establish exactly that; and since the Civil War the question has not been raised.

c. Incidence

Judicial control of executive action has always been considered essential to the maintenance of the civil rights of citizens. It is improbable that the federal Union could survive very long if there were not some national authority to restrain the actions of the states. On the other hand, many of the state laws that have been declared unconstitutional were in no way disruptive of the Union; and when federal legislation has been questioned it has usually been because it would increase national power rather than diminish it. People who have been willing to accept judicial

d. Uses

review as a device for defending civil rights against executive usurpation and for holding the Union together have protested when state legislation has been invalidated because it seemed to the Court economically unwise, and when federal legislation intended to deal with national problems was declared to exceed the delegated powers of Congress.

THE CONSEQUENCES OF JUDICIAL REVIEW

Criticism of the Court

From 1905 to 1937 the Supreme Court was under bitter criticism because of its invalidation of social legislation and other national and state laws in the economic field. The same decisions evoked praise from the opponents of such legislation. Throughout this period, evaluation of the work of the Supreme Court and of the practice of judicial review was in terms of this one aspect of the problem. Since 1937, however, this violently controversial question has been put to rest. It is now possible to view the subject more broadly, and perhaps with less partisan feeling.

Issues

The controversial issues were two: Could Congress, under the power over interstate commerce, supply national guidance and control to the economic life of the country, or must such matters be left to piecemeal action by the separate states; and did the Fifth Amendment, which required Congress to observe "due process of law" in dealing with life, liberty, and property, and the Fourteenth, which imposed the same obligation on the states, forbid such regulatory economic legislation? For a generation the Court answered the first question in the negative and the second, by and large, in the affirmative.

Reversal by the court

In 1937, after the whole legal structure of the New Deal had been imperiled by adverse Court decisions, President Roosevelt asked Congress for legislation enlarging the Court by the addition of younger men who would presumably allow more latitude to experimental economic legislation than the "nine old men" of the Supreme Court, whose average age at that time was seventy-two. Congress failed to enlarge the Court, but the President's message was probably the cause of the reversal of attitude which occurred immediately on the part of the Court. Since

1937 the narrow view taken of the commerce power in *Schechter Poultry Corporation v. United States*,¹⁹ in which the National Recovery Act was held invalid, has been abandoned, and the Court has held that Congress may deal not only with interstate transportation but with the conditions of manufacture and distribution in businesses directly linked with interstate commerce. On the general question of constitutional prohibitions, including the due process clause, the Court has adopted two distinct standards, the difference between which had been shadowed out by Justice Brandeis but first emerged clearly in the Chief Justiceship of Harlan F. Stone (1941-1946), to whom the new approach owes much. The Court allows the legislature, national or state, considerable latitude in determining what constitutes a reasonable regulation of individual liberty in the ordinary case. There is a presumption in favor of the constitutionality of such laws. But where "basic rights" are involved—and these include freedom of speech, freedom of worship, and the integrity of one's physical person—the Court not merely indulges no presumption in favor of the legislative decision but approaches the statute with suspicion.²⁰ What this means is that the Court has very largely ceased to uphold the claims of economic interests to immunity from public regulation, but is determined to protect the individual from persecution. "The law knows no finer hour," said Justice Murphy, "than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution."²¹

Present
attitudes

Although this attitude has not recommended itself to Congressmen who wish to pass bills of attainder,²² or to school boards which wish to persecute Jehovah's Witnesses,²³ it is obviously a defense of basic American values. As a result of the criticism which beset it in the first four decades of the century, the

¹⁹ 295 U.S. 495 (1935).

²⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and associated cases.

²¹ *Falbo v. United States*, 320 U.S. 549, 561 (1944).

²² *United States v. Lovett*, 328 U.S. 303 (1946).

²³ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Court has made a conscientious revaluation of its responsibilities and has won increased prestige.

ORGANIC LAWS

Direct administration

The constitution provided that Congress should have "exclusive jurisdiction" over territory acquired for the national capital. Accordingly, Congress is the sole lawmaking authority for the District of Columbia, and the executive officers are federal appointees. The Panama Canal Zone is likewise under direct federal administration. Guam and Samoa are under naval administration, and other Pacific Islands, which were administered by the Department of the Interior at the outbreak of the late war, are also at present under the Navy Department. The United States has shown little regard for its responsibilities to the natives in its treatment of insular possessions.

Organic laws

The two incorporated territories—Alaska and Hawaii—and Puerto Rico and the Virgin Islands, which are not incorporated, are governed under special acts of Congress, called "organic laws," which take the place of constitutions and which allow some measure of self-government. In each case a governor, appointed by the President with the consent of the Senate, possesses executive power. Alaska and Hawaii have bicameral legislatures which are authorized to legislate within the limits fixed by the organic act; the governor has a suspensive veto, but this can be overridden by a two-thirds vote in both houses of the legislature. In Puerto Rico the situation is the same, except that a measure passed over the governor's veto must be submitted to the President for his approval or rejection. The Virgin Islands has a unicameral legislature which consists of the members of the legislative councils of the two municipal corporations into which the territory is divided sitting together as a territorial legislature. A two-thirds vote is required to pass a law. The governor has a suspensive veto, which can be overridden by another two-thirds vote; but here as in Puerto Rico a measure passed over the governor's veto must be sent on to the President to be signed or vetoed. It goes without saying that Congress has the power to

annul the acts of all territorial legislatures, and also to pass laws for the territories, despite the delegation of a limited power of self-government in the organic laws.

THE REVISION OF THE CONSTITUTION

The first state constitutions were adopted by the state legislatures, but in a rather short time the idea became established that "constituent power," the power to frame or alter a constitution, was distinct from legislative power and ought to be exercised in a different manner. The constitutional convention became the accepted organ to frame a constitution on behalf of the sovereign people, and there grew up also the practice of submitting the constitution drafted by the convention to the voters for ratification.

Constituent power

The constitution of 1787 was framed by a convention assembled to propose alterations in the Articles of Confederation. This convention exceeded its mandate and framed an entirely new constitution, to go into effect when approved by conventions in nine of the states. Since the Articles of Confederation required unanimous consent for amendment, the adoption of the constitution of 1787 was a revolutionary act, illegal by the old standards but of course legal in terms of itself and the new system which it created.

Adoption of the constitution

Article V of the constitution describes the permissible procedures for amendment of the constitution. Two steps are required: the proposal of the amendment by a national organ and its ratification by state organs. Two possible methods of proposal are described, and two possible methods of ratification. Since either method of ratification may be associated with either method of proposal, there are in all four possible methods of amendment. But only the first of the two possible methods of proposal has actually been employed; consequently, only two of the four methods of amendment have been used.

Amending process

The two houses of Congress, by a two-thirds vote in each house, may propose an amendment, which is then transmitted by the Secretary of State to the governors of the states for state ac-

tion. The approval of the President is not considered necessary for the proposal of amendments. Congress is to direct which method of ratification is to be employed—ratification by the legislatures in three-fourths of the states or by conventions in three-fourths of the states. The method of ratification by conventions was required for the first time in the Twenty-first Amendment.

The framers provided also that Congress, if requested to do so by the legislatures of two-thirds of the states, should call a national convention for the proposal of amendments, which were then to be ratified by legislatures or by conventions in three-fourths of the states, as Congress should direct. Although states have intermittently requested a constitutional convention, a request has never come from two-thirds of the states in any one period of time, and a national convention has not been called.

These methods of amendment are exclusive and invariable. Therefore a provision of the Ohio state constitution which undertook to suspend the effect of the ratification of a proposed federal amendment by the Ohio legislature until the voters of Ohio had had an opportunity to approve or disapprove the legislative ratification was invalid. The voters had no power to participate in the amending process, and the legislature's ratification was counted without submission to the voters.²⁴ Consider these questions: A legislature approves a proposed amendment, and then votes to withdraw its ratification, before three-fourths of the states have ratified; or a legislature rejects a proposed amendment, and subsequently votes to approve it. Which vote should be counted? The Supreme Court has said that these are political questions for the determination of Congress rather than the courts.²⁵ In 1868 Congress by concurrent resolution voted that the Fourteenth Amendment had been duly ratified, despite the fact that some of the states which were counted had ratified and then attempted to withdraw their ratifications, and others had rejected and then later approved the amendment. So we have a legislative determination that only ratifications are to be counted

Congressional interpretation

²⁴ *Hawke v. Smith*, 253 U.S. 221 (1920).

²⁵ *Coleman v. Miller*, 307 U.S. 433 (1939).

in determining whether an amendment has been adopted.

The amending process is beyond the power of Congress to alter. When Congress attached to the Eighteenth Amendment the stipulation that the proposed amendment would lapse if not ratified within seven years, it appeared to be taking liberties with the amending clause, by adding a limitation not found in the constitution. But the Supreme Court held²⁶ that the amending clause impliedly required that an amendment be ratified, if at all, within a "reasonable" time; the framers expected the ratifications to be roughly contemporaneous, not strung out over a long period of years. It was proper for Congress to fix upon seven years as a reasonable time. Furthermore, the question of what is a reasonable time is one for Congress to determine; if Congress does not limit the life of a proposal, by a statement in the proposed amendment or by a subsequent concurrent resolution, the Court will consider the proposal still to be alive.²⁷

It should be said in conclusion that the amending process, although it is the only means of introducing textual changes into the constitution, plays a much less important part in producing changes in our constitutional law than do changing interpretations of an unvaried text. This element of elasticity has been supplied by the Supreme Court, and also by executive interpretations by vigorous Presidents. In addition to changes in law, changes in practice on the extra-legal level are also important. Although the text of the constitution is today not very different from what it was in 1789, our constitutional system operates according to principles and in manners undreamed of by the framers.

Non-textual
changes

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CHAPTER 7

CITIZENSHIP AND CIVIL RIGHTS

Acquisition of Citizenship—Loss of Citizenship—
Classification of Rights—Constitutional Rights of
Citizens—Other Civil Rights—Protection of Civil
Rights

ACQUISITION OF CITIZENSHIP

Who is a national, and what are the rights and duties of nationals? These are questions governed entirely by the laws of the country concerned. All persons whom the state does not consider nationals are aliens by the law of that state. There are, as a result of historical vicissitudes, some persons with no nationality whatever; these are called stateless persons. National-
ity

Ordinarily, the state recognizes only one kind of national, called a citizen or subject. But the United States, as we have seen, has two classes of nationals, citizens and non-citizen nationals. The status of non-citizen nationals arose when the United States acquired insular possessions and failed to extend citizenship to the inhabitants. Congress has by statute granted to non-citizen nationals some of the privileges granted to citizens, but by no means all. General
principles

The states of the world confer nationality upon individuals on the basis of birth or by a legal procedure called naturalization. There are two rival principles for conferring citizenship at birth. The Roman law rule, the so-called *jus sanguinis* or law of blood, which was followed in the city-states of the ancient world and by the Germanic tribes and is applied in continental Europe today, was the tribal principle of inheritance of citizenship from one's parents. The rule of English law, the *jus soli* or law of the

soil, grew up in a feudal society in which political rights and duties were attached to the land. The place of birth, rather than parentage, is determining. All persons born on British soil, whatever the nationality of their parents, are British subjects.

American
law

1. *Jus soli*

One of the purposes of the Fourteenth Amendment was to define national citizenship, a subject which had been in considerable doubt up to that time. The Fourteenth Amendment recognizes the *jus soli* as American law: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside." Consequently, children born in this country of alien parents ineligible for naturalization are citizens by operation of the Fourteenth Amendment. For the purposes of the amendment, foreign merchantmen in American territorial waters and American ships-of-war everywhere, even in foreign waters, are considered to be "in the United States." However, the words "subject to the jurisdiction thereof" were intended to limit the operation of the amendment in three ways. The Indian tribes were in 1868 considered to be quasi-sovereign nations, not subject to the jurisdiction of the United States even though they lived in the territory of the United States, and their children were therefore excluded from the scope of the amendment. But by a series of statutes beginning in 1887 Congress extended citizenship to all native-born Indians, so that this exception to the operation of the amendment no longer stands. The second exception is the case of the children born in the United States to foreign diplomats. Foreign diplomats carry with them the immunity of their sovereign from the laws of the state in which they are stationed, and children born to them are not born "within the jurisdiction." Finally, children born to the forces of an invading enemy are not born "within the jurisdiction" of the United States and are not citizens by operation of the Fourteenth Amendment.

2. State
citizen-
ship

It will be noted that the Fourteenth Amendment says that the persons mentioned shall be citizens of the United States "and of the state wherein they reside." In our federal system there is

state as well as national citizenship; each citizenship carries its own distinct rights. By the Fourteenth Amendment state citizenship is made derivative from national citizenship; a citizen of the United States who takes up residence in a state immediately becomes a citizen thereof, entitled to all the privileges of state citizenship. No state today undertakes to confer state citizenship by any other process; but it seems theoretically possible for a state to extend state citizenship to one who is at national law an alien.

In the Fourteenth Amendment the United States adopted the *jus soli*. Congress has by statute enacted the *jus sanguinis* in modified form. Children born abroad to United States citizens, or to non-citizen nationals of the United States, acquire the status of their parents. Since the only delegated power Congress has to declare citizenship is the power to naturalize, this enactment of the *jus sanguinis* must be considered to be a naturalization statute.

3. *Jus sanguinis*

In general, however, we mean by naturalization a process which occurs subsequent to birth. On occasion, Congress by statute or joint resolution has extended citizenship to entire groups, as to the Indians, the Puerto Ricans, and the inhabitants of the Virgin Islands. This practice is called collective naturalization. More familiar, however, is the process of individual naturalization, which follows a uniform procedure prescribed by statute. Congress has limited eligibility for naturalization to certain racial groups—white persons, persons of African nativity or descent, descendants of races indigenous to the continents of North and South America, Filipinos, Chinese, and persons of races indigenous to India. Persons who advocate the violent overthrow of all government are not eligible for naturalization. All candidates must satisfy certain tests as to morality, loyalty, and education. These qualifications are determined in a hearing before a court of record, state or national; but the Immigration and Naturalization Service has taken from the judge most of the burden of investigating and examining the candidate. The naturalization procedure involves three steps spaced in time: a declaration of intention to acquire United States citizenship, which

4. Naturalization
a. Collective

b. Individual

is attested by the issuance of a certificate colloquially called "first papers"; a formal petition for citizenship, two to seven years after the declaration of intention; and, not less than thirty days after the petition, the formal examination by the court referred to above, at which the applicant is admitted to citizenship. The total period of residence must be at least five years, except for aliens who have married United States citizens, for whom the period is two years, and aliens serving or having served in the armed forces of the United States, for whom reductions in time are made under certain circumstances.

Status of dependents

The naturalization of parents naturalizes also their children under the age of eighteen years, if the children reside in the United States at the time of naturalization, or if they take up permanent residence here before becoming eighteen. But the naturalization of one spouse does not naturalize the other, although, as we have seen, it reduces the residence requirement.

LOSS OF CITIZENSHIP

Multiple citizenship

Whether or not one is a citizen of a state is a question of the law of that state rather than the desire or intention of the individual. Naturalization is an old process, but until recently the state of origin of the naturalized citizen persisted in claiming his allegiance and, if it practiced the *jus sanguinis*, that of his children as well. So it was, and is, possible to have dual and even triple citizenship.

Expatriation

The United States first recognized the right of expatriation, the right to make a voluntary surrender of citizenship. This was by act of Congress in 1868. Great Britain, France, and Germany followed our example. Congress has provided that the citizen who becomes naturalized in a foreign state, or who makes an appropriate declaration before a consul or diplomatic officer of the United States abroad, is released from his United States citizenship.

Forfeiture of citizenship

Congress has also declared that certain actions shall result in a loss of citizenship, regardless of the intention of the individual. Taking an oath of allegiance to a foreign state; voting in a

foreign election; accepting office in a foreign state, when the holding of such office carries with it foreign citizenship; conviction of treason to the United States—all automatically entail loss of citizenship. What of the constitutional question: Can Congress by act take away citizenship confirmed by the Fourteenth Amendment? Surely not, yet Professor Willoughby thought that legislation of this sort would be upheld if it were not arbitrary.¹ It seems not to be arbitrary for Congress to declare that conduct which shows a preference for a foreign power constitutes voluntary expatriation, even though the citizen protests that he wishes to have his cake and eat it too. On this basis we can justify the legal provisions described above. But if this justification is adopted, it would be impossible for Congress to make loss of citizenship consequent upon actions which have no international implications. The statutes which make loss of citizenship result from conviction of desertion from the armed forces or leaving the country to escape military service seem to be of doubtful constitutionality.

Still another situation revolves about "presumption of expatriation." If a naturalized citizen resides abroad continuously for five years or if he resides in the country of his origin for three years, or if he resides in the country of his origin for two years and by such residence gains the citizenship of that country, an act of Congress declares that he shall be presumed to have expatriated himself. The same act declares that a native-born national who resides for six months or longer in a state by whose laws either he or one of his parents has been a national is pre-

Presumption of expatriation

¹ W. W. Willoughby, *The Constitutional Law of the United States* (Baker, Voorhis and Company, New York, 2nd ed., 1929), i, 351-352. He relied on *Mackenzie v. Hare*, 239 U.S. 299 (1915), in which the Court upheld an act of Congress declaring that an American woman who married an alien lost her citizenship. With little difficulty this case can be assimilated to the principle stated in the text: At a time when women suffered grave legal disabilities and were little more than extensions of their husbands, such a marriage might well be inconsistent with the maintenance of allegiance to the United States. The Court said that marriage to an alien was "tantamount to expatriation." With the altered status of women, Congress changed the law, so that today United States citizenship is neither gained nor lost by marriage.

sumed to have expatriated himself. In all such cases, however, the presumption of expatriation can be rebutted by the showing of satisfactory evidence of intention to maintain bona-fide citizenship.

Denaturalization

Another statute gives rise to "denaturalization." This is a judicial proceeding initiated by a United States district attorney to secure a cancellation of naturalization on the ground that the original naturalization proceeding was imperfect. Naturalization certificates gained by fraud or illegality can thus be canceled. If a naturalized citizen takes up permanent residence abroad within five years of his naturalization, a presumption arises that the naturalization was not undertaken in good faith, and unless the citizen is able to offer countervailing evidence the court will cancel his certificate. Any other conduct which indicates that the oath of allegiance was taken with fraudulent intent or with mental reservations may be made the basis for denaturalization proceedings. Under this statute members of the German-American Bund have been *denaturalized where it has been shown that the oath of allegiance to the United States was taken with fraudulent intention—i.e., without a bona-fide intention of giving primary loyalty to the United States.* But subsequent political conduct is not enough to show fraudulent intention; the government must prove a disloyal state of mind at the time of the naturalization.

CLASSIFICATION OF RIGHTS

Source of rights

Citizens enjoy some rights, mostly political, which are denied to non-citizen nationals and to aliens; but most of the rights recognized at national and state law extend to all persons, aliens as well as citizens, "artificial persons" or corporations as well as natural persons. The term "civil rights" is loosely used to include some or all of these rights.

The rights of persons recognized at national law are of three sorts. There are certain rights which belong to citizens of the United States by virtue of their national citizenship. These are not expressly stated but are implied in the constitution; they are affirmative rights which can be enforced against the national

government, the states, and private persons. Secondly, there are rights which take the form of prohibitions upon action by the national government or by the states. Since these rights are stated as restrictions upon action by government, they protect not merely citizens but all persons; but they prohibit only governmental action and not private action. The third class of rights is that created by act of Congress; these extend to citizens or to all persons as the act designates; and of course they are valid against both state and private action. Congress has no delegated power to create civil rights but may do so in the exercise of one or another of its express powers.

CONSTITUTIONAL RIGHTS OF CITIZENS

The only reference to rights of citizens of the United States in the constitution is in the Fourteenth Amendment, which says that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It has been held that this clause is entirely without significance, for it created no new privileges of citizens,² nor did it create a new prohibition, for it was never possible for the states to abridge national rights.

But although no rights are expressly granted to citizens in the constitution, there are numerous implied rights. A basic right is that of all citizens to enter and reside in the United States. A citizen of the United States has an implied right to inform federal officers of the commission of a crime against the federal government,³ and a right to protection while in the custody of federal officers.⁴ In *Hague v. C.I.O.*⁵ it was held that citizens have a right to inform others of the provisions of federal laws, and to hold meetings for this purpose. Some rights are implied in the fact that ours is a federal system. In *Crandall v. Nevada*⁶ it was held that a state could not impose a poll tax on travelers passing

Derivative
from cit-
izenship

² *The Slaughterhouse Cases*, 16 Wall. 36 (1873).

³ *Motes v. United States*, 178 U.S. 458 (1900).

⁴ *Logan v. United States*, 144 U.S. 263 (1892).

⁵ 307 U.S. 496 (1939).

⁶ 6 Wall. 35 (1868).

through the state, because that might burden national citizens exercising their right to go to the offices of the national government and transact business. The fact that the national government is republican in form gives rise to other rights. Citizens of the United States have an implied right to assemble in order to petition the national government, a right quite distinct from that in the First Amendment, for it is valid against the national government, the states, and private persons.⁷ Citizens likewise have a right to an honest count of the ballots in elections to national office.⁸ Most of these rights were first recognized in criminal prosecutions of private persons for depriving other persons of rights of national citizenship.

OTHER CIVIL RIGHTS

Our second category of rights consists of those which take the form of constitutional prohibitions upon government. Here we shall consider only the prohibitions which restrict the national government. As has been said, these protect all persons, but only against invasion by the national government, not against action by the states, unless the prohibition chances to be one which applies also to the state, and not against invasion by private persons.

Habeas corpus

As we have seen, Article I, Section 8, confers upon Congress a long list of delegated powers. Section 9 follows immediately with prohibitions upon national action. Of these, three require discussion here. "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This section concedes that in appropriate circumstances the privilege of the writ may be suspended, so that this method of testing the legality of a detention will not be available. What are appropriate circumstances? The United States has adopted the "open court" doctrine of English common law: In areas in which the courts are open and able to function, the writ will issue even though rebellion or invasion may have closed the courts elsewhere; and an attempt by Con-

⁷ *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁸ *United States v. Classic*, 313 U.S. 299 (1941).

gress or the President to prevent the issuance and return of the writ is unconstitutional.⁹ Where the courts are unable to function because of rebellion or invasion, the privilege of the writ may be suspended, but the general opinion is that an act of Congress must authorize the action; the President cannot act on his sole authority.

"No bill of attainder or ex post facto law shall be passed." Article I, Section 9, imposes this prohibition upon the national government, and Section 10 places the same restriction upon the states. A bill of attainder is a legislative conviction of crime; it is forbidden, of course, because it violates the canon of justice which requires a fair trial. In 1943 Congress attached to an appropriation act a rider declaring that certain named individuals, employees of the government charged with "subversive activities," should be discharged and disqualified for any federal employment in the future except military or jury service. The Supreme Court held this unconstitutional as a bill of attainder.¹⁰

Bill of attainder clause

An ex post facto law is a retroactive criminal law disadvantageous to the accused. It may undertake to change the legal character of an action after it has occurred, by making it punishable although it was not punishable when committed, or by increasing the penalty beyond that in effect at the time the action was done; or it may make conviction easier by depriving the defendant of safeguards to which he was entitled at the time the action complained of was done. All these are prohibited as ex post facto laws. But a retroactive civil law is not ex post facto, although it may be a denial of due process of law. And a retroactive criminal law advantageous to the accused is not an ex post facto law.

Ex post facto clause

The first eight amendments, which Thomas Jefferson named our Bill of Rights, contain other prohibitions upon the national government. They do not limit the states, except in so far as they are incorporated in the requirement which the Fourteenth Amendment imposes upon the states of observing "due process of law"; and they do not prohibit any private actions whatever.

⁹ *Ex parte Milligan*, 4 Wall. 2 (1866).

¹⁰ *United States v. Lovett*, 328 U.S. 303 (1946).

On the other hand, like other prohibitions, they protect all persons from national action, aliens and corporations as well as natural citizens.

**Religious
freedom**

The First Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Supreme Court has held that the whole content of the amendment is incorporated in the due process clause of the Fourteenth Amendment, so that the states also are forbidden to do these things. But the rights granted in the First Amendment are not absolute. Where the public interest seems to require limitation of individual freedom, and the Congressional regulation is reasonably calculated to serve the public interest, the governmental action will be upheld, even though it limits the freedom of individuals. It is proper for Congress to forbid the practice of polygamy in the territories, even when it is recognized and encouraged by a religious faith.¹¹ Similarly, reasonable restric-

**Right of
assembly**

tions on assembly, intended to prevent the impeding of traffic, are constitutional. So the rights granted in the First Amendment are qualified by the word "reasonable"; reasonable restrictions of those rights are valid. However, the word "reasonable" is itself qualified, in the area of freedom of speech, by the "clear and present danger" test, first stated by Justice Holmes in

**Freedom
of speech**

Schenck v. United States.¹² No restriction upon freedom of speech is reasonable or justified unless "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent. It is a question of proximity and degree." This means that political utterances, even incitements to disloyalty, cannot be curbed except in a setting in which there is a likelihood that the speech

¹¹ *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

¹² 249 U.S. 47 (1919). See also *Herndon v. Lowry*, 301 U.S. 242 (1937); *Taylor v. Mississippi*, 319 U.S. 583 (1943).

will lead to immediate—not remote or conjectural—violence. Justice Holmes justified this rule in terms both of the right of the individual and of the social utility of free thought and free discussion:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought itself to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution.¹⁸

Many of the remaining provisions of the Bill of Rights deal with judicial procedure. The Fourth Amendment forbids “unreasonable searches and seizures,” and the federal courts have interpreted this to forbid introducing in court, for the purpose of convicting the defendant, evidence illegally seized by federal officers. The Fifth, Sixth, and Seventh amendments guarantee the use of the jury system. The Fifth Amendment provides that “No person shall be held to answer for a capital or otherwise infamous crime, unless upon a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.” A grand jury is simply an accusing jury; it determines whether evidence warrants holding a person for trial for crime. The Sixth Amendment requires that the trial itself be before a petit jury which determines the fact of guilt or innocence. These two juries originally took their names from their size. The grand jury was the larger, and the federal grand jury still consists of sixteen to twenty-three persons. The petit jury numbers twelve. The Seventh Amendment grants the right to jury

Searches
and
seizures

Jury sys-
tem

¹⁸ Dissenting opinion in *Abrams v. United States*, 250 U.S. 616, 630 (1919). The classic argument for freedom of speech is, of course, John Stuart Mill's essay *On Liberty* (1859).

trial in civil suits at common law in the federal courts if the value in controversy exceeds twenty dollars. In both criminal and civil cases, the defendant may waive—that is, make a voluntary surrender of—his right to jury trial.

Self in-
crimina-
tion

The Fifth Amendment contains several other provisions of note. It confers the privilege against self incrimination; the defendant in a criminal case cannot be compelled to testify against himself. The Fifth Amendment also declares that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." "Life or limb" has been generously construed to include any criminal penalty whatever, so that after one has once been put in jeopardy—that is, in danger of conviction of crime—in a federal court, he cannot be tried again by the federal government for that offense. Jeopardy does not attach, however, until the defendant is put on trial before a petit jury able to convict him. Consequently, the failure of a grand jury to indict is no bar to a subsequent prosecution. Moreover, the privilege granted by the double jeopardy clause can be waived, and is waived by the defendant if after conviction he asks for a new trial. Finally, it will be noted that although the Fifth Amendment forbids the national government to put a man in jeopardy twice, it does not forbid the national government to try him after he has been tried and convicted or acquitted in a state court, as can happen if the defendant by a single action violates both a national and a state law.

Double
jeopardy
clause

Due proc-
ess clause

Another important provision of the Fifth Amendment—and, indeed, the most important provision in the Bill of Rights—is the due process clause, which forbids the national government to deprive a person of life, liberty, or property without due process of law. Most of the litigation on due process has arisen in connection with state laws alleged to violate the due process clause of the Fourteenth Amendment, but the principles established in these cases are transferable to the Fifth Amendment.

The words "life, liberty, or property" have been interpreted broadly, to include a very wide variety of interests. But the amendment does not forbid that these be taken; it permits a tak-

ing which is in compliance with the requirements of due process. The problem as to what constitutes due process falls into two parts, procedural due process and substantive due process.

It will be remembered that procedural law consists of the rules by which rights or duties are enforced. The requirements of procedural due process are met if the government affords a traditional procedure, familiar to English law, but they are satisfied also by a new procedure, if it results in substantial justice. So if Congress creates a new right of action and provides for jury trial, this is due process, for jury trial is a familiar procedure; but, since the action is one unknown to common law, jury trial is not required by the Seventh Amendment, and it can also be dispensed with without violating the due process clause, if the new procedure is a fair one. It is even possible for Congress to provide for a conclusive finding of facts by an administrative officer or board, if the essentials of procedural justice, notice of the proceeding and a fair hearing, are provided.

a. Procedural due process

The requirement of substantive due process applies, not to the procedure by which interests are affected, but to the substantive interests themselves. As we have already seen,¹⁴ the Court will declare unconstitutional as a denial of due process a law which invades private rights without accomplishing some recognized public purpose, but will uphold it if it appears to serve a legitimate public need. The formula for testing state action is found in the definition of police power—a promotion of public health, safety, morals, or the general welfare. An action undertaken by Congress under one of its delegated powers and serving one of these purposes will be also upheld. So the power over interstate commerce and the postal power have been used to accomplish purposes like those achieved under the police power of the states, and the expression "federal police power" is sometimes used in connection with these two delegated powers.

b. Substantive due process

The Fifth Amendment concludes: "nor shall private property be taken for public use without just compensation." This refers to the power of eminent domain, under which property is taken

Eminent domain

¹⁴ See pp. 111-112.

by the government for its own use, in contrast to the "taking" of property under the due process clause, which amounts not to the appropriation of property because it is useful but to the destruction of property because it is noxious. No compensation need be paid for destroying noxious property, but where property is taken for the public advantage the power is eminent domain and just compensation must be paid. It is not necessary that the government acquire title to property; a long-continued trespass by the government, as by flying planes low over land adjoining a national airport, amounts to a taking for which compensation must be made.

**Rights
created by
Congress**

In addition to all these rights granted by the constitution, it will be remembered that rights can also be created by Congress in the exercise of one or another of its delegated powers. Under its power to dispose of the public lands Congress created a right of establishing homesteads, which was protected by national law against a conspiracy of private persons to prevent the exercise of the right;¹⁵ and under its power over interstate commerce Congress created a right to engage in collective bargaining which is likewise good against private persons. Of course, thousands of other rights are also created by act of Congress.

PROTECTION OF CIVIL RIGHTS

**Legal
status**

Since civil rights are a part of our national law, they will be recognized by the courts, state or federal, whenever they are involved in a controversy. The defendant in a criminal case can interpose the defense that the evidence against him was illegally obtained, or that he has already once been placed in jeopardy, or that the law under which he is prosecuted violates his civil rights. But in addition to these general recognitions of civil rights, certain acts of Congress undertake specifically to protect civil rights by both criminal and civil proceedings.

**Statutory
remedies**

An act of 1870, originally directed against the Ku Klux Klan, made it a federal offense for two or more persons to conspire, or to go in disguise upon the highways or upon the premises of

¹⁵ *United States v. Waddell*, 112 U.S. 76 (1884).

another, for the purpose of restricting a citizen in the "free exercise of any right or privilege secured to him by the constitution or laws of the United States." The same act made it criminally punishable for anyone acting under color of state authority willfully to subject any person to a deprivation of rights conferred by federal law.¹⁶

The federal Judiciary Code also authorizes civil suit in the federal courts against persons interfering with a right conferred upon the plaintiff at federal law. In *Hague v. C.I.O.*, mentioned above, the suit for an injunction in the federal court was grounded on the theory that the officials of Jersey City were interfering with a federal right of freedom of speech and citizenship.

These statutes are powerful weapons for the defense of civil rights but have been little used, and then not always with success.

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¹⁶ U.S. Code, title 18, secs. 51, 52.

P A R T I I.

BASIC STRUCTURES OF NATIONAL GOVERNMENT

FOREWORD

The basic structures of national government are prescribed by the constitution, and fundamental principles concerning their powers, their responsibilities, and their relations are laid down there. The constitutional provisions are supplemented by legislation, by interpretation, and by extra-legal practices and conventions of one sort or another.¹

These organs are not only structurally but, to a degree, functionally basic. Woodrow Wilson, who was a student of political science before he became a practitioner of the subject, said that government carries on two activities: formulating a will and executing that will.² Frank J. Goodnow, another celebrated political scientist, gave to the formulation of policy the name "politics," and to the execution of policy the name "administration."³ Politics is the master, administration the servant. Our legal arrangements chiefly assign the political function to the basic structures considered in this part of the book. They chiefly assign the administrative function to the organizations considered in Part III. To this distribution of functions, however, there are certain exceptions. As we shall see in Part III, the formation of

¹ See p. 107.

² "The Study of Public Administration," *Political Science Quarterly*, ii, 197 (1887).

³ *Politics and Administration* (The Macmillan Company, New York, 1900).

policy is in some degree in the hands of the administrative branch. Moreover, the President is at once a political and an administrative officer. He is the nexus between the two branches and the two functions. The courts also have a double role. In orthodox legal theory they are mere administrative organs; they apply the policies established in the constitution or in statutes or other expressions of the political branch. But in fact their power to interpret these legal documents, giving them one or another meaning, makes them political organs as well. Since they are singled out as legally basic structures in the constitution, and have as a practical matter political functions, they will be described in this part.

It would, however, be unrealistic to suppose that political action exclusively or even chiefly originates in the government. Outside forces—political parties and interest groups—impinge upon the political branch, influencing or determining its decisions; and sometimes, brushing aside this formality, they operate directly upon the administrative branch, supplying the content to be given in the administration of law.

CHAPTER 8

POLITICAL FORCES

Voters and Voting—Interest Groups—Parties—Government by Groups—Theories of Group Autonomy

VOTERS AND VOTING

In the ideal democracy, every voter would study issues and candidates and would cast an informed and unselfish ballot in the public interest. This is not the situation which exists in practical politics. Studies of voting behavior stress the importance of traditional voting and interest voting—practices in which both rationality and disinterestedness may well be lacking.

A considerable majority of the voters in the United States have a traditional affiliation with either the Republican or the Democratic party. With some voters, probably a majority, the ties of traditional association are so strong that they vote for the candidates of their party without regard for their abilities, their characters, or their views. A considerable percentage of voters can be counted on to vote for a candidate who is positively distasteful to them, if he appears under the emblem of their party. In the southern states, and in rural regions in northern states, traditional voting is an expression of attitudes fixed by the Civil War. In northern urban centers, other factors enter in. Local circumstances are likely to have attached national or religious groups to one or the other party. In New York City, for example, the Irish and Jewish vote is predominantly Democratic; the Italian vote inclines to the Republican side.

But in the present century traditional voting has declined. The Progressive party, an insurgent Republican movement, placed second in the Presidential election of 1912; and a party of

Traditional
voting

the same name polled an impressive vote in 1924. In 1928 H. L. Mencken predicted that Hoover would win over Smith, giving the unanswerable reason that there were five million more Republicans in the country than Democrats. But the four campaigns of Franklin D. Roosevelt showed that a great part of the Republican vote was capable of deflection, and actually tipped the scales of traditional voting in favor of the Democrats. Nevertheless a very large fraction of the electorate today feels deeply committed to neither party, and it seems unlikely that the outcome of any election in the future can be predicted on the principles used by Mr. Mencken in 1928.

**Interest
voting**

Non-traditional voting is called interest voting, because the vote is dictated by some interest or objective sought by the voter, rather than by habitual allegiance. A great part of the shifting vote consists of "independent" voters, who do not make an emotional identification with either party. But another part consists of voters who in times of stress break away from a party which they usually support. Interest voting takes up where traditional voting leaves off. But the interest pursued by the voters may be little more coherent than a desire for change. The party in power claims credit for all favorable developments during its administration, and usually receives that credit from the voters; it is not eager to be blamed for untoward events, but it is likely to be punished for them by the voters, even when they were beyond the control of the party. The Democratic party was punished in 1920 and in 1946 because it was in power during the two wars; the Republican party was punished in 1932 for the occurrence of the depression. It has been shown that in the wheat states the vote is a function of the rainfall. In good years, the farmers vote traditionally; but in years of drought they leave the party. This is not so irrational as it appears, for in the dry years, when the farmer's income dwindles, his debt burden becomes intolerable, and the party to which he turns is usually a cheap-money party, which promises that it will increase the currency and thus raise prices and enable the farmer to meet his fixed debt charges.

Until recently the South has been an agricultural region. It has traditionally voted Democratic since the Civil War. The northern states, both agricultural and industrial, have been in the main Republican. But there have been periodic secessions by the agricultural Midwest from the Republican party which express the farmers' interest in higher prices or reduced production. In 1928 several southern states, traditionally Democratic, voted for the Republican candidate for the Presidency. This was no doubt in part a prohibitionist and anti-Catholic vote, but it has been interpreted also as a tentative groping of the emerging industry of the South toward the party which was at that time considered the industrial party, the Republican. In the 1930's, however, the grip of the Republican party on the industrial states was broken. Large numbers of industrial workers left the Republican party and became somewhat loosely affiliated with the Democratic party, partly because of the relief program of President Roosevelt, but more especially because of the social security program and the National Labor Relations Act of 1935, which protected the workers in joining unions and obliged the employers to practice collective bargaining. But the urban industrial vote can hardly be considered a safe property of the Democrats. The Political Action Committee, the political arm of the C.I.O., has had considerable success in swinging this vote to individual candidates, whether Democratic or Republican, on the basis of their personal positions on questions in which labor is interested.

These are the major examples of interest voting since the Civil War. Interest voting ranges in intelligence from a fairly meaningless "protest vote," largely negative, which expresses hostility to the party in power, whether because of its actions or because of events beyond its control, to a fairly enlightened adherence to a new program which shows some promise of satisfying the needs of the interested voters. It is not necessarily to the discredit of interest voting that it seeks to gratify interests. Every interest group tends to identify its own interest with the public interest, and would resent the suggestion that its interest voting

was selfish. Moreover, in some cases it is true that the interest which a group of voters supports offers no advantage to them which it does not offer to the whole community. Many traditionally Republican voters supported President Roosevelt in 1940 solely because they believed that his policy in foreign affairs was best for the entire country.

INTEREST GROUPS

Organized and un- organized groups

A body of voters who seek a common interest is called an interest group. An interest group may lack formal organization; on the other hand, it may be highly organized. A formally organized interest group is called a pressure group or a lobby. These organizations exist side by side with the party organizations. They do not ordinarily express themselves by endorsing or challenging one of the parties. Rather, they work within the framework of both parties, sometimes taking advantage of the competition between the parties but often ignoring it altogether. Unorganized interest groups have no effective means of expression but the vote. In times of economic distress, or under some other stimulus, they express themselves thus, and produce one of those convulsive overturns called political landslides. Pressure groups, however, operate effectively year in and year out.

Lobbies

The chief pressure groups on behalf of business are the National Association of Manufacturers, representing big business, and the United States Chamber of Commerce, representing various levels of business. In addition, trade associations undertake to advance the interests of businesses engaged in a given type of activity. The American Bankers Association is a familiar example. Organized labor is represented by the American Federation of Labor, the Congress of Industrial Organizations, and the Railroad Brotherhoods. The Farm Bureau is the largest lobbying organization for agriculture, but the National Grange and the Farmers Union are active. The chief veterans' organizations are the American Legion, the Veterans of Foreign Wars, and the American Veterans Committee. Professional associations also act as political pressure groups. The American Medical Association,

the American Bar Association, and the National Education Association all undertake to advance the interests of their members by political action.

For the most part, pressure groups are concerned to promote special interests. Some, however, champion not merely programs which serve their members but also proposals in which their members have no special interest. The veterans' organizations take a stand not merely on veterans' problems but on questions of general interest. The church organizations are primarily interested in general questions, and only occasionally in issues peculiar to the churches. There are a few pressure groups, like the League of Women Voters, which represent no special interest whatever. The League is not a feminist organization but a "reform" group, and has fought a long battle for extension of the merit system at both the national and the state levels.

Some pressure groups take part in political campaigns, attempting to influence both the nomination and the election of candidates. The Farm Bureau will seek, in a given Congressional district, to have a good Farm Bureau man nominated by each party; there is then no need for Farm Bureau activity in the fall election, for whichever way the election goes the Bureau will win. Labor unions sometimes try to influence the nominations of both parties; if they succeed only with one, they may support that candidate vigorously in the fall election. Another tactic is to attempt to influence policies and elections by organizing a minority party. The Prohibition party is less a party than a pressure group. It does not seriously expect to control the personnel of government by winning elections, but it hopes to influence nominations and policies by offering or threatening to offer its own candidates.

Ordinarily, however, pressure groups do not concern themselves with the election of candidates. They find it to their advantage to accept the legislators who are elected and then influence their votes on proposed legislation. They exert pressure also on the President and on commissions and other executive organs charged with the enforcement of law. They seek to write

Tactics

1. Direct action

2. Pressure politics

their programs into party platforms—if possible, the platforms of both major parties. They are often able to accomplish these purposes without making a formal show of strength in the elections because officeholders are aware of the voting behavior of their constituents. Ordinarily an incumbent Congressman has been nominated or elected by a majority which would be converted into a minority if members of a substantial interest group were detached from his supporters. The interest group may be a distinct minority in his district, yet it can defeat him for re-election. He may have received the support of only a minority of the members of that interest group in his district, yet he is obliged to retain what he has. It may even be the case that the interest of the pressure group is inconsistent with the interests of most of his supporters; still he must satisfy the demand of the pressure group. He is able to do so with impunity because voters are seldom provoked to punish a Congressman for his votes on any legislation except that in which they themselves are immediately interested. So a Congressman from a district containing substantial agricultural and labor groups will vote to raise agricultural prices, without great fear of retaliation from the industrial workers who must pay those prices; he will also support a policy of raising industrial wages, with little likelihood of arousing resentment on the part of the farmers who must pay higher prices for manufactured goods.

3. Agitation

Not all pressure groups represent substantial organizations of voters. Some lobbies seek only to inform and persuade Congressmen, with no hope of coercing them. Others rely on more indirect means of pressure. The National Association of Manufacturers represents an altogether negligible number of votes, but it undertakes by advertisements and other propaganda devices to enlist support for its proposals from the masses of unorganized voters, or at least to persuade Congressmen that such support exists. The specious appearance of popular demand is often as successful as the reality in influencing votes in Congress. The newspapers have in recent years played a considerable part in such propaganda campaigns.

But the Congressman is not a completely accurate barometer of pressures. He may be so closely identified with a particular interest that he will ignore the suggestions of other interest groups, even at the cost of losing votes. Moreover, he owes loyalty to his political party and will go a certain distance in support of the policies advocated by the party leadership, even at the risk of alienating interest groups adversely affected. The conscientious Congressman is obliged to strike a balance between his convictions—that is, the interests he personally endorses; the demands of his party; and the pressure of interest groups in his district. The less conscientious Congressman has a simpler task.

The Congressman

One other situation requires description. Sometimes a Congressman is so deeply committed to the support of a particular interest that he regularly acts in concert with others similarly situated on all questions affecting that interest. So the "agricultural bloc" is a familiar feature of the Senate. Similarly blocs may form about silver, wool, or cotton. For a time during the Presidency of Franklin D. Roosevelt there was a "liberal bloc" in the House of Representatives which caucused on pending legislation in order to settle on a common policy. A bloc cuts across party lines and sometimes establishes ties between legislators which are closer than party ties.

Blocs

PARTIES

In theory the voter is the basic unit in the party. He chooses the party officials, and directly or indirectly he nominates the candidates of his party for public office. In practice, of course, the individual voter takes little part in party activities. The party officials, from precinct committeeman to national chairman, are determined by the small fraction of the party which takes an interest in these matters—professional, semi-professional, and amateur politicians. Where the direct primary is used for nominating candidates, the voter may take a more active part. He is likely to accept an "official slate" agreed upon by the party officials, but he may support an outside candidate. Party leaders

Role of the voter

rely more on the passivity than on the support of the voters, and an outside candidate who challenges their control sometimes wins enough votes in the primary to be nominated. So there may arise the curious situation of open conflict between a nominated candidate of the party, chosen in the primary election, and the officials of the party organization. This conflict may be resolved through the ousting of the party leaders by the candidate and his followers, who then gain control of the party machinery; on the other hand, the party officials may secure the defeat of the candidate in the general election or at an ensuing primary; finally, the party division may persist indefinitely.

Duties of parties

Very important tasks are entrusted to parties in our system of government. They are supposed to take stands on national issues and to offer the voters clear-cut alternatives to choose between. They are expected to educate the voters by offering rival arguments, on the level of rational persuasion, on the merits of their respective policies. To carry out their programs, they should nominate candidates committed to the support of their policies. But a party organization tends to become an end in itself. The first task of the party officials is to retain control of the party; a second purpose, likely to be sacrificed to the first, is to elect candidates. The advocacy of definite policies may cause the defeat rather than the election of candidates. Consequently, political parties tend to avoid embarrassing issues and to be all things to all men. It has often been remarked that the national platforms of the Democratic and Republican parties usually resemble each other closely. Both promise preferential treatment to farmers, businessmen, labor, and veterans. Both promise prudent management of national finances and alert conduct of foreign policy. They differ in their estimates of the comparative merits of the two parties.¹

Response of the parties

¹ Mr. Dooley put it thus: "Years ago, Hinnyssy, manny years ago, they was a race between the dimmycrats and the raypublicans fr to see which shud have a choice iv principles. Th' dimmycrats lost. I dinnaw why. Mebbe they stopped to take a dhrink. Annyhow, they lost. Th' raypublicans come up and they choose the 'we commind' principles, and they was nawthin' left fr the dimmycrats but the 'we denounce and deplores.' I dinnaw how it come about, but th' dimmycrats didn't like th' way th'

Party platforms are hospitable to the more trifling demands of pressure groups. Sometimes a pressure group succeeds in forcing a party to take a stand on a really vital issue. This is likely to split the party, as the issue of free silver split the Democratic party in 1896, and the civil rights issue in 1948. The cohesive forces in our major parties are supplied by traditional party affiliation and machine organization rather than by principle. Each party is a congeries of incompatible elements, and periodically the inconsistencies emerge. When the Republican party was in power in the 1920's, its majority in the Senate was sharply divided between the representatives of eastern financial and industrial interests and the insurgent Republicans of the west—"sons of wild jackasses," as conservative Republican Senator Moses of New Hampshire called them. In the second term of Franklin D. Roosevelt there became apparent a division between conservative southern Democrats and the Democrats from urban and industrial regions in the North which paralyzed the party on many important issues. For a party so constituted, it is dangerous to take a stand on controversial questions. When it becomes impossible not to take a stand, the party splits.

Party dis-
unity

The importance of pressure groups in the formulation of policy is a consequence of the abdication of this function by the political parties. By and large, the parties confine themselves to electing candidates, and leave it to pressure groups to determine the actions of those candidates when elected.²

Role of
pressure
groups

The voting on bills in Congress is usually not on party lines;

thing shtud, an' so they fixed it up between thim that whichever won at th' illiction shud commind an' congratulate, and thim that lost should denounce an' deplore. An' so it's been, only the dimmycrats has had so little chancer f'r to do annything but denounce an' deplore that they've almost lost the use iv the other wurruds." F. P. Dunne, *Mr. Dooley's Philosophy* (William Heinemann, London, 1900), p. 100.

² Stuart Chase said in 1947: "The Democratic-Republican system is not nearly good enough for the atomic age. After watching it carefully from the sidelines for a generation, I have concluded that it fulfills two functions, as follows: (1) it gives us something to bet on, like a horse race; (2) every so often it swings a large mass of small jobs from one group of City Hall party workers with limited IQ's to another group similarly handicapped." 47, July, 1947, p. 7.

a bipartisan coalition is ordinarily required to make up a majority, and the minority which opposes the bill is also bipartisan. The dangers in this situation are obvious. Political parties are accountable to the voters at the polls. But pressure groups are irresponsible. Although they are composed of voters, they are in almost all cases minorities, and the interests which they seek to advance are minority interests. Pressure groups are seldom concerned to promote the public interest.

**Presiden-
tial leader-
ship**

The situation would be entirely intolerable were it not for the alleviating factor of Presidential leadership. A party can be a wet party in some areas, and a dry party in others; but it is difficult for the Presidential candidate to be neither wet nor dry. The Democratic candidate in 1928, Alfred E. Smith, campaigned for repeal of the Eighteenth Amendment, although the party's platform was silent on the question. Nevertheless even a successful candidate is not always able to control his party. Party discipline is extremely weak. The separation of powers encourages loose party organization, as the Parliamentary system encourages strict party organization. The federal nature of our government, which makes a national party a mere federation of forty-eight state organizations; the size and variety of the country, which produce sectionalism—these play a part in weakening party discipline. But the most important cause is the fact that each party relies upon, and is obliged to retain, a large number of traditional voters whose interests are in many ways inconsistent. This makes unified action impracticable, and encourages independence on the part of individual Congressmen.

The voters have learned to look to the Presidential candidates to fulfill the roles traditionally assigned to political parties. It does no good to denounce this as dictatorship or Caesarism, for the voters must be allowed to look somewhere for political representation. But the most effective personal leadership cannot take the place of a functioning party system. And to place primary reliance upon individuals is not without its dangers for a democracy.

GOVERNMENT BY GROUPS

Interest groups do not confine themselves to influencing government from the outside. They wish to entrench themselves within government, and themselves to make and administer the laws in which they are interested. Aside from electing candidates to office, there are three techniques by which this is accomplished.

Groups within government

Interest groups succeed in procuring the establishment of a governmental agency for the advancement of their interests. The Departments of Agriculture, Commerce, and Labor were created at the insistence of farmers, businessmen, and trade unions. Between such a governmental agency and the interest group responsible for its creation there exists a relationship of great cordiality. The interest group defends the agency before Congress and protects its appropriation when budget cuts are threatened. The agency administers the laws with full sympathy for the interest group; it also frames new bills for the advancement of the interests it was created to promote, and advocates their passage through Congress. It is assisted in this task by the committee structure in Congress. The committee in each house which deals with measures in which the agency is interested ordinarily has an intimate relation with both the interest group and the agency and is likely to report favorably the bills sponsored by the agency. Since committee reports are usually accepted by the house, there is a strong likelihood of the bills' being enacted into law.

1. Clientele agencies

The second technique by which interest groups influence governmental action might be called infiltration. The group supplies the personnel of government. This is most prominent at the state level. In Alabama and Utah the attorneys in the state are authorized by statute to elect the persons charged with administration of the laws governing admission to the bar. In Alabama the state medical association chooses a board of censors which administers the laws for the licensing of physicians, and which

2. Infiltration

also becomes ex officio the state board of health. Probably the results are not very different when the licensing officials are appointed by public authority, for they will almost certainly be appointed from the profession to be regulated.

At federal law, interest representation on public bodies is not uncommon. Of the thirty-six members of the National Railroad Adjustment Board, which has quasi-judicial power to decide disputes growing out of grievances or allegations of the violation of the contractual rights of employees of the railroads, half are appointed by the carriers and half by labor organizations of employees. The Railroad Retirement Board, which administers the retirement system, unemployment insurance, and employment service for railroadmen, consists of three members appointed by the President with the advice and consent of the Senate. One is appointed from recommendations made by representatives of the carriers and one from recommendations made by representatives of the employees; the third, the chairman, represents the public interest and is appointed without designated recommendation. The National War Labor Board consisted of four members representing the public, four representing employees, and four representing employers. These, however, were appointed by the President rather than chosen by the interest groups. The Fair Labor Standards Act of 1938 provided that the Administrator of the Wage and Hour Division should appoint for each industry an "industry committee," one-third of the members of which should represent the public, one-third the employees, and one-third the employers in the industry. This committee, after elaborate studies, was to recommend minimum wages for the industry, not to exceed forty cents an hour. The Administrator was free to reject the recommendation and refer the question back for further study to the same committee, or to another committee, if he wished. This machinery has become obsolete since the goal of forty cents an hour has been universally attained.

3. Legislative power

The third and most surprising technique by which interest groups acquire governmental power is the direct transference of legislative power from the legislature to the interest group. In

1893 Congress by statute directed the Interstate Commerce Commission to adopt as a rule governing the height of drawbars on freight cars a standard to be certified to it by the American Railway Association, which represented the businesses being regulated by the act. The most important national statutes of this character were the National Industrial Recovery Act of 1933, the Bituminous Coal Conservation Act of 1935, and the second Agricultural Adjustment Act, that of 1938. The first two were declared unconstitutional; the third is still in effect.

In the National Industrial Recovery Act, Congress provided that businesses in a given field of enterprise might form an organization which would frame a "code of fair competition" for the government of the industry. The President was to adopt and proclaim the code as law if in his judgment it tended to promote recovery from the depression. He was also given the power to alter terms in the code before proclaiming it, if this seemed necessary. The legally effective step was of course the proclamation by the President. In *Schechter Poultry Corporation v. United States*³ the Supreme Court held the act unconstitutional as a delegation of legislative power to the President. The Court looked askance at the intervention of a private group in the lawmaking process, but since the effective legal action was that of a public official, the President, it was not possible to attack the statute as a delegation of public power into private hands.

The Bituminous Coal Conservation Act of 1935 raised the question directly. An excise tax of 15 percent of the value of coal at the mine was imposed upon all coal operators, but 90 percent of the tax was returned to those who subscribed to a code for the coal industry. The act further provided that when operators producing more than two-thirds of the national tonnage of coal mined should agree with their employees, numbering more than one-half of the mine workers, on maximum daily and weekly hours of labor, this standard should be binding on all code members. Moreover, whenever in any district operators producing more than two-thirds of the coal mined in that district

³ 295 U.S. 495 (1935).

should agree on wages with their employees, numbering more than one-half of the mine workers in the district, this figure should become the minimum wage to be paid by all code members in the district. The effect of the tax and rebate, said the Supreme Court in *Carter v. Carter Coal Co.*,⁴ was to oblige coal operators to subscribe to the code, and once they had become code members the other provisions of the act subjected them to the exercise of legislative power by a majority which could bind them without their consent. "This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." The act was held an unconstitutional delegation of legislative power, and was also held to violate the due process clause of the Fifth Amendment.

The Agricultural Adjustment Act of 1938 presents the opposite situation, the revocation of law at the will of a private group. The act provides that the Secretary of Agriculture shall by proclamation fix farm marketing quotas to bind the producers of various crops, but if more than one-third of the farmers affected vote against marketing restrictions, the proclamation becomes void. Provisions of this type have been held not to involve an unconstitutional delegation of legislative power.⁵

Signifi-
cance

Such practices are not necessarily inconsistent with the public interest. In some cases it can plausibly be argued that the group interest and the public interest are identical. Furthermore, it is clear that valuable, sometimes indispensable, information and advice can be obtained from the group most directly affected by legislation or administration. Finally, it is in many cases necessary to enlist the support of the group to be regulated, or effective regulation is impossible. But obviously the policy of entrusting public power to private groups, or to the representatives of private groups, is full of danger and should be used only with great caution.

⁴ 298 U.S. 238 (1936).

⁵ *Curran v. Wallace*, 306 U.S. 1 (1939).

THEORIES OF GROUP AUTONOMY

Yet many people have held precisely the opposite point of view. The theory that society should be based on the principle of self-determination by occupational groups has been widely held. Oddly enough, this point of view has been advocated by schools of thought ranging from the extreme left to the extreme right. It has been founded on the complete repudiation of the state which anarchists teach, and on the idealization of the state by fascists.

**Advocates
of group
autonomy**

Syndicalism is a political philosophy derived from anarchism. It is chiefly a French and Italian doctrine, although it was the creed also of the I.W.W., the Industrial Workers of the World, the "one big union" movement which attracted many American workers in mining, lumbering, and itinerant occupations during the second and third decades of this century. There are different schools of syndicalists, but all advocate the abolition of the state and the substitution of a society organized in terms of occupational groups of producers. The syndicalists believe that this would end economic exploitation. During the same period the English school of guild socialists—G. D. H. Cole and Sidney and Beatrice Webb are the best known—advocated a change in the system of representation, with guild or occupational representation replacing territorial representation. The guild principle is not necessarily socialist. Something rather like it is seen in pluralism, a philosophy particularly popular in England during the first three decades of the present century. Frederick W. Maitland, Harold J. Laski, and Ernest Barker were the leaders of the pluralist movement. The pluralists adapted the natural-rights philosophy to social groups. Voluntary associations they regarded as natural expressions of human personality, essential to the satisfaction of human needs. The state was only one such association and should not have decisive control over the others. So the chief concern of the pluralists was to attack the theory of sovereignty and its legal and sociological implications.

**1. Syndi-
calists**

**2. Guild
socialists**

**3. Plural-
ists**

The corporative state, on the other hand, was an exaltation of

4. Corporatism

the state, and yet it professed to practice group autonomy. The Chamber of Corporations in the Italian fascist state replaced the old Chamber of Deputies, which had been chosen from territorial districts. The "corporations" were vertical organizations of the various industries, trades, and occupations. They included employers and employees, and all enterprises, large and small. In theory the corporations determined their own affairs, but in practice they were controlled by the Fascist party. In Nazi Germany, occupational groups were organized into estates or *Staende* in much the same manner. Fascist Austria, 1934-1938, planned a similar system but did not perfect it. There was a theoretical reason for the corporative state and a practical reason. In theory the vertical organization of industry practiced by the corporative state denied and refuted the Marxist doctrine of class struggle, which emphasized the horizontal stratification of society. The corporative system represented harmony rather than disharmony, and thus made the state the apex of an integrated and monolithic structure. In practice, the corporative state served the secret purpose of fascism, which was to give over society into the hands of those who controlled the industries. The corporations and estates were at the mercy of their leaders, who were the owners of great enterprises and managed the whole economy to serve their purposes.

A limited pluralism

What one thinks of group autonomy depends on what one thinks of many other things. Probably no simple answer would be satisfactory. The traditional American attitude is to agree with the pluralists that some things should indeed be placed beyond the reach of the state; but this does not imply a pluralist organization of all society—it means only that a few cherished principles like freedom of speech, of worship, of association should not be denied. Beyond this, American tradition looks to democratic determination of all questions, rather than the surrender of the power of determining them to private groups. Yet if the argument of this chapter is correct, we have officially and legally gone a short way down the road of pluralism; and unofficially, in party and legislative matters, we have gone much farther. Pluralism implies a confidence in the beneficence and the

moral value of groups. "We should see value in the Mafia,"⁹ said Ernest Barker. In our Mafia—the "black horse cavalry of privilege" who are denounced by party orators every four years, but not often in between—we may indeed see value, for the representation of group interests is useful and even indispensable; but we must learn to be wary of them as well.

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CHAPTER 9

THE ELECTORAL PROCESS

National Offices—The Franchise—Political Parties— The Process of Selection

NATIONAL OFFICES

At the peak of the expansion in personnel in the federal service during World War II, about one person out of every forty in the United States was a salaried civil officer or employee of the federal government. Out of this group of more than 3,000,000, only 533 are selected through popular elections. In later chapters, we will consider the vast army of appointed officers and employees in the federal service; in this chapter, attention will be directed toward the legal provisions, governmental operations, and political activities revolving around the 533 elective offices in the federal system.

Role of the voter

The federal government has been described as a government of three major departments, executive, legislative, and judicial. In only two of these, executive and legislative, do the people have any direct voice in the selection of officials. Let us look at the part actually played by an individual voter in the selection of the elective officials of the federal government. Every two years the voter is privileged to vote for one of the 435 members of the United States House of Representatives.¹ In two out of three of such biennial elections a voter may also vote for a candidate for the United States Senate. Each state has two Senators, but they are elected at different times. Every four years a voter may vote (indirectly, as will be explained) for candidates for the

¹ In a state where one or more Congressmen are elected at large, Ohio, for example, a voter may vote for such Congressmen-at-large in addition to the one from his district.

offices of President and Vice-President. Thus any one voter may normally participate during a four-year period in elections to fill not more than five of the 533 elective offices in the federal government. This may seem a "short ballot," and by comparison with state and county office ballots it is; but a British voter at even longer intervals may vote for a candidate to fill only one position in the national government, namely, membership in the House of Commons.

Even though the part one voter plays in the affairs of the federal government may seem insignificant, nevertheless our democratic form of government depends on a free electoral system. By and large, the 533 elective officers determine the policies of government. When officials know that to stay in power they must stand for election at relatively short intervals, they are not likely to disregard the wishes of the voters. How does one become a voter in federal elections?

THE FRANCHISE

The privilege of voting or the right to vote is not a personal right or right of citizenship; it is confined to those who meet the requirements of the laws governing the suffrage. The terms "franchise," "suffrage," and "vote" are all used interchangeably to apply to the privilege or act of participating in choosing officials or expressing choice on policies in an election. Collectively, voters are referred to as the electorate or the people.

Constitutional provisions

At the time the constitution was originally ratified, it was necessary to prescribe qualifications for voters for only one set of federal officers. Only the members of the lower house of Congress, the House of Representatives, were to be elected by popular vote. The method used in the constitution for prescribing the qualifications of the voters for this office was to adopt by reference the qualifications prescribed in the several states for voters for members of the state legislature. Article I, Section 2, of the constitution provides that "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." When United States Senators

were made popularly elective in 1913 by the Seventeenth Amendment, the same language was used to describe the electorate for the Senatorial office.

A third set of federal officers has since come to be elected by popular vote. The Presidential electors from each state were to be appointed "in such manner as the legislature thereof may direct." In the first Presidential election, the state legislatures chose the electors, but by 1832 all states had provided for the popular election of such electors except South Carolina. South Carolina continued to choose them by the legislative method until the Civil War. The states have given the right to vote for Presidential electors to those whom it permits to vote for other offices. On the whole there is at present a uniform suffrage for state and federal offices within each state. A state does not fix qualifications for voters for members of the lower house or "most numerous branch" of its legislature different from those for voters for members of the upper house, or for the governor. It is true, however, that there is no uniform national suffrage. A brief review of the laws of the various states will make this clear.

**State
qualifica-
tions**

Today every state requires that a voter be a citizen of the United States, although in the past some states have extended the suffrage to aliens who had made application for United States citizenship. All states also have a residence requirement, ranging from three months to two years in the state and including a shorter period in the county or voting district. There is in addition a minimum age requirement—in Georgia eighteen, in other states twenty-one years. In about half the states there is a literacy or educational test, which is satisfied by the completion of a stipulated amount of schooling, or, alternatively, successful passage of a reading test. All but two require the registration of voters within a given period, ranging from two weeks to three or four months, before the date of the election. In many states a person must register at regular intervals; a growing number of states, however, have permanent registration—that is, as long as the voter resides in the state he need not reregister, although if he moves from one voting district to another he will be required

to transfer his registration. One other qualification for voting is found in seven southern states: the payment of a capitation tax, commonly called a poll tax.

There are certain disqualifying provisions which should be noted. The constitution or statutes of a state may provide that persons convicted of certain crimes be deprived of the right to vote, either permanently or during any period for which they may be in prison. Insane persons or persons of unsound mind are generally excluded from the franchise. In some states, wards of the state or of local units—that is, persons in public charitable institutions—are not permitted to vote.

Disqualifications

Certain provisions of the national constitution in addition to those referred to above deal with the right to vote. The Fourteenth Amendment provides that if a state denies the suffrage to any male inhabitants of the state twenty-one years of age or over, its representation in the House of Representatives shall be proportionately reduced. The enforcement of this provision would require Congressional action, and no such action has ever been taken. More important is that clause in the same amendment which forbids any state to “deny to any person the equal protection of the laws.” This federal guarantee forbids the state to practice unfair discrimination in voting as in other fields. A state must allow Negroes, for example, to vote on the same terms as white persons. This applies not only in elections but in the primaries in which candidates are chosen. The Fifteenth and Nineteenth amendments were directed specifically at the problem of suffrage. The Fifteenth Amendment forbids the United States, or any state, to deny a person the right to vote on account of his race, color, or previous condition of servitude; the Nineteenth provides that neither the United States nor any state shall deny the right to vote on the basis of sex. It will be observed that these two amendments do not by themselves give anyone the right to vote; they merely provide that the state in conferring the right to vote cannot withhold it on these grounds.

Restrictions on states

In recent years the Fourteenth and Fifteenth amendments have been invoked against the “white primary.” A primary elec-

White primary

tion is one in which the members of a political party choose candidates for public offices. The white primary was for a long time effective in rendering Negroes politically powerless. In the southern states the only real contest, even for United States Senators and Representatives in Congress, occurs in the Democratic primary; the election itself is merely a perfunctory ratification of the verdict of the voters in the primary. For many years it was assumed, and even held by the Supreme Court, that a political party had a right to determine its own membership. If a political party were not an agency of the state it could establish racial qualifications without violating the Fourteenth and Fifteenth amendments, which forbid the states to practice discrimination. In 1944, however, the Supreme Court held that Negroes were entitled to vote in Democratic primaries in Texas and that any law, rule, or regulation which seeks to prevent them from taking part in choosing elective officials is a violation of the Fifteenth Amendment.² This decision, together with one rendered three years before, holding that Congress has the power to protect persons participating in Congressional primaries,³ apparently sounds the death knell to the white primary.

Conduct
of elec-
tions

All such rights would be ineffective if there were not an honest administration of the primaries or elections in which federal officers are chosen. The Supreme Court has held that not only the voting rights conferred by the constitution but the implied right to an honest count come within the protection of the power of Congress, and it has been made a penal offense for a state officer to abridge the right. On numerous occasions persons have been convicted of violating laws regulating the conduct of elections in which federal officers are elected.

Voters
and
amend-
ments

So history has seen the progressive democratization of the electoral process. Legislators and Presidential electors have been made popularly elective, and the franchise has been extended and protected. One other national function may fall to the electorate. The first twenty amendments to the national constitution

² *Smith v. Allwright*, 321 U.S. 649 (1944).

³ *United States v. Classic*, 313 U.S. 299 (1941).

were ratified by state legislatures. The Twenty-first, however, was ratified by conventions in the states, the members of which were elected by popular vote. In voting for one slate of delegates or the other, the voters were in fact voting for or against the ratification of the amendment. For all practical purposes the amendment was ratified by popular vote.

POLITICAL PARTIES

The laws define the electoral process, but they are powerless to make it operate. Nor could it function by the spontaneous action of individual voters. If every voter were truly independent, and voted for candidates according to his private judgment, it would be virtually impossible to fill any office. Organization is necessary to present choices to the voters and to restrict those choices within workable limits. For this purpose we rely on political parties.

Need for parties

A political party is not a very exclusive organization. To be a Democrat, legally recognized as such, one needs only to enroll or register as a Democrat or vote the Democratic ticket. Republican membership can likewise be easily acquired. Only some of the minor parties, such as the Socialists and Communists, require a person to be "admitted" to the party and to pay dues if he expects to retain his membership. A person does not become a member of the Socialist party simply by voting for Socialist candidates. The Democrats and Republicans, however, ask for no more than a vote. To a major party leader, a voter who switches from the leader's party is a disloyal renegade; but the voter who changes to the leader's party is a far-sighted, upright citizen who is willing to place the welfare of his community above that of his party.

Membership

Equally loose are the rules applying to persons who want to run for office as members of the Democratic or Republican party. In general it may be said that the two major parties do not care what a person believes or advocates so long as he can get the votes. The principle was well stated by the late Senator Borah of Idaho as follows: "Any man who can carry a Repub-

Qualifications of candidates

lican primary is a Republican. He might believe in free trade, in unconditional membership in the League of Nations, in states rights, and in every policy that the Democratic party ever advocated; yet if he carried his Republican primary he would be a Republican. He might go to the other extreme and believe in the Communistic state, in the dictatorship of the proletariat, in the abolition of private property and in the extermination of the bourgeoisie; yet if he carried his Republican primary, he would still be a Republican."⁴

Functions

1. Naming candidates

2. Stating issues

In a study of governmental functions one is accustomed to examining constitutions, laws, statutes, and regulations in order to determine the functions with which this or that agency is charged. The functions of political parties are real, even essential, but they are not written out in the laws of the land. It is true there may be, and especially in more recent years there are, regulations which political parties must abide by in performing their functions, but it is taken for granted that certain functions will be performed. First, political parties select candidates for elective offices and designate available personnel for appointive positions. Candidates for elective offices are ordinarily selected through primaries or conventions but appointive personnel are designated by the regular party organization. The organization as a functioning unit, and the primaries and conventions, will be explained more fully later. Secondly, political parties in some degree enunciate principles, either specifically through platforms or official party statements or through practices and traditions, upon the basis of which voters are supposed to choose in deciding their party allegiance or support. Presumably people who vote with the Democratic or Republican party believe that there is a difference between what the two parties advocate. Relatively few voters, however, could point out differences in their platforms. So far as the voter is concerned, it may be simply a choice between the party in power and the party wishing to get into

⁴ "Child of the Sacred Primary," *New York Times*, May 29, 1923, quoted by Clarence A. Berdahl in "Party Membership in the United States," *American Political Science Review*, xxxvi, 16-50, 241-262, at p. 16 (Feb.-April, 1942).

power. The things that are being done are condemned by the "outs," but it is not always necessary to say how things will be done. A third party function is that of waging political campaigns in an attempt to secure the election of its nominees. For the higher offices especially, virtually the whole burden of a campaign is carried by the party rather than by the candidates personally. Imagine a candidate having to spend several million dollars of his own money to be elected President! Yet the major parties spend millions in every Presidential election. In the fourth place, political parties are supposed to help keep the voters informed on matters of politics and government. With a party of opposition always ready to criticize any false move by the party in power, it is expected that the latter will be careful to act in a way which will best serve the public interest, or at least satisfy the demands of the public. There may be some question as to the educational value of the propaganda put out by the political parties. But in a democratic country all parties are free to disseminate information and the voters are expected to use their own judgment as to its validity. Finally, political parties act as a liaison agency among the various offices and departments of government, to make it possible for the government to operate more smoothly. A President and Congress of different political parties are notorious for their failure to work together. The leadership in Congress and in the Presidency results not from any constitutional or statutory provision but from the relationships that have grown up in the party system. A President with a Congress dominated by the opposite political party has the same legal power and authority as when the Congress is overwhelmingly of his party; but his practical authority is far greater when his party controls the legislature.

In order to accomplish the several party functions, parties must have organizational activities. There is a kind of ebb and flow of party activities which is related to the election cycle. The highest degree of activity is reached in the period before the general election every four years when the President, Vice-President, one-third of the United States Senators, the members

3. Waging campaigns

4. Education

5. Coordinating officials

Temporary organizations

of the national House of Representatives, the governors in most of the states, and many other state and local officers are elected. Because of the interdependence between national and state party organizational activities, it will be necessary to include some state and local material to give a complete picture.

**1. Pri-
mary**

Temporary organizations of extremely short duration are the primary elections and conventions. In most states it is in the primary election that the voters of the party have complete authority over party affairs—if only for a day. In these states party members in the primary select candidates of their party for the various offices from constable to governor or United States Senator, elect the local or basic party officials upon whom the whole superstructure of the party organization is built, and elect delegates to a state or district convention of the party. There are, of course, variations in voter functions in primaries among the states. In some states the voters are even given an opportunity to express a choice for a candidate for President. In a few states party officers and convention delegates are not elected in the primaries. Instead, “primary meetings” of voters are held in each local precinct and delegates are elected to state conventions. From the standpoint of the party organization the primaries or primary conventions are extremely significant. In most states this is the only point at which the voter has an opportunity to influence the organization or policies of his party.

**2. State
conven-
tions**

Conventions are much older party agencies than are primaries. In the primary the party member or voter himself acts for the party; but in the convention delegates represent voters in the transaction of party business. Conventions may be held in any political jurisdiction from a county or city to the entire nation, but in general only state and national conventions attract much attention. In Presidential election years the state conventions generally elect delegates to the national convention of the party. Since delegates may be “instructed” to vote for one or another candidate for President, or a slate known to favor one candidate may be chosen, there may be considerable interest in state convention proceedings. A state convention may also nominate can-

didates for Presidential electors, and indicate the persons whom it wishes to represent the state on the national committee of the party.

The national convention of the party is an event of interest and importance. Although neither the constitution nor the statutes require it, one of the two men named by the two major parties will be elected President. Millions of other men are qualified under the constitution and have a legal right to be voted for for President, but in all probability only the two will receive any votes of Presidential electors. About fifty million persons will go to the polls in November after the conventions meet to choose between the two men. From the hundreds of persons qualified by training and experience, the parties say to the fifty million voters: "You will take one of the two named." The voters, of course, meekly accept the dictum. The selection of these two men is in some ways more important than the choosing between them. One can easily see why the spectacle of a major political party convention attracts the attention of the nation. The national convention of each party, in addition to naming the party's candidates for President and Vice-President, adopts a party platform and names, or confirms, the two national committee members from each state.

3. National conventions

Thus by means of primaries and conventions a political party goes a long way toward the performance of two of the functions listed above, namely, selecting candidates for the various offices and adopting a platform upon which the party stands. These functions can be completed and brought to an end by a temporary agency. Other functions are of a continuous nature: criticizing or defending governmental policies and acting as a liaison within the governmental structure. Hence a political party must have an organization that is permanent in nature, one that is ever ready to perform the continuing function. Attention will next be directed to this more permanent section of the party structure.

Permanent organization

The permanent organization of a political party consists of a hierarchy of officers and committees from the precinct or ward

1. Structure

committee or officers up to the national committee and its officials. Just as we have a federal system in the governmental structure, so there is also federalism in the political party structure. State organizations function more or less independently of the national organization, but usually in coöperation with it. Just as the national government depends on state government for its very existence—for conducting elections for its officers, for example—so does the national party organization depend on the state party for perfecting its organization and accomplishing its functions.

2. National committee

The national organization of the political party is headed by a national committee consisting of two representatives, a committeeman and committeewoman, from each state and from a number of the territories. The party rules of the major parties provide for the election of the committee by the national convention. In many states laws provide for the selection of national committee members by the state party convention or the state executive committee. It may be said, therefore, that a party national convention formally elects members of the national committee but the actual selection is made in some other manner.

3. National chairman

The chairman of the national committee is named by the committee. When a chairman is selected after a candidate for President is nominated, the latter designates the person to be named and the committee always accepts the nominee. The committee chairman is the manager of the national political campaign for the Presidency. If he is successful in securing the election of his candidate, he himself will be a man of considerable influence, especially in the executive branch of the government. There have been exceptions, but there is now virtually an established tradition that the manager of the campaign of a successful candidate for President will become Postmaster General under the President.

4. Congressional campaign committees

Mention has been made of the federal nature of the party system in the United States. State and national parties usually work in close harmony, but the state party organizations are definitely not subject to the control of the national organization. Even at

the national level there are two party agencies more or less independent of the national committee, the Senatorial campaign committee and the Congressional campaign committee of each party. The former is selected by Senators of the party and the latter by party members of the House of Representatives. These committees are interested in electing members of the party to seats in the respective houses of Congress. The committees, of course, must work more or less continuously, for Congressional elections occur every two years and special elections may occur any time. The special Senate and House campaign committees coöperate closely with the national party organization, especially during Presidential election years. However, members of Congress are often more closely associated with state party organizations than with the national organization. In view of the fact that the titular head of the national party, the President, will on occasion seek to unseat a member of Congress of his own party, it is not surprising that the legislative branch of the government insists on a degree of "separation of powers" in political party organization.

In addition to the party organization, the politician would recognize as a distinct agency the headquarters organization. Most laymen would not at first see the reason for such a distinction. "Headquarters" springs up during a campaign and then dies down when the race is over. The chairman of the party committee at a given level becomes head or director of the headquarters organization at that level. The committee may meet only once or twice during a campaign. Headquarters is buzzing with activity every day and night until the votes are counted.

Headquarters
organizations

The party chairman organizes his forces under various departments or types of activities. The publicity director, for example, will attempt to get information calculated to advance the party's interest and to see that it is given the widest possible publicity; and so on with various kinds of activities. Some duties will be divided on the basis of persons to be reached or influenced. Women, Negroes, laborers, young persons, farmers—each will be the concern of a bureau or department of any national, state,

The campaign

or large city headquarters. Even in the village or hamlet, one is likely to find headquarters established, especially in the states where the parties are somewhat evenly matched. In general, political propaganda and "orders" or messages sift down from national headquarters to the state headquarters and thence to the city or county, and finally to the precinct worker of the party. In headquarters there are both paid and volunteer workers. To appreciate the temporary nature of a headquarters organization, one should visit one a few days before an election and observe the hustle and bustle in the place, and then return a few days after the election to see a deserted office with campaign literature, buttons, telegrams, and other outdated matter littering the floor. Of course, the state or national chairman even of a defeated party will continue to have an office in which party affairs will be attended to, but the floor space and the clerical assistance will be radically reduced.

**Support-
ing organ-
izations**

Independent organizations also spring up during political campaigns to support one ticket or another. There are several reasons why they do not amalgamate with the party of their choice. An outstanding reason in the Presidential campaigns of 1940 and thereafter was the drastic limitations placed on party expenditures by the First Hatch Act, which was passed in 1939. A political party is not permitted to spend more than \$3,000,000 in a Presidential campaign; but the Hatch Act does not prohibit the "Blank-for-President Club" from spending \$3,000,000 also if it has it and wants to spend it. The "Independent Voters League," "Liberty League," "Dewey-Bricker Club," "Republicans-for-Roosevelt Club," and many others have all been organized at one time or another. These organizations raised and spent millions of dollars. In most instances their work was coördinated with that of the respective parties, another job for the campaign manager and his headquarters organization.

One cannot treat these various campaign groups as a part of the political party organization. We do know that party managers encourage their establishment and aid and abet them in their work. Some of the laws and regulations applying to political

party activities also apply to them. They lack the cohesiveness of political parties. No doubt there are many instances when persons active in one of the groups are duly rewarded by the successful party; nevertheless there is no obligation to reward such workers. The party faithful, however, are traditionally entitled to receive favors from the leaders.

THE PROCESS OF SELECTION

In order to understand the process of popular election in the federal government, one must examine the mechanism in actual operation against the background of laws, rules, customs, and practices governing its operation.

The United States constitution provides that two United States Senators shall be elected from each state and that members of the House of Representatives shall be apportioned among the states on the basis of population, provided that no state shall have less than one Representative. It provides also that the President and Vice-President shall be chosen by electors from each state equal in number to the number of Senators and Representatives from the state. At present there are 96 Senators and 435 Representatives; therefore 531 Presidential electors are chosen every four years. Elective offices

The constitution further provides that Congress may by law fix the time for the election of Senators and Representatives and that each state legislature shall determine the manner of choosing Presidential electors. By federal law members of the House and one-third of the Senators are elected on Tuesday after the first Monday in November of every even-numbered year.⁵ National law

All state legislatures have provided that in Presidential election years electors shall be chosen by popular vote on the same day that members of Congress are elected. They have further provided that the electors shall be chosen at large; that is, by the voters of the entire state, with each voter having a vote for each State law

⁵ Maine is permitted to elect Senators and Representatives in September before the general election in November, in conformity with the state's own constitution.

office to be filled. This means that each voter of the majority party will cast one vote for every candidate for Presidential elector of his party in the state; each voter of the minority party will cast one vote for each of the candidates of his party. Consequently, all of the candidates of the majority party will be elected and none of the candidates of the minority party.

Voting
by
electors

By constitutional mandate electors must meet in their respective states to cast their votes for President and Vice-President, but the time of such meeting is fixed by Congress as the first Monday after the second Wednesday in December following their election. The votes must be forwarded to the President of the Senate from the several states, and on January 6 following the election the votes are counted in a joint meeting of the two houses of Congress.

There is a considerable volume of both state and federal law relating to the federal elections: laws to limit campaign expenditures and corrupt practices in campaigns and elections, laws to protect voters in the exercise of their franchise in such elections, laws to provide for the many details in carrying on the elections, and so on. There is, however, so much in the electoral process which is extra-legal or beyond the law that to get a complete understanding of it one must consider the process apart from the formal laws and rules.

Choice of
a Presi-
dent

A narration of the principal events in connection with a Presidential and Congressional campaign and election will give a picture of the federal electoral process. A year or more before a campaign begins, activity in the interest of prospective candidates for nomination, especially for President, may be carried on. The first formal step in the process, however, is the meetings of the national committees of the two major parties. These meetings usually occur around the first of the year in which a general election for President is to be held. At its meeting each committee will usually choose a city in which to hold the party's nominating convention, will determine, in accordance with the party rules adopted at an earlier convention, the number of delegates to be chosen from each state, and from each territory for

1. Preliminary
meetings

those territories that are to be permitted to send delegates, and will notify state central committees of the actions taken.

During the spring and early summer of the election year further events take place. Primary elections are held in the states. In forty-four states the primary is used to nominate candidates for the House of Representatives and for United States Senator. In at least a third of the states, delegates to the party national conventions are elected in the party primaries. If the primary laws permit the voters to choose delegates instructed or pledged to support a designated candidate for President, the primary is called a Presidential preference primary. Illinois, Wisconsin, and Maryland are examples of states having preference primaries. In some primaries candidates for Presidential elector are also nominated.

2. Choosing delegates

At about the same time parties hold their state conventions in the various states. Candidates for United States Senator are nominated by convention in a few states, and in most states delegates to the party's national convention are chosen in the state convention of the party. In most states the state party convention also nominates candidates for Presidential elector and names the state's two members of the national committee for the ensuing four years. Heated campaigns may develop in the primaries for nominations for Senator or Representative or for convention delegates, but these are all intraparty races. In fact, it is in these and some later events that the parties are squaring off for the big fight ending in November.

We assume that the parties in all states and the territories have selected their delegates to the national conventions. For many years the two major parties assigned delegate quotas to states on the basis of the number of electoral votes from each state, at first one delegate for each elector and later two for each. The Democrats still follow this method, except that each state which voted Democratic in the most recent Presidential election is given a bonus of four votes. The Republicans follow a more complicated formula which dates from 1924. Each state is allotted four delegates, and two additional delegates for each Congressman-

3. Apportionment of delegates

at-large that a state may chance to have. One delegate is also allotted for each Congressional district in which at least 1000 Republican votes were cast in either of the last two federal elections, and an additional delegate for each district in which as many as 10,000 Republican votes were cast in either of such elections. A bonus of three delegates is assigned to each state which voted Republican in the last Presidential election. Each party allots a small number to each of several territories. In all there will usually be from 1000 to 1100 delegates in each convention. An alternate is elected for each delegate.

4. Convention city

Little attention is paid to any convention, or for that matter to other activities, of any party except the Democratic and Republican parties. By long tradition the Republican national convention meets first, usually near the middle or the latter part of June, at the place previously selected by the national committee. The stakes are high in a national election, especially when a President is to be chosen. Every activity of the party is a measured one. A convention city must meet certain standards in order to be selected. First, the party committee will require a sizable contribution of money. Second, the city must have, or must agree to build, a large auditorium to accommodate the crowd of delegates and others in attendance. Third, the city must be strategically located from a political standpoint. A middle-western city will nearly always measure up to this third requirement because of the "doubtful" status of this area politically. Generally speaking, a southern city is not in favor because the Democrats do not have to try to attract the southern vote and Republicans realize the present hopelessness of trying to capture the "solid South."

5. The convention

National conventions assemble for one principal purpose: to nominate candidates for President and Vice-President. The convention also prepares the party platform and formally elects the national party committee.

The national party convention gives testimony to the federal character of our government. In making up the convention committees, each state is given representation; in placing names of

candidates for nomination before the convention, the names of states are called in alphabetical order and each is allowed to present a candidate if it chooses; and in voting on the nominations for President and Vice-President, and for that matter on any other question presented to the convention, ballots are taken by roll call of states. In recent years the proceedings of the conventions have been broadcast and more and more people have been able to "observe" the convention in action.

Soon after the convention adjourns the campaign for President gets in full swing. Under the general direction of the national committee of the party, and more particularly of the chairman of this committee designated by the party's Presidential candidate, political propaganda is spread by all the media in use in the nation.

6. The campaign

The campaign comes to an abrupt close on Tuesday after the first Monday in November when the voters throughout the forty-eight states go to the polls and choose their Representatives, Senators, and, indirectly, the President and Vice-President of the United States.⁶ Although the voters actually cast their ballots for Presidential electors, in many states the names of candidates for President and Vice-President, and not those of candidates for elector, now appear on the ballots. Electors regularly vote for the nominees of their respective parties, and as a consequence we know after the popular election in November how many electoral votes each candidate will get.

7. Choice of electors

The electors meet in their respective state capitals on the first Monday after the second Wednesday in December following their election and cast their ballots separately for President and Vice-President. The electors prepare six separate lists showing how many votes were cast for each person for the two offices. One list is sent by registered mail to the President of the United States Senate, two lists are mailed to the Secretary of State of the United States, two lists are delivered to the secretary of state in the state where the voting is done, and the sixth list is delivered to the federal district court judge of the district. On the

8. Formal election

⁶ Except as stated in the footnote on p. 175.

following January 6, the houses of Congress meet in joint session with the President of the Senate presiding. The votes are tabulated and official declaration is made of the results, which the people have of course known since the popular votes were cast in November.

To be elected President or Vice-President a candidate must receive a clear majority of the electoral votes—at present, 266. Only once in our history has a candidate for President failed to get a majority of the votes cast—in 1824.⁷ The Twelfth Amendment provides that in case no candidate for the Presidency receives a majority of the electoral votes, the House of Representatives shall choose a President from the three highest on the list. The voting is by states; each state has one vote, and a majority of all the states is required to elect. If no candidate for Vice-President receives a majority, the Senate chooses from the two highest. Two things largely explain the almost 100 percent effectiveness of the electoral vote system in selecting by a majority, namely, the strong two-party system which has prevailed during most of our history and the electoral practice employed in every state which insures that the candidate or party receiving a plurality of popular votes in the state gets all the electoral votes of that state.

**Disputed
elections**

The election of 1876 was indecisive because twenty-one votes were disputed. Samuel J. Tilden, the Democratic candidate, had 184 votes, and his Republican opponent, Rutherford B. Hayes, had 164. Thus Tilden needed only one of the disputed votes and Hayes needed all twenty-one to win. The controversy went to Congress but the two houses could not agree. Congress finally

⁷ The election of 1800 was indecisive because of a tie vote for President. Under the original constitutional provision, electors voted twice for President and no vote was cast for Vice-President. The one receiving the highest number of votes, if a majority of all the electors, was to be declared President; and the one receiving the second highest number of votes, if a majority of the electors, was to be Vice-President. Jefferson and Burr each received a majority, but they received the same number. The House of Representatives had to choose between the two. After weeks of wrangling Jefferson was elected President and Burr Vice-President. To prevent recurrence of this problem, the Twelfth Amendment was adopted.

created a special commission of fifteen—five Senators, five Representatives, and five justices of the Supreme Court—to award the disputed votes. In the end, Hayes won on a strict party vote, for eight of the members of the commission were Republican and seven were Democratic. In 1887 Congress passed an Electoral Count Act designed to prevent a recurrence of the Hayes-Tilden type of contest. The act declares that if a state's votes are in dispute and two or more lists are certified, the state will be deprived of its votes unless the two houses of Congress agree on one list.

The Twentieth Amendment provides that if no President has been elected or qualified at the time fixed for the beginning of a new term, the Vice-President-elect shall act as President until a President is elected and qualified. Likewise it provides that the Vice-President-elect shall become President if the President-elect dies before taking office, and that the Congress shall by law provide for filling a vacancy when neither a President nor a Vice-President is elected and qualified at the time fixed for a new term to begin. It is further provided in the Twentieth Amendment that the Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President or the Senate a Vice-President whenever the right of such choice devolves upon the one house or the other.

20th
Amend-
ment

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CHAPTER 10

THE NATIONAL EXECUTIVE

The Man and the Office—Qualifications, Term, Immunities—The Cabinet—Chief of the Administration—Appointment and Removal Power—Control of Foreign Affairs—The Pardoning Power—Military Powers—Powers Relating to Legislation—The Vice-President

THE MAN AND THE OFFICE

In his book, *The American Presidency*, the British political scientist Harold J. Laski points out that an institution such as the Presidency will vary markedly, depending upon the qualities of the man who happens to occupy the office.¹ Certain it is that the position of chief executive of the United States has been one thing in the hands of Theodore Roosevelt or Woodrow Wilson; it has been quite another in the hands of Warren G. Harding.

Much of the variation in the character of this office is due to the fact that it derives its authority not only from express provisions of the constitution of the United States and from statutes enacted by Congress but also from certain intangible sources. For one thing, it should be remembered that when the constitution and the statutes of Congress vest powers in the chief executive they employ very general terms. A strong President may interpret them so as to give himself a considerable access of authority. One who is inclined to shun responsibility may interpret them so as to limit himself sharply in the exercise of

Power
and in-
fluence

¹ Harold J. Laski, *The American Presidency* (Harper & Brothers, New York, 1940), p. 1.

his functions. Furthermore, custom and tradition play a part in defining the powers of a President, chiefly by limiting the manner and scope of their exercise. Custom and tradition have a considerable influence on the actions of all Presidents, but some traditions have not been sufficiently well established or adequately backed by public opinion to keep a strong-minded President from embarking upon a course of conduct which a more timid one would hesitate to follow. In addition, the political party which a President represents regards him as its leader and chief spokesman. This in itself adds greatly to his power and prestige. Furthermore, the President of the United States has become the principal spokesman for the American people. They look to him for leadership in internal affairs both political and economic. They expect him to show leadership and to make major decisions in the field of international relations. Even beyond the borders of the United States, the President has become the spokesman for millions of persons. In fact, a vigorous President backed by public opinion and supported by dependable majorities of his party in both houses of Congress is inferior in power and prestige to no officer in the world.

Duties

1. Ceremonial

Anyone who studies the office of President of the United States cannot help but be impressed with the many functions of that office and the tremendous burdens which it imposes upon an incumbent. For one thing, the President is the ceremonial head of the United States, and this in itself involves the expenditure of a great amount of energy and time. He is called upon to address important national gatherings, to speak at ceremonies on national holidays, to talk at important meetings of the political party to which he belongs. He is requested to send messages of greeting to national meetings and conventions. He is expected to entertain distinguished guests and diplomats from foreign countries. He gives dinners to important officials in this country, such as Supreme Court judges, Senators, Representatives, and cabinet officers, and to persons in private life. He is called upon to be present at the opening of significant federal projects, such as a new dam or national park, and to dedicate new federal

monuments and shrines. He proclaims national holidays. These tasks in themselves are enough to occupy the full time and energy of one person. In Great Britain the King performs most of these ceremonial tasks, thus relieving the Prime Minister and freeing his time for the important executive tasks which he must perform.

But the ceremonial tasks of the President, although time-consuming, are insignificant compared with his other duties. He must take an active part in preparing and securing the adoption of legislation. He is responsible for American foreign policy. He is the executive head of the government of the United States. He is the leader of his political party. Any one of these tasks is a full-time job even for an unusually intelligent and energetic person. There is probably no position anywhere which imposes heavier duties and responsibilities upon its holder than does the American Presidency.

2. Legal
and political

QUALIFICATIONS, TERM, IMMUNITIES

The constitutional provisions give only the formal and minimum qualifications for the Presidency. What extra-constitutional qualifications should a President have in order to perform satisfactorily the arduous and multitudinous tasks with which he is confronted? He should have integrity and intelligence far above that of the ordinary person. He should have a great store of physical and nervous energy upon which he can draw. He should have vision and imagination and a thorough knowledge and understanding of the political, economic, and social forces which are at work both at home and abroad. This latter is tremendously important. With the colossal power a President wields, his attitude on political, social, and economic questions and the decisions he makes may affect the lives not only of persons in the United States but also of vast numbers of persons throughout the world for generations. The ability to choose able men to aid him in his task and to handle them skillfully is a quality of paramount importance. Some Presidents have had this, and others seem to have been totally lacking in it. Further-

Personal
qualifications

more, a President should be able to make sound decisions and make them rapidly. A sudden change in the foreign situation or in economic conditions at home, or the occurrence of some unforeseen catastrophe, may call for the making of a decision on a matter of great moment on very short notice. He should be skillful in directing and molding public opinion. He has fuller access to information than the citizenry, and it is his duty to impart this, and to help the public formulate an intelligent opinion. A striking illustration is to be found in the international situation prior to World War II. Franklin D. Roosevelt and his advisers undoubtedly realized from the special information available to them that sooner or later war with the Axis powers was likely to come. The problem Roosevelt faced was how to inform the public and secure support for an intelligent foreign policy dealing with this critical situation.

Many of our Presidents have not possessed all of the above-mentioned qualities in impressive degree. The somewhat haphazard ways by which they rise in American political life, the compromises which they must make to achieve eminence, the method of nominating Presidential candidates, all militate against the likelihood that the best-qualified persons will always or even frequently be selected to this high office.

**Legal
qualifica-
tions**

Under Article II of the constitution no one except a natural-born, that is, a native-born,² citizen is eligible to the office of President. The candidate must also be at least thirty-five years of age and have been fourteen years a resident within the United States. These qualifications do not operate as a serious barrier to the great majority of persons who might aspire to the office. Actually, a person who had not reached the age of thirty-five or who had not been a resident in this country for fourteen years would have little chance of receiving serious consideration for the post of President. The disqualification of naturalized citizens might possibly bar an otherwise well-qualified individual. How-

² It is sometimes said that this provision requires merely that the candidate be born a citizen. But persons who acquire citizenship by birth abroad to United States citizens appear to be naturalized rather than "natural-born." See p. 129.

ever, as the percentage of foreign-born persons has decreased, this qualification has become a less significant barrier.

The constitution states that the President shall hold office for four years. It says nothing whatsoever about eligibility for reelection. One finds in some state constitutions provisions which forbid a governor to run for reelection, at least for the term immediately following the one that he has served. There is no similar provision in the federal constitution. In fact, Alexander Hamilton argued in favor of the principle that a President should be eligible to succeed himself.³ However, the refusals of George Washington and Thomas Jefferson to accept third terms gave rise to the custom that a President should not serve more than two terms. From Van Buren to Lincoln there was a one-term tradition, but Lincoln broke this by seeking and winning a second term. Grant desired a third term but failed to win the nomination. Theodore Roosevelt was nominated but defeated for reelection to what he himself regarded as a third term. The two-term tradition was finally shattered by Franklin D. Roosevelt, who was elected to the Presidency four times successively.

The Eightieth Congress passed and sent to the state legislatures for ratification a joint resolution proposing a constitutional amendment which would forbid a President to serve more than two terms. The resolution makes an exception in the case of a Vice-President who succeeds to the Presidency. Such persons may serve a maximum of ten years. Several state legislatures have already ratified this proposed amendment. The joint resolution was launched out of political enmity to Roosevelt rather than out of sound consideration of public policy. The wisdom of the limitation proposed in this amendment is doubtful. Military or economic emergencies might arise which would make it highly desirable that a President be able to succeed himself for a third or even a fourth term if the people so wished.

The constitution states that the President shall receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been

Term

Compensation

³ *The Federalist*, Nos. 71-72.

elected. He is not to receive any other emolument from either the states or the United States. The provision against additional emolument has not been interpreted as forbidding the payment of substantial sums for expenses each year to the President in addition to his salary. The salary of the President has been fixed by statute at \$100,000 a year. In addition, he receives large allowances for travel, his official residence, and numerous other items.

**Immuni-
ties**

As chief executive of the United States the President is one of the three coördinate branches of government, and he enjoys an immunity of his person from commands of the other two branches. He cannot be subpoenaed to testify as a witness in court, nor can he be arrested or tried for crime during his tenure of office. This immunity is implied rather than expressly stated in the constitution. However, at the expiration of his term, or upon impeachment and conviction and removal from office, he loses his immunity and can be held accountable for actions during his term of office.

**Inaugura-
tion**

Before the adoption of the Twentieth Amendment, the President and Vice-President, although popularly chosen in November and officially elected in December, did not take office until March 4. This had many disadvantages. A President who had not been reelected might continue a program which had been repudiated by the people at the polls, or he might engage in a kind of "sit-down strike" and refuse to attempt a solution of urgent and important problems. Under the provisions of the Twentieth Amendment, adopted in 1933, members of the newly elected Congress take office on January 3 and the President-elect assumes office on January 20.

THE CABINET

**Individual
advisers**

An executive in a position of such importance and responsibility as the American Presidency is greatly in need of counsel and advice. A President may, of course, seek and obtain advice from any source he chooses. Presidents have consulted with various federal officials whom they have found helpful and have not infrequently called upon persons who have held no federal

post. William McKinley, during his administration, was reputed to have sought frequently the counsel of the well-known Republican political boss of that era, Marcus A. Hanna. Woodrow Wilson relied heavily upon Colonel House. Franklin D. Roosevelt sought advice from numerous persons during the long period of time that he was in office. Among the best-known of those who served in this capacity were Raymond Moley, who was frequently consulted by President Roosevelt during his first term, and Harry Hopkins, whose counsel he sought during his later terms.

The framers of the constitution may have intended that the Senate serve as an advisory body to the President, but it has never been used for this purpose. The cabinet, consisting of the heads of the various departments, has been our nearest approach to an official advisory body. Its use by the President, in fact its very existence, is extra-legal, since neither the constitution nor any statute makes mention of a cabinet.

Use of
cabinet

The extent to which a President uses his cabinet, the times and frequencies of meetings, and the subjects which are submitted for its consideration depend entirely upon the President. In so far as there is any regularity or uniformity in its proceedings or deliberations, they are the result of custom or usage. Under some Presidents cabinet meetings have been held twice each week; under others weekly meetings have been the rule. Such matters as the President wishes to discuss are submitted for consideration and advice. There is, of course, no obligation to hold weekly meetings. During the latter part of his administration Woodrow Wilson did not do so. Nor is there any obligation on the part of the President to submit even the most important issues to the cabinet if he prefers to handle them in another way. As has been previously pointed out, a President frequently consults outsiders and follows their advice rather than that of his cabinet.

As can be seen, the position of the cabinet in our governmental system is an anomalous one. As a collective body, it has no legal status. There are no persons whom the President must

Selection
of mem-
bers

appoint as department heads and hence make members of his cabinet. In Great Britain, a Prime Minister is almost bound to include in his cabinet the most important persons in his party. It is true that a President usually endeavors to make selections from various geographical sections of the country. He has frequently included the chairman of his political party, usually as Postmaster General. James Farley and Frank Walker served in this capacity under Franklin D. Roosevelt, and Will H. Hays under Warren G. Harding. Until the Presidency of Franklin D. Roosevelt, the Secretary of Labor was always a member of a labor union. Since the division of the labor movement into two large branches, the American Federation of Labor and the Congress of Industrial Organizations, it is not feasible to appoint a union member, for a member chosen from one of these two groups would be unacceptable to the other. The President frequently includes persons from various large religious groups in his cabinet. A President may also be obligated to repay important political leaders who have supported him. Undoubtedly the selection of William Jennings Bryan as Secretary of State by Woodrow Wilson was made in payment of a political debt.

Weakness
of cabi-
net

As a result, the ties in the American cabinet are individual relationships between the President and the separate department heads, whereas the British cabinet is a corporate body of which each member is an integral part. Harold Laski says of our cabinet members: "They have rarely, as a team, had continuity of contact with great affairs. They have not learned to be a unity in the sense that the members of an English cabinet are a unity before they begin their work. Some of them, even, do not know either their chief or one another, except in the most casual way, until they find themselves in office."⁴ As a consequence, the American cabinet does very little to lighten the burden of the President. It is not a responsible group, nor is it in any sense a policy-making body as are the cabinets in France and Great Britain. Members of the British and French cabinets share responsibility with their respective Prime Ministers in preparing a legislative

⁴ *Op. cit.*, p. 83.

program and defending it before the legislature. This role is not expected of members of the American cabinet. In order to give the cabinet in this country more responsibility, it has been suggested that its members occupy seats in Congress and have the right to speak on the floor of Congress. No serious attempt has been made to act on this suggestion. Congress is probably too jealous of its prerogatives in the field of legislation to acquiesce readily in such a proposal. Moreover, it seems clear that the British cabinet is the product of the British constitution with its close relationship between legislative and executive power, and could not easily be translated to our system with its separation of powers.

CHIEF OF THE ADMINISTRATION

The only direct references in the constitution to the executive powers of the President are the statements that the executive power is vested in him, and that he shall take care that the laws shall be faithfully executed.⁵ There are other provisions, however, which are important to him as chief executive. He is given certain appointive powers, he is Commander in Chief of the Army and Navy, and he may require the opinions in writing of the principal officers of the various executive departments.

The statutes of Congress are an important source of executive authority. Earlier Congresses were inclined to withhold from the President over-all executive power. For example, under some of the early statutes both the Treasury Department and the Post Office Department were placed under the direction of Congress. As time passed, Congress realized the importance of strengthening the chief executive by placing administrative agencies directly under his control. At present, the executive branch of the federal government represents a far better-integrated system of administration than that found in most of our state governments.

Unlike the constitutions of most states, the federal constitution makes provision for only one elected executive official, the Pres-

Sources of executive power
1. Constitution

2. Statutes

The executive function

⁵ Art. II, secs. 1, 3.

ident. In many state constitutions there is provision for the election of a number of executive officials in addition to the governor, such as the auditor, the treasurer, the secretary of state, the attorney general, and the superintendent of public instruction. Sometimes even state boards or commissions have been elected. But in the federal government all executive power is concentrated in the hands of the President. Because of the vast size of the federal service, however, he cannot exercise this control by immediate personal decision. He can do little more than establish broad outlines of policy and exercise some over-all supervision. He must, of course, depend in large measure upon the department heads, bureau and section chiefs, and the thousands of other administrative officials to carry out the details. Even in exercising over-all control he stands in need of assistance. The urgency of this was recognized by the President's Committee on Administrative Management, which in its report in 1937 recommended that an administrative staff be set up to help the President in his gigantic job of administration. In 1939, under statute and executive order, six administrative assistants were provided for and established in what is called the Executive Office of the President. It should be remembered that these assistants have no authority over any of the departments, commissions, or bureaus of the executive branch of the federal government. It is their task to gather information, formulate plans, write reports, and otherwise assist the President in such manner as he directs to carry out his duties as chief executive. By the same executive order, the Bureau of the Budget was also placed in the Executive Office of the President and instructed to assist in the management function.⁶

**Directoral
power**

But just how does the President exercise the extensive executive authority that he enjoys? For one thing, he has the power to issue rules and regulations. This is spoken of as the ordinance power of the President. It is true that most of the rules and regulations governing the executive branch of the federal government are issued by the heads of departments or even by subordi-

⁶ See pp. 322, 333-334, 363-365, 424, 428-429.

nate officials. Many, however, are issued by the President. A glance at the *Code of Federal Regulations*, which contains the numerous rules and regulations of the federal government, shows the great number and variety of the orders issued by the President himself. These regulations range from the transfer of personnel from one department to another to the establishment of a refuge for migratory birds. Much of the direction of administration by the President is exercised informally. Through correspondence, through discussion and conferences with department heads and other administrative officials the President exercises the tremendous executive and administrative authority which has been placed in his hands.

APPOINTMENT AND REMOVAL POWER

The power of the President to appoint and remove is closely related to his control of administration. The constitution provides that the President shall nominate and by and with the advice and consent of the Senate appoint ambassadors, public ministers, consuls, judges of the Supreme Court, and the other officers of the United States whose appointments are not otherwise provided for by law. The constitution also declares that Congress may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.⁷ There is no definition in the constitution of the term "inferior officers." Congress has discretion to determine what officers shall be considered inferior. In general, Congress has provided for the appointment of important officers, such as heads of departments and members of commissions, by the President and the Senate. A large number of officers of lesser importance are appointed in the same manner. But these constitute only a small fraction of the whole group of federal employees. Congress has classed the great majority of the two million persons employed by the federal government as inferior officers and has provided for their appointment by heads of departments or other subordinate officials.

Appoint-
ing
power

1. Consti-
tutional

2. Statu-
tory

⁷ Art. II, sec. 2.

**Senate
approval**

The purpose of the framers of the constitution in requiring Senatorial confirmation to the positions they enumerated was to insure considered and sound judgment on these appointments. This is the ostensible reason for the acts of Congress which require Senatorial approval of many other appointments. In fact, however, two different classes of officers have been subjected to Senatorial approval. The first, consisting of those in judicial positions and policy-forming offices in the executive branch, are genuinely important officers. The second class includes those in posts which do not necessarily affect policy but which do carry good salaries and therefore constitute patronage rewards for party members. The Senate has always showed more interest in the second class than in the first.

**Policy-
forming
offices**

Several different considerations come into play when the Senate is asked to confirm Presidential nominees. It is generally considered that the President should have a free hand in appointment of department heads upon whom he relies for execution of the laws, and almost never is serious opposition offered to nominees for these positions. In the case of other policy-forming offices, opposition is more often raised, sometimes out of honest doubt as to the qualifications of the nominee, sometimes out of political enmity to the President or the nominee. But it is with the patronage appointments that the Senate is seriously concerned. Of the positions requiring Senatorial confirmation, most of those of a patronage character are located outside of Washington. The office of Supreme Court judge is not regarded as a patronage appointment, but inferior judgeships are often treated as patronage; and the better-paid positions in the field service in the Treasury Department and the Post Office are invariably filled on a patronage basis.

**Patronage
positions****Senatorial
courtesy**

Patronage is monopolized by the President's party. Even when the opposition party has a majority in the Senate, it does not expect to share in the federal patronage. It is ordinarily expected that patronage appointments in the field service will be suggested to the President by the Senators or Representatives of the President's party from the state in question. When the patronage

position is one requiring the approval of the Senate, the senior Senator of the President's party from the state in which the position lies claims the right to dictate the nominee for the position. In this claim he is supported by all other Senators of both parties, for every Senator has an interest in establishing a claim to Senatorial control of patronage. If the President offers any other nominee than that suggested to him by the Senator entitled to patronage, the Senate unanimously rejects the nomination. This practice among Senators on patronage appointments is known as "Senatorial courtesy."

If there is a vacancy and the Senate is not in session, the constitution has provided for "recess appointments." The President is authorized to fill all vacancies that may occur during the recess of the Senate by granting commissions which shall expire at the end of the next session. By the use of recess appointments it is possible for a President to keep in office persons to whom the Senate objects. Although a recess appointment expires with the adjournment of the Senate, the President may again give the recess appointment to the same individual. Congress has sought to limit such reappointments by providing, with exceptions too detailed to note here, that no salary is to be paid to a recess appointee if the vacancy existed while the Senate was in session.⁸

**Recess ap-
point-
ments**

The only provision in the constitution concerning removal is one stating that all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors. Certainly this is not a very workable device for removing persons from governmental positions. For one thing, the procedure is so cumbersome that removal through impeachment is a very uncommon practice. Moreover, it is not the chief executive but the House and Senate which are responsible for employing this method of removal. Furthermore, grounds for removal by impeachment are not those for which a removal is usually sought. If the chief executive wishes to remove a subordinate it is usually

**Removal
power**

⁸ U.S. Code, title 5, sec. 56.

for incompetence or incompatibility, and these are not bases for removal by impeachment proceedings.

1. Constitutional basis

What then is the constitutional basis for the removal power of the President? It may be implied from his general executive power. No chief executive could faithfully execute the laws unless he had the power to remove persons who had failed to aid him in carrying out this mandate.

One of the questions concerning removal over which controversy has arisen was whether or not Congress could limit the power of the President to remove executive officers. In 1876 Congress passed a statute providing that postmasters of the first, second, and third classes were to be appointed by and might be removed by the President with the advice and consent of the Senate. It was not until fifty years later that the Supreme Court had occasion to pass upon the constitutionality of this provision in the case of *Myers v. United States*.⁹ The President had removed Myers, a first-class postmaster, without the consent of the Senate. Myers brought suit in the Court of Claims for salary which he contended was due to him, alleging that he had been removed illegally. The case went to the Supreme Court, which held that the act of 1876 was unconstitutional. In so deciding, the Court reviewed the history of the question, pointing out that beginning with the First Congress, in which sat members of the Constitutional Convention, it had generally been assumed that the power to remove civil officers appointed by the President with the advice and consent of the Senate resided in the President alone. The Court also pointed out that the power to remove might reasonably be inferred from the provision of the constitution which states that the President shall take care that the laws be faithfully executed.

2. Limits In *Rathbun v. United States*,¹⁰ the Supreme Court answered another question concerning the President's removal power. Under the statute creating the Federal Trade Commission, commissioners might be removed only for inefficiency, neglect of

⁹ 272 U.S. 52 (1926).

¹⁰ 295 U.S. 602 (1935).

duty, or malfeasance in office. The President removed a commissioner without alleging any of these faults. The Supreme Court held that his action was invalid. Such independent commissions as the Federal Trade Commission, the Court pointed out, were largely quasi-judicial and quasi-legislative agencies. The President's constitutional removal power was limited to officers with executive duties, and Congress could fix conditions for the removal of a quasi-judicial officer without invading the constitutional power of the President.

CONTROL OF FOREIGN AFFAIRS

Under the constitution of the United States, the control of foreign affairs belongs exclusively to the federal government. Obviously this must be the case, since any control by the states would create confusion and cause difficulties for those in charge of the conduct of international relations. In general, the conduct of foreign affairs rests chiefly with the President of the United States and his subordinates in the Department of State. It is true that he shares with the Senate the treaty-making power and the power of appointment of foreign service personnel. It is also true that through its power to appropriate money Congress is able to exercise an indirect and sometimes important control over foreign affairs. An interesting illustration of this is to be found in the struggle in Congress in 1948 over the size of the appropriation to be made for the European Recovery Program. The President and Secretary of State had made commitments for the United States which would have called for the expenditure of a large sum of money. The House of Representatives was reluctant to appropriate the amount requested, and cut the appropriation sharply. The Senate, however, restored most of the reduction. Any severe reduction in this appropriation would have exercised a profound influence on the foreign relations program.

The extent to which a President actually exercises control over foreign relations is a matter of his own choosing. Some Presidents, such as Thomas Jefferson, Theodore Roosevelt, and Woodrow Wilson, themselves shaped very extensively the

Joint
control

Personal
control

course of foreign affairs during their administrations. Franklin D. Roosevelt exercised a very real control over the foreign affairs of the United States during the time that he was in office. He even conducted in person many of the important negotiations with representatives of foreign countries. His conferences with Winston Churchill and Joseph Stalin are striking examples of the personal conduct of foreign affairs by a President. Other Presidents have been content to allow the Secretary of State and the Department of State not only to conduct foreign affairs but even to play a determining part in the shaping of American foreign policy. Under Warren G. Harding, Charles Evans Hughes did much to formulate our foreign policy during the time that he was Secretary of State.

**Means of
control**

The President controls our diplomatic representatives through the power of appointment and removal. He is authorized by the constitution to receive representatives from foreign countries. He may, of course, refuse to receive a foreign diplomat who is *persona non grata*. He may even go farther and request the recall of a foreign representative who is objectionable. Implied in the power to receive foreign ambassadors is the power to recognize a foreign government. The question whether or not to recognize a new government or a new state is a most important one for our diplomatic relations. Undoubtedly our failure for a long period of time to recognize the Soviet Union led to an antagonism toward the United States that had an unfortunate effect upon our diplomatic relations with that country for many years thereafter.

Treaties

The constitution gives the President the power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. The language seems to indicate that the framers of the constitution intended that the President and Senate should share in the drafting of treaties. Both Hamilton and Jay favored this arrangement.¹¹ George Washington attempted to make treaties with the advice of the Senate but found this procedure so unsatisfactory that he aban-

¹¹ *The Federalist*, No. 75.

done it. No President since his day has used the Senate in drawing up treaties. Some Presidents have found it advisable to use certain influential Senators in the drafting of important treaties. President Truman used Senator Vandenberg, a Republican, and Senator Connally, a Democrat, in many of the negotiations following the Second World War. Such procedure is advantageous in that it assures a President greater support when a treaty is presented to the Senate for approval.

The first stage in the making of a treaty is negotiation. The President himself may, if he wishes, actually conduct negotiations for the United States, as did President Wilson in drawing up the Treaty of Versailles. Usually negotiations for important treaties are carried on by the Secretary of State; those for treaties of lesser significance, by an ambassador or special representative of the President.

1. Negotiation

After the negotiation of a treaty, the President submits it to the Senate for approval. The Senate may approve it, reject it, or amend it. Approval or amendment requires a two-thirds majority of those present in the Senate. If a treaty has been amended by the Senate, and the President is dissatisfied with the amendments, he will drop the whole matter. If he is willing to accept the treaty as amended, he seeks renegotiation of the treaty with the foreign country. After ratification of a treaty by both the United States and the foreign country, the President proclaims that it is in effect and has the force of law within the United States.

2. Approval

In addition to his treaty-making power, the President has the authority to enter into what are called *executive agreements* with foreign countries. Such agreements, unlike treaties, do not require approval of the Senate. There is no express statement in the constitution giving the President the power to make executive agreements. His constitutional authority seems to rest on the general control of foreign relations which he enjoys, coupled with his command of the administrative machinery as chief executive. Executive agreements made under the President's constitutional authority are not permitted to establish general rules

Executive agreements

1. Constitutional basis

of law governing the conduct of citizens. In general, they cover business relations or administrative adjustments between the United States and foreign states. This being the case, there should be a distinction between the subject matter of treaties and that of executive agreements, but this distinction is not always observed. For example, in 1905 President Theodore Roosevelt made an executive agreement with Santo Domingo which dealt with customs duties in that country. Later, Roosevelt submitted and secured approval by the Senate of a treaty with Santo Domingo on this same subject.

2. Statutory basis

In addition, acts of Congress sometimes authorize the President to negotiate executive agreements. Since these agreements have the sanction of statute, they may be used to establish rules of law in any area in which Congress has a delegated power to legislate. They are most commonly used for the regulation of foreign commerce, as under the Trade Agreements Act of 1934.

THE PARDONING POWER

The constitution gives the President the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

Reprieves

A reprieve is the postponement of the execution of a penalty upon a person who has been convicted of crime. It is granted in order to gain time for further study of the case in instances where it seems possible that the defendant deserves executive clemency in the form of a pardon or commutation. The occasion for the granting of a reprieve arises only in capital cases, since only here will the execution of the penalty forestall further investigation.

Pardons

A pardon is the remission of the punishment for a crime. The President may grant a pardon for any offense whatsoever against federal law. He may issue what is called a *commutation of sentence*; that is, he can reduce a fine or otherwise lessen a penalty which has been imposed. He can issue a conditional pardon, that is, a pardon which is granted on condition that the person shall perform a particular act or on condition that he shall refrain

Other acts of clemency

from a certain course of conduct. The President may also issue an amnesty. This is a blanket pardon granted to a group of offenders, often before trial, and ordinarily it is used for political offenses, such as rebellion.

At one time there was doubt as to whether the President could pardon persons who had been found guilty of criminal contempt of court. It had been argued that an exercise of his pardoning power would violate the doctrine of separation of powers, since punishment meted out by courts for contempt was a device by which courts were able to maintain their dignity and prestige and aid themselves in enforcing their decrees. However, in *Ex parte Grossman* the Supreme Court upheld the power of the President to pardon for contempt of court in criminal cases.¹² The Court pointed out that there was even more necessity that the President should have power to pardon in this kind of case than in most situations, for contempt of court cases are tried without a jury, and this removes an important check on the exercise of arbitrary authority by the judiciary.

Criminal
contempt

It should be pointed out that the grant of a pardon does not operate automatically. The individual to whom a pardon is issued must accept it. Although this rule may seem strange, there is sound reason for it. A pardon may have attached to it a condition that makes it objectionable to the person to whom it is issued, or the individual may for reasons of his own prefer to serve the sentence or pay the fine.

Although under the constitution the pardoning power rests with the President, in actual practice he exercises it only on recommendation from the Pardon Attorney and the members of his staff in the Department of Justice. They receive and carefully review all applications for pardons and recommend to the President such action as they deem appropriate.

MILITARY POWERS

The military powers of the President are derived from the constitution and from the statutes of Congress. The constitution

Constitutional
provisions

¹² *Ex parte Grossman*, 267 U.S. 87 (1925).

states that the President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the states when called into the actual service of the United States.¹³ This is an extensive military power. As Commander in Chief he can, if he wishes, issue commands to both the military and the naval forces. Since the President is usually a civilian without extensive military experience, and moreover is preoccupied with the other duties of his office, he does not attempt to exercise direct control of military and naval operations. He frequently does take an active part in over-all planning and in the making of final decisions having important military significance. During the Second World War President Roosevelt as Commander in Chief took a direct and active part in the formulation of war plans and himself actually made many important military and naval decisions.

Even though Congress alone may declare war, a President by virtue of his position as Commander in Chief may create a situation in which a declaration of war is inevitable. President McKinley ordered the battleship *Maine* to the harbor of Havana in 1898. When the vessel was blown up, a declaration of war by Congress inevitably followed.

Two other constitutional provisions give the President some military power, at least for internal purposes. The first of these declares that the United States shall guarantee to every state a republican form of government.¹⁴ The President may use military force, if necessary, to discharge this obligation. The same section declares that upon application of the legislature of a state, or of the executive when the legislature cannot be convened, the United States shall protect the state against domestic violence. Here again is a situation in which the President might be called upon to exercise military authority.

Civilian
affairs

It is not only in the actual conduct of military operations that the President may exercise military authority. Since modern warfare has tended to become more and more total warfare, it

¹³ Art. II, sec. 2.

¹⁴ Art. IV, sec. 4.

has become necessary to mobilize civilian affairs so as to make the maximum contribution to the war effort. During World War I and World War II, Presidents Wilson and Roosevelt made numerous regulations affecting civilian life in the United States. Some of these were made under constitutional provisions; others were based upon statutes enacted by Congress. Among the statutes enacted during the Second World War by Congress giving the President extensive war powers pertaining to both military and civilian affairs were the First and Second War Powers Acts. Under this authorization, President Roosevelt reorganized many governmental agencies, and in addition he established many new ones which had a profound effect upon civilian life, such as the Office of Emergency Management, the Office of Defense Transportation, the War Production Board, and the War Labor Board.

POWERS RELATING TO LEGISLATION

The relationship between the President and Congress in the field of legislation is among the more unsatisfactory situations under our constitutional system. The President is not in the position of the Prime Minister of Great Britain, who with his cabinet is expected to initiate legislation, to urge its adoption, and to defend it in Parliament. In fact, a British Prime Minister usually resigns if he is defeated on any important legislative measure which he or a member of his cabinet presents. The framers of the constitution probably intended that the President should not be in a position to exercise much influence over legislation. Nevertheless, he does participate very directly in the legislative process. Part of the legislative power which he enjoys is derived from the constitution; part is derived from the predominant position which he occupies in our political system.

President
and Con-
gress

The influence which a President exercises over legislation varies considerably. It depends in part upon his temperament and personality, whether he is a Coolidge or a Roosevelt. It depends even more upon the economic, political, or international situation at the time he is seeking to influence legislation. It is not an

Presi-
dent's in-
fluence

exaggeration to say that throughout our political history a constant struggle has been waged between Congress and the President as to which shall have the upper hand in legislative matters. In periods of emergency, however, Congress has usually accepted the leadership of the President. Abraham Lincoln was able to exercise more influence over legislation than have most peacetime Presidents. Likewise, during the First World War and the Second World War, Woodrow Wilson and Franklin D. Roosevelt were able to secure the passage of their legislative programs dealing with the war without too much difficulty. The severe depression in 1933 and the economic emergency arising therefrom likewise produced executive leadership of the legislature. President Franklin D. Roosevelt was able to secure the adoption of an extensive program of social and economic reform during the first hundred days of his administration. At the opposite extreme are those instances in which there has been almost no cooperation between a President and Congress. This is most likely to occur when the President is of one political party and Congress is of another, as during the last two years of Harry S. Truman's first administration.

**Means of
influence**

**1. Mes-
sages**

**a. State
of the
Union**

b. Budget

The President's influence varies enormously; his constitutional powers, on the other hand, are invariable. The constitution instructs him from time to time to give Congress information on the state of the Union, and to recommend for its consideration such measures as he shall judge necessary and expedient.¹⁵ His annual message is delivered at the opening of Congress. This message contains not only a report on the state of the Union but also includes many specific recommendations for legislation. Many of the messages of the President have been epoch-making. For example, it was a Presidential message which contained the pronouncement of the Monroe Doctrine.

A President does not limit himself to the delivery of his regular annual message. He delivers to Congress each year a budget message containing a statement of the anticipated revenues of the federal government and proposed expenditures. From time

¹⁵ Art. II, sec. 3.

to time, if the situation demands, he delivers special messages. He is at liberty, of course, to send Congress a message at any time on any subject he deems pertinent. c. Special

Some Presidents have delivered their messages orally to joint sessions of the Senate and the House. Both George Washington and John Adams followed the practice of delivering oral messages. After their day, American Presidents until the time of Woodrow Wilson sent written messages to Congress. Since Wilson's day, some Presidents have sent written messages and others have delivered them orally. If a President has real oratorical ability, an oral message has greater effect, especially with the extensive radio facilities now available. In delivering an oral message, a President knows full well that he is addressing not only members of Congress but also a large segment of the American public and, in addition, a considerable audience in other parts of the world.

Another power of the President pertaining to legislation is that which the constitution gives him to convene and adjourn Congress. Congress meets regularly on January 3 of each year. If a special session is needed, the constitution declares that the President may on extraordinary occasions convene both houses or either of them. The time of adjournment has been left primarily to Congress. However, the constitution states that the President, in case of disagreement between the houses with respect to adjournment, may adjourn to such time as he shall think proper. 2. Power over sessions

One of the most important ways in which a President participates in legislation is through his power of veto. When a bill which has been passed in both houses reaches him, he has ten days in which to consider the course of action that he wishes to follow. He may sign the bill, thus making it law. If he disapproves, he may veto the bill, thus preventing it from becoming law. In this latter case the bill is returned to Congress, together with such reasons as he wishes to give for his action. Congress may, of course, pass it over his veto by a two-thirds majority in each house, and thus enact it despite the veto. If a President dis- 3. Veto

approves of the bill, yet prefers not to veto it, he may allow the ten-day interval to elapse and the bill will then become a law without his signature. If Congress adjourns within the ten-day period and before the President has acted, the bill is killed if the President thereafter fails to act on it. This is called a *pocket veto*.

In exercising the veto a President must either accept or reject a bill in its entirety. He may not, as may some governors, veto particular items in it. This limitation has serious drawbacks. If a President thinks that the bill as a whole is desirable and should be enacted, and yet he disapproves strongly of one item, he is faced with a dilemma. As a result of this limitation on the veto power of the President, Congress, knowing that the President will hesitate to veto appropriation bills, sometimes attaches "riders" to them. The riders usually have nothing whatsoever to do with the body of the bill, and would probably receive a veto if the President were able to consider them on their merits.

4. Rule-making power

The power of the President to make rules and regulations that have the force of law is an important phase of his participation in lawmaking. Although a President sometimes exercises this ordinance or rule-making power under constitutional provisions, more frequently he derives his authority from acts of Congress. In recent years the importance of rule making by the chief executive has increased greatly. As the problems faced by Congress have become more numerous and more technical and complicated, there has been a tendency to enact statutes containing broad and general provisions, leaving the details to be filled in by rules and regulations. Although many rules and regulations are promulgated by department heads, commissions, or even lesser officials, the President himself issues a very large number.

a. Standards

The Supreme Court has held that, in delegating to the President or other officials of the federal government the power to make rules and regulations, Congress must lay down some standard to guide the rule-making authority. The question arose in *Schechter Poultry Corporation v. United States*. Congress had enacted the National Industrial Recovery Act in 1933 and had

given the President the power to approve codes of fair competition established by various industries, but had failed to set any standard for guidance of the President. The Court held that the National Industrial Recovery Act was unconstitutional.¹⁸ It is proper for Congress to give the President "quasi-legislative" power to make rules within the framework of a policy supplied by Congress, but for Congress to allow the President to choose the policy he wishes to follow violates Article I, Section 1, of the constitution, which says that "All legislative powers herein granted shall be vested in a Congress" and impliedly forbids the delegation of these powers.

Although Congress must provide standards for guiding officials in making rules and regulations, such standards may be and often are very vague and indefinite. The Supreme Court has held that it is sufficient to provide that railroad rates fixed by the Interstate Commerce Commission be "just" and "reasonable," or that the rules governing practices on the stock exchanges be such as are necessary or appropriate in the public interest.

The President has many extra-constitutional ways of influencing legislation. In fact, the extra-constitutional methods are as important as some of those expressly provided in the constitution. His power over patronage is one of the most important. Naturally, members of Congress desire posts for their political followers. Failure on the part of a Senator or Representative to support a piece of legislation which the President regards as important may cost that member of Congress the privilege of designating to the President appointees to federal positions in his district. The appeal to the public is another potent weapon upon which the President may rely in order to aid him in forcing a reluctant Congress to follow his program of legislation. He can always be sure of a large audience when he speaks. If he feels that the public will support a given piece of legislation or a legislative program, he may appeal for public support, hoping that the constituents of Senators and Representatives will bring pres-

b. Discretion

5. Extra-legal powers

¹⁸ Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

sure to bear and force them to follow his wishes. Since the advent of the radio, the appeal to the public has become a primary reliance of the President in his disputes with Congress.

THE VICE-PRESIDENT

Constitutional functions

The framers of the constitution relegated the Vice-President to a minor role in our political system. They expressly assigned him only two tasks. One was serving as presiding officer of the Senate; the other was succeeding to the Presidency in case of the removal, death, resignation, or inability of the President to discharge the powers and duties of his office.¹⁷ Occasionally, a President has asked a Vice-President to attend and participate in cabinet meetings. A few other relatively minor assignments complete the tasks that a Vice-President is expected to perform.

It is unfortunate that the Vice-President has been cast into a role so comparatively insignificant. Sometimes this fact has tempted political parties in making nominations to select individuals not because of real political stature but because of local vote-drawing ability. On the other hand, it has sometimes produced the opposite situation. Politicians, fearing some outstanding individual, have nominated him for the Vice-Presidency in the hope of burying him for four years in that office. Furthermore, the Vice-President, whose really important function is possible succession to the Presidency, has little or no opportunity in performing the minor tasks allotted to him to gain experience that would fit him for the difficult and strenuous position of chief executive which he may be required by force of circumstances to fill.

Presidential succession

Acting under its constitutional mandate, Congress has provided for succession to the Presidency should both President and Vice-President die or become unable to discharge the duties of the office. The Presidential Succession Act which was in force from 1886 to 1947 provided that the office should be filled first by the Secretary of State, and after him by the Secretary of the

¹⁷ Art. II, sec. 1.

Treasury, the Secretary of War, and so on through the heads of the seven departments first established.¹⁸

There was criticism of this scheme of Presidential succession because the department heads were appointed rather than elected officials. In order to meet this objection Congress in 1947 passed a new law making the Speaker of the House of Representatives next in line of succession. If there should be no Speaker or if he could not meet the constitutional requirements for the Presidency, the president *pro tempore* of the Senate should succeed. These would be followed by the various department heads, beginning with the Secretary of State and ending with the Secretary of Labor. The objection to this arrangement is that the Speaker, although he is an elected representative, is elected from a district rather than by the nation at large, and may be entirely unrepresentative of the people generally. The president *pro tempore* is also an unsatisfactory successor. He is chosen president *pro tempore* merely because he is the member of the majority party who has the greatest seniority in the Senate, and these attributes do not necessarily qualify him for the Presidency. Furthermore, he is selected by the electorate of only one state, and he may fail to mirror public opinion throughout the United States.

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¹⁸ U.S. Code, title 3, sec. 21.

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CHAPTER 11

THE CONGRESS

Functions of Congress—The House of Representatives—The United States Senate—Common Provisions—Organization and Procedure—Some Organizational and Operational Features—Enactment of Legislation—Lobbies—Conclusion

FUNCTIONS OF CONGRESS

"All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."¹ So we ordinarily think of Congress as the policy-forming branch of our government. But, as we have already seen, political parties, pressure groups, and voters play some part in initiating policy. Furthermore, the President ordinarily takes the lead in the legislative process, and his veto power gives him direct participation in legislation. And below the President there are "policy-forming officers" in the executive branch of the government, who by directing the application of policies are able to mold the shape of governmental action.

Policy-forming outside Congress

It is also true that Congress has other than purely legislative functions. In proposing amendments to the constitution it participates in the constituent power. In determining the elections, returns, and qualifications of members, and in disciplining and expelling members, each house exercises judicial power. Power of impeachment is judicial, but at the same time it is in a sense executive, since it can be employed to control the personnel of government, a task of supervision we ordinarily think of as executive in nature. Congress intrudes directly into the task of administrative management when it passes detailed laws to control

Non-law-making functions

¹ United States Constitution, art. I, sec. 1.

the personnel and the business routines of the executive branch. But there are limits to the extent to which Congress can dominate the executive. It cannot limit the President's power to remove purely executive subordinates upon whom he relies for enforcement of the laws;² nor can it by statute remove federal employees for alleged faults, disqualifying them for office in the future, for this amounts to a bill of attainder, a legislative conviction without trial.³

THE HOUSE OF REPRESENTATIVES

Apportionment

The constitution, Article I, Section 2, provides that each state shall have one Representative; beyond that, states are entitled to representation in proportion to their population. The number of Representatives was originally fixed at sixty-five but the constitution provided that Congress could by law change the total number and that it should after each decennial census reapportion the membership among the states. Congress increased the number after every census until 1920 with the exception of 1840. The number reached 435 in 1910 and has remained at that figure since. Some states had failed to keep pace in population growth. Their ratios of membership to population had become too large unless the number of members was to be increased every ten years. The alternatives were to let the House grow to an unwieldy size or to set a fixed number and apportion members on an equitable basis even if some states lost members. Under an act of 1929 Congress "froze" the number at 435. After each census, as now provided, the Census Bureau in the Department of Commerce prepares data showing the population of each state and the number of Representatives to which each state is entitled. This tabulation is transmitted to the Congress by the President, and the Congress has an opportunity to act on the data by passing a reapportionment bill. If the Congress fails to act, the reapportionment proposed by the Census Bureau becomes effective for the next general Congressional election. Such an automatic

² See p. 196.

³ *United States v. Lovett*, 328 U.S. 303 (1946).

reapportionment occurred after the censuses of 1930 and 1940. Thus the apportionment of members has become a matter of mathematics rather than politics.

Congress under its authority to alter state laws fixing "the times, places, and manner of holding elections for Senators and Representatives"⁴ has required that every state having more than one Representative be divided into districts, from each of which one Representative shall be elected. If a state is given one or more additional Representatives, the additional ones are elected from the state at large, and if the number from the state is reduced, the total number must be elected at large, until a new redistricting law is enacted. The function of redistricting belongs to the state legislatures. For many years the Congressional statutes contained specific procedural restrictions on state legislatures in the matter of redistricting. Districts within a state were required by the statute to be composed of compact and contiguous territory, and all had to be approximately equal in population. The act of 1929 did not carry forward these provisions, and state legislatures are apparently free to handle the matter as they choose. Districts have always been composed of contiguous territory, but in numerous cases their compactness has seemed questionable, even though none was ever declared illegal on this ground.

The creation of districts in the states brings into play much political maneuvering. The party in control tries to take advantage of the situation. When a district (or a number of districts) is arranged to the advantage of the party in power, the process is called gerrymandering. By skillful contrivance of the districts the opposition strength can often be either scattered so that it can be completely overcome or else concentrated so that the opposition party can elect only a minimum number of Representatives. An examination of state maps showing Congressional districts will reveal some grotesquely shaped districts. The following diagram shows how gerrymandering can be accomplished.

1. Gerrymandering

⁴ Constitution, art. I, sec. 4.

Let each of the divisions represent a county, and group the nine counties into three Congressional districts of three counties each. The two major parties are represented as the "ins" and the "outs," and the figures in the squares represent the respective voting strengths of the two parties. If the district lines are made to run horizontally by putting counties marked *1a*, *1b*, and *1c* in one district, *2a*, *2b*, and *2c* in a second district, and *3a*, *3b*, and *3c* in the third district, the "outs" will win in two districts and the "ins" in one. But if the district lines are made to run vertically—first district *1a*, *2a*, *3a*; second district *1b*, *2b*, *3b*; third district *1c*, *2c*, *3c*—the "ins" will win in two districts and the "outs" in one. However, if the district lines are made to run so that counties *1a*, *1b*, and *2a* make one district, counties *3a*, *2b*, and *1c* make a second district, and counties *3b*, *3c*, and *2c* make a third district, the "ins" will have a majority in all three districts, whereas the "outs" will be able to carry no district. Even though the third arrangement is not as logical as either of the others it is politically expedient, and would probably be the one followed by the party in power in the state's legislature.

Ins—23,000 Outs—28,000 <i>1a</i>	Ins—36,000 Outs—30,000 <i>1b</i>	Ins—24,000 Outs—28,000 <i>1c</i>
Ins—30,000 Outs—20,000 <i>2a</i>	Ins—32,000 Outs—21,000 <i>2b</i>	Ins—34,000 Outs—22,000 <i>2c</i>
Ins—30,000 Outs—36,000 <i>3a</i>	Ins—21,000 Outs—27,000 <i>3b</i>	Ins—25,000 Outs—30,000 <i>3c</i>

2. Inequality of districts

Since the present law does not require approximate equality of population among districts in a state, and since some states have not redistricted for many years, there are now great inequalities among districts in many states. By a strange coincidence the least populous and most populous districts in the entire country were, until 1947, in the city of Chicago. In 1940 the fifth district had a population of 112,000, whereas the seventh district had a popu-

lation of 914,000—a ratio of less than 1 to 8. Attempts have been made without success to compel legislatures to remedy such situations. In recent cases carried as high as the United States Supreme Court the “equal protection of the law” clause has been invoked. Although the Court by a close decision turned down the plea, there was a strong dissent,⁵ and many people believe that it will not be long before the Court will recognize that allowing one vote in one district to count as much as eight in another is not in keeping with the constitution.

Members of the House of Representatives are elected on the Tuesday after the first Monday in November of even-numbered years.⁶ The term, of course, is two years and begins on January 3 following the election. A member may succeed himself indefinitely and tenure of ten or fifteen terms is not unusual in the House. The constitution requires that a member of the House be at least twenty-five years of age, a citizen of the United States for seven years, and a resident of the state from which he is elected. It forbids a member of Congress to hold any other federal office while serving in Congress.

Term
and
qualifica-
tions

By long tradition a member regularly resides in the district from which he is elected. It is doubtful whether a non-resident could be elected; thus the unwritten rule requires residence in the district. The House may refuse to seat a member for failure to meet the qualification requirements—or for other reasons, since each house is the judge of the qualifications of its members. The House once refused to seat a Mormon, and on another occasion rejected a Socialist who because of his pacifism during the First World War had been accused of sedition and disloyalty.

THE UNITED STATES SENATE

Each state elects two Senators from the state at large for six-year terms. There are ninety-six Senators in all; the terms are

Term
and
election

⁵ *Colegrove v. Green*, 328 U.S. 549 (1946). In 1947 the General Assembly of Illinois passed a Congressional reapportionment act changing the 1901 districting attacked in *Colegrove v. Green*.

⁶ By special dispensation of Congress, the election in Maine occurs in September.

staggered so that thirty-two are elected every two years, at the time members of the House are elected, and their terms begin January 3 following their election. The terms of the two Senators from each state expire at different times. The Senator from a state who has had the longer term of service is called the senior Senator and the other the junior Senator. The constitution originally provided that the United States Senators should be elected by the state legislatures, but this was changed by the Seventeenth Amendment and since 1913 Senators have been elected by popular vote.

Qualifications

The constitutional qualifications required of a United States Senator are that he be at least thirty years of age, that he have been for at least nine years a citizen of the United States, and that he be a resident of the state from which he is elected. A Senator, like a Representative, is forbidden to hold any other federal office while serving in Congress. The Senate, like the House, is the judge of the "elections, returns, and qualifications" of its own members. It failed to follow the lead of the House in refusing a seat to a Mormon, but it has refused to seat members who spent exorbitant amounts of money, or allowed it to be spent in their behalf, in securing nomination as candidates for United States Senator.

COMMON PROVISIONS

Pay

Senators and Representatives are each paid \$12,500 a year in salary plus a tax-free personal expense payment of \$2,500 annually. The Speaker of the House and the Vice-President are each paid \$30,000 a year plus a \$10,000 tax-free spending allowance. Each member is given rent-free office space in the Senate or House office building. There is appropriated the sum of \$14,340 for each Senator (\$15,360 if he represents a state having a population of more than 4,000,000) and \$9,500 for each Representative each year to be used in the employment of clerical assistants. Although this money is not for the members to keep but only to spend, many Congressmen do keep much of it "in the family" by employing members of their families on their clerical staffs.

In addition to these perquisites, each Senator and Representative is furnished stationery, telephone and telegraph service, and travel expense of ten cents a mile to and from Washington for each session of Congress.

In 1942 Congress enacted a Congressional pension system, but there was such a sustained popular reaction against it, at least if the press truly reflected public opinion, that Congress became weak-kneed and repealed it forthwith. However, in 1946, after the country had become conditioned to lavish spending, and after many large corporations had set up liberal retirement systems for their "above-social-security" employees and officials, there was hardly a ripple of protest when Congress enacted another retirement plan. A member of Congress contributing 6 percent of his annual salary may after six years, provided he is at least sixty-two years old, draw retirement pay ranging up to three-fourths of his annual salary at the time of his retirement. Pensions

It has long been recognized that members of a lawmaking body should enjoy a high degree of freedom from legal attacks from the outside. The founding fathers wisely put into the constitution certain provisions which give members of Congress this freedom. A member of Congress while going to, attending, or returning from a session of Congress is not subject to arrest except "for treason, felony, or breach of the peace." The exception is broad enough to include all criminal actions except misdemeanors which chance not to be breaches of the peace, but it leaves Congressmen free from civil process. A Congressman can be arrested and prosecuted for purloining a meal but cannot be sued during the session for refusing to pay his board and room bill. Immunities

A member of Congress cannot be made to answer, outside the house of which he is a member, "for any speech or debate in either house." Regardless of what a member of Congress says in the House or Senate about any other individual, he is not subject to suit for slander. Each house has its own rules of decorum and members may be punished by their respective houses for in-

decent or too ungentlemanly conduct. By a two-thirds vote a member can be expelled from either house.

The board of directors of a large corporation carries on its activities virtually in secret. The Congressmen, the board of directors of our government, work figuratively in a goldfish bowl with all their remarks taken down and practically all their meetings open to the public. This situation justifies considerable freedom to members of Congress for what they say or do at their work.

ORGANIZATION AND PROCEDURE

Sessions The constitution provides for annual sessions of Congress. Before 1933, the Congress convened on the first Monday in December following the beginning of members' terms on the fourth of March preceding, and thirteen months after election. The Twentieth Amendment changed this by providing that *terms begin on January 3 following the election and that the annual session begin at noon on that day, unless another day be fixed by law.* Special or extraordinary sessions of one or both houses may be called by the President. There have been special Senate sessions to consider treaties or appointments, but the House has never been assembled in a special session without the Senate. There is no fixed constitutional limit on the length of sessions, but the Congressional Reorganization Act of 1946 provides that Congress shall adjourn not later than July 31 each year except in time of war or during a national emergency proclaimed by the President. Normally a regular session may be expected to extend to late spring or summer, but during the late war Congress was in session practically all the time. The period covering a Representative's term of office constitutes *a Congress*. The Congress beginning January 3, 1949, is called the Eighty-first Congress. During a Congress, sessions are numbered consecutively.

Officers The Vice-President of the United States is the presiding officer of the Senate. He is referred to in this capacity as President of the Senate. A president *pro tempore* is elected from and by

the Senate membership to preside in the absence of the Vice-President or if there is a vacancy in the office. The House members elect a presiding officer from their membership. He is called the Speaker of the House. Other officers in each house elected by the membership of the houses respectively are clerk, sergeant at arms, postmaster, and chaplain, and in the House a door-keeper. These are by no means all of the Congressional employees. All the officers, except the chaplain, have staffs of assistants. In addition there are many other House, Senate, or committee employees ranking from professional assistants and legal counselors down to the pages and custodial employees. Furthermore, each member has a staff of clerical assistants personally selected but paid from public funds.

Before the Congressional Reorganization Act of 1946 became effective there were forty-eight standing committees in the House and thirty-three in the Senate. These numbers were drastically cut by the Act and now there are only nineteen in the House and fifteen in the Senate. The House committees range in size from nine members on the Committee on Un-American Activities to forty-three on the Committee on Appropriations. In the Senate the committees consist of thirteen members each except the Committee on Appropriations, which has twenty-one members. Committees are chosen in each house by the vote of the members themselves from slates prepared by the party members in the house. A joint committee of the two houses which recommended the reorganization in 1946 recognized the significance of the work of committees. Of them it said: "About ninety per cent of all the work of Congress on legislative matters is carried on in these committees. Most bills recommended by congressional committees become laws of the land and the content of legislation finally passed is largely determined by these committees."⁷ The actual process of committee selection and the work of the committees will be more fully described later.

Commit-
tees

Certain things must be kept in mind if one is to understand

⁷ The Joint Committee on the Organization of Congress, "Organization of Congress," *Report No. 1011*, 79th Congress, 2nd session.

**Partisan
control**

Congressional organization and procedure. First, one must remember that partisan politics dominates the whole process. Secondly, Congressional activities are steeped in customs and traditions that are virtually unbreakable. There is no speculation, for example, as to which one of 435 House members will be elected Speaker when the House is organized; he will be one of a very small group of members belonging to the majority party in the House. The Speaker always belongs to the party having a majority of the membership and he must be one of the select few who have had long tenure and party regularity.

**House
organiza-
tion**

Soon after the Congressional elections preparations for organization begin. The events will be briefly narrated, first as they take place in the House. A group of recognized leaders of each party meets and does some preliminary planning for the party. Next a conference or caucus of all members of the party in the House is held and several steps are taken. First the members select their candidates for Speaker and for other House offices. The person selected for Speaker by the party having a majority will without doubt be elected; his defeated opponent usually becomes the floor leader of the minority party. The floor leader is the person who directs a party's activities on the floor during a session and in caucus meetings or elsewhere. A second action of the party caucus is the selection of a committee on committees. The Democratic party selects its candidates for membership on the House Committee on Ways and Means and lets them serve *ex officio* as the Democratic Committee on Committees. The Republicans select a Committee on Committees composed of as many members as there are states with Republican Representatives. A third activity of the party caucus is to decide on some major policies or lines of party action for the approaching session of Congress. Other activities may involve one or both party caucuses. The majority caucus decides the ratio of the committee memberships. The majority party always assigns itself a safe majority on a committee, but the ratio is generally fixed at a figure roughly comparable with the ratio of majority and minority members in the House. The caucuses decide also about

assigning committee positions to independent or third party members who have been elected to the House.

The respective Committees on Committees hold meetings to prepare the lists of members of slates for all the standing committees. Because of the strong tradition of seniority, the committees by and large have only to assign the new members, that is, those who have not served in the previous Congress, and to advance old members to more important committees. A member on a committee seeks by long service or seniority, rather than by his merits, to work himself to the position of chairman when his party is in the majority. Hence members tend to hold on to positions on committees. An older member will seek to be elected to one of the more important committees, such as Rules, Ways and Means, Appropriations, or Military Affairs. The Committee on Committees of the minority party may have a more difficult job, since for some committees there may be a greater number of returning minority members than the new ratio allows the party. The Committee has to decide which ones will be shifted. At times in the past, the majority members have unfortunately agreed to increase the total membership of a committee in order that there would not need to be a reduction in the number of minority members on the committee. One should remember that, although the two parties in Congress are always struggling against each other for advantage, there are close friendships between individuals that reach across party lines, and favors may result accordingly.

Committee assignments

After the Committees on Committees have made up their slates, with the majority slate showing in each case the nominee for chairman, another meeting of each caucus is held to approve the party slate with or without changes. The two slates are then ready for presentation to the House when it convenes and takes up the matter of electing committees.

Approval of slates

At noon on January 3, or on the day fixed by law for the beginning of the first session of the new Congress, the House assembles and begins its formal organizing activities. The clerk of the previous House presides over the meeting temporarily.

House procedure

1. Elec-
ting
Speaker

On the basis of the election certificates submitted to the clerk by the proper state election official, the clerk calls the roll of the members. Immediately the question of the election of the Speaker is taken up. The persons selected in the majority and minority caucuses respectively are put in nomination. If there are third party members, additional nominations may be made. The question is put by the clerk and another roll call is taken to record the vote. The majority party candidate will, of course, be elected. His defeated opponent escorts him to the Speaker's platform, where the oath of office is administered to him as the newly elected Speaker.

2. Seat-
ing mem-
bers

After taking the oath of office the Speaker takes over the duty of presiding. He immediately administers the oath of office to the other members. However, if there are questions on the "elections, returns, and qualifications" of any members, such members may be asked to stand aside while the oath is administered to the other members collectively. The membership disputes will be referred to the Committee on House Administration for investigation. In the meantime the members whose seats are in dispute may be allowed to participate in the proceedings pending the settlement of the disputes. After the report of the Committee on House Administration the question of seating a challenged member will be settled by a vote of members of the House, as is provided in the constitution.

3. Elect-
ing of-
ficers

The next matter of business, after the administration of the oath of office to the members, is the election of the clerk, chaplain, and other officers of the House. None of these is a member of the House. The slate prepared by the majority caucus is presented and as a matter of course is elected. The House now

4. Adopt-
ing rules

comes to the business of adopting rules of procedure. This is usually done by the adoption of a motion to accept the rules of the House during the preceding Congress as the rules of the present House. If, however, there are to be changes in the rules, this is the stage at which they should be made. The changes are simply amendments offered to the rules as previously existing—that is, the old rules are adopted as amended. By and large

the House rules have been built upon the *Manual of Parliamentary Practice* prepared by Thomas Jefferson while he was Vice-President and President of the Senate. It is true that many rules have been added and many "decisions and precedents" have been given by House Speakers, until today there are many volumes with which one would have to be acquainted if he aspired to be a House parliamentarian.

The next stage is formal election of the members of the standing committees. The majority and minority lists or slates are presented to the House, and on a formal motion and vote all the standing committees are elected with the proper balance between parties and with a chairman for each. The process illustrates the small proportion of the whole process of government one would learn by studying only the written rules and having an acquaintance with only the official or formal activities.

The process of organizing the Senate is in general similar to that in the House, but there are some very significant differences which should be pointed out. In the first place, the Senate never requires a complete organization or reorganization. It has been organized since its first meeting in 1789. This continuity of organization results from the fact that only one-third of its members are new every two years. A second difference between the two houses is that the Senate normally has a presiding officer, the Vice-President, when it meets. It elects a president *pro tempore* every two years to preside in the absence of the Vice-President or when there is a vacancy in that office.

The newly elected members of the Senate are sworn in in the same manner as House members; the officers of the Senate are then elected, and the committee assignments are made. Just as in the House, slates of candidates for the different offices and lists of names for the committee positions are agreed on in conferences or caucuses of the Senate members of the political parties. The task of assigning committee positions is not simply one of distributing positions held by non-returning Senators to those who take their places. Some of the returning Senators may wish to give up positions on certain committees in exchange for those

5. Electing standing committees

Senate organization
1. Continuity

2. Procedure

held by non-returning Senators. In the general shift which occurs the new Senators end up at the bottom of the heap.

SOME ORGANIZATIONAL AND OPERATIONAL FEATURES

The Speaker

The Speaker of the House of Representatives is a powerful factor in American politics. Unlike his English counterpart in the House of Commons, he is expected to be a partisan rather than an impartial presiding officer. His powers and prerogatives reached the zenith of power during the latter part of the last and the first part of the present century. Through changes in the House rules in 1910 and 1911 the Speaker's powers were curtailed considerably. Since that time he has been the leader or spokesman for a group or clique that controls the House, rather than an independent agent having the elements of control vested directly in himself.

Powers of Speaker

A power which the Speaker still enjoys is that of recognition. No member can address the House without first being recognized. An impartial presiding officer would always attempt to determine the order in which persons ask for recognition or address the presiding officer, and then give recognition accordingly. The Speaker of the House, however, being partisan, may recognize only those he wishes to recognize. He may even inquire of a would-be speaker what he proposes to say before deciding whether to recognize him. In practice, when important bills are being formally debated, the Speaker is furnished a list of the persons from both parties who are to be recognized for debating the bill.

1. Recognition

2. Interpreting rules

The Speaker also makes rulings or decisions on points of order in the application of rules. The House may reverse him on such decisions but rarely does. The Speaker signs bills, resolutions, orders, subpoenas, and other documents passed by the House.

3. Appointing select committees

He appoints members to special or interim committees, including conference committees. He may speak before the House and may vote as a member of the House. If he votes on a bill or resolution and a tie vote results he cannot cast another vote to

break the tie, but if he has not voted and the result is a tie he may be required to cast the deciding vote.

The Speaker of the House is definitely a party leader in the House but the Vice-President, as President of the Senate, is not necessarily the leader of his party in the Senate. In many cases, especially during the latter two years of a Vice-Presidential term, he may be of the opposite political party to that in control of the Senate. Since the Senate is a much smaller body than the House of Representatives, it can get through its business without submitting to the rigid control which the Speaker exercises over the House. These facts contribute to making the Vice-President a mere presiding officer rather than the dominant figure in the chamber. He recognizes members who wish to address the Senate. He appoints select committees and signs documents in the name of the Senate. By a strange quirk, Harry Truman, as Vice-President, signed at least one bill which had passed the Senate and later, as President, signed the same bill into law. The Vice-President does not have a vote in the Senate except in case of a tie.

President
of
Senate

Mention has been made above of the majority and minority party caucuses or conferences in each house of Congress. Every member of either house is *ipso facto* a member of his party's caucus in the house, though not all members attend all caucuses. Each caucus has a formal organization, and meetings are held more or less frequently as the occasion justifies. Meetings are not public but should not be thought of as secret conclaves. Major meetings, such as those at which office slates and the Committee on Committees are considered, are usually fully reported in the press. Meetings are held to consider, among other things, the party stand on policy matters in Congress. The caucus cannot decide every move for the party. The making of decisions and the leadership of the party must be delegated by the caucus. This is accomplished through the selection of party instrumentalities to function on the floors (and in the cloakrooms!) of the two houses. But in the Congress, as in other deliberative bodies,

Party
caucuses

leadership is not entirely formalized. Apparently some men or groups simply gravitate to positions of influence, whether or not they are elected to such positions.

**Floor
leader**

The one man in each house who symbolizes leadership of his party is the floor leader. Selected by the caucus of the party, he is the "leader of action" for his party in the house of which he is a member. Seniority is, of course, a factor in the selection of the floor leader, but qualities of leadership are primary. The majority floor leader in each house is the person through whom the President must work, if he is of the same party, to put over any program of legislation. In addition to directing the flow of events on the floor, if majority leader, or leading the opposition if minority leader, the leader must act as a liaison between the party leaders, the caucus, and the President or other leaders of his national party. They all look to the floor leader to see that the right thing is done on the floor at the right time. It would be impossible to describe specifically the duties of the majority floor leader, but an example may be given for illustration. The floor leader in the House arranges the time when a particular bill will be brought up for debate; sees to it that it is brought up at the time set; and, if debate is strictly limited, apprises the Speaker of the names of those to be recognized to speak on the bill. He may also name floor assistants, or party whips, to help keep party members in line.

**Steering
commit-
tee**

The steering committee of the majority caucus also plays an important part in legislation. This committee, theoretically at least, is made up of the most influential leaders of the party in the house involved. If, as a result of some fortuitous circumstance, the chosen group happens not to be the one upon whom the floor leader and perhaps the President depend for guidance, the actual steering committee may turn out to be a small group which steers or leads from sheer influence only. It is not always possible before Congress is organized to select a group of fifteen or twenty-five members who will turn out to be the leaders in putting through a program of legislation. At times a kind of joint steering committee of both houses, called a Policy Com-

mittee, has been used. During a part of the Roosevelt administration this practice was in vogue. Such a committee decides on legislation to be pushed through both houses.

The Committee on Rules is an important standing committee in the House.⁸ Theoretically such a committee would be expected to consider proposed changes in the basic rules of the house in which it exists. Actually, however, the Committee on Rules does much more than this. It is a day-to-day procedural device. If the floor leader and steering committee must get bills through, the Rules Committee must find a way in which this can be done. It can bring in for House adoption a special rule at almost any time to alter the procedure; it may by such rules set the time for and limit debate, restrict or forbid amendments to bills being debated, or even write a bill and submit it for a vote before any legislative committee has considered it. This is done in response to the instructions of the majority floor leader.

This Committee formerly killed bills by failing to open a way for them with a special rule, but in 1949 a change in the rules permitted bills to be considered ahead of their regular order without special rules. The enormous number of bills reduces the chance of any one ever receiving full consideration by the House, hence the necessity for some kind of device to push important bills ahead of their turn in the Calendar for House Action. This is done by the Rules Committee with special rules. Also, if a bill is being considered and for some reason the opposition gains the upper hand, the Rules Committee can rush in with a special rule to consider another subject. The whips set to work and get the majority members in their places; or delaying tactics can be engaged in until the majority leadership is in control again. It should be remembered that more than half an hour can be killed by one roll call.

The legislative committees in the House and Senate are a necessary part of the machinery of control in Congress. Formerly they were perhaps more important for the actual scrutiny and

House
Rules
Committee

Standing
committees

⁸ The Senate has a Committee on Rules and Administration, but it has never exercised power comparable to that of the House Committee on Rules.

preparation of bills than as "burial grounds" of unwanted legislation. But today many, if not most, of the bills that eventually become law are prepared by administrative departments. Not typical, but perhaps one of the most striking examples of legislation without committee deliberation, was a banking bill passed in the hectic days of 1933 during the first Roosevelt special session. A special message of less than 100 lines was sent to Congress. As its reading was concluded in each House, prepared bills were simultaneously introduced. Before the end of the day the country had a new banking law.

The Joint Committee on the Organization of Congress referred to the control aspect of committees as follows: "Hundreds of bills introduced by members of Congress are never considered even for a brief period by the committees to which they are referred. In order to get a hearing by the committee having their legislation in charge, members must informally solicit committeemen for the privilege of even a brief cursory appearance. This tends to bottle up legislation originating in Congress itself, while the right-of-way is generally given to legislation originating in the executive departments."⁹ This being the case, it is easy to understand how control of committees fits into the whole pattern of organization and control of Congress by the dominant party.

Confer-
ence com-
mittees

When one house of Congress passes a bill and the other also passes it but with certain changes or amendments, the house originally passing it may agree to the changes or may ask for a conference to attempt to iron out the differences. The presiding officers appoint a number of conferees, usually three to five each. Since the conference committee is a joint committee of the two houses, the majority of the members from each house must agree to any proposal by the committee. At first blush the conference committee might not be considered a part of the plan of control of legislation; nevertheless members deliberately work at times to get a bill thrown into conference. It is a part of the strategy to get favorable action on a bill. For one thing, a

⁹ "Organization of Congress," p. 7.

supporter may be able to get into it in conference provisions that he could not get through the house of which he is a member. Conference reports are almost always accepted, even though the Joint Committee on Reorganization of Congress is itself authority for the following statement: "Parliamentary procedures make it possible for conferees completely to rewrite legislation substantially agreed upon in both chambers."¹⁰ The rules of each house forbid amendment of a bill reported from conference; it must be accepted or rejected in the precise form in which it has been cast by a small group of men in secret session. Consequently the conference committee has enormous powers.

We have mentioned the institution of select committees. The conference committee is an example; others are found in investigating committees created by one or the other house. Whereas the standing committee is a permanent body, elected to consider all business of a given character, the select committee is a temporary body, created to deal with a particular problem, and it dissolves when it has reported to the house on that problem. Since each house has full control over its own organization, it could elect the members of the select committees; but it is usual to entrust the power of appointing them to the presiding officer. The presiding officer is, however, to a considerable degree controlled by custom in his appointments. For example, he always appoints to a conference committee the chairman of the standing committee which considered the bill in question, the ranking majority member of that committee—that is, the member of the majority party who stands next to the chairman in seniority or length of service on the committee—and the ranking minority member—the member of the minority party who has served longest on the standing committee and will be made chairman when his party comes into power.

Select
commit-
tees

ENACTMENT OF LEGISLATION

There are certain formal procedures and activities which Congress follows in the performance of its functions. In the

¹⁰ *Ibid.*, p. 8.

preceding pages we have described the organizations through which Congress operates. In this section the formal procedures will be described, and an attempt will be made also to show the unofficial steps involved in the process of lawmaking. One must always keep in mind that there is more to lawmaking than is discernible from the rules of procedure.

Origin of bills

Bills may originate from a variety of sources. As we have said, a substantial percentage of bills that eventually become law is prepared by the executive departments of the government. If the passage of a bill is sought by the President, it is commonly referred to as an administration measure. Hundreds of bills are sponsored by administrative agencies, but a given bill may or may not have the President's active support, though none will be advanced by an executive organ if the President disapproves of it. More than half of all bills introduced come from the executive departments.¹¹ Other bills are prepared by private citizens, corporations, or organizations and are given to receptive Congressmen for introduction. Members of Congress, or select or standing committees of the House or Senate, may prepare bills for introduction.

Introduc- tion

Bills are introduced only by a member of Congress, regardless of who the author or sponsor is. A member simply endorses a copy of a bill and hands it to the clerk or secretary of his house. There is no limit on the number of bills that a Congressman may introduce. On the first day of the first meeting of a new Congress, hundreds of bills will reach the clerk's (or secretary's) desk. Once introduced, a bill remains on the agenda for the duration of a Congress unless disposed of finally in some manner.

Reference to com- mittee

When a bill or resolution is introduced it is given a number by the clerk and recorded in the *Congressional Record* and the *Journal* and is then referred to the appropriate committee, technically by the Speaker but actually, in most cases, by the clerk or one of his assistants. Formerly a bill was read aloud by the clerk before it was referred to the committee. The stage of introduction and reference is still called "first reading." The

¹¹ *Ibid.*, p. 11.

"readings" of bills, first, second and third, are significant only as stages through which bills must usually pass and not for an actual word-by-word reading of the bill.

A committee cannot guarantee that a bill will pass even if given a favorable report by the committee; but a committee can almost surely kill a bill if it refuses to consider it or report it out. Bills that are not considered at all or are not reported out by a committee are said to be pigeonholed. In the House a petition of a majority of the members may be used to force a committee to report a bill. This process is called discharging a committee; it is seldom successfully used.

Pigeon-
holing

For our purpose we will suppose a bill is in a committee of the House and then trace it from that point. We must assume that the bill will be considered by the committee. A committee may break up into subcommittees for the consideration of important and complicated bills like revenue or appropriation bills. The main committee and subcommittees may use their own personnel for securing information, or they may hold open or public hearings, at which people may voluntarily offer testimony or information regarding the subject matter of a bill. Subcommittees report to the full committee and the various reports are eventually combined into a report of the committee.

Commit-
tee action

A bill coming from a committee may be so altered as not to be recognizable even by the author except for the number and the introducer's name. In fact a committee may write its own bill, in which case the bill usually takes the name of the chairman. When the committee reports the bill out it is placed on one of the calendars or files, theoretically to await its turn for consideration by the House. We say theoretically because, even though the rules require that bills be taken up for consideration in the order in which they are placed on the calendar, actually they are taken up as the leaders decide. Special rules proposed by the Committee on Rules and adopted by the House or adopted by unanimous consent in the Senate give bills the right of way when the order of filing would not.

Assume that our bill is taken up for consideration in the

House
action1. Read-
ings

House. It is said to be on "second reading." At this stage it may be debated; amendments or changes may be made; and a vote is taken to advance it to "third reading." The vote to send to third reading is normally the real test on the bill. As and if it passes on second reading, it will probably pass the House. The bill is engrossed, that is, all amendments and changes adopted are put in and it is printed. This is done before it is submitted to the House for the vote on passage. This final stage is called "third reading." Debate is not allowed and amendments are not in order.

2. Com-
mittee of
the whole

It should be pointed out that the House functions a great deal of the time as a committee of the whole. The Speaker yields the chair to a member he chooses and the House membership proceeds as a committee. Procedure is expedited; debate is automatically limited to five minutes to each member instead of one hour, voting is never by roll call and therefore is never recorded. After the committee of the whole concludes its deliberations it "rises," the Speaker resumes his position, and the House acts on the committee's recommendations.

3. Vot-
ing pro-
cedure

There are several methods by which votes are taken on questions before the House. The most common is the voice vote, in which the Speaker directs all in favor to say "Aye," opposed "No," and the members respond in chorus. If a member demands it, a rising vote may be had in which members for and against are asked in turn to stand and be counted. Or if one-fifth of the quorum—that is, of a majority of the membership—demands it, a teller vote may be taken in which the members favoring a question pass between designated tellers, and then those opposing so pass, to be counted. All these methods are prescribed by the rules of the House. The constitution provides that a roll call or record vote may be demanded by one-fifth of the members present. The name of each member is called, votes are given by "Aye" or "No" and are recorded in the *Journal* by the clerk. Members are often reluctant to be "recorded" on questions; hence, there are fewer record votes than might be expected.

When a bill is passed by the House it is sent by the Speaker to the Senate, where the procedure is substantially repeated. There are, however, a few noteworthy procedural differences between the two houses. The Senate, for example, has no limit on debate and seldom uses the committee of the whole. Being less than one-fourth the size of the House, it can afford to be leisurely, although there is serious question whether unlimited debate is not too much of a luxury even for the United States Senate. Unlimited freedom permits "filibustering," a practice by which a minority undertakes to defeat a bill or motion by talking interminably and preventing a vote. The member is recognized or gets the floor and talks on and on. He may be relieved by a confederate to whom he yields for a question or a statement. The confederate may take hours to ask the question or complete his statement! At the end of a day the Senate adjourns or recesses until the next day of meeting, when the business must start with the filibusterer on the floor. In 1917 a rule was adopted providing that if sixteen Senators sign a petition for closure or cloture, that is, to limit debate, and two calendar days later two-thirds of the Senators vote for cloture, debate will be limited thereafter to not more than one hour to each member. This rule has not been effective; it has been successfully used less than a half-dozen times since adopted. However, the Senate does actually limit debate on many bills or motions by agreement called unanimous consent.

Senate
action

1. Fili-
bustering

2. Clo-
sure

A bill having passed the House and the Senate in identical forms and having been signed by the respective presiding officers is then sent to the President for his action. The President may sign the bill within ten days (Sundays excepted), in which case it becomes a law; or he may veto it or refuse to sign it, and return it with his objections within the ten-day period to the house in which it originated. A vetoed bill is killed unless both houses re-pass it by a two-thirds vote in each. If the President does not act on a bill within the ten-day period, it becomes a law without his signature if Congress is still in session. A bill reaching the President within ten days of the adjournment of Congress may be

Presi-
dent's
action

held by him and thus be killed, in which case he is said to use the *pocket veto*.

It was assumed in the above discussion that the bill originated in the House. One must bear in mind that a bill may originate in either house, except that bills for raising revenue—tax bills, for example—must originate in the House of Representatives. Even revenue measures may be amended beyond recognition in the Senate. This requirement is in fact of no real significance.

The assumption was also made that the bill passed the second house just as it had passed the first. This was an unreal assumption. Important bills are nearly always changed in some way by the second house that passes them. As a consequence, conference committees come into being on almost all significant legislation.

**Promul-
gation**

When a bill has been signed by the President or has become a law without his signature, it is sent to the Secretary of State, who arranges for its publication and distribution. This is called promulgation. Copies of single laws or acts, known as slip laws, can be secured from the Superintendent of Documents soon after a law is enacted. When a session of Congress ends, all the laws enacted at the session are compiled and published in the series, the *United States Statutes at Large*.

**Terms
defined**

The terms "bill" and "act" or "law" have been used in this discussion to include all the enactments by Congress. There are others, and perhaps an explanation of terms might be profitable. A bill is a formally proposed law. When it is passed by Congress and accepted by the President, or repassed over his veto, it becomes a law and is referred to as an act. A law may be general, local, or private. That is, it may apply generally to the United States, only to one locality, or to one individual or at most to a relatively small number of individuals. Any enactment by Congress enforceable as law could be accomplished by bill. Congress prefers, however, to act on certain occasions by joint resolution. A declaration of war, the admission of a state, or the submission of a proposed constitutional amendment is likely to be by joint resolution. Perhaps one could say this is used for special purposes to lend a degree of dignity or solemnity to the occasion.

Joint resolutions, except constitutional amendments, must be submitted to the President for his signature. A concurrent resolution is one passed by the two houses without the concurrence of the President. It has no legal force except in cases in which the two houses may legally act without the President.¹² When it lacks legal force, it is merely a request or expression of opinion. Either house may pass a resolution having legal force on a matter on which it is empowered to act, such as the expulsion of a member; it may also pass a resolution expressing its feeling or wish in a matter.

LOBBIES

A non-member of a legislative body who seeks to influence the action of such a body is called a lobbyist; collectively such persons may be referred to as the lobbies. Cynically, the Congressional lobbyists have been called the third house. Lobbies are enormously important factors in the legislative process and no one can understand the process without knowing about the work of such groups.

The Congressional Reorganization Act of 1946 provided certain regulations to apply to the Congressional lobbyists. One is that they must register; but those representing manufacturers, labor, and agriculture are exempt from this regulation—an example of successful lobbying by such groups when the bill was in Congress. The supporters of legislation for requiring lobbyists to register, and to disclose information as to whom they represent and what legislation they are interested in, believe that such publicity is the best type of control.

Lobbying at all levels of government is accepted as not only proper but, if viewed realistically, necessary at the present time. Every large trade organization or association has its lobbyist or "legislative counsel" in Washington. If one follows the life of prominent Senators and Congressmen who have voluntarily or involuntarily retired from Congress, one finds that in a high proportion of the cases such individuals have remained in Washing-

¹² Statutes sometimes confer such a power on the two houses. See p. 321.

ton to practice law. Quite often, however, the kind of law practice in which they engage is to represent the interests of large corporations or associations in Washington. It is obvious that one who has had years of experience in Congress and who perhaps can call most Congressmen by their first names would make a very successful lobbyist.

Services People outside of government do not do all the lobbying. The departments and even the larger bureaus have their "public relations" employees or others to represent them before Congress. Not only does such an individual look after his department or bureau when appropriations are being considered but he must also "screen" all seriously proposed legislation to see if there is any provision in it which might adversely affect his agency.

Lobbyists may serve a useful purpose. They supply information, edited, no doubt, but it is for Congress to correct the bias. Usually there are opposing lobbyists on the questions before Congress. A committee may listen to them very much as a jury in court hears evidence from both sides in a case. By balancing the two against each other and by using its own staff members to present a final summary of essential points, a committee might well reach the best solution.

CONCLUSION

Congress is meant to be a representative body. It is not a body of experts, yet some men in Congress become experts in their fields of special interest. Years of hard work on the House Committee on Ways and Means, for example, may make of a member an authority on federal taxation. A member who gives his major attention to his duties as a member of the Military Affairs Committee may become a real expert on military affairs, so that we are not altogether dependent upon the "brass hats." Any person who attends a hearing before one of the House or Senate committees is likely to be impressed by the way the members can match knowledge of relevant matters with the best legal counsel or lobbyists that can be sent in by the interest groups. Nevertheless members of Congress must depend upon outside sources for

a great deal of their information, and they are likewise influenced by a multitude of other factors.

Dr. George B. Galloway describes the forces which shape the final product of Congressional labors thus:

In the end, the statutes that emerge from the travail of the legislative process reflect the influence of many forces. For better or for worse, they are affected by the way in which Congress is organized and by its rules of procedure. They show the influence of executive proposals and private pressures. They reflect the legislators' own judgment and the attitude of their constituents. . . . Legislative action is also influenced by the congressman's hope of reelection and fear of social insecurity, making him vote for measures he might otherwise oppose; by the newspapers he reads and the public opinion polls; by private group and governmental lobbyists; and last, but not least, by the intelligence and character of the legislative staff who play a large but unsung part in the legislative process. The final fabric is thus a network of many threads which it would be almost impossible to unravel and trace back into the loom of history.¹³

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¹³ George B. Galloway, *Congress at the Crossroads* (Thomas Y. Crowell Company, New York, 1946), p. 203.

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CHAPTER 12

THE SCOPE OF NATIONAL LEGISLATIVE POWER

Judicial Attitudes—The Commerce Power—The Taxing Power and the Power to Borrow and to Make Appropriations—The War Powers—Foreign Affairs—Powers over Currency—Other Powers—Federal Police Power

JUDICIAL ATTITUDES

The framers of the constitution were not unduly generous in their assignment of powers to the national Congress. They were well aware of the suspicion with which the instrument would be viewed by the champions of states' rights, and they delegated to Congress only those areas of control in which national action was demonstrably necessary, or at any rate highly convenient. Exclusive control over foreign relations, the power to maintain an army and navy, the taxing power, were obviously essential to the political existence of the national government. Congressional authority over interstate commerce, over currency, bankruptcies, and weights and measures was necessary if the nation was to have that economic unity which must underlie political unity.

In addition to enumerating these and similar express powers, the framers authorized Congress to pass all laws "necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." This clause gives rise to the implied powers of Congress. It does not enlarge the number of topics with which Congress may deal, but it has been interpreted to allow Congress considerable lati-

Limited
powers

Court
extension

tude in choosing the means which it will employ in dealing with those topics. This, however, was not an inevitable interpretation. In *McCulloch v. Maryland*¹ the state of Maryland argued that the necessary-and-proper clause restricted rather than enlarged Congressional power. Congress had issued a charter to the Bank of the United States and had authorized it to establish branches, and a branch had been established in Baltimore. The Maryland legislature forbade banks operating within the state and not chartered by the state to issue bank notes except upon specially stamped paper which was heavily taxed by the state. Penalties were provided for disobedience. The branch bank refused to comply, and Maryland sued the cashier, McCulloch, to collect the penalties. McCulloch argued that the state could not tax a bank holding a federal charter, and the state replied that the Congress had exceeded its power in issuing the charter. Congress had no express power to create corporations, and the necessary-and-proper clause forbade it to pass laws which were not strictly necessary to the execution of the express powers. Chief Justice Marshall, however, held that the clause was intended to enlarge rather than to restrict the Congressional choice of means for implementing the express powers. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." And Marshall went on to hold that an instrumentality created to accomplish a national purpose, such as the Bank, could not be taxed by a state.

**Court
restrictions**

This readiness to uphold national action has been characteristic of the Supreme Court through most of its history. In only three periods has the Court seriously opposed national action. The *Dred Scott* decision² held that Congress could not forbid slavery in the territories, and thus played a part, although a minor one, in causing the Civil War. After the Civil War three amendments were adopted, the Thirteenth, Fourteenth, and Fif-

¹ 4 Wheat. 316 (1819).

² *Scott v. Sandford*, 19 How. 393 (1857).

teenth, which might have enlarged the powers of Congress enormously; but they were largely denied such effect by the Supreme Court.³ From 1918 to 1937 the Court held that Congress could not deal with such problems as child labor or general economic depression under either the taxing power or the commerce power,⁴ but since 1937 it has uniformly upheld legislation of this character.⁵

Although the tendency has been toward a steady enlargement of national power through judicial interpretation, this does not mean that the national government has ceased to be one of delegated powers. It is still necessary to justify Congressional action as being expressly or impliedly conferred in one of the enumerated powers recited in the constitution. Only the more important of these powers can be described here.

THE COMMERCE POWER

One of the primary reasons for calling the Constitutional Convention in 1787 was the lack of power on the part of the central government under the Articles of Confederation to regulate commerce between the states. Restrictions on imports and exports, tariff barriers, and other forms of discrimination on the part of the states were rapidly threatening to break up this country into a number of almost independent economic units. Trade between the states was being strangled, and serious causes of friction were being engendered.

The commerce clause which was proposed and finally adopted represented one of the important compromises of the constitution. Some persons wanted to give the central government control of all commerce. Others would have left all regulation of commerce to the several states. Article I, Section 8, provided that Congress should have the power to regulate commerce with

Scope of
clause

³ The Civil Rights Cases, 109 U.S. 3 (1883).

⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

⁵ *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

foreign nations, among the several states, and with the Indian tribes.

Since the commerce clause does not give the federal government the power to control all business and industry but only interstate and foreign commerce, it becomes important to know what transactions are regarded as interstate or foreign commerce. The constitution contains no definition which would help to clarify these terms, so reliance must be placed upon judicial interpretation.

**Buying
and
selling**

Very early in our constitutional history it was understood that the term "commerce" included the buying and selling of commodities.⁶ Buying and selling which is purely local in character and which takes place entirely within a state and is not part of a movement of commodities between states is not looked upon as interstate commerce.

Transportation

The well-known case of *Gibbons v. Ogden* decided early in the history of the United States that commerce included transportation.⁷ The means of transportation is immaterial, whether by railroad, automobile, pipe line, horse, airplane, or boat. Nor does it matter whether the transportation is performed gratuitously or for hire. If the movement takes place between states, it is interstate commerce. All persons and instrumentalities used in such transportation are agencies of interstate commerce. It is immaterial that the persons or instrumentalities do not pass beyond the boundaries of a state. They are agencies of interstate commerce if they transport or assist in transporting articles moving between states.

**Movement of
goods**

Courts have now come to regard general movements of commodities as interstate commerce. In one case, for example, the Supreme Court held that federal regulation of the buying and selling of livestock at the stockyards was constitutional because it was part of a large regular movement throughout the United States of livestock and meat products.⁸ In upholding the consti-

⁶ See the statement of the Court in *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

⁷ *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

⁸ *Stafford v. Wallace*, 258 U.S. 495 (1922).

tutionality of the National Labor Relations Act as applied to nineteen large corporations that owned iron mines, coal mines, steel mills, and railroads and were engaged in buying and selling throughout the United States and transporting their products, the Supreme Court again recognized the importance of the principle that general movements of commodities constituted interstate commerce, various aspects of which could be regulated by the federal government.⁹

Transmission of intelligence from state to state by radio, telephone, or telegraph is interstate commerce and hence subject to control by the federal government. Similarly the transmission of electric power between states is regarded as interstate commerce.

Messages

For a long period of time the federal courts did not regard insurance as commerce because there were no commodities which were shipped from state to state but merely contracts to indemnify persons in case of loss.¹⁰ In 1944 the Supreme Court overruled the earlier decisions and held that insurance was commerce, pointing out that the modern insurance business holds a commanding position in commerce in the United States, that insurance directly affects millions of persons in all walks of life, that large insurance companies operate throughout the country, and that a constant flow of premiums and other documents used in insurance takes place between states.¹¹

Insurance

The courts have held that the federal government has plenary power to *control* foreign and interstate commerce. In furtherance of its power to regulate, Congress may prohibit the shipment of commodities between states. For example, the Supreme Court upheld an act which made it unlawful to ship in interstate commerce goods in the production of which any person was employed in violation of the minimum wage or maximum hour provision of the law.¹²

Prohibition of shipment

In addition to regulating interstate and foreign commerce,

⁹ *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁰ *Paul v. Virginia*, 8 Wall. 168 (1869).

¹¹ *United States v. S. E. Underwriters Assn.*, 322 U.S. 533 (1944).

¹² *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

**Prevent-
ing inter-
ference**

Congress may *prevent interference* with such commerce, even though it means controlling persons who are not themselves engaged in interstate commerce or regulating activities which are not even commerce. A good illustration of regulation of this type is that contained in the Sherman Anti-Trust Act, which forbids restraints upon interstate and foreign commerce even though the persons who are being prosecuted for a violation of its provisions are not themselves engaged in commerce.

**Control
of intra-
state
commerce**

The courts have held that the federal government has the power under certain circumstances to regulate *intrastate* commerce. As a general rule, the regulation of intrastate commerce remains with the states, but in a few instances the courts have allowed the federal government some authority where it is essential for proper control of interstate commerce or where interstate and intrastate commerce are inseparably intermingled.

**1. Rela-
tion to
inter-
state**

There are many interesting illustrations of federal control of intrastate commerce because of its intimate relationship with interstate commerce. Much of it is in the field of railroad regulation. For example, the courts upheld the validity of an order of the Interstate Commerce Commission fixing both intrastate and interstate passenger rates. To have permitted a lower rate for intrastate transportation would have been a serious burden upon interstate commerce, since such commerce would have been forced to bear too large a proportion of railroad expenses.¹³ The laws pertaining to safety appliances for locomotives and other railroad equipment furnish another illustration of federal control of intrastate commerce.¹⁴ These safety appliance statutes refer to all cars and locomotives, whether used for interstate or intrastate traffic. Another example is found in the control which Congress has given to the Interstate Commerce Commission over issuance of stocks and bonds by railroads despite the fact that money derived from the sale of these securities is used partly for interstate and partly for intrastate operations.¹⁵ In this latter case it would

¹³ Railroad Commission of Wisconsin v. C. B. and Q. R. Co., 257 U.S. 563 (1922).

¹⁴ U.S. Code, title 45, secs. 1-43.

¹⁵ See *ibid.*, title 49, sec. 20a (2).

be practically impossible to separate interstate and intrastate commerce, for it would be difficult to ascertain what part of the money derived from the sale of stocks and bonds would be employed for interstate and what for intrastate operations.

Although the control of railroads affords the most frequent illustration of the regulation of intrastate commerce by the federal government, examples in other fields can be found. The Federal Communications Act gives to the Federal Communications Commission established under its provisions control of all radio stations, even though they are engaged in intrastate as well as interstate operations. The logic of this arrangement is obvious. It would be impossible to separate interstate and intrastate radio operations. The Food, Drug, and Cosmetic Act of 1938 states that any food, drug, device, or cosmetic which is adulterated or misbranded when introduced into or while in interstate commerce may be proceeded against while in interstate commerce or *at any time thereafter* in any district court of the United States and may be seized and condemned.¹⁸

Although the courts have permitted to the federal government a considerable control over intrastate commerce and even over persons not engaged in commerce, they have indicated that there are limits to this authority. In the National Industrial Recovery Act of 1933, Congress had provided for the establishment by executive order of codes for the government of various industries, and the enforcement of these codes by criminal prosecution for their violation. Suit was brought for violation of a code covering wages and hours of persons engaged in slaughtering and dressing chickens in New York City. The Court held that the code provided for an unconstitutional regulation of commerce. The transactions involved were not interstate commerce, nor were they part of the flow of such commerce. The Court went on to point out that while Congress might not only regulate but also protect interstate commerce, subjects dealt with on this theory must have a close and substantial relationship to such commerce. In this case the wages and hours of

2. Inseparably mingled

3. Affecting interstate

¹⁸ *Ibid.*, title 21, sec. 334.

workers governed by the code that had been violated had only an indirect effect upon interstate commerce.¹⁷ In a more recent case, however, the Supreme Court upheld federal control that seemed not to have any very direct effect upon interstate commerce. The federal government had provided for the regulation of the production of wheat. It had even gone so far as to control wheat which was not intended in any part for commerce but was wholly for consumption on the farm. The Supreme Court held that this regulation was valid because it was intended to control the market price of wheat in interstate commerce, and any production whatever influenced that price.¹⁸

Typical
legislation

The commerce clause has been the basis for much of the legislation enacted by Congress. The Interstate Commerce Act and its many amendments providing for extensive regulation of the railroads were enacted under this clause. Through the Sherman Anti-Trust Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914, the federal government has attempted to prevent monopolies, restraint of trade, and unfair methods of competition in commerce. In the Packers and Stockyards Act of 1921 and in the Commodities Exchange Act of 1936, the federal government has attempted to prevent certain practices in the buying and selling of livestock and grain which are regarded as injurious to commerce. The Securities Act of 1933 and the Securities Exchange Act of 1934 enacted under the commerce clause require the registration of stocks and bonds and the registration of stock exchanges and prohibit certain trading practices which are deemed to be anti-social. Congress greatly extended federal control of commerce when it passed the National Labor Relations Act (1936) and the Labor-Management Relations Act (1947) which superseded it. These acts regulated the practice of collective bargaining between employers and employees in all businesses affecting interstate commerce, on the theory that orderly bargaining prevents the interruptions of commerce that result from strikes and lockouts. The Trade-

¹⁷ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁸ *Wickard v. Filburn*, 317 U.S. 111 (1942).

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Mark Act, the Anti-Kidnapping Law, and the Mann Act are other illustrations of statutes enacted by Congress under the commerce clause.

THE TAXING POWER AND THE POWER TO BORROW AND TO MAKE APPROPRIATIONS

Perhaps the constitutional provisions which rank next in importance to the commerce clause as a source of power for the federal government, at least in time of peace, are the taxing power and the power to make appropriations. Under the taxing clause of the constitution, Congress is given the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States. This clause, together with the power given Congress in the same section of the constitution to borrow money on the credit of the United States and the power to make appropriations, gives the federal government a considerable area of authority.

Constitutional basis

We are not here concerned with the use of the taxing clause for raising revenue. That question is discussed in Chapter 20. We are concerned with the question of regulation or control through the taxing power, and the authority given to the federal government to undertake projects because of the power to spend money. Of course, revenue and regulation are often inseparably connected, as in the case of tariff duties.

As a source of power for the federal government, the taxing clause has two aspects. In the first place, it gives the federal government direct regulatory authority of a kind. Congress has on occasion made use of this clause to impose a tax so heavy that the effect has been to stamp out the practice or business entirely. The 10-percent tax which has been imposed upon state bank notes has driven them from circulation. Similarly, a tax of ten cents a pound on colored oleomargarine has made it very difficult to sell that product. Congress has taxed phosphorous matches out of existence by imposing a tax rate of two cents a hundred. Perhaps the outstanding illustration of the use of the

Regulatory taxation

taxing power to regulate is found in the tariff. Many of the tariff acts have frankly stated at the beginning that their purpose was not only to raise revenue but also to encourage the industries of the United States—in other words, to protect them from foreign competition. Duties of 90 percent, 100 percent, and 150 percent which were imposed under the Tariff Act of 1930 indicate that the latter purpose was carried out.

**Taxation
for gen-
eral wel-
fare**

**1. For
public
benefit**

In the second place, the taxing clause, together with the power to borrow and appropriate money, is an important source of power in that it enables the federal government to raise money and spend it for the general welfare. The importance of this is hard to overemphasize. The phrase "general welfare" is extremely broad and would seem to enable the federal government to embark upon almost any kind of enterprise that would benefit all or a large number of its citizens. It might build a series of federal hospitals or housing projects, it might undertake the ownership and operation of all kinds of business enterprises, a fleet of merchantmen, the coal mines, railroads, stockyards, or packing plants. It might, as it has already done, set up an old-age pension system, spend money on the development of an extensive national park system, or provide for a network of highways.¹⁹ In *Massachusetts v. Mellon* the Supreme Court made it extremely difficult to challenge the constitutionality of a federal appropriation act on the grounds that the money would not be spent for the general welfare. In that case the Court held that a taxpayer could not maintain a suit challenging the validity of an appropriation act unless he could show that he was in danger of sustaining some direct injury.²⁰ This was a consequence of the rule that the federal courts can take jurisdiction only of genuine controversies involving concrete adverse interests.²¹

**2. By
grants-
in-aid**

Another phase of this power to spend money for the general welfare is the control that it gives to the federal government over the states. The federal government not infrequently offers money to the states, and usually on a conditional basis. Often it

¹⁹ *Helvering v. Davis*, 301 U.S. 619 (1937).

²⁰ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

²¹ See pp. 274-275, 416.

has been a matching fifty-fifty arrangement; the federal government has offered the states a certain amount of money for a specific purpose, such as the building of highways, and the states in order to participate must be willing to spend an equivalent amount. Often the federal government has required that the states in accepting the money meet certain standards or fulfill certain requirements. For example, in granting money for personnel to operate the state employment services the federal government required that personnel to operate these offices be selected on the basis of merit. It is obvious that this method of control can be very important. The federal government with its tremendous financial resources can, if it wishes, regulate indirectly through the states in dozens of situations where it would not be constitutional for the national government to legislate directly. This has not in fact been done to any great extent.

THE WAR POWERS

The constitution states that Congress shall have the power to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for governing the land and naval forces. These, together with the constitutional provisions that the President shall be Commander in Chief of the Army and Navy, and certain powers with regard to militia, comprise the so-called war powers of the federal government. That these powers are tremendous in scope is obvious. They include, of course, the organizing and maintenance of the naval and military forces not only in time of war but also in time of peace, with all that this implies. They give Congress the authority to conscript man power for the military forces without violating the Thirteenth Amendment. Development of waterways, support of scientific research, and establishment of plants for the manufacture of arms, machines, and equipment for the armed forces can be justified as an exercise of the war power.

**Military
powers**

In addition, in time of war Congress and the President, in order to make the maximum use of our resources, may control the entire civilian economy if that becomes necessary, as they did

**Control
of civilian
life**

during the Second World War. The First and Second War Powers Acts, the Emergency Price Control Act, the Economic Stabilization Act, and similar laws formed the bases for an extensive program reorganizing our civilian economy during the war.²² A brief glance at some of these statutes together with the executive orders issued thereunder will show the tremendous authority assumed by the federal government.

1. Reorganization of agencies

For one thing, the statutes gave to the President extensive powers to make such redistribution among the executive agencies as he might deem necessary of all functions and powers previously conferred by law on any agency. Acting under this statutory authorization, the President issued numerous executive orders reorganizing federal agencies.²³

2. Regulation of transportation

Furthermore, numerous regulations were made pertaining to transportation. The Interstate Commerce Commission was given additional powers over motor carrier operations. The Office of Defense Transportation was set up by the President. This latter office sought to coordinate transportation policies and the activities of governmental agencies and private groups in order to further the war effort. The Office of Defense Transportation, or ODT, arranged for the pooling of refrigerator and tank cars, required heavier loading of freight cars, froze passenger schedules, and prohibited the use of special trains or cars.²⁴ The ODT made numerous regulations pertaining to motor carrier transportation which were designed to bring about better use and conservation of trucks, buses, and taxicabs.

3. Priorities and allocations

One of the most important and interesting provisions of the wartime statutes was the section of the Second War Powers Act which gave the President the power to issue priorities and in case of shortages to allocate materials in such manner and upon such conditions as he deemed necessary or appropriate in the public interest and for the promotion of national defense. Under this

²² U.S. Code, title 50, App.

²³ For these executive orders see U.S. Code, title 50, App., sec. 601, and notes that follow.

²⁴ *U.S. Government Manual*, Winter 1943-44 (Government Printing Office, Washington, 1944), p. 87.

provision the War Production Board set up an elaborate system of priorities for materials according to the relative scarcity of such materials. In addition, the WPB issued *limitation orders* restricting the number of units of certain items which could be produced, and in some instances even prohibited the manufacture of certain products. The WPB also established production quotas for manufacturers. It required that the so-called *necessity certificates* be obtained before persons could install or construct production facilities. These certificates were issued only after a showing that the proposed facilities were needed for military, naval, or essential civilian use.²⁵ The controls exercised through the WPB constituted a tremendous and reasonably successful plan imposed upon our industrial and economic machinery.

The Office of Price Administration and its controls provided for by the Emergency Price Control Act and by executive orders furnish another illustration of the exercise of extensive war powers by the federal government. The OPA established maximum retail prices, wholesale prices, and prices which manufacturers could charge for almost all important commodities. In addition, a system of rationing was established for such essential and scarce commodities as meat, butter, sugar, and canned goods. The OPA also had the task of enforcing maximum rent regulations in most areas throughout the United States.

The Office of Economic Stabilization was established in 1942 and was authorized to formulate and to develop a comprehensive national economic policy relating to the control of civilian purchasing power, prices, rents, wages, salaries, profits, and rationing. In general, its purpose was to exercise some over-all control of the economy of the United States in order to combat the inflationary tendencies that were developing during the Second World War.

The National War Labor Board was established to settle labor disputes in industries where interruption by strikes would interfere with the effective prosecution of the war. The Board did

4. Price control and rationing

5. Labor disputes

²⁵ *Code of Federal Regulations*, Cumulative Supplement, 1943, title 32, secs. 910.1-910.7.

not supplant the other agencies of the federal government which were engaged in the task of settling labor disputes but was created in order to aid in the important task of settling industrial disputes by peaceful means. It was authorized to use mediation, voluntary arbitration, and arbitration under Board rules. Another agency established during the Second World War to deal with certain labor problems was the War Manpower Commission. This Commission was established to assure the most effective mobilization and use of the manpower resources of the United States.

6. New agencies

In addition to the boards and commissions mentioned above, many other agencies were created by statute or by executive order. Among these were a number of government corporations. A Defense Plant Corporation was set up to erect, lease, and finance plants for the production of war materials. The Metals Reserve Corporation was organized to produce or acquire strategic metals needed for the war effort. A Rubber Reserve Company was established whose function it was to acquire crude rubber and scrap rubber and to aid in the establishment of synthetic rubber plants.

From these examples some idea can be gained of the tremendous scope of the war powers. The civilian economy of the country was brought under more extensive and drastic controls than ever before in our history. It is fair to assume that most of the controls which have been mentioned would have been upheld by the courts as constitutional, but for the most part they were not challenged.

Limits of war powers

Although the power of the federal government in time of war is very great, the courts have on occasion held that it is not unlimited, but is subject to constitutional limitations. If an action is really necessary to a successful prosecution of the war, the courts in all probability will uphold it, and they will undoubtedly allow Congress and the President a very considerable latitude in judging what may really be essential in winning a war. If, however, they act in an arbitrary fashion and in disregard of civil rights and their actions are not really essential to the win-

ning of the war, the courts are quite likely to declare their actions unconstitutional. The case of *Ex parte* Milligan is a good illustration. In that case, which arose during the Civil War, the defendant had been tried and condemned by a military tribunal. The military court had been established in an area which was not in the war zone and where the regular courts were open and functioning. From a military point of view, there was no need for the creation of military courts with jurisdiction to try civilians. The Supreme Court held that trial in the military court violated certain of the defendant's constitutional rights, such as the right to trial by jury and indictment by grand jury, and was therefore unconstitutional.²⁶ Undoubtedly many of the actions against American citizens of Japanese descent taken during World War II and justified as essential for the defense of the United States were unnecessary, and even if essential were so arbitrarily applied that they formed an unconstitutional violation of the rights of this group of American citizens.²⁷

FOREIGN AFFAIRS

Most of the control of foreign affairs, as has been previously indicated, rests in the hands of the chief executive. Congress participates through its legislative powers and its power over appropriations, and the Senate shares the treaty-making power with the President. All actions of the federal government in this field must be taken in accordance with the constitution. Obviously such specific prohibitions as those against slavery, or taking life, liberty, or property without due process of law must be observed in exercising control of foreign relations. However, since the states have no authority in the field of international relations, the scope of federal control seems to be greater here than in many other areas. An interesting illustration is to be found in the case of the treaty-making power. A treaty is law just as is a statute, if it has internal application and is self-executing. Apparently a treaty may deal with any subject, even though it is one

Partici-
pants

Scope of
treaties

²⁶ *Ex parte* Milligan, 4 Wall. 2 (1866).

²⁷ *Ex parte* Endo, 323 U.S. 283 (1944).

normally reserved to the states. Furthermore, Congress has the power, under the necessary-and-proper clause, to enact a statute in order to carry out the provisions of a treaty. And this appears to be true even though a law on the subject without a supporting treaty would be unconstitutional as invading the residual powers of the states. This was established by the case of *Missouri v. Holland*. Because of inadequate state legislation, Congress had passed a Migratory Bird Act. This act, as its name indicates, protected migratory birds and provided punishment for persons who violated its provisions. The law was declared unconstitutional by lower federal courts because the protection of birds was an exercise of the police power which had been reserved by the constitution to the states.²⁸ The federal government then made a treaty with Canada under the terms of which the United States and Canada agreed to protect migratory birds and to take such steps as might be necessary to carry out the provisions of the treaty. In furtherance of the treaty, Congress enacted what was called the Migratory Bird Treaty Act, providing for the protection of birds and for punishment of persons who violate its provisions. The constitutionality of the law was challenged on the grounds that it violated the Tenth Amendment, which reserved to the states the powers not delegated to the federal government. The Supreme Court, however, upheld the validity of this statute. It pointed out that the treaty-making power is granted in general terms, and is not confined to enumerated topics as is the legislative power of Congress, and that Congress has the power to pass all laws necessary and proper to implement the treaty-making power.²⁹

**Legal
standing**

In discussing the treaty-making power it is important to note that a treaty is one type of legislation. Treaties are placed by the supremacy clause on a footing of equality with acts of Congress. The result is that a treaty may repeal a statute or a statute may

²⁸ *United States v. Shauver*, 214 Fed. 154 (1914); *United States v. McCullagh*, 221 Fed. 228 (1915).

²⁹ *Missouri v. Holland*, 252 U.S. 416 (1920).

repeal a treaty, just as one statute may repeal another statute of Congress.³⁰

POWERS OVER CURRENCY

One of the important fields of control enjoyed by the federal government is that over currency. The constitution declares that Congress shall have the power to coin money and regulate the value thereof. Also Congress has the power to borrow money on the credit of the United States. The constitution gives the federal government complete control in this field by declaring that no state shall coin money, make anything but gold and silver legal tender, or emit bills of credit.

Constitutional basis

Under the above-mentioned constitutional powers, Congress has enacted legislation providing for the coinage of money, the issuance of paper money, and the establishment of our monetary system. Legislation by Congress in the field of currency has from time to time given rise to constitutional questions concerning the extent of its powers. In 1862 Congress passed the Legal Tender Acts which authorized the issuance of treasury notes, and made them legal tender in payment of all debts except duties on imports and interest on the public debt. The court upheld the action of Congress, declaring that the power could be implied from the power to coin money and from the war power.³¹ Later, Congress passed similar legislation in time of peace. In *Julliard v. Greenman* the Supreme Court upheld the validity of this legislation without reference to the war power.³²

Constitutional issues

1. Legal Tender Acts

Until 1933 there was little additional monetary legislation which gave rise to constitutional questions. In 1933 the United States was in the depths of a serious depression. President Roosevelt and his New Deal associates prepared an elaborate program which was designed to combat this depression. An important phase of their program was to exercise control over the value of money. Through lowering the value of money they hoped to raise prices and stimulate business. As one step in the program

2. New Deal laws

³⁰ *Head Money Cases*, 112 U.S. 580 (1884).

³¹ *Legal Tender Cases*, 12 Wall. 457 (1871).

³² *Julliard v. Greenman*, 110 U.S. 421 (1884).

Congress gave the President the power to devalue the dollar by raising the dollar price to be paid for gold. This in turn made it necessary to prohibit the payment in gold of United States bonds despite the fact that the bonds called for redemption in gold at the time of maturity. Furthermore, the payment of private debts in gold was forbidden even though the parties had contracted for payment in gold. In addition, the federal government authorized the Secretary of the Treasury to order the surrender of gold coins to the Treasury of the United States in return for payment in currency.³³

Laws
upheld

A series of suits was brought challenging the validity of these regulations. One case presented the question of the validity of the joint resolution of Congress forbidding payment of gold in fulfillment of gold clauses in private agreements. The Court held that the resolution was constitutional and pointed out that Congress had the power to establish a monetary system for the United States. In part, this power was derived from the power to coin money and regulate the value thereof, but in part it was derived from the broad and comprehensive authority of the federal government to lay and collect taxes, borrow money, regulate commerce, and fix standards of weights and measures. By virtue of this power, the Court declared, there attached to the ownership of gold and silver bullion and certificates certain limitations which public policy might require by reason of their use as a medium of exchange. Gold clauses in private contracts constituted an actual interference with the broad powers of Congress to determine money policy. If the gold clauses in private contracts were upheld, this would result in two monetary standards, the gold standard and the other standard established by Congress. Congress was entitled to reject a dual system and provide a uniform monetary system.³⁴ In another case, the owner of gold certificates who sought to redeem them claimed that he was entitled not to their value in currency but to their value in gold, at the new, governmentally fixed price of gold. The Supreme

³³ U.S. Code, title 12, sec. 952; title 31, secs. 462, 463.

³⁴ *Norman v. B. and O. R. Co.*, 294 U.S. 240 (1935).

Court held that gold certificates called for redemption in dollars and not bullion and pointed out that Congress had complete authority to regulate currency.³⁵ In only one case did the Supreme Court seriously question the actions of the federal government. This was in connection with the prohibition of the payment of gold called for in bonds of the United States. The Supreme Court declared that while Congress could regulate the value of currency it could not invalidate the terms of an obligation entered into under its power to borrow money. But the Court pointed out that the promise to pay contained in the bonds was not necessarily a promise to pay in gold, but only a guarantee that the person who had lent money to the federal government should not suffer any loss through a depreciated currency. In this case the plaintiff could not show that he had suffered any loss by being forced to accept currency. The purchasing power of the dollar was even higher at the time of repayment in 1933 than it was at the time the United States borrowed the money.³⁶

OTHER POWERS

The federal government has a number of other powers less important than those which have been previously mentioned. One of these is the postal power, under which Congress may establish post offices and post roads. This clause has given the United States the power to establish its largest government owned and operated business enterprise and make numerous regulations pertaining thereto.

Postal
power

In order to promote the progress of science and the useful arts by securing monopolies of their productions for limited times to authors and inventors, Congress was given, by the so-called patents and copyrights clause of Article I, Section 8, of the constitution, the power to grant to authors and inventors exclusive rights to their writings and discoveries. Congress has provided for the issuance and protection of patents, and for the registration and protection of copyrights. In this field the federal gov-

Patents
and copy-
rights

³⁵ *Nortz v. United States*, 294 U.S. 317 (1935).

³⁶ *Perry v. United States*, 294 U.S. 330 (1935).

ernment has assumed exclusive control, and the federal courts have been given exclusive jurisdiction over patent and copyright cases. Patents are issued only by the United States Patent Office. Copyrights are registered solely in the Office of the Register of Copyrights, attached to the Library of Congress. Although the federal government has gone no farther than to provide for the issuance and protection of patents, it probably could under the above constitutional provision undertake more extensive controls if that should be considered desirable.

Bankruptcy

The constitution states that Congress shall have the power to establish uniform laws on the subject of bankruptcies. Just as in the case of patents and copyrights, Congress has given to federal agencies exclusive jurisdiction in this field. Only federal courts may hear and decide bankruptcy cases.⁸⁷

The last power that need be mentioned here is the power given to Congress to fix standards of weights and measures.

FEDERAL POLICE POWER

Incidental power

The question is often raised as to whether or not the federal government has police power, i.e., the power to protect the health, morals, safety, and general welfare of the public. This is the chief of the powers reserved to the states. It is probably accurate to say that the federal government has not police power as such. It does, however, enact legislation which is designed to protect the health, safety, morals, and general welfare. It does so through one or another of its delegated powers. Under the postal power it has forbidden the sending through the mails of obscene literature or lottery tickets, and letters or literature designed to obtain money under false pretenses.⁸⁸ This certainly has nothing to do with the establishment of post offices and post roads and is of no benefit to the postal system; it is merely a measure to protect the morals and welfare of the public. Nevertheless, the Supreme Court has upheld the validity of this type of legislation.⁸⁹ Congress has enacted the Fair Labor Standards

⁸⁷ U.S. Code, title 28, sec. 371.

⁸⁸ *Ibid.*, title 18, secs. 334, 336, and 338.

⁸⁹ *In re Rapier*, 143 U.S. 110 (1892).

Act, which is designed to fix minimum wages and maximum hours for workers.⁴⁰ Again, this legislation is less directly an aid to commerce than a protection of the welfare of large groups of workers who are unable to protect themselves against exploitation. The Mann Act, forbidding the transportation of women from state to state for immoral purposes, and the Anti-Kidnaping Law, which punishes individuals who transport kidnapped persons across state lines, although enacted under the commerce clause are obviously intended to protect the morals and safety of the public.⁴¹ The federal law which imposes a tax of two cents per hundred on phosphorous matches is not intended to raise revenue but is designed to prevent the manufacture of such matches because they are dangerous to the health of the workers.

Thus one can see that although the United States has no police power, it can and does through other means protect the health, morals, safety, and general welfare of the public.

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⁴⁰ U.S. Code, title 29, secs. 201-219.

⁴¹ *Ibid.*, title 18, secs. 398 and 408a.

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CHAPTER 13

THE JUDICIARY

Constitutional Courts—Legislative Courts—Administrative Aids to the Courts—Jurisdiction of the Courts—An Appraisal

CONSTITUTIONAL COURTS

One of the weaknesses of the Articles of Confederation was that they did not provide for a system of courts for the central government. In his essays in *The Federalist* Alexander Hamilton declared that laws are a dead letter without courts to expound and define their meaning. It would have been possible for the framers of the constitution to give to state courts all jurisdiction over federal questions. Hamilton indicated the weakness of this arrangement when he said that if there were in each state a court of final jurisdiction there might be as many different final determinations on the same point as there were courts. And he added that a central system of courts was essential to prevent a bias of local views and prejudices and the possible interference of local regulations with those of the central government.¹

Need for
national
courts

There is little doubt that if jurisdiction over federal matters had been left to the state courts there would have been not only a lack of uniformity in the interpretation of federal statutes and a great diversity in the application of law but also a positive danger that the central government might have been seriously weakened. Certain it is that the federal courts have been a tremendous aid in strengthening the central government. In fact it is doubtful whether the Union would have survived without them.

Article III of the constitution states that the judicial power of the United States shall be vested in one Supreme Court and in

Constitu-
tional
courts

¹ *The Federalist*, No. 22.

such inferior courts as Congress may from time to time establish. Congress has seen fit to provide for two levels of courts below the Supreme Court, namely, circuit courts of appeals, and federal district courts. These, together with the Supreme Court, comprise the so-called constitutional courts of the federal government.

**Independence
of judges**

In order to protect judges against political interference and to relieve them from other undesirable pressure—in order to secure to the judiciary as much independence as possible—two important provisions were included in the constitution. The first of these states that the judges of both the Supreme Court and the inferior courts shall hold office during good behavior.² The only way in which a federal judge can be removed is through impeachment proceedings. Federal judges may resign, and the statutes of Congress provide that federal judges who have served a certain number of years may retire on very liberal pensions. The second provision of the constitution designed to secure the independence of the judiciary declares that the compensation of judges shall not be diminished during their term of office. In commenting on this in *The Federalist*, Hamilton declared: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice, the complete separation of the judicial from the legislative powers, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."³

Selection

The constitution specifically provides that judges of the Supreme Court shall be appointed by the President with the advice and consent of the Senate.⁴ The constitution does not expressly provide that judges of the lower courts shall be appointed in this fashion. But the only category of officers whose appointment the constitution states may be vested in "The President alone, in the courts of law, or in the heads of departments" is that of "in-

² Art. III, sec. 1.

³ *The Federalist*, No. 79.

⁴ Art. II, sec. 2.

ferior officers." Probably the judges of the inferior courts are not inferior officers; if not, they must be "other officers . . . whose appointments are not herein otherwise provided for" who are to be appointed by the President with the advice and consent of the Senate, and Congress has in fact provided for this method of appointment.

Although the constitution speaks of the Supreme Court of the United States, it does not organize the Court or fix the number of judges who shall comprise it. The Judiciary Act of 1789 provided that the Supreme Court was to consist of a Chief Justice and five associate justices. Later statutes enlarged and diminished the size of the Court; at present it has one Chief Justice and eight associate justices. The salary of the Chief Justice has been fixed at \$25,500 and that of the associate justices at \$25,000. Although his salary is higher than that of the other judges, the opinion of the Chief Justice has no more weight in deciding cases than those of the others. He acts as a presiding judge and has the duty of assigning to the other judges the writing of opinions in the various decisions handed down by the Supreme Court. Probably the best known of the Chief Justices was John Marshall, who held office for more than thirty years (1801-1835). He wrote opinions in some of the most important cases in the history of the United States. Among the best known of these were *Marbury v. Madison* (1803), in which the Court held that it has the power to determine the constitutionality of statutes of Congress, and *McCulloch v. Maryland* (1819), in which the Court decided that the federal government has implied powers.⁵ Marshall's decisions did much to strengthen the powers of the federal government at a time when many persons of influence were eager to have it play a secondary role to that of the several states. Among the best known of the associate justices have been Joseph Story, who served on the bench from 1811 to 1845, Oliver Wendell Holmes, 1902-1932, and Louis Brandeis, 1916-1939.

The Supreme Court

1. Judges

⁵ *Marbury v. Madison*, 1 Cranch 137 (1803); *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

2. Sessions

The Supreme Court meets annually in its impressive new building in Washington. Its sessions open in October and last until about May. Six justices must be present at the argument of a case, and a majority of the judges must concur in any decision. A majority opinion is written in each case by the judge who has been assigned that task by the Chief Justice. Any one of the judges may write a concurring or a dissenting opinion. The cases decided by the Supreme Court and the opinions of the judges therein are reported and published in a series of volumes called the *United States Reports*.

3. Business

Although the Supreme Court has some original jurisdiction, the great majority of the cases which it hears and decides are brought to it from the lower courts. Some cases are brought from the lower federal courts, and others are cases which have been decided by the highest appellate courts of the states but which involve federal questions. The procedure before the Supreme Court of the United States differs from that in an ordinary trial court, such as a federal district court. There is no jury; there are no witnesses, except perhaps in cases of original jurisdiction; and a large part of the argument of the attorneys is in the form of printed briefs. There may be some oral argument in a case, but eloquence counts for little. It is mastery of the law and a well-organized presentation that most impress the judges of the Court.

Circuit courts of appeals

Next below the Supreme Court in the judicial hierarchy are the circuit courts of appeals. Congress by statute has provided for eleven of these, one for each of the ten judicial circuits and, in addition, a court of appeals for the District of Columbia.⁶ Some of these courts consist of only three judges; others have as many as seven judges. The circuit courts of appeals have no original jurisdiction, unless their power to enforce or review the decisions of certain administrative tribunals be considered original jurisdiction. They hear appeals from the many federal district courts and enforce or review the orders of some of the in-

⁶ The courts of the District of Columbia are constitutional courts, but they may also be classified as legislative courts because of the jurisdiction peculiar to their status as courts of the District of Columbia.

dependent commissions, such as the Federal Trade Commission and the Federal Power Commission.

The district courts are the courts of general jurisdiction for the federal government. They have original jurisdiction only. Cases may of course be removed under certain circumstances from a state court to a federal district court. There is at least one district court for each state, and in many states there are two or more. Most district courts have only one judge; others have more than one; and in one of the districts in New York, where there is a great volume of litigation, there are twelve judges, each, as a rule, sitting separately.

**District
courts**

LEGISLATIVE COURTS

In addition to the constitutional courts which have been mentioned there are several other federal courts which are called legislative courts. The distinction between constitutional and legislative courts was invented by John Marshall. Legislative courts are those set up by Congress not under Article III of the constitution but under some other provision—under the necessary-and-proper clause or under Article IV, which authorizes Congress to make rules for the territories. If Congress has the power to legislate on a certain subject, it may establish a court or courts to carry out the law more effectively. For example, the United States Customs Court created by Congress was established under the power of Congress to impose import duties. The Court of Customs and Patent Appeals was set up in order to review decisions of the Patent Office and the Customs Court. A Court of Claims to hear suits brought against the federal government was created under the authority to pay the debts of the United States. In addition, federal courts have been established in the territories and in the District of Columbia. One of the important differences between these so-called legislative courts and the constitutional courts is that in dealing with the legislative courts Congress is not bound by the limitations of Article III; it need not provide for appointment of judges for life, and it may even, if it so desires, reduce the compensation of judges during their

**Constitu-
tional
basis**

term of office.⁷ However, in setting up many of the legislative courts Congress has followed the pattern used for constitutional courts and has provided life tenure for their judges.⁸

**Adminis-
trative tri-
bunals**

In addition to the legislative courts, Congress has established a number of boards and commissions which have judicial or, to be more technical, quasi-judicial functions. These agencies are commonly referred to as administrative tribunals. Among the best known of these are the Interstate Commerce Commission, which hears cases between shippers and railroads involving alleged discrimination or unreasonable rates, the Federal Trade Commission, which hears cases involving the use of unfair methods of competition, and the National Labor Relations Board, which hears charges of violations of the Labor-Management Relations Act of 1947.

ADMINISTRATIVE AIDS TO THE COURTS

**Judicial
council**

No account of the organization of the federal judiciary would be complete without some mention of certain ancillary arrangements that aid the courts in the performance of their task. At one time the inferior federal courts functioned almost independently and with little regard for the operations of one another. One court might have considerably more business than it could handle and another might have a very light judicial load. In order to remedy this and other undesirable situations in our federal court system, Congress passed an act providing for a kind of judicial council. Under this law the Chief Justice of the Supreme Court of the United States is required to call an annual conference of the eleven senior circuit court judges, and they are to advise him in any matter in respect to which the administration of justice in the courts of the United States can be improved. The senior judge for each district court is to make a report to this annual conference setting forth the situation with respect to the docket in his district. The conference arranges for the assignment of judges to or from districts depending on their needs.⁹

⁷ *Ex parte* Bakelite Corporation, 279 U.S. 438 (1929).

⁸ U.S. Code, title 28, secs. 241 and 301a.

⁹ *Ibid.*, sec. 218.

In 1939 Congress took another step toward improving the situation in the federal judiciary by creating the Administrative Office of the United States Courts. The director of this office has general supervision of various administrative matters pertaining to the federal courts. For example, he supervises clerks and other administrative personnel. He is in charge of the purchase and distribution of equipment and supplies. He audits the accounts and prepares the budget.¹⁰ These tasks are performed under the supervision of the above-mentioned conference of circuit court judges.

**Adminis-
trative
Office**

JURISDICTION OF THE COURTS

As has been previously noted, the federal government is a government of delegated powers. Its various branches have only such powers as have been given to them by the constitution. In conformity with this general constitutional principle, the federal courts also have only delegated jurisdiction. Article III of the constitution recites the maximum jurisdiction which the constitutional courts may exercise. Under the statutes, they possess something less than this permissible maximum.

**Delegated
jurisdic-
tion**

It is important to bear in mind that there is complete dependence of inferior courts, both district and appellate, upon statutes of Congress. Congress determines not only the number of such courts and the number of judges but also the jurisdiction which such courts shall exercise. As the various kinds of jurisdiction are discussed in succeeding paragraphs it should be remembered that they are conferred upon the courts by statute, subject to the broad statements contained in Article III, Section 2, of the constitution. It should also be noted in passing that the appellate jurisdiction of the Supreme Court is likewise dependent upon statutory authority. The constitution states that the Supreme Court shall have appellate jurisdiction with such exceptions and under such regulations as Congress shall make. In the matter of original jurisdiction of the Supreme Court the constitution confers certain jurisdiction directly on the Court, namely, cases af-

**Congres-
sional
control**

**Supreme
Court's
jurisdic-
tion**

¹⁰ *U.S. Government Manual*, 1st ed., 1947, p. 50.

fecting ambassadors, public ministers, and consuls, and cases in which a state is a party.

Kinds of jurisdiction

The jurisdiction permitted to the federal courts is of two general kinds: (1) jurisdiction over certain topics, a kind of jurisdiction which is based on the nature of the controversy—that is, the subject matter of the suit; and (2) jurisdiction over suits between certain parties.

1. Law applicable

Article III specifies four classes of cases in which jurisdiction may be said to be based upon the nature of the controversy: those arising under the constitution, those arising under the laws of the United States, those involving treaties made under the authority of the United States, and admiralty and maritime cases.¹¹

a. Constitution

Cases which arise under the constitution form one of the most important categories of jurisdiction exercised by the federal courts. The doctrine of judicial review,¹² which was established in *Marbury v. Madison*,¹³ is one of the most significant features of our legal and political system. Under it the courts may declare a statute of Congress, an executive order of the President, a provision of a state constitution, a state statute, an executive order of a governor, a city ordinance, or the actions of any federal or state official invalid because they consider them to be contrary to the constitution of the United States. Nowhere else in the world do the courts play so important a role in shaping policy as in the United States. Through their decisions on constitutional questions they may and do shape social and economic policy. When the Supreme Court ruled in 1936 that the first Agricultural Adjustment Act was unconstitutional, it was in effect vetoing a very significant economic policy established by the Congress.¹⁴ When in 1923 it held that a minimum wage law for women and children was contrary to the constitution, it was exercising a profound influence upon social and economic policy in this country for many years thereafter.¹⁵

¹¹ Constitution of the United States, art. III, sec. 2.

¹² See p. 117. ¹³ 1 Cranch 137 (1803).

¹⁴ *United States v. Butler*, 297 U.S. 1 (1936).

¹⁵ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

In passing upon the constitutionality of legislation, the federal courts do not necessarily declare all of a law invalid merely because some part is contrary to the constitution. If the parts of a law are separable and the valid parts can stand without the unconstitutional portion, a court will declare the offending part invalid but will uphold the remainder.

One of the largest categories of jurisdiction exercised by the federal courts is that which arises under the laws of the United States. Here are found the numerous cases, both civil and criminal, which originate under various statutes enacted by Congress—such miscellaneous statutes as the Interstate Commerce Act, the Sherman Anti-Trust Law, the Pure Food and Drug acts, the postal laws, the Bankruptcy Act, the Copyright Act, and the patent laws. In some of the cases arising under federal laws Congress has given the federal courts exclusive jurisdiction. This is the situation in bankruptcy cases, and in cases appearing under the patent and copyright laws.¹⁶ Under other statutes giving rise to civil suits in which private persons are the parties, Congress has provided that if the value involved is \$3000 or more, the federal courts have jurisdiction concurrent with that of the states. If the value is less than \$3000, the suit can be brought only in a state court.¹⁷

b. National statutes

Article III of the constitution states that judicial power shall extend to cases deriving from treaties that are made under the authority of the United States. The courts have held that treaties between the United States and foreign countries which have internal application and which are self-executing are law and are enforceable and binding just as are federal statutes. This is not an especially important category of jurisdiction for the federal courts, as the number of cases which have arisen involving treaties has been relatively small.

c. Treaties

The last of the class of cases based on the nature of the controversy over which the federal courts have jurisdiction is that covering admiralty and maritime matters. In this category are

d. Admiralty law

¹⁶ U.S. Code, title 28, sec. 371.

¹⁷ *Ibid.*, sec. 41.

the cases that arise out of maritime contracts and claims for maritime insurance or services. The jurisdiction also includes torts, suits for breaches of contract, or other civil wrongs which have taken place on the high seas and under American jurisdiction or on the navigable waters of the United States.¹⁸ Congress has given the federal courts exclusive jurisdiction in admiralty and maritime cases.

2. Character of parties

The jurisdiction of the federal courts which is based upon the nature of the parties to a suit includes all cases affecting foreign ambassadors, public ministers, and consuls, controversies to which the United States is a party, suits between a state and a citizen of another state, suits between citizens of different states, and suits between a state or a citizen of the United States and a foreign state or citizen.¹⁹

a. Diplomatic officials

Suits brought by ambassadors and other diplomatic representatives may be brought in either federal or state courts. The Supreme Court of the United States has by statute been given exclusive jurisdiction over all suits brought against ambassadors and public ministers. Actually this is not an important category of jurisdiction, since acts of Congress recognize diplomatic immunity for these foreign representatives. The federal district courts have jurisdiction over suits against consuls and vice-consuls, although the Supreme Court may take jurisdiction of these cases if it so desires.²⁰ The jurisdiction which this statutory provision confers upon the federal courts appears to be all-inclusive. However, by court decision it has been limited in at least one kind of case. A vice-consul was sued for divorce in a federal district court. Even though the language of Article III of the constitution and the federal statutes on the subject appeared to cover this case, the Supreme Court held that the suit was not a proper one for a federal court. Questions of domestic relations, the Court pointed out, belonged exclusively to the states.²¹

¹⁸ *The Belfast v. Boon*, 7 Wall. 624 (1869).

¹⁹ Constitution of the United States, art. III, sec. 2.

²⁰ U.S. Code, title 28, sec. 371.

²¹ *Ohio ex rel. Popovici v. Alger*, 280 U.S. 379 (1930).

It is natural that the federal courts should have jurisdiction over suits to which the United States is a party. They have such jurisdiction in all cases in which the United States is the plaintiff. The United States cannot be sued as a defendant without its consent by a person or even by a state.²² In certain types of cases enumerated by statute, the United States allows itself to be sued. Congress has established the Court of Claims as the principal tribunal in which such suits shall be brought. Congress has also provided that suits in certain types of cases may be brought against the United States in federal district courts.

b. U.S. a
party

Article III of the constitution declares that the judicial power of the federal courts shall extend to controversies between a state and a citizen of another state. In *Chisholm v. Georgia*, decided in 1793, the Supreme Court held that a state could be sued by a citizen of another state under this provision of the constitution.²³ This decision aroused such a storm of protest that soon thereafter the Eleventh Amendment was adopted. This declared that the judicial power of the federal courts should not be construed to extend to any suit against one of the states by a citizen of another state or a citizen of a foreign state. The Supreme Court has held that a citizen may not sue his own state in a federal court,²⁴ although the amendment does not expressly prohibit such action.

c. State
vs.
citizen

One kind of controversy provided for in Article III, and one which has on occasion caused the courts some difficulty, is that of suits between states. In most instances a state which has lost a suit abides by the ruling of the Court and no trouble arises. Occasionally a state refuses to obey the decision or engages in dilatory tactics. The case of *Virginia v. West Virginia* is a good illustration. At the time that West Virginia was formed from those areas of Virginia which had remained loyal to the Union during the Civil War and was admitted as a state, she agreed to assume a portion of the public debt of Virginia, to the amount of \$19,000,000. Later West Virginia refused to meet this obliga-

d. State
vs. state

²² *Kansas v. United States*, 204 U.S. 331 (1907).

²³ *Chisholm v. Georgia*, 2 Dall. 419 (1793).

²⁴ *Hans v. Louisiana*, 134 U.S. 1 (1890).

tion. Virginia brought several suits against her, the last one in 1918. The Supreme Court in this last case decided that West Virginia was obliged to pay, but did not issue the writ of execution that had been requested in the suit.²⁵ Fortunately, West Virginia made arrangements to pay the debt, and the Court was spared the embarrassment and difficulty of actually trying to enforce a decree against an unwilling state. This case does illustrate, however, the very real difficulty that may be encountered in suits between states. Congress has wisely provided that such suits must be brought originally in the Supreme Court.

Many of the cases of state versus state are for breach of contract or other matters similar to those that might be brought by an ordinary private person against another person. Sometimes they are boundary disputes. Occasionally they are suits involving the so-called *parens patriae* principle. That is, one state sues another on behalf of its citizens, claiming pollution of a water supply or diversion of a water course or some other injury of a public nature. Since citizens cannot sue a state in a federal court because of the prohibitions of the Eleventh Amendment, the only recourse is for a state to bring suit on their behalf, alleging an injury to the public. But one state cannot sue another in behalf of a private interest of its citizens, for this would be an attempt to evade the Eleventh Amendment.

e. Diversity of citizenship

The controversies between citizens of different states constitute one of the largest categories of jurisdiction handled by the federal courts. Numerous as are these cases based on diversity of citizenship, they would be even more numerous if Congress had not by statute sharply limited the jurisdiction of the federal courts in this type of case. Congress has provided that such suits cannot be brought in a federal court unless the value in controversy amounts to at least \$3000. Suits for less than that amount must be brought in a state court.

One of the questions that naturally arise in cases of diversity of citizenship is the question as to what law must be applied. Obviously the court does not apply federal law, since the suits

²⁵ *Virginia v. West Virginia*, 246 U.S. 565 (1918).

are brought into court because of the nature of the parties and not the nature of the controversy. The federal courts have held that they will apply the statute law or the principles of common law or equity of the state in which the cause of the suit occurred.

A corporation is a person but it is not a citizen. Despite this, the federal courts take jurisdiction of suits between a corporation chartered in one state and a citizen of another state on the ground of diversity of citizenship. The courts have done this through the use of a legal fiction which conclusively presumes that the stockholders of each corporation are citizens of the states in which the corporations are incorporated.²⁶ Although it is obviously not true in most situations that the stockholders of a corporation are all citizens of the state of incorporation, the courts will not allow evidence to be introduced rebutting the conclusive presumption which they have established.

f. Foreign
persons
and
states

Another important category of jurisdiction based on the nature of the parties is that which includes controversies between states or citizens and foreign states or citizens. Here again the Court does not allow a citizen of a foreign state to sue a state, but of course permits a state to sue a citizen of a foreign country. Although there is no prohibition in the constitution, the Supreme Court has held that the federal courts cannot take jurisdiction of suits involving foreign states. In so deciding, the Court pointed out that it lacked the power to enforce the decree. Furthermore, it declared that to hand down a decision against a foreign state might give rise to international complications and the Court was unwilling to assume this risk.²⁷

The relation of the federal courts to the state courts is an important subject. Review by the Supreme Court of decisions by state courts on federal questions is necessary in order to preserve uniformity in our national law, and also in order to prevent the states from weakening the structure of the federal union. Accordingly, Congress has provided that if a state court holds a federal statute or treaty to violate the federal constitution, or

Relation
to states

²⁶ *Ohio and Miss. Ry. Co. v. Wheeler*, 1 Black 286 (1862).

²⁷ *Monaco v. Mississippi*, 292 U.S. 313 (1934).

denies a right claimed under federal law (constitution, statutes, treaties), the Supreme Court is required to grant an *appeal* from the decision of the highest state court which under state law could hear the case and review the decision. If the state court holds a state law invalid as conflicting with the federal constitution or a federal statute or treaty, the Supreme Court may in its discretion grant a *writ of certiorari* to review. Besides appellate review, Congress has provided for removal of cases from state to federal courts for trial in certain situations. We have seen that the state courts have jurisdiction in many cases involving federal questions and in cases of diversity of citizenship, and that the federal courts have jurisdiction also if a value of at least \$3000 is involved. If the plaintiff elects to bring his action in a state court in such a case, Congress has provided that the defendant may, by motion before trial, remove the case to the federal district court to be tried. In two cases Congress has provided for such removal even when the \$3000 minimum requirement is not met. When any criminal prosecution or civil suit is begun in any state court against an officer of the United States acting under a revenue law or against any officer of a federal court or of either house of Congress for actions performed in the course of duty, the case may be removed to a federal district court for trial.²⁸ And when any criminal prosecution or civil suit is begun in a state court against a person who is denied or cannot enforce his civil rights in the state courts, he may remove the case to the federal district court.²⁹

Limits on
jurisdiction

1. Case
or contro-
versy

Before leaving the question of jurisdiction of the federal courts, we should note two limitations which they have imposed upon their own jurisdiction. The constitution states that the judicial power of the courts shall extend to cases and controversies. The courts have interpreted this to mean that they may take jurisdiction only when there is actual litigation and when there are adverse parties to a suit. If the parties are merely seeking an advisory opinion from the court, no case or controversy is in-

²⁸ U.S. Code, title 28, sec. 76.

²⁹ *Ibid.*, sec. 74.

volved, within the meaning of the constitution.³⁰ This limitation does not prohibit the federal courts from handing down so-called declaratory judgments, that is, decisions in cases in which adverse parties request an opinion from the court on their respective rights and duties without actually going through all the steps in a trial. In fact, Congress has enacted a Declaratory Judgments Act expressly giving to the federal courts the authority to handle cases of this type.³¹

Another limitation which is not expressly provided by the constitution but which the courts have imposed upon themselves is the rule that they will not decide what are called political questions. A political question is one which belongs to the policy-making or political branches of the government, that is, the legislature and the executive. With the exercise of their political powers the judiciary will not interfere. Chief Justice Marshall made this clear very early in our history when he declared in *Marbury v. Madison*: "By the Constitution . . . the President is invested with certain important political powers, in the exercise of which he is to use his own discretion. . . . In such cases . . . whatever opinion may be entertained of the manner in which executive discretion may be used . . . there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . . The acts of such an office . . . can never be examined by the courts."³²

2. Political questions

Among the most significant of the political questions are those dealing with foreign relations. Whether to recognize or to refuse to recognize the diplomatic representative of a foreign country is a political question. A decision of the President on the matter is conclusive and the courts will follow the decision of the chief executive if any question on the matter should be raised in a case before them. Likewise the courts will follow the decision of the

³⁰ *Muskrat v. United States*, 219 U.S. 346 (1911).

³¹ U.S. Code, title 28, sec. 400.

³² 1 Cranch 137 (1803).

political branches of the federal government that a state of war exists or that a state of war has begun or ended, since these are political questions. The Supreme Court has refused to consider the question whether or not a state had a republican form of government on the ground that it was a political question.³³

AN APPRAISAL

Private and criminal law

An appraisal of the federal court system and the work of the federal judges is difficult because it involves judgments based upon so many intangible and imponderable factors. A few general remarks, however, seem worth while.

In the field of private law and criminal law the federal judiciary has done a reasonably creditable job. On the whole its work ranks above that of the courts of the various states. It would be surprising indeed if this were not the case. In picking federal judges the President has a larger area from which to select than does the chief executive of a state. Also, judges are selected for life, and this in itself is an inducement to a member of the legal profession to accept a federal appointment. The prestige of the federal courts has been such as to make almost any lawyer feel highly honored at selection to a position on the federal bench.

Public law

In the field of public law one cannot bestow upon the federal judges the same degree of commendation. It is true that their record here is still probably superior to that of the state courts. The explanation of their shortcomings in the field of public law lies in part in the legal background and training given to lawyers in this country. They have received most of their training in private law—torts, contracts, equity, real property, and other subjects which prepare them as effective practitioners in private law. Until a comparatively recent date, they have been given little training in such subjects as administrative law, government control of business, public utilities, and other areas of the rapidly expanding field of public law. Until recently, likewise, their

1. Train- ing of judges

³³ *Pac. States T. and T. Co. v. Oregon*, 223 U.S. 118 (1912).

education in the social sciences—economics, political science, and sociology—has been inadequate. The results of this deficiency are found in the decisions of the courts on public law questions, which have arisen in increasing numbers in the cases brought before them. At least two weaknesses have been apparent. One is a lack of understanding of the whole field of public law. Another, among older judges at least, has been a lack of sympathy with programs of social and economic regulation and control. Striking examples of this have occurred from time to time in the past fifty years. The federal judiciary during the latter part of the nineteenth century and the earlier part of the twentieth practically wrecked the regulatory program of the Interstate Commerce Commission, in part because they lacked sympathy with the economic and social philosophy underlying the program, in part because they did not understand the principles of administrative law. In the same way for many years the federal courts practically sabotaged the work of the Federal Trade Commission in seeking to prevent unfair methods of competition under the Federal Trade Commission Act. In recent years the federal courts have shown more sympathy with programs of control and a wider understanding of administrative law, with the result that they have tended to interfere less with the findings of administrative agencies.

In at least two fields there would seem to be justification for greater vigilance by the courts over the actions of administrative officials. One of these is the area of so-called civil rights. In this area arbitrary action is not uncommon and may easily be injurious to the persons against whom it is exercised, especially since these are frequently persons who do not know their rights and cannot readily defend them, even though they realize that they are being infringed. Many illustrations come to mind where abuses might easily take place, such as the actions of draft boards in applying a selective service law, or the decisions of the Attorney General designating certain organizations as subversive and applying the penalties which follow, or the removal of persons from certain territory in time of war by the military. Courts

2. Control of administration

should be solicitous to protect the victims of arbitrary administrative action in this field.

3. Need for court review

Another area involves actions of governmental officials engaged in the administration of government-owned and -operated enterprises. The size of some of these, their monopolistic control, and the harm which may be done to small private operators seem to call for a careful system of review of administrative decisions. A good illustration is to be found in the case of the power of the Postmaster General to withhold second-class mailing privileges. Because of the monopolistic control over and the importance of the privilege, irreparable damage can be done to persons by the arbitrary exercise of this power on the part of postal authorities. Courts should have power to review and should review carefully administrative decisions in the area of government-owned and -operated enterprises.

Statutory provisions commonly give the courts authority to determine whether or not decisions of administrative agents are arbitrary, unlawful, manifestly against the weight of evidence, or beyond the jurisdiction of an agent or agency. Perhaps this is inadequate as a basis for review of decisions in the area of civil rights or in that of government-owned and -operated enterprises. If this criterion is used, a most careful review is called for of administrative decisions in these areas.

Constitutional law

In the field of constitutional law, the record of the federal judiciary has paralleled its policy on administrative law. For years the federal courts prevented adequate programs of state control of business through their interpretation of the due process clause of the Fourteenth Amendment and other provisions of the constitution. Recently the courts have shown a more enlightened attitude toward some of the pressing problems of the day and have upheld state control of business and other areas of social control. Also, the courts have lately shown a commendable willingness to strike down obnoxious regulations that have tended to interfere with freedom of speech, press, and assembly.

On the question of personal integrity, there has been little to criticize in the conduct of federal judges. Few indeed have been

the charges of misconduct brought against even the lower court judges. A few lower court judges have been impeached and found guilty and removed from office under the constitutional provisions. No judge of the Supreme Court has ever been impeached.

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CHAPTER 14

INTERGOVERNMENTAL RELATIONS

**National-State Relations Constitutionally Prescribed
—Indirect National-State Relations—Dual Federal-
ism—Compensatory and Reciprocal Legislation—
Federal Grants to States—Federal-Local Relation-
ships—Extra-Legal Relationships**

Levels of govern- ment

The government of the United States is federal in form; hence there are, as a minimum, a national government and as many state governments as there are states in the Union. In thinking of American government in the abstract, one thinks only of these minimum units with each unit fitted into its own compartment according to the general distribution of powers. When, however, one considers the day-by-day functioning of government in bringing myriads of services to people, one must not overlook the subdivisions within the states, which carry the units of government beyond the above-stated minimum. The constitution may take no account of counties and cities, but in the administration of criminal laws, for example, the relationship between the Federal Bureau of Investigation and county or city law enforcement officers may be a very close and very practical one.

Plan of treatment

The relation of governments and governmental units with each other is an important aspect of government. Our relations with countries outside the territorial jurisdiction of the United States have been treated earlier. In this chapter we will consider the relationships of the units within our own domain, particularly as they involve the national government and its functions. Primary attention will be given to those situations which involve the national government as a major participant, but some atten-

tion will be given to activities between units in which the national government is concerned only indirectly or secondarily.

NATIONAL-STATE RELATIONS CONSTITUTIONALLY PRESCRIBED

Congress may admit new states into the Union, but no part of the territory of a state can be taken in the formation of a new state without the consent of the state legislature as well as of Congress. Thus, the federal government guarantees the territorial integrity of the states. Beyond these constitutional restrictions Congress is free to set up its own standards and procedural requirements for the admission of new states. Once admitted, however, a state is on a basis of legal equality with other states and may disregard any restrictions placed on it as the price of admission except those of a financial or contractual nature, as for example a stipulation forbidding the taxation of land for five years after it has been transferred from the federal government to private owners. A state in the Union could enter into such an agreement and be required to respect it; hence it is not considered unreasonable to expect a territory to honor such agreements after it becomes a state.

Admission of states

Typically, a state comes into existence by admission from organized territory of the United States, i.e., territory to which some measure of self-government has been given. There were thirteen "original" states which simply ratified the constitution to become states in the Union. Five states were formed by taking territory from other states; one, Texas, was an independent republic before its admission; and California was formed from unorganized territory of the United States. The steps in the admission of states from organized territory are usually three. First, the territorial legislature *petitions* Congress for admission. Second, if Congress is favorably disposed it passes an *enabling act* authorizing the territorial government to arrange for the preparation and popular ratification of a constitution. The constitution being acceptable, the third step, *admission*, formerly by act of Congress, has recently been accomplished by Presidential proclamation.¹

¹ In such cases Congress has reserved to itself the power to disapprove his action.

National elections Mention was made in another place of the fact that elections for all elective federal offices are conducted by administrative agencies within the state. The federal government contributes nothing toward financing such elections and exercises no administrative supervision over them. Congress, however, has authority to make such changes as it sees fit in state requirements relating to the "times, places and manner of holding elections for Senators and Representatives." In most states the elections for local, state, and federal officers are held at the same time—a time fixed by Congress for holding Congressional elections. There is, as a consequence, little additional expense involved by reason of the fact that federal officers are to be elected.

Guarantees to states The constitution makes it the obligation of the national government to protect the states against invasion and domestic violence and to guarantee to each a republican form of government.² Actually these guarantees have given rise to relatively few occasions for action. States have now and again requested aid in keeping order, and on other occasions they have protested when federal agencies stepped in to protect national interests. "Republican form of government" has never been defined. This is a political question to be decided by Congress. To date, the guarantee has been enforced on the part of Congress by seating or refusing to seat members of the House and Senate from a state. Southern states after the Civil War were allowed to have their Representatives and Senators seated only after they had agreed to conditions imposed by Congress which presumably would make their governments republican in form.

Interstate relations The framers of the United States constitution were careful to vest the control of foreign affairs in the national government. Even the relations of states to each other are partially subject to federal supervision. For example, the states are forbidden to make treaties or enter into confederations; and compacts or agreements among states or between a state and a foreign power can be entered into only with the consent of Congress.³ Com-

² Art. IV, sec. 4.

³ Art. I, sec. 10.

pacts and agreements coming within this limitation are those of a political nature. An agreement changing a boundary between two states would require the consent of Congress, as would a compact among states agreeing to regulate and control the pollution of a river common to all states in the group. On the other hand, two states may agree to let motor vehicles licensed by one state pass through the other without a second license, and such an agreement does not require the consent of Congress. Agreements of the latter type do not limit state authority. They can be revoked at any time by the states making them.

The consent of Congress to an agreement between states may be given by implication. Two states, for example, might agree to change a boundary so that a city in one would be transferred to the other. This would require the consent of Congress; but if no direct act of approval were given at the time, and Congress subsequently passed a law or resolution in which reference was made to the city as being located in the state to which it was transferred, the consent would be implied. Congress may give its positive or direct consent before or after a compact is made. Several years ago, Congress passed a resolution consenting to a compact among the states in the Ohio River Valley to regulate the pollution of the Ohio River. The necessary number of states ratified it and it became effective in 1948. Normally, the consent of Congress is given after the agreement is reached by the states.

INDIRECT NATIONAL-STATE RELATIONS

The constitution sets out certain obligations of states to each other. In international relations, similar obligations may be covered by what is called the comity of nations. In at least three areas—interstate rendition of fugitives from justice, interstate privileges of citizenship, and recognition of legal acts and processes—the constitution has made it a definite legal duty of states of the Union to act reciprocally with each other. Ours being a federal system, it becomes the duty of the national government to settle disputes arising out of the application of these provisions.

Duties
of states

1. Inter-state rendition

According to Article IV, if a fugitive from justice in one state is found in another state and is demanded by the state from which he fled, he shall "be delivered up." One state, of course, cannot enforce its will against another state even in carrying out a provision of the constitution. Hence the enforcement of this provision is the responsibility of the national government. Congress has enacted legislation setting out the manner in which demands are to be made and the surrender of fugitives effected. On the whole the system has worked splendidly. Disputes have arisen, and several cases have reached the Supreme Court of the United States for final adjudication. The federal government will not attempt to compel a state to deliver up a fugitive if the governor of such state chooses not to do it. On the other hand, if one is brought back into a state through deceit or illegal processes he cannot compel the captor state to release him for these reasons. In this respect interstate rendition differs from international extradition.

2. Privileges and immunities

People of the United States travel or move from one state to another. This was anticipated by the framers of the constitution. They did not wish to have states discriminating against citizens of other states. Article IV provides that: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Here again the injunction is against states, but the burden of enforcement is on the national government. It has devolved upon the Supreme Court of the United States to say when an act of a state is in violation of this provision. Absolute uniformity of treatment is not required. A person from New York, for example, cannot demand admission to a state college or university in Montana on the same basis as citizens of Montana. Neither can a person expect the privilege of voting to be extended to him the day he takes up residence within a state. A state may favor its own citizens in granting hunting and fishing licenses, in welfare and relief, and in many other matters. Even with the allowable distinctions, the people in one state are in no sense considered "foreign" when they journey to or move into another state. By and large, we all consider ourselves first of

all citizens of the United States. The state of residence is in this sense of secondary importance.

The constitution requires that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."⁴ Here again the direct relationships are state to state, but in case of violation the federal government must enforce the requirement. It should be pointed out that this provision applies only in civil, and not criminal, procedure. The federal government has never undertaken to see that this provision of the constitution is carried out except through the judiciary. When a matter is justiciable, that is, when a person can bring the issue into court, the federal courts may decide that a state must give "full faith and credit" where it has been denied. One of the most common, or at least most notorious, fields of civil law which become involved with this constitutional provision is that of marriage and divorce. A marriage ceremony and record and a divorce decree are both matters which come within the "full faith and credit" requirement. State laws vary, and may be in direct conflict, on these subjects. The fact is, however, that a marriage ceremony properly performed in one state must be recognized in a second state, even though such a marriage would be in violation of the law of the second state if performed there. A will made in one state might not be legal if made in a second state but if probated in the second state its terms must be followed.

3. Full
faith and
credit

DUAL FEDERALISM

As we have seen, the power of the national government is limited in two ways. Congress before legislating must find some delegated power authorizing the legislation; moreover, the statute must not conflict with the prohibitions placed on national action by the constitution. One of these prohibitions is of particular importance here; it is a limitation on the power of the national government which results from the existence of the states. To the idea that the federal structure which includes the states

Limits
on U.S.

⁴ Art. IV, sec. 1.

as partners with the national government impliedly limits the power of the national government, Professor Corwin has given the name "dual federalism."⁵

State im-
munity
from
taxes

Just as the Supreme Court has held that the states cannot tax the national government, so it has also held that the national government cannot tax the essential functions of the states. The Court has said that to permit such taxation would threaten the independence of the states.⁶ At one period, the Court also held that federal legislation directed at private persons might collide with the constitutional rights of the states. In *Hammer v. Dagenhart*⁷ in 1918 the Court declared invalid a federal statute forbidding the interstate shipment of goods made by child labor on the ground that the right to prohibit child labor was reserved to the states by the Tenth Amendment. An attempt to suppress the employment of child labor through the national taxing power was stricken down for the same reason.⁸ In *United States v. Butler*⁹ the Court held that the regulation of agriculture was a state concern. The idea that the Tenth Amendment limits the powers of Congress is erroneous, for that amendment defines as powers belonging to the states only those not previously assigned to the national government and not prohibited to the states. The scope of the delegated powers of Congress cannot be determined by inquiring into the reserved or residual powers of the states, for they themselves cannot be defined until the extent of the delegated powers is first determined. More recently, the Court has entirely abandoned the idea that the Tenth Amendment limits national power.¹⁰

Other
decisions

Reversal
of trend

As a consequence of this reversal of attitude on the part of the Court, it has been held that the national war powers may control state action, so that a state is bound to observe price ceilings

⁵ Edward S. Corwin, *The Twilight of the Supreme Court* (Yale University Press, New Haven, 1934).

⁶ For a fuller discussion see pp. 416-417.

⁷ 247 U.S. 251.

⁸ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

⁹ 297 U.S. 1 (1936).

¹⁰ *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

fixed by the national government.¹¹ Similarly, the national government may take state property by the exercise of eminent domain.¹² These holdings are applications of the supremacy clause of Article VI of the constitution, which in case of collision between national and state action makes the national action "the supreme law of the land." As a result of recent decisions, almost nothing survives of dual federalism except a fairly narrow state immunity from national taxation.¹³

COMPENSATORY AND RECIPROCAL LEGISLATION

The federal government has by law granted to states certain powers, or immunities from some statutory or constitutional provisions, which have increased the scope of action of the states. Some of the grants may be designed to bring about more or less uniform policies among all the states whereas others would avoid unequal burdens as between private persons or groups regulated under federal and state laws.

One of the earliest and best-known examples of a power conferred by the federal government upon the states was the permission to tax national banks.*Under the rule of *McCulloch v. Maryland*,¹⁴ decided in 1819, the states were forbidden to tax national banks. The National Bank Act of 1864, however, specifically conferred upon the states and territories the power to tax national bank shares as personal property at a rate not greater than that imposed upon "other moneyed capital" in any state or territory and to tax the real estate of such banks. This basic principle has been continued in later amendments and revisions of the original statute, and is contained in Section 5219 of the *Revised Statutes of the United States*. Students of public finance commonly refer to the principle simply as "Section 5219."

Taxation

Credit up to 80 percent of the amount of federal estate taxes

¹¹ *Chase v. Bowles*, 327 U.S. 92 (1946).

¹² *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

¹³ See David Fellman, "Federalism," *American Political Science Review*, xli, 1142 (1947).

¹⁴ 4 Wheat. 316 (1819). See pp. 27-28, 240.

is allowed taxpayers for any state inheritance or estate taxes paid. Under this provision a state may levy an inheritance or estate tax up to this percentage of the federal tax and, except for the double filing, the tax will be painless in its application to taxpayers. The state in such a case is the beneficiary and the federal government is the loser.

Under the social security law, employers are given credit up to 90 percent of the federal unemployment compensation tax for any state unemployment compensation tax paid. The state, however, must operate an unemployment compensation system which meets federal standards, and the money collected is deposited to the state's account in the federal treasury, to be used only for paying benefits under the program. The federal government justifies its retention of 10 percent of the receipts from the unemployment compensation taxes on the ground that it underwrites the administrative costs of the system. Grants are made to the states for this purpose.

**Interstate
com-
merce**

Outside the field of finance, federal legislation of this type was passed to help states that had laws restricting or forbidding traffic in intoxicating beverages. In 1890 Congress passed the Wilson Act, which permitted states to exercise control over the importation and sale of intoxicating beverages through interstate commerce. In other words, it was a relaxation of the constitutional restrictions on such action by states. Later, the Webb-Kenyon Act (1913) as amended sought to give further aid to the prohibition states by providing federal penalties for actions in violation of state laws regulating the importation of intoxicating liquor.

**1. In alco-
hol**

**2. In
prison-
made
goods**

At least three significant federal statutes have been enacted regarding the shipment of prison-made goods in interstate commerce. One act forbade the shipment of prison-made goods in interstate commerce in violation of state laws. In another attempt to help states regulate this matter, Congress enacted a law divesting prison-made goods of their interstate character when shipped in interstate commerce, thus allowing states to regulate them as intrastate commerce. Finally, the shipment of such

goods in interstate commerce was forbidden, with certain specific exceptions.

The federal government may incorporate state statutory regulations in its own statutes, as was the case with corrupt practice legislation. Likewise, states may adopt in their own statutes legislative or administrative rules of the federal government, as was done by some states in the case of federal price and rent maxima during World War II.

These are by no means all the examples that could be cited, but they will suffice to show the significance of this area of federal-state relations.

Reciprocal adoption of laws

FEDERAL GRANTS TO STATES

The authority of the federal government over states is limited by the constitution. In certain areas of government the powers of states have always been considered independent or supreme. The matter of public education, for example, has generally been considered the exclusive province of the states. Even in this area, however, the national government began to lend aid before the present constitution was adopted. Under the Articles of Confederation provision was made for granting lands in the old Northwest Territory to the states for the support of public education. This practice was extended to other United States territories. Generally one section of land (or later, two) in each township of thirty-six sections was reserved against private entry or purchase and given to the state in which it was located for the use of public schools. Grants were also made for the support of higher education. In the early years these lands commanded very low prices. States that converted them into money and used the money for operating expenses of schools soon used up this patrimony. Some states sold the lands and placed the proceeds in trust funds. The interest from the funds was then used to support schools. Other states provided for long-time leasing of the lands, with the title remaining in the state. Where lands have later proved to be very valuable, this method has been a boon to education. On the whole, and with certain notable exceptions,

Early examples

the land-grant policy for the support of schools was not very successful.

**Morrill
Act**

In 1862 a new era in federal grants began. Up to this time grants had been made as outright gifts, and generally without restrictive provisions except as to the nature of the use of the grants. In 1862 Congress enacted the Morrill Act, under which a grant of land was made to each state for the support of a college or university, and provision was later made for granting money for operating expenses. A new feature, however, was that the federal government placed certain qualifying conditions on the grants. If a college or university was to receive grants it had to provide that agriculture and the mechanic arts should constitute regular parts of its curriculum.¹⁵

Every state in the Union has benefited from the Morrill Act. Some of the outstanding colleges and universities of the country are land-grant institutions. Rutgers, Pennsylvania State, Purdue, the University of Illinois, Iowa State College, and the University of California are examples. The coöperation between the federal and state governments did not cease with the establishment of these colleges and universities. The two levels of government have found that these institutions can furnish leadership in federal-state agricultural extension programs. These will be discussed in more detail in another chapter.¹⁶

**Profes-
sional
training**

Military science and tactics is a part of the curriculum of all land-grant colleges and universities. Other educational institutions, including academies and high schools, have accepted grants from the federal government in return for which military science and tactics is taught. In all of the institutions in which grants of money are made to support military science and tactics, the federal government also furnishes certain equipment, and the instructional staff is from the military services personnel. A large portion of the officer personnel in the military services during World War II consisted of persons who had received their reserve commissions in the federally subsidized institutions.

¹⁵ 12 *Statutes at Large* 503, 1862.

¹⁶ See pp. 478-479.

In the fields of agriculture and engineering, the land-grant colleges play a major role in training personnel, in research, and in disseminating information. In each of nearly 3000 counties in the United States there is a corps of professional workers engaged in the extension of agricultural information and assistance to farmers and their families. Practically all these people were trained in land-grant colleges. The percentage of those engaged in engineering pursuits who were trained in land-grant colleges, though substantial, is not nearly so large.

Around the turn of the century new features were added to the federal aid system. As has been seen, the early grants were practically outright gifts. The state had to put up nothing, and there were few restrictions on and no administrative supervision over the use of the money or property granted. Today, however, the term "grant-in-aid" ordinarily suggests the grant of money to a state for a specific purpose on condition that the state will put up an equal sum, will conform to federal rules, regulations, specifications in the expenditure of the money, and will submit to a certain degree of federal supervision in carrying out the purpose for which the grant is made. Although the matching principle seems well established, there have been since 1930 notable exceptions to it, and a further tendency away from it seems likely. It is argued by some that the poorer states, which most need federal assistance, can ill afford to match grants. States also complain of the federal regulation and supervision of expenditures. The federal government, however, is not likely to give the money without strings attached. It is as much interested in seeing that specific services are performed as it is in helping poorer states bear their financial burdens. Back of all modern federal grants to states is the conviction on the part of federal policy makers that there is a need for the accomplishment of certain public service activities in states on a national scale. The federal government may not have been given the authority to accomplish them directly, but it can "encourage" the states to act,¹⁷

Grants-in-aid

¹⁷ *Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447 (1923).

and the inducement of federal funds usually proves irresistible.

1. For
highways

One of the early and best-known examples of grants-in-aid is that in connection with highways. The advent of the automobile made improved highways a practical necessity. People wanted not merely good roads in the states but also coördination of these state highways. Only a national agency could bring it about. In 1916 Congress passed a law providing for grants of money to states on a matching basis and appropriated \$25,000,000 for coöperating in constructing "rural post roads." The Bureau of Public Roads, for the federal government, and state highway departments, for the states, were to be the expending agencies. At first only principal highways were eligible for federal aid. The purpose was to establish a system of national trunk highways. Relatively small amounts were appropriated annually by the federal government during each of the early years; this was in contrast to a half-billion appropriated in 1944 for each of three postwar years. Secondary or feeder roads have been for some time eligible for federal aid. Even those who are opposed to grants-in-aid in principle admit that federal coördination of highway planning and construction has been advantageous.

2. For
education

The so-called Smith-Hughes Act of 1917 introduced federal aid for vocational education in agriculture, trade, industry, and home economics. The money was granted to states on the fifty-fifty pattern, and a state agency administered it to the local teaching units. By and large, the teachers of the vocational subjects are required to meet training standards and receive salaries according to schedules fixed by federal agencies.

3. For
other
services

Grants were made for the state militia establishments, or the National Guard as they became known, and for forestry work, agricultural extension services, public health services, and other activities before 1930. There was a great expansion in the volume of grants and number of services for which grants were made after 1933. Social security, public works in addition to highways, and unemployment compensation were new services supported. One tabulation shows that in the period 1934-1946 over

\$35,000,000,000 in federal grants-in-aid was distributed.¹⁸ This, of course, was not a typical period, but the tempo of grants has been stepped up so that it may not seem out of line with similar periods in the future.

The end of federal grants-in-aid is not in sight. There may be times when they decline, but there are sound reasons why and definite indications that the practice will in the long run increase rather than decrease. In 1947 the Indiana General Assembly passed a resolution asking the federal government to discontinue the practice of giving "handouts" to states. At the same session, however, it passed an act giving blanket authorization to any agency of the state, and to all local governments in the state, to accept any and all "handouts" offered by the federal government.

Future of
grants

FEDERAL-LOCAL RELATIONSHIPS

The government of the United States was in its establishment to be a union of states with a national government having power to deal with states and with the people directly. A person living in a state is a subject of both state and federal governments. The situation with respect to local units of government was for a long time viewed differently. The township, town, county, school district, and other units of local government have been construed to be subordinate units or arms of the state governments. As a consequence, the federal government before 1933 dealt with local units through the states in matters of finance, although there were many formal and informal relationships between them regarding other matters. It is still considered good practice, as well as good law, for the federal government to obtain state authorization before dealing with local units. In 1934 when the federal government enacted a municipal bankruptcy law, it was declared unconstitutional because it by-passed the states in this federal-city relationship.¹⁹ Congress promptly re-enacted the law with the constitutional defects removed.

National-
local
relations

¹⁸ Senate Document No. 13, 80th Congress, 1st session.

¹⁹ *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513 (1936).

**Indirect
financial
aid**

Of course, local units of government benefit from aids which the federal government renders through states to the people generally. The Home Owners' Loan Corporation, created in 1933, saved many homes, especially in urban areas, from foreclosure, kept them on the tax lists, and in many cases promoted the collection of delinquent taxes. This was of considerable aid to cities and towns. Loans to farmers had a similar effect on rural units of government. Grants to states for highways, public health, education, agricultural extension, and many other activities have helped local units of government. It was not until after 1930, however, that the federal government began to deal directly with cities in the matter of financial aid.

Loans

The Reconstruction Finance Corporation made loans to cities and other local units in financial distress. At first an effort was made to follow through on the traditional practices of state authorization before dealings were made directly with cities. As conditions became more critical in cities, the federal government rendered the aid first and asked questions later.

Relief

Soon after President Franklin D. Roosevelt came into office there was established a Civil Works Administration under which unemployed people were given small amounts of money each week but were required to do some sort of work for a public agency for a few hours each week. An attempt was made to follow the traditional pattern of dealing with local units through states, but in the case of New York City, at least, the situation was so critical that the state was entirely ignored. A feature of this program was that it was financed entirely by the federal government. States and local units were not required to put up any funds at all. They were, however, expected to find something for the needy recipients to work at, so our jobless citizens would not be stigmatized as being on an un-American dole.

**Public
works**

The general relief under CWA gave way to two programs of organized work relief, namely, the Public Works Administration (PWA) and the Works Progress (later Works Projects) Administration (WPA). In both of these the federal government dealt directly with the local units of government. Under

PWA it gave 45 percent and lent 55 percent of the cost of various kinds of self-liquidating public works undertaken by state or local agencies. There were certain rules relative to the employment of persons on unemployment lists in effect for both plans, since they were designed primarily to take able-bodied employable persons off the relief rolls. On WPA projects the local or state unit was required to pay only for the materials for approved projects, and the federal government paid for all labor and supervision. Under this plan there were projects in which close to 100 percent of the entire cost was paid by the federal government—those in which materials constituted only a small proportion of total costs.

At the peak of the two programs more than 4,000,000 persons were employed directly on projects coming under one or the other. It would probably be difficult to find a local unit of government that did not participate in at least one of the two programs. Courthouses, jails, waterworks, school buildings, sewerage systems, sewage treatment plants, streets, parks, gymnasiums, city halls—these are a few of the many kinds of public works that were carried on under PWA or WPA.

Another field in which the federal government has in recent years dealt directly with local governments is that of public housing. Cities having housing authorities were permitted to borrow money from the federal Public Housing Authority on very advantageous terms. During the war, and also during reconversion, cities and other units of government were given special assistance in the form of priorities, grants, etc., in providing for emergency housing. Since the war cities have been given the opportunity to secure housing units for veterans.

Public
housing

Closely related to the reconversion housing program is the permission given cities to purchase surplus property from the federal government. In this, the local governmental units receive certain advantages whether they buy directly or through state agencies.

Different units in the federal government offer assistance to local units of government, either free or for fixed fees. The De-

Other
services

partment of Commerce in the twenties rendered a valuable service to cities and towns by preparing and distributing a model zoning enabling act, a uniform vehicle code, and a model traffic ordinance. The Bureau of Standards in the Department of Commerce has compiled the *United States Government Master Specifications* and the *National Directory of Commodity Specifications*. Any purchasing agent would do well to secure these specifications. The Bureau of Standards will test materials and supplies for cities for a small fee. Most cities cannot afford competent bureaus of measurement and testing, and many of them have come to rely on the federal agencies. The Bureau of Mines renders service in the fields of fire protection, gas explosions, and smoke abatement. Even the Department of Agriculture may help cities through the work of its Bureau of Chemistry and Soils.

Coöpera- tion

Another type of service might be called coöperative services with local units. A good example is the service rendered by the Federal Bureau of Investigation to cities and other local units, and also to the states. The Bureau collects crime statistics, calling on local units for assistance and coöperation. Likewise it maintains a file of personal criminal records and fingerprints. Local and state police agencies can, of course, contribute greatly to the value of these files by furnishing information. In return the F.B.I. supplies information to police officers in any part of the country. A fingerprint can be sent to the Bureau and in a short time the sender will be given the name of the person involved, if it is matched in the files. The crime laboratory of the Bureau is one of the best. Criminal laboratory tests are made in it for law enforcement officers in any locality.

Another feature of the F.B.I. service is that of training state and local police. The Bureau conducts schools in its headquarters to which police departments are asked to send students; it also sends members of its staff out to talk to or teach police in local police schools. Police officers in an area of a few counties or in a large city will be invited. At such a school a local policeman may learn how to preserve evidence for test purposes and

how to send material for analysis to the F.B.I. laboratory. No doubt many a criminal escapes because an untrained policeman unwittingly destroys the best clues and evidence.

In actual police operations the federal officers often work with state and local officers. A state or local policeman would not hesitate, for example, to take a person into custody and hold him pending the arrival of a federal officer. In the same way, federal officers coöperate with local police officials in the apprehension of criminals.

The federal government has long made use of local prisons or jails for some of its alleged or convicted criminals. As a rule this is done on a contractual basis. Approved local prisons are designated by the federal Bureau of Prisons in the Department of Justice. To be acceptable to the federal government for keeping prisoners, a prison must pass inspection by the Bureau of Prisons. As an incident to this, the people of counties and cities have a basis of comparison for their local jails and prisons, since jails must maintain definite and high standards in order to remain on the federally approved list.

The examples given of the relations of federal and local governments through coöperative and reciprocal services are by no means exhaustive. They are simply illustrative of many such relations. Fifty years ago a typical county in the United States had little contact with the federal government. There were postal employees, to be sure; occasionally a rumor might indicate that a revenue officer was in the vicinity; and every ten years census takers made their appearance. In metropolitan counties, of course, federal tax or customs officers and federal courts might be found, but these were not typical. A few years ago a well-known organization selected five "typical" United States counties for intensive study. The study was directed particularly toward throwing light on the intergovernmental relationships, federal, state, city, county, and district. Henry County, Indiana, was one of the counties selected for study. From a report on Henry County it is evident that "federal men" are no longer strangers at the lowest level of government. In the county it was

Extent
of
contacts

found that 106 different federal agencies transacted governmental business with the citizens of the county. Most of these operate independently of local or state governments from a purely legal standpoint, but quite naturally there is on a personal or unofficial basis a considerable degree of interplay among the personnel of the different levels of government.

EXTRA-LEGAL RELATIONSHIPS

Let us now consider the federal-state and federal-local relationships which are not prescribed by law or regulations. Although extra-legal, they are nevertheless very real and contribute to the smooth functioning of the complicated governmental system under which we live. There are many areas in which conflict and confusion would be the rule unless those representing the different units of government worked together in the instances which laws cannot foresee or provide for.

Law enforce- ment

It was pointed out above that the federal government renders distinct and direct services to local government in the area of law enforcement. Law enforcement officers of all levels of government find many ways of being helpful to each other. If a person is charged by the federal government with a crime he may be taken immediately, even if he is already being tried on another charge by a state. In other words, the authority of the federal government is paramount. Nevertheless, there is seldom any conflict between federal and state or local police officers over persons charged with both federal and state crimes. Convenience and common sense rather than technical legal rights are applied.

Mutual respect

A police official at one level could take the view that capturing a person charged with crime by the government at another level is not his business, and could refuse to render assistance. This, unfortunately, is the attitude that too many private individuals take toward law enforcement, but police officials generally view it otherwise. They are mutually helpful in the apprehension of criminals. An F.B.I. agent may inform a state policeman that a man in the latter's vicinity is wanted on a fed-

eral charge and is about to escape before the federal agent can get to the vicinity. The state officer will detain the suspect until the federal officer arrives. The system works reciprocally. The federal agents are often called upon for assistance by local authorities, especially if a person is likely to escape across a state boundary.

When a federal officer is acting in line of duty and under order of a superior he is not subject to arrest even though he violates state or local criminal laws. A person driving a military vehicle or mail truck, for example, could ignore traffic regulations in a city if ordered to do so by a superior officer. If this were common practice, traffic accidents would be more numerous than they are at present. The fact is that federal officials and employees do quite generally respect state or local regulations.

Anyone familiar with life in a city or town in or near which was located a large military establishment during World War II realizes in some degree the extent to which federal officers, civilian and military, and state and local officers worked together in the matter of law enforcement. It was not uncommon for military officials to demand passage of regulatory ordinances or better enforcement of those on the books. If a camp commander threatened to boycott local milk suppliers unless a Grade A milk ordinance was enacted and enforced, the city usually responded favorably. On the whole, however, such methods of compulsion were not necessary.

Military
and
civil

For their public uses the federal and state or local governments may take property through regular legal channels. Here again the federal government is paramount. It may take whatever property is essential to its functioning. There is seldom a dispute over this, yet the federal government has taken millions of acres for one purpose or another, and in many cases lands on which local public buildings were located. Here again the human factor enters. The cold letter of the law favors the federal government, but the taking of property for public uses is coördinated much as if there were only one governing agency over the territorial domain.

Eminent
domain

Information

A chief source of governmental data is the Census Bureau in the Department of Commerce. From the reports of this office one can get data regarding local and state governments throughout the nation. The information is furnished voluntarily by the various state and local officials. If the officials were not willing to cooperate it would mean that we would have no central source of data for the entire country.

In many other ways the various units of government cooperate in supplying information through regular or special reports. Some types of information are considered confidential and will not be released even to another governmental unit. Federal income tax returns, for example, are open for inspection only upon a direct application of the governor of a state and then only to the person, or persons, designated in the letter of application. The Bureau of Internal Revenue will furnish information on income collections in a particular state, even though special tabulations of the data may be necessary. Such tabulations must not divulge information in such a way that any taxpayer's return can be identified. For example, if a state has only one taxpayer in a given category, tax information will not be published regarding such category.

Thus in many ways the federal government carries on relations with the states and the units within the states. In the future we are likely to see an extension of this practice and a larger number of direct relations between the federal and local governments. Though legally or technically distinct and more or less independent in their respective spheres, the individuals personifying the various governments in action normally work together without serious friction.

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PART III.

THE ADMINISTRATIVE PROCESS

FOREWORD

Functional analyses and structural analyses never agree perfectly. In Part II we examined the political branch of the government, which formulates policies, and we come now to the administrative branch, which executes them. But the President is at once a member of the political branch and the chief of the administration; his duties embrace both the formulation and the execution of policy. Furthermore, it is in part as the head of the administration that he takes the initiative in the political process. We recognize this fact when we speak of "the administration" and "administration measures"; to a considerable degree, legislative leadership is supplied by the executive.

It is not even the case that the policies which are formulated in the administrative branch are all routed through the political branch. Congress has made numerous and extensive delegations of quasi-legislative power to administrative officers and agencies. Other officers have been given such wide discretion that we call them "policy-forming officers," and Congress has recognized their political character by exempting them from the operation of the Hatch Act.¹ Although we can distinguish verbally between politics and administration, the institutional structure and governmental processes do not reflect this distinction with perfect fidelity.

In the following chapters the term "administration" refers to the structural organs which are primarily engaged in applying the policies formulated by the political branch, but it also includes all the activities of those organs, even when they partake of a political character.

¹ See p. 351.

CHAPTER 15

THE HISTORY OF ADMINISTRATION

**Introduction—The Courts—The Departments—The
Commissions—Governmental Reorganization—The
Agencies**

INTRODUCTION

A description of the administrative process requires the discussion of three topics: the governmental agencies which carry on the administration; the techniques by which they operate; and the tasks which they perform. Each of these is a large and intricate subject; and no one of them can be understood without some knowledge of the other two. It is therefore necessary, before taking up the single topics, to supply an over-all view of the entire process. Such an account will necessarily be superficial, and inadequate for any purpose except that for which it is designed. It is hoped, however, that it will supply a background which will enable the student to understand the discussion of the administrative structure in Chapter 16, and that of administrative techniques in Chapter 17. Most of Part IV of this book is given up to the third subject, the tasks which the administration performs.

This survey most appropriately takes the form of a historical account of the creation of governmental agencies, of the emergence of new techniques of administration, and of the adoption of new governmental objectives to be achieved by the administration. Any running account which attempts to weave all these things into a single narrative must be guilty of oversimplification; but omissions can be corrected and qualifications introduced at a later date. The following elementary statement of

the history of administration opens the door to a systematic analysis of the administrative process.

THE COURTS

Shifting
responsi-
bility

In the earlier days of the Republic, primary reliance for the execution of the law was placed on the courts. The administration of the criminal law had traditionally belonged to the courts, and as a result of the constitutional prohibitions contained in the bill of attainder clause and the Fifth and Sixth amendments it must remain there. Much of the administration of the civil law was left to the courts. The burden was put upon the individual litigant aggrieved by a violation of law to take the initiative in securing enforcement. In a simple society, where the interests with which the law concerned itself were primarily those of identifiable individuals, this was not an ineffective method of administration. But in the course of the nineteenth century the character of the society changed, and the interests which government wished to protect broadened. For many reasons it became necessary for government to take the initiative in law enforcement. In part this was done by an extension of the criminal law, as in the anti-trust laws. Here the courts continued to be responsible for the administration of law. More and more, however, government undertook activities for which judicial administration was inappropriate, and the executive branch of the government grew correspondingly.

Separation
of
functions

Traditionally, the English and American courts had had executive as well as judicial functions. The English justices of the peace had fixed wages and prices and issued licenses, and similar duties fell to local courts in colonial America. The courts of the United States, however, took the position that under the constitution they could not undertake non-judicial duties.¹ When Congress in 1791 passed an act instructing the United States circuit courts to administer pensions for Revolutionary soldiers and their dependents, the Circuit Court for the district of New York refused to do so, on the ground that this was not a judicial func-

¹ See pp. 274-275.

tion.² The courts still refuse to undertake non-judicial functions.

Nevertheless, they have accepted certain administrative tasks which look only remotely judicial. The naturalization procedure, which in no way resembles litigation, has always been under their jurisdiction. The national courts were given responsibility for administering the first national bankruptcy act in 1800, and they still supervise bankruptcy proceedings. To this have been added corporate reorganization and other measures for the relief of debtors.³ In 1928 more than 53,000 bankruptcy cases involving assets of more than \$830,000,000 were settled in the federal courts. And in 1945 approximately 35,000 miles of railroad were being operated under the direction and supervision of the national courts.

Judicial
adminis-
tration

The assumptions that the judicial function of applying the law could be separated sharply from the executive application of the law, that these two functions could be assigned to separate branches of the government, and that neither branch need exercise the function of the other were long accepted as essential to and inherent in democratic government. However, the imperious necessity to get work done may give rise to procedures and institutions which do violence to neat formulas, and so it occurred that the distribution broke down in three directions. A set of agencies, usually called the regulatory commissions, was created, beginning with the Interstate Commerce Commission in 1887. These were primarily concerned with the executive application of the law, but they were also given much work of a decision-making or, as the courts named the activity, quasi-judicial character. In the second place, officials in the executive branch of the government were given the power to make decisions which required a weighing of evidence and which had the same effect on the activities of individuals as court orders. Furthermore, judicial bodies called legislative courts have been created. They are usually engaged in activity judicial in character, but sometimes they are given in addition what the courts called non-judicial functions.

Blending
functions

² Hayburn's Case, 2 Dall. 409 (1791).

³ See pp. 444, 467.

**Customs
Court**

The narrowness of the line between the application of the law by agencies in the executive department of the government and its application by a judicial agency is illustrated by the history of the United States Customs Court. Goods imported into the United States subject to customs duties are examined and described by officials known as appraisers or examiners so that they will be properly valued for tax purposes. The owners of the goods frequently disagree with the valuation placed upon them, and various ways have been provided from time to time for review of such valuations. By the Tariff Act of 1890, three appraisers designated by the Secretary of the Treasury were to act as a board to hear and decide such disagreements. In 1922 the Board of General Appraisers was created. In 1926 the name of this board was changed to the United States Customs Court. Here, by changing the name of an agency, and without substantial changes in its functions, there was created a legislative court, and its members became judges.

THE DEPARTMENTS

The managerial application of the law is in the main the work of the executive branch of the government. Examples of administration are collecting taxes, conducting the relations with other states, taking the census every ten years, maintaining an army and a navy, and operating the postal service.

**Depart-
ment
head**

The function of the head of a department in the early days of the government was quite different from what it is supposed to be now. He had little or no supervisory power over his subordinates.⁴ It is true that the principle was early recognized that the head of the department could remove employees whom he had appointed,⁵ but supervision of subordinates appeared unnecessary, since Congress had taken pains to set forth their duties in detail in the law which they administered. Instructions which heads of departments gave to subordinates were lightly brushed aside, for, said the Supreme Court on one occasion, "any instruc-

⁴ John A. Fairlie, *The National Administration of the United States* (The Macmillan Company, New York, 1941), pp. 61 f.

⁵ *Ex parte Hennen*, 13 Peters 230 (1839).

tions . . . could not change the law or affect" the rights of persons under the law.⁶ The courts were available to hold in check or spur on those subordinate officials who overstepped the limits of their duties or failed to perform them. And in keeping with the political philosophy of the time, the system embodied the assumption that there was more danger from the official who might try to do too much than from one who might do too little. If he failed to do enough, there was the judicial spur of a writ of mandamus. The supervision of subordinate officials below the President was therefore largely a function of the courts and not of superiors in the department.

1. Responsibility to law

This dependence upon the judiciary as headmaster gradually gave way under a century of practice. Today, subordinates in the executive branch of the government are subject to a steady flow of instructions and are constantly guided by positive supervision. The power to remove has been held to be included in the executive power because the possession of removal power will contribute to more effective supervision.⁷ The supervisory relation of higher officials with subordinates has been formalized by giving heads of departments directoral power, the authority to issue rules and regulations which guide their subordinates.

2. Supervisory powers

When the government of the United States began to operate in 1789, there was not a great deal of administrative work to be done. The total number of national civil employees was about 300. For the most part, administrative activity in the executive branch of the government was carried on through a departmental organization. The department is still the typical executive organ, but since 1883 the commission has become increasingly important.

The first department to be established under the constitution was the Department of Foreign Affairs, created by act of Congress on July 27, 1789. Within less than two months its title was changed to the Department of State and its functions were enlarged to include certain domestic activities. As its first name in-

History of departments

1. State

⁶ *Elliot v. Swartwout*, 10 Peters 137, 153 (1836); see also *Tracy and Balestier v. Swartwout*, 10 Peters 80.

⁷ See pp. 196-197.

dicated, it was primarily concerned with the conduct of foreign affairs, communication with American representatives abroad, the conduct of negotiations with foreign states, the protection of American citizens, and the promotion of American interests abroad. When it was given domestic activities on September 15, 1789, it was entrusted with custody of the statutes passed by Congress and the records and seal of the United States. Subsequently, other domestic functions have been conferred on it, such as receiving from the governors of the states the lists of persons chosen by the states to be Presidential electors.

2. Military establishments

The second of the departments to be established was the Department of War, created August 7, 1789. In addition to the responsibility for organizing, training, and maintaining an army, it was also entrusted with the management of the Navy until 1798, when a separate Department of the Navy was created, the fourth department in order of creation. These military departments continued to be independent of each other until by the National Security Act of 1947 they were placed, together with the Air Force, in a new National Military Establishment.

3. Treasury

The third department to be established was the Treasury Department, created on September 2, 1789, to manage national financial affairs. The Secretary of the Treasury was charged with the preparation of plans for the improvement and management of the revenue and the support of the public credit. The public credit in 1789 was a matter of grave concern; the Continental Congress had achieved the unhappy distinction of issuing a paper money the name of which became a synonym for worthlessness in everyday language. The states, too, had become so heavily indebted that there was fear of wholesale repudiation. Consequently, when the First Congress charged the Secretary of the Treasury with the responsibility of formulating plans to support the public credit, it was striking at a pressing issue of the day. A great many functions of a non-fiscal character were later conferred on the Treasury Department, but some of these, like the United States Public Health Service, have been taken away from it. The Treasury Department, then, is primarily concerned with

fiscal matters. Its chief responsibilities are the collection of governmental revenues, the custody and disbursement of funds, and control of the currency of the United States. Control of the currency includes the examination of national banks.

The office of Attorney General was established by the First Congress on September 24, 1789. But it was eighty-one years later, June 22, 1870, that the Department of Justice was created. During the terms of the first Presidents the Attorney General was expected to supplement his salary by private practice, and until 1814 he was not even required to reside in Washington. However, the Attorney General as the legal adviser to the President and to heads of executive departments was a member of the cabinet from the beginning of the cabinet. He performs the function of giving advice in two ways. He may give informal counsel or he may give official opinions. These latter are final and conclusive for public officials in a multitude of cases, since judicial interpretations may not be available to them.⁸ These opinions, published as the *Opinions of the Attorney General*, constitute a body of legal precedents which have authority next to decisions of the courts. In addition to his duties as the legal counselor of the President and the heads of the executive departments, the Attorney General and his subordinates are charged with enforcement responsibilities. These include representing the United States when it is a party to a suit, supervising the United States district attorneys and marshals in the various judicial districts, detecting violations of national law, and supervising national penal institutions.

The office of Postmaster General is much older than the government under the constitution. Benjamin Franklin for approximately forty years was either deputy postmaster or postmaster general of the colonies. The British removed him in 1774, but the Continental Congress continued him in office. At the time of the establishment of the government under the constitution, the Post Office was a part of the Treasury Department. It was not until Jackson became President in 1829 that the Postmaster Gen-

4. Justice

5. Post Office

⁸ 6 *Opinions of the Attorney General* 326.

eral became a member of the cabinet. The Post Office became an executive department in 1872.⁹ The operation of the postal system is the operation of a business—one of the largest in the world, with approximately 370,000 workers, an annual pay roll in excess of \$800,000,000, and an annual income in excess of \$1,000,000,000—and it will therefore be described in the chapter dealing with the national operation of enterprises.¹⁰

6. Interior

The Department of the Interior was created in 1849 by an act of Congress which purported to establish a "Home Department" to advance the domestic interest of the people of the United States. Actually, the Department is a collection of miscellaneous bureaus concerned with unrelated activities, such as the Geological Survey, the Office of Indian Affairs, the Bureau of Mines, and the Petroleum Conservation Division. Because there was not at its creation a central function which could be used as a standard to include and exclude activities, it has served on occasion as a temporary repository for very diverse activities. For example, when the Department of the Interior was established, the Patent Office was transferred from the State Department to it, later to be transferred to the Commerce Department, and the Pension Bureau was transferred to Interior from the War Department and was later taken away and consolidated with other agencies to form an independent establishment, the Veterans Administration, under the President.

7. Agriculture

Agriculture was the first occupational interest to gain a seat in the cabinet; long before this occurred, however, it had been the object of official interest. An agency concerned with agriculture was established in 1862. It was made the eighth executive department in 1889 with a secretary as a member of the cabinet.

The chief function of the agriculture organization from 1862 to 1889 was research. This has continued to be a major function, and indeed the Department of Agriculture is said to be one of the world's greatest research organizations. Coupled with research from the beginning has been the dissemination of knowl-

⁹ 17 *Statutes at Large* 283.

¹⁰ See pp. 495-504.

edge. This has been carried on through the colleges of agriculture and the land-grant colleges, with which the Department has been closely affiliated, and directly through the issuance of pamphlet material. The Department has also much power in the field of regulation, and carries on its own operations on a considerable scale. The regulation of the markets for agricultural produce, assistance in rural rehabilitation, the guarantee of prices and a stable market for farm commodities, the provision of agricultural credit, and assistance in establishing electric service for rural dwellers are some of the widespread functions entrusted to this Department.

In 1903 the Department of Commerce and Labor was established. It was the ninth department with a secretary in the cabinet. With the exception of two new bureaus, the Bureau of Corporations¹¹ and the Bureau of Manufactures, which were created in 1903 and 1904, all of the functions assigned to it by the act creating it were already being performed by bureaus scattered among existing departments. These were collected in the new department. In 1913 the Department of Labor, which had been a bureau in the Department of Commerce and Labor, was split off as a separate executive department with a secretary in the cabinet. The Department of Commerce as now constituted has as its statutory purposes the fostering, promoting, and developing of foreign and domestic commerce and of the domestic mining, manufacturing, shipping, and fishing industries. These purposes are carried out by the operations of such agencies as the Bureau of the Census, the Coast and Geodetic Survey, and the Bureau of Foreign and Domestic Commerce.

The purpose of the Department of Labor as set forth in the statute establishing it was "to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment." While much of the law of interest to

¹¹ The Bureau of Corporations subsequently became the Federal Trade Commission.

labor has been administered outside of the Department, particularly by the National Labor Relations Board and the Federal Security Agency, the Department has been concerned with matters of vital importance to labor and the welfare of the country as a whole. The first Secretary of Labor stated that the chief function of the Department was the adjustment of labor disputes.¹² Other functions include the collection of labor statistics and the operation of the Children's and the Women's bureaus and the Division of Labor Standards.

Depart-
ments
classi-
fied

The first six departments to be created, State, War, Treasury, Justice, Post Office, and Navy, are usually considered to have functions of a different character from those of the last three, Agriculture, Commerce, and Labor. Interior, in this classification, may be considered to have functions belonging with both groups. The functions of the first group are sometimes said to be corporative, incidental to governmental housekeeping, and therefore serving the entire public. The departments in the last group are concerned with performing service to special groups. This is a useful classification for purposes of understanding the shift in emphasis of governmental action in the course of history. It may, however, be misleading if we assume that when a new organization is created a wholly new kind of activity is being undertaken. It is not the case that all of the earliest functions were indispensable to the maintenance of government. The existence of the government did not depend upon its monopoly of the mail service. Conceivably, the mails could have been handled as express or freight is handled today. The Public Health Service had its origin in the marine hospitals established to care for ill sailors. Throughout its history the national government has engaged in an enormous variety of activities. Nevertheless, the creation of the Departments of Agriculture, Commerce, and Labor shows an extension of governmental interest, for they are directly devoted to the economic interests of substantial segments of the population.

¹² John Lombardi, *Labor's Voice in the Cabinet* (Columbia University Press, New York, 1942), p. 355.

THE COMMISSIONS

The reader will have observed that in the course of history there have appeared a number of organizations immediately dependent upon the President but not possessing departmental status. The tendency has been to erect these into departments, as happened with the office of the Attorney General and the Department of Agriculture, or to incorporate their functions in existing departments. For the most part, departmentalization has been considered the normal pattern of executive organization. But there have been "independent establishments" which have escaped inclusion in the departments; the Library of Congress, for example, has been independent since its creation in 1800. The most important block of non-departmental agencies consists of those having a commission form of organization.

Independent establishments

The Civil Service Commission was not the first, but it was the first important commission. When the reformers who desired to substitute the principle of merit for the principle of spoils in the selection of national employees drove the Pendleton Act through Congress in 1883, they caused the administration of the merit system to be placed in a commission. This device made it possible to secure bipartisan representation and bipartisan administration of the act. In creating subsequent commissions, Congress has usually limited the representation of any one party to one more than half the membership of the commission.¹³

Civil Service Commission

In the case of the so-called regulatory commissions, the fact that quasi-judicial and quasi-legislative functions are included among their duties has appeared to recommend the collegial form. We usually think that adjudication is more impartial and rule-making more carefully considered if performed by a group than by one man. The regulatory commissions have been charged in great part with responsibility for administering the economic policy of the United States. That policy has shifted in the course of time, but the method of administration has continued to be the same.

Regulatory commissions

¹³ Notable exceptions to this practice are the Tennessee Valley Authority, the Atomic Energy Commission, and the Railroad Retirement Board.

**Problem
of
monopoly**

The first problem of economic regulation attacked by the national government was that of monopoly. The so-called public utilities are by their nature more or less monopolistic. At common law they were subject to a kind of regulation by the courts. They were required to serve to the limit of their capacity all who desired their services, and at a reasonable rate. Failure to perform this common law duty would give rise to a suit for damages by the injured customer. But in the ordinary case, the cost of litigation greatly exceeded the amount of the recovery against the public utility, and consequently the suit for damages proved to be an altogether inadequate instrument for control.

**Interstate
Com-
merce
Commis-
sion**

In the course of the nineteenth century the states attacked the problem of monopoly by a variety of devices. In 1886 the Supreme Court held that the states could not regulate the interstate rates of railroads.¹⁴ This freed the railroads from much of the state regulation and made national intervention necessary. Preparation for national regulation had been going on for some time. Several Congressional committees had studied the problem, and a report by a Senate committee in 1886 provided a basis for the act of 1887 which created the Interstate Commerce Commission. This act undertook to supplement the common law by authorizing the Commission to initiate court proceedings to declare charges made by railroads to be unreasonable. It gave other, rather meager, powers which were largely lopped away by the Supreme Court's interpretation of the statute. In 1906 Congress gave the Commission power to fix rates, subject to court review. Subsequently, other powers were added, until today the Commission supervises virtually all activities of interstate carriers. The Transportation Act of 1920 marked a change in philosophy. Originally, the attitude of Congress was hostile, almost punitive, and its ambition was merely to prevent unfair practices by the railroads. Chief Justice Taft characterized the new point of view which dominated the act of 1920 thus: "The new act seeks affirmatively to build up a system of railways pre-

¹⁴ *Wabash, St. Louis and Pacific R. Co. v. Illinois*, 118 U.S. 557 (1886), overruling *Chicago, B. and Q. R. Co. v. Iowa*, 94 U.S. 155 (1877).

pared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railway systems of the country more completely than ever under the fostering guardianship and control of the commission."¹⁵ The spirit in which the Commission has administered the law has likewise been one of fostering guardianship; indeed, it has been alleged that the Commission has become so interested in protecting the railroads that it sometimes fails to give thorough attention to the public interest.

Several other commissions are charged with the regulation of monopolies. The regulation of interstate carriers of messages was in the hands of the Interstate Commerce Commission until the Federal Communications Commission was created in 1934 and given this responsibility.¹⁶ The Federal Power Commission has regulatory authority over businesses engaged in the interstate transmission of electricity and natural gas, and certain other powers with respect to these utilities.¹⁷ The Securities and Exchange Commission, created in 1934, has powers over the issuance of stocks and bonds and the conduct of security exchanges.¹⁸ In all these cases, the new philosophy of the Transportation Act of 1920 has prevailed over the suspicious attitude which at first characterized regulatory legislation. What this means is that Congress, the public, and the commissions have become reconciled to the institutional structure of our economy, including the principle of monopoly.

Other
regula-
tory com-
missions

The Sherman Act (1890) and the Clayton Act (1914), the so-called anti-trust laws, reflect the earlier attitude of hostility toward economic concentration.¹⁹ At common law the only remedy for agreements between competitors for the restraint of trade was a judicial declaration of the illegality of such a con-

Anti-trust
laws

¹⁵ *Dayton-Goose Creek R. Co. v. United States*, 263 U.S. 456, 478 (1923). On the Interstate Commerce Commission see below, pp. 440-449.

¹⁶ See pp. 451-453.

¹⁷ See pp. 450-451.

¹⁸ See pp. 456-458.

¹⁹ See pp. 459-462.

tract. But the common law sanction was merely the court's refusal to enforce the bargain, and if both parties profited by the monopolistic arrangement they would voluntarily adhere to it and the public interest would suffer. The problem did not become serious until after the Civil War. Contracts in restraint of trade did not threaten to change the character of the economy from one of competition to one of monopoly until the corporation became the dominant economic device and the number of competitors had been reduced in many areas to a few gigantic concerns. It now proved to be feasible and profitable for the competitors to agree to eliminate competition among themselves. The usual device was the trust. The shareholders in the competing concerns retained equitable title to their shares but transferred legal title to a group of trustees, who thus gained voting control of the competing companies and were able to coordinate their actions. The trustees, of course, restricted production and raised prices. The same result could be achieved by formal or informal agreement without the use of the trust form, and today restraints of trade never rely on the device of the trust.

1. Procedure

The Sherman Act declared "Every contract, combination in the form of a trust or otherwise . . . in restraint of trade or commerce among the states" to be illegal. It provided for both criminal and civil action by the Attorney General, and for a suit by private persons injured by the agreement to recover three times the damages they had suffered as a result of the illegal activity. Little attempt, however, was made to enforce the act. Only eighteen suits were filed by the government during the combined administrations of Presidents Harrison, Cleveland, and McKinley. Theodore Roosevelt won the title of "trust buster" largely as the result of two successful anti-trust suits. One resulted in a Supreme Court injunction against Chicago meat packers which the packers disregarded.²⁰ The other resulted in an order to dissolve a holding company which had been

2. Failure

²⁰ Merle Fainsod and Lincoln Gordon, *Government and the American Economy* (W. W. Norton and Company, New York, 1941), p. 485; the case was *United States v. Swift and Co.*, 196 U.S. 375 (1905).

formed to unite the Northern Pacific and Great Northern railroads.²¹ Although the holding company was dissolved, the policies of the two roads continued to be coordinated in informal fashion.

The failure of the Sherman Act to compel competition, however, only increased public pressure for anti-trust legislation. In 1914 an attempt was made to promote competition in interstate commerce by two further pieces of legislation. All restraint and all monopoly were proscribed in the Sherman Act. By the Clayton Act of 1914, Congress undertook to make the prohibition more precise by defining certain practices as constituting monopoly and restraint of trade. Among these were price discriminations, ownership by one corporation of stock in a competing company, and interlocking directorates, when the effect of such conditions was to restrain trade. Furthermore, Congress apparently felt that since judicial application of the law had not been successful, the independent commission method might solve the problem. Consequently the Federal Trade Commission was established in 1914 by an act of that name. A collateral purpose, to put competition on a more healthful plane, was aimed at by outlawing certain unfair trade practices and charging the new Commission with seeing that they were abolished. Practices which were forbidden included packaging or labeling food in such a way as to lead the consumer to think it was produced by another company, usually a well-known company; commercial espionage, the use of spies to gain trade secrets or lists of customers of a competitor; commercial bribery, hiring an employee of a customer to induce the customer to purchase certain goods.

3. Re-
newed at-
tack

Trade
Commis-
sion

The Federal Trade Commission was no more successful than the Attorney General in enforcing the anti-trust laws until it was given greater authority in 1938. Since then it has won some court cases, but how successful it will be is yet to be determined. In the field of the prevention of unfair trade practices, the Commission has had a better record.

²¹ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

**Labor
Board**

The National Labor Relations Act of 1935 was patterned after the Federal Trade Commission Act. As the earlier act forbade unfair trade practices, so the later act forbade unfair labor practices by employers in restraint of collective bargaining, and created a National Labor Relations Board to enforce its provisions by quasi-judicial action. The act of 1935 was superseded in 1947 by the Labor-Management Relations Act, which retained the earlier list of unfair labor practices on the part of employers but declared a number of union actions and demands to be unfair labor practices, and gave to the government a considerable power to break strikes by injunction.²²

The Federal Trade Commission and the National Labor Relations Board differ from the commissions described earlier in that they deal with practices of a given character, wherever they are found, whereas the other commissions deal each with a single industry, and with all the major practices of that industry. As a result, the Federal Trade Commission and the Labor Relations Board have retained more of the character of a policeman than have the other commissions.

These examples do not exhaust the list of regulatory commissions, but they will serve to illustrate the type and the considerations which led to their creation.

GOVERNMENTAL REORGANIZATION**Presi-
dent's
Commit-
tee**

In 1936 President Roosevelt appointed a Committee on Administrative Management to study the executive branch of the government and propose a reorganization which would increase its efficiency and responsibility. The Report of the Committee in 1937 disclosed that there were nearly a hundred organizations outside the departments and responsible only to the President. As a practical matter he could not effectively supervise this number; and the machinery for supervision was in any case inadequate. The Committee recommended an expansion of the White House staff in order to assist the President in "thinking, planning, and managing," and made certain other proposals to

²² See pp. 484, 487.

increase the efficiency of central supervision. In addition, it recommended the creation of two new departments and the placing of all the non-departmentalized establishments under one or another of the departments. The regulatory commissions posed a special problem. Because of their quasi-judicial functions it seemed desirable that they remain plural-headed bodies, rather than be assimilated to the pattern of the single administrator which the Committee believed should, in general, dominate the administration. For the same reason, it seemed desirable that the President's control over the commissions continue to be limited to removal for specified causes. To solve this problem, the Committee proposed that all the functions of a regulatory commission except the quasi-judicial functions be transferred to a bureau chief within one of the departments. The board would be retained to discharge the quasi-judicial duties, and for "house-keeping" purposes it was to be placed in the department; but otherwise it was to be treated as a sort of court, independent of the executive branch.

The President submitted the Report of the Committee to Congress in 1937 and requested legislation authorizing him to carry out the recommendations of the Committee. In 1939 the Congress passed an act permitting a partial reorganization. The President was empowered to appoint six administrative assistants in the White House Office to help him discharge the managerial function. He was also authorized to prepare reorganization plans transferring agencies into departments and shifting them from department to department; these plans were to be submitted to Congress and were to go into effect if not disapproved by concurrent resolution of the two houses within sixty days. The President was forbidden to abolish or create departments or to transfer the functions of twenty-one specified organizations. The regulatory commissions were included among the twenty-one.

President Roosevelt submitted five reorganization plans to Congress, and all went into effect. Under these plans he organized the Executive Office of the President as a general manage-

rial agency which included the Bureau of the Budget as well as the White House Office with the six new administrative assistants. He also centralized various scattered functions in three new agencies, each under an administrator directly accountable to the President: the Federal Works Agency, the Federal Security Agency, and the Federal Loan Agency. The Loan Agency did not prove to be indispensable for administering the loan functions of the national government. Accordingly it was abolished by act of Congress in 1947 and its property and records were transferred to the Reconstruction Finance Corporation.²³

The Reorganization Act of 1939 expired by its own terms on January 1, 1941. However, changes in administrative structure become necessary as subjects with which government deals and the environment in which it operates change. The task of reorganization is, then, a continuing function. Consequently, President Roosevelt was authorized to effect reorganization after 1941, and President Truman was given authority in 1945 similar to that conferred upon President Roosevelt in 1939. In neither case was there a significant departure from the pattern of organization established by President Roosevelt under the Act of 1939. In 1947 Congress established the Commission on Organization of the Executive Branch, and empowered it to make a comprehensive study of all the instrumentalities of the executive branch of the government and to report its recommendations for improving the executive organization to Congress in January, 1949.²⁴

THE AGENCIES

Structure Although the Reorganization Act of 1939 forbade President Roosevelt to create new departments, the two agencies—Works and Security—which he organized are to all intents and purposes departments. The head of each of the agencies is called an administrator rather than a secretary, and he receives a slightly smaller salary than a department head; but he is the chief

²³ Public Law 132, 80th Congress, 1st Sess., approved June 30, 1947.

²⁴ U.S. Code, title 5, secs. 138a-138j.

of an organization which compares favorably in size with some of the departments, and like the secretary of a department he is accountable only to the President.

We cannot anticipate here the description of the organization **Scope** or the functions of the agencies, but this is a convenient point to take account of a development in administration which we have hitherto overlooked. The departments, as we have seen, were originally created to perform functions essential to the existence of the state as a corporate body, although government operation, as represented by the Post Office, and service to special groups, as in Agriculture, Commerce, and Labor, represent a broader philosophy of government. When government embarked upon a program of economic regulation, the regulatory commission became a prominent device. Although the agencies do not represent a new philosophy of government, the scale on which they discharge familiar functions is altogether new.

The Federal Works Agency deals with federal works which **Works Agency** are not incidental to the normal operations of other departments, and it administers grants-in-aid and loans for construction to state and local governments.

The conferring of benefits by government is nothing new. Patents, copyrights, the grant of public lands, aid to veterans, aid to education—services of this sort go far back in our history.²⁵ But the most ambitious undertaking of this sort is the social security program enacted in the 1930's. This is entrusted to the Federal Security Agency. The federal-state program of **Security Agency** unemployment insurance is intended to cushion the blow of unemployment to employees in industry and commerce. Old-age and survivors' insurance provides for the old age of workers or their surviving dependents. Other benefit functions, such as vocational rehabilitation; aid to the indigent aged, to children, and to the blind; and the Public Health Service, are found in the Federal Security Agency.

The extent of the activities of these agencies—assistance to **New era** states, humanitarian provisions against misfortune, and economic

²⁵ See chap. 22.

support for business enterprise—marks a new departure in government, just as the regulation of monopoly was a novel activity when it first appeared. As government takes on new duties, new institutions are developed, so that just as the geologist can read geological eras through successive deposits on the earth's crust, so the student of politics in the succession of institutions can discern eras in political ideas.

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CHAPTER 16

THE ADMINISTRATIVE STRUCTURE

Introduction—The Departments and Agencies—Lateral Organization—The Independent Establishments—Public Corporations—The Structure of National Employment—Employee Associations

INTRODUCTION

It has been pointed out that the governing process can be divided into two parts—the making of policy and the execution of policy. Although we think of execution as falling within the executive branch, the courts are also engaged in the application of law and are in this sense administrative agencies. They have already been treated.¹ The administrative organizations in the executive branch can best be described under a series of headings.

Kinds of structure

Both tradition and structural similarity justify the category “Departments and Agencies.” In general the nine departments and two agencies follow a neat hierarchical pattern. In all cases, however, there are horizontal as well as vertical lines within the departments; and horizontal lines also link the departments with organizations outside their boundaries. This qualification upon the pyramidal organization of the executive branch is described under the heading “Lateral Organization.”

There are a number of organizations which are not departmentalized, and these are often called “The Independent Establishments.” Sometimes, however, the term “independent” is reserved for the regulatory commissions, which have a sort of qualified independence of the President. We shall include in the category of independent establishments all the organizations

¹ See chap. 13.

not found in the departments and agencies—the laterally related organizations outside the departments which were mentioned above; the regulatory commissions; and miscellaneous instrumentalities in the executive branch which are immediately dependent upon the President.

One other structural form exists, the government corporation, which will be taken up under "Public Corporations." This is found both within and without the departments. The problems of personnel are here dealt with under the headings "The Structure of National Employment" and "Employee Associations."

THE DEPARTMENTS AND AGENCIES

The structural shape of the executive departments and agencies is pyramidal. The President is the apex; beneath him are the heads of the nine departments and two agencies.² The heads of the departments are called secretaries, except in the Post Office and the Justice departments, and the heads of the agencies are called administrators. Under each of these is a subordinate, usually called an under-secretary, and below each under-secretary there are usually several assistant secretaries. The State Department has six, the Treasury and Interior two, Commerce only one. The under-secretary acts as head of the department in the absence of the secretary. Since the Secretary of State has become, in recent years, an itinerant negotiator, the Under-Secretary of State acts as directing head of the Department for a considerable part of the time. The assistant secretaries are sometimes the heads of operating units, which are often called bureaus but are sometimes called by other names—"divisions" in Justice, "offices" in Commerce. The bureaus not headed by assistant secretaries are under bureau chiefs. Bureaus are also subdivided, and each subdivision has a head. The subdivisions are usually called divisions. It will be noted that each department, as

Char-
acteristics
1. Pyra-
mid

² The departments are State, Treasury, National Military Establishment (embracing the Departments of Army, Navy, and Air Force), Justice, Post Office, Interior, Agriculture, Commerce, and Labor; and the two agencies are Security and Works.

well as the whole of the executive branch, takes the form of a pyramid.

2. Single head

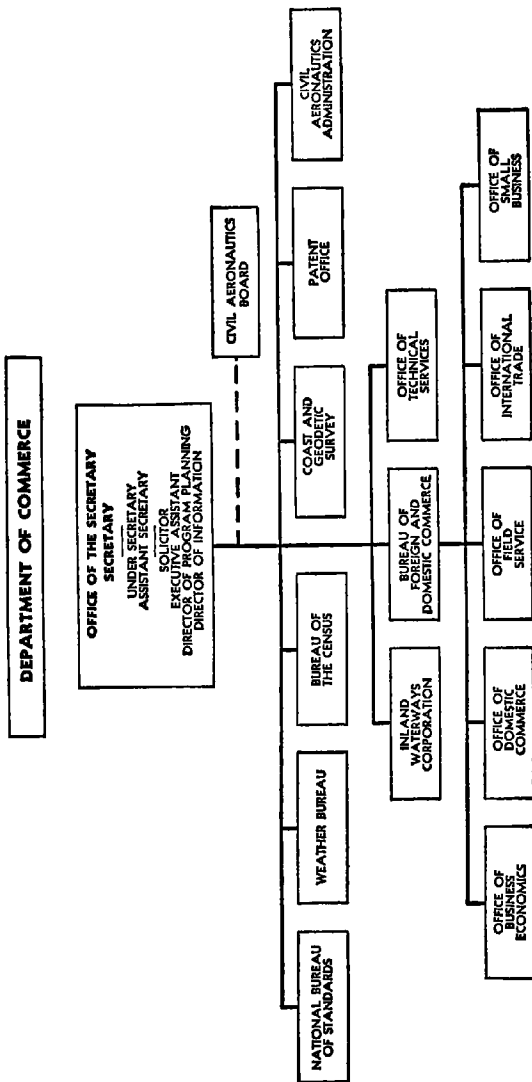
From this it is clear that the departments and agencies have a second feature in common: the use of a single head for the department. Each subdivision within the department also has a single head. This use of a single head is in contrast to the independent establishments to be discussed in later paragraphs, for many of these have plural or collegial heads.

3. Hierarchy

The pyramid form of organization, with a single individual at the top having authority directly over a few men—usually not more than twelve—each of whom in turn has authority over others, gives rise to the third characteristic of the system, namely, that there is authority from the top down and responsibility from the bottom up. There are, however, some autonomous bureaus; in fact, most of the bureaus in Interior are autonomous. The principle of responsibility opens a channel for positive supervision. Directives originating with the policy-makers at the top move down to the persons who are to execute them by delivering the mail, by inoculating for disease, by making loans to farmers. Each person in the system can thus know what his job is. And furthermore, what is equally important, he is responsible to a particular person. In an organization that is functioning properly, if he fails to do his job, a reason must be given. If he sees a better way of doing his job, he can pass the information up. Thus the experience in the day-to-day application of the law can flow upward to the head of the department. The department heads and the President are then in a position to advise Congress with respect to bills before it. Congressional committees have come to have so much respect for the critical capacities of departments that they seldom report a bill favorably which is not approved by the department concerned.³

An advantage of the pyramid arrangement is that each head has a small number of men to supervise. Henry A. Wallace, who presided over a well-organized and well-administered depart-

³ George B. Galloway, *Congress at the Crossroads* (Thomas Y. Crowell Company, New York, 1946), p. 6.



(Source: *U.S. Government Manual, 1947*.)

ment, said that "most administrators can keep in contact directly, effectively, and continuously, with not more than twenty men."⁴ The "span of control," the number of men that one man can supervise and coördinate—if these persons in turn have the direction of subordinates—is frequently put at an even smaller number than twenty. The number must be small if the head is to have time to think and to coördinate the activities of the different units.

4. Managerial function

A fourth characteristic common to the departments and agencies is found in the activities of the heads. The secretaries and administrators all manage their organizations; appoint and remove subordinates; issue orders, called rules and regulations; and serve on interdepartmental committees for purposes of coördination. These functions will be described more fully in the next chapter, since they are largely administrative techniques.

5. Allocation of duties
a. Functions allocation

A fifth characteristic of the departments and agencies lies in the allocation of functions. All activities related to a major function are usually placed in the same department, and there is likely to be only one major function in a department.⁵ This formula applies in a general way to all the departments and agencies except Interior, which will be described presently. Thus the conduct of foreign relations, the protection of the interest of the United States and its citizens in relation to other states, is placed in the Department of State. Within the department work is also allocated functionally, in terms of a more detailed analysis of the major functions. The collection of taxes due to the United States is placed in the Treasury; the collection of duties levied on goods imported into the country is a more narrow and specific function of tax collection assigned to a Bureau of Customs. A bureau ordinarily has one task, or at most a series of closely related tasks.

But other considerations than work processes influence the

⁴ Henry Wallace, "Emergency Problems in Public Administration," address to the American Political Science Association and the Society for Public Administration, Washington, Dec. 25, 1939, *American Political Science Review*, xxxiv, 217 (1940).

⁵ S. C. Wallace, *Federal Departmentalization, A Critique of Theories of Organization* (Columbia University Press, New York, 1941), pp. 91-104.

assignment of work to bureaus. The controlling consideration may be the clientele or the area to be served.⁹ An example of an allocation to a bureau on the basis of the people to be served is the Office of Indian Affairs. Its function is to protect the interests and promote the welfare of those Indians who are under the guardianship of the national government. The Departments of Agriculture, Commerce, and Labor are frequently said to be examples of departments created to serve special groups—farmers, businessmen, workers. Examples of assignment to bureaus on the basis of a territory to be served are found in the divisions within the State Department which deal with Far Eastern Affairs, Near Eastern and African Affairs, and American Republic Affairs.

b. Other
bases of
allocation

The Department of the Interior requires special comment. We have noted that it contains a miscellaneous collection of functions, some of which are unrelated to the others. Each of the bureaus in the Department, however, has a coherent function to perform. These bureaus are largely autonomous, so that the line of command from the Secretary down is not so clear as in other departments. The Secretary is more a coördinator than a supervisor. More or less autonomous agencies are also found elsewhere—for example, the Public Health Service in the Federal Security Agency, and the Civil Aeronautics Board in the Department of Commerce. The Civil Aeronautics Board is specifically authorized to act independently of the Secretary of Commerce.

Autono-
mous
units

LATERAL ORGANIZATION

In the main, lines of authority and responsibility in the executive branch run vertically, from top to bottom—from the President to the man carrying letters or inspecting meat. This organization is called, in a borrowing of military terminology, "line" organization. But there are other functions to be performed in addition to the ultimate or line functions. Services must be supplied to the line organization in order to enable it to operate.

Nature of
service

⁹ *Ibid.*, pp. 112-146.

Providing the names of persons eligible for appointment; making purchases; framing budgets; giving legal advice; making recommendations—these are sometimes called “staff,” sometimes “housekeeping,” sometimes “auxiliary” functions. These terms do not mean exactly the same thing. For our purposes it will be enough to speak of the organizations supplying these services as lateral organizations. The significant lines of contact here are not vertical but horizontal. The important function is supplying aid laterally to the line officer, rather than transmitting his orders vertically to an operating unit.

Location Departmental officers with these responsibilities can be recognized under such titles as general counsel, counselor, solicitor, assistant to the secretary (the Treasury has eight assistants), special assistant, director of personnel, director of finance, director of information (public relations). In addition to departmental officers performing lateral functions for their own departments, one sometimes finds a lateral organization in one department which serves all the others. The Bureau of Federal Supply in the Treasury Department, for example, does most of the purchasing for the entire civilian service. Finally, there are lateral organizations which lie outside the departments and serve the whole executive branch, and in some instances the legislative and judicial branches as well. The Executive Office of the President is an independent, that is to say non-departmental, lateral organization; the Civil Service Commission is another.

Executive Office The Executive Office was an outcome of the recommendations of the President's Committee on Administrative Management.⁷ The Committee recommended a strengthening of the machinery for Presidential control of the administration. When Congress passed the Reorganization Act of 1939 President Roosevelt organized the Executive Office and assigned to it several lateral functions. The agencies now in the Executive Office of the President are the White House Office, the Bureau of the Budget, the Council of Economic Advisers, the Liaison Office for Personnel

⁷ See pp. 320-321.

Management, the Office for Emergency Management, and the Office of Government Reports. Only two of these require immediate description, the White House Office and the Bureau of the Budget.

The White House Office contains the six administrative assistants to the President. It is their task to facilitate communication by the President with Congress, with individual members of Congress, with the heads of executive departments, and with the press. They report back to the President and advise him. They are expected to be possessed with a "passion for anonymity" so that the President can have confidence in them and so that they will not seek to exercise power in their own behalf or to advance their own fortunes, public or private. Two of the assistants to President Roosevelt, Harry Hopkins and Samuel Rosenman, are said to have had in full measure the selfless devotion to duty which made them ideal for such service.⁸

1. White
House
Office

The Bureau of the Budget has had a somewhat checkered career, but under the directorship of Harold Smith it became, after 1939, a central management agency.⁹ Like the executive departments, the Bureau of the Budget has a single head, in this case called a Director, and it is divided into several divisions with a single head of each division. It differs from the departments in another respect; the departments are for the most part organized in the form of a pyramid, or vertically, but a diagram of the Bureau would show the main lines of authority as horizontal, running to each of the departments and agencies of the executive branch and even to the independent establishments. The reason for these horizontal lines is that each agency is required by law to appoint a budget officer who under the direction of the head of the agency is to prepare the budget for the agency. This official, appointed by and responsible to the head of the agency, is also responsible to the Director of the Bureau. In some respects

2. Budget
Bureau

⁸ Don K. Price, "Staffing the Presidency," *American Political Science Review*, xl, 1154 (1946).

⁹ Fritz Morstein Marx, "The Bureau of the Budget: Its Evolution and Present Role," *American Political Science Review*, xxxix, 653-684, 869-898 (1945).

he has a prior responsibility to the Director. In the first "Budget Circular," dated June 29, 1921, General Dawes, the first Director, described the dual allegiance owed by the departmental budget officer:

The Director of the Budget in gathering information for the use of the President acts for the President, and his calls upon the Chiefs of Bureaus and other Administrative Officers for purposes of consultation or information take precedence over the Cabinet Head of a Department, or any head of an independent organization. The Budget representative in each Department, being appointed by the Cabinet Head, will present to the Director of the Budget the views of the Cabinet Head upon the wisdom of conclusions drawn by the Director of the Budget, for the use of the Chief Executive and Congress, but as in the case of Bureau Chiefs and other officers, the call of the Director of the Budget for their presence and advice takes precedence over the Cabinet Head.¹⁰

The Bureau as a managerial arm of the President will be described further in the next chapter.

Civil
Service
Commis-
sion

Another lateral agency is the Civil Service Commission. It is charged with the procurement of most of the government personnel and with the duty of studying the whole range of problems of personnel management. It is headed by three commissioners who are appointed by the President with the consent of the Senate. They serve during the pleasure of the President and may be removed at his discretion. The statute requires that not more than two of them be of the same party. There is subordinate to the three commissioners a general manager who is called the Executive Director and Chief Examiner. Under his direction are several subsections, called, for the most part, divisions. The function of the Commission in providing lists of persons eligible for appointment to positions in the national service will be described later in this chapter.

Difficulties in finding a means of communication between the President and the three member commissioners prevented it from being used effectively by the President during part of its history. However, under the Reorganization Act of 1939 the

¹⁰ Quoted in *ibid.*, p. 671.

President solved this problem by setting up in the Executive Office a unit called the Liaison Office for Personnel Management. Then he put an administrative assistant in this office whose duty it was to serve as a channel of communication between the President and the members of the Commission and between the President and personnel officials in the departments and agencies.¹¹

Liaison
Office

Another agency for personnel management must be mentioned, the Federal Personnel Council. The members of this agency are the personnel officers of the various executive departments and agencies. These officials from all the agencies of the government meet weekly with representatives of the Commission and the Bureau of the Budget. Here policies are interpreted; problems of personnel are hammered out; uniform standards and practices are developed. The Council is concerned with over-all personnel administration.

Federal
Personnel
Council

Still another kind of lateral agency is the advisory committee, a board of private citizens attached to a governmental officer for the purpose of assisting him with their special knowledge. An example is the Advisory Board of the Inland Waterways Corporation. It is composed of six persons who are "prominently identified with commercial or business interests in territory adjacent to the operations" of the Corporation. Its function is to advise the Secretary of the Army with respect to matters affecting the Inland Waterways Corporation. Another example is found in the Business Advisory Council, a committee of businessmen associated with the Secretary of Commerce. Its task is to study all questions referred to it by the President or the Secretary of Commerce; it serves as a clearing house between governmental policies and business. Advisory committees usually have no power except to study and recommend. Sometimes the official whom they serve cannot act without first receiving their advice, but he is not bound to follow it.

Advisory
commit-
tees

¹¹ William H. McReynolds, "The Liaison Office for Personnel Management," *Public Administration Review*, ii, 121 (1941); see also John McDiarmid, "The Changing Role of the U.S. Civil Service Commission," *American Political Science Review*, xl, 1067 (1946).

THE INDEPENDENT ESTABLISHMENTS

Multi-
plicity

The so-called independent establishments may be divided for convenience into two broad groups, the regulatory commissions and the other non-departmental establishments. The President's Committee on Administrative Management in 1937 recognized eight organizations as regulatory commissions.¹² All have quasi-judicial power, and several have quasi-legislative power as well. The other independent establishments are more numerous than the regulatory commissions, and are in the aggregate very miscellaneous. The chief of these are the Civil Service Commission, created in 1883, the Tariff Commission, set up in 1916, the Veterans Administration, which took its present form in 1930, and the Atomic Energy Commission, established in 1946. These examples show the wide range of subjects dealt with by the independent establishments.

Degree
of inde-
pendence

The independent establishments are not, of course, independent of Congress or of the courts. The chief reason for using the name is that they are outside of the executive departments and agencies. They are not independent of the President. He appoints the heads of the establishments, in most cases with the approval of the Senate. However, in the case of the regulatory commissions exercising quasi-legislative or quasi-judicial power, his power to remove commissioners is subject to Congressional control, whereas in the executive departments and agencies his power of removal stems from the constitution and is not subject to Congressional control.¹³ In the case of all the regulatory commissions except the Communications Commission, Congress has limited the President's removal power by requiring that removal

¹² These were the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Securities and Exchange Commission, the Federal Communications Commission, the National Labor Relations Board, the Bituminous Coal Commission, and the United States Maritime Commission. For a fuller list, which includes departmentalized regulatory agencies, see the *Report of the Attorney General's Committee on Administrative Procedure*, Senate Document No. 8, 77th Congress, 1st session, pp. 3-4.

¹³ See pp. 196-197.

be for cause—that is, for inefficiency, neglect of duty, or malfeasance in office. There is no formal channel of communication through which the President can directly and positively supervise the regulatory commissions, but he does exercise considerable influence over all but the Interstate Commerce Commission.¹⁴

Structurally there are some similarities among the independent establishments. The Veterans Administration has a single head, but most of the independent establishments have a plural head, a commission, the members of which are called commissioners. Usually there is an uneven number on the commission. The law generally requires that not more than one more than half be members of the same political party—two out of three on the Civil Service Commission, six out of eleven on the Interstate Commerce Commission.¹⁵ Usually the terms of the commissioners expire at different times, and the terms are long enough so that a President will not have opportunity to appoint a majority of the members of a commission during a four-year term.

Top level
structure

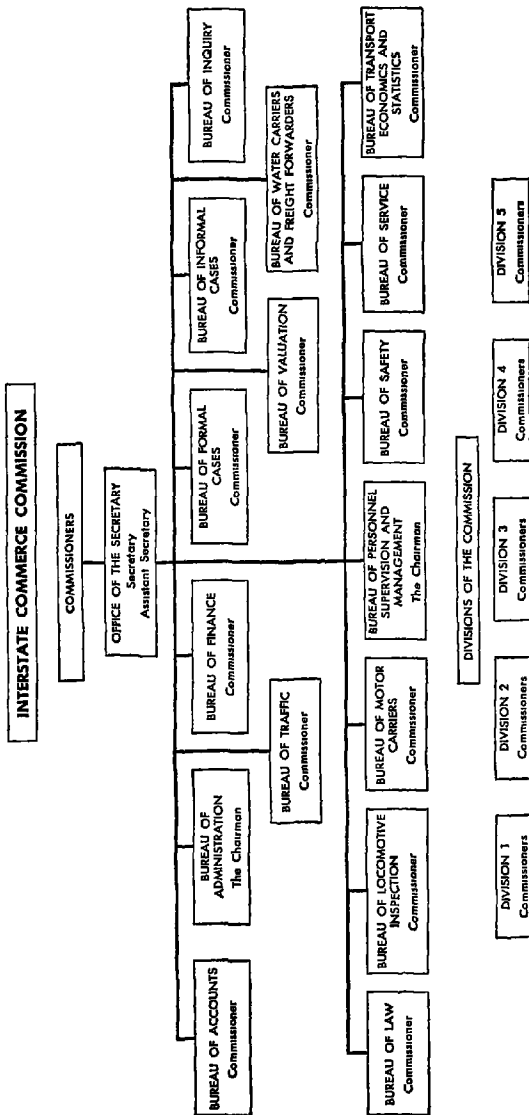
The organization below the commissioners is usually of the bureau type, as in the regular executive departments. Each bureau is under a single director. The Interstate Commerce Commission has sixteen bureaus. These are the operating machinery of the Commission. For example, the Bureau of Locomotive Inspection of the Interstate Commerce Commission carries on the work which its name indicates. Some of the agencies have an executive officer who is in charge of all operations and is responsible to the commissioners. In the Atomic Energy Commission this official is called the General Manager.

In some of the regulatory commissions, the commissioners themselves are organized into groups called divisions. The Interstate Commerce Commission is divided into five divisions, with three commissioners assigned to each. The functions over which the Commission has jurisdiction are then allocated to these divisions. Matters concerning rates, for example, are allotted to one

Commis-
sion or-
ganization

¹⁴ L. D. White, *op. cit.*, p. 114.

¹⁵ See p. 315, note 13.



Source *U S Government Manual, 1947*

division, the issuance of safety rules and the inspection of carriers to determine compliance are assigned to another. The decisions made by one of the divisions have the same effect as if made by the whole Commission. Appeals, however, from a division to the whole Commission are permitted.

Two questions may be raised. First, is it preferable for a governmental agency to have a plural or single head? Second, should there be staggered terms for members of the plural-headed agencies? Students of government seem to be agreed that for the execution of policy there should be one general manager, but when there is to be deliberation, as for example in deciding on a policy, there should be more than one person. Consequently, some of the newer agencies, such as the Atomic Energy Commission, have a plural head, but the operations are to be carried out under the direction of a General Manager. The more extensive the operations to be supervised, the more essential a single manager seems to be. The Tennessee Valley Authority was originally established with a board of three as the managerial head. After a period of confusion and friction which finally caused the President to remove one of the board members, a General Manager was provided for.

A similar separation of policy formation and administrative execution has been accomplished in some cases in the executive departments. For example, the Civil Aeronautics Authority in the Department of Commerce is divided into two units. One is the Civil Aeronautics Board, an independent agency which has been placed in the Department of Commerce in order to permit the Department to perform its housekeeping functions, provide it office space, secretarial service, etc. The Board makes investigations preliminary to policy formation, as by determining the causes of aircraft accidents; then it makes rules for economic regulation of commercial aviation and issues safety regulations. The other unit of the Authority is the Administrator—an individual—who is responsible for the application of the acts of Congress and for the execution of the rules made in pursuance of the law by the Board.

Organizational
problems
1. Managerial

**2. Stag-
gered
terms**

As to the question of the use of the staggered term for members of the plural-headed agencies, at least two arguments have been advanced in its favor. One is that it makes for continuity in experience. A second is that it makes for continuity in policy. Both of these arguments have some merit. A major business enterprise like the railroads has complex problems which require much time for their understanding. Consequently, when new commissioners are appointed to the Interstate Commerce Commission they can benefit from the experience of members then serving. Also, the great business enterprises cannot change their policies quickly and radically, and continuity of policy on the part of the regulatory body may be of vital importance to them. However, undue weight should not be given to the need for continuity of experience and policy on the part of a commission, since those commissions which regulate the largest enterprises have well-trained staffs which can supply both. Giving too much attention to the experience of the commissioners causes one to lose sight of the prime function of policy-forming administrators, which is to supply the bridge between the public, as its will is expressed by the political branch of the government, and the experts in the staff of the regulatory body.

A third feature of the staggered term, which is used as an argument both for and against the device, is that it tends to prevent any President from getting control of a commission during any single four-year term by appointing the majority of the members. Those persons who distrust the democratic process and feel that elected officials should be hedged about with many limitations regard the staggered term with favor. On the other hand, the staggered term, since it deliberately creates a lag in responsiveness to public opinion, is inconsistent with immediate democratic control of the administration.

PUBLIC CORPORATIONS**History**

The private corporation is a legal entity having many of the legal characteristics of a natural person. It may engage in business in its own name by buying and selling and by managing the

enterprise which it owns. The use of the corporation to accomplish a public purpose is an adaptation of this type of business organization. It has had a long history of use by the national government for operating economic services. Beginning in 1791, when Congress issued a charter for the first Bank of the United States, the corporate form has been used extensively. The number of nationally created corporations had reached fourteen thousand in 1936.¹⁶

For convenience in describing these corporations they may be classified according to their ownership. There are three general classes. First are those privately owned but created or incorporated by the national government, rather than by one of the states. The national banks furnish an example of this kind of corporation. Second are those owned jointly by private persons and the national government. These are called mixed enterprises. An example is the federal land banks. As of June 30, 1943, private interests held 44 percent and the national government 56 percent of the capital stock in these banks.¹⁷ The privately owned corporations and the mixed enterprises operate principally in the field of banking and credit. The third class consists of corporations wholly owned by the national government. These are usually called government corporations.

The privately owned corporations have a great deal of autonomy, but the regulation of these, and also of the mixed enterprises, is carried out through the regular departments and agencies. The government corporations, except for the Tennessee Valley Authority, are also subject to managerial control through the departments and the Bureau of the Budget. For the most part government corporations exist in order to provide credit or to operate large-scale business enterprises. The Reconstruction Finance Corporation and the Export-Import Bank of Washington are examples of corporations concerned with providing credit. The Tennessee Valley Authority, the Inland Waterways Corpo-

Kinds

Activities

¹⁶ *Report of President's Committee on Administrative Management* (Government Printing Office, Washington, 1937), p. 44.

¹⁷ Senate Document No. 227, 78th Congress, 2nd session (1944), pp. 45, 47.

ration, and the Panama Canal Railroad are examples of corporations established to operate businesses.

Advantages

It was found during the depression and during World Wars I and II that government corporations were excellent devices for speedy action. They were permitted to use business rather than governmental practices with respect to employment, monetary matters, and the formulation of policy. Consequently, they were frequently established to accomplish some task during the emergency. After the passing of the crisis, if the performance of the task were to be discontinued, the corporation could become inactive or be dissolved; or, if the task were a continuing one, the regularly established controls could be applied, or the function could be transferred to some other agency and the corporation dissolved.

Economic vs. legal controls

The government corporation represents an attempt to secure for governmental procedures the freedom from legal controls and the flexibility in management which private business enjoys. The public official must find legal authorization for all his acts; the private person may do anything not prohibited by law. The private person in turn is made accountable for his economic actions by competition. If his business practices are bad, he loses money and fails. When the government enters the field of business management, as in the operation of the Panama Canal Railroad or a transportation system on the inland waterways, it can also use the profit and loss system to achieve accountability. However, it has been said that the economic controls do not actually work, since government corporations by virtue of their national ownership have immunity from taxes and other advantages which private businesses do not enjoy. Apparently on the theory that the alleged inefficiency of economic controls called for the reintroduction of legal controls, a Government Corporation Control Act was passed by Congress in 1945. This act brought all the government corporations except the Tennessee Valley Authority under the supervision of one or another of the executive authorities.¹⁸

¹⁸ J. P. Harris, "Wartime Currents and Peacetime Trends," *American Political Science Review*, xl, 1137 (1946).

This substitution of legal for economic controls is evidence that Congress considered the emergency over and thought that flexibility might be sacrificed somewhat in order to secure accountability. Whether Congress went too far and destroyed the effectiveness of the government corporations is yet to be determined.¹⁹

THE STRUCTURE OF NATIONAL EMPLOYMENT

Having described the main framework of the national administration, we turn now to the structure of national employment.

Except for the President, every individual in the national administration gains his place in the governmental structure by appointment. The constitution divides this personnel into two classes. The first class is composed of those appointed by the President with the approval of the Senate: ambassadors, other public ministers, consuls, judges of the Supreme Court, and "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." The second class is "inferior officers," whose appointment Congress may, if it wishes, vest "in the President alone, in the courts of law, or in the heads of the departments."²⁰ This has not proved to be a useful classification.

A more satisfactory classification, one representative of actual conditions, takes into account the motives which control in the appointment of officials. These purposes seem to be mainly two: patronage, and effective performance of the work of the government. A patronage appointment is one in which the choice among individuals depends mainly upon such considerations as faithful political service to the party of the appointing officer and the effect of the appointment in securing or retaining political support for the party. This does not mean in all cases that the appointee lacks qualifications for the position. He may or may not be well qualified; but the essential characteristic of patron-

Legal
classes

Purposes
of ap-
point-
ment

1. Pa-
tronage

¹⁹ See C. Herman Pritchett, "The Government Corporation Control Act of 1945," *American Political Science Review*, xl, 495 (1946).

²⁰ Art. II, sec. 2.

age appointments is that primary consideration is given to party welfare and only secondary regard is paid to ability to perform the work for which pay is given.

2. Merit

Appointments made with a view to effective performance of the work of the government may depend entirely on the discretion of the appointing official or they may be made from a list of names furnished him by a recruiting agency. When a list of qualified persons is supplied to the appointing officer, the position is said to be under the merit system. In some cases, where the law has left the agency free in making appointments, the agency has voluntarily instituted a merit system. This has been done by the Federal Bureau of Investigation and the Tennessee Valley Authority.

Top-level appoint- ees

Efficient administration would be promoted if all administrative personnel except policy-forming officers were recruited under a merit system. The term "policy-forming officers" does not include all of those who exercise discretion, for the exercise of discretion occurs at almost all levels in the administrative hierarchy; nor does it include top-level officers if the type of discretion they are called upon to exercise goes only to the scientific or technical means of implementing a policy about which there is no debate. Policy-forming officers are top-level administrators who exercise discretion on political topics, i.e., on topics which lie within the area of debate as to the objectives of governmental policy. There are about 3000 such officers in the national government. It would not do to recruit these officers by a merit system, for merit systems are non-political and might well yield appointees who were technically competent but whose political views were opposite to those of Congress and the President, and who might therefore use their discretionary powers to sabotage the policy they were supposed to effectuate. Sharing the political views of the administration is therefore an essential qualification for such officials. Policy-forming officers should be appointed on a political but not a patronage basis; they should be chosen because their political views accord with those of the administration, but not as a reward for political influence. Of

course competence is also a primary consideration in choosing a policy-forming officer.

The struggle to place non-political positions under the merit system has been long and arduous. In 1883, after years of struggle, the Pendleton Act was passed. This created the Civil Service Commission and authorized it to test the fitness of applicants for certain classes of the national service by competitive examination. That part of the service which was required to recruit its personnel from lists prepared by the Civil Service Commission was called the classified service; the rest, the unclassified service. The President was authorized to extend the classified service by executive order. In general the Presidents have favored extension of the merit system, for not merely does it promote efficiency but it spares them the importunities of political office seekers and the enmity of those who must inevitably be disappointed in the award of patronage. But individual Congressmen are clamorous for patronage, which strengthens their positions in the party organization at home, and they are supported in their demands by the professional politicians. Especially at a change of administration the pressure for jobs to reward the party faithful has been great; accordingly, the years 1913, 1921, and 1933 saw wholesale turnovers in the unclassified service and attempts to make inroads in the classified service. Nevertheless the Presidents, especially Grover Cleveland, Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt, have extended the classified service by executive order when political pressures permitted. In 1938 the limits permitted by law were reached, and in 1940 Congress enacted the Ramspeck bill, which authorized the continued expansion of the merit system until it covered most of the positions for which Senatorial confirmation was not required. A series of executive orders in 1941, according to Professor Anderson, extended the merit system "to about ninety-five per cent of the total number of positions in the national administration that are covered by the civil service laws."²¹

History
of merit
system

²¹ William Anderson, *The National Government of the United States* (Henry Holt and Company, New York, 1946), p. 261.

**Position
classi-
fication**

The effective functioning of a merit system requires more than non-political appointment. Qualifications for positions should be determined, and levels of positions should be standardized, so that equal pay can be given for equal work and a constant relationship maintained throughout the service between duties and responsibilities and pay. The analysis of jobs for these purposes is called position classification. Although that part of the national service placed under the merit system by the Pendleton Act was called the classified service, there was no position classification in the national government until 1923.

**The five
services**

The Classification Act of 1923 authorized a position classification of that part of the classified service which was in Washington. In the plan formulated and adopted under the act, the positions classified were placed according to the nature of the work in five large groups, called services. The professional and scientific service is designated by the initial P. Within the service the ranks are called grades, and are designated by subscripts. The lowest grade is P_1 , and ordinarily the highest grade is P_8 . Stated educational training, or alternatively, in some instances, stated experience, is an eligibility requirement. The clerical, administrative, and fiscal service is designated by the letters CAF. The grades in this service normally range from 1 to 15. The starting salary for a CAF_1 is lower than for a P_1 , but in the higher grades of both services responsibility and salaries are comparable. There is opportunity for an individual to shift from one of these services to the other. The subprofessional service (SP), as indicated by the title, requires persons with less training or less experience in the same fields as the professional service. The crafts, protective, and custodial service (CPC) includes such persons as elevator operators, mechanics, guards, and caretakers for buildings. Clerical and mechanical (CM) is a service which contains only jobs located in the Bureau of Engraving and Printing.

**Exten-
sion to
field
service**

The Classification Act of 1923 did not apply to any of the thousands of national employees outside of Washington, D.C. However, heads of the executive departments attempted to apply the system to their employees elsewhere. Some of the de-

partments, like Agriculture, were successful in dividing their field employees into services and assigning them grades within the services, following the formulas used in the District of Columbia. The Ramspeck Act in 1940 authorized the President to extend the position classification system to the classified service outside of Washington. This project was interrupted by the war, but it has been resumed.

There is always difficulty in keeping positions properly classified. Shifts occur. The bureau acquires new functions; these are assigned to persons who thus acquire duties and responsibilities of a different position from the one they formally occupy. Another kind of shift may come about by degrees. It is found that A does a certain job better than B, and shortly one or both of them may be performing services of a different degree of difficulty and of responsibility from that belonging to the positions to which they were appointed and for which they are being paid. The most successful way of preventing a deterioration of the position classification system is to conduct a continual audit of positions. A classification officer may be placed in the department or agency—the departments and agencies each employ enough personnel to require the full time of at least one and often several personnel officials—and given a status sufficiently independent so that he can examine the work of any employee who feels that his duties are improperly classified. Also this official conducts checks from time to time to discover unsuspected shifts in functions.

We have not yet examined the methods of recruitment. The chief machinery for recruitment of personnel is the Civil Service Commission. The Commission assumes that in the normal course of events many positions will become vacant each year. Consequently, from time to time it holds examinations for all the positions which employ large numbers of people. Notices of such examinations are posted in post offices and in all federal buildings throughout the country. Anyone who fears he may miss such a notice may write to the Commission asking to be notified of any examination which he will be qualified to take. After the exami-

Continuing classification

Recruitment and appointment

nation has been announced, the candidates ask the Commission for permission to take it. This is done by providing information to the Commission on a blank furnished by it. All persons sending in the blanks will be notified as to the time and place—this holds, however, only for what are called assembled examinations. The names of all persons making a passing grade on an examination for a specific position are placed on the register for that position. When a vacancy in the position occurs in any department or agency, the appointing officer for the organization sends a request to the Commission. The names of the three persons having the highest grades in the register for that position are then certified by the Commission to the appointing official. He selects the person he thinks most suitable and the names of the other two are returned to the register to await other vacancies. The requirement that three names be sent to the appointing officer to afford him a choice among them is called the rule of three. The names remaining on a register a year after an examination is given are usually discarded, and a new examination is given to establish a new register. Occasionally the Commission extends the life of a register. A person who fails of appointment even though his name is on the register may have it put on again by taking and passing another examination. The person who has his name on the register is under no obligation to take a job when it is offered to him.

Unassembled examinations

For positions high in the services, assembled examinations are not usually given. The number of vacancies may not justify it; the number of persons qualified to take such a test may be small; the qualities to be sought for among the applicants may be of such character as not to be ascertainable by a written examination. Unassembled examinations are employed to select such personnel. The unassembled examination may consist of an investigation of an applicant's work in the jobs he has held. He may be interviewed, and persons who have known him may be interviewed. He may be given a special written examination which is set up for that one occasion. The kind of investigation made of

a particular applicant will depend in some cases on the kind of position to be filled.

The Civil Service Commission has in recent years become convinced that applicants for some positions should not be selected by it. Such are certain top positions and those which require a narrow specialization. It has therefore encouraged the departments to establish examining boards when a vacancy of this type is to be filled. The board may be composed of persons inside the service, and it may also include members from outside the national employment. This procedure is calculated to provide an examining board which is especially qualified to recognize the qualities needed for a particular position. It also relieves the Commission of the necessity of attempting to maintain on its staff persons able to appraise the capacities of candidates for extraordinary positions, as, for example, positions requiring a knowledge of rare manuscripts.

Decentralized recruitment

Honorably discharged veterans, and the wives and widows of veterans, have been given a favored status in the national employment. Five points are added to the earned examination grade of a veteran, ten to that of veterans with service-connected disabilities, wives of disabled veterans, and widows of veterans if they have not remarried. Furthermore, if an appointing officer appoints a non-veteran when a veteran is available, he is required by the statute to file his reasons for passing over the veteran in writing with the Commission. Veterans have additional preference in case of removals from the service. They are entitled to a special consideration in appeals procedure if dismissed. When reductions in the number of personnel are made, as occurred after the war, the veterans are given preferential treatment.

Veterans preference

Throughout the service, ladders of promotion have been established. The uniform rule is that promotion may be made only on the basis of examination. There are two kinds, competitive and non-competitive. If an individual remains in a particular specialization within a service, his examination may consist of an investigation of his record which reveals whether his perform-

Promotion

ance has been satisfactory. Sometimes he may also be given a written examination. If he makes a passing grade in this, he is eligible for promotion. Persons changing from service to service, as from the professional (P) to clerical, administrative, and fiscal (CAF), or changing from one specialty to another within a service, will normally be required to take a competitive examination, which may or may not be assembled.

Person-
nel for
top levels

Problems connected with promotion are crucial to the national employment. Should top positions in the services be filled from below, or should new blood be introduced into the system at successive grades? The American system has depended largely on filling the higher grades by promotion. The British system, commonly regarded as one of the best employment systems, has used a dual arrangement. Many grades are filled by promotion from the bottom. But at the upper levels a large number of outside personnel are introduced by means of competitive examinations. The persons eligible for these positions are university men who have been graduated with superior records. They are expected to fill most of the grades above the point where they enter the service, but some of the most able administrators are recruited from the lower grades.

J.P.A. ex-
amina-
tions

When Professor White, a careful student of the British system, was a member of the Civil Service Commission, he was influential in establishing a series of examinations, including those for junior professional assistants, which were intended to secure some of the ablest college graduates. There is one essential difference between these and the British examinations. The British tailor theirs to suit the courses given in the best universities. Consequently, an honor student in mathematics or Greek would take an examination in his major field. It is assumed that ability is general; if a man can make an excellent mark in Latin, he can be trained to administer financial matters with distinction. In the selection of able college graduates the American practice continued to be what it had long been: to test for a particular quality which will be of immediate use in the government employment.

The political activity of persons in the national employment and questions with respect to their loyalty constitute two vexatious problems. Governmental employees have long been viewed by politicians as a legitimate source of funds. To protect the national employees from such pressure the Pendleton Act provided that "no person in the public service is for that reason under any obligation to contribute to any political fund, or to render any political service," and that no one in the service "has any right to use his official authority or influence to coerce the political action of any person or body." However, it was not thought to be sufficient to protect the governmental employee from political pressure; he must be restricted in his own political activity also. Consequently, since 1907 a rule of the Civil Service Commission has prohibited persons in the classified service from taking an active part in party management or political campaigns.

Political
activity

The restrictions on persons in the classified service were extended to other employees by the Hatch acts. The First Hatch Act, enacted in 1939,²² forbade all federal employees except policy-forming officers to take "any active part in political management or in political campaigns."²³ The Second Hatch Act, passed in 1940,²⁴ provided that if any state employee, paid in part or in full with funds received from the federal government, were permitted by the state to engage in political activities, the national government should withhold assistance to the amount of twice his annual salary. These acts were attacked as unconstitutional invasions of the rights of citizens, but were upheld by a divided Court.²⁵ Many students of constitutional law were not persuaded by the majority opinion. But even if the acts be considered constitutional, this does not settle the question of the

Hatch
acts

²² U.S. Code, title 18, secs. 61-61k.

²³ An exception can be made by the Civil Service Commission in municipalities where the majority of the voters are national employees, whenever and to the extent that the Commission considers it to be the "domestic interest" of the employees that they participate in politics.

²⁴ U.S. Code, title 18, secs. 61a ff.

²⁵ *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947).

wisdom and justice of forbidding 2,000,000 national and 3,000,000 state and local employees to take part in the democratic process.

**Employee
loyalty**

Of equal concern are the issues raised by President Truman's "loyalty order" of 1947. All federal employees are made subject to investigation and upon a finding of disloyalty by a loyalty hearing board are to be discharged from the service. Of course no organization, governmental or otherwise, can tolerate employees who will in a moment of crisis sabotage it. But widespread criticisms of the standards used to determine loyalty, and of the evidence received and the procedures employed, raise doubt whether the objective aimed at is really being accomplished. Discharging persons on suspicion without giving them a real opportunity to demonstrate their loyalty may result in the intimidation of perfectly innocent employees and a considerable degree of demoralization in the national service. Moreover, it is dangerous to democracy to establish machinery which can be converted into a device for the censorship of political opinion.

In normal times, the assumption has been that a democratic government practicing freedom of thought is capable of surviving; that liberty, indeed, adds strength rather than weakness to the state. The issues raised by the Hatch acts and by the loyalty tests go to the core of American ideals.

EMPLOYEE ASSOCIATIONS

**Profes-
sional as-
sociations**

Associations of governmental employees are not a part of the legal governmental structure. They have, however, achieved sufficient influence to require notice. Two kinds of associations may be mentioned. The first is of the professional and the second of the labor union type.

Differing in this respect from state and local officials, national employees have not formed large or numerous associations of the professional type. For the most part their participation in professional associations takes the form of membership in private professional groups, or in some cases in the associations of state or municipal officials. Thus doctors, lawyers, and scientists in

the national service continue to belong to the medical or bar associations and similar organizations composed predominantly of private persons.

In terms of influence, the labor union type of association is more important in the national governmental personnel system. The first unions were among post office employees. In general, however, unionization in the national service has paralleled unionization in private employment; in recent years it has covered most of the lower grades²⁶ and it is expanding in the higher grades of the public employment. There was a hostile official attitude toward unions of public servants for a long time. Theodore Roosevelt in 1906 formalized this attitude in his "gag rule" forbidding "all officers and employees . . . of every description . . . whether acting directly or indirectly, individually or through associations to solicit an increase in pay or to influence or attempt to influence in their own interest any other legislation whatever, either before Congress or its committees. . . ."²⁷ In 1912 an act of Congress reversed this order of President Roosevelt, and since then employees of the national government have been permitted to exercise the right to petition the government guaranteed in the First Amendment to the constitution.

The status which governmental-employee unions have attained can be indicated by referring briefly to issues with which they have concerned themselves. The right to organize has been firmly established, first by law in the act of 1912 and second by the practice of department heads. The right to lobby was legalized in the act of 1912. The public employee unions have maintained for some years their own organization for representing their interests to Congress. They have supported legislation for the improvement of the service performed by public employees as well as for better wages, hours, and working conditions for themselves. Collective bargaining is not on the same level for public as for private employees, largely because of the lack of freedom of department heads. Frequently their authority is care-

Union af-
filiation

Status of
union ac-
tivity

²⁶ W. E. Mosher and J. D. Kingsley, *Public Personnel Administration* (Harper & Brothers, New York, 1936), p. 497.

²⁷ Quoted by L. D. White, *op. cit.*, p. 435.

fully defined by law, so that the limits of their bargaining power are quickly reached. Bargaining for governmental employees is of necessity mostly with Congress. The closed shop is not possible for governmental employees because of the competitive system of recruitment. The right to engage in partisan political activity has been sharply curtailed, as we have seen. The right to affiliate with private employee unions is recognized, and most unions of governmental employees have affiliation either with the American Federation of Labor or with the Congress of Industrial Organizations. However, the right to strike has been definitely denied to all employees of the United States. In 1947, appropriation bills specifically reaffirmed this denial.

The
future

It seems probable that the large number of employees in the national government, the feeling of isolation which individual persons have in a large organization, the tendency of the national government to pay wages which on the whole do not quite equal the pay for the same kind of work in private employment, and the punitive attitude which the party out of power assumes toward the "bureaucracy" create conditions out of which employee organizations are bound to arise. It may be concluded, therefore, that employee unions will have a permanent place, even though there may be temporary decreases in their influence from time to time.

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CHAPTER 17

ADMINISTRATIVE TECHNIQUES

Types of Techniques—Guidance—The Control of Personnel—The Control of Finance—Support Functions—Establishment of Standards—Application of Standards—Other Functions

TYPES OF TECHNIQUES

The techniques of administration can be divided into two large classes. There are, first of all, the devices for internal management of the administration. By means of these devices the gigantic machine is made to respond to the directions of the President and Congress, and to move, with a considerable degree of efficiency, toward the accomplishment of the purposes of government. Four devices of internal management will be discussed: guidance, the control of personnel, the control of finance, and support functions. The internal controls of the judicial system were described in Chapter 13. The second class of administrative techniques deals not with the internal machinery of government but with the end product of government, the application of law. The application of law takes place in so many different ways that no altogether satisfactory classification of techniques can be found. For our purposes a classification into the establishment of standards, the application of standards, and a category which can only be called "other functions" will be adopted.

GUIDANCE

Policy decisions

It is the function of the President and of the head of each operating unit below him to determine, within the limits estab-

lished for him, what the policy of his unit is to be. The limits of the discretion of the President in his determination of policy are relatively wide. These limits are established by the constitution, by statute, and, to some extent, by custom. Below the President are the heads of departments and agencies. These are subject to the same limits as is the President, and in addition they are confined by the directives which the President gives them. As the lower ranges of the pyramid are reached, the choices of policy for each person in charge of an operating unit are constantly being narrowed. Nevertheless each head must make some decisions on policy.

To illustrate, let us glance at policy determination at the bottom of the Post Office Department pyramid. In a post office out of which letter carriers operate, the route of each carrier must be laid out. The postmaster performs this task and then seeks approval from a superior higher in the pyramid. The work in the office must be allocated among the postal employees. The postmaster is responsible for this, but his choices are limited by directives which give some preference among jobs on the basis of the seniority of employees. It may be necessary to establish stations—called relay points—midway in the routes where the foot letter carriers can pick up additional bundles of mail. This is the responsibility of the postmaster. A particular postmaster may not need to do one or another of these tasks because the policies were established when he entered office. But they were originally the responsibility of the postmaster, and as conditions change they will need revision. Policy determination is an ever occurring function. What is true at the bottom of the executive pyramid is true on a larger scale at every step up in the pyramid.

The directives flow down through the executive pyramid in many forms. The formal directives of the President are executive orders and proclamations. Other directives may take the form of letters, circulars, or oral instructions. The formal written directives usually come from the President or the department or agency head; lower in the pyramid, directives tend to be more informal. Some of the agencies collect the regulations ap-

Form of
direc-
tives

plying to them and publish them for the guidance of their employees. For example, the Post Office Department issues a publication called the *Postal Laws and Regulations*.

**Control
of
conduct**

The conduct of some of the employees of the national government while they are on duty is strictly regulated. An example of minute regulation is the Post Office Department rule that letter "carriers shall . . . not loiter or stop to converse on their routes, and shall refrain from loud talking, profane language, and smoking in the office or on their routes . . . nor shall they drink intoxicating liquor while on duty nor in public places while in uniform."¹

**Coördi-
nation**

Coupled with the determination of policy is the duty of the President and the heads of operating agencies below him to coördinate the work of persons under their supervision. This is necessary to prevent overlapping of work within the service and the consequent feuds and destruction of morale which then develop among the employees. The failure to determine an all-inclusive policy or to coördinate the application of that policy may also result in confusion to the public, as occurred with the harassed hotel owner who wrote to a fire marshal: "Dear Sir: The hotel inspector has ordered me to put in a new floor. One of your deputies has instructed me to tear down the building. Which shall I do first?"²

**Informa-
tion**

The executive branch of the government is, for the most part, so organized that there can be a steady flow of information upward to supervising heads. As was indicated in Chapter 16, this greatly assists the President in performing his constitutional duty to advise Congress. This flow of information is also a vital factor of internal control. By means of it, the responsible heads are better able to direct the work under their supervision.

The fact that reports of all the details of work are constantly being made to supervising officials is in itself a controlling influence on the persons who do the work. In addition, studies of operating units are constantly being made by other agencies.

¹ *Postal Laws and Regulations*, 1940, sec. 929, p. 437.

² Jeremiah S. Young, "Administrative Reorganization in Minnesota," *American Political Science Review*, ix, 273 (1915).

The Bureau of the Budget is continuously engaged in collecting such information; and agencies constituted for the particular purpose also make special studies of the application of the law. These are discussed in Chapter 19.

The function of investigation as a means of control belongs to every supervising head. At the higher levels the tendency is to conduct it through formal means; lower in the pyramid it may be conducted more informally. The postmaster may walk around in the office to see how the clerks are performing their work, but there is even at the lowest levels some formal checking. To take yet another example from the post office, regular checks are made of the clerk at the stamp window to see if the money he has on hand will pay for the stamps he checked out and has been selling earlier in the day. Occasionally unexpected checks are also made.

Investigation

THE CONTROL OF PERSONNEL

The most direct method of controlling the application of the law is to control the persons who do the work. For purposes of description the means of control will be divided into two large categories, the negative and the positive measures. We shall examine the harsher kinds of controls first.

Negative control
1. Discipline

Negative controls involve the imposition of penalties. The less drastic controls are disciplinary measures, such as reduction in rank, transfer to a less desirable position, demerits which may slow up the rate of promotion, and reprimands. The most drastic control is removal, which requires detailed attention.

Removals may be initiated either by the legislative branch of the government or by executive officials. The constitution provides for the removal by impeachment of all civil officers of the United States. The term "civil officers" appears to include all national governmental personnel except members of Congress and of the armed forces of the United States. The constitution designates the causes for which removals may be made: treason, bribery, and other high crimes and misdemeanors.

2. Removals
a. Impeachment

The term "impeachment" refers to the accusation. This is

made by the House of Representatives. Ordinarily some member makes a charge against an official. If the House votes to investigate the charge, a committee is appointed for the purpose. The report of the committee may exonerate the official, or it may recommend impeachment. If a motion to impeach is made and carried by a majority vote, the House appoints persons called managers to present the case to the Senate. The Senate hears the case, which is conducted much as a court trial is. Conviction of the accused requires a vote of two-thirds of the Senate. Conviction removes the accused person from the office. To removal may be added disability to hold any "office of honor, trust, or profit under the United States."

Impeachment is little used—only a dozen persons have been impeached by the House during the whole history of the country and only one-third of those were convicted and removed from office. Nevertheless it is not unimportant. On several occasions persons have resigned because impeachment proceedings were threatened. Possibly the fear of impeachment has influenced others. Impeachment is most significant, however, in relation to the judiciary, for there is no other method of removing judges. All four convictions in impeachment proceedings were of judges.

But in a sense impeachment is not a means of internal control, for it is used by an agency outside of the executive branch. Moreover, it is to be used only for those gross errors of conduct which raise questions not only of technical competence but of character as well.

b. Executive removals

Removals initiated inside the executive branch fall into two classes: those undertaken by the President and those undertaken by any other officer in the executive branch of the government. As we have seen,⁸ the President has a constitutional right to remove executive officers; but his power to remove officers with quasi-legislative or quasi-judicial duties can be, and in the case of the heads of most of the regulatory commissions has been, restricted by act of Congress.

⁸ Pp. 196-197, 336.

In the second class of cases, the general rule is that the appointing officer has also the power of removal. However, the removal of persons in the classified service is limited by law. An act of 1912 provided that "no person in the classified civil service . . . shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing."⁴ While the language of this act covers all removals, whether by the President or by any other officer, probably the decision in *Myers v. United States* means that the President is not bound by it.⁵ If a removing officer follows the requirements when he separates an employee from the service, by stating the reasons in writing and giving the person discharged a copy of the reasons, his decision is final and he need not even permit the employee a hearing—unless the employee charges that such requirements have not been followed or that the separation was made for political or religious reasons. Hearings are conducted by officials representing the Civil Service Commission and in its name.

Veterans have been given more security than other employees in the classified service. By statute the veteran has the privilege of appealing from the decision of a removing officer to the Civil Service Commission. The Commission apparently has no statutory power to compel an officer to reinstate a veteran, but in a letter of August 23, 1945, to the heads of the executive departments and agencies the President said: "It is my desire that the heads of all departments and agencies arrange to put into effect as promptly as possible the recommendations which the Civil Service Commission makes" with respect to overruling the decision of an appointing officer. This directive of the President makes it necessary for officials to follow the recommendations of the Commission in cases of appeals by veterans.

So much for the negative methods of control. More difficult to apply, but of greater importance, are the affirmative techniques. The problem of personnel management in government

c. Veterans

Positive controls
1. Morale

⁴ 37 *Statutes at Large* 555.

⁵ Edward S. Corwin, *The President: Office and Powers* (New York University Press, New York, 1941), p. 93; see also p. 356, n. 77.

resembles that in industry, but it is greater because the establishment is larger. Security is one desideratum. This has been achieved for the classified service. Employees in the classified service, and some types of employees in the unclassified service, are not only protected against arbitrary dismissal but included in a federal pension plan, under which the employee and the national government contribute to an annuity toward retirement. The advantages to morale arising from security, however, are diminished by a low pay scale. The upward revision of salaries in 1946 leaves the national government still paying less than private employers for comparable work. Promotions pose another problem. They must be managed so that ambitious employees can be reasonably confident of improving their positions.

2. Leadership

The responsibility for effective management of personnel rests in part with Congress, inasmuch as it determines the major outlines of the organization and appropriates the money to pay the costs. *Further responsibility rests with the President. It is he who originates the impulses of motivation which determine the whole tone of the service.* To the extent that he sets the direction and provides the stimulus, the heads of departments and the heads of operating units within the departments will be able to transmit an effective leadership to the line employees. But on the other hand an inspiring President may have his effectiveness diluted by poor channels of communication. To insure the adequacy of these channels, special arrangements have been made.

3. Organization

The heads of departments, and often the supervisors of the operating subdivisions within the departments, are provided with expert personnel advice. An official called a personnel director, ordinarily assisted by a staff, supplies this advice. It will be concerned with whatever problems arise in the unit; it will probably include such matters as suggestions for the application of the position-classification system, plans for the maintenance and improvement of employee health and safety, methods for employee counseling, for the hearing and settlement of grievances, for the use of incentives, for the handling of disciplinary actions. Through his contacts with the Civil Service Commission

the personnel director is able to keep informed of the most successful practices throughout the national employment and to apply this pooled experience to the special problems in his department.⁶ Thus assisted, an able supervising head can adopt and effectuate a personnel program which will infuse life and vigor and enthusiasm into the corps of workers under his direction.

THE CONTROL OF FINANCE

The control over expenditures is the most powerful of all the techniques for managing administrative machinery. No wheel turns without money. As its flow to the departments and agencies is made to ebb or rise, so their activities decrease or expand. Not only does financial control determine the quantity of work done, but it also affects the quality. The activity of the Bureau of the Budget as the agent of the President in making the annual financial and work plan will be described in Chapter 20. However, some illustrations of the operation of the Bureau will be given here to indicate the minute, far-reaching, and omnipresent influence deriving from the management of monetary controls.

**Money
the key**

When the budget officer in an operating bureau, together with the chief of that bureau, makes estimates as to the amount of money needed for the ensuing year, he must show in detail for what the money is intended. Directives transmitted by the Bureau of the Budget request an itemization of the materials and equipment needed and the number of employees required to perform the work planned. The agency is instructed to give information as to the operating unit and what the operating standards are.⁷ These estimates are reviewed by the Estimates Division of the Bureau of the Budget. The officials in the Estimates Division, with the expertness which comes from the experience of handling many such work plans, subject the plans to a penetrat-

**Budget-
making**

**Plan
analysis**

⁶ See Division of Administrative Management, Bureau of the Budget, "Organization and Responsibility for Personnel Administration," *Personnel Administration*, v, 3 (1943).

⁷ Fritz Morstein Marx, "The Bureau of the Budget," *American Political Science Review*, xxxix, 653-684, 869-899 (1945).

ing analysis. Some or all of the following questions may be raised. Is the purpose of the request a proper one? A statute may require its accomplishment; in this case, a question of the wisdom of the choice of means may be raised. Are the materials and equipment asked for the proper ones? Is the work load of each individual employee equal to the work load of employees performing similar work elsewhere? If not, the item for salaries will be pared down. Are the operating standards high enough? If not, suggestions for raising them may be given, or perhaps the amount of money requested may be cut as a stimulus to the bureau chief to improve them. When consideration of the budget has reached this stage, many duplications and conflicts of plans are eliminated. Officers in the Estimates Division in the examination of the work plans of the operating units have the opportunity to detect and point out overlapping and contradictions. Once such duplications or conflicts are brought to light, consultation with the bureau chiefs involved usually eliminates them, but if not, reducing the proposed appropriations will do so.

**Budget
execu-
tion**

After the money has been appropriated by Congress, control over the spending of it, and thus over operations of the governmental machinery, continues. A department will receive an appropriation of a certain sum of money which is available for its use during the fiscal year. Under the guidance of the Budget Bureau, this sum of money is divided into quarterly apportionments so that it will not be used up before the year has elapsed. The Bureau receives reports showing the rate of expenditure. In reviewing the expenditures, the Bureau also reviews the work of the agency to see that it is accomplishing the purposes set for it by Congress and the President.⁸ If the agency's program does not require it to spend the money appropriated to it, the Budget Bureau places the funds not needed in a reserve fund. If, on the other hand, conditions arise which require the spending of more money, the agency in coöperation with the Bureau may ask for supplemental appropriations. In this manner a constant recon-

⁸ Harold Smith, "The Bureau of the Budget," *Public Administration Review*, 1, 106 (1940).

sideration of the activities of the departments and agencies goes on throughout the year.

The Director of the Bureau of the Budget is likewise charged with determining for each quarter of the year the number of employees needed "for the proper and efficient exercise" of the work of each operating unit in the executive branch of the government. A fairly extensive system is set up to ascertain the amount of work to be done and the number of persons needed to do it. All employees in excess of the number determined by the Director to be needed must be released at such times as he orders.⁹

Work
load

One word of caution with respect to the exercise of internal controls should be noted. Although the system is as described, the administrative machinery of the government is manned by people. Some of them, including Presidents, department heads, and other chiefs on down the scale, do not always operate within the customary limits. The deviations from the procedures described occur not only because of the differences in temperament and ability of superior officers but because of influence of one kind or another which can be marshaled by subordinates. A line officer may have his estimates slashed by the Budget Bureau, but he may get his appropriation because of powerful friends in Congress. He may fail to follow the President's lead, possibly because he leads the President, possibly because the President needs him in order to retain the support of his faction in the party and therefore cannot afford to dismiss him from office. Qualifications of this sort modify but do not destroy the general picture drawn above.

Excep-
tions

SUPPORT FUNCTIONS

The procedures used by the government to maintain itself are here called support functions. In order to exist and to function, the government must have property and it must have people. These two categories can each be subdivided. Property may be in the form of money; it may be in the form of materials, sup-

Sources
of
support

⁹ Fritz Morstein Marx, *op. cit.*, p. 879.

plies, equipment, etc.; or it may be in the form of land. The chief procedure for collecting money income is taxation; for procuring materials, it is purchase; for acquiring land regardless of the desires of the private owners, it is eminent domain. Acquiring people can be divided into two parts, civil and military recruitment. The recruitment of personnel to perform the civilian tasks of the government has been covered in Chapter 16 and will need no further description here. Each of the other subdivisions of the support function will be summarized.

Taxes

1. Customs

The burden of determining the amount of tax to be paid on imports falls upon government officials stationed at the ports of entry. They classify the goods and determine the amount due the government. The importer then pays the duty, or, if he feels that the official has failed to classify the goods properly or has evaluated them improperly, he may appeal from the decision of the field officer to the Customs Court, thence to the Court of Customs and Patents Appeals, and thence to the Supreme Court of the United States.

2. Income tax

The burden of determining the amount of many of the other taxes rests with the taxpayer. In the case of the personal income tax, the Collector of Internal Revenue normally sends a form to the taxpayer upon which he can enter his income and deductions along with detailed instructions as to how the entries on the form are to be made. However, if the taxpayer does not receive the form, he is still required to secure it and to pay his tax. To assist the taxpayer, the Bureau of Internal Revenue has established more than sixty collection districts with an office centrally located in each. In these district offices persons are available to assist the taxpayer to complete his returns. Also, other persons to whom the taxpayer may go for help are stationed, frequently in the post offices, in cities other than those in which the collector of the district is located. All of this service to the taxpayer is provided gratis.

a. Collection procedure

After the tax forms have been returned to the collector, they are audited. The thoroughness of the audit is dependent upon the number of employees available to the Bureau of Internal

Revenue. A Congress which cuts down the appropriation for personnel in the Bureau of Internal Revenue is likely to reduce the income to the government because of corresponding reduction in the checking of tax returns and in field investigations. Errors of several types are found in auditing the returns; three sorts deserve comment. Clerical errors which cause the tax payment to be wrong in any substantial amount are adjusted. The taxpayer may have made errors with respect to allowable deductions; these usually result in an underpayment to the government. In such cases a conference is ordinarily arranged with the taxpayer and an adjustment is made. The third kind of error which sometimes can be detected from evidence in the return is of a willful nature. For the purpose of unearthing such evasions, investigation is also carried on in the field by agents of the Bureau of Internal Revenue and of the Federal Bureau of Investigation. The Revenue Act of 1928 provides that the Collector of Internal Revenue may add an assessment of 50 percent of the amount due where the deficiency is the result of fraud with intent to evade the tax. This is a "civil sanction" which may be imposed in addition to criminal prosecution without violating the double jeopardy clause.¹⁰ Often, however, in the less flagrant cases, the debtor is allowed to pay his deficiency and civil penalty without prosecution.

A person who feels that the assessment of practically any of the internal taxes is not according to law has an appeal from the field officer making the determination to the Collector of Internal Revenue, and from the Collector to the Tax Court of the United States. Appeals can be taken from this court to a circuit court of appeals and then to the United States Supreme Court.

The purchase of materials for governmental use has always required watchfulness to prevent waste and even corruption. Consequently, authority to purchase and the procedures attending it are carefully set out in the law. Purchasing for all the non-military agencies of the government is done by the Bureau of Federal Supply, which is located in the Treasury Department.

b. Appeals

Purchases

1. Peace-time

¹⁰ *Helvering v. Mitchell*, 303 U.S. 391 (1937).

The armed forces have their own purchasing agencies. Bureau action is initiated in two different ways. There is one procedure for the purchase of materials which are regularly required by governmental agencies, such as coal, and another for the purchase, with some exceptions, of all other materials. The departments make estimates of the amount of the first kind of materials they will require and the Bureau of Supply carries on a continuous program of purchase. These materials may be stored and later distributed as they are needed. The purchase of the other class of materials is ordinarily initiated by the operating department. A certain item is wanted. A requisition is sent to the Bureau of Supply; this describes the article, specifies the time when it is needed, and bears the approval of a fiscal officer indicating that there has been an appropriation under which the purchase can be made and that there is money in the fund to pay for it. Then the Bureau is ready to begin the procedure of obtaining the article.

In making purchases, the Bureau is required to advertise the nature of the commodities it wishes to purchase, setting forth the quality, quantity, and time of delivery. It receives bids submitted by the prospective sellers. The lowest bidder ordinarily receives the contract to furnish the goods. The Bureau carries on a program of inspection, including in some instances laboratory tests, to make sure the goods delivered are as represented. The statute permits exceptions to the requirement for competitive bidding when immediate delivery is "required by public exigency," and also for an itemized list of purchases for designated agencies if the cost of the article is not more than \$25, \$50, \$100, and in some instances \$500.

2. War-time

The supply of materials, particularly of scarce ones, was the occasion of some improvisations during the recent war. The Second War Powers Act, passed in 1942, authorized the President to monopolize plant output by assigning priorities for the products of industry to agencies engaged in activities essential to the conduct of the war. This power he delegated to the War Production Board, an emergency agency in the Executive Office

of the President; and the War Production Board in turn delegated it to the armed forces. Since each of these issued priorities independently, there were soon priorities outstanding which exceeded the total volume of plant output, and accident rather than coördinated plan determined the distribution of materials. In 1943 the War Production Board resumed the power of assigning priorities, and thereafter awarded priorities to the armed forces, or to independent contractors, in terms of its estimate of the comparative urgency of needs.¹¹

The national government needs land for many of its purposes, as sites for post offices, custom houses, and other national buildings, and for army camps. It may acquire such land by purchase in the same manner as a private purchaser. But if its purpose requires a particular site and the private owner refuses to sell, it can acquire the land through eminent domain proceedings. If the need for the land is so urgent as not to brook delay, a United States district attorney at the instance of the Federal Works Administrator or other official may seek an order, usually from a United States district court, for the occupants to vacate the land, so that its national use can be begun immediately. If the urgency is not so great, proceedings to determine the value of the land may be begun first. After an appraisal of the land, its sale value may be determined by direct negotiation between the owner and an agent of the government, by the informal use of the judgment of third parties, or by a formal proceeding in a district court with a jury to set the value. The government is required by the constitution to give just compensation for land which it acquires. One test of just compensation is to find the current sale price of the property.¹² Another limitation on the government is that the land can be taken only for public use.

The reservoir from which the armed forces of the United States may be supplied contains practically the total number of able-bodied males in the country. The procedures which have been employed for inducting them into the armed forces are of

Acquiring land

Personnel for armed forces

¹¹ David Novick, Melvin Anshen, and W. C. Truppner, *Controlling War Production* (Columbia University Press, New York, 1948).

¹² *United States v. New River Collieries Co.*, 262 U.S. 341 (1923).

two kinds: voluntary entrance and conscription. Four routes are ordinarily available for voluntary entry into the armed service. They are direct enlistment, citizens' military training, reserve officers' training carried on in the colleges and universities, and enrollment in the military and naval academies. These normal methods of supplying personnel for the armed services have given way under the strain of war, first in 1863 and again in 1917 when conscription was resorted to. In 1940 Congress for the first time during peace was willing to require involuntary induction of men into the armed forces. However, this was not as severe a break with traditions as might at first appear, since war already was imminent. In 1948 Congress revived conscription. Whether this is the opening wedge for a permanent policy of conscription is a question for the future.

ESTABLISHMENT OF STANDARDS

Scope of power

Although the formulation of policy rests with the legislature, Congress can delegate to executive officers and administrative agencies a quasi-legislative power to make rules effectuating the legislative policy, and these rules have the force of law. Virtually every department and agency has been given the power to make rules concerning its own internal procedures. In addition, the President, secretaries of departments, and a number of regulatory commissions have been authorized to establish general rules which affect the activities of private persons.

Formal procedure

Until the adoption of the Administrative Procedure Act of 1946, there was no uniformity in the procedure followed by administrative agencies in the formation of rules. With specified exceptions, such as rules in the fields of military, naval, and foreign affairs and the rules governing the internal organization of an agency, the act requires that an agency proposing to make a rule give notice of its intention in the *Federal Register* and then hold a hearing at which interested persons are permitted to submit their views or arguments, orally or in writing. In cases in which earlier law required a more elaborate hearing and the

establishment of a record, as in rate fixing by the Interstate Commerce Commission, the act requires that the hearing be conducted in a quasi-judicial manner. Unless there is good cause for haste, the rule adopted will not go into effect until at least thirty days after its publication in the *Federal Register*. These provisions are intended to give interested persons an opportunity to be heard before the rule is adopted, and to learn the contents of rules which are to govern their conduct.

In addition, the Supreme Court has held that the due process of law clause of the Fifth Amendment requires that in some cases, which are not clearly defined, the rule must be accompanied by a recital of the facts upon which it is based.¹² This is supposed to be necessary in order for the courts to determine the legality of the order on review. Since the first statement of this doctrine by the Court in 1935, the inclusion of findings of fact in the rule or order of an administrative agency has become common.

Findings
of fact

In addition to rule making, administrative agencies establish formal standards which do not have compulsory force in the sense of requiring conduct of one sort or another but are nevertheless of first importance. An example is found in the Grain Standards Act of 1916, which met the need for a uniform grading of grain. The act provides for the determination of grades of grain by the Grain and Seed Division of the Agricultural Marketing Service of the Department of Agriculture and the promulgation of these standards by the Secretary of Agriculture. A hearing is required by the Administrative Procedure Act, but before the act was passed the Department had built up a practice of consultation with members of the trade. The act forbids the use of other grades in sales in interstate or foreign commerce, and forbids the application of the grades by other than licensed inspectors, but otherwise leaves the buyer and seller free. The government grades have won universal acceptance because "The standards furnish a language understandable by both buyers

Voluntary
standards
1. Compliance
for convenience

¹² *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

and sellers, and official inspection supplies an unbiased appraisal of the quality and condition of grain."¹⁴

2. Compliance
for benefits

Another case of the fixing of standards is found in the making of rules whose only sanction is the awarding or withholding of benefits. The Maritime Commission is authorized to fix minimum standards as to size of crew, wages, and working conditions which must be met by all vessels which receive operating-differential subsidies from the government. The Walsh-Healy Act of 1936 requires that contractors performing work for the national government must pay wages not below a figure determined by the Secretary of Labor to be the prevailing minimum wage for similar work in the locality.

Inter-
pretative
rules

A fixing of standards of another character is found in the Trade Practice Conferences held by the Federal Trade Commission. The Commission is charged with preventing unfair trade practices but is given no quasi-legislative power to regulate these practices. It can, of course, build up standards by the slow practice of quasi-judicial decision and accumulation of precedents. But this would postpone effective regulation and would leave businesses in doubt as to the legality of their conduct. To solve this problem the Commission calls a conference of the members of an industry, either on its own initiative or on petition from the industry. If the industry has a trade association, the proposal of a conference may come from it. The conference then considers the debatable practices and formulates rules concerning them. After the conference adjourns the Commission studies the rules and selects the ones which it believes forbid practices already prohibited by statute. These it publishes, in trade journals and elsewhere; and it invites all interested persons to attend a hearing or to submit written comment on the rules. After the hearing the Commission prints those rules which have survived the discussion and sends them to every member of the industry, together with an acceptance form on which the business may, if it wishes, indicate its intention to abide by the rules.

¹⁴ *Monograph of the Attorney General's Committee on Administrative Procedure: Administration of the Grain Standards Act* (76th Congress, 3rd session, Senate Document No. 186, part 7), p. 2.

This pledge has no legal force. The rules are called "interpretative rules" and although they do not have the standing of quasi-legislative rules they are usually accepted by the public as binding. The Commission follows them in construing the statute, and the courts are likely to be influenced by the Commission's interpretation.

The fixing of standards by government agencies ranges from these formal procedures to actions of such informality that systematic discussion becomes impossible. But we should note in closing that, just as the courts build up law by decision, so administrative adjudication of individual cases results in the establishment of general standards.

APPLICATION OF STANDARDS

A fairly small number of administrative agencies have been given quasi-judicial power. The Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the National Labor Relations Board, the Tax Court, and the Bureau of Customs are the more familiar examples. Ordinarily the action is a civil proceeding by the government—which is to say, in most cases, by the agency—against a private person; but some agencies, such as the Interstate Commerce Commission and the Employees Compensation Commission, entertain disputes between private litigants.

The due process clause has been interpreted to require that a person whose legal rights may be adversely affected by an administrative adjudication be given notice and a fair hearing on the issue. Often the statute creating the agency requires the keeping of a record of the proceeding, to facilitate review of the action by administrative superiors or by the courts. In all cases in which a record is required, the Administrative Procedure Act requires also a standardized procedure not unlike a court trial.

The decision of an adjudicatory agency ordinarily resembles a court judgment. It declares in favor of one party or the other and, subject to review, concludes the question as between them.

Quasi-judicial agencies

1. Procedure

2. Effect of decision

Sometimes the agency has the power of enforcing its own decision, as when the Federal Deposit Insurance Corporation terminates the insured status of a bank which it has found to be engaged in unsound banking practices, or when the Federal Communications Commission revokes a broadcasting license. Sometimes the enforcement of an order by an administrative agency is left to the courts. A shipper to whom the Interstate Commerce Commission has awarded a judgment against a railroad sues in the district court to collect the judgment. Several agencies, among others the Federal Trade Commission, the National Labor Relations Board, the Secretary of Agriculture acting under the Packers and Stockyards Act of 1921, and the Commodity Exchange Authority, employ the "cease and desist" order. Having determined, after a hearing, that the defendant is engaged in a forbidden practice, the agency issues the order. If the defendant fails to cease and desist from the practice in the future, a court suit may be instituted for the collection of a "civil penalty" for violation of the order.

The Administrative Procedure Act authorizes agencies with quasi-judicial power to issue "declaratory orders," which are the counterpart of declaratory judgments by the courts. These clarify the rights of the parties when uncertainty exists but give rise to no other remedy.

**Stand-
ards for
licensing**

A judicial or quasi-judicial proceeding is ordinarily thought of as an evaluation of past conduct, the application of standards to events which have already occurred in order to determine the legal character of past actions. In addition to this type of action, administrative agencies also apply standards in the exercise of the licensing function. The Interstate Commerce Commission, for example, issues certificates of convenience and necessity authorizing persons to engage in interstate rail or motor traffic. The Federal Communications Commission issues licenses to radio stations. In such cases the agency applies a statutory standard to determine whether or not the applicant should receive the privilege. Decisions on licensing are treated as quasi-judicial orders

by the Administrative Procedure Act, and formal hearings must be held.

Other administrative agencies make decisions as to whether applicants for benefits come within the statutory standards which they administer. The Veterans Administration passes on applications for veterans' benefits. Decisions of this sort do not come within the provisions of the Administrative Procedure Act, but regularized procedures not unlike judicial procedures are followed. In the case of other benefits, however, the judicial analogy is abandoned. Government lending agencies make loans in the same manner as private banks, after a businesslike rather than a judicial investigation.

**Benefit
func-
tions**

Thus the application of standards shades off into an area in which the judicial analogy disappears altogether, and the informal decision of the officer on the spot assumes the character of finality.

OTHER FUNCTIONS

The fixing of standards and the application of standards by no means exhaust the external operations of administration. Administration carries on many activities which are ancillary to these two functions and other activities which are not related to either of them.

Many organs of government carry on elaborate investigative activities. The discovery that laws or rules have been infringed, and the bringing of these cases to the courts or administrative agencies for adjudication, is the major occupation of many government employees and an incidental responsibility of others. Investigation preparatory to legislation by Congress is in part an administrative responsibility,¹⁸ and investigation preparatory to rule making is wholly so. In addition, all the functions of internal management, support, and control already described must be performed in order to maintain the administrative structure which in its external activities comes into contact with the

¹⁸ See chap. 19.

public through the fixing or the application of standards.

The problems arising in connection with standards are problems about people. But government also administers property, and this type of activity is not connected in any significant way with the making and application of standards. The problems involved in connection with the administration of the national parks and forests, the Tennessee Valley Authority, the physical operation of the Post Office, and the numerous other proprietary activities in which government engages are problems about things. Administration here is a function not very different from that performed by private businesses and individuals.

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THE IMPLICATIONS OF BUREAUCRACY

Essentials of Bureaucracy—Weaknesses of Bureaucracy—Characteristics and Weaknesses of Bureaucracy in Non-Administrative Organizations—Remedies for the Weaknesses of Bureaucracy—Government Service as a Career

ESSENTIALS OF BUREAUCRACY

A smear
word

In the minds of most persons the word "bureaucracy" carries with it a somewhat invidious meaning. Journalists, industrialists, lawyers, politicians, and others have often applied this term to governmental administrative agencies that have incurred their displeasure. Similarly they have frequently referred to unwanted controls or poor administrative policies or techniques as bureaucratic. The titles of certain books containing the word "bureaucracy" indicate in no uncertain terms the sentiments of their authors. *Bureaucracy Triumphant* by Carleton K. Allen, *The Dead Hand of Bureaucracy* by Lawrence Sullivan, *Our Wonderland of Bureaucracy* by James K. Beck, to name a few, express quite clearly the intense dislike authors have had for this word and its implications. And the contents are no less hostile to bureaucracy and the things for which they believe it stands.

Even in the minds of some modern writers in the field of political science the word has had an unfavorable connotation. Writing in the *Encyclopaedia of the Social Sciences*, Harold J. Laski declares that bureaucracy is a term usually applied to a system of government the control of which is so completely in the hands of officials that their power jeopardizes the liberty of ordinary citizens. The characteristics of such a regime, accord-

ing to Mr. Laski, are a passion for routine in administration, the sacrifice of flexibility to rule, delay in the making of decisions, and a refusal to embark upon experiment. And he adds that in extreme cases the members of a bureaucracy may become a hereditary caste manipulating government to its own advantage.¹

In their book on bureaucracy Carl Friedrich and Taylor Cole have advanced an explanation of the origin of the antipathy toward this word. They have pointed out that many modern states were organized by monarchs during the seventeenth and eighteenth centuries. The fierce struggle waged against these monarchs over the control of administration produced popular indignation against the administration itself. The natural tendency of those engaged in the fight for democracy to decry the administration as the servants of the prince led to attempts to arouse antagonism toward the administrative branch of government, to create an antithesis between democracy and bureaucracy, and to give a wholly unfavorable connotation to the word "bureaucracy."² The continuance of this hostility has perhaps been due to the fact that the general public comes into very frequent contact with the administrative agents and often under unfavorable circumstances. The cumulative displeasure which the public has felt because of instances of unwanted interferences on the part of government agents has coalesced into a permanent resentment which "bureaucracy" expresses. Furthermore, in the United States big business, resenting governmental interference with and control of its operations, has kept alive this antipathy in order to serve its own purposes.

What has resulted has been an emotional attitude rather than an intelligent understanding of the nature of bureaucracy and its implications. Recently, however, some writers, especially writers in the field of public administration, have attempted to analyze the term and discover the essential characteristics of

Its associations

Characteristics

¹ *Encyclopaedia of the Social Sciences*, ii, 70 ff.

² Carl Friedrich and Taylor Cole, *Responsible Bureaucracy* (Harvard University Press, Cambridge, 1932), pp. 3-4.

bureaucracy.³ The first of these characteristics seems to be a fairly well-defined distribution of functions among the units or subdivisions of an organization. In other words, in a bureaucracy each of its component units has a particular area or sphere within which it is expected to operate. If an organization is large, a clear-cut distribution of functions becomes important—in fact, indispensable—to the smooth operation of the organization. The second characteristic of a bureaucracy is a definite distribution of powers of control and coercion. In other words, in a bureaucracy there is a definite hierarchical arrangement of its component parts, in which the relationships of the higher to the lower units are fixed. In an organization of any size it is important to have lines of authority clearly marked out and rigidly followed. A third characteristic of bureaucracy is the formalization of personnel policies, sometimes referred to as *professionalization*. A well-developed bureaucracy tends to require certain minimum qualifications for various positions, to provide some security of tenure, to establish salary ranges, and to adopt a somewhat regular system for promotions. The larger the organization, the more essential it becomes to standardize personnel policies and procedures.

WEAKNESSES OF BUREAUCRACY

But in the minds of the general public not these but quite other characteristics are usually thought to be the essentials of bureaucracy. In truth these latter seem rather to be perversions of or undesirable accompaniments of the essential features which have been mentioned.

Unresponsiveness

One of the most common accusations is the *unresponsiveness* of an organization to the demands of the public. “. . . We condemn as bureaucratic the delay and lack of response from the representative of a large organization . . . because we do not sympathize with or do not understand at all the ultimate objectives or combination of objectives which this organization is

³ See *Investigation of Concentration of Economic Power*, Temporary National Economic Committee, Monograph No. 11 (Government Printing Office, Washington, 1940), p. 31.

supposed to realize. In such situations the word bureaucracy is widely used to decry acts of officials which, while required for the sake of 'efficiency,' are cumbersome and irritating to the person subjected to them."⁴ Sometimes the condemnation of bureaucracy results from such a misinterpretation of the conduct of bureaucrats. Sometimes, on the other hand, there is a basis for the accusation. The personnel policies which are found in a bureaucracy—the security of tenure, formalized procedures for promotion, etc.—permit public employees to show a lack of consideration for those whom they are supposed to serve without great likelihood of disciplinary action. Because they enjoy certain advantages under a bureaucratic system, employees are sometimes inclined to be arrogant and inconsiderate in their relations with the public. Be that as it may, such conduct, where it exists, is not an essential characteristic but rather a weakness of bureaucracy which can be reduced if not eliminated.

Another undesirable feature often instanced is an *excess of Legalism* *legalism*, or, to put it in another way, an *over-strict adherence* to rules and regulations. But what is frequently overlooked in such criticism is that the use of more or less rigid and precise rules and working procedures is essential to a large organization. In no other way can big administrative units be made to operate effectively. However, what may be necessary from an administrative point of view is often irksome to members of the public who do not understand the administrative implications of a given rule or regulation. The statement that something cannot be done because of a rule of a division or bureau does not make an exasperated citizen feel that his particular case is being treated with the consideration which it deserves.

Maladjustment of the working parts of an organization is *Maladjustment of working parts* frequently given as one of the weaknesses of bureaucracy. Many instances can be cited in which one part of an organization works at cross-purposes with another or wastes its efforts by duplicating the work of another. The truth appears to be that this situation exists in a bureaucracy because one of its essential purposes

⁴ Carl Friedrich and Taylor Cole, *op. cit.*, p. 1.

is not being fulfilled, namely, the maximum coördination of effort.

**Low
morale**

A *low level of morale* is often given as one of the weaknesses of bureaucracy. It is sometimes asserted that the worker in a bureaucracy is so weighted down and bound by rigid rules and regulations that he has no incentive to give his best efforts to advancing the work of his agency. This generalization is certainly no more than partially true. Some governmental units have an extraordinarily high level of morale, and others have presented the picture which is supposed to be typical of bureaucracy. It is obvious, however, to anyone conversant with government personnel and personnel problems of governmental agencies that the blanket accusation cannot be justified.

**Aggran-
dizement**

Another alleged weakness of bureaucracy is the tendency of units in an organization *to seek to increase their control and authority and to endeavor to perpetuate themselves*. "The inherent tendency of government to expand is one of the most common complaints directed at government."⁵ That this criticism has much validity cannot be denied. The various departments, bureaus, commissions, and other units of the federal government maintain legislative representatives whose task it is to work for favorable legislation, to watch appropriations, and in general to look after the interests of the units they represent. Much of this is legitimate. Senators and Representatives should be kept informed of the needs and the attitudes of governmental agencies. Nevertheless, these activities do in part represent the desire and the apparently inherent tendency of units to retain what they have, regardless of needs, and to expand if possible.

CHARACTERISTICS AND WEAKNESSES OF BUREAUCRACY IN NON-ADMINISTRATIVE ORGANIZATIONS

**Uni-
versality**

Interestingly enough, foes and critics of governmental activity and control have asserted that the essential characteristics of bureaucracy, and more especially the weaknesses of bureaucracy, are somehow peculiar to the administrative branch of govern-

⁵ Temporary National Economic Committee, *op. cit.*, p. 34.

ment. But this seems to be an unjustifiable generalization. Rather we are here confronted with basic and natural trends inherent in large organizations. The judicial branch of government, labor unions, large corporations, church groups—all exemplify to a high degree some of the essential characteristics of bureaucracy and in some cases exhibit the weaknesses of bureaucracy to an even greater extent than the administrative units of government which have been the object of such bitter attacks.

A case in point is that of the judiciary. The court system **Judiciary** evinces some of the essential characteristics of a bureaucracy and many of its weaknesses. The organization of the courts into lower, intermediate, and appellate courts, in which the vertical relationships are rigidly fixed, presents as definite a hierarchical system as any to be found among the administrative units of government. There is present also a rigid distribution of functions, or rather jurisdiction, quite as marked as that present in most administrative units. Likewise many of the weaknesses of bureaucracy can be detected in the judiciary. There certainly is a superabundance of legalism and a meticulous and often literal adherence to rules and regulations. Likewise there has been a tendency on the part of the judiciary in this country to expand its jurisdiction and control. This is especially noticeable in the rise and extension of the power of judicial review of legislation and administrative action.

But the essentials of bureaucracy and its weaknesses are to be found not only in government but also in organizations outside the government. Hierarchy is as characteristic of large business units as it is of governmental units, and the power of superior officers over subordinates in such hierarchies is usually greater and more arbitrary in business than in government. If a hierarchy with such arbitrary powers should be found in government, it would promptly be labeled despotic. One finds in large corporations a definite distribution of functions and activities among departments. It is true that in governmental agencies the devices whereby these activities are allocated often differ from those found in business. In governmental agencies, the allocation and **Business**
i. Hier-
archy

distribution of functions is usually fixed by statute or definite rule and regulation. In the case of a large business enterprise, the scope of a particular department may be determined by a fixed rule, but it may depend largely upon the capacities, interests, or aggressiveness of a particular department head.

2. Unresponsive-ness

More important is the likelihood that the weaknesses of bureaucracy usually attributed to governmental units will be found in large corporate units. As has been previously pointed out, one of the most general criticisms of governmental agencies is that they are unresponsive to the demands of the public. But this same attitude is found in many large business organizations, especially those having monopolistic or quasi-monopolistic status. The attitude of the railroads toward the traveling public for a long period of time was as notorious an illustration of the "take it or leave it" attitude as any situation found in governmental agencies.

3. Rigidity

Furthermore, the use of more or less rigid and precise rules and working procedures is quite general in giant corporations. Within a corporation, subordinate officials often complain that they are not permitted sufficient discretion and that transactions must be referred through too many channels to make efficient operation possible.⁶ This situation is likely to occur in any large-scale activity, whether in government or in business. Without precise rules and regulations, large administrative units cannot operate consistently or effectively. A large body of rules and regulations is thus built up. And it becomes as easy in large-scale business as in government to forget the objectives in blind obedience to rules.

4. Maladjustment of parts

Certainly governmental offices are not the only agencies in which there are maladjustments of the working parts of an organization. Many instances can be found in large corporations in which one part of an organization works at cross-purposes or duplicates the efforts of another. An interesting illustration of this was found by a governmental committee which prior to the war was investigating practices of large corporations. One of the

⁶ See *ibid.*, p. 33.

companies being investigated was divided into units on the basis of the different products which were manufactured. The committee found that officials of one division often consulted with employees of competing firms on research and other problems instead of attempting to discover what their colleagues in their own company had been doing that might be of aid to them.⁷

As we have said, a low level of morale is supposed to be one of the weaknesses of bureaucracy. Here again there is no reason to assume that governmental agencies have a monopoly on this phenomenon. Executives of some large corporations will admit that the morale of their employees is not particularly high, or that it was very low before a particular policy was adopted. In fact, it has been asserted that within large corporations a high level of morale is uncommon. Extra time and effort in cases of emergency are grudgingly given. Corporation officials often complain that potential executive material is destroyed by the dulling environment at the lower levels of their hierarchies. They also charge that their employees are in a rut or do not have a broad point of view. These complaints are not indicative of a high level of morale among employees.⁸

The last of the weaknesses of bureaucracy mentioned, i.e., the tendency of a unit in an organization to improve its position and increase its control, is certainly as prevalent in large business organizations as it is in governmental agencies. In fact, there is more pressure to do this in business than there is in government. A corporate manager is looked upon as being inefficient unless he is able to report that his unit is larger or has done more business than during the preceding year. This tendency is recognized by many corporation officials as operative within their enterprises. They complain that executives are often eager to have an outstanding record, even though such record may be achieved at the expense of the corporation as a whole.⁹

From these observations it seems clear that the essential characteristics as well as the weaknesses of bureaucracy are not confined to administrative or even to governmental agencies. When-

5. Low morale

6. Aggrandizement

Universality of defects

⁷ *Ibid.*, p. 34.

⁸ *Ibid.*, p. 34.

⁹ *Ibid.*, p. 34.

ever it becomes necessary to organize large numbers of persons for the accomplishment of a common purpose, success depends upon the extent to which each member of the organization can be brought to subordinate certain of his objectives to the larger objectives of the organization. Hence arise the controls which comprise the essentials of bureaucracy. These phenomena inhere in and are necessary to large organizations but they are not peculiar to governmental agencies, and certainly not to administrative units of government. Business organizations and other large groups use the same human material with which to operate and are therefore subject to the same necessities for control as well as to the same weaknesses. A statement by Henry A. Wallace very aptly sums up the situation. "I am well aware of the sins of bureaucracy, its occasional pettiness and red tape. The bureaucracy of any country cannot be much better than the human beings of that country. But I am convinced that governmental bureaucracy, from the standpoint of honesty, efficiency, and fairness compares very favorably with corporation bureaucracy. There is less nepotism, less of arbitrary and unfair action, and a more continuous consideration of the general welfare. This is not because human beings in government bureaus are so much finer as individuals than human beings in corporation bureaucracies, but because continuous public scrutiny requires a higher standard."¹⁰

REMEDIES FOR THE WEAKNESSES OF BUREAUCRACY

Clearly
stated
objec-
tives

Administrative antidotes to the evils of bureaucracy are numerous and varied. One of these is a clear statement of objectives for the employees in an organization. A carefully expressed purpose for an enterprise may not be vital in a small organization, where personal loyalty to the chief executive officer may be sufficient. But in a large organization, where personal relationships are not common, a substitute must be found for personal loyalty in order to maintain morale and to direct the efforts of all to-

¹⁰ Quoted from "The American Choice," in Frank Kingdon, *An Uncommon Man* (The Readers Press, Inc., New York, 1945), p. 187.

ward some common objective. A common objective may prevent some of the bureaucratic inertia and prove a considerable stimulus to initiative. The more definite the objective, the easier it is for administrative personnel to appraise their activities in terms of what they wish to achieve. Business organizations have one advantage over others in this respect; they can make an increase in sales or production the goal of an organization and thus present to employees a concrete, definite, and understandable objective.

Another method of preventing some of the inflexibility so characteristic of bureaucracy is to provide a periodic reexamination of existing policies, responsibilities, and objectives. Every large organization becomes weighted down with procedures and rules and regulations which have long since lost their *raison d'être* but which persist because of a failure to call for a reexamination and appraisal of such procedures. In order to be most effective, such reexamination should be conducted at the termination of regular periods instead of being used only in times of crisis or at irregular intervals.

Reappraisal

Improvement of devices for internal communication will assist in preventing some of the undesirable characteristics of bureaucracy. Frequent intercommunication is highly to be desired. Policies and decisions must be communicated to all who are to carry them out in ways likely to cause the minimum of friction. To a certain extent, formal methods of communication must be utilized. But less formalized methods should be encouraged wherever possible, not only between those occupying positions on the same level in a hierarchy but also among those in vertical relationships. Face-to-face contacts in large organizations should be encouraged. Likewise every opportunity should be utilized to transmit information from one branch of an organization to another. A thoughtfully conceived system of intercommunication will help to overcome some of the undesirable characteristics of bureaucracy.

Intercommunication

Another important device which may help to neutralize the inflexibility that so frequently creeps into bureaucracy is an ade-

Delegation of authority

quate delegation of discretionary authority to subordinates. In a large enterprise there are definite limits to an executive's ability to oversee in detail its various parts, and hence there are limits to his effective span of control. Delegation of authority becomes essential not only to the maintenance of efficiency but also to the maintenance of the morale of an enterprise. Few things are more destructive to initiative than an attempt to exercise too much authority from above or a failure to give adequate power for the task which has been assigned.

Leadership

One of the principal reasons for the weaknesses of bureaucracy is ineffective leadership. First-class executives are probably as rare as first-class inventors or artists. The traits desirable in executives are not few, nor are they often combined in one person. If, as some writers on administration have insisted, the following traits are essential, it is no wonder that the undesirable characteristics of bureaucracy flourish for lack of adequate leadership. Initiative, enthusiasm, imagination, knowledge, intelligence, originality, persistence, speed of decision, purpose, sympathy, tact, patience, broad social outlook, and prestige constitute a long list of traits to find in any one person. Certain it is that when appointments to top administrative posts are made chiefly on the basis of politics, there is little likelihood that persons with these characteristics will be placed in important administrative positions.

Personnel policies

Finally, the observance of certain well-known principles of personnel administration can be of considerable help. Uncovering talent, avoiding promotion solely on the basis of seniority, giving special training to promising employees are personnel devices that will materially aid in avoiding certain weaknesses. In fact, any of the better personnel policies and techniques which have been developed can be helpful in overcoming the undesirable characteristics of bureaucracy.

The task

To decry the growth of bureaucracy not only is a futile gesture but may even be dangerous because it diverts attention from some of the real problems which modern society faces. Large administrative units are here to stay. They have come into

existence because of increasing demands that the government take on new functions. The Interstate Commerce Commission came into being because the railroads abused their powers and position. The Securities and Exchange Commission was created and given the power to control public utility holding companies, stock exchanges, and the issuance of new stocks and bonds because of abuses in those businesses. The Tennessee Valley Authority was a necessary attempt to solve the problems of flood control, erosion, high cost of electricity, and other recognized evils that were retarding the prosperity of a large section of the United States.

Attention should not be unduly focused upon the mere growth of bureaucracy, but rather upon means of remedying its weaknesses. This latter objective becomes more and more important as government grows larger and takes on new functions, such as the ownership and operation of business enterprises.¹¹ A failure to solve the weaknesses of bureaucracy might well doom us to a static society; in fact it might even seriously endanger our democratic form of government.

GOVERNMENT SERVICE AS A CAREER

As has been previously pointed out, one of the chief remedies for the weaknesses of bureaucracy is to secure competent personnel for positions in the government service. Realizing this, educators and many governmental officials have sought means of attracting qualified persons into the service and affording them conditions which will induce them to remain in and give their best efforts to government service. Unfortunately legislators have often seemed to be more interested in playing politics and weakening the administrative branch of government than in enacting legislation which would improve the quality of governmental service. And yet they have often been the loudest in their denunciations of administrative officials who have shown evidences of some of the weaknesses of bureaucracy.

**Procuring
personnel**

¹¹ See James Burnham, *The Managerial Revolution* (The John Day Company, New York, 1941), chaps. 6, 17.

JPA examination

Despite many handicaps, steps have been taken toward attracting into the federal service competent personnel. One of the outstanding illustrations of this is the junior professional assistant examination, which is given to college seniors as well as to others with certain work experience. This JPA examination, as it is commonly called, is designed to test the intelligence and general background of applicants as well as their skill or competence in a particular field. Competitors all take the same tests of general abilities, such as tests in English usage, vocabulary, arithmetic reasoning, abstract reasoning, etc. They are rated not only on the results of this written examination but also on their education and experience. Many types of positions are open to persons who qualify. There are places for administrative technicians, economists, mathematicians, psychologists, physicists, social science analysts, and statisticians, among others. These positions entail minor administrative responsibility. Through the junior professional assistant examination it is hoped that intelligent and able young persons with good educational background will be attracted to the federal service.

Unassembled examination

Another device that has been of assistance in recruiting able persons is the so-called "unassembled examination," by which a person is rated on the basis of his education and experience instead of by a written examination. This makes it possible for an agency to go out and get a person peculiarly fitted for a particular position which is open.

Working conditions

It is not enough to recruit able persons for the federal service. Conditions under which they work must be such that they will stay and give their best efforts to their work. Opportunity must be given for promotion. They must have an adequate scale of pay. They must have security against dismissal for political reasons. Provisions for old-age pension and insurance against sickness or accident are important morale builders. Also there must be sufficient opportunity for initiative to make the work experience a satisfying one. The federal government has moved ahead to some extent in these fields.

The opportunities for promotion vary from agency to

agency. In most agencies it is possible to advance at least until the political level is reached. The top personnel, such as department heads, members of independent commissions, and bureau chiefs, are as a rule political appointees, not career administrators. There are of course exceptions. Occasionally a high diplomatic post has been filled by a person who has had a career in the foreign service. A recent outstanding illustration of the appointment of a career person to a high administrative post was the appointment by President Truman of a Postmaster General who had risen from the ranks in the Post Office Department. Despite the lack of opportunity at the top there is still a very considerable career open to able, intelligent, and industrious persons in the federal service.

Promotion

The salary scale, especially at the lower levels, has been reasonably adequate. For example, the beginning salary for junior professional assistant in 1947 was \$2644 a year. Salaries exclusive of the top positions range up to about \$10,000 in the federal service. At the top level, especially in the political appointments, salaries, although ranging from about \$10,000 to \$15,000, have not been adequate to attract and hold competent persons against the competition from private business. It is true that the competition in salaries from business and other outside groups has varied considerably from time to time. During the period prior to World War II the federal scale of pay was fairly adequate. Beginning with the war and in the period which followed salaries in private business and industry advanced more rapidly than did those in the government service, with the result that many capable persons sought employment elsewhere. Although it is true that there are important incentives other than money which attract people into particular occupations, and government service offers many of these, an adequate salary scale and one which is commensurate with the scale prevailing outside the service is important.

Salary

The federal service by and large has given reasonable security to persons against dismissal for reasons other than inefficiency. The civil service regulations which cover the great bulk of fed-

Security

eral employees provide that no person in the classified civil service shall be removed except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose removal is sought must be given notice in writing of the charges against him and be allowed a reasonable time in which to answer.¹² Other agencies which have merit systems of their own, such as the Tennessee Valley Authority and the foreign service, also have provisions against arbitrary dismissals.

Pensions
and
leaves

The federal laws contain provisions for sick leave. They also provide for retirement with a pension, usually at the age of seventy. Civil service employees are required to contribute 5 percent of their salaries each month toward their retirement and the federal government contributes a similar sum.

Chance
for lead-
ership

Perhaps the most difficult of all conditions to meet which might aid in attracting competent personnel into the government service is the opportunity for initiative and the use of discretion in the tasks which they must perform. Inevitably, because of the size of the federal service and the public character of its operations, public employees are circumscribed more rigidly in the performance of their duties than are persons in private business. They operate under numerous statutes and rules and regulations which they must follow carefully lest they lay themselves open to charges of violation of the law. Such a situation is bound to repress initiative and to limit somewhat the exercise of discretion. Even so, a government official can, if he wishes, display considerable initiative. Again, this varies from agency to agency, depending on such factors as the quality of top personnel, the kind of task to be performed, etc. In the Tennessee Valley Authority, especially during the early years of its existence, there seemed to be considerable opportunity for initiative on the part of employees. In some of the older agencies, notably the Post Office, the opportunities for initiative are much more limited.

Government service does offer a career to young persons. It will probably offer more opportunities in the future as govern-

¹² U.S. Code, title 5, sec. 652.

ment takes on new functions necessitated by changing economic and social conditions.

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PART IV.

AREAS OF NATIONAL ACTION

FOREWORD

It should now be possible to assume an acquaintance with the structure of government and the manner in which it operates. We turn our attention to the end product of government, the tasks which it accomplishes. Of course these actions are not end products in the sense that they are ends in themselves. They are means to the accomplishment of a wide range of purposes; these purposes vary with the particular case and will become evident as the student reads.

It should be unnecessary to say that the following account of national action is incomplete, and the examples given are illustrative rather than exhaustive.

CHAPTER 19

INTELLIGENCE AND INFORMATION

**Definitions—Congressional Sources of Intelligence—
Executive Sources of Intelligence—Research—Plan-
ning—Public Information Agencies—Private Infor-
mation Agencies**

DEFINITIONS

The survival of an organism is in great part dependent upon the fidelity of the reports on its environment which it receives through its senses. Similarly a government, in order to survive, must have reliable reports of the changes, especially political and economic changes, which occur abroad and within the country. It must learn the effect of its own operations, their success or failure. Furthermore, every government must communicate with its citizens, if only to tell them the laws which they should obey. A democratic government has also the duty of supplying its citizens with reliable information on public questions and on its own activities, for only an informed public opinion can successfully operate a democracy.

These two functions of government, the receiving and the dispensing of information, are among its most important activities; but they have received little attention. No attempt has been made to systematize either process; there is not even an agreed-on nomenclature. Professor Roy V. Peel has suggested that for purposes of uniformity two terms used somewhat irregularly during World War II be adopted: intelligence, for the data received by government; and information, for that dispensed by government to citizens.

Of course these two processes take place at all levels of for-

mality. The President in supervising the national administration receives continually what may be called intelligence about the operation of government. The postal clerk who informs a customer of the postal charge on a package is dispensing information. Of necessity, however, this chapter will be limited to the formal acquisition of intelligence as such, and to the institutionalized distribution of information. Since the problem of acquiring intelligence leads directly to research, research must be included in the discussion. Between research and planning the line is narrow and in many cases artificial, so we must glance also at the problem of planning.

CONGRESSIONAL SOURCES OF INTELLIGENCE

Congress has formal responsibility for the determination of policy, and accordingly has need of enormous bodies of factual information upon the basis of which to legislate. Insofar as it obtains this information, it does so from the President and other executive officers, from its own members and committees, from the Library of Congress, and from private sources, such as lobbies and individual citizens.

Sources:

1. President

The constitution instructs the President to give to the Congress "information of the state of the Union." In discharging this function he ordinarily complies with the remainder of the mandate also, by recommending "such measures as he shall judge necessary and expedient." The President presents to Congress not merely intelligence but a plan based on that intelligence.

2. Executive agencies

Most executive organs report to the President rather than to Congress. The independent commissions, however, and some miscellaneous organizations, such as the Veterans Administration, the Library of Congress, the Board of Governors of the Federal Reserve System, and the Board of Directors of Federal Prison Industries, report to Congress.¹ But however informative reports may be, Congress relies much more on another means of contact with the executive agencies, the budget hearings. In the

¹ The National Labor Relations Board, the Tennessee Valley Authority, and the Comptroller General report to both the President and Congress.

course of their study the appropriations committees interview the heads of departments and agencies, and undertake to evaluate the work of each organization. This investigation, however, results in something less than adequate education of the Congress in the work of the agency, and something less than effective supervision of the agency by the Congress. The Legislative Reorganization Act of 1946 charges each standing committee with "continuous watchfulness" over agencies dealing with the subject with which it is concerned, but it is unlikely that this will result in improved supervision.

The committees of the two houses are the chief fact-gathering agencies of Congress. Each legislative committee has a permanent staff trained in research which supplies it with data on the subject with which the standing committee deals. This information is supplemented by that gleaned from executive departments and from witnesses who testify at hearings. When the committee resolves upon a hearing on a question, witnesses appear, at the request of the committee or on their own initiative, to contribute what they can in the way of data. The Legislative Reorganization Act of 1946 gives to each standing committee and subcommittee of the Senate the power to compel by subpoena the attendance and testimony of witnesses and the production of records and documents. The only standing committee of the House given such power by the act is that on Un-American Activities. It is, however, possible for the House by resolution to grant the power of subpoena to one of its committees.

Ordinarily hearings before a standing committee or its subcommittees are considered adequate to explore a problem. Occasionally, however, one house or the other creates a special investigating committee. This is usually a select committee, established by a resolution of the house and authorized to spend money out of the contingent fund appropriated to the use of the house in the current budget. The House Committee on Un-American Activities is the only investigating committee ever to attain the status of a standing committee. The ostensible reason

3. Congressional committees
a. Standing

b. Investigative

for creating a special investigating committee is that the problem is too involved to be assigned to a standing committee already burdened with other duties. Sometimes, however, a special committee is created because the house desires a particular outcome from the investigation and it believes that the existing personnel of the appropriate standing committee would arrive at the opposite conclusion. The house delegates to the investigating committee the power of compelling testimony and the production of evidence.

c. Legal
limits

Congressional investigations, whether by standing or select committees, have two legitimate objectives. Each house is the judge of the elections, returns, and qualifications of its members, and possesses as well the power to discipline and expel members, and it can subpoena witnesses and compel testimony for the purpose of arriving at a sound conclusion on these questions. Moreover, each house has the power to initiate legislation, which implies the power to investigate and to compel testimony. From this it follows that a house possesses the power to investigate, and to punish for contempt those persons who refuse to testify, only in areas in which Congress is constitutionally authorized to legislate. The delegated powers of Congress are so broad that this limitation is of little importance; but there is no power to investigate a plainly judicial matter, which has no legislative implications.²

It is proper for a house to investigate the conduct of the executive branch of the government, for Congress has legislative authority over that branch, and its inquiries might lead to corrective legislation.³ But no Congressional committee, nor the two houses themselves, can compel the President to testify, or gain access to his papers against his will. As one of the three coördinate branches of the government, the President is not subject to the commands of the other two. It seems appropriate that the legislature investigate executive agencies, for one of the purposes of the separation of powers is to allow the former to supervise

² *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

³ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

and scrutinize the conduct of the latter. Investigations of executive agencies are sometimes undertaken in good faith, but often they are animated by political motives and are intended merely to build up a case against the agency or the administration investigated. This is particularly likely to occur when one party controls the Congress and another the Presidency.

A Congressional committee cannot itself punish witnesses for contempt, but it can recommend that the house take action. Each house has the power to imprison for contempt those persons who disobey lawful commands of the house, but not for a period beyond the duration of the current session. This procedure, however, is not used in contempt cases arising out of investigations; rather, the committee reports the contempt to the house and the house votes to initiate a criminal prosecution. An act passed in 1857 makes it a misdemeanor for a person subpoenaed by authority of either house to refuse to testify or produce papers before the house or any of its committees, and instructs the district attorney for the District of Columbia to initiate criminal proceedings when the fact of the contempt is certified to him by the presiding officer of the house.

The Legislative Reorganization Act of 1946 undertook to supplement these sources of intelligence by establishing a Legislative Reference Service in the Library of Congress. It is directed, "upon request, to advise and assist any committee of either House or any joint committee in the analysis, appraisal, and evaluation of legislative proposals pending before it or of recommendations submitted to Congress, by the President or any executive agency, and otherwise to assist in furnishing a basis for the proper determination of measures before the committee"; and also "upon request, or upon its own initiative in anticipation of requests, to gather, classify, analyze, and make available . . . data for a hearing upon legislation, and to render such data serviceable to Congress, and committees and members thereof, without partisan bias in selection or presentation." The Service has a staff of specialists to carry out this work.

This exhausts the official sources of Congressional intelligence.

d. Contempt powers

4. Legislative Reference Service

5. Un-
official
sources

Of major importance are the unofficial sources, the information and views presented to Congressmen or to committees by individuals or by the representatives of interest groups. Lobbies undertake to supply Congress with information relevant to proposed legislation. So the expert staffs of government are duplicated, in the field of their interest, by the national associations and other formally organized interest groups. When one of the houses considers labor legislation, therefore, the skills of economists and other specialists in the Department of Labor, the National Labor Relations Board, the staff of its own Committee on Education and Labor, the Library of Congress, the National Association of Manufacturers, the United States Chamber of Commerce, the American Federation of Labor, and the Congress of Industrial Organizations will be called into play. This is an embarrassing large array of specialists.

Limita-
tions of
Congress

It is necessary to end with a note of warning. Although the Legislative Reorganization Act of 1946 was intended to increase the importance of Congress as a policy-forming organ, by giving it more efficient tools with which to work, it is doubtful that Congress can ever take the lead in the formulation of policy. The experience of the whole world indicates that executive leadership of the legislature is inevitable. Furthermore, despite the apparatus for scientific discovery of fact described above, the votes of Congressmen are determined much more by political than by scientific considerations.

EXECUTIVE SOURCES OF INTELLIGENCE

The President is the chief representative of the United States in foreign relations, and ordinarily he takes the lead in important legislation on the domestic level. For these purposes he needs full and reliable sources of intelligence.

State De-
partment
1. Diplo-
matic
service

The State Department maintains in every country with which the United States has diplomatic relations an ambassador or minister and a staff to assist him. One of the duties of the embassy is to inform the State Department of all significant developments in the country in which it is stationed, and whatever else of in-

ternational import it can glean. One of the members of the embassy is the military attaché, who quite candidly takes an interest in the military forces, preparations, equipment, and installations of the country to which he is assigned.

Ambassadors are often appointed because of their campaign contributions to the victorious party rather than because of fitness for the post. Some of our foreign representatives have been inept. On the other hand, the qualities which make for business success sometimes prove useful to a diplomat. Recently it has become possible for "career diplomats" to attain ministerial or ambassadorial rank. Our foreign intelligence is sometimes considered amateurish, but whatever its weaknesses, the President has the opportunity to be the best-informed American on foreign affairs.

The consul is an officer of the State Department, but his duties are not on the diplomatic level. He performs a variety of executive tasks for the United States abroad, and sends back intelligence of commercial importance. The economic condition of the city or region in which he is stationed, trade opportunities for American business, the volume of shipping or transport, the state of agriculture in the region—these are his concern.

The last war disclosed a lack of coördination in the intelligence services of the national government. An attempt to remedy this was made in the National Security Act of 1947, the act which created the cabinet office of Secretary of Defense. This act provided for a National Security Council consisting of the President and the Secretaries of State, Defense, the Army, the Navy, and the Air Force. The Chairman of the Munitions Board and the Chairman of the Research and Development Board may be added if nominated to the Council by the President and approved by the Senate. The Council is charged with coördinating the policies and agencies of the national government in relation to security, and to this end is to appraise the security position of the United States, consider policies, and make recommendations to the President. Subordinate to the National Security Council is a Central Intelligence Agency under a Director of Central In-

2. Con-
sular
service

National
Security
Council

**Central
Intelli-
gence
Agency**

telligence appointed by the President with the consent of the Senate. The Director is to have access to information possessed by the Federal Bureau of Investigation and, upon recommendation of the National Security Council and approval by the President, to security information possessed by other agencies of the government. He is to correlate intelligence relating to national security, to advise the Security Council concerning intelligence activities, to make recommendations for further coordination in intelligence to the Council, and to perform other services at the direction of the Council.

**Bureau
of Census
and
others**

Some other agencies have the acquisition of intelligence as a principal function. The Bureau of the Census accumulates vast amounts of data about the United States, its population, and its social structure. The Federal Trade Commission is instructed to make studies of business practices in the United States and abroad. The Tariff Commission is charged with investigation of costs of production at home and abroad, and reports its findings to Congress and the President. The Bureau of Foreign and Domestic Commerce in the Department of Commerce accumulates much information of advantage to businessmen; this is made directly available to them in published reports. The Government Information Service in the Bureau of the Budget affords to every government agency, upon request, a newspaper clipping service covering its field of interest. These will serve as examples of the miscellaneous intelligence activities in the executive branch.

RESEARCH

The communication of intelligence presupposes some research in acquiring the intelligence. Moreover, the day-to-day operations of every agency of government require continuous investigative activities which might appropriately be called research. But here we mean only those activities which involve sustained research by specialists whose work ends when they have discovered and reported the desired facts. There is so much of this "pure research" carried on by the national government that it will be possible to give only illustrative examples.

Until the recent war, the Department of Agriculture administered the largest bloc of research activities. Its area of action is still impressive. The Hope-Flannagan Act of 1946, which on this point did little more than describe the existing situation, authorized the Secretary of Agriculture to conduct and stimulate research into the "laws and principles underlying the basic problems of agriculture in its broadest aspects," and gave an illustrative list of problems which included production and marketing; the discovery of new uses and new markets for agricultural products; plant and animal genetics; conservation of man power, soil, forest, and water resources; the improvement of farm homes and machinery; and "research relating to any other laws and principles that may contribute to the establishment and maintenance of a permanent and effective agricultural industry." The act provided for increased appropriations for agricultural research; the research total for 1946 was \$53,000,000, and under the act this figure will be more than doubled by 1951.⁴ Part of the money goes to state experiment stations as grants-in-aid, and in some cases the states are obliged to match the grants in order to obtain the money. The Secretary is instructed to use not merely the facilities of the national Department of Agriculture for research but also state facilities, and to enter into contracts with public or private organizations or individuals to carry on research.

Agriculture

The Departments of the Army, Navy, and Air Force carry on extensive research activities. The National Security Act of 1947 created a Research and Development Board in the National Military Establishment to propose and coördinate research. Out of the Manhattan Project of the Army during the Second World War grew the discovery of means for producing atomic fission, one of the most important, and certainly the most gigantic, research program of all time. Further research in atomic power is entrusted by the Atomic Energy Act of 1946 to an Atomic Energy Commission, which has, among its numerous duties, the

Military research

Atomic energy

⁴Charles M. Hardin, "Political Influence and Agricultural Research," *American Political Science Review*, xli, 670 (1947).

conduct of research in atomic fission and in the utilization of its by-products. This research is carried on both in publicly owned establishments and by contract with private organizations.

These are by no means the only national research programs. The Departments of Interior, Commerce, and Labor likewise carry on "pure research."

Presi-
dential
commis-
sions

Attention must also be given to a device employed with some frequency of late, the use of private persons or organizations for research on a particular problem. President Hoover created the so-called Wickersham Commission to study the whole problem of national law enforcement, and also the Committee on Social Trends. The President's Committee on Administrative Management was a group of political scientists appointed in 1936 to make a study of the existing administrative structure and to make recommendations. The Reorganization Act of 1939 relied in part upon its Report. In 1947 the Committee on Civil Rights and the Air Policy Commission made controversial reports. As a means of uncovering facts and securing expert opinion on the facts such a committee is a valuable device. It should be remembered, however, that when the President chooses experts, or when the Senate turns to a research agency for advice, this choice of advisers is made with some knowledge of the recommendations likely to be forthcoming from that particular source. The recommendations of the experts can be controlled by appointing experts favorable to the point of view of the authority making the appointment.

PLANNING

Planning is primarily a legislative function. Congress can draw upon fact-finding organs for data relevant to the adoption of a policy, but the decision as to whether the policy is to be undertaken is a political rather than a factual question. Nevertheless between the amassing of the raw material for a decision and the taking of the decision there are intermediate steps, and Congress has repeatedly indicated its desire that the data come to it predigested, in the form of proposed legislation which Congress can

accept or reject. The President performs this service when he submits administration measures. In creating agencies of government Congress has sometimes specifically charged them with the duty of proposing legislation in the area with which they are concerned. This is true of the Interstate Commerce Commission, the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the Comptroller General, and the Board of Governors of the Federal Reserve System.

Nothing very significant has come out of these instructions. The commissioners are not appointed because they have the foresight and vision necessary for planning, but for quite other reasons. Their routine work is time-consuming and involves so much detail that it narrows the vision. Moreover, significant planning is not likely to involve only the province of a single commission but to raise problems in other areas in which the commissioners have no special competence.⁵

A broader attack on the problem of planning was attempted by the National Resources Planning Board, which was created by executive order in 1934. It undertook to coördinate and to generalize the planning of other executive agencies. In addition it published a number of studies dealing with the conservation and effective utilization of natural resources and with economic, social, and industrial problems. Professor Dimock has said that "the National Resources Planning Board gave us a start in national planning that will sometime be considered historic."⁶ But in 1943 Congress, which too often feels that the best way to deal with problems is to ignore them, abolished the Board.

National
Resources
Planning
Board

The Second World War saw, of course, the most extensive planning in our history. The whole economy was controlled, and was integrated with the economies of other nations. The country's resources, natural and human, were organized and allocated. Although these actions were obviously necessary to win

Wartime
planning

⁵ See Robert E. Cushman, *The Independent Regulatory Commissions* (Oxford University Press, New York, 1941), chap. 12.

⁶ Marshall E. Dimock and Gladys O. Dimock, *American Government in Action* (Rinehart and Co., New York, 1946), p. 806.

the war, the restraints imposed were irksome, and the nation was abandoned to planlessness and inflation within a year after the end of the war.

**Council
of Eco-
nomic Ad-
visers**

The possibility of depression revived with the end of the war, and it was proposed that the national government plan for such an eventuality, adopting as its policy the maintenance of full employment. Those persons who opposed the establishment of full employment as a governmental objective succeeded in limiting the purpose of the Employment Act of 1946 to the affording of "useful employment opportunities." The act created a Council of Economic Advisers in the Executive Office of the President. It consists of three men, chosen by the President with the consent of the Senate because they are "exceptionally qualified to analyze and interpret economic developments, appraise programs and activities of the Government . . . , and to formulate and recommend national economic policy to promote employment, production, and purchasing power under free competitive enterprise." The Council carries on studies and assists the President in the preparation of an annual Economic Report to Congress. The Economic Reports have not thus far been given much heed by Congress.

**National
Security
Resources
Board**

Congress has taken more seriously the need for planning in the field of national security. The National Security Act of 1947 created a National Security Resources Board, consisting of a chairman appointed by the President with the consent of the Senate and representatives of the departments and independent agencies designated by the President. The Board is to advise the President concerning the coordination of military, industrial, and civilian mobilization. To this end it is to propose policies and formulate programs for mobilization; it is to prepare plans for unification of activities of federal agencies in time of war; it is to study resources for war and propose policies for maintaining reserves of materials; it is to plan the strategic relocation of industries, services, government, and economic activities. The same act created the National Security Council already de-

**National
Security
Council**

scribed and instructed it to formulate policies in the field of national security.

The Bureau of the Budget should also be mentioned as a planning agency. Subject to the decision of the President, it revises the requests of departments and agencies for funds. This, of course, has an important effect on the activities carried on by executive agencies. In addition, it was charged, by executive order in 1939, with studying the general problem of administrative management and recommending to administrators and to the President improved methods of organization and practice. The same executive order makes the Bureau of the Budget a clearing house for administration bills. Legislation desired by the departments is channeled through the Bureau, which undertakes to coordinate the proposals of the various agencies and makes recommendations to the President.

**Budget
Bureau**

On special topics one or another executive agency is engaged in continuous formulation of plans. The Federal Works Agency, in cooperation with state agencies, plans public works programs far in advance. The Department of the Interior plans the use of the public lands. The Tennessee Valley Authority engages in the same sort of planning as a giant private corporation and in addition concerns itself with the public questions of conservation of soil and water resources. Once again it is necessary to say that these illustrate rather than exhaust the areas of governmental planning.

**T.V.A.
and others**

PUBLIC INFORMATION AGENCIES

The national government has no planned information service by which it communicates with its citizens. Instead, it has a multiplicity of special services.

**Official
reports**

First to be considered are the official reports. These include the *Congressional Record* and other published reports of Congress, the decisions of the courts, and the printed reports of the executive organs of the government. The President makes no report to the people as such, but messages to Congress and radio

addresses are increasingly used for this purpose. The official reports are, of course, invaluable sources on government, but they are largely inaccessible to the ordinary citizen, and in any case are extremely voluminous and likely to be beyond his comprehension.

**Special
services**

Special information services are also maintained. The Department of Commerce regularly publishes information of interest to businessmen and in addition answers individual inquiries. The Department of Agriculture supplies information to farmers, in the form of printed materials and otherwise. The Children's Bureau in the Department of Labor has published several famous studies and issues a monthly bulletin, *The Child*. Other organs of the government, the Department of State, for example, issue regular informational publications. Government publications can be obtained at a low price from the Superintendent of Documents.

**News
releases**

Less formal are the news releases of the executive agencies. The President has his White House staff, one of the duties of which is public relations; and every major subdivision of the executive branch has an officer charged with public relations. This practice is often criticized, on the ground that the agency is advertising itself, or that it communicates information in a way advantageous to itself. It is certainly true that executive agencies have sometimes used their funds for propaganda purposes. On the other hand, good government requires that the public have access to information about the operations of government, and this includes hearing the agency's side of the story.

**Government
Information
Service**

The Government Information Service in the Bureau of the Budget publishes the *United States Government Manual*, an annual volume describing the structure of the national government. It also supplies information, upon request, about all branches and all activities of the national government. Nevertheless it is still true that we lack an integrated national information service giving day-to-day reports on public problems. For reporting of this sort, the people are obliged to rely very largely on private sources of information.

PRIVATE INFORMATION AGENCIES

The chief sources of information are the newspapers. The radio, magazines, and books are of secondary importance, and the movies are a poor third.

This means that the primary duty of informing the public belongs to the newspapers. Some dailies have the reputation of undertaking this task honestly and seriously. By far the greater number, however, make no serious effort at coverage of news of public concern, as opposed to public interest; and often they treat such news, when they deal with it, in a partisan and irresponsible manner. The apologists for the newspapers argue that with all its faults the American press is superior to that of most countries. In many other fields, Americans are not satisfied with a level of performance of which the best that can be said is that there are lower levels abroad.

Duty of press

The usual excuse for inadequate coverage of news of national importance is that the public is more interested in other subjects—reports of crime and “human interest” stories. This is certainly true, although the press must bear its share of responsibility for cultivating these tastes. But in any case, a glance at the composition of the ordinary newspaper is enough to show that the coverage of significant news could be doubled or tripled without displacing the staple features of the paper, the crimes, stories about notorious persons, and comics. The fact is that most newspapers are not interested in, and are not equipped to handle, many aspects of news of governmental importance.

Inadequate coverage

Still more alarming is the feature of monopoly in the American press. This is a fairly recent development and has not yet run its course. In only one out of every twelve cities in which daily newspapers are published are there competing dailies.⁷ Moreover, gigantic chains own newspapers in many cities. More than half of the total newspaper circulation in the country is controlled by less than a hundred owners, individual or corpo-

Monopoly

⁷ The Commission on Freedom of the Press, *A Free and Responsible Press* (University of Chicago Press, Chicago, 1947), p. 37.

rate.⁸ The point of view of these owners reaches the public; but there is no assurance that opposing points of view, or the facts supporting opposing points of view, will be given publicity.

Another feature of concentration is found in the press associations which gather news. Most of the dailies are completely dependent, for other than local news, on one or another of the three major press associations—the Associated Press, the Scripps-Howard-owned United Press, and the Hearst-owned International News Service. Until 1945, moreover, a publisher belonging to the Associated Press could prevent his competitors from securing the service; the by-law of the association conferring this privilege was declared an illegal restraint of trade by the Supreme Court in *Associated Press v. United States*.⁹ The restriction of the sources of news which results from the monopoly enjoyed by the press associations must be considered unwholesome.

Proposals The public depends upon the press not merely for reports of events and for factual data. In a democracy an essential function is the free voicing of opinion, for without this the democratic formulation of opinion is impossible. Concentration of ownership of the means of communication, and restriction of the avenues to the public are threats to this democratic freedom. The Commission on Freedom of the Press, created by Time, Inc. and the Encyclopaedia Britannica, Inc., has made a thoughtful study of the problem and a number of recommendations, which include the recommendation of certain governmental actions:

"1. Without intruding on press activities, government may act to improve the conditions under which they take place so that the public interest is better served. . . .

"2. New legal remedies and preventions are not to be excluded as aids to checking the more patent abuses of the press, under the precautions we have emphasized. . . .

"3. Government may and should enter the field of press comment and news supply, not as displacing private enterprise, but as a supplementary source."

⁸ *Ibid.*, p. 43.

⁹ 326 U.S. 1 (1945).

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NATIONAL FINANCE

Constitutional Provisions—Federal Taxation: Historical Perspective—The Collection of Revenue—Appropriations—The Administration of Appropriations—The Disbursement of Funds—Accounting and Auditing—Trend and Nature of Expenditures—The National Debt

CONSTITUTIONAL PROVISIONS

Articles of Con- federation

One of the chief weaknesses of the government under the Articles of Confederation was the lack of adequate authority in the matters of finance and taxation. The central government could borrow money and could expend money. It could also issue currency and coin money. The central government could not, however, levy taxes or regulate coinage or the issuance of currency by the states. Under the present constitution the federal government has adequate powers in all of these areas. Coinage is specifically forbidden to the states, and by taxing state bank notes or currency out of existence Congress restricted the issuance of currency to the national government and national banks.

Grants of powers

Taxation and borrowing are authorized in Article I, Section 8: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . ." and "To borrow money on the credit of the United States." The Sixteenth Amendment authorized Congress "to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

A duty or impost is a levy or charge on goods or articles imported into the United States. Today these are commonly called tariffs. An excise has been defined as an arbitrary levy on any measurable unit. Under this broad definition an impost, or indeed any tax, would be called an excise. Ordinarily, however, the term is used to apply to levies on articles of trade or commerce within the United States. These are the familiar internal revenue taxes on tobacco products, intoxicating beverages, gasoline, and other articles of manufacture. But an excise need not be on a commodity; a pay-roll tax is also an excise.

Duties,
imposts,
excises

Article I, Section 2, introduces another term when it says that "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers." The Supreme Court has defined only two levies as direct taxes which must be apportioned among the states on the basis of population: a capitation or poll tax, and a tax on real property. The income tax, because it reached income from real property, was once held to be a direct tax and hence subject to apportionment.¹ As such it would not have been a very practicable type of tax; accordingly the Sixteenth Amendment, which dispenses with the requirement of apportionment of income taxes among the states, was adopted in 1913.

Direct
taxes

The federal power of taxation is not unrestricted. In fact, the constitution goes into much more detail in imposing restrictions than in bestowing the taxing power. There are, first, certain express and specific restrictions. Article I, Section 9, provides: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," and this still controls the levy of all direct taxes except income taxes. The same section declares that "No tax or duty shall be laid on articles exported from any State," and that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." Congress under its power over foreign

Restrictions on
powers

1. Specific

¹Pollock v. Farmers Loan and Trust Co., 158 U.S. 601 (1895).

commerce may regulate exports from the states to the point of embargo, which means they cannot be shipped at all; but Congress cannot tax exports as such. It has been held, however, that territories and possessions of the United States do not come within the protection of this clause, and Congress may tax goods exported from a territory to the United States; territories do not come within the "customs union" of the states.²

2. General

There are also general restrictions on the taxing power. Taxes may be levied "to pay the debts and provide for the common defense and general welfare of the United States," but for no other purpose. In the ordinary case, tax revenues are merged in the general funds, and the ultimate destination of any particular tax dollar is unknown; consequently the taxpayer cannot resist collection of the tax on the ground that it is not to be spent for one of the prescribed objectives. But when the revenue of the tax is earmarked for a particular object of expenditure, and it can be alleged that that object is neither to pay the debts nor to provide for the common defense or general welfare of the United States, the taxpayer can invoke the general welfare clause. The Supreme Court held the processing taxes provided for in the first Agricultural Adjustment Act unconstitutional on the ground that the program of agricultural regulation to which the revenue from these taxes was devoted was beyond the power of Congress to enact.³

Another general restriction says that "all duties, imposts, and excises shall be uniform throughout the United States." The immediate incidence of a duty or excise may be on only one state or area, but this does not vitiate it. North Carolina may be the place of collection for a major share of the tobacco excises; nevertheless the excise itself is uniform, since it applies to the product wherever manufactured.

As a corollary to *McCulloch v. Maryland*, which held that the states could not tax national functions, the Supreme Court has held that Congress may not tax the essential agencies or func-

² *DeLima v. Bidwell*, 182 U.S. 1 (1901).

³ *United States v. Butler*, 297 U.S. 1 (1936).

tions of the states or their subordinate units. This restriction also protects the income from the bonds of state and local governments. Until 1939, salaries of state and local officers and employees engaged in "governmental" functions were not subject to federal taxation; but in that year the Court ruled that non-discriminatory taxation of the salaries of the employees of one government by the other was proper.

FEDERAL TAXATION: HISTORICAL PERSPECTIVE

In the early years of the Republic the securing of revenue for the operation of government was not very difficult, even though the excise on whiskey did stir up a "rebellion" in Pennsylvania. After Alexander Hamilton, the first Secretary of the Treasury, had secured the adoption of a tariff for protection, the import duties at times produced an embarrassingly plentiful amount. True, excise taxes were used from 1791 to 1802 and from 1813 to 1818, and direct taxes or levies apportioned among states on the basis of population were also used. In 1837 the surplus in the federal treasury was so great that \$27,000,000 was distributed to the states "subject to recall"; it has never been demanded.⁴ This surplus was due to the high protective tariffs.

It was not until the Civil War period that the federal government began to diversify its revenue sources. Direct taxes, income taxes, and excises were all used to finance the war. The excise tax has been a regular part of the federal tax structure since that time. The income tax and other direct taxes were soon repealed, although a new income tax law was passed in 1894. It was this law that led to *Pollock v. Farmers Loan and Trust Co.*, mentioned above, in which the income tax was declared a direct tax and the law was held unconstitutional because the tax was not apportioned among the states on the basis of population.

With the ratification of the Sixteenth Amendment and the demand for huge funds during World War I, the income tax became established as an important source of revenue for the

Early
taxation

Income
tax

Sixteenth
Amend-
ment

⁴ 5 *Statutes at Large* 52, 1836; 5 *Statutes at Large* 255, 1838. See also *Report of the Secretary of the Treasury*, 1851, iv, 1, 2.

federal government. During both the First and Second World Wars the income tax, individual and corporate, was the principal source of tax revenue for the federal government. In both wars, excess-profits taxes were levied as a part of the income tax structure. During World War II the income tax exemption was lowered to \$500 for a single person, and as a result millions of new taxpayers were added to the list. The federal government has always followed the principle of progressive taxation with respect to income taxes—that is, the rates become higher as net incomes become larger. Excise taxes, on the other hand, are regressive. They are “indirect” taxes, for they are ordinarily passed on to the consumer; and since they are levied at a fixed rate, they take a larger percentage of the income of the poor than of the rich.

**Pay-roll
tax**

A comparative newcomer in the field of federal taxation is the pay-roll tax, enacted to support social security functions. To finance unemployment compensation, a tax of 3 percent is levied on the pay rolls of employers of eight or more persons, with certain exceptions. The federal government allows an exemption of 90 percent of this tax if the taxpayer has paid such amount into a state unemployment compensation fund. The federal government's share is designed to underwrite the administrative expense of the state unemployment compensation systems. The retirement and assistance benefits of the social security program are also financed through federal employment taxes.

**Estate
tax**

The estate tax used at various times since the Civil War has apparently become a fixed part of the federal tax structure. This tax was never meant to affect small estates, since exemptions have always been high. The present exemption, \$60,000, came in with the wartime financing. Rates in the upper brackets are high. The estate tax was easily evaded by those who had huge fortunes; they gave to those whom they intended to be their heirs the greater portion of their estates before death. To check this Congress enacted a gift tax. Now the rates on gifts approach those on estates, although they are not yet as high. The high income, estate, and gift taxes may make the accumulation and

transmission of huge fortunes more difficult in the future. This is generally considered a socially desirable result.

Perhaps one can best get an over-all picture of the federal tax structure by looking at a report for one year's taxes. During the fiscal year ending June 30, 1947, the following collections were made:

Direct individual taxes (income, estate)	\$20,408,102,758
Direct corporation taxes	9,676,458,680
Excises	7,270,474,741
Employment taxes	2,038,546,516
Customs	494,078,260

In addition, miscellaneous receipts (postal receipts, fines, receipts from sales of services and sales of property, etc.) amounted to \$4,830,664,155, making a grand total of \$44,718,325,110. This was a peacetime year. Never in our history had such a sum been collected by the federal government. It was more than the total reported annual national income in 1932, and about five times as much as was spent by the national government in any year of the "pump-priming" days of the middle and late 1930's.

It was freely predicted when World War II ended that peacetime expenditures would stabilize at around \$30,000,000,000 a year. Excess-profits taxes were repealed and over the President's veto a tax reduction bill was enacted in the regular session of the Eightieth Congress in 1948. However, in view of the fact that the President in January, 1948, estimated expenditures of \$37,728,000,000 for the fiscal year 1948 and \$39,669,000,000 for the fiscal year 1949, together with the fact that additional appropriations of much over \$10,000,000,000 were made for the military establishments and foreign aid, it appears that taxes will have to be increased again if deficit spending is to be avoided. Private estimates of federal expenditures at a rate of around \$30,000,000,000 or three times the prewar rate may never be realized.

THE COLLECTION OF REVENUE

There is no definite order in which the different parts or processes in federal finance can be taken up to form a complete pic-

Revenues

Expenditures

ture. Two different processes, enacting a tax law and making appropriations, for example, may go on simultaneously. The order in which the subjects are treated here may not appear to be a logical one, but it seems well to present an over-all picture of the collecting agencies before taking up the subjects of budgeting, appropriating, borrowing, and accounting.

Treasury
Department

1. Customs
Bureau

The Treasury Department is the principal agency for the collection of federal revenue. The Bureau of Customs and the Bureau of Internal Revenue in the Department are tax-collecting bureaus. The former collects the duties on imports. There are fifty-one customs collection districts covering the entire area of the United States, states and territories. Collections are made at "ports of entry," usually located along the coastal or other boundaries. The customs officials and employees are first of all collectors of revenue, but they also perform many other functions in the course of watching at ports of entry to see that contraband goods do not come into the country.

2. Bureau
of Internal
Revenue

The Bureau of Internal Revenue collects the internal taxes and revenues, such as personal and corporate income taxes, liquor, tobacco, and amusement taxes, and pay-roll taxes. Continental United States, including Alaska and Hawaii, is divided into sixty-six districts, in each of which there is a collector with his staff. As already indicated, the internal revenue collector does not necessarily collect even the direct taxes from the ultimate payer. The employer "collects" from employees by withholding the tax from salary and wage payments. The federal government in 1943 instituted the "pay-as-you-go" plan of income tax payment. Persons on salary have the tax deducted from their pay checks. Every three months the employer pays to the collector the amount collected. At the end of the year the individual must file a return, which may be a simple statement prepared by his employer. The five-dollar use tax levied on automobiles during the war was collected largely through post offices. Eventually, however, the money gets into the Bureau of Internal Revenue. Not only is it the job of the Bureau to accept money offered in payment of taxes, but it must also perform police duties to see

that people do not evade payment of taxes. Taxpayers' returns are examined to see if they are correct, and arrests and prosecutions are made where flagrant violations are discovered. In former years the "revenooer" was to most people the typical federal law enforcement officer. It was his efforts to enforce the excise taxes on liquor that made him a well-known figure.

Moneys collected by other agencies outside the Treasury Department, e.g., the Post Office, the Tennessee Valley Authority, the judiciary, and so on, are ultimately paid into the Treasury Department. The latter is the custodian of federal funds and the "paymaster" for the federal government. It also manages coinage, issuance of currency, and the sale of bonds or other evidences of debt.

3. Outside collections

APPROPRIATIONS

Probably most people think of an appropriation as an authorization of the expenditure of specific sums of money from the Treasury of the United States. This, however, is not always the case. When appropriations are made, it is impossible for Congress or any other agency or interested person to determine immediately how much money has been appropriated. With constant changes in the debt picture, the appropriation for interest payment is indefinite. An agency of the national government, such as the Tennessee Valley Authority, which has a large operating income, may spend the operating income which it receives. Congress "appropriates" to the Post Office Department the anticipated postal revenue for expenditure in addition to an amount of the regular Treasury funds equal to the anticipated departmental deficit. In 1849 Congress made an appropriation of an indefinite amount, "to pay for horses, vessels, and other property lost in the military service under impressment or contract."

A permanent appropriation was made in 1879 which is probably unique in national appropriation history. An irredeemable debt of \$250,000 was made in favor of the Printing House for the Blind at Louisville, Kentucky, with interest at 4 percent. By

Types of appropriations

this device the United States government obligated itself to pay \$10,000 a year in perpetuity to the printing house.

The general nature of appropriations was described in a budget message by the late President Roosevelt as follows:

Appropriations . . . are of two general types—annual and permanent. The annual appropriations, ordinarily found in the departmental supply bills, are voted each year by Congress. They are usually definite and specific as to amounts. They may be obligated only during the year to which they relate, but remain available for payment of unliquidated obligations for two years thereafter before any unused balance is converted into the surplus funds of the treasury. The permanent appropriations are automatically renewed each year over a period of time by virtue of permanent legislation, without annual action by Congress. Such appropriations may be specific or indefinite as to amounts. An example of the latter is the indefinite appropriation to cover the interest on the public debt. . . . The Congress makes some appropriations available until expended, or until the object for which they are made is accomplished. These appropriations are without a definite time limit and may, therefore, be called “no-year” appropriations. They are generally for construction of public works projects.⁵

Early appropriation methods

By the Legislative Reorganization Act of 1946 the appropriations committees of both houses of Congress were authorized and directed to make a study of existing permanent appropriations with a view to limiting the number and were instructed to recommend which ones, if any, should be discontinued.

Under the practice first set up by Congress, the revenue and appropriation policies of the national government were initiated largely by a Committee on Ways and Means in the lower house of Congress. It was not until 1865 that a separate Appropriations Committee was set up. From that year until 1921 the subjects of revenues and appropriations were treated in Congress as virtually unrelated matters. Not only the appropriations committees but other legislative committees were authorized under the rules to report appropriations independently, so that by 1921 there were as many as fourteen committees in the House recommend-

⁵ *The Budget of the United States Government* (annual), 1942 edition (Government Printing Office, Washington, 1941), p. A20.

ing appropriations. It was impossible to get any idea of the relationship between probable revenues and anticipated appropriations, and it was even impossible to get any idea of the volume of the proposed expenditures themselves until all bills were reported and acted upon.

Perhaps no other change in policies relating to procedure in appropriations has been so momentous as that instituted in 1921 through the Budget and Accounting Act. Until this time Congress and the President had faithfully followed the principle of separation of powers insofar as it applied to appropriations. To be sure, some Presidents exerted considerable influence on Congress in financial matters; but there had never been an approach to executive leadership in the formulation of a tax and spending program. Since 1921, however, the basis for virtually all appropriations is the detailed estimates submitted to Congress by the President himself. These estimates are prepared in the Bureau of the Budget, now attached to the Executive Office of the President. The work is carried on under the supervision of the Director of the Budget, who is appointed by the President without the necessity of Senate approval. There is one assistant director appointed in the same manner who might be thought of as vice-director, and there are a number of other assistant directors, each in charge of a specific functional division of the Bureau. At this point we are primarily interested in the Bureau's function in its relation to the formulation of appropriation acts; but it plays a part in the administration of the budget; and we must remember that it also has important duties in general administrative management.⁶

Requests for all regular appropriations must come through the Budget Director's office. The fiscal year of the national government runs from July 1 until the following June 30. Before the end of one fiscal year, the Budget Bureau is already beginning work preparatory to making up the estimates for the year beginning a year from the following July 1. A circular is mailed, customarily on July 1, to all departments or other operating units

**Budget
and Ac-
counting
Act**

**Executive
budget**

**Budget
making
1. Re-
quests**

⁶ See pp. 363-365, 409.

or establishments suggesting the manner in which requests for appropriations are to be made. An officer or employee in each department, unit, or establishment acts as budget officer in preparing such estimates, which are accompanied in each case by supporting data. The Treasury Department has been directed by executive order to prepare and transmit the reports "relating to the financial activities of the federal government and the status of appropriations of funds and the apportionment thereof as the director may require for the compilation of the budget or for other purposes of budgetary administration."⁷

2. Review

The Bureau of the Budget reviews the various budget requests. In this process, representatives of the various departments or establishments are given a chance to be heard. Consultations over the budget estimates continue throughout the summer and autumn preceding the session of Congress in January. The Estimates Division of the Bureau of the Budget is in charge of this particular phase of the work. An indication of the extensive nature of the consultative work of the Division is found in the fact that the following agencies were in conference on various budgetary matters with various staff members of the division on a single day: the Federal Power Commission, the Office of Education, the National Youth Administration, the Civilian Conservation Corps, the Defense Commission, the Federal Loan Agency, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, the Forest Service, and the ambassador to Cuba.⁸

3. Budget message

In the Bureau of the Budget, whose Director is always in close touch with the President, are compiled the budget estimates as finally determined. For comparative purposes, four sets of figures are arranged in parallel columns showing expenditures for each of the past two completed fiscal years, the appropriations for the current year, and the estimated expenditures for the ensuing fiscal year. In like manner, revenues are detailed in the

⁷ Executive Order 8512, August 13, 1940, *Federal Register*, August 15, 1940.

⁸ Harold D. Smith, "The Bureau of the Budget," *Public Administration Review*, i, 106-115 (1941).

compilation. These data, with the various explanatory statements, including a brief "budget message" from the President, are arranged in a large volume of more than a thousand pages. Also included are statements and tables relative to the public debt, the various trust funds, government corporations, and other pertinent financial data. If the estimated expenditures are greater than the estimated available funds, it is the President's duty to recommend new taxes, loans, or other appropriate action to meet the estimated deficiency.

A few days after January 3, when Congress convenes in regular session, the budget is submitted to Congress by the President. Actually Congress is not obliged to give any attention to the budget prepared by the Budget Bureau and submitted to Congress by the President. As a matter of fact, however, the budget estimates form the basis for all regular appropriations. Both the Senate and the House revised their rules about the time the Budget and Accounting Act became effective so that each has only a single Appropriations Committee. The rules of the two houses have also been changed so as to confine the appropriations committees to matters of appropriations and even to prevent them from initiating recommendations of appropriations to agencies for purposes not previously recognized by general law. At the present time the House Appropriations Committee has forty-three members, and the corresponding Senate Committee has a membership of twenty-one. Each committee works largely through subcommittees. A subcommittee considers proposed appropriations roughly on the basis of the titles of appropriation bills listed in a later paragraph. Each of several of the Senate subcommittees has three ex-officio members who are members of the regular legislative committees. For example, when the Senate Subcommittee on Appropriations for the District of Columbia meets, three members of the Legislative Committee on the District of Columbia meet with it. The subcommittee recommendations, with or without changes, are ratified by the general committee and, of course, become the recommendations of the full committee in its report to the Senate or House.

Congressional action

1. Legislative ceiling

It is literally true that the President's budget is the "textbook" of the Appropriations Committees in their deliberations on the appropriation bills. The two Appropriations Committees, the House Ways and Means Committee, and the Senate Finance Committee were under the Legislative Reorganization Act of 1946 authorized and directed to meet jointly at the beginning of each regular session of Congress to formulate a "maximum" legislative budget for the fiscal year. That is, an over-all amount was to be arrived at within which appropriations would have to be held. This act was effective for the first session of the Eightieth Congress. The committees' report is required to be submitted by February 15. In 1947 no report was ever agreed on, and no so-called legislative budget was ever adopted. The Senate conferees insisted on a \$4,500,000,000 reduction from the President's estimate of expenditures and the House conferees on a reduction of \$6,000,000,000. When the session was over, total reductions of less than \$2,000,000,000 from the operating budgets had been accomplished. The provision for the legislative budget ceiling had apparently proved unworkable.

2. House action

All appropriations are made in bills prepared by the House Appropriations Committee and embodying the estimates submitted in the President's budget, with such changes as the Committee votes. Major appropriations are usually enacted in from ten to twelve separate bills, such as the following: Legislative Establishment, Labor and Federal Security, National Military Establishment, Agriculture, State, Justice, and Interior. There is usually a deficiency appropriation bill, and often one or more bills for specified emergency purposes. The Director of the Budget, his assistant, or others from the Bureau, along with the representatives of the department, unit, or establishment whose appropriation is under consideration by the Committee, are very much in evidence during the Committee's deliberations. As an indication of how closely the budget recommendations are followed, the total estimates in the prewar year 1939 were \$13,158,292,467, and the corresponding appropriations actually made amounted to \$13,349,020,562. Thus the appropriations exceeded

the estimates by \$190,728,095, or 1.4 percent. Almost every detail of appropriations is scrutinized carefully by the Committee. Some idea of the amount of work which goes into the process may be had by considering that during one session of Congress the House Appropriations Committee worked an average of eight hours a day for five months on appropriations bills.⁹

Appropriation bills recommended by the Committee are, of course, considered at length in the House and somewhat more briefly in the Senate. Like other bills, an appropriation bill must pass both houses in identical form or it is defeated. As has been indicated, all general appropriation bills originate in the House; but the Senate may, and usually does, make changes before accepting them. However, the two houses usually compromise their disagreements without great difficulty. In 1939 the regular appropriation bills as passed by the House called for an expenditure of \$12,746,328,371. In the Senate the total was increased to \$13,449,095,355. The compromise figure was \$13,349,020,562. Contrary to what many would assume to be the case, the Senate, and not the House, is often the more liberal body in acting on appropriations. Spending is generally considered "popular," yet the more "popular" branch is often the more conservative.

3. Senate
action

The prominence of the Budget Bureau in the process of formulating and securing Congressional action on appropriation measures has been evident in the discussion thus far. Its work in this process is not over even when the bills pass the two houses and are presented to the President for approval. Upon receiving an appropriation measure the President refers it to the Bureau of the Budget for study and for recommendations as to what action he should take. The Budget Director in turn gives an opportunity to the agency or agencies involved to express its or their views on the matter. These, with the recommendations of the Director, are transmitted to the President. The same course is open to him as is the case with other bills. He may allow the bill

4. Presi-
dential
action

⁹ Jay Franklin, "Congress Passes a Bill," *Current History*, li, 19-20, 59 (1940).

to become law with or without his signature, or he may veto it, in which case it is defeated unless passed over his veto. He cannot veto items, but must accept or reject a bill in its entirety.

THE ADMINISTRATION OF APPROPRIATIONS

The appropriation of funds is an important, indeed an essential, step in the expenditure of money by the national government. In itself, however, it is not the expenditure of money but rather an authorization of an expenditure. Other important steps must be taken before money is actually paid out of the Treasury. Formerly when an appropriation was made to a department or agency of government, such department or agency was free to spend the money as slowly or rapidly as it saw fit, unless specific or implied limitations were placed in the law. Often an agency would exhaust its funds long before the fiscal period expired and thus would have to operate "on credit" for the remainder of the period. Deficiency appropriations would then be made by Congress to cover the additional expenditures. Attempts to curb this practice were made through general laws, but effective laws for matters of this nature proved to be too rigid. The administration of appropriations is really an executive function, and at present such administration is left largely to the executive branch.

Control by Budget Bureau 1. Appor- tion- ments

It is the function of the Bureau of the Budget to supervise and control the administration of the budget. To insure that an agency receiving an appropriation for ordinary operating purposes does not exhaust its appropriation prematurely, the monthly, later quarterly, apportionment plan has been put into effect. Under it an agency to which an appropriation is made is required to submit to the Director of the Budget within fifteen days a proposed allotment of the funds over the fiscal period. This plan is approved or revised by the Director. After approval by the Director, the apportionments to the different periods are binding upon the agency and may not be exceeded "unless life or government property is endangered," and in such a case the

excess expenditure must be justified in writing to the Director of the Budget.

Copies of the allotment or apportionment schedules of all departments or agencies are filed with the Treasury Department. Payment from the Treasury in excess of the apportionment for a given period would be unauthorized. However, unexpended balances are cumulative and may be spent during future apportionment periods. Modification or waiver of apportionments can be made only by the Director of the Budget.

Emergency appropriations are ordinarily allocated by the President upon the recommendation of the Budget Director. With many of the emergency appropriations during the 1930's and the war period, quarterly instead of monthly periods were used. The Director has also designated the proportion of these appropriations that could be used for administrative purposes.

2. **Emergency appropriations**

The Director of the Budget is in no sense a "watchdog" of the Treasury. His supervision of the expenditures is not in the nature of a pre-audit. Apportionments of funds are of totals and not of specified items of appropriations. It might be possible, for example, for a department to spend in one month all of its annual allowance for "travel and communication" and yet not exceed the apportionment for the month for total expenditures.

Thus it is still possible for an agency to run short of funds for one purpose even though its appropriation as a whole can be spent only as allotted by the Director. If the Director of the Budget, on the basis of his intimate knowledge of the affairs of an agency, believes that circumstances have made it unnecessary for the agency to spend its entire appropriation, he may so report to the President. The latter may then direct the agency to set aside a portion of its appropriation to be spent only upon the approval of the Director of the Budget.

3. **Reserve**

THE DISBURSEMENT OF FUNDS

After an appropriation has been made and the agency has been authorized by the Director of the Budget to incur obligations against such appropriation, the next significant step in the proc-

Drawing checks

ess of spending is disbursement, or the actual drawing of checks for the payment of money out of the Treasury. This is done by disbursing officers. Actually this step may be preceded by some form of accounts checking or pre-auditing; but this feature, although a desirable one, is not an essential step in the process of expenditure of money.

1. Centralization

One might define a disbursing officer as anyone having authority to draw a check against the Treasury of the United States. Formerly this function was decentralized. In 1932, for example, approximately 2000 persons in various departments and units of the federal government acted as disbursing officers. A step toward the integration of the function was taken in 1933 with the creation by executive order of the Division of Disbursement in the Treasury Department and the centralization of the disbursement function in it. Certain departments, such as Army, Navy, Justice, and Post Office, have been wholly or partially excepted from the order; and thus there remain some disbursing officers outside the Treasury Department.

2. Procedure

When payment is to be made for goods or services, the accounting officer of the agency issues a voucher to each of the persons to whom money is due, certifying that the amount shown is due and indicating from what fund payment is to be made. On the strength of the voucher and certificate, the disbursing officer issues a check against the Treasury for the amount indicated. The cashing and clearing of the check marks the completion of the cycle of expenditure.

That the function of disbursement is no small task is indicated by the fact that even before the war more than 100,000,000 checks had been issued during a single year. The greater the centralization in the process, the more simple becomes the process of auditing and accounting, the subjects to be considered in the next section.

ACCOUNTING AND AUDITING

Reference has been made several times to the Budget and Accounting Act of 1921. This act, as has been shown, revolution-

ized the budgeting system of the national government. It also made important changes in the laws relating to the organization of the units having to do with the functions of accounting and auditing. The General Accounting Office created under the act was charged with several duties, two of the most important being as follows: first, to settle and adjust all claims and demands whatever by the government of the United States or against it, and all accounts whatever in which the federal government is concerned, either as debtor or as creditor; and second, to "prescribe the forms, systems, and procedures 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." In brief this would appear to mean that the office was to post-audit the payments to or by the national government, and to approve such with or without adjustments, and to prescribe a system of accounting. These functions have not been fully performed.

At the head of the General Accounting Office is the Comptroller General. This officer is appointed by the President with Senate approval for a term of fifteen years. He may not succeed himself and is removable only by a joint resolution of Congress.

The Comptroller General must countersign all Treasury warrants, including requisitions by department heads for advances to disbursing officers. When an appropriation is made, for example, for the payment of interest on the public debt, this payment is made directly by the Secretary of the Treasury through the issuance of a warrant or check. On the other hand when an appropriation is made, let us say, to the Department of Labor for operating expenses, the money is made "available" in the Treasury through a requisition signed by the Secretary of the Treasury and approved or countersigned by the Comptroller General. Disbursing officers cannot spend appropriations until this is done.

Under accounting and auditing should be considered at least four processes or procedures, namely, accounting, advance de-

General
Account-
ing Of-
fice
1. Du-
ties

2. Struc-
ture

3. Pro-
cedure

cision, post-audit, and settlement. These will be taken up in the order named.

a. Accounting

Accounting methods and procedures until 1921, insofar as any central supervision had been established, were largely prescribed by the Treasury Department. Even at present the Treasury Department exercises considerable influence in the setting up of accounting procedures. However, under the Budget and Accounting Act the General Accounting Office was specifically charged with the duty of establishing uniform rules and methods of accounting in all branches of the national government. It has taken some steps in this direction, but at present it appears that the Budget Bureau, along with the Treasury Department, will probably set the pace in prescribing accounting forms and procedures in the future.

b. Advance decisions

By the term "advance decision" is meant an examination of a proposed payment of money before the payment is made, in order to determine the propriety of such payment. A decision may be requested by disbursing officers, heads of executive departments or independent establishments, and by certifying officers. When rendered, a decision governs in the settlement of the account involving the payment inquired about. In practice an advance decision may be requested in order to set up, for a department, establishment, or office, a rule with respect to a type or class of payment. For example, an advance decision approving payment of employee travel by air would indicate that that type of transportation could be confidently certified for payment in the future pending of the appropriation involved.

c. Post-audit

An examination of a payment after it is made to determine its propriety is the common audit or post-audit. For many years before 1921 this was done in the national government by a number of auditors in the Treasury Department under the general supervision of the Comptroller. These offices were abolished by the Budget and Accounting Act and their duties were transferred to the General Accounting Office. At the present time, therefore, the function of post-audit of accounts is primarily in the latter office.

Under present practice, the post-audit and settlement of accounts for payment are made or adjusted on the basis of the Comptroller General's findings. To illustrate this process, let us suppose that a person receives a payment from the national government. The voucher for the payment will be examined after the payment has been made. If it is found to be proper in every respect the payment is approved or settled. There can be no further question of the matter. However, if the General Accounting Office finds that there was an overpayment, or that the payment was unlawful for any reason, it will be disapproved and proper steps taken to adjust it. Disbursing officers are bonded and may be held responsible to the Treasury for any unlawful payment.

d. Settlement

It will be observed from the above discussion that the Comptroller General as head of the General Accounting Office plays an important role in the phase of the spending process under consideration here. Students of the subject of financial administration are by no means agreed that the present arrangements are most conducive to efficient administration in general, or that they are necessary to assure an honest administration of federal expenditures.

When the office of Comptroller General was created and made virtually independent of the executive, it was naturally thought of as a kind of arm of the legislative branch. In relation to the administration, Congress was meant to have investigative powers and to keep itself informed on how well its policies were being carried out by the executive and administrative officials. Except through enactment of laws or rules, Congress should not attempt to supervise administration. The Comptroller General became to a large extent, however, an independent supervisor of the administrative process, rather than simply an investigator for and reporter to Congress. This was possible, whether intended or not, through his authority to settle accounts and to countersign Treasury warrants and requisitions. He could declare any payment or requisition invalid on the ground that it did not fall within the appropriation act as he interpreted it.

Outside audit

Only Congress or the courts could overrule him. This being the situation, department heads, bureau chiefs, and disbursing officers found it to be the better part of valor to seek advance decisions or prior approval before entering upon the administration of a program.

**The best
opinion**

The most authoritative opinion seems to be that prior approval and settlement of accounts should be carried on by agencies within the administration and that such settlement should be binding on the executive departments of the government. The departments are responsible for the proper administration of the laws, including appropriations, enacted by Congress. They should be allowed full authority to accomplish the purposes which they believe Congress intended, subject of course to the traditional court review. As to their stewardship, their acts should be subject to review or audit by Congress or its agents. *Hence, the proper function of the Comptroller General would be, according to this view, to examine or audit the accounts and to report his findings to Congress. If nonfeasance or malfeasance is shown, Congress is able to see that appropriate steps are taken to remedy the situation.*

**Anoma-
lous cases**

Perhaps because of the prestige of the General Accounting Office, or the hold which the idea of the "watchdog of the Treasury" secured upon the popular imagination, Congress has never enacted any law to change the Comptroller General's status or to restrict the general nature of his functions. However, it has not hesitated to limit the coverage of his authority. He does not, for example, have authority to settle all accounts of the national government, as the original law provided. Almost from the beginning Congress has exempted certain agencies from his jurisdiction. An agency which has sufficiently strong political backing, such as the Veterans Administration, is able to get the necessary legislation to exempt it from his control. We have, as a consequence, an anomalous situation in which some agencies of government may be hamstrung because of a too ambitious system of auditing while other agencies operate without any regular outside or investigative audit of their accounts.

TREND AND NATURE OF EXPENDITURES

In 1800 the government of the United States expended slightly over two dollars for each person within its borders; sixty years later the annual per capita expenditure rate was under two dollars. After 1860, however, expenditures increased much more rapidly than did the population, reaching eight dollars per capita before 1914 and over sixty dollars per capita in 1940, the year before the abrupt increase in expenditures preceding our entry into the Second World War. A study of the trend of expenditures shows that after a major war the rate of expenditures never gets back to the prewar level; it is more likely to be at least two to four times the latter. Optimistic forecasters have not suggested that our annual peacetime expenditures will stabilize at less than \$200 per capita, or a total of about \$30,000,000,000.

Upward
trend

One may ask what have been the causes of the enormous increase in the cost of the national government. The absolute cost would, of course, have risen because of the growth in size and population, even if the services rendered had remained constant. The per capita or relative increase can be ascribed mainly to the increased services or functions of the federal government, and secondarily to the changes in the price level. Up to 1860 the national government rendered comparatively few services outside of maintaining an army and navy, conducting the relations—including wars—with foreign countries and the Indian tribes, and delivering the mails. Since 1860 the scope of its functions has greatly increased, the most extensive increase coming perhaps after 1933. A few examples will be sufficient to illustrate the trend. After the Civil War the national government began to enact and enforce more regulatory laws, such as the Interstate Commerce Act, the Sherman and other anti-trust acts, the Pure Food and Drug Act, and many other laws of a "police" nature. Another type of expenditure is grants of money to states; these were authorized as early as 1862 and during the last quarter of a century have accounted for a considerable part of national expenditures. The assistance grants—for the aged, dependent chil-

Reasons

dren, blind persons—under the social security program come in this category. In recent years loans and grants have also been made to cities and other units of local government.¹⁰ The various forms of direct and indirect relief to individuals and corporations, instituted chiefly since 1932, have added greatly to the per capita cost of government in this country. The expenditures attributable to wars are considerable, but relatively they have not increased as rapidly as have other costs. In 1810, for example, 85 percent of the expenditures of the national government were for the Army and Navy, war pensions or disability payments, or interest on war debts; in 1930 the corresponding expenditures were only 50 percent and in 1940 only 30 percent of the total national expenditures. During the next several years, war costs will constitute an abnormally high proportion of expenditures, but in the long run the volume of national expenditures depends primarily on the extent of the peacetime activities of the federal government.

THE NATIONAL DEBT

Occasions for bor- rowing

At various times the national government has found it necessary or expedient to borrow money, to assume existing debts, or to guarantee the payment of debts. When this government was set up it assumed the debts of the preceding confederation, and shortly thereafter it assumed a large volume of state debts incurred during the Revolution. The government during recent years has underwritten, usually up to a stated percentage of each loan, a large volume of private debts. The principal occasions for extensive long-term borrowings have been wars, although on several occasions, such as the purchase of territory or during periods of depression, large sums have been borrowed during times of peace.

Methods

The common method by which the national government borrows is for the Treasury Department, after Congressional authorization, to exchange bonds, notes, certificates of indebtedness, or other evidences of indebtedness for cash. A form of

¹⁰ Discussions of federal grants will be found on pp. 289-295, 473-475, 487-489.

forced loan is the process of issuing fiat money or "greenbacks" with a simple promise of redemption at some future date. Congress can make these legal tender and thus compel people to accept them in payment for services and goods. Governments, like individuals and private corporations, may have temporary or floating debts. These may be in the form of short-term notes, open accounts, or warrants.

The gross debt of the federal government on June 30, 1940, was slightly less than \$43,000,000,000. This figure may be taken as the pre-defense-program debt total. After five years of defense and war financing the total federal debt had risen to nearly \$270,000,000,000. For some time to come the amount to be required annually to meet the interest payments on the federal debt will exceed the average annual expenditures of the federal government during the 1920's for all governmental purposes.

Public
debt

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CHAPTER 21

NATIONAL REGULATION

The Need for National Regulation—Regulation of Railroads—Regulation of Motor Buses and Trucks, Inland Water Carriers, and Airplanes—Control of Electric and Gas Utilities, Telephone and Telegraph Companies, and Radio Communication—Control of Banking—Regulation of Security Exchanges, Public Utility Holding Companies, and Commodity Exchanges—Prevention of Monopoly and Restraint of Trade and Unfair Methods of Competition—Issuance of Patents, Registration of Copyrights and Trade-marks—Administration of Bankruptcy—Control through Pure Food and Drug Laws—Criminal Law

THE NEED FOR NATIONAL REGULATION

As has been pointed out in previous chapters, the federal government is a government of delegated powers. Such regulation as it undertakes must therefore come within one of the powers given to it under the constitution. The commerce power, the war power, and the taxing power are the most important—at least, these three have given to Congress most of the power under which it has enacted regulatory legislation. To these should be added the postal power, the power over currency, the power to grant patents and copyrights, the power over bankruptcy, and a few others of lesser importance. **Powers**

Many of the framers of the constitution did not desire a strong central government but hoped rather that the states would exercise most of the controls which might be necessary or desirable. Even those persons who wished a strong central government probably did not contemplate a government which would exer- **Increasing control**

cise as extensive regulation as the federal government exercises today. In the beginning the federal government attempted very little control. It enacted currency legislation, patent laws, and some minor regulations of commerce. It was not until the latter part of the nineteenth century that Congress embarked upon any very extensive programs of regulatory legislation. In 1864 Congress passed an act providing for the incorporation and regulation of national banks. In 1887 it passed the Interstate Commerce Act regulating railroads and in 1890 the Sherman Anti-Trust Law prohibiting monopoly and restraint of trade. In 1906 the Pure Food and Drug Act was placed on the statute books, in 1913 the Federal Reserve Act, and in 1914 the Federal Trade Commission Act and the Clayton Anti-Trust Law. The years 1933 to 1938 saw the enactment of the Federal Communications Act, the Securities Exchange Act, the Federal Motor Carrier Act, the Public Utility Holding Company Act, and many other regulatory statutes.

Reasons

Numerous factors contributed to the need for federal regulation. One of these was the growth of industry and the increase in the size of corporations, which rapidly acquired monopolistic control in certain fields. States alone would have been powerless to prevent monopoly and restraint of trade. For another thing, railroads, motor buses and trucks, and pipe lines grew in size and engaged more and more in interstate commerce. State control would have been insufficient, unless fortified by national regulation, to prevent abuses and protect the public in these areas. As large public utility holding companies were organized and acquired control over operating utilities, federal regulation became imperative if the industry was to be effectively controlled. In many other areas federal regulation has become essential as commerce and industry have tended more and more to transcend the boundaries of the several states.

REGULATION OF RAILROADS**The trend**

One of the oldest and most important instances of federal control is that of railroad regulation. In fact, it is probably not an

exaggeration to say that it represents the most extensive program of control undertaken by the federal government. It should be noted in passing that the federal government has not taken over the entire burden of control of railroads but has left part of their regulation in the hands of the states. As time has passed, however, the federal government has assumed more and more of the burden of railroad regulation. It could probably constitutionally undertake the entire task of control if it were desirable to do so. On several occasions Congress has turned over to the Interstate Commerce Commission the regulation of some phase of the railroad operations which was intrastate in character, and the courts have upheld the constitutionality of the legislation on the grounds that such control has been needed for proper regulation of interstate commerce.

Federal regulation of the railroads dates back to 1887. In that year Congress passed the Interstate Commerce Act establishing the Interstate Commerce Commission and endowing it with some regulatory authority. The act of 1887 has been amended several times. Among the most important amending statutes have been the Hepburn Act of 1906, the Transportation Act of 1920, and the Transportation Act of 1940.

From their entry into service until abandonment, railroads are subjected to governmental control. New railroads or new lines of railroads may not be built without government consent. Railroads are required by the Interstate Commerce Act to serve at reasonable rates and without discrimination. They must secure the approval of the Interstate Commerce Commission before combining or consolidating, or before issuing stocks and bonds. They must make regular reports and keep uniform accounts in a form prescribed by the Commission, and they may not without the consent of the Interstate Commerce Commission abandon a line of railway. These various regulatory provisions were adopted in order to remedy abuses which arose under a policy of *laissez faire*. Irresponsible financial manipulation, rebates to favored shippers, overcapitalization, cutthroat competition brought the inevitable public reaction, and the Interstate Com-

Railroad
acts

Phases of
regulation

merce Act of 1887 and subsequent amendments were an attempt to overcome these abuses.

1. Entrance into service

In the early period of railroad development, no attempt was made to curb the building of railroads. In fact, federal, state, and local governments tried to stimulate railroad construction by grants of land or donations of money. As a result, many unnecessary lines were built and there was needless duplication of facilities, a situation from which some of the carriers have never fully recovered. In 1920 the Transportation Act amended the Interstate Commerce Act so as to provide that no new line could be built without securing from the Interstate Commerce Commission what was called a *certificate of convenience and necessity*. The Commission would issue such a certificate only if it was convinced that there was public need for the proposed railroad facilities.¹

2. Abandonment

In recent years the problem of discontinuance of service by railways has been one of some importance. Unnecessary railroad lines had been built, and it became difficult to operate these lines without a loss. Railroads sought to abandon some of them without giving much consideration to the public interest. Furthermore, the development of other forms of transportation, especially motor buses and trucks, made the railroads wish to abandon certain routes. The Transportation Act of 1920 gave the Interstate Commerce Commission jurisdiction over abandonment. Under this statutory provision no railroad may abandon any line without securing from the Commission a certificate declaring that convenience and necessity no longer require the service.²

3. Combinations

An important problem which has received much attention is that of railroad combination. A complete reversal in attitude toward this question on the part of the government has taken place during the past fifty years. In 1904 the Supreme Court in the case of *Northern Securities Company v. United States* held that a union of the Great Northern and Northern Pacific was a viola-

¹ U.S. Code, title 49, sec. 1 (18).

² *Ibid.*, sec. 1 (10) (11) (13) (14) (21).

tion of the Sherman Anti-Trust Law.³ In the Transportation Act of 1920, Congress not only removed barriers but endeavored to encourage combinations. The act covers various forms of railroad combination such as pooling, purchases of property, stock acquisitions, leases, operating contracts, mergers, and consolidations. Under the act, it is lawful for railroads to combine in any of these ways or for any person who is not a carrier to acquire control through stock ownership or otherwise with the approval of the Interstate Commerce Commission. If the Commission finds that the proposed combination is consistent with the public interest, it is to give its approval, subject to such terms and conditions or modifications as are reasonable. In passing upon a proposed combination the Commission is to consider the following: the effect of adequate transportation service to the public, the effect upon the inclusion or the failure to include other railroads in the territory involved, the total fixed charges resulting from the proposed transaction, and the interest of the employees of the railroads concerned.⁴

It is highly important that a regulatory body should have the power to approve or to disapprove of the issuance of stocks and bonds by the businesses which it regulates. Requests for excessive rates or charges are frequently the result of overcapitalization arising from an unjustifiable issuance of securities. If rate control is to be effective it must be supplemented by control of stocks and bonds. It was not until 1920 that Congress passed the Transportation Act as an amendment to the Interstate Commerce Act and gave the Interstate Commerce Commission authority over the issuance of securities by railroads. The Interstate Commerce Act now provides that no railroad shall issue any stock, bonds, or other evidence of indebtedness, except certain short-term notes, without the approval of the Interstate Commerce Commission. If a railroad issues any securities contrary to the act they are void. Although in approving or rejecting requests for issuance of securities the Commission has considerable discretion, it must find that the proposed issue is for

4. Securities

³ 193 U.S. 197 (1904).

⁴ U.S. Code, title 49, sec. 5 (2).

some lawful purpose and is compatible with the public interest. In general, of course, the Commission seeks to guard against overcapitalization. In addition it watches carefully the purpose for which the railroad plans to use the stocks and bonds.

5. Reducing capitalization

One of the problems which have caused the federal government some concern has been the financial condition of some of the railroads. During many periods in the last thirty years the railroads have as a whole been unable to earn a fair return on their capitalization. Some carriers have consistently operated at a loss over considerable periods of time. It was obvious that if they were to be restored to financial health their capitalizations would have to be scaled down. Congress has provided several methods of doing this: through *equity receiverships*, through *reorganizations*, and through *adjustments*. These are all federal court proceedings, with the Interstate Commerce Commission participating in the latter two.

6. Safety rules

The non-accident record of the railroads from about 1920 to 1940 was a fairly good one. More recently it has not been as satisfactory. In its annual report for 1946 the Interstate Commerce Commission states that more than 200 persons were killed and 3500 injured in the previous year as the result of train wrecks. There are many reasons for this increase in casualties. During the war the railroads were called upon to carry capacity loads, and they were unable to replace their rolling stock, to repair their roadbeds to any appreciable extent, or to buy up-to-date equipment. Furthermore, there has been a noticeable increase in the speed of trains. Safety devices have apparently not kept pace with the increased speed of traffic. For many years, it is true, the federal government has had legislation pertaining to safety. Laws have required power-driven brakes for engines and cars, safety ashpans for locomotives, automatic couplers, and inspection of steam boilers and other railroad equipment. The laws have also given the Interstate Commerce Commission the power to require railroads to install automatic train-control and train-stop devices.⁵ Additional legislation now seems to be needed in order

⁵ *Ibid.*, title 45, secs. 1, 2, 4, 17, 22, 35, and title 49, sec. 26.

to enable the Commission to protect the public and to meet the needs created by faster service.

One of the most important aspects of railroad regulation is control of rates. Regulation of consolidation, security issues, new lines, and abandonment are secondary to rates. Since 1920 the Interstate Commerce Commission has had comprehensive control over rates. Under the Interstate Commerce Act railroads have a duty to charge only just and reasonable rates. In order to enforce this obligation the Commission has been given the power to determine whether or not existing rates are just and reasonable and to order maximum, minimum, or absolute rates.⁸ The level of rates of the railroads as a whole is supposed to be set so as to enable them to earn a fair return on the value of their property over and above operating expenses. In order to be able to do this intelligently it has been necessary for the Interstate Commerce Commission to find the valuation of the railroads. This was no short or simple task, but took many years' work. Although the Commission has attempted to keep the rates at a level which would enable the railroads to earn a fair return, it has found it difficult to attain this goal, partly owing to the competition from other forms of transportation and partly owing to a capitalization too high to support a level of rates that shippers would pay. During many of the past thirty years carriers as a whole earned only 1 or 2 percent on their capitalization and seldom over 4 percent. During the Second World War their earnings were better than average but that of course was an unusual situation.

7. Rate
control

A type of regulation that is closely related to rate control is the regulation of accounts. It is difficult for the Commission to be able to know whether or not rates are just and reasonable unless accounts are adequate and uniform. The Interstate Commerce Act gives to the Commission the authority to prescribe the forms of accounts and records of the railroads. It also gives the Commission access to all records and accounts of railroads and authorization to require reports.

8. Ac-
counting

⁸ *Ibid.*, title 49, sec. 15 (1).

9. Discrimination

One of the chief causes for the beginning of government regulation of the railroads in 1887 was the practice of granting preferences to favored shippers. A shipper who was discriminated against by a railroad was often placed at a serious competitive disadvantage. This was especially true when railroads were almost the only important form of transportation. So serious had this situation become that a large part of the original Interstate Commerce Act of 1887 was directed at prevention of various forms of preferences to shippers. Under the law as it now stands it is illegal for a railroad to discriminate in rates between shippers.⁷ The law also forbids a railroad to give any unreasonable preference of any kind to a person, locality, district, or class of traffic.⁸ It contains another provision which is designed to prevent discrimination, namely, the so-called "long and short haul clause." This clause makes it unlawful for a railroad to charge more for a short haul than for a long haul over the same route in the same direction or to charge more for a long haul than the aggregate of intermediate rates over the route.⁹ There are certain exceptions to these provisions against discrimination or preference, but the Interstate Commerce Commission has been given authority to see that any differences are justifiable and reasonable.

REGULATION OF MOTOR BUSES AND TRUCKS, INLAND
WATER CARRIERS, AND AIRPLANES

Motor carriers

One of the reasons for the financial difficulties of the railroads has been the competition with which they have been faced from the motor bus and truck industry. This situation was aggravated by the fact that, although railroads were subject to stringent regulation on the part of the federal government, motor buses and trucks for many years were not subject to governmental control. In fact, it was not until 1935 that the Federal Motor Carrier Act was passed bringing four important classes of interstate motor carriers under federal control: *common carriers*, that is, those which hold themselves out to serve all; *contract*

⁷ *Ibid.*, sec. 2.⁸ *Ibid.*, sec. 3.⁹ *Ibid.*, sec. 4.

carriers, which serve a limited number of customers under contract; *private carriers*, namely, those who own and operate motor carriers in furtherance of any commercial enterprise; and *transportation brokers*, who are defined by the law as persons, other than common or contract carriers, who sell or arrange for transportation.¹⁰ It should be remembered that the Federal Motor Carrier Act regulates only those carriers engaged in interstate commerce and leaves the control of intrastate motor carriers to the several states.

The controls which have been imposed upon motor carriers are similar to those imposed upon railroads. However, certain of the controls are more important and others less so, since the problems which the government faces obviously vary with the different forms of transportation. In the case of motor carriers, certificates of convenience and necessity have been much more important than in the case of the railroads. It is much easier for a person to enter the business of motor transportation than to start a new railroad. The original cost of motor equipment is not heavy and the cost of operation is greatly reduced because the federal and state governments construct and maintain the highways. Without restriction of numbers the highways might become congested with bus and truck lines. All persons proposing to begin operating after 1935 common or contract motor carriers in interstate commerce were required by the act to secure certificates of convenience and necessity. Congress provided, however, that persons already operating at the time of the passage of the act of 1935 should be issued certificates more or less automatically upon application to the Interstate Commerce Commission. Some notion of the large number of persons engaged in interstate motor operations can be gained from the fact that by 1937 more than 90,000 had applied to the Interstate Commerce Commission for certificates, alleging that they had been operating before the date of the act.

As might be expected, the Federal Motor Carrier Act of 1935 provides for rate regulation, prohibits discrimination, and re-

1. Need
for
controls

2. Scope

¹⁰ *Ibid.*, sec. 303.

quires reports from common carriers. Less drastic regulations pertaining to rates have been imposed upon contract carriers. The Motor Carrier Act imposes upon both common and contract carriers regulations with regard to the issuance of stocks and bonds similar to those imposed upon railroads under the Interstate Commerce Act as amended by the Transportation Act of 1920.¹¹ Because of the financial limitations of many motor carriers and the rather hazardous character of motor transportation, the federal law declares that no certificate or permit may be issued to a motor carrier unless it complies with the Interstate Commerce Commission's rules pertaining to the filing of surety bonds or insurance. This regulation is designed to assure persons who have suffered loss or injury that a carrier will be able to meet its liability. Finally, the Commission has been given the power to make regulations designed to promote the safe operation of vehicles by fixing qualifications and maximum hours for employees and by prescribing standards for motor vehicle equipment.¹²

Inland
water
carriers

Until 1940 the federal government made little attempt to regulate inland water carriers. One of the chapters of the Transportation Act of 1940, however, imposed regulations on common and contract water carriers similar to those imposed on railroads and motor carriers and turned over the task of enforcement to the Interstate Commerce Commission. One of the important provisions of this act requires all common and contract carriers to obtain certificates of convenience and necessity or permits from the Interstate Commerce Commission before engaging in operations. The law provides that carriers which were in bona-fide operation at the time of the act are entitled to certificates or permits as a matter of right.¹³ The act contains several detailed provisions pertaining to rates of water common carriers similar in many respects to the provisions of the Interstate Commerce Act pertaining to railroads. The Interstate Com-

¹¹ *Ibid.*, sec. 314.

¹² *Ibid.*, sec. 304a (2) and (3).

¹³ *Ibid.*, sec. 909 (a) and (e).

merce Commission has been given much less power to control the rates of contract carriers. The latter are under the obligation to establish reasonable minimum rates. The Commission has authority to alter minimum rates in accordance with certain policies set forth in the act. The act also forbids preferences to persons, ports, localities, or traffic and gives the Commission power to require reports, prescribe the form of accounts, and inspect all records.¹⁴

The only important form of interstate transportation that has not been placed under the jurisdiction of the Interstate Commerce Commission is transportation by airplane. The control of aviation has been given by Congress to the Civil Aeronautics Board and the Administrator of Civil Aeronautics. Both of these are attached to the Department of Commerce. The control exercised over aviation is of two kinds: regulation of common carriers by plane, and safety protection for persons using these carriers as a medium of transportation. The regulation of airplanes as common carriers follows closely that of control of other forms of transportation. Certificates of convenience and necessity are required, preferences are prohibited, and rates are regulated.¹⁵ By statute and through rules and regulations of the Civil Aeronautics Board, elaborate safety precautions have been adopted for airplanes and airplane transportation. Many kinds of certificates are required. Certificates are required for all pilots and mechanics of aircraft. *Type certificates* which are issued for aircraft, engines, and propellers testify to the design, materials, or construction of planes and parts. *Production certificates* allow manufacturers to make duplicates of approved aircraft or parts. *Airworthiness certificates* are issued to owners of aircraft if their planes after inspection conform to requirements and are deemed to be in safe condition for operation.¹⁶ In addition to issuing certificates, federal authorities have made numerous safety rules and regulations pertaining to planes and flying. These are contained

¹⁴ *Ibid.*, sec. 905, 907, 913.

¹⁵ *Ibid.*, secs. 481, 483, 487, 489.

¹⁶ *Ibid.*, sec. 553.

in the Air Traffic Rules promulgated by the Civil Aeronautics Board. They are numerous and detailed, covering minimum altitude, signals, landings, take-offs, passing, acrobatic flights of aircraft, etc.¹⁷

CONTROL OF ELECTRIC AND GAS UTILITIES, TELEPHONE AND TELEGRAPH COMPANIES, AND RADIO COMMUNICATION

Gas and electricity 1. State action

State control of electric and gas utilities antedated federal regulation. Obviously early public utility systems were local, or at best no more than state-wide in area. As time passed there was a steady increase in interstate operations. In addition, mergers, consolidations, and the formation of holding companies increased the size of utilities and made federal control essential, since state control even at its best could not be relied upon to be adequate. The federal government has not attempted, however, to cover the entire field of control but has left large areas to the several states.

2. Federal Power Commission

The agency to which Congress has delegated the task of regulating gas and electric utilities is the Federal Power Commission, which was established in 1920 with very limited authority. Its principal task at that time was to issue licenses for persons who wished to build dams or erect power plants on land belonging to the government of the United States or on the navigable waters. The Commission still has this right to issue licenses and may attach thereto numerous conditions which are intended to promote the public interest.¹⁸ At the expiration of the license the federal government has the power to take over any project on condition that the licensee is paid the money which it has spent on the project.

3. Electric utilities

In 1935 Congress added to the jurisdiction of the Federal Power Commission by giving it control over electric utilities engaged in the transmission or sale at wholesale of electric energy in interstate commerce. No electric utility may merge, consolidate, lease, or sell its facilities without first having secured

¹⁷ *Code of Federal Regulations*, Cumulative Supplement, 1944, title 4, secs. 60.152, 60.32, 60.3300, 60.3503, 60.342.

¹⁸ U.S. Code, title 16, sec. 803.

authorization from the Federal Power Commission. Securities may not be issued without Commission approval. All rates and charges must be just and reasonable. If the Commission finds that any rate is unreasonable or discriminatory it may fix a reasonable or non-discriminatory rate. It also has the right to require uniform accounts and records and to demand reports of all utilities under its jurisdiction. Whenever it finds that any interstate service is inadequate or insufficient, the Commission may order the establishment of proper or adequate service. It may even order an electric utility to establish physical connection with another utility if necessary or appropriate in the public interest.¹⁹

In 1938 Congress gave the Federal Power Commission authority to regulate companies engaged in the interstate transportation of natural gas. Constitutional and economic difficulties had made state control of certain aspects of this industry difficult. The United States was rapidly being covered with a vast network of natural gas pipe lines which stretched from Texas eastward to New York and northward to Minnesota. Under the Natural Gas Act of 1938 the Federal Power Commission has jurisdiction over persons engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption. Rates must be reasonable and non-discriminatory. If upon investigation the rates are found to be unreasonable or discriminatory the Commission may fix reasonable and non-discriminatory rates. It is authorized to order a company to extend or improve its facilities or to establish a physical connection with the facilities of any person engaged in the local distribution of gas to the public. It has been given control over accounts and records similar to that exercised by federal authorities over other utilities and transportation companies.²⁰

Prior to 1934 the federal government regulated to some extent interstate telephone and telegraph communication through the Interstate Commerce Commission. In 1934 the control of telephone and telegraph communication was strengthened and was

4. Natural gas

F.C.C. 1. Telephone and telegraph

¹⁹ *Ibid.*, sec. 824.

²⁰ *Ibid.*, sec. 824.

taken from the Interstate Commerce Commission and given to the newly created Federal Communications Commission. Under the law as it now stands the Federal Communications Commission has the power to prescribe reasonable charges, practices, or regulations of interstate telephone and telegraph companies if it finds existing ones are unreasonable. It may prescribe forms for accounts and require reports. It has the power to issue certificates of convenience and necessity and to approve petitions for consolidation.²¹

2. Radio The chief task of the Federal Communications Commission is the regulation of radio. In the field of radio communication the federal government has assumed exclusive jurisdiction. This arrangement is necessary since joint control by states and federal government would give rise to endless confusion and interference. Although there was some regulation of wireless by the federal government as early as 1910, it was not until the creation of the Federal Radio Commission in 1927 that effective control was inaugurated. In 1934 the name of the Commission was changed to the Federal Communications Commission.

a. Licens- One of the important tasks of the Federal Communications ing Commission in regulating radio is to issue several kinds of permits or licenses in the *public interest, convenience, and necessity*. Licenses are issued for comparatively short periods of time but may be renewed if the requirements of public interest, convenience, and necessity can be satisfied. They may be revoked on grounds set forth by statute.

b. Censorship The Federal Communications Commission is expressly forbidden to exercise over the radio any general power of censorship which interferes with the right of free speech. Indirectly the Commission may act, however, as a kind of censor, since it is given the power to issue or refuse to issue station licenses on the basis of public interest, convenience, and necessity; and this is a very comprehensive term indeed.

c. Allot- Another important task of the Federal Communications Com- ting fre- mission has been to establish a band of frequencies from 550 to quencies

²¹ *Ibid.*, title 47, secs. 202, 203, 213, 214, 219, 220.

1600 kilocycles known as the "broadcast band" and assign stations to these frequencies. Of the frequencies or channels in the broadcast band many have been designated as *clear channels*, and large stations have been assigned to them. Some have been designated as *regional channels*, and stations with less power have been assigned to these frequencies. A few frequencies have been designated as *local channels* to be used by small stations. Needless to say, the task of controlling radio communication involves the making of a large number of detailed rules and regulations, and this the Federal Communications Commission has done covering such matters as keeping an adequate operating log, the minimum regular operating schedule for stations, the announcement of call letters, and the location of stations.²²

The average person thinks of the Federal Communications Commission chiefly as an agency for regulating ordinary radio broadcasting. Its functions are more extensive and its task more complicated than that. The frequencies which can be used for some sort of radio communication stretch from about 10 kilocycles to 30,000,000 kilocycles.²³ From this it can be seen what a comparatively small area is covered by the present broadcast band. The frequencies on both sides of the broadcast band have been assigned for many uses, such as point-to-point communication, ships, airplanes, amateurs, experiment, television, FM broadcasting, educational broadcasting, and governmental purposes.²⁴

CONTROL OF BANKING

Unlike many other powers, the authority over banking is not expressly given to the federal government by the constitution. In the well-known case of *McCulloch v. Maryland*, however, the Supreme Court held that the federal government had implied power to charter a national bank. Incorporating and regulating national banks is necessary and proper in order to carry out

Source of
power

²² *Code of Federal Regulations*, title 47, secs. 3.121, 3.151, 3.155.

²³ See *Annual Report of the Federal Communications Commission*, 1946 (Government Printing Office, Washington, 1946), p. 5.

²⁴ *Ibid.*, pp. 15-20.

more effectively some of the express provisions of the constitution.

Like the railroads, motor carriers, and electric and gas utilities, the banking business is a business affected with a public interest and has been subjected to extensive and detailed regulation.

**Entrance
into
business**

For one thing, the federal government has made detailed regulations concerning the entry into the business of national banks. An application must be filed with the Comptroller of the Currency. Persons desiring to establish a national bank must have a minimum amount of capital, varying with the size of the city in which the bank is to be established. In making the investigation as to whether or not an application should be granted, consideration must be given to such factors as the character and experience of the organizers and officers, the adequacy of existing banking facilities in the community, and the prospects of success of the enterprise if efficiently managed.²⁵

**Reports
and exam-
inations**

An important aspect of federal control of banking is the requirement of reports to and examination by governmental authorities. In the case of no other business is this more important; the financial condition of banks is of very direct interest to every person who uses their facilities. Every national bank is required to make at least three reports each year. National banks must be examined at least twice a year. Bank examiners visit a bank unannounced, look at the records, and report irregularities to the Comptroller of the Currency.²⁶

**Other
controls**

The Comptroller of the Currency has been given certain powers over the establishment of branch banks and the consolidation of national banks. Federal laws contain a number of restrictions on the power of national banks to make loans, the rate of interest that they may charge, the ownership of real property, the issuance of national bank notes, and many other matters.

Although the system of national banks which was provided

²⁵ See *Instructions of the Comptroller of the Currency Relative to the Organization and Powers of National Banks, 1928* (Government Printing Office, Washington, 1928), p. 1.

²⁶ U.S. Code, title 12, secs. 161-164, 481.

for by federal act in 1864 was a considerable improvement over the system of state banks, it had many weaknesses. In order to remedy some of them the Federal Reserve System was established in 1913. Under it the country has been divided into twelve districts with a Federal Reserve Bank in each district. At the head of the Federal Reserve System is the Board of Governors, each member of which is appointed by the President with the advice and consent of the Senate for a term of fourteen years. Every national bank is required to be a member of the Federal Reserve System, and state banks may become members with the consent of the Board of Governors.

The Federal Reserve Act sets forth in detail the powers of the Board of Governors. Among other things the Board may examine the affairs of each Federal Reserve Bank and each member bank and may require reports. It may permit Federal Reserve Banks to discount the paper of other Federal Reserve Banks.

Primarily Federal Reserve Banks are banks that serve other banks and perform numerous financial functions of a semi-public nature. For example, they may discount notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes. Federal Reserve Banks have the power to sell and purchase state, federal, and municipal bonds. They may receive deposits from member banks and from the government of the United States. One of the most important powers of the Federal Reserve Banks is their power to issue currency. The *federal reserve notes* which they issue have become an important part of the currency of the United States. The conditions under which federal reserve notes may be issued are designed to give greater elasticity to our currency, expanding or contracting its volume according to needs.

The Federal Deposit Insurance Corporation is an important agency in our system of governmental control of banking. It was established after the "bank holiday" of 1933 and insures deposits up to \$5000 for every depositor in any bank that is a member of the system. It has been estimated that this protects

more than 98 percent of the depositors of the United States.²⁷ Between 1934 and 1942 only 300 banks failed. More than 200 of these were insured banks and the Federal Deposit Insurance Corporation made good the losses in accordance with the act.²⁸

REGULATION OF SECURITY EXCHANGES, PUBLIC UTILITY
HOLDING COMPANIES, AND COMMODITY EXCHANGES

Abuses

One of the phenomena which characterized the era from 1920 to 1930 and which undoubtedly contributed to the depression that followed that decade was the inordinate speculation on the stock exchanges of the country. Another was the selling of vast quantities of highly speculative and in many cases worthless stocks to members of the public who could ill afford the luxury of speculation. Millions of small investors knew little of the securities they were buying and were ready prey for unscrupulous promoters. Even supposedly reputable banking houses were none too careful of the interests of their clients. In addition, "insiders" often enriched themselves unjustly, and the public suffered. All this led to demands for corrective legislation. Two federal laws were enacted in order to remedy some of these abuses, the Securities Act of 1933 and the Securities Exchange Act of 1934.

Controls
1. Securities

The Securities Act of 1933 requires that persons who use the facilities of interstate commerce or the mails to sell stocks and bonds must register with the Securities and Exchange Commission. The Commission requires a considerable amount of information to be submitted and made available to the public at the time of registration.²⁹ The purpose of the Securities Act is not to guarantee that issues of securities are sound but merely to give purchasers detailed and accurate information concerning stocks and bonds that are being issued and the financial situation of corporations issuing them. The act provides for the exemp-

²⁷ *Annual Report of the Federal Deposit Insurance Corporation, 1940* (Government Printing Office, Washington, 1940), p. 11.

²⁸ *Annual Report of the Comptroller of the Currency, 1942* (Government Printing Office, Washington, 1942), p. 106.

²⁹ U.S. Code, title 15, secs. 77e and 77f.

tion from registration of many kinds of securities, such as government bonds, short-term notes, and issues under a certain amount.

The Securities Exchange Act of 1934 gave to the newly created Securities and Exchange Commission power to regulate certain practices on the various stock exchanges in the United States. Among the important provisions were those that required the registration of security exchanges unless exempted by the Commission and provided for the revocation of this registration for violation of the act or of the rules of the Commission. Similarly all brokers, dealers, and members of these exchanges must register, and their registration may be revoked by the Commission. Furthermore all securities which are traded on these markets must be registered. Other provisions of the law give federal authorities the power to fix margin requirements, prohibit the circulation of false information in order to induce persons to buy securities, and outlaw certain vicious practices by which insiders formerly manipulated the markets for their own gain.⁸⁰

A third important task of the Securities and Exchange Commission is the regulation of public utility holding companies. The period from 1920 to 1930 was marked by the growth of large holding companies in the public utility industry. In some instances a vast pyramid of holding companies, one on top of another, was erected. For the most part these corporate monstrosities were of little benefit either to the public or to the ordinary investor, but were devices to enrich a few promoters. Many were unsound. State control was either inadequate or non-existent. When the depression came, some of them, such as the Insull group, crashed, with serious loss to persons involved. The result was a widespread public demand for federal control, a demand which crystallized into the Public Utility Holding Company Act of 1935. Under this act all holding companies that controlled gas and electric utilities were required to register with the Securities and Exchange Commission, which was given the power to examine the corporate structure of every public

2. Exchanges

3. Utility holding companies

⁸⁰ *Ibid.* secs. 78e, 78f, 78g, 78h, 78i, 87j, 78l, 78o.

utility holding company and to determine the extent to which it should be simplified. The Commission was also authorized to require any utility system to take such steps as might be necessary to make it into a well-integrated system.³¹ As a result of this law many holding companies reorganized and simplified their structures. Others which failed to do so voluntarily were required to reorganize by the Commission. The constitutionality of this so-called "simplification" provision was challenged by the utilities but it was upheld by the Supreme Court.³²

Grain futures

A "futures contract" is an agreement on the part of the seller to deliver and on the part of a buyer to receive and pay a certain price for a certain kind and quality of a commodity at a specified time. Trading in futures is confined, as a rule, to wheat, corn, oats, rye, soybeans, cotton, and certain other agricultural commodities. Because of excessive speculation in commodity futures on the various grain exchanges following the end of World War I, the federal government passed the Grain Futures Act of 1921. In 1936 Congress passed the Commodity Exchange Act, which amended the Grain Futures Act by strengthening certain of its provisions.

Commodity exchanges

Under the law as it now stands a commodity exchange must be registered and designated as a contract market. Every contract market is required to furnish to the Commodity Exchange Authority, which has been entrusted with enforcement of the act, a copy of its by-laws and rules; it must permit inspection of its books and keep its records in a form prescribed by the Authority. All commission merchants and floor brokers must register and must furnish certain information concerning their operations. The dissemination of false and misleading information is prohibited, fraudulent practices are forbidden, and certain fictitious transactions have been outlawed. The Commodity Exchange Act gives to the Authority some power to prevent excessive speculation. Unfortunately the law does not give any

³¹ *Ibid.*, secs. 79d, 79f, 79g, 79h, 79k.

³² *American Power and Light Co. v. Security Exchange Commission*, 329 U.S. 90 (1946).

power to fix margin requirements. Recently, because of apparently excessive speculation in commodity futures, there has been agitation to give some federal agency this power. The act provides several methods of enforcement. Orders to cease and desist from illegal practices may be issued against any commodity exchange, or its officers or employees. A failure to comply with such orders may result in a fine or prison sentence. If any board of trade, commission merchant, or floor broker violates any law or rule of the Commodity Exchange Authority, the license may be suspended or revoked.³³

PREVENTION OF MONOPOLY AND RESTRAINT OF TRADE
AND UNFAIR METHODS OF COMPETITION

One of the most important economic developments of the past seventy-five years in this country has been the growth of monopolies, or trusts, as they are commonly called. The development started soon after the Civil War and by 1890 had reached such menacing proportions that Congress in response to public agitation passed the Sherman Anti-Trust Law of 1890. The Sherman Act with its amendments is the backbone of federal legislation on this subject today. Its provisions declare that every contract, combination, or conspiracy in the form of trust or otherwise in restraint of trade between the states or with foreign nations is illegal. They further declare that every person who shall monopolize or attempt to monopolize trade or commerce among the states or with foreign nations is acting illegally. They further declare that every person who shall monopolize or attempt to monopolize trade or commerce among the states or with foreign nations shall be deemed guilty of a misdemeanor. The act relies entirely upon suits in court, either by private parties or by the Department of Justice, for its enforcement. These may take the form of suits for injunctions or damages, or of criminal prosecutions giving rise to a fine or short imprisonment.³⁴

Sherman
Act

³³ U.S. Code, title 7, secs. 6, 6b, 6c, 6f, 6g, 7a, 7b, 13a.

³⁴ *Ibid.*, title 15, secs. 1, 2, 4, and 26.

Under the Sherman Anti-Trust Law numerous suits have been brought with varying degrees of success. Such large corporations or groups as the Standard Oil Company, the American Tobacco Company, the Associated Press, and the American Medical Association have been found guilty of violating the Sherman Act.

T.N.E.C. Although the Sherman Act may have had some deterrent effect, it certainly has not prevented the growth of large corporate groups, for despite numerous suits and prosecutions concentration of industrial control has continued. In fact it had grown to such alarming proportions in 1938 that Congress appointed a committee known as the Temporary National Economic Committee to investigate monopoly and restraint of trade. The report of this Committee contains some very interesting and important information. For example, some of the testimony showed that prior to World War II one company controlled 100 percent of the manufacture of aluminum, three companies 86 percent of the manufacture of automobiles, two companies 95 percent of the manufacture of plate glass, and three companies 80 percent of the production of cigarettes.³⁵ These are a few of the more striking illustrations of the fact that the Sherman Anti-Trust Law had not prevented the growth of monopoly in the United States.

**Clayton
Act**

In addition to the Sherman Act Congress has enacted other laws which are intended to prevent monopoly and restraint of trade. Among the more important of these are the Clayton Act of 1914 and the Packers and Stockyards Act of 1921. Under the Clayton Act four specific practices are prohibited if they tend to create a monopoly or restrain trade between the states. The first of these is the purchase by one corporation of the stock of a competing corporation. Another is the making of so-called exclusive dealing agreements, under which a dealer agrees to sell only the products of one company. Another is the making of price discrimination between purchasers of commodities of

³⁵ See *Hearings of the TNEC*, 75th Congress, 3rd session (Government Printing Office, Washington, 1939), pp. 136-137.

the same kind. The last is the prohibition of so-called interlocking directorates, that is, arrangements in which one person holds directorships in two or more competing corporations.³⁶ Some of these provisions of the Clayton Act have not been effective, especially the one forbidding the purchase of stock of one corporation by a competing corporation and the provision forbidding interlocking directorates. The anti-trust provisions of the Clayton Act may be enforced through suit in court or by proceedings before the Federal Trade Commission.

In 1921 Congress passed the Packers and Stockyards Act. In part this was an anti-trust law aimed at one particular industry, the packing industry. It prohibits a number of specific practices that had prevailed in that business and that were likely to result in restraint of trade. It forbids unfair, deceptive, or discriminatory practices, unreasonable preferences to persons or localities, and apportionment of supplies, territory, purchases, or sales.³⁷ The law places the enforcement of its provisions in the hands of the Secretary of Agriculture. In actual practice, however, it is the Production and Marketing Administration of the Department of Agriculture which carries out the administration of the law.

Packers
and Stock-
yards Act

In 1914 Congress passed the Federal Trade Commission Act establishing the Federal Trade Commission and forbidding unfair methods of competition in interstate commerce.³⁸ This provision represents an effort to retain the competitive system but to eliminate certain of its undesirable practices. The Federal Trade Commission Act does not in any way attempt to define unfair methods of competition or to list the specific practices that are forbidden. As a result it has been necessary for the Federal Trade Commission and the courts through a series of decisions to define this term.

Federal
Trade
Commis-
sion

One of the prevalent practices which have been considered unfair methods of competition is *misbranding*. This has assumed

1. Unfair
practices

³⁶ U.S. Code, title 15, secs. 13, 14, 18, 19.

³⁷ *Ibid.*, title 7, secs. 202-208.

³⁸ *Ibid.*, title 15, sec. 45.

a wide variety of forms, such as misrepresentation of the quality of goods or misrepresentation of the place of manufacture. Another unfair practice is known as *passing off*. This latter consists of imitating the goods of a rival firm with a well-established reputation by placing goods in similar packages or employing a trademark resembling that of another company. *Commercial bribery* is another unfair method of competition that has caused the Commission some trouble. This consists of paying the purchasing agents of customers in order to induce them to buy goods from the company paying the bribe. *Commercial espionage*, another unfair method of competition, consists of hiring the employees of a rival firm to divulge trade secrets such as volume of business, names of customers, etc. Many other practices have been listed by the Federal Trade Commission as unfair.³⁹

2. Procedure

In seeking to prevent unfair methods of competition the Federal Trade Commission sometimes uses its so-called *regular* procedure and sometimes employs *trade practice conference* procedure. Under the former any person who has been injured by the use of an unfair method of competition may file an application with the Federal Trade Commission. After proper consideration the Commission may decide that the application should be dismissed, or it may decide that there is sufficient evidence to justify the issuance of a complaint. In the latter case the Commission holds a hearing and may decide to dismiss the complaint or to issue an order to cease and desist. The trade practice conference procedure has already been described.⁴⁰

ISSUANCE OF PATENTS, REGISTRATION OF COPYRIGHTS AND TRADEMARKS

The federal government exercises exclusive control over the issuance and protection of patents. Fortunately the framers of the constitution conferred upon Congress the power to grant

³⁹ For a list of unfair methods of competition, see *Annual Report of the Federal Trade Commission, 1941* (Government Printing Office, Washington, 1941), pp. 82 ff.

⁴⁰ See pp. 372-373.

to inventors exclusive rights to their discoveries. State control, even at its best, would probably have resulted in considerable diversity and confusion.

The organization entrusted with the task of issuing or refusing patents is the Patent Office located in the Department of Commerce. Each year it is deluged with thousands of applications which it must examine and pass upon. Between 1836 and 1943 the office granted more than 2,275,000 patents. In order to make available to the public information concerning patents the Patent Office publishes a document known as the *Official Gazette* which appears weekly and contains drawings and descriptions of patents that have been granted together with decisions in patent cases.

The patent laws enumerate four kinds of inventions or discoveries for which patents may be obtained: a machine, an art, a composition of matter, or a manufacture. A patent may also be obtained for the creation of a new kind of plant or for a design.⁴¹ In the case of all of the above, the invention or creation must be new, and in the case of all except plants and designs it must be useful.

To obtain a patent involves much time and minute attention to detail. In fact, so complicated is the procedure that the Patent Office advises that no one proceed without the aid of a patent attorney. After the necessary papers have been filed, a search is made by an examiner in the Patent Office to determine whether or not the applicant is entitled to a patent. Provisions have been made for review of the decision of an examiner, first by persons within the Patent Office and later by the Court of Customs and Patent Appeals.

Patents are granted for seventeen years except for design patents, which are issued for shorter periods of time. A patent may not be renewed except by special act of Congress. During the life of a patent the owner has the exclusive right to make, to use, or to sell his invention throughout the United States and its territories. A patent or any interest therein may be assigned.

⁴¹ U.S. Code, title 35, sec. 31.

In fact, the practice of assigning patents to large corporations has become a more and more prevalent practice. Many large monopolies have been built up and maintained by control of patents in a particular field.

Although the Patent Office is charged with the issuance of patents, it does not have jurisdiction over questions of infringement. The owner of a patent must look to the federal courts for protection through suits for damages or injunction.

3. Weak-
nesses

Our patent system has been severely criticized by many persons in recent years. They have contended that it does not perform the function for which it was intended, namely, that of encouraging, rewarding, and protecting inventors and conferring the benefits of their efforts upon society. One of the objections to the system is that it permits the suppression of inventions at the whim of the owners of patents. Another criticism arises from the cost and time necessary to secure a patent. This is especially serious if an inventor has little money and his invention is very valuable. Large corporate interests that are likely to be injured by the grant of the patent will spend thousands of dollars harassing an inventor by numerous suits in the Patent Office and in the federal courts. Another criticism, and perhaps the most serious, is that our system fosters monopoly. It is true that it was intended to give a monopoly to an inventor for a limited period of time. As it has developed, however, it has contributed materially to the growth of large corporate monopolies. Corporations have built laboratories and then obtained a monopoly of inventive talent in the field. Furthermore, large corporations often attempt to purchase all important new patents in a particular field, thus retaining their monopoly. Finally, through *patent pools* or *cross-licensing* of patents two or three large companies may obtain a very decided advantage over competitors in a field and thus enhance their monopolistic position. All of these criticisms raise a grave question as to whether it might not be wise for the government to exercise far more control over patents than it now does.

The registration of copyrights is another area of control exer-

cised exclusively by the federal government. Federal legislation on this subject goes back to 1790. The present copyright statute was passed in 1909 and with amendments, including a codification in 1947, forms the basis for the law today.

Copy-
rights

The procedure for obtaining a copyright is very simple. In case of certain works such as books, prints, or maps a copyright may be obtained upon publication with notice of copyright. If a person wishes to register his claim to copyright he must file application and send two copies of the published work and pay the necessary fee to the Register of Copyrights, who is attached to the Library of Congress. A person desiring a copyright must affix to each published work a notice of copyright.⁴² In the case of unpublished works, the applicant is required to deposit only one copy of the work and to pay the necessary fee. No search is made to determine whether or not the applicant is entitled to a copyright. If the subject matter is the kind that can be registered under the law and the simple procedural requirements have been met, the registration is automatic. In this respect copyright procedure differs from patent procedure. If any person claims that an applicant is not entitled to registration, he must bring suit in a federal court.

The Copyright Act lists a number of things for which copyrights may be registered, such as books, periodicals, lectures, dramatic compositions, musical compositions, maps, works of art, photographs, and motion pictures. A copyright lasts for twenty-eight years and may be renewed for another twenty-eight years. The owner of a copyright is given certain valuable and exclusive rights: to print, reprint, publish, copy, and sell the work; to translate, to make any version thereof, or to dramatize it. If it is a copyright for a musical composition, the owner has the exclusive right to public performance for a profit.⁴³

Another area in which the federal government exercises some control, but which is less important than either patents or copyrights, is that of trademarks. Here, however, the federal govern-

Trade-
marks

⁴² *Ibid.*, title 17, secs. 10 and 19.

⁴³ *Ibid.*, sec. 5.

ment shares control with the states. The federal law covers the registration and protection of trademarks used in interstate and foreign commerce, and the state laws pertain to trademarks used in intrastate commerce. The federal government has from time to time passed trademark acts. All of these have been superseded by an act of 1946, which now covers the field. Under the law as it now stands a person may register with the United States Patent Office a trademark used in commerce unless it contains immoral, deceptive, or scandalous material; or comprises the flag or insignia of the United States, a state, municipality, or foreign state; or consists of a mark which so closely resembles the mark of another as to deceive the purchaser; or consists of a mark that is merely descriptive in some way of the goods.⁴⁴ The procedure for registration is much more complicated than that for registration of copyrights. An examiner in the Patent Office makes an investigation to determine whether or not the mark is registrable. Opportunity for review and other procedures within the Patent Office are prescribed. Appeals from actions within the Patent Office may be taken to the Court of Customs and Patent Appeals.⁴⁵

ADMINISTRATION OF BANKRUPTCY

Article I, Section 8, of the constitution declares that Congress shall have the power to make uniform laws on the subject of bankruptcies. In accordance with this constitutional grant, Congress has from time to time enacted bankruptcy laws. The present law was enacted in 1898 but was drastically revised in 1938. The administration of bankruptcy is carried on entirely under control of the federal district courts. So numerous are the cases and so involved and technical the problems that it has been found necessary to delegate most of the details to persons called referees, who operate under the judges of the various district courts.

Kinds of
bank-
ruptcy

The federal bankruptcy law recognizes two kinds of bankruptcy: *voluntary*, in which the individual himself petitions

⁴⁴ *Ibid.*, title 15, sec. 1052.

⁴⁵ *Ibid.*, sec. 1071.

to become a bankrupt, and *involuntary*, in which some creditor or group of creditors files the petition. Certain kinds of persons, such as municipalities, railroads, insurance companies, and banking corporations, may not go through bankruptcy.⁴⁶ If they become involved in financial difficulties, other procedures are provided.

As has been stated, the procedure in bankruptcy is complicated and is apt to require considerable time for its completion. First, the person must be adjudged a bankrupt by the court. In voluntary bankruptcy, this is not usually contested, but in involuntary bankruptcy there may be considerable litigation. After the adjudication in bankruptcy a meeting of all creditors is called by the court, claims are filed, and a *trustee* is elected. It is the duty of the trustee, who represents the creditors, to collect the assets of the debtor, to reduce them to money, to pay such dividends to the creditors as it is possible to do, to set aside certain exempt property for the bankrupt, and to close up the estate as quickly as possible. An important feature of the bankruptcy law is the provision pertaining to discharge of the bankrupt. Unless he has committed one of several acts set forth in the bankruptcy law, there is little difficulty in obtaining this discharge. The discharge relieves him of all previously incurred financial obligations, with certain exceptions stated in the law.⁴⁷

In addition to the bankruptcy law, Congress has enacted a number of other statutes designed to provide relief for certain debtors. One of these provides an arrangement for the relief of local governments which find themselves overburdened with debts. Another affords railroads an opportunity to reorganize. A third gives other business corporations a chance to reorganize when they find themselves in serious financial difficulties. There is also a law that gives to so-called wage earners a chance to make a special arrangement with their creditors whereby they can pay their obligations over an extended period of time.⁴⁸

Procedure

Other forms of relief

⁴⁶ *Ibid.*, title 11, secs. 22, 95.

⁴⁷ *Ibid.*, secs. 32, 35, 104, 107.

⁴⁸ *Ibid.*, secs. 1200-1229, 701-799, 401-403, 205, 526-579, 1001-1086.

CONTROL THROUGH PURE FOOD AND DRUG LAWS

Police
measures

The control which the federal government exercises through the pure food and drug laws is what might be called minor regulation, by way of contrast to its control over railroads, motor buses and trucks, banking, or electric and gas utilities. In the case of these latter businesses, the federal government exercises extensive controls over most of their operations, but in the case of foods and drugs it goes no farther than to seek to prohibit certain fraudulent and dangerous practices that might be injurious to the public.

Food,
drugs,
cosmetics

Because of the dangerous and widespread adulteration and misbranding which existed in the food and drug business during the latter part of the nineteenth century and the beginning of this century, Congress in 1906 passed several laws designed to protect the public against some of the worst dangers. The best known of these was the Pure Food and Drug Act of 1906, which forbade the shipment in interstate commerce of misbranded foods and drugs. At about the same time Congress enacted the so-called meat inspection acts. These laws, which are still on the statute books, provide for the inspection by federal authorities of cattle, meat products, and packing establishments.⁴⁹

1938 act

Under the laws the food and drug situation in the United States improved materially. Even so there were many weaknesses. Finally in 1938 Congress passed the Food, Drug, and Cosmetic Act, which amended many of the provisions of the Pure Food and Drug Act. It prohibits the introduction into or receipt in interstate commerce of any food, drug, device, or cosmetic which is adulterated or misbranded. It contains definitions of the terms "adulterated" and "misbranded." In general "adulterated" refers to products that are poisonous or injurious to health, and the term "misbranded" refers to products that are not adequately or properly labeled or the label of which contains false information concerning the content.⁵⁰ The Food, Drug, and Cosmetic

⁴⁹ *Ibid.*, title 21, secs. 71-89.

⁵⁰ *Ibid.*, secs. 321, 331, 342, 343, 351, 352, 361, 362.

Act allows the federal government to establish standards for any food product when such action will promote honesty and fair dealing in the interest of consumers. The act also prohibits the introduction or delivery for introduction into interstate commerce of any new drug without an application filed for approval with the Food and Drug Administration. Approval is automatically given unless tests show that the drug is unsafe, or that the method of manufacture is inadequate to preserve its strength, quality, or purity.⁵¹

For violation of the Food, Drug, and Cosmetic Act the law provides fines, imprisonment, or seizure of offending products. The detailed administration of the law rests with the Food and Drug Administration, which is located in the Federal Security Agency. If it is necessary to bring suit in court for violation of the act, this task has been entrusted to the various United States district attorneys.⁵²

Enforcement

CRIMINAL LAW

As has been previously pointed out, the federal government does not have any general police power. Such criminal legislation as Congress enacts must be based upon one or more of its delegated powers.

Source of power

Much of the criminal law passed by Congress has been designed merely as an adjunct to a general policy laid down by Congress. For example, in order to carry out its prohibitions against monopoly and restraint of trade, Congress has provided for fines and imprisonment of persons found guilty of violating the Sherman Act. The bankruptcy laws have criminal provisions, as do the pure food and drug acts, the copyright laws, the Interstate Commerce Act, and numerous others. Criminal penalties are provided for persons who violate the many internal revenue laws and other tax statutes of the United States.

Incidental penalties

Some of the criminal statutes of the federal government, however, have not been enacted merely as adjuncts to ulterior policies. Rather, they contain their own objectives, in that they are

Police laws

⁵¹ *Ibid.*, sec. 355.

⁵² *Ibid.*, sec. 335.

enacted because the conduct prohibited is considered by Congress to be detrimental to the health, morals, or safety of the public. The anti-kidnapping law enacted under the commerce clause is of this latter type. The law which forbids the transportation of stolen automobiles in interstate commerce is of the same kind. The laws against sending indecent or profane literature or lottery tickets through the mails are criminal laws whose primary purpose is to protect the morals of the people of the United States.

Scope

Some idea of the extent of the criminal jurisdiction of federal courts can be gained by looking at Title 18 of the United States Code, which has been designated Criminal Code and Criminal Procedure. This title contains more than 800 sections. But even it does not by any means contain all the criminal laws of the federal government. Many are attached to the various laws which they are intended to help enforce. This is true of the criminal provisions of the Sherman Act, the Interstate Commerce Act, the bankruptcy law, and many others.

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CHAPTER 22

NATIONAL ASSISTANCE

The Constitutional Policy on Aids—Early Legislative Policies on Aids—More Recent Aids to Business—Aids to Agriculture—Aids to Labor—Aids to Other Groups

THE CONSTITUTIONAL POLICY ON AIDS

Group
interests

Charles A. Beard¹ has pointed out that several economic groups expected concrete advantages from the adoption of the constitution. Manufacturing interests, and likewise merchants and shippers, desired free trade between states and access to foreign markets; and Congressional control of foreign and interstate commerce supplied that. Moneylenders, vexed by the paper currencies of the states and the indulgence shown to debtors by the state legislatures, desired, first, a national currency with a single national standard of legal tender, and, second, the prohibition of state legislation impairing contractual obligations which was included in Article I, Section 10. The holders of the public debt desired the redemption of the debt. Certainly these groups desired and received these types of assistance; but the analysis is misleading in that it suggests that the economic policy of the framers of the constitution was piecemeal, and was confined to such an itemization. In the list of delegated powers of Congress the framers supplied something like a blueprint for the future economic life of the nation. National power over the currency was imperative; an orderly economy could hardly have existed if the states had retained the right to coin money and to define legal tender. National control over foreign and interstate commerce was neces-

National
plan

¹ *An Economic Interpretation of the Constitution* (The Macmillan Company, New York, 1913).

sary in order to achieve a nation-wide economy. Congress was authorized to fix standards of weights and measures; uniformity in this field was at least highly desirable. Congress might fix a uniform bankruptcy law. "To promote the progress of science and useful arts," Congress was authorized to grant "for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

All of these powers have been exercised, and the blueprint of the framers still supplies the skeletal structure of our economy. But in addition, Congress has exercised its delegated powers in a myriad of other ways. Under its powers to tax, to spend, and to control foreign and interstate commerce it has embarked upon a program of active assistance to various occupational groups. Under these and other powers it has also taken over responsibilities originally shouldered by the states, when they were discharged at all; so that today there is a vast program of federal assistance, so extensive that its items cannot well be enumerated and so various that they cannot be classified.

Aid to groups

EARLY LEGISLATIVE POLICIES ON AIDS

Alexander Hamilton, Secretary of the Treasury under President Washington, introduced what is possibly the greatest measure of assistance our government has ever rendered to private interests. In his famous *Report on Manufactures* he pointed out the advantages of levying duties on imports for the purpose of raising revenue as well as for protecting manufactures in this country. A tariff law was enacted in Washington's administration, and during most of the time since then more or less use has been made of the tariff for the purpose of protecting industry, mining, and agriculture. At times the tariff has been the principal source of revenue as well. A study of any major tariff law of modern times will indicate the protective features of it. Studies of the Smoot-Hawley Tariff Act of 1930, for example, have shown that numerous "taxed" imports were not shipped into the country at all because the levy was more than the domestic price. To conceal the tendency of that particular tariff bill, some

The tariff

rates in previous laws were lowered, but not to a point where foreign goods could compete. It was found, for example, that if a specific rate had been two dollars and the domestic selling price of the article had fallen to one and one-half dollars, the tariff rate could well be lowered at least 25 percent without hurting any of our "infant" industries.

The protective tariff is designed to bring immediate benefit to manufacturers and other sellers in this country. Of course the extra cost is against the ultimate consumer. In the long run, however, all are likely to suffer, because as a nation we cannot hope to continue to sell goods abroad unless we are willing to import goods. After both world wars we have found that our foreign debtors could not pay us because we were not willing to accept the kind of payment they could make. We keep up trade by lending or giving money to other nations so that they can buy our goods for cash. The loans we never expect to collect, so that in the final analysis the trade is at the expense of the American taxpayer. The pattern after World War I is clear now and we will probably follow it again. Government and private loans made possible a revival of trade and industry in Europe. With the debts owed to us and with us in possession of most of the world's gold, we raised tariff barriers against imports, thus stifling foreign trade. The artificial trade protection envisioned by Hamilton and perpetuated through Congressional statutes is still defended by some as essential to our national welfare and is condemned by others as a precursor of certain national or even world-wide economic upheavals.

Land grants

Perhaps the greatest patronage or plunder available through the national government in its beginnings was the vast amount of public lands. Some of the worst scandals grew out of their disposition. The federal government almost from the beginning gave away large areas to the states and sold at very low prices millions of acres to private individuals or corporations. Unfortunately much of the land was bought by speculators rather than by bona-fide settlers. It was 1862 before the Homestead Act was passed under which "squatters" were allowed to secure title to

as much as 160 acres of land simply by occupying it. In general it can be said that the benefits under this policy accrued immediately to those who settled the land.

Perhaps the chief beneficiaries of the liberal land policies, taken as a group, were the railroads. Transcontinental lines were given millions of acres of valuable lands along proposed rights of way. Grants were also made to other roads. The total area of land granted to railroads is equal to the combined area of several states of the Union. In addition to the grants of land, federal troops were used to protect the workers in laying the lines of the transcontinental railroads.

A national banking system is another evidence of the interest the federal government has in aiding and promoting business and commerce. The need of a central banking system was recognized immediately after the federal government came into existence. Such an institution or system not only was an aid to people engaged in commerce but also served the federal government in many essential capacities.² The first national bank was chartered in 1791, two years after Washington took office. Its charter expired in 1811 and was not renewed until 1816. It was not until 1864 that a permanent policy relative to the banking system was established. No one doubts now that for trade and commerce a central banking system is preferable, and it is taken for granted that the general welfare will be promoted by such a system.

National
banks

MORE RECENT AIDS TO BUSINESS

In 1903 the Department of Commerce and Labor was created by an act of Congress. A decade later it was divided into the two separate departments—the Department of Commerce and the Department of Labor. This was not by any means the first recognition by Congress of a need for a program to aid business, but it was a formal implementation of the idea. It is the function of the Department of Commerce “to foster, promote, and develop the foreign and domestic commerce, the mining, manu-

Com-
merce De-
partment

² See the statements by the United States Supreme Court in *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

facturing, shipping and fishing industries and the transportation facilities of the United States." When the combined Department was created in 1903 it consisted of the following divisions: Bureau of Lighthouses, Steamboat Inspection Service, Bureau of Navigation, Bureau of Standards, Coast and Geodetic Survey, Bureau of Statistics, Bureau of the Census, Bureau of Fisheries, Bureau of Manufactures, and Bureau of Corporations, in addition to the Bureau of Immigration and the Bureau of Labor, which were transferred to the new Department of Labor in 1913. The relation of these to the aid and promotion of business is obvious. Many other agencies have been created in or transferred to the Department of Commerce. The Patent Office, the Civil Aeronautics Administration, and the Weather Bureau are examples. Transfers and consolidations have been made, but the primary function of the Department remains the same—to aid and promote commerce.

R.F.C. One of the outstanding and most direct programs of aid to business was that envisaged in the creation of the Reconstruction Finance Corporation in 1932. The purpose of this corporation is "to provide emergency financing facilities for financial institutions; to aid in financing agriculture, commerce and industry, to purchase preferred stock, capital notes, or debentures of banks, trust companies, and insurance companies, to purchase non-assessable stock, capital notes, or debentures of national mortgage associations, mortgage loan companies, savings and loan associations and other similar financial institutions; and to make loans as prescribed by law." The Reconstruction Finance Corporation was originally capitalized at \$500,000,000, all subscribed by the federal government. It was later given authority to create special war agencies, and did create such agencies as the Defense Plant Corporation, the Rubber Reserve Company, the Metals Reserve Company, the Defense Supplies Corporation, the Defense Homes Corporation, the Disaster Loan Corporation, and the RFC Mortgage Company. Its authority has been generously expanded. The war activities were, of course, to promote the war effort, but on the whole they were directed to-

ward the assistance of private industry in securing materials, supplies, etc., in order to fulfill war contracts.

The over-all significance and magnitude of the operations of the Reconstruction Finance Corporation may be indicated by some comments of well-known persons. A former head of the Corporation has said that it can make loans in any amount, for any length of time, at any rate of interest to anybody. The Corporation has been called by Senator Byrd of Virginia "the most colossal banking institution the world has ever known." It was originally set up to furnish short-run aid to distressed businesses, but it appears to have become a permanent prop of the economy.

Many so-called regulatory measures applying to business were in fact adopted at the instance of business organizations and are for the good of established businesses. Fair trade practice laws, for example, help those businesses with well-known products to market. The Federal Trade Commission is thought of as regulatory, but when a tobacco company in its advertising suggested that one inclined to be overweight should "reach for a Lucky instead of a sweet," the candy manufacturers complained and the "unfair trade practice" was ordered stopped. Much regulatory legislation is enacted as a result of pressure from business groups and not consumers or government bureaucrats. Business, in other words, invites the government to step in and act as umpire to see that the game is played according to the rules which the business organizations generally foster. A reputable business has nothing to fear from standards fixed by government if it already meets such standards; on the other hand, it may be protected by such standards against fly-by-night concerns using unscrupulous business methods.

Aid
through
policing

AIDS TO AGRICULTURE

The federal government did not formally recognize the agricultural interests as early in our history as it did those of business, but since the middle of the last century no group has secured more sustained aid from Washington than have the

Agricul-
ture De-
partment

Home-
stead Act

farmers. A Department of Agriculture was established in 1862, although not until 1889 was it raised to the rank of the major executive departments and its Secretary made a member of the President's cabinet. Mention has been made of the Homestead Law, also enacted in 1862. This law was aimed at taking public land out of the hands of speculators and giving it directly to bona-fide settlers or farmers.

Morrill
Act

We have mentioned the Morrill Land Grant College Act.^a This act also dates from 1862. It did not provide for direct aid to the farmer or to agriculture but rather made provision for grants-in-aid to states if colleges were established in which "agriculture and the mechanic arts" were included in the curriculum. This act, with the Hatch Act of 1887, providing grants for agricultural experiment stations, and the Smith-Lewis Act of 1914, providing aid for the agricultural extension services, has certainly given us one of our most nearly typical "courthouse" officials—the county agricultural agent. Briefly, the program makes available to the individual farmer, through the medium of a college-trained county agent stationed no farther away than the county courthouse, the results of the extensive federal-state program in research and experimentation. In addition, the county agent represents the national government in the administration of the soil conservation and marketing restriction programs.

Tariff

In the Convention of 1787 the agricultural interests insisted on tax-free exports. They probably did not realize at the time that taxes on imports would ever be of much interest to farmers. The farmer, however, has not overlooked the advantages, in terms of immediate self-interest, which tariff protection affords. When new tariff laws are written, the farm lobby is always on hand to see that competitive imports are included in the list.

Experi-
ment

Two invaluable services rendered to farmers by the federal government, usually in coöperation with states, are the work in connection with the improvement in types and breeds of plants and animals and the protection of farm crops and animals from diseases, insects, and parasites. It has been discovered through

^a See p. 290.

government experimentation that crosses between Brahman cattle and well-known American breeds result in an animal type very desirable for certain purposes. Rust-resistant strains of wheat have been developed which yield as much as 50 percent more per acre. The citrus fruit industry of Florida, Texas, Arizona, and California has, no doubt, been saved through the work of government entomologists in keeping back destructive fruit flies. The number of examples of such services to agriculture could be multiplied almost indefinitely.

Another important agricultural aid is that of providing farm credit facilities. Before the First World War Congress enacted the Federal Farm Loan Act creating federal land banks and providing credit to farmers at a low rate of interest on terms of from five to forty years. The act has been amended at various times; at present it provides for loans at 3.5 percent interest to help farmers purchase, refinance, or improve and equip farms. Land banks were established in twelve districts into which the country was divided. Millions of farmers have secured loans through these facilities.

In 1933 a Farm Credit Act established a production credit corporation in each of the land bank districts. This act provides for short-term loans at a low rate of interest for the year-to-year operation of farms and ranches. Special provisions of the act provide for emergency crop and feed loans of from \$10 to \$400 to small farmers and for loans to farmers' cooperatives for construction of facilities for storing and marketing produce.

The federal government also has a program under which farm tenants are assisted in purchasing farms. The Farm Security Administration was set up to administer these loans. The program includes instruction in farm and home management, conservation, and crop rotation, and other services for the farm families involved. Thus the small family with no real commercial borrowing power is provided credit and other facilities by a benevolent or paternalistic federal government.

Another recent federal credit activity has been that carried on by the Commodity Credit Corporation. Loans on commodities

Farm credit:

1. Long term

2. Short term

3. Farm improvement

4. Price support

or purchases of surplus commodities on the open market are made by the Corporation in an attempt to promote orderly marketing and sustain prices at or above fixed levels. A farmer may be able to borrow more money on a commodity than he could get at the time by selling it. Newspapers in 1947 carried stories of our making loans and gifts to European countries to buy food for their starving citizens and in the same issues told of the Commodity Credit Corporation's purchasing millions of bushels of potatoes to be destroyed.

A.A.A.

To many people the Agricultural Adjustment Act of 1933 meant "killing little pigs" and "plowing under field crops." Actually the original act and its successors instituted, among other things, a most successful program of conservation or rebuilding of farm lands. Instead of destroying crops for which payments are made, farmers are simply paid for allowing certain land to be utilized for soil-building crops. The federal government under this program has also purchased for farmers lime and other soil-building chemicals or compounds. This legislation provided for control of production and marketing through agreements with producers and processors. So-called "parity" prices for principal farm crops were guaranteed. Parity was defined as a price level at which farm products would have the same relative value or purchasing power as in the period 1909-1914, which was a period favorable to agriculture.

**Wartime
aids**

During World War II the farmer received special attention from the various agricultural agencies. Some normal services were expanded to make it easier for farmers to meet the wartime demand for food and other commodities. Draft deferments for farm workers and priorities in the manufacture of new equipment were allowed too sparingly to satisfy the farmers, yet studies indicate that farmers bought more new farm machinery and equipment during the war than during any like period before that time. The special war legislation guaranteed "parity" farm prices until January 1, 1949, extended by later legislation to 1950.

AIDS TO LABOR

Labor is another group which has gained recognition from the federal government in the form of many laws passed to promote the welfare of the group. Just what people are included in this group is difficult to say. For the most part workers who are organized into unions are the ones who exercise the most direct influence with the agencies of government. Labor organizations or unions existed on a local scale at the time of the beginning of our national government. They had some influence on local and state politics, but it was the second half of the nineteenth century before organized labor began to make its influence felt nationally.

One of the first subjects in which labor became interested was immigration, especially the bringing in of contract laborers. American labor saw that it would be difficult to raise the standard of living of its members and secure higher wages if employers were permitted to bring in contract laborers who would work for wages far below the American standard. Ironically enough, in 1864, when the country was fighting a bloody war over slavery, Congress enacted a law authorizing the immigration of laborers bound by contract to work for the employers who imported them. The importers operated somewhat on the same basis as the early slave traders. The law did not remain long on the statute books, but the practice of bringing in contract laborers was continued for some time.

Immigration control

An evidence of the increased activity of organized labor was the formation of the American Federation of Labor (A.F. of L.) in 1886. This was a national federation of craft unions. Industry-wide labor organizations were not organized on a national basis until 1935 with the formation of the Congress of Industrial Organizations (C.I.O.). It was shortly before the formation of the A.F. of L. that labor succeeded in getting legislation through Congress placing restrictions on immigration. The early laws were directed particularly at contract laborers and so-called

Union action

cheap-labor peoples or nationalities. Eventually some restrictions were placed on all immigration. Perhaps an indication of the recognized interest of labor in the subject of immigration is the fact that the Bureau of Immigration and Naturalization was one of the original units in the Department of Labor. It was not until 1939 that the Bureau was shifted to the Department of Justice.

Labor Department In 1884 a Bureau of Labor was established by Congress in the Department of Interior. Sometime later it was made independent as a Department, but without executive rank—that is, its head was not a cabinet member. It reverted to a bureau in the Department of Commerce and Labor in 1903 when that Department was created. Labor now complained that it was merely a stepchild to commerce and industry. A separate Department of Labor was created by an act of Congress approved March 4, 1913.

Labor laws Since laborers became strongly organized and politically important, many laws have been enacted by Congress for their benefit. Most fields of employment were not formerly considered subject to federal jurisdiction. More recent decisions of the Supreme Court have greatly increased the scope of federal powers, particularly in commerce. Organized labor secured passage of state laws to protect labor before much progress was made at the federal level. Here, of course, we do not concern ourselves with state legislation. Federal legislation in labor's behalf has been anchored primarily on four expressed or implied powers of the federal government, namely, the power to regulate foreign commerce, the power to make regulations affecting federal employees, the power to make regulations applying to persons holding contracts with the federal government, and the power to regulate interstate commerce, including activities affecting interstate commerce.

Basis

Types For purposes of discussion some of the principal statutes enacted by Congress for the special benefit of labor may be classified into six categories, as follows: (1) laws regulating hours and conditions of employment; (2) laws seeking to decrease or mini-

mize the effect of hazards of employment; (3) laws seeking to provide for settlement of industrial disputes involving labor; (4) laws fixing or requiring certain minimum wage scales; (5) laws enacting programs to promote employment security; and (6) laws providing general or special benefits or recognition to labor.

One of the early labor battles in Congress was waged by American seamen. The treatment of seamen in our early and middle history was not a matter of which we can be proud. The Seamen's Union succeeded in 1915, with the assistance of the A.F. of L., in getting the LaFollette Seamen's Act through Congress. This act not only regulated hours and conditions of work but also regulated diet and the nature and time of wage payments—no scrip payments were allowed—and contained many other significant provisions.

1. Hours,
etc.

a. Sea-
men

Employees of railways have succeeded in securing favorable legislation. As far back as 1907 an act was passed fixing the maximum hours of sustained work for trainmen in interstate commerce at sixteen. In 1916 the Adamson Act prescribed an eight-hour day for railroad employees. Laws requiring safety devices and others relating to working conditions have been enacted.

b. Rail-
road men

Federal employees and employees of those holding contracts with the federal government have for some time received special attention from lawmakers. The federal government has for its own employees an eight-hour day and a forty-hour week. The rule also applies to contractors and subcontractors engaged in public work for the federal government. By the Government Contract or Walsh-Healey Act of 1936 employers who hold contracts with the federal government for supplies, equipment, or materials are required to maintain an eight-hour day and a forty-hour work week in addition to meeting other prescribed conditions. This act has influence beyond its immediate application, for it sets standards which are likely to be followed by the employer when not working on federal contracts.

c. U.S.
employees

In the Bituminous Coal Act of 1937 provision was made for collective bargaining, and it was also stipulated that the federal

d. Coal
miners

government would buy no coal produced under conditions not approved by the government.

2. **Workers' compensation** The federal government was somewhat tardy in making it possible for laborers in industries under its jurisdiction to recover damages for injuries incurred in the course of their employment. An act of 1908 provided for employer liability for injuries to employees engaged in interstate commerce and made recovery of damages easier. This principle has been extended to seamen and longshoremen, and the government has also set up a plan of compensation insurance for its own employees.

3. **Settlement of disputes** The federal government has a responsibility for the settlement of labor disputes. At times federal troops have been used for this purpose, as in the railway strike in Chicago in 1894. The national government has also attempted to create better conditions in the labor-management bargaining process. In 1913 a Conciliation Service was set up in the Department of Labor to assist the parties in arriving at an agreement. By the Labor-Management Relations Act of 1947, the so-called Taft-Hartley Act, the name of this agency was changed to the Federal Mediation and Conciliation Service, and it was given an independent status outside any department. The National Labor Relations Act of 1935 made collective bargaining a legally accepted principle in industry and set up a government agency to enforce the obligations imposed upon the employer by the act. This act was superseded by the Taft-Hartley Act, which continued most of the definitions of unfair labor practices on the part of the employer but also stipulated that certain demands and strikes on the part of unions should constitute unfair labor practices, and limited in various ways the rights which unions had enjoyed under earlier legislation.

4. **Wages** The first minimum wage law enacted for industry by the national government applied to women and children in the District of Columbia. It was declared unconstitutional by the Supreme Court in 1923. Of course the government continued its national policies relative to pay for employees in the federal service, but no further effort was made to fix minimum wages in industry

until the advent of the New Deal. The act providing for the National Recovery Administration envisaged the fixing of minimum wages. Under the industrial codes formulated, minimum wages were fixed, but the whole program was upset by an adverse Supreme Court decision.

What appeared before the inflation to be one of the most significant labor laws yet enacted was the Wage and Hour or Fair Labor Standards Act of 1938. This law was made to apply to employments in interstate commerce or in industries or occupations affecting interstate commerce, with exceptions mentioned in the act. The act fixed maximum hours and minimum wages in employments coming under the law. A forty-four-hour week and twenty-five-cent hourly wage were prescribed at the beginning with provision for the former to be gradually reduced to forty hours and the latter increased to forty cents. These two standards have long since been accomplished. The Wage and Hour Division of the Department of Labor is charged with the administration of the law. Bills have been before Congress for some time which propose to raise the minimum wage to sixty-five or seventy-five cents an hour.

Many of the laws mentioned up to this point have had as their purpose the attainment of a greater degree of employment security for workers. The most effective activities in this field, however, have been under legislation providing for federal-state co-operation. An example is the United States Employment Service, which works in close coöperation with state employment services to bring employee and employer together when there is a demand for workers and workers are out of jobs. Grants-in-aid for administrative costs are made to the states. Also there are the unemployment compensation and social security programs which were provided for in 1935, both of which are federal-state coöperative endeavors. A recognized "security hazard" is unemployment by reason of advanced years or temporary lay-offs. Hence these programs are designed to give more security to employees. Part of the program under the Social Security Act is not directly intended to benefit labor, inasmuch as some who

5. Em-
ployment
security
a. Em-
ployment
Service

b. Social
Security

benefit are not workers. But the major part of the program is specifically for labor, and practically all persons who participate in it are members of the working class, though they may not receive the aid in that capacity. The entire program falls under four heads. First there is aid to the aged. It is of two kinds: (a) The old-age and survivors' insurance is to provide for salaried employees and wage earners covered by the system when they retire at the age of sixty-five. They contribute to a fund and payments to them are insurance payments rather than aid to the needy. (b) The old-age assistance program is operated by the states under grants-in-aid from the national government. It is for any persons in need beyond the age of sixty-five years. The second kind of security is unemployment compensation. The general compensation for the unemployed is operated by the states under grants-in-aid from the national government; in addition, the national government directly administers a system of unemployment compensation for unemployed railroad workmen. The third kind of assistance is aid to dependent children. This is a state-operated national grant-in-aid program. The fourth kind of assistance is aid to the needy blind. This also is a state-operated system with grants-in-aid from the national government.

6. Special
legislation
a. Clayton
Act

Labor has secured changes in regulatory laws to prevent prosecutions in and to impose restrictions on the federal courts in cases affecting workers. The Sherman Anti-Trust Act of 1890 was an attempt to prevent trusts or combinations in restraint of trade. A labor union boycott against an employer was adjudged to be in violation of this law.⁴ In 1914 in the Clayton Anti-Trust Act labor unions were specifically exempted from the provisions regulating combinations in restraint of trade. One of the weapons used by employers to break strikes has been resort to injunctions against allegedly illegal activities of the unions. Sometimes temporary injunctions were issued without any inquiry into the merits of the case. Even though the injunction did not in terms forbid the strike, its enforcement might well break the strike. The use of the injunction was deeply resented by labor, and in

⁴ *Loewe v. Lawlor*, 208 U.S. 274 (1908).

1932 the Norris-LaGuardia Act limited drastically the power of the national courts to issue injunctions in labor disputes. However, the scope of the Norris-LaGuardia Act was curtailed by the decision of the Supreme Court in *United States v. United Mine Workers*⁵ in 1947 and by the Taft-Hartley Act. In the *United Mine Workers* case the Court held that the Norris-LaGuardia Act forbade injunctions against unions to be issued at the suit of private persons, but not at the suit of the government, and therefore the President, whenever he had statutory authority to take over and operate an industry, could break a strike by instituting government operation and then securing an injunction against the continuance of the strike. The Taft-Hartley Act authorizes the National Labor Relations Board to seek an injunction against the making of certain demands by unions, and against certain strikes which are defined as unfair labor practices.

b. Norris-LaGuardia

c. Taft-Hartley

Labor as a political group belatedly received recognition by Congress in the form of legislation specifically designed for the benefit of the group. This tardiness is not surprising in view of the fact that in the Constitutional Convention of 1787 only two delegates were not employers of labor, and it is only slowly that labor has achieved political expression.

AIDS TO OTHER GROUPS

It is sometimes difficult to classify on any economic or social basis large numbers who receive direct aid from the federal government. Home ownership, for example, cuts across all economic and social lines. Wealthy people own homes, and very poor people also own homes. Apparently there has never been any organization or pressure group with home ownership as a basis, although real-estate interests which sell property have sometimes attempted to disguise their lobby as one of the consumers who buy it. The Home Owners' Loan Corporation (HOLC) created in 1933 had as its general purpose granting

H.O.L.C.

⁵ 330 U.S. 258 (1947).

long-term mortgage loans, at low interest rates, to persons who were in urgent need of funds for the protection, preservation, or recovery of their homes. Mostly this involved refinancing mortgaged homes. During the three-year lending period of the agency, 1,017,824 borrowers were granted loans in a total amount of \$3,093,451,321. These borrowers had perhaps only one thing in common—they were distressed homeowners.

F.H.A. The Federal Housing Administration (FHA) is another agency created to help homeowners or would-be homeowners finance the repair or construction of residential buildings. This agency does not make direct loans but simply guarantees approved loans made by banks or other lending agencies up to 80 or 90 percent of the appraised value of property. The FHA has not been entirely for the purpose of direct assistance to homeowners. Non-occupiers of buildings are eligible under the program, if the purpose of loans is to provide family living accommodations. Also, since banks and other lending agencies made loans substantially guaranteed by the federal government, the lending agencies were beneficiaries of the program.

Publishers Newspapers and publishers have been the recipients of government aid. State and local governments through legal advertising subsidize the small-town weekly papers and no doubt in many cases make possible their continued existence. The federal government contributes mainly through reduced postage rates generally and postage-free mailing to box holders within the county of publication. The aids may actually not be of much significance to relatively large newspapers, but to the small-town weekly, especially, they are of great importance. Publishers of magazines and periodicals are usually given second-class postage rates and mailing privileges, and there is also a low postage rate on books. The theory is that it will be for the general welfare to lessen the cost of reading materials to the public, although the immediate beneficiaries are the publishers themselves; and to judge by the source of pressure for passage of such laws, one would conclude that the publishers are not unmindful of the benefits to themselves.

Billions of dollars have been granted in subsidies to ship builders and operators in an attempt to build up our merchant marine, especially in wartime. Likewise huge amounts in contracts have been paid out to air and water carriers of mail for the federal government. For practical purposes these contracts, since they result in almost total money losses, are little more than money grants or subsidies to the industries involved. **Shipping**

Another group of private individuals receiving federal aid, and one which cuts across all social lines, is the veteran group. Ever since the Revolutionary War it has been the policy of the United States to reward those who have offered their lives in defense of the nation in time of war. These benefits are sometimes available to widows of veterans or to other survivors. **Veterans**

Grants and aids to veterans take various forms. In the early days it was common to grant lands, and later to give veterans priority in the homesteading of public lands. Priorities in the purchase of surplus goods and preferences in federal civil service jobs are common privileges extended to veterans. By far the most important general aid is in the form of pensions, bonuses, or other cash payments. It has been only a matter of a few years since the last pension payment for the War of 1812 was made. Wars have occurred frequently enough to keep a comparatively large number of veteran pensioners on the rolls. **1. Preferences and payments**

After World War I a rehabilitation program was established for veterans with service-connected disabilities. They were allowed to attend college, to learn a trade, or to establish themselves in a business or other occupation under the auspices of the Veterans Administration. The federal government financed such rehabilitation activities. Rehabilitated or other veterans with service-connected disabilities were paid compensation each month, the amount ranging to \$100 a month or more depending on the percentage of disability. This program has been extended to veterans of World War II. Veterans were also given hospitalization for service-connected injuries or disabilities. This has also been extended so that it now covers non-service injuries or disabilities. It is estimated by the Veterans Administration that **2. Rehabilitation**

by 1951 hospital facilities will be sufficient to take care of all veterans demanding hospital care.

3. Education

Veteran aids or benefits specifically for veterans of World War II have been more liberal than at any other period in history. The most comprehensive statute was the so-called GI Bill of Rights. It provides educational training for veterans in the school or college of their choice. Tuition, fees, books, and supplies are paid for for the veteran, and in addition he is paid \$75 a month if single and \$105 if married, and an additional \$15 a month if there is a child dependent. A veteran may also secure on-the-job or on-the-farm training and receive the same monthly payments, provided his total monthly earnings do not exceed certain maximum amounts. Unemployment pay of \$20 a week for fifty-two weeks is also available for veterans under this statute.

4. Loans

The GI bill guarantees loans to veterans for new houses, farms, or businesses up to \$4000 on real estate and \$2000 on other transactions. Under a separate statute terminal-leave pay was granted enlisted men in World War II. The total of this payment is about \$2,000,000,000. The pay of disabled veterans taking training under Public Law 16, the original bill setting up the rehabilitation program, has been increased over the amount paid after World War I.

5. Cost of veteran aid

At the present time the cost of administering and paying for direct veteran benefits is about \$7,000,000,000 annually. This sum is about double the total annual expenditures of the federal government for all purposes during the boom years of the 1920's and almost equal in amount to the annual cost of the federal government during the pump-priming years of the 1930's. If no additional benefits are enacted, the total annual outlay will decrease slowly until 1957, when the GI bill will have expired. The major portion of the expenditures of the federal government is for past and future wars. Debt service, defense expenditures, and veteran benefits comprise these expenditures.

In general one would not think of aid to foreign countries or foreign peoples as falling into the category of "aid to private

groups." The situation following World War I and especially that existing after World War II might justify the inclusion of such aid in this discussion. The bulk of the aid has been through grants to nations or international organizations rather than to the people directly. Nevertheless, if we treat foreign peoples as a group we can certainly say that the group has been able to get much aid from the United States government. No one can foresee now what the total of our aid to foreign countries will be, but if we take the aid rendered during the war through the lend-lease program and that rendered and to be rendered after the war, it is easy to see that it will amount to many billions of dollars. In this connection we must note that, as with other programs of assistance, there are indirect benefits as well as benefits to the direct recipients of aid. American producers of steel and tobacco, for example, are delighted with a government purchasing program which takes their surpluses at a profit, and at the same time, by keeping them off the domestic market, holds up prices and profits at home.

Aid to
foreign
groups

The government of the United States, if performing only the services it performed in the early years of the Republic, could be financed at a small fraction of its present cost. Conversely, if increasing amounts of money are to be paid to many groups and expanding services are to be performed, we need not expect a downturn in the general trend of governmental costs and activities. Groups will have to demand less if they want expenditures to be smaller.

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CHAPTER 23

NATIONAL OPERATION

**The Scope of Operation—The Post Office Department
—The Tennessee Valley Authority—The Atomic
Energy Commission—Natural Resources**

THE SCOPE OF OPERATION

Ordinarily we think of government as operating by and upon people. But no government can function without possessing property as well; and sometimes considerations of public policy lead to the maintenance of large enterprises, even enterprises of an economic character. The framers of the constitution prepared for such a development when they wrote: "Congress shall have power to dispose of and make all needful rules and regulations respecting . . . property belonging to the United States. . . ."¹

Government as proprietor

The management of property by the national government in its capacity of proprietor was of considerable magnitude when it began to function under the constitution, and there have been gigantic extensions of this activity as the country has been industrialized. The postal service, marine hospitals, arsenals, ordnance depots, and other military installations, and the United States mint are examples of operations which have been carried on almost from the beginning. The list has grown until at present the national government is engaged as a proprietor in dozens of operations of one kind or another.

The governmental machinery for the operation of these undertakings falls into three general categories: the regular administrative machinery, usually located in a department headed by a

Machinery for operation

¹ Art. IV, sec. 3. This little-used clause was made the basis for the constitutional power of the Tennessee Valley Authority to sell surplus electricity, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

1. Departmental

secretary who is in the President's cabinet; the government-owned corporation; and the independent establishment. The undertakings listed in the previous paragraph are examples of property administered by the regular administrative machinery. In most of these cases the management of property is incidental to other functions of the department in which the operation is placed; but the chief business of the Post Office is the conduct of the enterprise entrusted to it. The work of the Post Office will be described to illustrate departmental operation of property.

2. Government corporation

The government-owned corporation is a relatively recent development. But its novelty is no measure of its extent. The Government Corporation Control Act of 1945 listed forty-one corporations which were wholly owned by the government. A great variety of activities is carried on by these agencies. Among these are transportation, by the Inland Waterways Corporation and the Panama Railroad Company; credit operations, by a large number of agencies, such as the Reconstruction Finance Corporation, the Commodity Credit Corporation, and the Federal Intermediate Credit Banks; research in the development of rubber, by the Rubber Development Corporation; construction and financing of housing, by such agencies as the United States Housing Authority and the Home Owners' Loan Corporation; and manufacturing, by Federal Prison Industries, Inc., and the Defense Plant Corporation. The Tennessee Valley Authority is a government corporation, and will be described as representative of the type.

3. Independent establishment

The independent establishment as a device to carry on the administrative functions of government has long been familiar to students of political science; but for it to act in the capacity of proprietor for the government, as in the case of the Atomic Energy Commission, is a new development. The work of the Commission will be described at some length.

Natural resources

One large area of government administration of property cannot be brought under any simple administrative category. The management of natural resources is the responsibility of literally scores of agencies. Most of these are departmentalized in In-

terior, Agriculture, and the Army, but there is no over-all plan and too little coördination among these agencies. They are concerned chiefly with the public domain and its physical resources in grazing lands, forests, water, and minerals, with the conservation of soil resources privately owned, with the water resources which come under national jurisdiction because they are related to inland navigation or because they lie within the three-mile off-shore oceanic boundary of the United States, and with wildlife, including the oceanic fisheries. The President's Committee on Administrative Management in its Report in 1937 recommended the concentration of most of these subjects in a single department, to be known as the Department of Conservation, but this part of the Report was not acted upon. The so-called Hoover Commission, the Commission on the Reorganization of the Executive Branch which is to report in 1949, is expected to make a recommendation for the systematic integration of these management functions.

THE POST OFFICE DEPARTMENT

The "biggest single business in the world" was the Post Office Department's own description of the postal system in 1924. It is indeed big business: during the year 1946, more than 36,000,000,000 pieces of mail were handled; the total number of employees of all classes was more than 377,000; and the total audited expenditures of the Department were more than \$1,350,000,000. Mail transportation by railroad amounted to nearly 500,000,000 miles, and there were more than 25,000 regularly scheduled mail-carrying air flights per month.² The business is of such size that its statistics seem more fitted to the study of astronomy than to the description of communication.

The chief function of the postal system is the collection, transportation, and distribution of written and printed matter. There are numerous incidental activities. Some of these are: the operation of savings banks; the transportation of money and goods;

² *Annual Report of the Postmaster General, 1946* (Government Printing Office, Washington, 1946), pp. 3, 5, 11, 15, 101.

the selling of United States savings bonds and stamps; the selling of stamps through the Philatelic Agency to the million stamp collectors of the country; the handling, outside of the larger cities, of civil service affairs; the distribution and collection of livestock and crop reports. We shall take up the main function of the postal system, and some of these incidental functions, and then shall suggest some of the implications of government ownership and operation.

1. Handling mail
a. Classes

For purposes of fixing charges and for handling, mailable matter is divided into four categories: first-, second-, third-, and fourth-class mail. In general, first-class mail consists of written matter, postal cards and private mailing cards, and all other matter sealed against inspection.

The domestic rates for first-class mail are the highest of all postal rates and are the same regardless of the distance. Subject to domestic rates is mail within the United States, its possessions, Canada, and Mexico.

Second-class matter consists of periodical publications—that is, newspapers and magazines. To be accorded this class, publications must be issued at stated intervals and at least four times a year; they must be sold to subscribers at more than a nominal charge and must be devoted to literature, the arts, sciences, or some special industry or to the dissemination of information of a public character. An object of these qualifications is to prevent publications designed primarily for advertising and not actually paid for by readers from being accorded the privileges of second-class rates. The rates for this class of mail are lower than for any other class. Indeed, publications admitted to second class may be carried free within the county of issue in many instances.

The third-class category includes printed matter and small parcels not exceeding eight ounces in weight. Included also is duplicated material when twenty or more identical copies are presented to be mailed at the same time. The general rate within the domestic rate zone is one and one-half cents for each two ounces, a rate so low as to make this a very significant service.

Fourth-class mail, usually known as parcel post, includes all mailable matter not in the first, second, or third class. It must weigh more than eight ounces, or it falls in the third class. Limits of maximum size and weight of matter which will be accepted as fourth-class mail are set up by postal regulation. Parcels may not weigh more than 70 pounds nor exceed more than 100 inches in length and girth combined. Rates for fourth-class mail are determined by the weight of the parcel and the distance it is to be sent.

b. Post
offices

For the handling of the vast bulk of mail, the Post Office Department maintains two main kinds of offices, post offices and branch offices. Post offices are to be established and abandoned at the discretion of the Postmaster General, but he may not discontinue an office at a county seat. On the basis of gross postal receipts they are divided into four classes. The type of service and the salary of the postmaster vary accordingly. There were 41,751 post offices in 1946; 22,130 were Presidential, that is, of the first, second, and third class, whose postmasters are appointed by the President with the approval of the Senate; and 19,621 were fourth class, the postmasters being appointed by the Postmaster General.

Branch offices may be divided into two classes, classified and contract stations. Classified stations are operated by postal employees and are situated in quarters provided by the Post Office Department. These quarters may be in federal buildings or in privately owned buildings, with space rented to the Department. Contract stations are operated by private persons under contract to provide services and the necessary equipment, light, and heat for handling services. These stations are the ones found in drug-stores and other places of private business.

The delivery of mail is accomplished by several means. It may be done through a general delivery window in the main office or classified station. The addressee may have a post-office box in which his mail is deposited and from which he may take it. The letter carrier delivers mail in urban and some village communities, and rural free delivery covers country regions. In addi-

c. Deliv-
ery

tion, mail is taken to the addressee by special delivery carriers for a small charge in addition to the regular postage. The amount of the fee is dependent upon the class of mail. Extraordinary care in protecting first-class mail is provided by the registration system. All handlers of registered mail are held responsible for its safety. For a small fee in addition to the registration fee, a return receipt may be requested for registered mail. The addressee is required to sign a receipt card when the mail is delivered to him, and this receipt will be returned to the sender. Properly packed parcel post may be insured against loss or damage in transit, for a fee based on actual value, but the valuation may not exceed \$200.

d. Transportation

Transportation of the mail is effected by most of the conveyances known to man—by foot, rail, motor, bicycle, air, rowboat and ocean liner, horse, dog sled, and pneumatic tube. Depending upon the place and the immediate purpose, the mail is transported in vehicles owned by the government and operated by civil service employees, by vehicles owned and operated by private persons, and by combinations of private persons and government employees with privately owned and publicly owned vehicles. A fleet of 73,000 trucks is owned and operated by the Post Office Department. Several kinds of arrangements are made for railroad transportation. Among these are post-office cars and apartment-car space, in both of which civil service employees sort mail in transit. Similar to the railway post-office car is the highway post office—a motor carrier in which mail is sorted en route. The motor service is in its initial stages of development. The Department plans to put about 200 highway post-office cars in operation.³ One other type of mail transportation merits mention, the star route. A star route is ordinarily operated by a carrier which transports mail, usually by motor, under a four-year contract between points not connected by rail service. When a star route is to be established, it is advertised and sealed bids may be submitted. The law requires the contract to be let to the low-

³ *Ibid.*, pp. 17-18.

est responsible bidder. There were 11,218 of these routes as of June 30, 1946.⁴

A service not connected with the mails is the practice begun under an act passed in 1910 whereby most of the local post offices perform the functions of a savings bank. Any natural person of the age of ten years or older may open an account in his own name by the deposit of at least one dollar. No person may deposit more than \$2500, exclusive of interest, nor may he have more than one postal savings account at the same time. All deposits which have been in the account for at least three months bear interest at the rate of 2 percent. Unless the interest is withdrawn by the depositor, it is credited to his account as it accrues each quarter. Any part or all of an account may be withdrawn on demand.

2. Savings bank

The amounts on deposit in postal savings are sizable. In 1946 a total of more than \$3,000,000,000 was reached—the largest in the history of the system. This growth in popularity has been steady and without fanfare, as there is no attempt on the part of the Post Office to advertise this service. The postal savings system has especially attracted the small savings of the foreign-born. In 1916 60 percent of the total number of depositors were born outside of the United States, and these owned three-quarters of all the deposits.⁵ And it is thought that foreign-born still are the chief users of the system.

Another feature of the finance functions performed by the Post Office Department is its cooperation with the Treasury Department in the sale of savings bonds and stamps. Although a depositor may not have more than \$2500, exclusive of interest, in postal savings, he may transfer his savings into bonds at the post office. These bonds bear interest just short of 3 percent. In 1946, bonds in the value of nearly \$620,000,000 were sold by the local post offices.⁶

3. Bond sales

⁴ *Ibid.*, p. 105.

⁵ Edwin W. Kemmerer, *Postal Savings* (Princeton University Press, Princeton, 1917), pp. 57–58.

⁶ *Annual Report of the Postmaster General, 1946*, p. 24.

**4. Trans-
mitting
money**

Another service of the Post Office Department to the public is the transmission of money for private persons. This is done by two methods, money orders and postal notes. Domestic money orders may be used for the transmission of money between person and person within the United States, and international money orders may be used for the transmission of money to persons located in many foreign countries. In 1946 more than \$4,000,700,000 was transmitted in approximately 271,000,000 money orders.⁷ Money in amounts up to and including \$10 may also be transmitted by postal notes. The use of postal notes was inaugurated in February, 1945. Nearly 8,000,000 were used the first year and more than 27,000,000 the next year. This more convenient method of transmitting small sums of money will no doubt increase quite substantially as the public becomes familiar with it.

A phase of the money order system is the collect-on-delivery service. Goods may be transmitted through the mail, and the post office or postman delivering the mail acts as agent to collect the money due and transmits it by money order to the sender. Contrary to the commonly held assumption, the addressee may not open the package before paying the charge.

Policies

It is sometimes alleged that the government operation of the postal system is a demonstrated failure because through practically all of its history it has operated at a loss. This analysis seems to be based upon a misconception of the function of the postal service. Three general methods could have been used for financing it. Congress could have provided free mail service, as it did with the weather-report service; or the policy of requiring the postal service to be self-supporting could have been adopted; or Congress could have made service to the country the primary objective and revenue secondary. This last policy was the one adopted. Whenever Congress was of the opinion that the public welfare would be benefited by free service, this was given; and whenever it was thought some charge would not be detrimental to the public welfare, then a charge was imposed.

⁷ *Ibid.*, p. 26.

Illustrations of the policy of free service are the free carriage of newspapers within the county of their issue, of official documents, of reports of agricultural colleges operating in part under federal appropriations, of official correspondence of members of Congress, and of first-class mail sent by members of the armed forces during the recent war. It was estimated in 1946 that if the mail of this character had paid the regular rates the additional revenue to the Post Office Department would have been in excess of \$100,000,000, more than two-thirds of the deficit for the year. Examples of service below cost are the reduced postage charges made to the blind, to libraries, to mail-order houses for the carriage of their catalogues, and to publishers. The second-class mail privilege can be considered as a form of subsidy. Mr. Justice Douglas of the Supreme Court has quoted the estimate that the second-class privilege was worth to one periodical alone, *Esquire*, \$500,000 a year.⁸ Another below-cost service is the distribution of mail in many rural areas and out-of-the-way places where neither the value nor the volume of the mail warrants regular daily, or perhaps even weekly, collections and distributions.

1. Free services

Deficits of another kind are created for the postal service by the Congressional policy of subsidizing transportation companies. Examples of this are the large sums of money paid to the American shipping industry for handling mail and the current underwriting of aviation with payments for carrying mail which are admittedly in excess of income. Here the process is reversed. Instead of the Post Office Department's providing a service below cost, it is required to pay more for a service than it is worth.

2. Subsidies

The ownership and operation of such a vital means of communication as the mails gives the government vast powers, particularly when it has the power to exclude any competitor from engaging in transporting the mail. If the government exercised its powers arbitrarily, the damage to private citizens could be

Vast powers

⁸ *Hannegan v. Esquire*, 327 U.S. 146 (1946). It has been claimed that mail subsidies "represented the entire profits of the prosperous *Time-Life-Fortune* enterprises." Nathan Robertson, "What Do You Mean, Free Enterprise?" *Harper's*, 197, No. 1182 (1948).

well-nigh incalculable. Such damage could occur especially in the exercise of two powers granted by statute to the Post Office Department, the power to classify the mail and the power to issue fraud orders which bar individuals from receiving mail.

1. Classi-
fication

With respect to the classification of mail, the success or failure of many a periodical publishing company depends upon whether it may have its publications distributed at the second-class rate. One court observed that it was not only the higher rates of other classes but also the labor cost of preparing matter for mailing under other classes which would ruin a publisher.⁹ And it has already been noted that second-class rates were estimated to be worth \$500,000 annually to *Esquire*. The statute defining matter in the second class set forth objective requirements, such as the number of issues per year, but it also included the provision that the publication must disseminate information of a public character, or must be devoted to literature, the sciences or arts, or to some industry. Publishers had long been disturbed over the question as to who was to decide whether a given publication was devoted to literature or the sciences or arts. Court decisions had appeared to leave this to the discretion of the Postmaster General. Finally, when *Esquire* was deprived of second-class privileges, this issue came squarely before the Supreme Court. It decided that the Postmaster General was not authorized to use his own standards of morals or taste to pass on the quality of literature in a publication.¹⁰ Consequently there is today little opportunity for the Postmaster General to use postal classification as an instrument of censorship.

2. Fraud
orders

The power of the Postmaster General to issue fraud orders and thus to prevent persons from receiving mail is extensive. The statute provides that the "Postmaster General may, upon evidence satisfactory to him that any person . . . is engaged in conducting a lottery . . . or . . . any . . . scheme . . . for obtaining money . . . through the mails by means of false . . . pretenses, instruct postmasters at any post office at which . . .

⁹ *Lewis Publishing Co. v. Wyman*, 152 Fed. 787, 793 (1907).

¹⁰ *Hannegan v. Esquire*, 327 U.S. 146 (1946).

mail . . . may arrive directed to such person . . . to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word, 'Fraudulent' plainly written or stamped upon the outside. . . ."¹¹ Thereupon the mail matter is to be returned to the sender. Mail matter which is returnable includes money orders made out to the person against whom the fraud order has been issued. This is an effective method for stopping all mail-borne revenue to such a person and for informing his correspondents of the fraudulent character of his activities.

Two comments will indicate the far-reaching effect of the Postmaster General's so-called "fraud order" power. In the first place, to prevent a person from receiving mail is an effective way of destroying his business. In the second place, the statute says that the Postmaster General may issue a fraud order "upon evidence satisfactory to him." The issuance of a fraud order by the Postmaster General is subject to review by the courts only when it is shown that he acted arbitrarily and without evidence. It is no help for one against whom a fraud order has been issued to plead that a court would have reached a different decision; the only question which may be inquired into judicially is whether there was evidence upon which the Postmaster General could have arrived at such a conclusion.¹²

Ordinarily the procedure involved in the issuance of a fraud order is initiated by a person who alleges that he has been injured by a fraudulent enterprise. He makes a complaint to the Post Office Department, and an investigation is made. If the facts warrant, a citation is made in which the offending party is officially notified of the fact that he is charged with fraudulent use of the mails. This is followed by a hearing, after which the fraud order may be issued. In the majority of cases the objectionable practices are discontinued before the issuance of the order. During the fiscal year 1945-1946, 348 cases were submitted for investigation, and in 239 of them citations were issued. But only 100 fraud orders were issued, which seems to indicate that many

¹¹ U.S. Code, title 39, sec. 259.

¹² Leach v. Carlile, 258 U.S. 138 (1922).

practices of a fraudulent nature were abandoned when the investigation was begun or by the time of the citation.

The power to deprive persons of the privilege of receiving mail is a dangerous weapon, but it can be made to serve a useful purpose. It is claimed that losses of thousands of dollars to unsuspecting persons are thus averted—and there seems to be little evidence that the power is being used arbitrarily or capriciously.

THE TENNESSEE VALLEY AUTHORITY

A government corporation

The Tennessee Valley Authority is one of the forty-odd wholly owned government corporations. In some respects, however, it is strikingly different from any other agency of the national government. Its operations are limited territorially to the confines of one valley, that of the Tennessee River. Whereas other agencies of the national government are created to perform a single major function, it is charged directly and by implication with performing a whole array of functions. It has been called a "regional Department of Agriculture," and from the number of service or welfare functions it performs it could be called most fittingly a little government.

Purposes

The Tennessee Valley Authority Act of 1933 which created the Authority authorized it to improve navigation, to control floods, and to generate electric power. Subsidiary to the accomplishment of this threefold purpose, the Authority was given the right to sell power not needed by it. Preference was to be given to "States, counties, municipalities, and cooperative organizations of citizens or farmers."¹³ Other powers incidental to the main purposes of the act were the production of fertilizers and experimentation and education in their use; the fixation of atmospheric nitrogen for the production of military explosives; coöperation in the readjustment of population displaced by the construction of dams; financial assistance to states and cities to aid them to arrange for the consumption of surplus electric power; and payments to governmental units in lieu of taxes

¹³ U.S. Code, title 16, sec. 831 i.

which would have been collected had the property acquired and operated by the Authority remained in private hands.

One section of the statute is in part the indirect source of the right to operate the extensive welfare program carried on by the Authority. This section¹⁴ authorized the President to use such means for conducting surveys and making general plans for the Tennessee River basin "as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas." The President designated the Authority as his agency for making these surveys and plans. The statute also spelled out what Congress hoped to accomplish in the valley, and it suggested to the President that he recommend to Congress legislation to achieve the purposes outlined. They were: "(1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin."

So much for the program directly authorized by the law and the aspirations given official utterance in the statute. What has been accomplished? The main objectives were flood control, improved navigation, and electric power. Flood control in the Tennessee Valley has been attacked in two ways, by control of water in the river channels and by control of water on the land. Previous to the building of the dams on the Tennessee River and its tributaries, a Congressional investigating committee found that there was an annual average loss due to floods of approxi-

Achievements
1. Flood control

¹⁴ *Ibid.*, secs. 831 u, v.

mately \$1,780,000.¹⁸ Since the completion of the system of reservoirs and dams there have been no floods in the valley. "So far as can humanly be foreseen," Professor Finer observed, "the flood control programme has eliminated the risk of flood."¹⁹ And the Authority has estimated that the completed system of dams will reduce the flood waters in the lower Mississippi between Cairo and the mouth of the Arkansas by two feet.²⁰ Control of water on the land involves not only the problem of floods but that of soil conservation, which is described below as one of the secondary objectives of the Authority.

2. Navigation

The second of the primary purposes, improvement of navigation, has been brought about by the construction of nine dams on the Tennessee River, each with an accompanying lock, and a series of dams in the upper tributaries. The total number of dams constructed or acquired and managed by the Authority is twenty-four.²¹ A waterway 9 feet deep and 652 miles in length from the mouth of the river at Paducah, Kentucky, to Knoxville, Tennessee, has thus been created. By virtue of the dams in the upper tributaries, which store vast quantities of water during floodtime, a constant level of nine feet can be maintained throughout the year. Millions of tons of freight are being transported annually on the Tennessee. This traffic is expected to increase when dock installations are constructed to facilitate loading and unloading.

3. Electric power

The achievement in accomplishing the third major objective, the production of electric power, is impressive. By the end of 1941 the total generating capacity of the Authority was in excess of 1,000,000 kilowatts. Owing to the need for great amounts of electric power for war purposes, Congress authorized the construction of steam-generating plants in addition to those which were already in operation, so that in 1941 steam plants were ac-

¹⁸ House Document No. 328, 71st Congress, 2nd session, pp. 16-18.

¹⁹ Herman Finer, *The T.V.A.: Lessons for International Application* (International Labor Office, Montreal, 1944), p. 206.

²⁰ *Annual Report of the Tennessee Valley Authority, 1938* (Government Printing Office, Washington, 1938), p. 16.

²¹ M. H. Satterfield, "TVA-State-Local Relationships," *American Political Science Review*, xl, 935 (1946).

counting for more than one-fifth of the total electric current produced by the Authority. The completion of new dams, the installation of additional generators, the steam plants constructed or acquired from private power companies in the region which sold their properties to the Authority all together brought the total power generated in 1944 to 2,000,000 kilowatts. The contribution to the war effort of the vast generating system operated by the Authority becomes evident when it is recalled that one of the atomic energy plants was located at Oak Ridge, Tennessee, where vast quantities of electric power were available.

The use of Authority-generated power before the war can be seen from the figures supplied by Professor Pritchett.¹⁹ In 1941 the Authority sold power amounting in value to \$20,254,000. This was divided among the various users in these amounts: municipalities, \$8,633,000; coöperatives, \$1,300,000; electric utilities, \$2,361,000; industries, \$7,780,000; direct sales, \$180,000.

As is indicated by these statistics, the Authority sells most of its power to distributors rather than to consumers of electricity. However, it has constructed a transmission system to tie together all the generating plants as well as to supply interconnections with the major private utilities in the area. It has agreements for the sale and interchange of power with utilities as far away as Chicago.

One of the chief secondary objectives of the Authority was the production of fertilizer in order that the eroded land in the valley might be made to produce. The kind of fertilizer insistently demanded by the farmers of the region was nitrates. They had been enthusiastic when Henry Ford wished to acquire the Muscle Shoals dams in 1921 for the production of nitrates. They expected the Authority to produce nitrogenous fertilizers. But the Directors of the Authority decided differently. Nitrogen is abundant in the air. It can be manufactured as nitrates by electric power and put into the soil as fertilizers, or it can be made available for plant food by growing certain legumes, such as al-

4. Soil
conservation

a. Fertilizer

¹⁹ C. Herman Pritchett, *The Tennessee Valley Authority* (University of North Carolina Press, Chapel Hill, 1943), p. 76.

falfa or lespedeza. Another plant food is phosphorus. An abundant supply is rarely found in the soil. When it is supplied artificially, the only way in which substantial amounts can be added to the soil, it will cause legumes, the nitrogen-producing plants, to grow luxuriantly. One pound of phosphates thus used will normally result in five to six pounds of nitrogen's being pulled down out of the air. Consequently, the Authority used most of the power available for fertilizer production to manufacture phosphate fertilizer.²⁰ The fertilizer thus produced was distributed for use on demonstration farms. Some of it has been distributed free, and some has been given to farmers in lieu of Agricultural Adjustment Act payments for soil conservation. By 1943 there were more than 43,000 demonstration farms covering more than 6,000,000 acres of land.

**b. Top
soil**

The fertilizer-soil conservation program is an integral part of flood control. Dams control the water in the river channels; but to prevent the reservoirs back of the dams from filling up with topsoil in a relatively short time is vital to the continued usefulness of the dams. Hence the Authority was by necessity required to contrive some means of holding the soil on the lands draining into the reservoirs. Restoring vegetation to the land through the fertilizer program achieved this objective over large areas of the valley.

c. Forests

Fifty-four percent of the land in the valley, approximately 14,000,000 acres, is forests and woodlands. The Authority has planted more than 150,000,000 trees. Holding the topsoil and producing timber are the joint purposes served by these extensive plantings. The Authority also has taken the leadership in encouraging good forestry practices. This has to be done largely through demonstrations and other means of dispensing information so that farmers can know what trees to cut, when they are mature, and in general what good forestry practice is.²¹ Good forest management is as necessary to holding water on the land as is good farm management.

²⁰ *Annual Report of the Tennessee Valley Authority, 1937*, p. 29; see also *Annual Report, 1936*, pp. 35-48.

²¹ M. H. Satterfield, *op. cit.*

Others of the secondary purposes of the Authority are of a general welfare character. A program for the development of the mineral wealth of the region has been undertaken. This has meant the operation of laboratories; the construction of pilot plants; the carrying on of geological and field investigations; and the giving of assistance to miners, mineral producers, and industrial operators. The Authority has been active in the development of water sources for industrial and domestic uses. Experimentation with fish, with ways of producing and catching them, with the length of closed seasons—it was found that under some circumstances there need be no closed seasons—has contributed to the recreational possibilities, as has the development of park areas. Professor Finer reports that 5,000,000 pounds of fish were taken in five reservoirs in 1940.²² The Authority has stimulated and coöperated with the state and local governments in the area. Problems of health, control of malaria-bearing mosquitoes, provision for libraries—in these areas there has been intergovernmental coöperation.

5. General welfare

Property owned by the national government is not subject to state taxation. From the beginning, however, the Tennessee Valley Authority has adopted a method of supporting government in the region by making voluntary contributions, called in-lieu-of-tax payments. These voluntary contributions are roughly equivalent to the local and state taxes on comparable privately owned utilities.²³

The record of the Tennessee Valley Authority when told in terms of the improvement in the material welfare and standard of living in the area repeats the story of the preceding paragraphs in another form. The fertilizer program has contributed significantly to the welfare of the people in the valley. In the counties where the demonstrations were being run, approximately eleven times as much fertilizer was used as in comparable counties where no demonstrations were carried on. Phenomenal increases in yields of hay, small grains, corn, cotton, and tobacco have been made on the demonstration farms. There have been

Record of T.V.A.

²² *Op. cit.*, p. 208.

²³ C. H. Pritchett, *op. cit.*, p. 94.

more sales of milk by one-half, of eggs by one-half, of hogs by two-thirds, of fruits and vegetables by one-half. R. L. Duffus has dramatized these increased yields by telling the story of a debt-ridden farmer with a large family.²⁴ Driven from the land, he tried other work, but failed and was obliged to return to his farm. His land had cost \$6000. It was mortgaged for \$2500 and was valued at \$2000 when he returned to it. The Authority chose him to be a demonstration farmer. After five years, his mortgage was reduced to \$1000, and the land was valued at \$8840.

In ten years the per capita use of electricity in the region jumped from the lowest to the second highest in the United States. In 1945 the Authority employed 40,000 persons.²⁵ Not all of these jobs were new. The Authority has acquired the property of privately owned utilities, and their employees have become the employees of the Authority. But private employment in the region also has risen rapidly, because of the increased amount of power available. The percentage increase of the per capita income for the United States between 1933 and 1940 was 57, whereas for Alabama, Mississippi, and Tennessee for the same period it was 84.²⁶ While bank deposits were increasing 49 percent for the country as a whole in the years 1933-1939, bank deposits in the valley increased 76 percent.

THE ATOMIC ENERGY COMMISSION

Need for
U.S. control

The development and subsequent administration of the production of fissionable matter is a striking example of the capacity for creative activity of and popular confidence in government. Without the intervention of the government for the supply of materials and equipment and the mobilization of large numbers of scientists who were enabled to concentrate their learning on the many complicated phases of the problem of the release of

²⁴ R. L. Duffus, *The Valley and Its People* (Alfred A. Knopf, New York, 1944), p. 111.

²⁵ Sterling D. Spero, *Government Jobs* (J. B. Lippincott Co., Philadelphia, 1945), p. 138.

²⁶ Herman Finer, *op. cit.*, p. 212.

nuclear energy, it is inconceivable that the theoretical knowledge of the structure of the atom could have been given practical effect for many years. The solution of the scientific problem produced an even greater social problem—to hold in leash the destructive potentialities of the discovery and to channel the new resources into peaceful use. There was unanimous agreement that only government is in a position to cope with this problem; whether it will solve it is another question.

The assumption by the government of the ownership and operation of the atomic energy industry is the most recent and certainly potentially one of the largest of its operational activities. It began after Professor Albert Einstein wrote to President Roosevelt, August 12, 1939, advising him that there was a real possibility of developing a method for the release of energy which would be in a different scale of magnitude from any power then known. The operation growing out of the Einstein letter can only be called stupendous. It appears that plant facilities have cost more than \$2,000,000,000. The annual operating expenditures in the budget for the year beginning July 1, 1947, were \$500,000,000.²⁷ The amount asked for the next year was \$647,000,000.

In some respects the Atomic Energy Act of August 1, 1946, provided only for a system of interim operation.²⁸ There was a virtually unanimous opinion among those acquainted with the destructive potential of atomic energy that the only feasible method of dealing with it was on a supranational scale. Room for such a development was written into the law in this language: "Any provision of this . . . statute or any action of the Commission to the extent that it conflicts with the provisions of any international arrangement . . . shall be deemed to be of no further force or effect," and "in the performance of its functions . . . the Commission shall give maximum effect to the policies contained in any such international arrangement."

The first purpose of the governmental ownership of the pro- **Purposes**

²⁷ *Second Semiannual Report of the Atomic Energy Commission* (Government Printing Office, Washington, 1948), p. 17.

²⁸ U.S. Code, title 42, sec. 1801.

1. Military

duction of fissionable matter is military in nature—defense and security. This involves stockpiling atomic bombs in such numbers as to make the prediction of the destruction of the human species in another war seem no longer fanciful but plausible; and it involves continuous research to discover more efficient methods of destruction.

2. Research

Research is the second main purpose of government ownership of the manufacture of fissionable matter. But research looks also toward industrial and medical or therapeutic uses of fissionable matter and its by-products. A delicate balance is necessary in the management of research. In order that maximum progress can be made there must be a great deal of interchange of information among scientists, both between those working on co-operative projects and the isolated scholars, and between those concentrating on the central problems of nuclear research and those engaged in research of a peripheral character. On the other hand, if the United States is engaging in a military race in atomic research, information must be kept from leaking to the wrong persons. These mutually contradictory objectives, neither of which can be fully achieved without destroying the other, are to be administered by the Atomic Energy Commission within the limits set by the statute. The repression of the spread of information takes such form as penalties of death or fines up to \$20,000 and imprisonment for terms as long as twenty years for the disclosure of information with the intent to injure the United States, and the prohibition to the Commission of authority to exchange information with other nations.

The policy for the stimulation of research by the diffusion of knowledge is also set forth in the statute. It is provided that, so far as this is consistent with the common defense and security, "the dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free exchange of ideas and criticisms which is essential to scientific progress."

The third major objective of government ownership of the fissionable matter industry, which is expected to be an outcome

of research, is to utilize atomic energy for peaceful purposes, presumably for industrial and medical uses. In the early reports to President Roosevelt, when the advisability of undertaking large-scale experimentation was being considered, the scientists suggested that if the chain reaction could be slowed down and controlled, atomic energy might be employed for such purposes as long-range propulsion of submarines. So far, apparently, explosives have been the chief development, and the implication of the reports of the Commission is that most of the research and experimentation is still concentrated on explosives. However, the reports of the Commission indicate that a small percentage of the research budget is being expended to develop peaceful uses. Radioisotopes are being produced and distributed rather widely. Processes have been developed which reduce their cost quite materially. For example, one millicurie of carbon 14, now being sold for \$50, would have cost about \$1,000,000 if produced by a cyclotron.²⁹ These radioisotopes are used by scientists for research purposes in chemistry, biology, medicine, and agriculture. About ninety different kinds of radioisotopes representing sixty elements are available, and about one hundred radioisotopes are being distributed per month.³⁰ Professor Karl Compton of the Massachusetts Institute of Technology expects that by 1950 one small experimental power plant will be operating on atomic energy.³¹ However, should the pressure for military development slacken or be withdrawn entirely and the whole of the energies available for the development of nuclear fission be concentrated on its peaceful uses, Professor Compton is of the opinion that progress would be as rapid in that field as it has been and now is in the military field.³² If atomic energy becomes

3. Industrial and medical use

²⁹ *Second Annual Report*, p. 25.

³⁰ *Ibid.*, pp. 4, 25-27.

³¹ *New York Times*, February 10, 1948.

³² During the hearings on the confirmation of the members of the Commission, David Lilienthal, the Chairman of the Commission, stated that research for peaceful and for military purposes could not be separated, and others supported this view. (*Hearings, Confirmation of Atomic Energy Commission and General Manager*, Government Printing Office, Washington, 1947, pp. 24, 596.)

useful for power, it will have the utmost economic and political significance. Indeed, the discovery of nuclear fission will probably be as revolutionary and as influential as the most fundamental inventions in human history, such as the discovery of fire or the principle of the wheel.

**Powers of
Commission**

A somewhat novel arrangement has been found for the representation of the public interest in and public control over the fissionable matter industry. The statute creating the Atomic Energy Commission vests in the United States the ownership of all fissionable matter and the sources from which it can be made,³³ the equipment and facilities for its manufacture, and the patents covering processes for dealing with it. The Commission is designated as the agent of the United States to exercise the powers of the government in behalf of the United States. To the complete transfer of ownership of all these materials, facilities, and processes one exception is made, that of facilities useful for the conduct of research and development which do not have a potential production rate adequate to produce sufficient fissionable matter to make an atomic weapon of any kind. At the same time the statute lays down the policy that private research and development are to be fostered, and that operations under it are to strengthen free competition in private enterprise. A method for reconciling these apparently contradictory purposes was found. The Commission was given authority to license materials, facilities, and processes.

**Contract
device**

The Commission itself carries on none of the major production or research programs. The huge installations at Hanford, Washington, are operated by the General Electric Company. The Oak Ridge National Laboratory, formerly the Clinton Laboratory, is operated by Carbide and Carbon Chemicals Corporation. A major program of research is carried on in Argonne National Laboratory, which is located in several divisions in Chi-

³³ The law specifies uranium and thorium. Such other material as the Commission with the approval of the President may determine to be essential to the production of fissionable matter may be added to this list. (U.S. Code, title 42, sec. 1805.)

cago. This institution is operated by the University of Chicago with the participation of twenty-nine midwestern universities. Similar laboratories are operated by other universities or groups of universities; for example, the Oak Ridge Institute of Nuclear Studies, Inc., is operated by fourteen universities of the South and Southwest. Brookhaven National Laboratory on Long Island is operated by nine universities in the East and Northeast. In all, the Commission has relations with over 100 contractors. These in turn have several hundred subcontractors.³¹

This particular use of the contract as an operative device was largely a development of World War II. Government has long made contracts with private persons for such persons to perform public service, such as the provision of transportation, the supply of light and power, and other services and commodities. In these instances the private person owned the plant and facilities. During the recent war the device of the contract was given a new application in the instances in which the government owned the capital investment but the facilities were operated by private persons under contract or lease. The object here was to combine governmental capital resources and private manufacturing skills in order to expedite the fabrication of munitions. The device of the contract is being employed by the Atomic Energy Commission as a means of control over the manufacture and use of fissionable material and also of maintaining the advantages of private skills and knowledge in research and production.

The security requirements of the statute apply to all these operations. The Commission has power to inspect the installations and the work at all times, and to require full reports. All persons employed by contractors or subcontractors who have access to restricted data must first have been approved by the Commission. Before the Commission approves, the Federal Bureau of Investigation must make an investigation and report its findings to the Commission. This in itself is a task of some magnitude. The Commission has several thousand employees, probably more than

Security
rules

³¹ *Second Semiannual Report*, p. 3.

5000, and the contractors and subcontractors had 50,231 as of December 31, 1947.³⁵

Problems
1. Collecting knowledge

The character of the activity of the Atomic Energy Commission creates extraordinary problems. One of these is to find a way of channeling technical information to it as such information is gathered in laboratories all over the country. Problems arise in the handling of materials used by the contractors which other scientists could assist in solving. The Atomic Energy Act provided for the establishment of a part-time committee of nine to be appointed by the President. This group, called the General Advisory Committee, is composed of the most distinguished leaders in their respective fields of specialization. The law requires it to meet at least four times annually. It held eight formal meetings during its first year, and much other work was done by its subcommittees and by individual members. The Commission was also authorized to appoint advisory committees for assistance in more specialized fields. It has appointed eight such committees.

2. Relation to Congress

Another problem is keeping Congress properly informed of the activities of the Commission. The Joint Committee on Atomic Energy was created for this purpose. It is composed of eighteen members, nine Senators and nine Representatives. It has a staff of nine professional employees and a budget for the fiscal year of 1948 of \$150,000. It keeps in close contact with the Commission.

3. Relation to military

To deal with a third problem, that of maintaining close relationship with the military arm of the government, a Military Liaison Committee was created. This is composed of military personnel designated by the Secretaries of Army and Navy. The Commission meets the Military Liaison Committee on alternate Wednesdays, and oftener when the occasion requires. Provision is made in the statute for reference to the President of differences between the Commission and the Committee, but as of the date

³⁵ Richard O. Niehoff, "Organization and Administration of the United States Atomic Energy Commission," *Public Administration Review*, viii, 91-102 (1948).

of the *Third Semiannual Report* no case had been referred to the President.³⁶

NATURAL RESOURCES

Since ours is a government of delegated powers, the national government has no general responsibility for custody of natural resources. It has, however, pieced out a rather broad coverage from a miscellaneous collection of particular powers. In part, no doubt, because of the variety of the sources of its authority, the administrative agencies in this field are numerous and badly coördinated.

The most important single source of power over natural resources is that which the national government enjoys as proprietor of the public domain. The public domain was acquired by the cession of the Northwest Territory by the thirteen states, the Louisiana Purchase from France in 1803, the acquisition of Florida from Spain in 1819, the settlement of the Oregon Question in 1846, the acquisition of Texan and Mexican land in the period 1848-1853, and the purchase of Alaska from Russia in 1867. In addition, land has been acquired from Indian tribes by treaty. Where the land acquired had already been reduced to private ownership, the United States gained only legal jurisdiction and not title; but by far the greater part of these acquisitions became a part of the public domain. The total area of the original public domain was about 2,250,000 square miles, three-fourths of the area of the United States proper.³⁷ Of this, 700,000 square miles remain the property of the United States. This area is almost three times the size of the state of Texas, but the land is for the most part in the arid and semi-arid regions of the West. Of the 570,000 square miles of territory acquired by the Alaska purchase, almost all is still in the public domain.

The disposal and management of the public domain present a checkered history. The original policy was to sell lands for

Public
domain

³⁶ *Ibid.*

³⁷ The United States also owns 70,000 square miles acquired by purchase or otherwise for special purposes, such as the sites of public buildings, army posts, etc.

revenue. In 1841 the plan of inducing systematic settlement was adopted, and the Homestead Act of 1862 and subsequent acts continued this policy. In the period of railroad-building 200,000 square miles, nearly a tenth of the total public domain, was given to railroads. With the creation of the Yellowstone National Park in 1872, however, the reservation of portions of the public domain from occupancy began. By successive statutes the President has been authorized to set aside reservations in timbered lands, or for waterpower or reservoir sites, or for the preservation of wildlife, and to withhold rights to coal and other minerals on public lands. There remain 265,000 square miles still unreserved.

Parks The National Park Service in the Department of the Interior administers the national parks, of which there are now 171. It assists in planning and managing recreation activities around the reservoirs created by the Hoover and two other national dams.

Forests The 152 national forests, which comprise over 265,000 square miles in forty states and Alaska and Puerto Rico, are managed by the Forest Service in the Department of Agriculture. The Forest Service is concerned with conservation of timber, soil, water, and wildlife resources. It also engages in research in scientific management of forest and wild lands. It assists the states and also private owners in all aspects of conservation and management of timber resources. It supplies planting stock to farmers for windbreaks and woodlots. It licenses the grazing of livestock in the national forests.

Grazing The unreserved public domain falls under the jurisdiction of the Bureau of Land Management in the Department of the Interior. For the most part this consists of some 200,000 square miles of grazing land in ten western states. The Bureau issues permits to cattle and sheep raisers for the use of this range. The Bureau of Land Management also administers the laws relating to homestead entry upon the public domain. It awards coal, oil, and gas prospecting permits and leases, by which private persons are permitted to exploit these resources on the public

domain. Its task is to combine conservation with efficient utilization of natural resources.

In the field of water resources, a number of agencies come into play. The United States Army Corps of Engineers has traditionally been charged with construction undertaken by Congress in connection with navigation. It builds dams and administers a considerable number of them. The Bureau of Reclamation in the Department of the Interior, which is charged with supplying irrigation water in 17 western states, also builds and administers dams and reservoirs. The Bonneville Power Administration in the Department of the Interior distributes electric power produced at the Bonneville Dam, which is under the jurisdiction of the Corps of Engineers, and at the Grand Coulee Dam, which is operated by the Bureau of Reclamation. The Southwest Power Administration, also in the Department of the Interior, distributes power from dams built by the Corps of Engineers in Kansas, Missouri, Arkansas, Oklahoma, Louisiana, and Texas. The work of the Tennessee Valley Authority has already been described, as has that of the Federal Power Commission, which licenses the use of navigable waters for the production of electric power by private concerns.³⁸ The Soil Conservation Service in the Department of Agriculture is charged with rendering assistance to farmers both in irrigation and in drainage, and undertakes flood control in cooperation with the agencies mentioned above and with the states. Its most important conservation service, however, is to encourage proper methods of tillage and soil use on the part of farmers.

National control and protection of wildlife are chiefly the consequence of international treaties for the conservation of migratory birds and oceanic fish and animals, and of the ownership of the lands on which fish and animals are found, which include the public domain and wildlife refuges. In the territories of the United States the national government also possesses the authority to legislate which in continental United States belongs

³⁸ See p. 450.

to the states. In 1945 President Truman by proclamation laid claim in the name of the United States to the "continental shelf" extending far into the Pacific, and to all the waters of the high seas in which "coastal fishing" occurs. The Fish and Wildlife Service in the Department of the Interior administers all the national laws in connection with wildlife. It administers the laws relating to the taking of fish and game, and undertakes to prevent poaching and illegal capture. It supervises 291 wildlife refuges with an area of 28,000 square miles. It administers the program for the utilization of the fur seal and fox herds on the Pribilof Islands, and as an incidental function governs the human inhabitants also. It engages in extensive research for the protection and restoration of wildlife, and assists states and private persons in the control of injurious species.

**Tidelands
oil**

In upholding the power of the national government to make a treaty for the protection of migratory birds and to pass the Migratory Bird Treaty Act pursuant to the treaty, the Supreme Court recognized a "paramount power" of the United States in this subject.³⁹ The doctrine of paramount power was made the basis of another national claim to control of natural resources in *United States v. California*.⁴⁰ In this, the so-called Tidelands Oil Case, the Supreme Court ruled that although the boundaries of the state of California extended out to sea to the three-mile limit, the national government had paramount power over the oil in the sea bottom, and that it belonged to the national government rather than the states to license its extraction. The decision rests on the international aspect of the off-shore territory, and to a degree buttresses the doctrine of "resulting power" and "inherent power" which has always been a somewhat disreputable concept on the margin of constitutional law.⁴¹

In the area of conservation of natural resources, as elsewhere, the national government is emerging as a more and more active force. In the course of one hundred and sixty years the center of gravity in our federal system has shifted from the states to

³⁹ *Missouri v. Holland*, 252 U.S. 416 (1920). See p. 254.

⁴⁰ 322 U.S. 19 (1947).

⁴¹ See pp. 28-29.

the nation. This is not chiefly because the national government has displaced the states in their original functions, although this has happened to a degree. It is principally the result of the fact that the national government has undertaken functions which previously were not performed, functions vital to the well-being of the nation. This could not have occurred if the Constitution had not been endowed with elements of elasticity which permitted the adaptation of government to a new age. Moreover, statemanship has been necessary in the process of constitutional interpretation. Justice Holmes said in *Missouri v. Holland*:⁴² "When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation."

Nation-
hood

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⁴² Above, note 39.

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CONSTITUTION OF THE UNITED STATES, 1789¹

(Italics Indicate Obsolete or Repealed Provisions.)

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States,² which shall consist of a Senate and House of Representatives.³

SECTION 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States,⁴ and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.⁵

No person shall be a Representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.⁶

Representatives⁷ and *direct taxes*⁸ shall be apportioned among the several States which may be included within this Union, according to their respective numbers, *which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.*⁹ The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they

¹ Drafted by the Constitutional Convention, May 25—September 17, 1787; submitted to the states by the Continental Congress, September 28, 1787; declared in effect by the Continental Congress, September 13, 1788.

² See pp. 26, 114, 157–158, 206–207, 211, 400.

³ See pp. 115–116.

⁴ See pp. 114, 175.

⁵ See pp. 163–165.

⁶ See p. 215.

⁷ See p. 212.

⁸ Modified by the Sixteenth Amendment. See pp. 415, 417.

⁹ Superseded by the Fourteenth Amendment.

shall by law direct.¹⁰ The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker¹¹ and other officers;¹² and shall have the sole power of impeachment.¹³

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, *chosen by the legislature thereof*,¹⁴ for six years; and each Senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year;¹⁵ *and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.*¹⁶

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.¹⁷

The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.¹⁸

The Senate shall choose their other officers, and also a President

¹⁰ See p. 212.

¹¹ See pp. 219-220.

¹² See pp. 219, 222.

¹³ See pp. 211, 360.

¹⁴ Superseded by the Seventeenth Amendment. See p. 216.

¹⁵ See p. 216.

¹⁶ Superseded by the Seventeenth Amendment.

¹⁷ See p. 216.

¹⁸ See pp. 208, 218, 225.

pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.¹⁹

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no person shall be convicted without the concurrence of two-thirds of the members present.²⁰

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.²¹

SECTION 4. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.²²

The Congress shall assemble at least once in every year, *and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.*²³

SECTION 5. Each House shall be the judge of the elections, returns, and qualifications of its own members,²⁴ and a majority of each shall constitute a quorum to do business;²⁵ but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.²⁶

Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.²⁷

Neither House, during the session of Congress, shall, without the

¹⁹ See pp. 218-219.

²⁰ See pp. 211, 360.

²¹ See p. 360.

²² See pp. 166, 174, 175, 213-215, 282.

²³ Superseded by the Twentieth Amendment. See p. 218.

²⁴ See pp. 211, 215, 220, 400.

²⁵ See p. 232.

²⁶ See pp. 211, 222-223, 227, 400.

²⁷ See p. 232.

consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States.²⁸ They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.²⁹

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.³⁰

SECTION 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.³¹

Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.³²

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the

²⁸ See pp. 216-217.

²⁹ See pp. 217-218.

³⁰ See p. 215.

³¹ See p. 234.

³² See pp. 205-206, 233-234.

United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.³³

SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts, and excises,³⁴ to pay the debts and provide for the common defense and general welfare of the United States;³⁵ but all duties, imposts, and excises shall be uniform throughout the United States;³⁶

To borrow money on the credit of the United States;³⁷

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;³⁸

To establish an uniform rule of naturalization,³⁹ and uniform laws on the subject of bankruptcies⁴⁰ throughout the United States;

To coin money, regulate the value thereof, and of foreign coin,⁴¹ and fix the standard of weights and measures;⁴²

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post offices and post roads;⁴³

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;⁴⁴

To constitute tribunals inferior to the Supreme Court;⁴⁵

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war,⁴⁶ grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies,⁴⁷ but no appropriation of money to that use shall be for a longer term than two years;

³³ See pp. 124, 205-206, 233-235.

³⁴ See pp. 241, 247-248, 259, 286, 414-417, 474-475.

³⁵ See pp. 248-249, 416.

³⁶ See pp. 109, 416.

³⁷ See pp. 248, 255-257, 436-437.

³⁸ See pp. 73, 120-121, 241-247, 259, 286, 288-289, 316, 440-453, 456-462, 468-469, 472, 481-487.

³⁹ See pp. 129-130.

⁴⁰ See pp. 258, 466-467.

⁴¹ See pp. 255-257, 472.

⁴² See p. 473.

⁴³ See pp. 257, 258, 292, 311, 488, 495-504.

⁴⁴ See pp. 257-258, 462-465, 473.

⁴⁵ See pp. 261-262.

⁴⁶ See pp. 249-253, 286.

⁴⁷ See pp. 249-253, 286, 310.

To provide and maintain a navy;⁴⁸

To make rules for the government and regulation of the land and naval forces;⁴⁹

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;⁵⁰

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States,⁵¹ and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.⁵²

SECTION 9. *The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*⁵³

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.⁵⁴

No bill of attainder⁵⁵ or ex post facto law⁵⁶ shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.⁵⁷

⁴⁸ See pp. 249-253, 287, 310.

⁴⁹ See p. 249.

⁵⁰ See p. 249.

⁵¹ See pp. 122, 264.

⁵² See pp. 27, 239-241, 265.

⁵³ Obsolete provision.

⁵⁴ See pp. 48, 134.

⁵⁵ See pp. 135, 212.

⁵⁶ See p. 135.

⁵⁷ Modified by the Sixteenth Amendment. See pp. 415, 417.

No tax or duty shall be laid on articles exported from any State.⁵⁸

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.⁵⁹

No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State.

SECTION 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

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

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.⁶⁰

ARTICLE II

SECTION 1. The executive power shall be vested in a President of the United States of America.⁶¹ He shall hold his office during the term of four years,⁶² and, together with the Vice-President, chosen for the same term, be elected, as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Sen-

⁵⁸ See p. 415.

⁵⁹ See p. 415.

⁶⁰ See pp. 111-112, 255, 282-283, 472.

⁶¹ See pp. 191, 196, 212, 400.

⁶² See p. 187.

ators and Representatives to which the State may be entitled in the Congress: But no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.⁶³

*The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.*⁶⁴

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.⁶⁵

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.⁶⁶

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the

⁶³ See pp. 114, 175-176.

⁶⁴ Superseded by the Twelfth Amendment. See p. 180.

⁶⁵ See pp. 175-176.

⁶⁶ See p. 186.

said office, the same shall devolve on the Vice-President,⁶⁷ and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.⁶⁸

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.⁶⁹

Before he enter on the execution of his office, he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2. The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;⁷⁰ he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices,⁷¹ and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.⁷²

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;⁷³ and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls,⁷⁴ judges of the Supreme Court,⁷⁵ and all other officers of the United States, whose appointments are not herein otherwise provided for and which shall be established by law;⁷⁶ but the Congress may by law vest the appointment of such inferior officers, as they

⁶⁷ See p. 208.

⁶⁸ See pp. 208-209.

⁶⁹ See pp. 187-188.

⁷⁰ See pp. 191, 202-203.

⁷¹ See p. 191.

⁷² See pp. 200-201.

⁷³ See pp. 198, 253-255, 269, 520.

⁷⁴ See pp. 193, 198.

⁷⁵ See pp. 193, 262.

⁷⁶ See pp. 193, 343.

think proper, in the President alone, in the courts of law, or in the heads of departments.⁷⁷

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.⁷⁸

SECTION 3. He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient;⁷⁹ he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper;⁸⁰ he shall receive ambassadors and other public ministers;⁸¹ he shall take care that the laws be faithfully executed,⁸² and shall commission all the officers of the United States.

SECTION 4. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.⁸³

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.⁸⁴ The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.⁸⁵

SECTION 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; *between a State and citizens of another State*,⁸⁶

⁷⁷ See pp. 193, 263, 343.

⁷⁸ See p. 195.

⁷⁹ See pp. 204-205, 398.

⁸⁰ See pp. 205, 218.

⁸¹ See p. 198.

⁸² See pp. 191, 196, 212.

⁸³ See pp. 279, 359, 360.

⁸⁴ See pp. 261-265.

⁸⁵ See p. 262.

⁸⁶ Modified by the Eleventh Amendment. See p. 271.

between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects.⁸⁷

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction.⁸⁸ In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.⁸⁹

The trial of all crimes, except in cases of impeachment, shall be by jury;⁹⁰ and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

ARTICLE IV

SECTION 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.⁹¹

SECTION 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.⁹²

A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.⁹³

⁸⁷ For this paragraph, see pp. 108, 117, 248, 267-276, 306.

⁸⁸ See pp. 267-268, 270.

⁸⁹ See p. 267.

⁹⁰ See pp. 137, 253.

⁹¹ See p. 285.

⁹² See p. 284.

⁹³ See p. 284.

*No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.*⁹⁴

SECTION 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned as well as of the Congress.⁹⁵

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;⁹⁶ and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a republican form of government,⁹⁷ and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.⁹⁸

ARTICLE V⁹⁹

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article;¹⁰⁰ and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

⁹⁴ Rendered obsolete by the Thirteenth Amendment so far as the return of slaves was concerned.

⁹⁵ See p. 281.

⁹⁶ See pp. 122, 140, 265, 474-475, 494, 517-520.

⁹⁷ See pp. 276, 282.

⁹⁸ See p. 282.

⁹⁹ See pp. 123-125, 211.

¹⁰⁰ Obsolete provision.

ARTICLE VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.¹⁰¹

The Senators and Representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

ARTICLES OF AMENDMENT

ARTICLE I¹⁰²

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.¹⁰³

ARTICLE II¹⁰²

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III¹⁰²

No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

¹⁰¹ See pp. 29, 40, 287, 298-299.

¹⁰² The first ten amendments were submitted to the states by Congress on September 25, 1789. Final ratification was communicated by the President to Congress December 15, 1791.

¹⁰³ See pp. 121, 136.

ARTICLE IV¹⁰²

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹⁰⁴

ARTICLE V¹⁰²

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;¹⁰⁵ nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;¹⁰⁶ nor shall be compelled in any criminal case to be a witness against himself,¹⁰⁷ nor be deprived of life, liberty, or property, without due process of law;¹⁰⁸ nor shall private property be taken for public use, without just compensation.¹⁰⁹

ARTICLE VI¹⁰²

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,¹¹⁰ which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.¹¹¹

ARTICLE VII¹⁰²

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,¹¹² and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

¹⁰⁴ See p. 137.

¹⁰⁵ See pp. 137, 253.

¹⁰⁶ See pp. 138, 367.

¹⁰⁷ See p. 138.

¹⁰⁸ See pp. 110, 111, 120-121, 138-139, 158, 371, 373.

¹⁰⁹ See pp. 139-140, 369.

¹¹⁰ See pp. 137-138, 253.

¹¹¹ See pp. 52-53.

¹¹² See p. 137.

ARTICLE VIII¹⁰²

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

ARTICLE IX¹⁰²

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X¹⁰²

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.¹¹³

ARTICLE XI¹¹⁴

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

ARTICLE XII¹¹⁵

The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.

¹¹³ See pp. 26, 286.

¹¹⁴ Submitted September 5, 1794. Ratification was communicated by the President to Congress January 8, 1798. See p. 271.

¹¹⁵ Submitted December 12, 1803; promulgated by the Secretary of State September 25, 1804. See p. 180.

But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII¹¹⁶

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV¹¹⁷

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.¹¹⁸ No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;¹¹⁹ nor shall any State deprive any person of life, liberty, or property, without due process of law;¹²⁰ nor deny to any person within its jurisdiction the equal protection of the laws.¹²¹

¹¹⁶ Submitted February 1, 1865; promulgated December 18, 1865. See pp. 240, 249.

¹¹⁷ Submitted June 16, 1866; promulgated July 28, 1868. See pp. 124, 240.

¹¹⁸ See pp. 109, 128, 131.

¹¹⁹ See p. 133.

¹²⁰ See pp. 111, 112, 120-121, 138-139, 371, 373.

¹²¹ See pp. 165, 215.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.¹²² But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.¹²³

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV¹²⁴

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

¹²² See p. 212.

¹²³ See p. 165.

¹²⁴ Submitted February 27, 1869; promulgated March 30, 1870. See pp. 115, 165-166, 240.

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI¹²⁵

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

ARTICLE XVII¹²⁶

SECTION 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE XVIII¹²⁷

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

*Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.*¹²⁸

¹²⁵ Submitted July 31, 1909; promulgated February 25, 1913. See pp. 415, 417.

¹²⁶ Submitted May 15, 1912; promulgated May 31, 1913. See pp. 114, 164-165, 175.

¹²⁷ Submitted December 19, 1917; promulgated January 29, 1919. Repealed by the Twenty-first Amendment.

¹²⁸ See p. 125.

ARTICLE XIX¹²⁰

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XX¹³⁰

SECTION 1. The terms of the President and Vice-President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.¹³¹

SECTION 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.¹³²

SECTION 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice-President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice-President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice-President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice-President shall have qualified.¹³³

SECTION 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice-President whenever the right of choice shall have devolved upon them.¹³⁴

SECTION 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

SECTION 6. This article shall be inoperative unless it shall have

¹²⁰ Submitted June 5, 1919; promulgated August 26, 1920. See pp. 115, 165.

¹³⁰ Submitted March 3, 1932; promulgated February 6, 1933.

¹³¹ See pp. 188, 215.

¹³² See pp. 188, 218, 221.

¹³³ See p. 181.

¹³⁴ See p. 181.

been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.¹³⁵

ARTICLE XXI¹³⁶

SECTION 1. The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.

SECTION 2. The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress.¹³⁷

¹³⁵ See p. 125.

¹³⁶ Submitted February 20, 1933; promulgated December 5, 1933.

¹³⁷ See pp. 124, 125, 167.

CHARTER OF THE UNITED NATIONS¹

We the Peoples of the United Nations Determined

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

And for These Ends

to practice tolerance and live together in peace with one another as good neighbors, and

to unite our strength to maintain international peace and security, and

to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

Have Resolved to Combine Our Efforts to Accomplish These Aims.

Accordingly, our respective Governments, through representatives

¹Charter of the United Nations, Signed at the United Nations Conference on International Organization, San Francisco, California, June 26, 1945. The Charter was ratified by the United States Senate on July 28, 1945, by a vote of 89 to 2.

The Charter was signed at San Francisco by the following fifty countries: Argentina, Australia, Belgium, Bolivia, Brazil, Byelorussia, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippine Commonwealth, Saudi Arabia, Syria, Turkey, Ukraine, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay, Venezuela, Yugoslavia. On October 15, 1945 the representative of the Polish Provisional Government signed the Charter in Washington as an original member, thus making fifty-one original members. Since that date the following seven states have become members of the United Nations by vote of the General Assembly: Afghanistan, Iceland, and Sweden on November 19, 1946, Siam on December 16, 1946, Pakistan and Yemen on September 30, 1947, and the Union of Burma on April 19, 1948.

assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I—PURPOSES AND PRINCIPLES

Article 1. The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall

refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II—MEMBERSHIP

Article 3. The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of January 1, 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4. 1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5. A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6. A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III—ORGANS

Article 7. 1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8. The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV—THE GENERAL ASSEMBLY

COMPOSITION

Article 9. 1. The General Assembly shall consist of all the Members of the United Nations.

2. Each Member shall have not more than five representatives in the General Assembly.

FUNCTIONS AND POWERS

Article 10. The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11. 1. The General Assembly may consider the general principles of cooperation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard to such principles to the Members or to the Security Council or to both.

2. The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.

3. The General Assembly may call the attention of the Security Council to situations which are likely to endanger international peace and security.

4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12. 1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13. 1. The General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
- b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

Article 14. Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15. 1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16. The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17. 1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

VOTING

Article 18. 1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions.

3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19. A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

PROCEDURE

Article 20. The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21. The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22. The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

CHAPTER V—THE SECURITY COUNCIL

COMPOSITION

Article 23. 1. The Security Council shall consist of eleven Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect six other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members, however, three shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

FUNCTIONS AND POWERS

Article 24. 1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25. The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26. In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

VOTING

Article 27. 1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

PROCEDURE

Article 28. 1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29. The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30. The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31. Any member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32. Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member

of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI—PACIFIC SETTLEMENT OF DISPUTES

Article 33. 1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34. The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35. 1. Any Member of the United Nations may bring any dispute or any situation of the nature referred to in Article 34 to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to the provisions of Articles 11 and 12.

Article 36. 1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37. 1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38. Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII—ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other

operations by air, sea, or land forces of Members of the United Nations.

Article 43. 1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44. When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45. In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46. Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47. 1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their repre-

sentatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional subcommittees.

Article 48. 1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49. The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50. If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII—REGIONAL ARRANGEMENTS

Article 52. 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security

as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53. 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54. The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX—INTERNATIONAL ECONOMIC AND SOCIAL COOPERATION

Article 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related

problems; and international cultural and educational cooperation; and

- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56. All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57. 1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58. The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

Article 59. The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60. Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X—THE ECONOMIC AND SOCIAL COUNCIL COMPOSITION

Article 61. 1. The Economic and Social Council shall consist of eighteen Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, six members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election, eighteen members of the Economic and Social Council shall be chosen. The term of office of six members so

chosen shall expire at the end of one year, and of six other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

FUNCTIONS AND POWERS

Article 62. 1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63. 1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64. 1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within its competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65. The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66. 1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

VOTING

Article 67. 1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 68. The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 69. The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70. The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71. The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72. 1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI—DECLARATION REGARDING

• NON-SELF-GOVERNING TERRITORIES

Article 73. Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74. Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII—INTERNATIONAL TRUSTEESHIP
SYSTEM

Article 75. The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements. These territories are hereinafter referred to as trust territories.

Article 76. The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

- a. to further international peace and security;
- b. to promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;
- c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and
- d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77. 1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

- a. territories now held under mandate;
- b. territories which may be detached from enemy states as a result of the Second World War; and
- c. territories voluntarily placed under the system by states responsible for their administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78. The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship

among which shall be based on respect for the principle of sovereign equality.

Article 79. The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned, including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80. 1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79 and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph 1 of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and other territories under the trusteeship system as provided for in Article 77.

Article 81. The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82. There may be designated, in any trusteeship arrangement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83. 1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84. It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance

of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the obligation towards the Security Council undertaken in this regard by the administering authority, as well as for local defense and the maintenance of law and order within the trust territory.

Article 85. 1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII—THE TRUSTEESHIP COUNCIL

COMPOSITION

Article 86. 1. The Trusteeship Council shall consist of the following Members of the United Nations:

- a. those Members administering trust territories;
- b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and
- c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified person to represent it therein.

FUNCTIONS AND POWERS

Article 87. 1. The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:

- a. consider reports submitted by the administering authority;
- b. accept petitions and examine them in consultation with the administering authority;
- c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
- d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88. The Trusteeship Council shall formulate a questionnaire on the political, economic, social and educational advancement

of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

VOTING .

Article 89. 1. Each member of the Trusteeship Council shall have one vote.

2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

PROCEDURE

Article 90. 1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91. The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV—THE INTERNATIONAL COURT OF JUSTICE

Article 92. The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93. 1. All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.

2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94. 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems

necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95. Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96. 1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV—THE SECRETARIAT

Article 97. The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98. The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100. 1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101. 1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required,

to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI—MISCELLANEOUS PROVISIONS

Article 102. 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103. In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 104. The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105. 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII—TRANSITIONAL SECURITY ARRANGEMENTS

Article 106. Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four-Nation Declaration, signed at Mos-

cow, October 30, 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107. Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

CHAPTER XVIII—AMENDMENTS

Article 108. Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two-thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council.

Article 109. 1. A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any seven members of the Security Council. Each Member of the United Nations shall have one vote in the conference.

2. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council.

3. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council.

CHAPTER XIX—RATIFICATION AND SIGNATURE

Article 110. 1. The present Charter shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The ratifications shall be deposited with the Government of the United States of America, which shall notify all the signatory states of each deposit as well as the Secretary-General of the Organization when he has been appointed.

3. The present Charter shall come into force upon the deposit of ratifications by the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and by a majority of the other signatory states. A protocol of the ratifications deposited shall thereupon be drawn up by the Government of the United States of America which shall communicate copies thereof to all the signatory states.

4. The states signatory to the present Charter which ratify it after it has come into force will become original Members of the United Nations on the date of the deposit of their respective ratifications.

Article 111. The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America. Duly certified copies thereof shall be transmitted by that Government to the Governments of the other signatory states.

In Faith Whereof the representatives of the Governments of the United Nations have signed the present Charter.

Done at the city of San Francisco the twenty-sixth day of June, one thousand nine hundred and forty-five.

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