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EXTENT OF THE CONTROL OF THE
EXECUTIVE BY THE CONGRESS
OF THE UNITED STATES

BY

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FOREWORD

The constitutional philosophy of the separation of powers among the three branches of government—the legislative, executive, and judicial—is well known to every schoolboy in America. Similarly the theory of checks and balances is also a fairly familiar one. However, the methods available to the Congress in exercising its functions to supervise and control the execution of its laws is not so well known.

This is a matter of particular interest to the House Committee on Government Operations since it is charged by law with the duty of studying the operations of government activities at all levels to determine economy and efficiency, and of evaluating the effects of laws enacted to reorganize the activities of government. Consequently the committee is publishing this study for the information and use of its members. It should also be of value to all Members of Congress and other persons interested in our government.

The author of the study, Dr. Charles J. Zinn, law revision counsel of the House Committee on the Judiciary, has followed the format of a report of the Interparliamentary Union Association of Secretaries General of Parliaments on the "Extent of the Control of the Executive by Different Parliaments." Thus this document will also be useful as a supplement to the Association's report. Dr. Zinn is a member of the executive committee of the Association.

In closing, it should be noted that the author has written a concise and readable exposition of the relationship between the Congress and the Executive. It is not, however, intended to be an exhaustive work on the subject.



Chairman, Committee on Government Operations.

WASHINGTON, D.C.,
August 2, 1962.

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EXTENT OF THE CONTROL OF THE EXECUTIVE BY THE CONGRESS OF THE UNITED STATES

INTRODUCTORY

The Inter-Parliamentary Union Association of Secretaries General of Parliaments has recently published a comprehensive combined report on the "Extent of the Control of the Executive by Different Parliaments."¹ The excellent final report, prepared by Sir Edward Fellowes (United Kingdom), coordinating and consolidating three separate reports previously considered by the association, was adopted by the association at its conference at Toyko in September 1960. It was based upon answers provided by 23 countries to questionnaires previously circulated. Inasmuch as the United States of America was not actively represented in the association when the questionnaires were circulated and consequently did not respond to them, the report does not contain information relating to this country. Our system, of course, differs greatly in many respects from the parliamentary system generally prevailing in European countries. Although the subject is fundamental to the operations of our form of government, and an understanding of it is essential to an intelligent comprehension of governmental activities at the national level, it is one about which many persons both in the United States and abroad often have complete misconceptions based upon little or no information.

This paper, following the outline of the report of the Association,² is intended to complement the report and to provide that information.

¹ Constitutional and Parliamentary Information, 3d Series—No. 44, October 1960.

² Throughout this paper the headings are substantially the same as in the report except that congressional nomenclature is substituted in place of the parliamentary terminology. In this particular frame of reference, for the purpose of a comparative study, many points of emphasis are at places where they would not otherwise be, and some of the headings, having little or no significance in the Presidential system, would not have been included in an independent exposition of that system alone. The arrangement of subject matter has required a certain amount of repetition in the text.

PART I

CONSTITUTIONAL RELATIONS BETWEEN THE CONGRESS AND THE EXECUTIVE

1. Relationship between the Congress and the President
2. Method of formation of the Cabinet
3. Method of dismissing the Cabinet
4. Composition of the Cabinet in relation to the Congress
5. Extent of control of the Congress by the Executive
6. Immunities of Members of the Congress
7. Disqualification from membership
8. Emoluments of Members
9. Differences in "Second Chamber"
10. Summary

1. Relationship between the Congress and the President

Under article II of the United States Constitution the executive power is vested in the President of the United States, who holds his office for a term of 4 years; and no person may be elected to that office more than twice.¹

Each State in the Union, in the manner directed by its own legislature, appoints a number of electors equal to the whole number of Senators and Representatives to which it is entitled in the Congress—but no Senator or Representative, or person holding an office of trust or profit under the United States, may be appointed an elector.² In some instances the electors (who have been previously named in party primary elections) are pledged to vote for their party's candidates for President and Vice President, and the candidates' names, rather than the electors' names, are listed on the ballot in the general election. The people then vote for those electors by indicating their preference of the candidates for President and Vice President whose names appear on the ballot. In other instances only the names of the electors under their party labels—and not of the Presidential and Vice Presidential candidates—appear on the ballots, and the electors are not necessarily pledged. The time when the people of the States choose the electors and the day on which the electors cast their votes are determined by the Congress—the former being the Tuesday next after the first Monday in November, in every fourth year succeeding the election of a President, and the latter being the first Monday after the second Wednesday in December following their appointment.³ The electors meet in their respective States on that day and vote by ballot for President and Vice President. Inasmuch as the electors are chosen en bloc on a statewide ticket, the successful Presidential candidate will receive all the electoral votes of the State, although his popular vote may constitute only a plurality of all the votes cast where there are more than two parties in the contest. The electors transmit to the President of the Senate certified lists of the persons voted for as President and as Vice President. By law, pursuant to

¹ Amendment XXII, U.S. Constitution.

² Art. II, sec. 1, U.S. Constitution.

³ 3 U.S. Code § 7.

the 12th amendment to the Constitution,⁴ at 1 o'clock in the afternoon of the 6th day of January succeeding every meeting of the electors, the Congress meets in a joint session at which the President of the Senate is the presiding officer, for the purpose of counting the electoral votes. The certified lists are opened by the current President of the Senate and the votes are counted by two tellers from each House who had previously been appointed from the two political parties.

The person having the greatest number of electoral votes for President is elected President if that number is a majority of the whole number of electors appointed. Otherwise, the House of Representatives, by ballot, immediately chooses the President from among the three persons on the list having the highest number of votes; in this balloting each State has one vote, and a majority of the votes cast is necessary to a choice. Similarly, the person having the greatest number of votes as Vice President is elected Vice President if that number is a majority of the whole number of electors appointed. Otherwise, the Senate, by ballot, immediately chooses the Vice President from the two highest numbers on the list; in this balloting each Senator has one vote and a majority of the whole number of Senators is necessary to a choice. The Vice President serves as President of the Senate during his term of office.

The Constitution authorizes the Congress to provide by law for the case where there is no President or Vice President, declaring what officer shall then act as President. A statute, enacted in recent years, authorizes the Speaker of the House of Representatives and the President pro tempore of the Senate, in that order, to act as President if, by reason of the death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President.⁵

Although a cardinal principle of the U.S. system of government is the separation of powers among the legislative, executive, and judicial branches, there is another fundamental and correlative principle of "checks and balances" among the branches which will be demonstrated in various phases in the course of this paper.

The President has specific formal functions to undertake in relation to the Congress, as do the heads of state in the parliamentary systems.

2. *Method of formation of the Cabinet*

The Cabinet of the President is an informal body not provided for in the Constitution and that has no statutory powers or duties as a body. It is the creature of custom and usage, varying in function and importance from time to time according to the philosophy and personality of the President; it is not a body comparable with the Cabinet in the parliamentary system.

In establishing the several executive departments, the Congress has provided that each shall have at its head an officer, usually designated as "Secretary"⁶ of that department, and these officers customarily constitute the President's Cabinet. The head of each department is appointed by the President "by and with the advice and consent of the Senate"—and the House of Representatives takes no part in this matter. In practice, the function of "advice" is not exercised by the Senate to the extent of formally suggesting the name of a potential

⁴ U.S. Code § 15.

⁵ U.S. Code § 19.

⁶ The head of the Department of Justice, designated "the Attorney General," and the head of the Post Office Department, designated "the Postmaster General," are the two exceptions among the 10 executive departments.

nominee, but the Senate may and, on occasion, has withheld its consent to the appointment of an individual nominated by the President. When it is submitted by the President the nomination is referred to a standing committee of the Senate that has jurisdiction of matters within the competence of the particular department concerned; for example, the nomination of an individual to be Secretary of State is referred to the Senate Committee on Foreign Relations. The committee may hold public hearings as well as closed executive sessions on the qualifications of the nominee and when it has reported to the Senate the final question is "Will the Senate advise and consent to the nomination?" The matter is usually considered in open session in the Senate unless the Senate by majority vote determines that it shall be considered in closed executive session, in which case all subsequent proceedings with respect to the nomination are kept secret. Nominations that are neither confirmed nor rejected during the session at which they are made may not be acted upon at any succeeding session without being again made to the Senate by the President.⁷ The unwritten "rule of senatorial courtesy" that may block an appointment to a Federal office within a State on the basis that the nominee is personally objectionable to a particular Senator from that State, does not apply to the nomination of a Cabinet member.

The President may withdraw a nomination submitted by him or by his predecessor in office even after the nomination has been reported to the Senate by a committee. He also has the power to fill vacancies in his Cabinet that occur during a recess of the Senate by granting commissions that expire at the end of the next session.⁸

Customarily, members of a Cabinet submit their resignations to a new President upon his inauguration. The Constitution does not fix a term of office for heads of departments and only in the case of the Postmaster General does a statute (enacted originally in 1794) attempt to limit the President in this regard by providing that "the term of the Postmaster General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed."⁹ That statute provided, until 1960, that he be appointed "by the President, by and with the advice and consent of the Senate and * * * may be removed in the same manner." The statute, which might have seemed to limit the President's removal power, has not been construed by the courts, but a similar statute relating to the removal of an inferior officer was held not to limit the President's power.¹⁰ The court relied largely upon a "decision of 1789" when the Congress in considering a bill to establish a Department of Foreign Affairs, after thoroughly discussing the President's removal power, amended the bill by striking out the clause that the head of the department was "to be removable from office by the President" and inserting in lieu thereof the words "whenever the said principal officer shall be removed from office by the President." The inference of the amendment, to many persons, is that the President possessed the power of removal without the interposition of a congressional authorization.

The Congress, by statute, permits the President, in the case of the death, resignation, absence, or sickness of the head of a depart-

⁷ Rule XXXVIII, par. 6, Standing Rules of the United States Senate.

⁸ Art. II, sec. 2, U.S. Constitution.

⁹ Formerly 39 U.S. Code § 361, reenacted as 39 U.S. Code § 302, without the limitation.

¹⁰ *Myers, Administratrix v. U.S.*, 272 U.S. 52 (1926).

ment to designate the head of another department to perform the duties of the vacant office temporarily.¹¹

The Congress has also provided special qualifications or impediments for appointment as heads of departments; for example, a person who has within 10 years been on active duty as a commissioned officer in a Regular component of the armed services is not eligible for appointment as Secretary of Defense, and a person appointed to the office of Secretary of the Treasury may not engage in certain business or commercial enterprises.¹² The Constitution provides that no person holding any civil office under the United States may be a Member of either House of the Congress during his continuance in office. This provision, based upon the principle of the separation of powers, is the nub of the distinction between the cabinets in the two systems of government.

The number of departments whose heads constitute the President's Cabinet is not established by the Constitution and has been increased by the Congress from time to time; and, in recent years, the former Department of the Army and the former Department of the Navy were incorporated into the newly created Department of Defense. There are now 10 executive departments.¹³ Additional officers, including the Vice President, are frequently invited by the President to attend and participate in the meetings of the Cabinet that are usually held each week.

It must be remembered that the Cabinet does not function pursuant to constitutional or statutory mandate but simply as a matter of custom and convenience. The Founding Fathers in the 18th century did not contemplate a cabinet form of government such as now exists in the parliamentary system (but which was not then fully developed even in England).

3. Method of dismissing the Cabinet

The life of the Cabinet of the President is not dependent upon a vote of confidence by the Congress, and the dismissal of the Cabinet is not an eventuality comparable to the dismissal of the government in the parliamentary system. Votes of no confidence are not contemplated by the presidential system. The normal term of office of a Cabinet member is 4 years—the same as that of the President who appoints him—and it outspans the life of a Congress which is only 2 years. This is true even in those instances when the Congress that is elected at midterm is controlled by the opposite political party. Of course, the President sometimes appoints members of his Cabinet to another position or members resign for other reasons. The President may request the resignation of a Cabinet member, and may dismiss him if he refuses to resign. The latter point has not been the subject of definitive action by the Congress or by the courts but there seems to be a good deal of support for that proposition as a concomitant of the appointing power and as part of the President's constitutional duty to "take care that the laws be faithfully executed."¹⁴

As a civil officer of the United States each Cabinet member is subject to removal from office on impeachment for and conviction of treason,

¹¹ 5 U.S. Code § 6.

¹² 5 U.S. Code §§ 171a, 243.

¹³ These are the Departments of State, Treasury, Defense, Justice, Post Office, Interior, Agriculture, Commerce, Labor, and Health, Education, and Welfare.

¹⁴ Art. II, sec. 3, U.S. Constitution.

bribery, or other high crimes and misdemeanors. The Constitution provides that the House of Representatives shall have the sole power of impeachment and that the Senate shall have the sole power to try all impeachments.¹⁵ Judgment in cases of impeachment may 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 for the crime, according to law. Throughout the entire history of the United States only one Cabinet member has been tried by the Senate sitting as a court of impeachment and he was acquitted. The impeachment or the dismissal by the President of one or more Cabinet members would have no constitutional effect upon the President's tenure.

4. *Composition of the Cabinet in relation to the Congress*

As pointed out above, the Constitution provides that no person holding any office under the United States shall be a Member of either House of the Congress during his continuance in office. As a result, membership in the Cabinet excludes Members of either House. It is not customary, although permissible, for a President to select members of his Cabinet from the Congress, and, of course, if selected the nominee would be obliged to resign his congressional seat—in all likelihood before his name was submitted to the Senate by the President.¹⁶

There is a further clause in the Constitution that a Senator or Representative, during the time for which he was elected, may not be appointed to any civil office under the authority of the United States, which has been created, or the emoluments whereof have been increased, during that time.¹⁷ Consequently, a Member of either House would be ineligible to appointment as Secretary of an executive department if it was created during his current term, or of an existing department if the emoluments of the office were increased during that time.

A special portion of the gallery in each chamber of the Congress is reserved for Cabinet members, and under the standing rules of each House, among other individuals who have "the privilege of the floor" are members of the Cabinet¹⁸ but, in common with the privilege accorded to certain other nonmembers of the Congress, this permission does not entitle them to address the Chair—it is not the same as "having the floor."

A member of the Cabinet does not have a right to speak—without special invitation—in the chamber of either House of the Congress, and on the rare occasions in modern practice when the Congress has extended such an invitation, as was extended to Secretary of State Cordell Hull in November 1943, his appearance in the chamber is as a guest and usually is for the purpose of presenting a formal personal report to the Congress meeting in joint session. Such an action is a manifestation of high regard for a particular official on the part of the Congress at a crucial period or in connection with an extremely important development in domestic or foreign affairs.

¹⁵ Art. I, secs. 2, 3, U.S. Constitution.

¹⁶ Two days before President Kennedy was inaugurated and submitted the name of Stewart Udall to be Secretary of the Interior, on Jan. 20, 1961, the latter resigned his seat as a Member of the House of Representatives.

¹⁷ Art. I, sec. 6, U.S. Constitution.

¹⁸ Rule XXXII, par. 1, Standing Rules of the House of Representatives; rule XXXIII, Standing Rules of the Senate.

In the early days of experience under the Constitution there was no such dichotomy and the Annals of Congress disclose that at least one Cabinet member attended sessions of the House of Representatives and proffered his advice on matters pertaining to his department. This practice was soon abandoned, however, and despite periodic suggestions for either the creation of a legislative council to include Cabinet members or for the establishment of a "question period," affirmative action has never been taken by the Congress.

The essential differences between the Cabinet in the presidential system as compared with that in the parliamentary system are that in the presidential system the heads of the departments manage their departments personally rather than delegating that function to permanent under secretaries, and the actions of the Chief Executive or an individual Cabinet member do not affect the tenure of the entire body.

5. Extent of control of the Congress by the Executive

"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." These are the opening words of article I of the Constitution and seem to be not only specific but also emphatic when compared with the opening words of article II—"The executive power shall be vested in a President of the United States of America," which substitutes the definite article in place of "all." However, this clause must be read in the light of the entire Constitution and particularly consideration must be given to several other clauses.

For example, section 3 of article II provides that the President "shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." By the terms of this clause the President has a duty to report to the Congress and to recommend legislation for enactment by the Congress—patently a legislative function on the part of the President.

For many years, from the administration of Thomas Jefferson until Woodrow Wilson's first term, the state of the Union message was frequently a somewhat perfunctory message read to the Congress by a clerk, but in 1913 President Wilson delivered the message orally to a joint session of the Congress, and the last half century has seen this practice continued with the result that the message has enjoyed greater prestige, comparable to the Gracious Speech from the Throne by the British sovereign. President Wilson believed that it was his duty to accept responsibility for legislative leadership and the state of the Union message was an ideal vehicle for this purpose.

In modern times, throughout the course of the congressional session the Congress receives numerous executive communications from the President or from members of his Cabinet suggesting the enactment of legislation—frequently accompanied by a draft of a bill for introduction.¹⁹ All executive communications from department heads, as a matter of internal administration, must first be "cleared" by the Bureau of the Budget (established in the Executive Office of the President) with a statement that the recommendation conforms with the program of the President. The communications are addressed to

¹⁹ As a matter of fact, a few years ago a particular Senator, who was not a member of the same party as the President, criticized a President for not providing a specific draft of a bill at the time he recommended legislation on a certain subject.

the President of the Senate and to the Speaker of the House of Representatives who, upon their receipt, refer them to the appropriate standing committee of the respective House. There is no constitutional or statutory requirement that a bill be introduced to effectuate the recommendation, but in practice—even when the House is not controlled by the party of the President—the chairman of the committee to which the communication has been referred will usually introduce the appropriate bill. All bills are, of course, "private-member" bills since the administration has no representation in either House. A bill introduced following an executive communication is subject to all the normal parliamentary stages and may be amended by the committee or the Chamber—as well as by the Member before he introduces it—and it may be defeated by the Chamber. The number of bills introduced pursuant to executive communications, although still a small percentage of all the bills introduced, has greatly increased in modern times,²⁰ but that is not to say that the President has arrogated to himself the legislative initiative, inasmuch as many of the communications relate to matters that have been discussed at length in the Congress and in the press, radio, and television, and there may then be pending in the Congress other bills on the same subject.

Soon after the delivery of the state of the Union message the President transmits to the Congress his budget message which is the basis for the several appropriation bills introduced in the House of Representatives. Before the bills are actually introduced extensive hearings are held by a subcommittee of the Committee on Appropriations at which Cabinet members and other officers appear and are interrogated with a view of arriving at the proper amounts to be appropriated—and items may be reduced or increased, deleted or added.

It is the practice of standing committees of both Houses to request the views in writing of the appropriate executive department on all bills considered by them, and in many instances the head of the department and other officers will be heard by the committee in open or executive session.

Section 3 of article II of the Constitution further provides that the President "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." On many occasions the President has exercised his power under this clause to convene the Congress in special session or at a date earlier than that fixed by the Congress in its resolution of adjournment, and on almost 50 occasions the Senate alone has been convened in special session, but the President has never had to avail himself of the power to adjourn the Congress by reason of their disagreement with respect to the time of adjournment. At the beginning of a session it is customary for each House, before proceeding to the transaction of business, to notify the President that a quorum of its Members are assembled and ready to receive any message that he may be pleased to make. Similarly, before adjourning sine die the Congress notifies the President of its resolution to adjourn but the Constitution specifically excepts resolutions on a question of adjournment from the requirement that "resolutions to which the

²⁰ During the 86th Congress (1959-60), the President transmitted to the House of Representatives 7 messages and the executive departments transmitted 2,435 communications. Altogether there were 13,304 bills introduced in the House.

concurrence of both Houses is necessary" shall be presented to the President for his approval or veto.²¹

The aspect of the legislative process with which the President is necessarily most intimately concerned is the approval or disapproval of bills passed by the Congress. The President's veto power is provided for by the Constitution's legislative article rather than the executive article and Woodrow Wilson wrote, before becoming President, that that power is beyond all comparison the President's most formidable prerogative and that he is no greater than that prerogative makes him.²² However, the President's veto power is only suspensive and if two-thirds of each House agree to pass the bill notwithstanding the President's disapproval the bill becomes law. It is only in the case of the so-called pocket veto, when by their adjournment the Congress prevents the return of a bill by the President with his objections, that the veto is absolute—at least until a new bill is introduced and passed at a subsequent session.

Each Senator's term of 6 years is 2 years longer than that of the President, with the result that a Senator may serve during the administration of two Presidents—but one-third of the Senators are elected each 2 years. The Members of the House of Representatives are elected for 2 years, and at the President's midterm all seats in the House as well as one-third of the Senate are subject to change.

Obviously, by force of personality or the exigencies of particular circumstances, certain Presidents have earned the reputation of being "strong Presidents" and have had a relatively greater influence upon the Congress. It is axiomatic that in time of war the President assumes a more dominant position than in time of peace when the Congress is considered by many as dominant. However, principally because of the fundamental philosophy of separation of powers and checks and balances, there is no real fear on the part of Americans generally that the Presidency will ever evolve into a Caesarism, as has been suggested by writers in other countries for many years.

6. Immunities of Members of the Congress

Members of the Congress "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." These words in section 6 of article I comprise the constitutional grant of immunity to Members of the Congress.

The privilege from arrest is, in modern times, of relative unimportance because the interpretation of the term "breach of the peace" as including all indictable offenses is so broad that, except for petty offenses such as traffic violations, Members do not enjoy any special immunity—particularly since the abolition of civil imprisonment for debt. The grant of the privilege was based upon the need to expedite the public business and was personal to the Member—but was not intended to include members of his family as the privilege once did in England. The service of a subpoena upon a Member is a violation of the privilege and in order to comply with a subpoena a Member must first obtain the permission of the House, inasmuch as a privilege of a

²¹ Art. I, sec. 7, U.S. Constitution.

²² Wilson, "Congressional Government," 15th edition (1925), p. 52.

Member is a privilege of the House—and the House of Representatives has declined to adopt a general rule allowing its Members to waive the privilege. However, Members may be made parties in civil or criminal cases.

The immunity with respect to any speech or debate in either House, patterned on the grant contained in the English Bill of Rights, was intended to enable and encourage a representative of the public to discharge his public trust with firmness and success. It is an absolute immunity. It applies to utterances in the chamber and, as the Supreme Court has held, "in short, to things generally done in a session of the House by one of its Members in relation to the business before it."²³ There has not been a definitive holding, however, as to whether the privilege extends to words uttered in the Speaker's lobby or in a committee room, although it does include written reports, resolutions, and votes. The privilege of a Member does not, however, restrain the House itself. The Constitution merely provides that he shall not be "questioned in any other place" and that provision does not impair the constitutional authorization to each House to punish its own Members for disorderly behavior.²⁴ As Thomas Jefferson noted in his Manual,²⁵ a Member "is not to have privilege *contra morem parliamentarium*, to exceed the bounds and limits of his place and duty." Both Houses have adopted standing rules relating to decorum in debate, and if a Member transgresses any of the rules, the presiding officer shall, or any Member may, call him to order; in which case he shall immediately sit down. The usual modes of punishment are resolutions of censure or of expulsion—the latter requiring a two-thirds vote. Impeachment, however, is not a proper procedure for the removal of a Member of either House and the Senate has so ruled specifically with respect to one of its Members.

7. Disqualification from membership

The Constitution establishes a number of qualifications for Senators and Representatives:

A person may not be a Representative if he has not attained the age of 25 years, and been 7 years a citizen of the United States, and if he is not, when elected, an inhabitant of that State in which he is chosen.²⁶ The qualification relating to residence applies as of the time of election but the age and citizenship requirements presumably apply as of the time the Representative is seated. On one occasion, in the case of a Member-elect who had not attained the constitutional age, the Clerk did not enroll him until he reached that age. Customarily, Representatives reside in the congressional district within the State from which they are elected but this is not a constitutional requirement, and residence in another district within the State is not a legal or constitutional impediment to election.

A person may not be a Senator if he has not attained the age of 30 years, and been 9 years a citizen of the United States, and if he is not, when elected, an inhabitant of that State for which he is chosen.²⁷ There is at least one instance where a successful candidate for the

²³ *Kilbourn v. Thompson*, 103 U.S. 168, 205 (1880).

²⁴ Art. I, sec. 5, U.S. Constitution.

²⁵ The manual prepared by Jefferson, based upon British parliamentary practice, for his own use as Presiding Officer of the Senate, is still recognized as authoritative by the House and Senate.

²⁶ Art. I, sec. 2, U.S. Constitution.

²⁷ Art. I, sec. 3, U.S. Constitution.

Senate did not attain his 30th birthday until after the convening of the Congress to which he was elected but he did not present himself to take the oath until attaining the constitutional age.

A person holding a regular commission in the Armed Forces or a civil office under the United States may not constitutionally be a Member of either House during his continuance in that office.²⁸

The constitutional penalty for conviction by the Senate sitting as a court of impeachment is disqualification to hold and enjoy any office of honor, trust, or profit under the United States—including membership in either House. Furthermore, a person may not be a Member of either House who, having previously taken an oath to support the Constitution of the United States, has engaged in insurrection or rebellion against them or given aid or comfort to their enemies. But Congress may by a vote of two-thirds of each House remove such a disability.²⁹

The Constitution specifically provides, however, that no religious test shall ever be required as a qualification to any office or public trust under the United States.³⁰

The Constitution also provides that each House shall be the judge of the elections, returns, and qualifications of its own Members,³¹ and even the statutes relating to the method of instituting a contest as to the right to a seat are not absolutely binding on either House. There is no available judicial appeal from the decision of the House in this matter. Whether the power to act as judge of the qualifications of a Member permits either House to waive any constitutional requirement for membership has not been determined although it has been suggested academically that the Senate is not bound by those prescribed qualifications. It would seem that the better view is that each House, the Members of which must take an oath to support the Constitution, must exercise its powers under this clause in the light of and in harmony with other constitutional provisions and that it could not nullify or ignore those requirements.

8. Emoluments of Members

The Constitution provides that the Senators and Representatives shall be paid a compensation to be fixed by law and paid out of the Treasury of the United States.³² Senators-elect and Representatives-elect whose credentials, in due form, have been filed with the Secretary of the Senate and the Clerk of the House of Representatives, respectively, receive their salaries monthly from the beginning of their terms.

The compensation of the President of the Senate (the Vice President of the United States) is \$35,000 per annum, plus an expense allowance of \$10,000 per annum.

The compensation of the Speaker of the House of Representatives is \$35,000 (plus an expense allowance of \$10,000) per annum, and of Senators and Representatives (including the Resident Commissioner from Puerto Rico), \$22,500 per annum. Members have the privilege of franking their domestic mail of official character and also receive allowances for stationery, postage, telegram and long-distance telephones, and for office space in home districts.

²⁸ Art. I, sec. 6, U.S. Constitution.

²⁹ Amendment XIV, sec. 3, U.S. Constitution.

³⁰ Art. VI, U.S. Constitution.

³¹ Art. I, sec. 5, U.S. Constitution.

³² Art. I, sec. 6, U.S. Constitution; see also 2 U.S. Code, ch. 3.

Members are paid a travel allowance for one round trip each session between their homes and the District of Columbia, and are also authorized to deduct from their income for tax purposes \$3,000 actual travel and living expenses in connection with their official duties.

Members are provided with a suite of offices in one of the Senate Office Buildings or House Office Buildings, respectively, and with various items of equipment for their office use. They are also provided with space in the post office or Federal building in their home State or district, or, if none is available, are given an allowance for rental, in addition to a quarterly allowance for the expenses of that office.

Each Representative from a district having 500,000 or more inhabitants is authorized to employ office clerks at the aggregate basic rate of \$23,000 per annum, and Members from smaller districts are allowed clerk hire in the sum of \$20,500, subject to several pay-increase statutes. The clerk hire allowance of Senators varies in a greater degree according to the number of inhabitants in their respective States.

Members may join the civil service retirement system and pay 7½ percent of their salary each month toward retirement benefits. They may also pay monthly premiums on a group life insurance policy in the face amount of their annual salary. If a Member dies while in office his widow is usually voted a gratuity equal to a year's salary.

At the time of the adoption of the first 10 amendments to the Constitution the States declined to ratify a proposed amendment providing that "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened." The salary of Members has been varied by statute on several occasions, effective during the Congress at which they were enacted, and other allowances have been similarly provided by statute or resolution.

9. Differences in "*Second Chamber*"

Although the term "Second Chamber" does not generally prevail in congressional usage, it is presumed here to refer to the Senate. Moreover, the term "Upper House" does not have any constitutional sanction—although that term is more or less commonly applied to the Senate—because the American system did not perpetuate the relative social standing that existed between the members of the House of Lords and of the House of Commons in the British Parliament.

In respect of legislative functions, except for the requirement that revenue bills can originate only in the House of Representatives,³³ there is no distinction between the Senate and the House of Representatives, both Houses being equal; and affirmative action by both Houses on a legislative proposal is required for passage and presentation to the President before it becomes a law.

The Senate, however, has two functions that it does not share with the House of Representatives, each of which relates to its power of advice and consent with respect to actions by the President.

In the first place, the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."³⁴ Here, in the important matter of foreign relations, the Senate

³³ Art. I, sec. 7, U.S. Constitution.

³⁴ Art. II, sec. 2, U.S. Constitution.

enjoys a singular prerogative. Without the advice and consent of the Senate the President is unable to conclude and proclaim a treaty with a foreign nation. The Senate standing Committee on Foreign Relations, which has been in existence for nearly a century and a half, frequently is kept informed by the Secretary of State during negotiations for a treaty. At the time of the drafting of the Constitution of the United Nations—as well as in the drafting of other important treaties—the President actually appointed several Senators as members of the commission charged with that task.

When a treaty is laid before the Senate for consideration it is read a first time and the only motions in order are (1) to refer it to a committee, (2) to print it in confidence for the use of the Senate, (3) to remove an injunction of secrecy, or (4) to consider it in open executive session.³⁵ (A committee to which a treaty is referred may hold extensive hearings on the matter.) After being reported by a committee and lying on the table for 1 day, a treaty may be read a second time and considered as in Committee of the Whole, by articles, and committee amendments are acted upon first, after which other amendments may be proposed. When completed, the proceedings in the Committee of the Whole are reported to the Senate and the question is taken on concurring in the amendments of the Committee of the Whole, and then new amendments may be proposed. The decision taken is then reduced to the form of a resolution of ratification, with or without amendments as the case may be, which is proposed on a subsequent day. On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senators present is necessary for a determination in the affirmative. Unfinished proceedings on treaties terminate with the Congress and are renewed at the commencement of the next Congress as if no proceedings had been previously had thereon. The concurrence of the House of Representatives is not contemplated by the Constitution.

The second Presidential action in which the Constitution envisages the advice and consent of the Senate is the appointment of ambassadors, other public ministers and consuls, judges of the Supreme Court, and other officers; but the Congress by law may vest the appointment of inferior officers in the President alone, in the courts of law, or in the heads of departments.³⁶

When a nomination is made by the President of the United States to the Senate it is referred to an appropriate committee. The committee may hold extensive hearings on the matter in public or executive (closed) sessions at which the nominee and other persons may appear or be called as witnesses.

The final question on the nomination, which may not be put on the day the nomination is received nor on the day on which it is reported is: "Will the Senate advise and consent to this nomination?" Debate in the Senate is subject to the rules of debate as upon any other Senate business. A majority vote of the Senators voting is necessary to carry the question in the affirmative. Any Senator who voted with the majority in confirming or rejecting a nomination may move for a reconsideration on the same day on which the vote was taken or on either of the next 2 days of actual executive session. The motion may be laid on the table³⁷ without prejudice to the nomination

³⁵ Rule XXXVII, Standing Rules of the Senate.

³⁶ Art. II, sec. 2, U.S. Constitution.

³⁷ The expression to "lay on the table" in the congressional system means to postpone action indefinitely—not to initiate action, as in the parliamentary system.

and that is a final disposition of the motion. Nominations neither confirmed nor rejected during the session at which they are made may not be acted upon at a succeeding session without again being made to the Senate by the President of the United States.³⁸

In the matter of impeachments, the Senate sits as a high court of impeachment to try officers impeached by the House of Representatives and if the President were being tried the court would be presided over by the Chief Justice of the United States.³⁹ The constitutional division of functions relating to impeachments between the House of Representatives and the Senate found a precedent in the practice in England where impeachments were initiated by the House of Commons and tried by the House of Lords.

10. Summary

The presidential system and the parliamentary systems have comparatively little in common in respect of the constitutional relation between the legislative body and the Executive. The philosophy of the separation of powers underlying the United States Constitution gives to the Executive the initiative in forming and dismissing his Cabinet—which in any event is not a counterpart of the Cabinet in the parliamentary systems. As a corollary to the principle of separation of powers, however, there is a system of checks and balances designed to frustrate the arrogation of all power by one branch of the Government, and accordingly, the legislative branch, by action in the Senate, exercises functions of advice and consent to certain Executive appointments and other actions, particularly the making of treaties. In like manner, the President is required to suggest to the Congress measures for enactment into law that he deems necessary and expedient although he is not officially or unofficially represented in either House for the purpose of furthering his recommendations, and the failure of the Congress to enact his proposals does not impair his tenure of office or that of his Cabinet. A vote of no confidence is unknown to the congressional system.

Other aspects of the system of checks and balances, including the functions of the Congress with respect to administrative policy, economic affairs, and foreign policy, will be delineated in other parts of this paper.

³⁸ Rule XXXVIII, Standing Rules of the Senate.
³⁹ Art. I, sec. 3, U.S. Constitution.

PART II

METHODS BY WHICH THE CONGRESS EXERCISES CONTROL OVER ADMINISTRATIVE POLICY, ECONOMIC AFFAIRS, AND FOREIGN POLICY

1. Introduction
2. Questions and interpellations
3. Congressional committees and commissions
4. Congress and witnesses
5. Congress, the budget, and national economy
6. Congress and delegated legislation
7. Congressional control by audit
8. Congress and nationalized industries
9. Congress and foreign affairs
10. Congress and the Executive between sessions
11. Congress and the law
 - (a) Measures taken to insure the legality of action taken by the Executive or its servants
 - (b) Measures taken to insure the legality of actions by the President
 - (c) Congress and breach of the law
 - (d) Congress as prosecutor or judge

1. Introduction

The procedures by which the Congress seeks properly to perform its duties within the limits laid down by the Constitution are varied and derive from several provisions of the Constitution, particularly the clause directing the Congress to make all laws that are necessary and proper for carrying into execution all powers vested by the Constitution, and the clause authorizing each House to make its own rules. Accordingly, the Congress is afforded generally adequate opportunities and means of exercising control over the initiation and carrying out of administrative policy, economic affairs, and foreign policy.

In the matter of congressional procedures, the standing and special committees of each House play most important roles. However, it must be remembered that the Congress proceeds as a body on the initiative of an individual Member—and all Members are “private Members.”

2. Questions and interpellations

The institution of interpellations that prevails in a number of parliaments, by which questions on major issues contemplate the initiation of a debate and may result in a vote of no confidence, is unknown in the American presidential system. Similarly, the rather extensive practice of the parliamentary systems of setting aside regular times each day or week for Members to put questions to members of the cabinet—“Question Time”—is not exercised in the Congress of the United States of America where members of the cabinet do not have seats in either House. This is not to say, however, that the Congress is powerless to obtain information concerning the policies or the activities of the Executive.

The Constitution requires that the President shall from time to time give to the Congress information on the state of the Union — which is complied with by the President's message on the state of the Union usually delivered in person at a joint meeting during the first few days of each regular session of the Congress. Heads of executive departments appear rather frequently before committees of each House (in either public or closed meetings) and, in response to questions put by committee members, testify in detail on matters within the competence of the respective committee in the course of hearings on the budget or on legislative proposals or investigations.

In recent years the exercise of the long-asserted privilege of the Executive to withhold from the Congress information the disclosure of which the Executive claims would not be in the national interest has occasioned increased comment in the Congress and elsewhere. However, in some instances the Congress (or the committee concerned) did not press the matter.

A statute enacted in 1928 provides that every executive department and independent establishment of the Government shall, upon request of the Committee on Government Operations of the House, or of any seven Members thereof, or upon request of the Committee on Government Operations of the Senate, or any five Members thereof, furnish any information requested of it relating to any matter within the jurisdiction of the committee.¹ That statute does not, however, provide any sanction for failure to comply with such a request. The subject continues to occupy the attention of the Congress, and the House Committee on Government Operations has repeatedly criticized abuse of the claim of an executive privilege to withhold information from the Congress.² In 1960, the committee concluded that, while the power of subpoena to obtain information from the executive branch should be used only as a last resort, the Congress should utilize the power of the purse and provide, in authorizing and appropriating legislation, that the continued availability of appropriated funds is contingent upon the furnishing of complete and accurate information relating to the expenditure of such funds to the General Accounting Office and to the appropriate committees of Congress at their request.³ Recently, provisions have been included in several statutes dealing with the foreign aid program to require the furnishing of information to committees after formal request. These provisions variously have fixed a time limit for compliance, provided for a cutoff of pertinent funds as a sanction for failure to comply, and also permitted noncompliance if the President certifies that he has forbidden disclosure and gives his reasons for so doing.⁴

¹ Art. II, sec. 3, U.S. Constitution.

² 5 U.S. Code § 105a.

³ H. Repts. Nos. 234, 1157, and 1224, 86th Cong.; H. Rept. No. 818, 87th Cong.

⁴ H. Rept. No. 2207, 86th Cong.

⁵ In 1960, the Comptroller General of the United States construed sec. 401(h) of the Mutual Security Act of 1959 (amending sec. 533A(d) of the Mutual Security Act of 1954), which authorized the expenses of the Office of Inspector General and Comptroller, Department of State, to be charged to program funds only so long as requests for information by committees were complied with and which did not provide for a Presidential certification to permit noncompliance. The Comptroller General's decision of December 8, 1960 (B-143777), held that unless certain requested information were furnished to the committee, further use of program funds would be disallowed. On the other hand, the Attorney General advised the President on December 19, 1960, that the Comptroller General's decision was an erroneous interpretation of the law which would reach an unconstitutional result. Accordingly, the President, on December 23, 1960, directed the Secretaries of State and Treasury to continue until the end of his term payment of expenses for the office in question out of program funds. Following the change of administration on January 20, 1961, operating procedures were eventually worked out with the Department of State whereby the information was made available to the committee. See also Mutual Security Appropriation Act, 1960, sec. 111(d); Mutual Security Act of 1960, sec. 131(a); Mutual Security Appropriation Act, 1961, sec. 101(d); Foreign Assistance Act of 1961, sec. 634(c).

In his address to the Congress on the state of the Union, on January 30, 1961, President Kennedy stated that he will not withhold from the Congress "any fact or report, past, present, or future, which is necessary for an informed judgment of our conduct and hazards."

The Congress, by law, has imposed requirements upon the President and every executive department, as well as agencies and commissions, to submit to the Congress at stated times reports of their activities. There are in excess of 400 such requirements.⁶ These reports are customarily referred to the standing committee having jurisdiction of the subject matter and may be the occasion for a committee hearing to seek additional information.

Furthermore, individual Senators and Representatives, on their own initiative or at the suggestion of a constituent, often request by mail, telephone, or personal interview, an explanation of administrative policies in specific cases from the Secretary concerned, and occasionally the reply, if given, is inserted in the Congressional Record by the Member.

There are other ways in which the Congress can exercise power relative to obtaining information from the executive branch. For instance, the Senate, in determining whether to confirm a presidential nomination, may consider the nominee's views—and his prior record, if any—with respect to furnishing information to the Congress.⁷

As a last resort the Congress possesses the power of impeachment for the removal of an officer by reason of malfeasance or nonfeasance in office. In such a case the House of Representatives serves in a capacity comparable to a grand jury and the Senate has the sole power to try impeachments, the affirmative vote of two-thirds of the Senators being required for a conviction.⁸

It is apparent, therefore, that the absence of the institution of Interpellations or Question Time does not constitute a barrier between the Congress and the executive branch with regard to obtaining information from the latter, and the Congress generally obtains the information it needs in order to act.

3. Congressional committees and commissions

More than a generation before he became President, Woodrow Wilson wrote that "Congress in its committee rooms is Congress at work."⁹ Precisely because the Congress does not operate in the fashion of a parliament, considering bills in the first instance in a Committee of the Whole with Cabinet members on hand to further legislative proposals, the need for a system of standing committees was demonstrated in the early days of the Republic. At the present time there are 20 standing committees in the House of Representatives and 16 in the Senate.¹⁰ The several jurisdictions of these committees cover almost 200 classifications of matters which may come before them. Usually a committee has a number of subcommittees, each with jurisdiction of particular matters within the general jurisdiction of the full committee. It is ordinarily in the subcommittee that the first consideration is given to a specific matter. In addition there

⁶ See "Reports To Be Made to Congress" (H. Doc. No. 23, 87th Cong.).

⁷ In 1959 charges were made and extensively debated in the Senate that an individual whose Cabinet nomination was pending had deliberately withheld certain information from the Congress during his prior service as head of another Federal agency. These charges undoubtedly contributed to the Senate's rejection of his nomination. (See S. Ex. Rept. No. 4, 86th Cong. (minority and individual views), at 105 Congressional Record 9982-9987; see particularly 105 Congressional Record 10271 and 10907.)

⁸ Art. I, secs. 2, 3, U.S. Constitution.

⁹ Wilson, "Congressional Government," p. 79.

¹⁰ Rule X, Standing Rules of the House of Representatives; rule XXV, Standing Rules of the Senate.

are several standing joint committees of the two Houses but of these only the Joint Committee on Atomic Energy is authorized to report legislative bills—by reporting identical bills to each House simultaneously.

Each committee is composed of Members from the two major political parties, elected by the respective House, in proportion to the total strength of the parties in that House. In allocating committee assignments all Members who are not of the majority party are assigned places with the minority Members. Although third parties have not been entirely unknown to the Congress, there are in modern times rarely more than two or three third-party or independent Members in either House. Since the end of World War II there have never been more than two such Members in the House of Representatives, and since 1954 there has been none. In the House of Representatives, nominations of Democratic Members to committees are made by the Democratic Members of the Committee on Ways and Means while the Republican Members are nominated by the Committee on Committees made up of the senior Republican Member from each State. In the Senate each party has a Committee on Committees for the assignment of Members to committees. Once appointed to a standing committee a Member usually retains his membership and by operation of the seniority rule will become chairman when he is the oldest member of the majority party in point of service on the committee.

In addition to the standing committees that exist under the rules of each House, special committees are occasionally appointed pursuant to a resolution in either House for a particular purpose, generally terminating at the end of the Congress during which they have been created.

These special committees resemble to some degree the commissions of inquiry created in the parliamentary system, except that, inasmuch as membership is restricted to Members of Congress, the executive branch is not represented on the committees.

The parliamentary system of questions and interpellations is not essential to the presidential system because of the numerous opportunities afforded to committee members to interrogate Cabinet members and other officers in the course of committee consideration of the budget and legislative proposals as well as in investigative hearings. The principal practical distinction between the two systems is that congressional interrogation never terminates in a vote of no confidence.

The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.¹¹ Accordingly, the Legislative Reorganization Act of 1946, as an expression of the rulemaking power of each House, authorized each standing committee of the Senate to make investigations into any matter within its jurisdiction and to hold hearings at such times and places during the sessions, recesses, and adjourned periods, and to require by subpena or otherwise the attendance of such witness and the production of such documents, as

¹¹ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

it deems advisable.¹² Although only three of the standing committees of the House of Representatives now have the power under the rules to subpoena witnesses and records, that authority may be granted by the House by special resolution to other committees as the need arises.

To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives is authorized to exercise continuous watchfulness ("legislative oversight") of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of the committee; and, for that purpose, to study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.¹³

Committees do not make a general practice of issuing subpoenas to officers of the executive branch—such action being ordinarily unnecessary because the officers voluntarily accept the committee's invitation to appear and testify. There is, however, no definitive determination of the question as to whether a committee may compel an officer to supply information in the face of a directive by the President to withhold the information. Although this is one of the more vexing problems existing today in legislative-executive relations, there has not yet been any real crisis as a result of an intransigent attitude on the part of an officer of an executive department.

Each House has the means of enforcing its process and requiring the attendance and testimony of recalcitrant witnesses and on occasion has referred such matters to the Department of Justice for prosecution under the law. It might not be feasible, however, to request the Department of Justice to prosecute an officer of the executive branch whose refusal to comply with the congressional demand is based upon a directive by the Chief Executive. Each House conceivably could resort to an expedient that it has used in the past in the cases of private witnesses, but that is still untried in respect of public officials, namely, bringing him before the bar of the House and if he there continues his refusal commit him to the custody of the Sergeant at Arms or to the common jail of the District of Columbia.

The commissions that the Congress occasionally creates by law are usually for the purpose of commemorating a particular event or for some other patriotic purpose and may include private individuals or civil or judicial officers as well as Members of Congress, but these commissions have a limited function that is not usually connected with administrative policy, economic affairs, or foreign policy.

4. Congress and witnesses

Because of the diverse and complicated subject matters that may become legislative proposals it is obvious that the expertise of governmental and private specialists in various fields is essential to committees engaged in considering bills or making inquiries as to whether any legislation is necessary and, if so, what it should provide. As pointed out previously, the committees may invite and—in some cases, if necessary—subpoena witnesses to testify before them and provide technical and professional information to assist them in their considerations. Witnesses may be interested individuals, representatives of professional, industrial, or labor groups, or officials of national or local government. The so-called Lobbying Act requires the regis-

¹² 2 U.S. Code § 190b.

¹³ 2 U.S. Code § 190d.

tion of any person, with certain exceptions, who engages himself for pay for the purpose of attempting to influence the passage or defeat of any legislation by the Congress.¹⁴ Many "lobbyists," however, are recognized experts in their respective fields and are respected by committee members of both political parties. No onus attaches to their being paid for their services and have registered in conformity with the law.

Each standing committee has a permanent professional staff to assist it in matters within its jurisdiction composed of experts in their respective fields—as frequently are individual Members of the committee—who can evaluate the testimony of lobbyists and other experts appearing before the committee. A committee may not, however, appoint to its staff any experts or other personnel detailed from any department or agency of the Government without the written permission of the Committee on Administration of the respective House.¹⁵

5. Congress, the budget, and national economy

"No money shall be drawn from the Treasury, but in consequence of appropriations made by law."¹⁶

In January of each year, usually within a few days after he has delivered his address on the state of the Union, the President transmits to the Congress his annual budget message, accompanied by the budget for the ensuing fiscal year commencing on July 1. The budget is prepared by the Bureau of the Budget in the Executive Office of the President, based upon estimates submitted by the heads of departments and agencies, upon which the Bureau holds hearings and in which it may recommend revisions by the President except with respect of estimates for the legislative branch and for the Supreme Court. As transmitted to the Congress the budget is the basic working document—the starting point of consideration—of the respective Committees on Appropriations to which it is referred by the Speaker of the House of Representatives and the President of the Senate.

These committees are organized into several subcommittees for the purpose of holding hearings on the estimates relating to various departments and agencies, at which officials appear for the purpose of justifying their estimates and to submit to questions. The hearings are conducted in executive (closed) session, but a transcript of the testimony is made and subsequently printed for the information of the Congress. Upon the conclusion of the hearings, the subcommittee prepares an appropriation bill for the departments and agencies concerned which it then reports to the full committee for subsequent reporting to the House. Under the Rules of the House of Representatives, a general appropriation bill may not be considered in the House until printed committee hearings and a committee report thereon have been available for the Members of the House for at least 3 calendar days.¹⁷ Once reported to the House an appropriation bill must follow all the parliamentary stages of a legislative bill before it becomes law. It may be amended in either body by reducing or increasing the amounts or by the elimination of items in their entirety. This power of the Congress to amend the President's estimates is an

¹⁴ 2 U.S. Code §261 et seq.

¹⁵ Rule XI, par. 28, Standing Rules of the House of Representatives; 2 U.S. Code § 72a(f).

¹⁶ Art. I, sec. 9, U.S. Constitution.

¹⁷ Rule XXI, par. 6, Standing Rules of the House of Representatives.

essential difference between the presidential and the parliamentary systems.

At the time of submitting the budget to the Congress the President also furnishes information as to appropriations, expenditures, and receipts of the Government during the current and the last completed fiscal years, as well as balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) its estimated condition at the end of the fiscal year in progress, and (3) its estimated condition at the end of the ensuing year if the proposals in the budget are adopted. If the estimated receipts plus the estimated amounts in the Treasury at the close of the current fiscal year are less than the estimated expenditures, the President must make recommendations to the Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency.¹⁸ The Congress by law has established a limitation on the public debt that may not be exceeded.

The President's recommendations for obtaining additional revenues are referred to the House of Representatives Committee on Ways and Means for the purpose of drafting necessary revenue bills. The Constitution requires that all revenue bills originate in the House of Representatives but the Senate may propose amendments as on other bills.¹⁹

In each House there is a standing Committee on Government Operations which has the duty of (1) receiving and examining reports of the Comptroller General of the United States and of submitting such recommendations as are necessary or desirable in connection with the subject matter of the reports, and (2) studying the operation of Government activities at all levels with a view of determining its economy and efficiency.²⁰

Furthermore, under the provisions of the Legislative Reorganization Act, in order to assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and House of Representatives exercises continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of the committee. For that purpose they study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.²¹ This is the so-called legislative oversight function of committees.

On the other hand, on one or two occasions a President has declined to expend funds appropriated by the Congress for purposes with which he was not in full accord.²²

6. Congress and delegated legislation

The making of laws is the function of the Congress in which both the Senate and the House of Representatives participate. ("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.")²³ The Congress may not delegate this function to

¹⁸ 31 U.S. Code § 13.

¹⁹ Art. I, sec. 7, U.S. Constitution.

²⁰ Rule XXV, Rules of the Senate; rule XI, Rules of the House of Representatives.

²¹ 2 U.S. Code § 190d.

²² In 1949 President Truman refused to expend about \$800 million to increase the number of groups in the Air Force; and in 1958 President Eisenhower, who proposed to reduce the strength of the Marine Corps, refused to expend the funds appropriated to maintain the full strength of the corps.

²³ Art. I, sec. 1, U.S. Constitution.

either the executive branch or to the judicial branch.²⁴ This is not to say that the executive branch (or regulatory agencies) may not issue regulations and orders pursuant to authority provided by law, or that the courts may not construe the acts of Congress and apply them to particular facts and circumstances. The Congress may authorize the promulgation of regulations by the Executive to implement statutes in which the Congress has laid down a policy and has provided standards to guide or limit the Executive when acting under the delegation. Accordingly, the Congress has authorized the President and the head of each executive department to promulgate rules and regulations to perform the functions prescribed for them by statute. In addition, the Congress has created a number of regulatory commissions and agencies (sometimes referred to as the "fourth branch" of the Government) to administer policies established by the statutes creating them. By the Administrative Procedure Act of 1946²⁵ the Congress has imposed a number of conditions upon the preparation and promulgation of rules and regulations, and has provided for the judicial review of orders issued by the executive and regulatory agencies. The Congress does not utilize to any great extent the practice, that is prevalent in Great Britain, of requiring proposed regulations to be submitted to it for its approval or veto. It has, however, in enacting a series of bills authorizing the President to promulgate plans reorganizing the several executive departments and agencies, required that the plans be submitted to the Congress before becoming effective. Similarly, in authorizing the Supreme Court to promulgate rules of procedure for the inferior courts it has required that the proposed rules be first reported to it. In some cases a simple resolution by one House of the Congress is all that would be necessary to veto the reorganization plan or the rules and regulations.

7. Congressional control by audit

Since the appropriation of funds to carry on the operations of government is one of the most important functions of the Congress, it is natural that the Congress should be concerned with the manner in which the appropriated funds are expended. By the Budget and Accounting Act of 1921²⁶ the Congress established the General Accounting Office under the direction of the Comptroller General, who is accountable to the Congress rather than to the Chief Executive. He may be removed from office before the end of his term only by impeachment or for cause by a joint resolution of the Congress. One of the objects of the Budget and Accounting Act was to provide an audit of government accounts by an independent office which is, in effect, an arm of the Congress.

The Comptroller General's reports to the Congress on analyses of expenditures of each agency in the executive branch are intended to enable the Congress to determine whether public funds have been economically and efficiently administered and expended. Also, as previously mentioned, the Committee on Government Operations in each House is charged with the function of considering the reports submitted by the Comptroller General and of making necessary or desirable recommendations in connection with the subject matter

²⁴ "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed . . ." *Schechter v. United States*, 295 U.S. 496 (1935). "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Weyman v. Southard*, 10 Wheaton 1, 42 (1825).

²⁵ 5 U.S. Code § 1001 et seq.

²⁶ 31 U.S. Code §§ 1-60.

of the reports. These committees also study the operation of Government activities at all levels to assess its economy and efficiency.

8. Congress and nationalized industries

Unlike a number of countries throughout various parts of the world, the United States does not have any truly nationalized industries. Private enterprise in a competitive society is one of its most cherished features. In order to preserve private enterprise, the Congress has granted considerable subsidies to the private operators in certain industries, particularly in the field of transportation, and to farmers, but leaving the operation to the private owners.

There is, to be sure, a degree of public enterprise in the United States, but not with the aim of taking over an established profitable industry. As a rule public enterprise is limited to matters intimately connected with the national defense or the public welfare—for example, atomic energy, flood control, reforestation, and the like, rather than radio broadcasting, steel, coal, or transportation.

The Congress has also created a number of government-owned corporations, such as the Panama Canal Company, the Tennessee Valley Authority, and the Atomic Energy Commission. In creating that Commission the Congress expressly stated:

It is therefore declared to be the policy of the United States that (a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common defense and security; and (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living and strengthen free competition in private enterprise.²⁷

In establishing the public corporations the Congress has as a rule provided for the submission of periodic reports by the head of the corporations to the Congress.

9. Congress and foreign affairs

The Constitution, in vesting the executive power in the President, grants him the initiative in foreign affairs but his power is circumscribed by the constitutional requirements that treaties must be concurred in by "two-thirds of the Senators present" and that his appointments of ambassadors are subject to the advice and consent of the Senate. In the matter of the appointment of ambassadors the Senate usually confines itself to giving or withholding its consent in the same fashion as with respect of the appointment of Cabinet members. The Senate may withhold its consent to treaties and at times has imposed conditions and reservations, but aside from occasional participation by individual Senators during the negotiation of treaties it does not generally exercise to any great extent its function of advice. In recent years the President has entered into numerous executive agreements with one or more foreign countries concerning matters that usually are of less international magnitude than subjects of treaties. These executive agreements do not have the same force in domestic affairs as treaties. Under the Constitution, treaties are the supreme law of the land and supersede prior statutes enacted by the Congress on the same subject. By the same token a statute enacted subsequent to a treaty supersedes the treaty to the extent of any inconsistency between them, although the United States might still have responsibilities to the other contracting parties under the treaty. Of course, a treaty

²⁷ 42 U.S. Code § 2011.

cannot contravene or supersede any provision of the Constitution.³⁸ The Congress can, of course, refuse to provide authorizations and appropriations to carry out Presidential policies. This is a negative power and its occasional use plus the right of refusal by the Senate to confirm nominations of ambassadors or ratify treaties may lead to the erroneous impression that the Congress can play only an obstructionist role.

The recent state of international affairs throughout the world has been the occasion for a greater manifestation on the part of the Congress of its potential role in foreign affairs—particularly in the sphere of implementation of decisions made by the President, but also in making policy itself. In addition, the Congress has increased its own participation in international groups similar to the Inter-Parliamentary Union, and the activities of the groups may lead to legislation by the Congress.³⁹ For many years a bipartisan foreign policy has been a reality even when the President and the congressional majority are not of the same political party. The Congress and individual Members reserve to themselves, however, the prerogative of inquiring into and criticizing the activities of the Executive in foreign affairs as well as in domestic matters.

The constitutional grants of authority to the Congress to regulate commerce with foreign nations, to enact immigration and naturalization laws, to lay and collect duties, to define and punish offenses against the law of nations, and to declare war, all touch upon the field of foreign affairs in important ways.

10. Congress and the Executive between sessions

Except in time of war or national emergency declared by the President, the two Houses must adjourn sine die at the end of July each year, unless otherwise provided by the Congress.⁴⁰ Thus there may be a period of 5 months each year during which the Congress is not in session and, as a body, has no direct communication with the Executive. On occasion, the resolution of adjournment has provided for a resumption of the session at the call of the congressional leadership;⁴¹ and, of course, the President may convene either or both Houses in special session.⁴²

Standing committees of both Houses serve during the entire life of the Congress and a committee may be empowered to sit during a recess or adjournment which is within that constitutional period. In authorizing investigative functions for special or standing committees it is not uncommon for the House to authorize them to sit even outside the District of Columbia, whether or not the House is in session. Consequently, the relations between the Congress and the Executive between sessions are limited to committee activities and, of course, to requests for information by individual Members.

The President has the power to fill all vacancies in appointive offices, requiring Senate confirmation, that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session.⁴³

³⁸ *De Geofroy v. Rigg*, 133 U.S. 258 (1890).

³⁹ An informal but significant development in recent years resulting from increased foreign travel by Congressional committees and individual Members, is the rather extensive practice of personal conversations between Members and foreign officials which must inevitably have an impact upon the conduct of foreign affairs.

⁴⁰ 2 U.S. Code § 198.

⁴¹ For example, see H. Con. Res. 222, 80th Cong., agreed to Aug. 7, 1948.

⁴² Art. II, sec. 3, U.S. Constitution.

⁴³ Art. II, sec. 2, U.S. Constitution.

11. Congress and the law

The process by which the Congress discovers the facts, makes up its mind, and arrives at a decision have been described, but always on the assumption that both the Executive and the Congress have kept strictly to their respective spheres and that the actions of the former have been within the law. What has now to be considered is the course of action open to the Congress when either there has been a breach of the law or at least dubiety as to the legality of the Executive's action.

(a) *Measures taken to insure the legality of action taken by the Executive or its officials.*—It is normal practice for officers or employees of the executive branch to take legal advice from the solicitor or general counsel within the department or agency on the legality of proposed actions. Furthermore, the President himself, or a head of a department or bureau, may request an advisory legal opinion of the Attorney General with respect to an action proposed to be taken by him. One of the most publicized of the Attorney General's opinions in recent times was that given to President Roosevelt in 1940 affirming the constitutionality and legality of the proposed transfer of 50 destroyers to Great Britain.³⁴ Similarly, the Comptroller General, who is the head of the General Accounting Office, may render opinions as to the legality of expenditures, actual or proposed. The published opinions and decisions of these officers may be and frequently are referred to as precedents in similar cases in the future.

A person aggrieved by Executive action may seek redress in an appropriate court in accordance with the statutory remedies provided by the Congress. The Congress has established a special U.S. Court of Claims with jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, an act of Congress, or a regulation of an executive department, upon an express or implied contract, or for damages not sounding in tort.³⁵ In addition, the Congress has provided in the Tort Claims Act that a person injured by the negligence of an employee of the United States under circumstances where the United States, if a private person, would be liable, may recover damages by administrative or judicial proceedings.³⁶ Similarly, a taxpayer may contest an assessment of tax in a special U.S. Tax Court or sue in the U.S. district court for a refund of tax erroneously paid.³⁷

The Administrative Procedure Act of 1946³⁸ also provides judicial review of decisions of administrative and regulatory agencies and commissions established by the Congress.

Public officials may be prosecuted in the U.S. district court for criminal malfeasance in office; and, of course, the Congress may impeach them for treason, bribery, or other high crimes or misdemeanors. Throughout the history of the Nation only 12 impeachment trials have been held, resulting in the conviction of 4 members of the judiciary but not one executive officer. In the only case of the impeachment of a President, that of President Johnson in 1868, the Senate declined to convict by a margin of one vote.

(b) *Measures taken to insure the legality of actions by the President.*—Unlike the sovereigns in certain other systems, the President of the

³⁴ Opinions of the Attorney General, vol 39, p. 484, Aug. 27, 1940.

³⁵ 28 U.S. Code §§ 171, 1491.

³⁶ 28 U.S. Code §§ 2672, 2675.

³⁷ 26 U.S. Code § 7441 et seq.; 28 U.S. Code § 1340.

³⁸ 5 U.S. Code § 1001 et seq.

United States is not above the law. At the time of his inauguration the President takes an oath that he will faithfully execute the office of President and will to the best of his ability preserve, protect, and defend the Constitution of the United States.³⁹ The Constitution provides that he, as well as the Vice President and all civil officers of the United States, shall be removed from office on impeachment for a conviction of treason, bribery, or other high crimes and misdemeanors. Presumably the President is also subject to the Federal criminal code and to the jurisdiction of the courts for any criminal actions on his part, and he would be subject to impeachment for such action or other malfeasance or nonfeasance in office not constituting a breach of the criminal code.

(c) *Congress and breach of the law.*—Under the principle of the separation of powers, the judicial power extends to all cases in law and equity arising under the Constitution, the laws, and treaties of the United States.⁴⁰ Accordingly the courts rather than the Congress have cognizance of breaches of the law. Committees of each House, however, frequently hold hearings for the purpose of determining the efficacy of existing laws and the need for amendments, in the course of which instances of breach of the law may be disclosed and investigated. As a legislative body the fundamental power that the Congress possesses to remedy a breach of the law is to enact amendments to the law effective for the future but hardly affecting the particular breach. The action of the Congress is prospective, and the Congress is expressly prohibited by the Constitution from passing *ex post facto* laws, i.e., penal statutes that are retroactive.⁴¹

If the Congress wishes to question the activities of officials, one or more of the appropriate committees of each House may call him to appear and explain his conduct, but aside from the impeachment procedure the Congress has no disciplinary powers over him.

(d) *Congress as prosecutor or judge.*—As pointed out previously, the impeachment process is generally the only function of the Congress by which it acts either as prosecutor or judge in the matter of breach of the law. In such a case the House of Representatives acts in a capacity comparable to that of a grand jury and the Senate has the sole power to try all impeachments—in other words, the House of Representatives is the accuser, and the Senate is the judge. If the President of the United States were to be tried the Chief Justice would preside. The concurrence of two-thirds of the Senators present is necessary to convict an officer by impeachment. Judgment in cases of impeachment may not extend further than to removal from office or honor, trust, or profit under the United States; but the party convicted is nevertheless liable and subject to indictment, trial, judgment, and punishment, according to law.

One other possibility of the Congress acting as prosecutor or judge should be mentioned. That is the trial at the bar of either House of a person charged with a contempt of that House. That practice has not been engaged in during modern times—persons charged with contempt being indicted and tried in the U.S. district court—but each House of the Congress still has the power to try such persons at the bar of the House, and to commit him to the common jail in the District of Columbia.

³⁹ Art. II, sec. 1, U.S. Constitution.

⁴⁰ Art. III, sec. 2, U.S. Constitution.

⁴¹ Art. I, sec. 9, U.S. Constitution.

PART III

POWERS EXERCISED BY THE CONGRESS OVER THE VARIOUS BRANCHES OF THE EXECUTIVE AND OTHER BODIES

1. Introduction
2. Congress' relations with the elected councils of local authorities
3. Methods by which the Congress insures that the exercise of executive authority is uniform throughout the country
4. The role of the Congress in the organization of public administration, e.g., in deciding the number, scope, and organization of the executive departments and other public bodies
5. Extent of the power of the Congress to settle disputes as to the rights, duties, and competence of different executive bodies
6. Congress and the appointment, dismissal, and conditions of service of public servants
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 - (a) Categories of courts and tribunals
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 - (c) Control exercised by the Congress over the jurisdiction of the courts
8. Direct control by the Congress over the Executive
9. Reports made by the Executive to the Congress
10. Reports made by the judiciary to the Congress
11. Interpretation of the law by the Congress
12. Congress and the Supreme Court
13. Differences in the relations of the Senate with the Executive from those already described

1. Introduction

In the report of the Association of Secretaries General of Parliaments this part was intended to accommodate situations in several of the countries where these powers are different from the powers for the general control of the Executive. In this paper, although several of those subjects have been treated in the first two parts and others have little or no application to the United States, there are a number of matters embraced in this part that have significance in the American system.

2. Congress' relations with the elected councils of local authorities

There is no structural relationship between the Congress and local authorities in the United States. Because of the Federal character of the American Government there are defined limitations on the power of the Congress to enact laws that have purely local application, i.e., intrastate matters not affecting the existence or operation of the National Government.

The Constitution guarantees every State a republican form of government¹ and reserves to the States, respectively, or to the people, all powers not delegated to the United States nor prohibited by it to the States.² In many respects, then, the several States are sovereign. The Constitution does deny a number of powers to the States and furthermore provides that the consent of the Congress must be obtained

¹ Art. IV, sec. 4, U.S. Constitution.

² Amendment X, U.S. Constitution.

by the States to levy any duty of tonnage, keep troops or ships of war in time of peace, enter into an 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.³ Frequently the legislatures of two or more States apply to the Congress for consent to enter into a proposed compact and the Congress may give absolute or conditional consent or decline to give any consent.

Furthermore, the supremacy clause of the Constitution provides that the laws of the United States made in pursuance of the Constitution are 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.⁴ The Congress thereby can supersede or nullify a statute enacted by a State legislature on a subject over which the Congress is competent to legislate. In recent years the Supreme Court of the United States has declared that a Federal statute relating to sedition had nullified a State statute on the same subject because the Congress had preempted the field.⁵ Some members have since suggested that legislation be enacted by the Congress to permit the States to enact their own laws on the subject.

In 1959 the Congress established the Advisory Commission on Intergovernmental Relations, to give attention to the need for the fullest cooperation and coordination among the Federal, State, and local governments, to bring together representatives of these levels of government for the discussion and consideration of common problems, to recommend the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government, and to recommend methods of coordinating and simplifying tax laws and practices to achieve a more orderly and less competitive fiscal relationship between the levels of government and to reduce the compliance for taxpayers.⁶ The membership of the Commission comprises three Members of each House of the Congress as well as private citizens, members of the President's Cabinet, State Governors, city mayors, State legislators, and elected county officers. The Congress, however, does not exercise any direct control over the State or local officials. In addition, the Committee on the Judiciary of the House of Representatives is currently (1962) engaged in a study of the problems concerning the State taxation of interstate commerce.

Generally, however, there is no direct relationship between the Congress and State or municipal legislative bodies.

3. Methods by which the Congress insures that the exercise of executive authority is uniform throughout the country

The President of the United States, as the Chief Executive—and not the Congress—has the primary responsibility of insuring that the exercise of executive authority is uniform throughout the country. Nevertheless, through the "legislative oversight" authority of each standing committee of the Senate and the House of Representatives, the Congress is in a position to inquire into the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of the committee. In this way any

³ Art. I, sec. 10, U.S. Constitution.

⁴ Art. VI, U.S. Constitution.

⁵ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

⁶ 5 U.S. Code § 2371.

lack of uniformity in the exercise of executive authority throughout the country would undoubtedly be noted and, if it were persisted in, the Congress would be able to take appropriate action to remedy the situation. Such action might take the form of denial of appropriations to the agency or department for that particular function, or the enactment of a new law transferring the authority to a different agency or department—or, if the offense were flagrant, the House of Representatives might initiate impeachment proceedings against the responsible officer.

On the other hand, a lack of uniform administration might be due to an ambiguity in the law, in which case the Congress could remedy the situation by enacting clarifying amendments.

4. The role of the Congress in the organization of public administration, e.g., in deciding the number, scope, and organization of the executive departments and other public bodies

The Constitution is silent on the subject of the number, scope, and organization of the executive departments and other public bodies. However, in the distribution of powers, a residuary clause grants to the Congress the authority to "make all laws which shall be necessary and proper for carrying into execution" all the powers vested by the Constitution in the Government of the United States, or in any department or officer.⁷ There are, in addition, several specific grants of power to the Congress, such as the power to establish post offices, to raise and support armies, to provide and maintain a navy, and so forth.

The authority of the Congress to decide the number, scope, and organization of the executive departments and other public bodies is also recognized by the clause that provides that the President, by and with the advice and consent of the Senate, may appoint all "officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law."⁸

In exercising its powers in this regard, the Congress has established 12 executive departments since the inception of the Government—the latest of which is the Department of Health, Education, and Welfare, established in 1953, following the authority delegated to the President by the Congress in the Reorganization Act of 1949. Of these, 10 are still in existence.

A major manifestation of the role of the Congress was the establishment in 1949 of the new Department of Defense, consolidating the then existing Departments of the Navy, Air Force, and War, which were abolished as executive departments but retained as military departments, whose heads, however, no longer have Cabinet status.⁹

Only the Congress can authorize the establishment of the executive departments and other public bodies, and when a new department or other public body is established the Congress determines its scope and organization. By subsequent legislation it may abolish functions, bureaus, or offices, or create additional ones within a department. The entire structure of the executive departments and of the independent agencies and commissions (sometimes referred to as "the fourth branch" of government) is within the competence of the Congress.

⁷ Art. I, sec. 8, U.S. Constitution.

⁸ Art. II, sec. 2, U.S. Constitution.

⁹ 5 U.S. Code § 17.

In recent years, however, the Congress has granted to the President a limited power of reorganization of existing departments and other public bodies. To carry into effect this power the President must promulgate reorganization plans which are subject to a veto by the Congress—or even by one House alone.¹⁰ Furthermore, there is a time limit placed upon the President's power, and the President may not enlarge the powers already granted to the departments or agencies by the Congress—he may merely transfer or reorganize them. When a reorganization plan becomes effective its provisions supersede the statutes with which they are in conflict but, of course, the Congress may subsequently enact a new statute superseding the reorganization plan.

5. Extent of the power of the Congress to settle disputes as to the rights, duties, and competence of different executive bodies

Although disputes between different executive bodies as to their respective rights, duties, and competence are possible, they rarely arise. The Congress does not seem to have the machinery to settle such a dispute if it does arise—aside from its powers to investigate or criticize, or to enact new legislation clarifying the existing laws that lead to the dispute.

If the dispute were positive in character—i.e., two or more bodies were claiming the same competence—it might very well present a justiciable issue affecting the rights of an individual. The person affected might seek relief in the courts by way of a writ or order of injunction restraining one of the bodies from acting. On the other hand, if the dispute were negative in character—i.e., at least two bodies refused to decide a specific juridical matter—the person affected could also seek relief in the courts by way of a writ of mandamus requiring the appropriate official to act. In neither type of dispute would the Congress have any function of deciding the rights, duties, or competence of the different bodies as to the individual.

6. Congress and the appointment, dismissal, and conditions of service of public servants

A very extensive system of career civil service based upon merit has been established by the Congress for almost a century. In the early days of the 19th century the so-called spoils system¹¹ prevailed under which appointments to positions in the civil service were largely made by the political party that won the election.

There are more than 2½ millions of civilian employees in the service of the Federal Government, of whom the number in the competitive service in recent years has been gradually increased to about 85 percent as a result of congressional action. These include nearly 1 million employees in the so-called classified service, about 700,000 blue-collar workers, and about 500,000 employees in the postal field service. Their positions are not subject to political fortunes. This state of affairs had its beginnings in the Civil Service Act of 1883 which has been broadened during the course of the years.

Aside from the heads of departments and other high positions that are subject to appointment by the President, by and with the advice and consent of the Senate, the civil service is a career service. There

¹⁰ See, for example, 5 U.S. Code § 133z-7, which provides that a resolution of either House may prevent a reorganization plan from becoming effective.

¹¹ "To the victor belong the spoils"—a remark by Senator William L. Marcy in 1832 is considered the origin of this designation.

are only about 1,200 positions exempted from that service, of which nearly half of the present incumbents were recruited from the competitive service and are eligible for transfer, demotion, promotion, or reinstatement to competitive positions in the civil service. Furthermore, about 30 percent of the present incumbents have veterans' preference and cannot be removed without at least 30 days' notice and the benefit of certain other procedures. All these benefits are the result of legislation by the Congress.

7. *The influence of the Congress on the courts*

(a) *Categories of courts and tribunals.*—In conformity with the political philosophy of separation of powers the Constitution provides that 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."¹² It also prescribes the original and appellate jurisdiction of the Supreme Court.

The Congress has, by law, established a system of intermediate appellate courts called courts of appeals, as well as courts of original jurisdiction called district courts.

As regards the Supreme Court, the Congress does not have the authority to enlarge or diminish its original jurisdiction, although it may constitutionally limit the Court's appellate jurisdiction by virtue of the clause granting that Court appellate jurisdiction both as to law and fact "with such exceptions and under such regulations as the Congress shall make."

The courts of appeals and the district courts, having been created by the Congress pursuant to article III of the Constitution, are sometimes referred to as "constitutional courts" and their judges hold office during good behavior—with no authority in the Congress to provide otherwise. Similarly, the Court of Claims, established by the Congress to determine suits against the United States not sounding in tort, is declared to be an "Article III court."¹³

In addition to the constitutional courts, the Congress has established a number of so-called legislative courts pursuant to its legislative authority under article I. For example, it has created the Tax Court to decide controversies arising out of rulings by the Internal Revenue Service.¹⁴ The judges of the legislative courts do not enjoy the same tenure as judges of the constitutional courts.

(b) *Congress' influence in electing or nominating judges or in their dismissal.*—The President of the United States by constitutional grant has the power, by and with the advice and consent of the Senate, to appoint judges of the Supreme Court; by statute he also has the same power with respect to judges of the courts of appeals and other courts.¹⁵ Consequently, aside from the Senate's role in "advising and consenting" to the President's nominations, the Congress as a body has no function in the matter. As mentioned earlier, in exercising its function of consenting to nominations, the Senate considers the nominations on the merits, but if a Senator of the majority party from the State in which a judge is to serve objects on the ground that the nominee is "personally objectionable" to him, the Senate will observe the unwritten rule of "senatorial courtesy" and reject the

¹² Art. III, sec. 1, U.S. Constitution.

¹³ 28 U.S. Code § 171.

¹⁴ 28 U.S. Code § 7441.

¹⁵ Art. II, sec. 2, U.S. Constitution; 28 U.S. Code, §§ 44, 133, 171, 211, and 251.

nomination. The President may follow the recommendations of the Attorney General in making his nominations, and individual Members of Congress may have a degree of personal influence, but this is a matter of practical politics rather than constitutional or statutory functions.

The only method of "dismissing" judges is by impeachment. Only four judges have been removed in this way throughout the history of the Nation.

(c) *Control exercised by the Congress.*—The Congress does not have any power to control the actions of judges. The independence of the courts is one of the cherished attributes of the American system of government.

8. *Direct control by the Congress over the Executive*

Congressional control of the execution of the laws is indirect rather than specific and is exercised through the ordinary procedures for congressional criticism, action on legislation and the budget, and by the Senate's functions of advice and consent to treaties and Presidential nominations. All these have been described earlier.

In recent years the Congress has been reserving to itself, or to one House alone, the right to veto certain executive acts. For example, in authorizing the President to promulgate plans reorganizing executive departments and agencies, the Congress has reserved the right to veto a proposed plan by the adoption of a simple resolution by either House within a certain period after it has been reported to the Congress by the President. Furthermore, in granting certain wartime or emergency powers to the President the Congress has provided that the powers may be terminated by the adoption of a concurrent resolution (which is not submitted to the President for his approval or veto).

A rare instance of attempted direct control by the Congress was the enactment of a provision in an appropriation act that funds appropriated to a particular department could not be used to pay the salaries of two specified individuals. The Supreme Court subsequently held that the provision was unconstitutional.¹⁶ The philosophy of the separation of powers is so integral a part of the constitutional system that after the Congress sets the policy by statute it normally makes no further attempt at direct control.

9. *Reports made by the Executive to the Congress*

As in most countries, the Executive is required to make periodic reports to the Congress. Perhaps the most important—and certainly the best known—is the report by the President on the state of the Union, which is delivered to the Congress during the first week of each regular session, frequently in person by the President at a joint session called for that purpose. This is made pursuant to the constitutional requirement that the President from time to time give to the Congress information on the state of the Union and recommend to their consideration such matters as he judges necessary and expedient.¹⁷ The state of the Union message is followed shortly by the President's budget message. Altogether the statutes require the President to submit more than 30 reports, some annually, others semiannually, and still others not less frequently than every 90 days.

¹⁶ U.S. v. Lovett, 328 U.S. 303 (1945).

¹⁷ Art. II, sec. 3, U.S. Constitution.

In establishing the several executive departments the Congress has provided that the head of each shall submit to the Congress an annual report, usually at the commencement of each regular session, embracing the general activities of the preceding calendar year. Furthermore, when by law additional or unusual functions are conferred upon him, that law frequently obliges him to make periodic reports to the Congress with respect to the administration of those functions. Similarly, the heads of the independent agencies and commissions are required to submit reports of their activities at stated times.

During the course of a year the Congress receives several hundred reports that it requires by law.¹⁸ Each is referred to the standing committee that has jurisdiction of the subject matter and many of them are printed for the information of the Congress and the public generally.

As a result, the Congress is kept advised of the activities of the executive branch, and if a report discloses activities that a committee believes should be inquired into the committee may request the appropriate official to appear before it for questioning. Remedial legislation may result from such an inquiry.

10. Reports made by the judiciary to the Congress

In establishing the Judicial Conference of the United States consisting of the Chief Justice of the United States and the chief judges of the judicial circuits, the Congress has provided that it shall submit to the Congress an annual report of its proceedings and its recommendations for legislation.¹⁹

The Congress has also created an Administrative Office of the U.S. Courts to supervise all administrative matters relating to the offices of clerks and administrative personnel of the courts. The Director of the Administrative Office is required to submit to the Congress annually a copy of his report to the meeting of the Judicial Conference of the United States. The report includes the activities of the Administrative Office and the state of the business of the courts, together with statistical data and the Director's recommendations.²⁰

Proposals made in the Congress in recent years that the Chief Justice should make an annual report in person to the Congress have not been adopted.

11. Interpretation of the law by the Congress

Under the constitutional distribution of powers, the judicial power is vested in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.²¹ That power includes the function of construing the laws and applying them to justiciable controversies. In this the Congress has no part. A provision in a statute that the statute shall be construed in a particular manner may not be binding on the courts if other provisions of the statute are not in harmony with such a construction.

However, in enacting a statute the Congress may interpret or define the terms it employs in the statute—which in turn are applied by the courts to give effect to the legislative intent.

¹⁸ See "Reports To Be Made to Congress" (H. Doc. No. 23, 87th Cong.).

¹⁹ 28 U.S. Code § 331.

²⁰ 28 U.S. Code § 604(a).

²¹ Art. III, sec. 1, U.S. Constitution.

Occasionally the Congress enacts a new statute or amends an existing one with the express purpose of overcoming for the future a decision of the courts, but the legislation is not retroactive and does not apply to the decision in the particular case.

12. Congress and the Supreme Court

It is probably inevitable that conflicts should arise between the body that makes the laws and the body that construes and applies them. Such conflicts have arisen from time to time between the Congress and the Supreme Court. In recent years a number of Members of the Congress have criticized certain decisions of the Supreme Court, among which was a decision invalidating a State sedition statute on the ground that a Federal statute had preempted the field of sedition.²³ However, the Congress has declined to enact a bill²⁴ to prohibit the courts from construing an act of Congress as an intent to occupy the field in which the act operates to the exclusion of all State laws on the same subject matter unless it expressly so provides or there is a direct conflict between the act and a State law so that the two cannot be reconciled.

The authority of the Supreme Court to declare unconstitutional an act of Congress was asserted by the Court in 1803,²⁵ and has never been seriously challenged although it has been exerted more than 80 times since then. However, on a number of occasions the Congress has enacted statutes intended to modify the effect of such decisions of the Court. In several instances the Court held the modifying statute unconstitutional also.²⁶

13. Differences in the relations of the Senate with the Executive from those already described

The specific functions of the Senate that are not shared by the House of Representatives have already been described. The only remaining differences may be said to be of a purely personal nature. During this century three Presidents, including the present incumbent of that office, had previously served as Senators and during their Presidential term many of their former colleagues retained their seats in the Senate. Furthermore, the Senate consists of only 100 Senators, as compared with 437 Members of the House of Representatives, and presumably, friendly relations with a number of Senators would be relatively more effective.

In recent years by far the greater proportion of the laws have been initiated in the House of Representatives, thereby giving to the Senate a revisory—or even an appellate—legislative role.²⁷

In addition, some writers believe that the longer term of Senators (6 years, as compared with 2 years for a Representative) enables Senators to adopt a more independent attitude not constrained by the knowledge that election time is just a short way off.

²³ *Pennsylvania v. Nelson*, 351 U.S. 115 (1956).

²⁴ H.R. 3, 85th Cong.; H.R. 3, 86th Cong.; H.R. 3, 87th Cong.

²⁵ *Marbury v. Madison*, 1 Cranch 137 (1803).

²⁶ *Washington v. Dawson & Co.*, 284 U.S. 219 (1925); *Rickett Rice Miller v. Fontenot*, 297 U.S. 110 (1936).

²⁷ During the 86th Congress (1959-60) there were introduced about 4,000 Senate bills and more than 13,000 House bills.

CONCLUSION

As in the report by the Association of Secretaries General of Parliaments it is true that the Executive is to some degree dependent upon the Congress, but the extent to which the latter has control depends upon what is meant by that word. As was suggested in that report, control may vary from the type exercised by a driver on his automobile to that exercised by a controller of railway traffic upon the engineer of a train on one of his lines.

The Executive necessarily acts quickly, and it often takes considerable time for legislative processes to catch up, so that congressional control does not closely resemble the control of a driver over his automobile. Having established the direction for executive action the Congress is not required to make every decision, day by day, in carrying out that direction. The second suggested type of control is more real. Although there are occasional exceptions, the Congress usually obtains the information it requires for action. It can discuss what it likes when it likes and is therefore in a position to prescribe rules of guidance to the Executive, and may take remedial action if the rules are not followed.

The American system of separation of powers together with the constitutional checks and balances seems to be a most happy form of compromise between an autocratic executive and an all-powerful legislature.

