CHAPTER V

Congress : Structure and Composition

Role of Congress

The first Article of the Constitution provides for the legislative branch of government : "The Congress of the United States" and vests all legislative power in it. The Acts of Congress are the supreme laws of the land. But the framers of the Constitution had no intention of making it all-powerful. The demands of the doctrines of limited government and federalism are such as to deny unlimited powers to any governmental agency. Yet, the importance of Congress in the final analysis cannot be discounted. In fact, Congress today exercises an almost incomprehensibly great authority to set the course of the public policy. For, Congress has not only the power given by the actual words of the Constitution, but also powers that may be reasonably implied from those delegated powers. So vast is the extent of the implied powers as also resultant powers that it embraces more or less the entire life of the nation. Unless Congress grants money, the Executive and Judicial Departments of government cannot operate, new policies cannot be enforced and the entire machinery of the government comes to a dead stop. It was, accordingly, not out of reason that the framers would have devoted the first Article in the Constitution to the organisation and powers of Congress.

Congress is Bicameral

Regarding the desirability of creating a national legislature consisting of two chambers there was little difference of opinion among the members of the Philadelphia Convention.[1] The Congress which operated under the Articles of Confederation was a single Chamber assembly, but the framers of the Constitution did not consider it worthy of emulation. They were familiar with the successful functioning of bicameral State legislatures. They also knew that in Britain, too, bicameral Parliament existed. The reasons, however, which prompted bicameralism were the result of a "great compromise" without which perhaps the Union would not have come into being. Under the Articles of Confederation, all States stood on a footing of equality. They would not agree to the new administrative set-up unless their old status was preserved in one branch of the legislature and where they could be represented as constituent political units. On the other hand, the larger States, which had sponsored the movement to federate, would not agree to a plan unless they were given adequate representation in proportion to their superior numerical strength. There were economic reasons too. The North, the more populous part of the country, was commercial in interest whereas the South, the sparsely populated part, was agricultural. The division of the legislature into two Houses based on two different principles of representation was in part influenced by these considerations in order to balance and harmonise the two distinct economic interests in the national government. At the same time, the Fathers of the Constitution entertained a fear of the majority rule and they desired to set up the Senate as a conservative check on the "turbulence of democracy." And if it was to be an effective check on the radicalism of the popular House, then it ought not to be a mere duplication of the latter both in its composition and powers. Accordingly, Congress was based on States as political entities and on population, the Senate representing the former and the House of Representatives the latter. The Senate was to be smaller in size, its members chosen for a long term of office and by a different method, higher age and residence qualifications were required. It was given certain specific powers, such as share in the appointing, treaty making and judicial powers, which were not conferred on the House of Representatives.

1. The story is told that when Thomas Jefferson returned from France after the Philadelphia Convention had completed its labour, he objected to the bicameral feature of the national legislature and asked Washington why the Convention had taken such a step. The conversation took place at breakfast, and Washington is said to have asked Jefferson, "'Why did you pour your coffee?'' "To cool it," replied Jefferson. "Even so,"' answered Washington, "We pour legislation into the senatorial saucer to cool it." Max Farrand, *The Framing of the Constitution*, p. 74.

THE HOUSE OF REPRESENTATIVES

Composition and Organisation

The Constitution does not specify the size of the House beyond stipulating that "representatives shall be apportioned among the several states according to their respective numbers," and that there shall not be more than one member for every thirty thousand people and that every state is entitled to, at least, one representative irrespective of its population.[2] The actual enumeration was to be made within three years after the first meeting of the Congress and within every subsequent period of ten years in such manner as determined by law. Elections are to be held every second year by the people of the several States.[3] The times, places and manner of holding elections shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations.[4]

Apportionment of seats has caused periodic controversies. The original 65 members of the House were allocated in the Constitution. Thereafter allocations were made by Congress after each census, ranging from the basis of one representative for each 30,000 in 1792 to one for 4,12,000 in 1961. After 1920 census Congress failed to carry out the constitutional mandate to reapportion seats after every ten years. The Reapportionment Act of 1929 set the "permanent" number of the House at 435. The admission of Alaska in 1958 and of Hawaii in 1959 brought the total membership to 437, but it dropped back to 435 in 1962 and remained there.

The formal qualifications which a member of the House of Representatives should possess are: that he must not be less than twenty-five years old, should be a citizen of the United States of, at least, seven years standing, and an inhabitant of the State from which he is elected. Custom has laid an important qualification regarding residence. The Constitution requires only legal residence in the State. It has since been modified to mean residence of the Congressional district. Custom has been so insistent on the locality rule that no choice of the candidate is likely to be made unless he is resident of the locality from which he seeks election. In fact, no candidate offers himself for election from a district in which he does not reside. Franklin D. Roosevelt, Jr., after deciding to run for the New York Congressional seat vacated by the death of Sol Bloom, rented an apartment in the district and announced that address as his legal residence. Helen Gahagan Douglas rented a hotel room in the industrial commercial district in Los Angeles which she represented, though she continued to live in fashionable Beverly Hills. In case of death or resignation of a member during his term, the Governor of his State may call a special election for the unexpired portion of the term.

The Constitution provides certain disqualifications. It provides that no person holding any office under the United States shall be a member of either House of Congress during his continuance in office.[5] This provision was adopted for the purposes of keeping separate, as far as practicable, the Executive and Legislative Departments. Secondly, no Senator or Representative may, during the time for which he or she is elected, be appointed to any civil office which shall have been created or the emoluments of which shall have been increased during such time.[6] The purpose of this provision is to prevent Congress from creating new offices or increasing the salaries of existing offices for the benefits of members who might desire to be appointed to them.

The Constitution provides that Congressmen will be paid salary and other perquisites of office as determined by law. The law fixed the salary subject to the national income tax. In addition to it, travelling allowance is paid for one trip in each session from the Member's home to Washington. Every member has a "franking privilege" too—of free postage on official correspondence and all other official mail matter, such as pamphlets and reprints of speeches sent free to the constituents. Stationery and office supplies, telephone and telegraph service are provided. Free medical service is made available to all members. Allowances for clerks and secretarial service are also made : $12,500 per year for a Representative and $25,000 to $60,000 per year for a Senator, depending upon the population of his home State. Retirement annuities have been

2. Article I, Section 2, Clause 3.
3. Article I, Section 2, Clause 1.
4. Article I, Section 4.
5. Article I, Section 6, Clause 2.
6. *Ibid.*

provided since 1946.[7]

Congressmen are exempt from legal process in all civil actions while attending the sessions of Congress and when going to or returning thereto. This immunity, however, does not cover indictable criminal offences. They are also legally immune from prosecution or suit, as for libel and slander, for anything they may say on the floor of the House.

The House of Representatives has a term of two years only. In 1966 President Johnson proposed that the term of Representatives be increased to four years. This would, it was argued, relieve members of the House of fresh elections after every two years. It was also argued that synchronisation of the term of the House with that of the office of the President would reduce considerably the possibility of deadlock with a President of one party and the House majority of another. But the four-year term of the House is likely to create problems in connection with the term of the Senate, as the present constitutional arrangement requires election of one-third of the Senators every two years. If the term of the Senate is increased to eight years, one-half of the Senators retiring after every four years, this scheme too, might lead to deadlock between a President and the Senate majority if both belong to two different parties. The other alternative is to reduce its term to four years. But the Senate is not likely to agree to it, two-thirds of which must vote affirmatively to submit the necessary constitutional amendment.

Before the adoption of the Twentieth Amendment in 1933, the term of the Representatives began on March 4, following election, although they did not assemble till next December unless called in a special session.[8] The old Congress, therefore, remained in office and continued functioning for about four months after a new Congress had been elected. The members defeated at elections would continue to make laws for their constituents who had not approved their re-election. These defeated members were popularly known as "lame-ducks" and the session of the House so convened as "lame-duck" session. The Twentieth Amendment sought to remove the evils inherent therein by providing that Congress must assemble at noon on January 3, unless another date is provided by law. It means that a new Congress fresh from elections of November, must begin legislative work early in January. Under the Legislative Reorganization Act, 1946, the regular session adjourns on July 31 unless otherwise provided by Congress.

The President may call either House or both in a special session. The Senate in particular is called to confirm appointments or ratify a treaty. As a rule, the President only summons the legislature in special session to deal with a matter of national urgency and usually announces his purpose well in advance so as to focus the attention of Congress and the country sharply to the business in hand.

The Constitution permits both the Houses to adjourn simultaneously. But what is to be done, if crisis happens during the adjournment and the members desire to assemble in a session ? The need for a decision on this issue happened in 1939 after the outbreak of the Second World War. The opponents of Roosevelt feared that, by taking drastic actions during an adjournment, he might involve the country in the War and consequently Congress remained almost in continuous session in 1939, 1940 and 1941. In 1941, it was in session for 365 days; in 1942, for 346 days, with a brief recess in December. In 1943, between January and July it was in session for 184 days, and the need for a vacation was generally recognised. But many members were unwilling to adjourn even for a brief recess without making some specific provision for meeting earlier than the stipulated date in a resolution of adjournment. The resolution, accordingly, provided for adjournment on July 8 and reassembling on September 14, 1943, or until three days after they were notified to reassemble whichever event occurred first. The President of the Senate and the Speaker of the House were authorised to call the Houses "whenever in their opinion legislative expediency might warrant it." The resolution further provided that Congress was to be recalled "whenever the majority leader of the Senate and the majority leader of the House, acting jointly, or the minority leader of the Senate and the minority leader of the House, acting jointly, file a written request with the Secretary of the Senate and the Clerk of the House that Congress reassemble for the consid-

7. Members who choose to join the retirement provisions are required to pay into the fund 7.5 per cent of their salaries. This entitles them to receive a retirement allowance, after the age of sixty-two and a minimum of six years service, of 2.5 per cent of their average salary multiplied by their years of service. Retirement pay may not exceed 75 per cent of final congressional salary.
8. Article I, Section 4, Clause 2.

eration of legislation." According to this precedent, Congress can now reassemble on the call of the majority or minority leaders and it has been freed from the pleasure of the President to call a special session.

The Rules of the House of Representatives provide for securing the attendance of members if the required quorum for the transaction of official business is not present. Fifteen members of the House may compel the attendance of absentees by instructing the Sergeant-at- Arms to arrest them and bring them in the House.

The Speaker

With regard to the internal organisation of the House of Representatives, the Constitution simply says that members "shall choose their Speaker and other officers."[9] It does not say anything about his powers and functions. Nor does the Constitution require that the Speaker must be a member of the House, although every Speaker has been at the time of his selection a member of the House.

The election of the Speaker takes place at the beginning of each new Congress and the nominee of the majority party is invariably elected by the House. Here it differs from the office of the Speaker of the British House of Commons. Unlike Britain, the election of the Speaker of the House of Representatives is not unanimous. Nor the Speaker of the preceding House need always be elected, although the tradition is now well established that Speakers are re-elected in subsequent Congress if their party maintains a majority; Sam Rayburn remained in office for 16 years. With the coming in of the other party in majority, the Speaker must change. Seniority is, no doubt, an important consideration in choosing a Speaker, but personal popularity and political backing are the most important prerequisites.

Unlike the impartial and judicious Speaker of the British House of Commons, the Speaker of the House of Representatives acts as a leader of his Party and uses the powers of his office to promote his Party's programme. There are two important reasons for such a development. The Constitution did not provide the House with an official leadership. Apparently the statesmen of 1787 took it for granted that the House would lead itself. As the House grew in numbers and its legislative business expanded, the need for guidance and leadership developed and this devolved upon the Speaker as a leader of the majority Party. "Beginning with Henry Clay, the Speaker gradually became the recognised leader of the majority party, and hence of the House as a whole. He became the man on whom the majority depended for getting its measures safely through the maze of rules. More and more authority was absorbed into his hands until he became a vital dictator of legislation."[10] During the decade around the turn of the present century Speaker Thomas B. Reed was frequently referred to as "Czar" Reed. Joseph G. Cannon, popularly known as "Uncle Joe," held the same position. "A simple Chairmanship," as Ogg and Ray put it, "grew into a vital dictatorship carrying the power over life and death over almost everything that the House undertook to do." [11]

Before the "revolution of 1910-11" which was directed against the Speaker of the House, he appointed all Standing as well as Select Committees and the Committee appointments went to those who would be depended upon to follow his wishes. And as legislation in the United States is really the work of the Committees, he had the virtual power in the shaping of legislation. As a Chairman of the Rules Committee, he would give place on the order of the business only those measures which he desired to be enacted. Moreover, until 1910, his power of "recognition," that is, the power to grant or withhold the right of discussion, enabled the Speaker to a large degree to prevent consideration of measures to which he was opposed and to cut off debate by members of the minority Party.

The Speaker's denial of the right of debate in many cases, together with the necessity of going to his room in advance in order to secure a promise to recognition, led in 1910 to revolt against "Cannonsism"[12] by a wing of the Republican party, the "insurgents." They were joined by the Democrats. The coalition of Democratic minority leaders and progressive Republican "insurgents" brought about several amendments to the rules. The Speaker was removed from the Rules Committee and the power of selection of all Standing Committees was restored to the House itself. His power of recognition, the chief source of complaint, was also taken away. All

9. Article I, Section 2.
10. Munro, W. B., *The Government of the United States*, pp. 324-25.
11. Ogg, F. A., and Ray, P.O., *Essentials of American Government*, p. 212.
12. Joseph G. Cannon was Speaker from 1903 to 1910.

told, the blow to the powers of the Speaker was so severe that the office has never been since then quite the same.

Nevertheless, the Speaker is still the "Commanding" figure in the House and many important duties belong to the office. He presides over the sittings of the House, arranges for the orderly conduct of the business of the House, preserves order and decorum. In case of disturbance or disorderly conduct he may either suspend business or instruct the Sergeant-at-Arms to quiet any disorder in the House. But the Speaker cannot censure or punish a member; only the House itself can do that. Then, he "recognises" members desiring the floor; the only power left out of the Speaker's three potentially great powers. The rules of the House provide that if two or more members rise, "the Speaker shall name the member who is first to speak." This in effect gives the Speaker wide discretion.

The Speaker has the right to interpret the rules of the House. Though he must follow the established precedent, but it is within his power to disregard them and to create new ones, provided that the House agrees. A majority of the House of Representatives may overrule the interpretation placed on a rule by the Speaker, but they rarely exercise this prerogative. All the same, the ruling of the Speaker is not final as it is with the Speaker of the House of Commons in Britain. He puts questions to a vote, signs all acts, addresses joint resolutions, writs, warrants and subpoenas ordered by the House. The Speaker appoints Select and Conference Committees and has the right to refer bills to Committees, though the Bills now are automatically sent to Committees by the Clerk of the House on the basis of their subject-matter. Occasionally, when the competency of a Committee which is to receive the Bill is disputed, the Speaker decides.

As a member of the House, the Speaker has the same right to speak and vote as other members, although he does not vote, except when the House is voting by ballot or when there is a tie. But the Speaker of the British House of Commons never participates in its deliberations and he votes only when there is a tie and that, too, he does according to the established customs of the House.

The Speaker of the British House of Commons becomes a non-party man immediately after his election to that office. But unlike his British counterpart, the Speaker of the House of Representatives is actively and openly identified with his party's organisation in the House. As a leader of the majority party in the House, the Speaker is frequently called to the White House to go over legislative matters with the President.

Today, the Speaker is relatively weak, yet he still has many "weapons" which he can use to influence the course of legislation. He is by tradition and practice the active member of the majority party in the House, the "elect of the elect"[13] and is second in succession to the Presidency. He, therefore, occupies an office of great prestige and importance in the Federal Government.

House Floor Leaders

Each of the parties, majority and minority in the House, has a Floor Leader, chosen or approved by the party caucus, to take charge of the party interests during legislative sessions. As his title indicates, the floor leader is normally the chief strategist and tactician on the floor for his party. The majority leader, when of the same party as the President, often is the administrative spokesman. Each floor leader is manager of his party's programme on the floor of the House and has effective control, through co-operation with the Speaker, over important aspects of procedure. He takes the initiative in planning the course of debate on the floor, determines the order in which members of his party may speak, and maintains party regularity. If the floor leader is the party general in the Chamber, the party whips are its colonels.

Dimock analyses the qualities of a floor leader and says, "The successful leader must be a born politician in the best sense of the word. He must be personally popular, be a good judge of men, have his ear to the ground, and know what not to believe. He must be able to cooperate with party leadership and the chief executive and yet have a mind of his own. He must possess that keen sense of timing and the judgment and finesse which characterises the successful executive."[14] When the Republican Party assumed majority in 1947, it designated as floor leader Charles A. Helleck of Indiana, who had been a member of the House since 1935, and the Democrats designated as minority leader Sam Rayburn of Texas, who had long served as Speaker of the House.

13. Polsby, Nelson W., *Congress and Presidency*, p. 51.
14. Dimock, M.E., *American Government in Action*, pp. 377-78.

THE SENATE

Composition and Election

The Senate is a small body of only one hundred members, two from each State irrespective of population or area, elected for a term of six years, one-third retiring every two years. It is so arranged that the terms of both Senators from a particular State do not terminate at the same time. It is a continuous body as only one-third of the Senators face re-election for any Congress. A long term of office, with frequent possibilities of re-election, puts Senators in more comfortable and advantageous position than Representatives. Unlike the latter with a two-year term, they have time even in a single term to acquire experience, master legislative procedure and to attain a certain degree of leadership. It is not uncommon for a Senator to run 18 to 24 years of service. The continuous existence of the Senate is also highly beneficial. The Senate never finds itself in a position in which the House of Representatives is found every two years. The latter is entirely a new body with greatly altered membership, "obliged to organise from the ground up." The Senate is continuous and always organised. Two-third of its members are already in office. Precedents and traditions of the House are therefore, "carried along on the current of a never-ending stream."

All States have an equal representation in the Senate and the Constitution recognises the sacredness of this political dogma when it prescribes that "no state, without its consent, shall be deprived of its equal suffrage in the Senate."[15] The concept of equality of representation was a great compromise which resulted in the establishment of the United States Union and proved a great balancing factor in the North and the South. George Hamilton asserted that, once the new government was in operation, there never would be a conflict of interests between large and small states. This prediction has proved true and throughout the course of American history, whether the State is large or small, it has made little or no difference in its political attitudes and alignment. The Senators, too, do not now consider themselves as ambassadors of their States. They deem themselves as representatives of the nation and their interests are national rather than regional. It has been suggested, during recent times, that the anomalies of equal representation should be removed, because, it is a gross violation of the democratic theory that geographical units should be the basis of representation. Moreover, geographical representation gives to the States with only one-fifth of the population more than one-half of the Senators and if these States with few people are "gauged up" against the thickly settled ones, there might be perpetual and intolerable conflict and hostility and inconceivable repercussions. For instance, California has more than seventy times the population of Alaska, yet both are entitled to the same number of Senators.

These complaints of "Senatorial tenderness towards farm and allied interests" are frequently heard in industrial areas. To remedy the situation it has been suggested that a State be allowed an additional Senator for every million inhabitants in excess of some fixed number. "The proposal, however" as Ogg and Ray say, "is little short of fantastic, because to carry it out would require not only a constitutional amendment, but the express consent of every State whose representation would become less than that of some other States—a prerequisite which could not possibly be met."[16] Even if the proposal would have been practicable, the increased strength of the Senate, it is suggested, would reduce its efficiency as a deliberative body. And, the Senate and House of Representatives would become both representative of the same people in the same proportions. It means duplication and the need for a second Chamber disappears. The whole question of change, therefore, remains an academic one.

The qualifications prescribed for eligibility to the Senate are the same in principle as those required of Representatives, though there is a little difference in degree. The Senator must be not less than thirty years old, an inhabitant of the State for which he is elected, and a citizen of the United States for nine years. The framers of the Constitution thought that the longer term and higher qualifications would tend to give greater strength and dignity to the Senate than would be found in the House of Representatives and, at the same time, a higher average ability.

There is no constitutional provision that a Senator should be a resident of a particular part of the State. In some States, however, custom came to be established that the two Senators shall be taken from two different parts. Sometimes

15. Article V.
16. Ogg. F. A, and Ray, P. O, *Essentials of American Government*, p. 201.

when there is a large city in the State, the custom is to take one of the Senators from the city and the other from the country. For a long time Maryland had a statutory provision that one of the Senators should be an inhabitant of the eastern shore and the other of the western shore.

In regard to the mode of election of the Senators there was a sharp difference of opinion among the members of the Philadelphia Convention. The method finally agreed to was that the Legislatures of the States should elect them. There were two main reasons for adopting this method. In the first place, the Founding Fathers thought that the choice by Legislatures would be the best means of forming a connecting link between the State governments and the national government thereby cementing the bonds of union. The jealousy of the State governments towards the National Government was so manifest at that stage that all possible efforts were made by the Constitution-makers to bring about cohesion through the mechanism of the newly established government. Secondly, it was believed that choice by Legislatures would enable the selection of Senators of greater ability as the legislators would be in a better position to evaluate the qualifications and merits of the candidates than the mass of the people.

But the working of this indirect method of elections belied the expectations of the Fathers of the Constitution. With the development of the party machinery, the actual choice of the Senator was made in the State party convention or in the legislative caucus, and both were controlled by bosses. It frequently led to long and stubborn contests which very often ended in deadlock. Not infrequently the Legislatures failed to elect a Senator and the State with vacancy in the Senate would go unrepresented. From 1890 to 1912 not less than eleven States at one time or another were represented in the Senate by one member only. In 1901 Delware had no Senator at all at Washington to speak for the State. And, then, the breaking of deadlock was sometime accomplished by bribery and other corrupt influences. Indeed, charges of bribery and corruption came to be very common, "and there is little doubt that between 1895 to 1910 a number of wealthy men found their support."[17] Finally, prolonged senatorial contests gravely interfered with the regular business of the State Legislatures. The obvious result was a spirited movement to secure the amendment of the Constitution and after a tiring effort the Seventh Amendment was adopted in 1913. It provides that the two Senators from each State shall be "elected by the people thereof for six years...." They are elected by vote of such persons as are entitled to vote for members of the Lower House of the State Legislature. It further provides that in case there occurs a vacancy in the Senate, the Governor of the State in which the vacancy occurs may fill vacancy by temporary appointment until the next General Election at which time a successor is elected for the balance of the former Senator's term.

The Presiding Officer

The Presiding officer of the Senate is the Vice-President of the United States and despite his much exalted position, he is little more than a moderator. He is not a member of the Senate, and, indeed, may belong to a different political party that controls the Chamber. He does not appoint the Committees of the Senate and so has no power of predetermining the character of legislation, and he votes only in case of a tie. Moreover, he cannot control debate through the power of recognition, as the Speaker of the House of Representatives does. The President of the Senate must recognise the members seeking the floor in the order in which they rise. The tradition requires that he shall treat the members of both parties impartially in according recognition for purposes of debate. The Senate does not expect leadership, as is the case with the Speaker of the House, from its Presiding Officer and would resent it most bitterly as Vice-President Dawes learnt to his sorrow in 1925, when he attempted to change the Senate rules.

The Senate also elects from among its own members a *President pro tempore*, who presides in the absence of the Vice-President. The *President pro tempore*, though nominally elected by the Senate itself, is really chosen by the majority of the caucus and is, like the Speaker of the House, the ranking member of the party. Though the President *pro tempore* is a position provided for in the Constitution, he follows the Speaker in the line of the succession to the Presidency, and his election carries with it such perquisites as an official automobile, but the occupant is not equivalent of the Speaker of the House. Since he presides in the absence of the Vice-President, whose position is of no consequence in the Senate's power structure, he gains no significant

17. Garner, J. W., *Government of the United States*, p. 183.

powers from this role. As a member from a State, he can vote on all issues. He presides permanently if the Vice-President succeeds to the Presidency.

The Senate has its own majority and minority floor leaders. They are elected in the same manner as the Party floor leaders of the House of Representatives and their position and influence are also identical. In 1947, when Republicans assumed majority in the Senate they chose as floor leader Wallace H. White, who had served for years first in the House of Representatives and then in the Senate. The Democrats, on their part, designated as minority floor leader Senator Alben Barkley, who had been their "masterful" majority floor leader since 1937. Necessarily the majority floor leader is potentially the more influential, especially if the President is also of the same party, but his opposite number on the minority side may be of only slightly less consequence.

The Filibuster

The principal point of difference between the Senate and the House procedure lies in the rules respecting debate. Limitation on debate in the House is a relatively simple matter and closure rules are rigid and strict. Senate is extremely jealous of its freedom of debate and a member can speak as long as his physical capacity enables him to hold the floor. The advantage of this privilege is occasionally taken by the Senators near the close of the session for purposes of "filibustering" a measure to which they are opposed. Sometimes the Senators opposing a Bill "talk it to death" by refusing to yield the floor until the supporters of the measure agreed to drop it from discussion. Many important measures had actually been abandoned on a mere threat of the use of filibustering. Individual filibusters of note include those staged by Huey Long and Robert Lafollette, Sr., who held the floor continuously for 18 hours in 1908. The all-time record for continuously holding the floor was achieved in 1953 by Senator Wayne Morse of Oregon; he talked for 22 hours and 26 minutes. A filibuster against an atomic energy Bill produced a Senate impasse for twelve days in July 1954, including a four-day around the clock session. The longest filibuster speech so far recorded is that of Strom Thurmond, who spoke for more than twenty-four hours against the civil rights legislation of 1957.

More commonly filibuster is conducted by a group of Senators talking in relays, each yielding the floor to a colleague known to be friendly and bound to continue the delaying action. Southern Senators have used the filibuster relay to great advantage in preventing the consideration of civil rights legislation. Very often, they had gained their ends merely by threatening to take and hold the floor. In 1917, a small group of Senators filibustered to prevent the Senate from taking a vote on a Bill to give to President authority to arm American merchant vessels notwithstanding the fact that nearly all the other Senators desired to pass the Bill. President Woodrow Wilson expressed the general public resentment over the obstructionist tactics by declaring: "The Senate of the United States is the only legislative body in the world which cannot act when its majority is ready for action. A little group of wilful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible."

The Senate had long recognised the serious repercussions of filibustering, but the incident of 1917 resulted in a movement to limit the filibuster and adoption of a new rule by the Senate which made it possible, by a two-thirds vote, to limit the debate on any measure to one hour for each Senator. This rule was applied for the first time in 1919, to bring to an end the discussion on the Treaty of Versailles. Since then it had been successfully used for three times more. The closure (cloture) rule of 1917 was amended in 1949, after a filibuster on civil rights legislation. A revised closure was made applicable on any matter under Senate proceedings, except change of rules. According to Rule XXII as amended in 1949, a vote of two-thirds members of the total membership of the Senate was required to carry closure. The old rule of 1917 required two-thirds votes of the members present and voting. The amendment of 1949 had, thus, made closure more difficult to use. A ceaseless effort was made to change the closure rules, but it was always opposed by Southern Senators who were out to filibuster the Civil Rights Bill. In 1959, on the proposal of the majority leader Johnson, the pre-1949 formula permitting two-thirds of members present and voting to impose closure was adopted. But the controversy has not ended. Current proposals centre around a closure by a majority vote or, alternatively, by a three-fifths vote of those present and voting.

Filibuster is, thus, a device by which an insistent minority can, if it feels strongly, usually block action on a proposed Bill and frustrate the business of the Senate. But "fortunately resort to

filibuster," remark Professors Swarthout and Bartley, "is infrequent. It is the ultimate weapon of the intransigent few." The fact is that even on most controversial matters the Senators are usually able to reach a unanimous agreement that the debate must end at stipulated time on a given day. "This self-imposed curb on unlimited debate," add Swarthout and Bartley, "is the rule; the filibuster is the rare exception,"

SPECIAL FUNCTIONS OF THE SENATE

The Senate was intended to be more than an Upper Chamber of Congress. The Founding Fathers designed it to be, in a way, the counterpart of the Privy Council in Britain and it was for this reason that they provided in the Constitution that the "advice and consent" of the Senate would be required in certain executive actions, for example appointments and treaties. President Washington, during his first term of office, sought the advice of the Senate in person. But the Senators refused to sit with the President in executive session and declined the proposal. Washington, accordingly, gave up his plan of personal conferences with the Senate and substituted the practice of sending business to it in written communications. In this way, the Senate ceased to be anything like a Privy Council and its "prerogative became one of consent rather than advice."[18]

Even then, its power of consenting to certain actions of the executive together with coequal legislative powers with the House of Representatives, and judicial powers relating to impeachment cases, gives to the Senate a unique position and it has eclipsed in prestige and authority the popular Chamber, the House of Representatives.

Share in Appointments

The President shares with the Senate the power of appointing federal officers. The President nominates and the Senate confirms officers of the United States by simple majority. The underlying idea was to restrain the unlimited powers of the President by a system of checks and balances and thereby ensure the appointment of honest and capable men to office. The Constitution-makers never intended to give the Senate anything more than the negative power of rejecting the nominations of the President.[19] But the practice of *senatorial courtesy* gives to the Senators of the State concerned, where an appointment is to be made, both a positive as well as a negative function.[20] According to law the President sends the nomination to the Senate, where it is referred to the appropriate Standing Committee. An appointment to the federal Judiciary, for instance, is referred to the Senate Judiciary Committee; an appointment to the military establishment to the Armed Services Committee. If the nomination is contested, hearing may be held at which those actively favouring or opposing the nomination are heard. If a Committee majority is favourable, a report to that effect is made to the Senate itself. On rare occasions, the Committee reports unfavourably. The Senate, then, votes and if it refuses to confirm a nominee, his appointment is not possible.

But the actual process of appointment has greatly altered the provisions of the Constitution. For a proper understanding of the procedure in vogue the principal officers of the United States may be divided into two groups: (I) those who serve the nation as a whole, as do Supreme Court Judges, 'Cabinet' members, officers of the military establishments, ambassadors, etc., and (2) those who serve as federal officers, within a particular state, as do federal district judges, certain classes of post-masters, distinct attorneys, marshals, etc. Presidential appointments of principal officers are rarely rejected by the Senate, though there have been a few outright rejections in recent years.

Appointees whose federal duties are confined within the boundaries of a single State, and referred to under category 2 above, come under the custom of senatorial courtesy. The custom demands that the President should consult the senior Senator of the State in which the appointment is to be made. If the senior Senator does not belong to the President's party, he must do so with the junior Senator. If neither Senator is of the President's party, the President is not bound to consult with either Senator, but he will often do so. Even if he does not consult, the President will rarely appoint a personal enemy of the Senators concerned. The Senate is jealous of its traditional prerogative and will rarely approve an appointment which is personally obnoxious to the Senator most concerned. In 1938, President Roosevelt tried to break this iron-clad tradition

18. Munro, W. B., *The Government of the United States*, p. 287.
19. See *ante*, Chap. III. Also refer to J. W. Garner's *Government in the United States*, p. 191.
20. The role of the Senate in making appointments has already been discussed in connection with the powers of the President, Chap. III, *ante*.

and nominated a federal Judge in Virginia, without first clearing his choice with the senior Senator from Virginia, Carter Glass. The latter, though himself a Democrat, asked his colleagues to reject the nomination as he had been bypassed. The Senate refused the nomination by 72 to 6 votes. In 1951, President Truman was unable to secure confirmation of two nominations of federal district judges in Illinois, because of the opposition of Senator Paul Dougals, senior Senator from the State. The nomination of Justice Fortas by President Johnson in 1968 for appointment as Chief Justice of the Supreme Court raised a storm and was rejected. Within five months, November 1969-April 1970, the Senate rebuffed for the second time President Nixon in his attempt to appoint a Conservative Southerner as Supreme Court Judge.

Share in Treaty-making

The Senate also shares with the President the power of making treaties. All treaties negotiated by and on behalf of the President are laid before the Senate and a two-thirds vote of the Senators present is necessary to the validity of the treaty.[21] The Fathers of the Constitution probably wanted the President and Senators to sit down together and jointly work out a treaty. It is evident from the use of the words "advice and consent" of the Senate used in the Constitution. Washington, who thoroughly knew the mind and intentions of the Philadelphia Convention, visited the Senate to discuss a treaty which he desired to be concluded with the Southern Indians. Having received the rebuff from the Senate, Washington "started up in a violent fret," and said that "this defeats every purpose of my coming here."[22] And since then no President has conferred directly with the Senate. Nonetheless the Senate plays a significant role in making treaties and ratifying treaties. If the President entertains doubts on the repudiation of a treaty by the Senate, he consults members of the Foreign Relations Committee in advance and solicits their views. In fact, the Secretary of State usually works closely with the Foreign Relations Committee of the Senate.

How important is the treaty-ratifying power of the Senate is given by John Hay, once the Secretary of State. He said, "A treaty entering the Senate is like a bull going into the arena; no one can say just how or when the final blow will fall. But one thing is certain—it will never leave the arena alive." This is rather too sweeping a statement and particularly when it comes from a former Secretary of State. It is true that the extraordinary two-thirds majority required for the approval of a treaty has frequently proved a great handicap and led to the defeat of a number of treaties. It is also true that a small majority can sometimes threaten to defeat a treaty and to reap political advantage thereby. Some of the rejected treaties such as Taft Knox arbitration treaties of 1911-12, the Treaty of Versailles, and the protocol for participating in the World Court, were of supreme importance. But the Senate, too, has unconditionally approved about 900 of the approximately 1,100 or more submitted to it; many of the remainder were passed with amendment or reservation. There is, however, strong agitation to modify the Senate's treaty-ratifying power. It is demanded that this power should be given to a simple majority either of the Senate or of the two Houses. There is evidently no marked sentiment for change and the Senate is not likely to surrender the power given to it by the two-thirds majority requirement so long as the proposing of an amendment to mark the change requires a two-thirds vote of both Houses of Congress.

A Court of Impeachment

Another special function of the Senate is that of acting as a court for the trial of impeachment cases. The Constitution prescribes that the President, Vice-President, and all Civil officers[23] shall be removed from office on impeachment for and conviction of treason, bribery, or other crimes and misdemeanours. The House of Representatives initiates the charge and the Senate sits as a court of trial. On such an occasion the Senate is on a judicial mien and issues writs, sub-poenas to witnesses, and administers oaths. When a President is on trial, the Chief Justice of the Supreme Court presides. A Committee of Representatives appointed by the House appears at the bar of the Senate and prosecutes the impeached official.

21. On June 13, 1952 three treaties were ratified when the Senator acting as Presiding officer voted 'aye' and the only other Senator in the Chamber remained silent.
22. As cited in Burns and Peltason, *Government by the People*, p. 422.
23. Military and Naval officers are tried by court martial. The members of Congress are not liable to impeachment. In the case of William Blount, a Senator from Tennessee in 1907, the Senate decided that it had no jurisdiction of the case.

A two-thirds vote of the Senate is required for conviction and the penalty which it can impose is removal from office and disqualification from holding office in the future. It cannot inflict punishment ranging to imprisonment or fine. But the person convicted and removed may be indicted and tried by courts under the ordinary procedure of law as any other criminal may.

The procedure of removing an officer by impeachment is so cumbersome and unwieldy that it is very seldom resorted to. The Senate has sat as a Court of Impeachment on twelve occasions so far, and it has given the verdict of guilty only four times. The most notable trial was that of President Andrew Johnson, who in 1868 escaped conviction by only one vote after a three-month sitting of the Senate as a Court of Impeachment.

SENATE : CAUSES OF ITS STRENGTH

Not a Subordinate Branch

In addition to the three general functions which the Fathers of the Constitution assigned to the Senate, it is also a legislative body. But it is a co-ordinate body and not a subordinate branch of Congress and exercises co-equal powers with the House of Representatives in making the national laws. There is no law in the the United States, as it is in Britain,[24] which empowers the House of Representatives to veto the Senate. The only eminence which the House enjoys over the Senate is the one relating to raising of the revenues and the Constitution simply provides that such measures must "originate" in the House of Representatives. But it, also, prescribes that the Senate "may propose or concur with amendments as on other Bills." It means that the Senate can agree to, amend, modify or reject any measure relating to revenues and sometimes it so drastically mutilates it that it becomes beyond any possible recognition, as it did a few years back with the Tariff Bill. The Senate can, thus, virtually initiate new revenue proposals under the guise of amendments. The Tariff Bill was so completely amended that it struck out everything in the Bill except the enacting clause. Then, it inserted a new tariff of its own and transmitted the measure back to the House of Representatives "as amended." The House unnecessarily grumbled over this invasion of its special privilege and in the end accepted the tariff as amended by the Senate. On another occasion, a tariff measure came back from the Senate to the House of Representatives with no less than 847 amendments. And every Bill, money or nonmoney, carries with it the introductory clause stipulating: "Be it enacted by the Senate and the House of Representatives of the United States, in the Congress assembled." According to the letter of the law the revenue Bills must originate in the House of Representatives, but in practice the Senate can also do that[25] and as Munro says, "it has found a way of doing what the Constitution did not intend it to do."[26]

With regard to the appropriation Bills, the Constitution is silent and the only logical inference is that in the absence of any constitutional prohibition, the Senate may originate appropriation Bills, including the national budget, if it wishes to do so. The custom, however, is and the House has guarded it "with great jealousy" that it has the exclusive right to originate appropriation Bills. Yet it cannot be denied that the Senate's fiscal role rivals that of the House of Representatives.

Investigative Powers

The Senate has very often undertaken special investigations embracing varied matters. Among the constitutional powers of Congress to which the investigating function is ancillary are those of legislation, impeachment, determining the qualifications and elections of its members, the consideration of treaties and agreements requiring Senate action, and the confirmation of Presidential nominees for public posts. Apart from this, as a result of the implied powers, which the Supreme Court has held as the valid jurisdiction of Congress, the investigation committees may exercise the power to delve deep from time to time into many aspects of the activities of the Executive. The Legislative Reorganisation Act, 1946, charges the Standing Committees of Congress with "watchfulness" over the corresponding agencies on the administrative side. In this "watchdog" capacity, the Committees may be concerned with the handling of appropriation, the personal or official probity of Executive appointees or with matters touching the national security.

The investigation committees may sit in Washington or they may go about the country to find facts, ideas, opinion and information, and seek advice that may be of utility in coming to a

24. Refer to the Parliament Act of 1911 as amended in 1949.
25. Lodge, Henry Cabot, *The Senate of the United States*, p. 9.
26. Munro, W. B., *The Government of the United States*, p. 302.

conclusion. It may summon witnesses, official and non-official, require them to produce papers and documents considered necessary for purposes of the investigation. In 1857 provision was made by law for one year imprisonment on conviction for refusal to testify. The Supreme Court has held the Act of 1857 constitutional. In *McGrain* v. *Daugherty* (1937) the Supreme Court while upholding the Senate's authority to probe into the official conduct of a former Attorney-General, did not indicate that a witness might refuse to answer if the bounds of power were exceeded by a committee or if the questions were not 'pertinent' to the matter under inquiry. In 1953, the Supreme Court held in *United States* v. *Rumely* that if the subject under examination lies outside the authority of the investigating committee, a witness is under no legal obligation to answer its questions. In 1957, in the case of *Watkins* v. *United States* the Supreme Court set aside the conviction of a witness for contempt of Congress because the questions he had refused to answer had not been demonstrated to be pertinent to the subject under investigation.

Bryce credits committees of the Senate with having more than once "unearthed dark doing" which needed to be brought to light. There is now increasing emphasis in the United States on the "watchdog" function of the investigation committees. The only way Congress can check the administration is through the questioning of official witnesses in the committees when appropriation Bills are under consideration, or through interim investigations of its own into the way Executive agencies are being run. The Committee can summon any official of the United States, from a member of the Cabinet to the routine clerk to testify in public and private hearings. It is, indeed, an effective method of checking administration. But to say, as Munro observes, that "they are merely seeking data as a basis for legislation is to use the words with Pickwickian versatility. What they often are seeking is ammunition that can be used in the next election campaign."[27] The inquiries are, therefore, largely political in nature. The Senators dominate the politics of the country and Congress, and its investigation committees are always politically vigorous. Many famous investigations have since taken place and the most recent was the Truman Committee during World War I which probed into waste and inefficiency, made many constructive suggestions, and helped put its chairman (Harry Truman) in the White House. Another important investigation committee was the Kefauver Committee inquiry into organised crime. The Water-gate Committee and the Tower Commission remain unsurpassed in making public sensational disclosures. Special Investigation Committees have all the powers of Standing Committees, except that they normally may not introduce legislation.

There is a mortal terror of these senatorial investigations and many official "dread the loaded questions of hostile Congressmen." Errors are likely to arise here and there in the conduct of administration which when discovered are widely publicized for political gains, and investigations thrive on publicity. Senatorial investigations operate "directly in spotlight" and often the "proceedings are covered by newsreel and television cameras and reported by the host of newsmen." Recently, some investigators have so fanatically sought publicity that "they have indulged in defamation of character, bullying and mistreatment of witnesses, and outright partisanship."[28] Such a situation is viewed with alarm even by the members of Congress. Senator Scott W. Lucas has warned that "unless Congress reforms its methods of conducting investigations, unless it puts some limits of responsibility both upon the interrogation of witnesses and upon the type of testimony which witnesses are allowed to give—unless, indeed, it adopts a wholly new and more judicious attitude—one of the great and important instruments of legislative process will be destroyed."

But the intrinsic utility of investigation committees cannot be denied if they conduct their investigations keeping in view the objects they are charged with. Brogan has correctly said that the investigation committees are "one of the most important modifications of the separation of powers and, consequently, one of the indispensable driving belts of the American system."[29] To put in the words of Galloway, they are "the buckle that binds, the hyphen that joins the legislature to the executive."[30] The investigatory power is an essential adjunct of the law-making authority, for investigatory function is used to

27. *Ibid.*, p. 303.
28. Burns and Peltason, *Government by the People*, p. 41.
29. Brogan, D. W., *The American Political System*, p. 328.
30. Galloway, G. B., "Investigation Functions of Congress." *The Political Science Review*, Vol. XXI, No. 3.

seek information in matters in which legislation is contemplated to ascertain the effectiveness with which laws are being executed, to uncover the wrongs and excesses of the government and thereby to put before the public problems essential to the country's welfare. It is only by such investigations that Congress can discover what has been going on, as it has not the day-to-day contact with the executive Departments the question time gives to the House of Commons in Britain. Some of the investigations conducted by the Senate Committees, especially by the Foreign Relations Committees, have been marvellously revealing and advantageous in keeping administration on its toes.

Conference Committees

In case of disagreement between the Senate and the House of Representatives the differences are resolved through a Conference Committee. The members of this Committee called "managers" are equally drawn, generally three and in exceptional cases five, from each Chamber and they confer together. Each Chamber votes as a unit and the conferees may be given instructions by their respective Houses. It is natural that the Senators, who are seasoned statesmen and stalwart politicians with longer and maturer parliamentary experience, should have better of the gain. And considering the degree of solidarity often exhibited by the Senators the conferees are usually supported by the Senate. The Senate, in fact, usually gives a free hand to its representatives on Conference Committees whereas the House binds its conferees more than often to instructions. That is done as the House feels that its managers are too easily out-talked by the Senators.

Political Role of the Senators

"Senators are somewhat a different breed of political animal from the average representatives."[31] The Senators represent, as compared with Representatives, more people and greater areas and thus, are not subject to the fluctuating public opinion and personal idiosyncrasies of the electors of a particular locality. A Representative must cater to local needs and remain susceptible to the influence of a few interest groups and handful of local party bosses. The Senators, and a majority of them, enjoy nationwide reputation for their political sagacity. Their opinions are reckoned with and even Presidents at times have to defer to the wishes of some eminent Senators, especially those who are the prospective candidates for the Presidency. Senators also very often command important positions and dominating influences in the organization and policies of their party in the state which they represent.[32] Their party position is essentially linked with their control of federal patronage. The power of the Senate to confirm Presidential appointments is important constitutionally as well as politically. The former is indicative as a part of the system of checks and balances whereas the latter emphasises that the individual Senator has virtually a veto power over major appointments in his State.

Senatorial Solidarity

Closely allied with it is solidarity exhibited by the Senators. "In a sense the Senate is a mutual protection society." Each Senator jealously guards the rights and privileges of others irrespective of party ties and whenever an onslaught had been made to break its solidarity, as Roosevelt did to bypass the traditional method of senatorial courtesy in 1938, it has always stood together. Washington correspondents have frequently reported that two Senators may attack each other in vehement language on the floor, only to be seen a short time later strolling arm in arm in the corridors outside. They thrive on the principle of live and let live and their code of behaviour is to speak well of the Senate as an institution. Such a sense of solidarity enables them to ward off all encroachments from outside. "The Senate," remark Swarthout and Bartley, "is alert against any possible threat of pressure by either of these two (the President or the House of Representatives) sources, and it is quick to resent any action it considers to be a danger to its prerogative or its tradition." In its solidarity lies the independence and assertiveness and these qualities make the Senate one of the most powerful legislative assemblies in the world.

Independent Spirit

One of the most important factors which accounts for the authority and independence of the Senators is the continuity, stability and traditions of the Chamber which the House of Representatives has not been able to develop. The entire membership of the House of Representatives must stand for re-election every two years and every time it is faced with the laborious task of

31. Burn and Peltason, *Government by the People*, p. 420.
32. As in the case of Huey Long of Louisiana, Joseph Guffey of Pennsylvania, Nelson Aldrich of Rhode Island, or, more recently, Robert A. Taft of Ohio, and Harry of Virginia.

reorganising itself. The Senate, on the other hand, has been continuously organised since 1789, for only one- third of its members stand for re-election in each two-year period. Coupled with this fact is the six-year Senate term. There are many members who gain election for three terms and some even see six Presidential terms come and go. The continued long service gives to the Senators a standing and prestige and they carry with them the sense of senatorial pride. They regard themselves as senior lawmakers of the country and custodians of the balance of powers between the Legislative and Executive departments. Each Senator strives to become a specialist, working hard "at unglamorous legislative work."

Membership in the Senate is, in fact, greatly coveted. A high proportion of its members are former Representatives or former State Governors. The tendency of many of the most able House members to seek Senate seats has constituted a drain on the talent of the House of Representatives. The loss of the House is the advantage of the Senate. Similarly, the presence of around twenty-five former State Governors not only adds to the prestige and stature of the Senate, but also imparts an active quality to Senate behaviour less evident among the House membership, where talent is depleted by the locality rule and some other factors.

Conservative Character

The Constitution-makers had thought that the Senate would prove the bulwark of conservatism. They had, accordingly, designed it and given it special powers so that it might serve as a check on the more radical House of Representatives. The Senate has fulfilled the expectations of its designers and acted as a conservative obstacle to hotheaded action as was illustrated some years ago when it opposed President Truman's proposal to draft rail-road strikes into the army. "It is from Senators," writes Charles Beard, "rather than Representatives that public may expect staunch defence of constitutional methods and powerful opposition to violent, high-handed and bigoted opinions and actions." But the Senate no longer remains a 'rich man's club', as it appeared before 1913. The Seventeenth Amendment to the Constitution made the Senate popularly elected and it has almost lost its "plutocratic" element. In recent years it has usually been more liberal than the House of Representatives, but it has never been swayed by violent gusts of passion. The Senate has justifiably fulfilled the expectation of the framers of the Constitution and to put it in the words of Washington "we pour legislation into the senatorial saucer to cool it."

Influence on Foreign Policy

The Senate has been the Congressional spokesman on foreign policy, and the House its junior partner. This is due to the Senate's treaty-ratifying authority and its veto power over Presidential appointments of ambassadors, ministers and other important officials. The Senate can, also, influence the foreign policy through investigations. The investigations of the Nye Committee paved the way for neutrality legislation in 1930. In 1951, the Senate Investigation on the question of dismissal of General Douglas MacArthur brought Truman's foreign policy in the Far East under fire and the administration was obliged to clarify its position.

But the present trend is to undertake international obligations by legislation rather than by treaty. The notable examples of such a joint action by the Senate and the House are the Greek-Turkish Air Programme, the European Recovery Programme, Point Four, the Indian Grain Programme, etc. Some Senators have vehemently protested against such an encroachment as well as the President's frequent use of executive agreements. They stress that no obligations be incurred except by formal treaty procedure.

The obvious result is that all through these times the Senate has kept its supremacy. The longer term and greater dignity of a Senator attract political leaders to the Senate than the House of Representatives and their appearance in the Senate enhances the prestige of being a Senator still more. The Senate is the smaller body and generally speaking its fellowhip includes citizens older in years and wider in political experience. They are usually better acquainted not only with the problems of law-making, but also with the inner working of the federal administration. It is through the Senate that most national patronage is siphoned to the State party machines. The Senate has more influence than the House over the conduct of foreign affairs. James Bryce remarked that the Senate "has succeeded in effecting the chief object of the Fathers of the Constitution, *viz.*, the creation of a centre of gravity in the government, an authority able to correct and check on the one hand the democratic recklessness of the House, on the other, the monarchical ambitions of the President. Placed be-

tween the two, the Senate is necessarily the rival and often the opponent of both. The House can accomplish nothing without its concurrence. The President can be checkmated by its resistance. There is, so to speak, the negative success on its positive side, it has succeeded itself eminent and respected." There has been a good deal of overlapping of actions of the Senate and the House during recent times, but if either body has increased its powers relative to the other, it is the Senate. While Upper Chambers in other parts of the world have been declining in power and importance, the Senate has added to its strength and prestige. It is not only the most powerful Second Chamber in the world, but also one of the most powerful legislative assemblies in the world.

According to C. Wright Mills, the American Congress operates at the middle level of state power. It generally registers dicisions made elsewhere by the American "Power Elite" which consists of theree inter-related, dominant elites : (1) heads of a few largest corporations; (2) top military generals, admirals and air force officers; and (3) a few hundred top leaders of the two main American Parties. Both Senators and Congressmen belongingto the lower house obey the dictates of what he calls the economic, military and politcal elites fused into an interconnected "power elite".

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CHAPTER VI

Congress : Functions and Powers

FUNCTIONS AND POWERS OF CONGRESS

The Senate and the House of Representatives make the national Legislature of Congress of the United States. Article 1 of the Constitution vests all legislative power in Congress and then enumerates the functions it shall have to perform and the powers it is authorised to exercise. If the Founding Fathers had strictly adhered to the application of the doctrine of Separation of Powers, Congress would have been only a law-making body. But the system of checks and balances gives it non-legislative functions as well, and these functions are in no way less important than its Legislative functions. Broadly regarded, Congress is the instrument by which the people frame, declare, and supervise the policies of the nation. Under the non-legislative functions, we may include: (1) constituent, (2) electoral, (3) executive, (4) judicial, (5) directive and supervisory, and (6) investigative. With regard to legislative functions, it must be observecd that Congress is not the only law-making authority notwithstanding what Article I of the Constitution says.

NON-LEGISLATIVE FUNCTIONS

Constituent Functions

The proposal to amend the constitution should either be made by a two-third vote of Congress or by a national Convention which Congress calls at the request of the legislatures of two-thirds of states.[1] Whatever method is adopted, and only the Congressional method has ever been invoked, not a syllable of that document can be changed without the intervention of Congress. In addition to the initiation of proposals for the alteration of the Constitution, Congress determines the manner to be used for ratification by either the legislatures of three-fourths of the States or by conventions in three-fourths of the States, and may specify time limit for ratification. Moreover, Congress has important duties in expanding and interpreting the original Constitution and this, as we have discussed,[2] is one of the most important factors to make the Constitution dynamic.

Electoral Functions

Congress and each of its Houses have electoral functions to perform. As a matter of routine, it meets in joint session every fourth year to count the electoral votes cast for the President and Vice-President. If no candidate receives a majority of the electoral votes for President, then, the House of Representatives selects, each State voting as a unit, the President from among the candidates with three highest votes. When no candidate secures a majority of the electoral votes cast for the Vice-President, the Senate makes the choice from among the two candidates with the highest number of votes. Only one Vice-President had been so far elected in this manner and that, too, in 1837, when the party system was not fully developed. Such a contingency cannot happen now. Congress by law determines who shall be the President in the event of the death or disability of the President and Vice-President. Congress, also, has authority to legislate on the times, places, and manner of holding elections for Senators and Representatives, and that it judges the qualifications of its own members, including the validity of their elections.[3] It may disqualify persons whose conduct a majority of the members disapprove.[4] In 1926, for example, the Senate "refused to seat" William S. Vare because of his excessive campaign expenditure.

Executive Functions

Executive functions extend to appointments and treaty making. Administrative functions we take under the heading directive and supervisory. This bifurcation has been made for purposes of clarity. In relation to more than sixteen thousand officials who are nominated by

1. See *ante*, Chapter II.
2. Chap. V, *ante*.
3. Article I, Sections, 4, 5.
4. The constitutionality of this practice has been questioned, although there are many precedents to support it.

the President and confirmed by the Senate, the Congressional role is specially outstanding. The Senators and the Representatives, but especially Senators, actually determine the vast majority of these appointments. Senators who belong to the President's party do not wait to be asked which candidate they would like to favour. They immediately proceed on their own initiative to suggest names of the candidates whom they desire and, except in rare cases, they get their recommendations accepted. If no Senator from a State belongs to the President's party, Representatives claim their privileges to recommend such names. Sometimes, even when there are party Senators, an agreement may be worked out under which the Senators share the patronage with the Representatives.

The Senate has the important functions of ratifying treaties.[5] In the negotiations of treaties, the President has the exclusive authority, but discreet and far-sighted Chief Executives consult the leading Senators and take their opinion in anticipation in order to facilitate its ratification.

Congress, as a whole, has intimate interest in the international relations of the United States. The President reviews the international situation in his messages and Congress permits the expenditure to be incurred on international obligations. The present tendency to incur international obligations through legislation rather than treaty emphasises the need of a joint action by the Senate and the House.

Judicial Functions

Impeachment proceedings of the President, Vice-President, Judges and other federal officials can be brought about by the Senate as a Court of Trial (the Chief Justice of the United States presiding when the impeachment of the President is being tried).

Each Chamber exercises disciplinary powers over both its own members and to a limited extent over private persons. Members of Congress are not subject to impeachment as they are not, according to the decision of the Supreme Court, civil officers of the United States. Both the Chambers, therefore, determine how to discipline their members, and a two-thirds vote of his own House is sufficient to expel a Congressman, though it is a most uncommon proceeding.

Each House has also the inherent power to punish private persons whose conduct directly interferes with the due transaction of Congressional business. If, for example, a witness before a Congressional Committee refuses to answer a question, the Chamber concerned to which the Committee belongs can sit as a court and convict him of contempt. It may order the Sergeant-at-Arms to hold him in custody. But he cannot be held longer than the time Congress remains in session. Such a power, however,Congress normally does not exercise. The matter is referred to the United States Attorney-General for punishment under the law whenever there is case of contempt of the House or the Senate.

Directive and Supervisory Functions

The President and his principal subordinates, no doubt, actually direct and supervise administration, but it is Congress which creates all the administrative Departments and agencies. The Constitution does not say anything about their organisation. Nor does it define their powers and functions. The form, the organisation and the powers to be exercised, by the administrative Departments are all defined by Acts of Congress. And, then, Congress provides money for carrying on their activities. All this "opens a way for watchfulness over the work performed, for requests for information and reports for assignments of tasks and duties, and, of course, for curtailment of activities, or even termination of them altogether (perchance of the agency itself), by denial of funds." The Legislative Reorganisation Act of 1946, stressed the importance of continuous vigilance over the execution of all laws by the Standing Committees of both the Houses. Then, Congress may from time to time see fit to pass laws directing the administrative Departments to report to it. Thus, the Controller-General has been made responsible to Congress rather than to the President. Congress may sometimes pass a resolution directing the administration to follow a certain course of action in the event of a particular situation.

Direction and review are a continuous process and both are complementary. Almost all agencies are required to make annual reports to Congress. Members of Congress may call for information and explanation. Congressional Committees may undertake a review of a particular agency or problem. Confirmation by the Senate of an appointment or confirmation of a treaty may necessitate widespread resentment or criticism and may, thus, lead to a Congressional inquiry. But the most appropriate occasion of a

5. See *ante* under the heading Special Functions of the Senate.

thorough review is when representatives of the various agencies appear before Committees to defend budgetary demands.

Investigative

While discussing the role of the investigative committees, it was pointed out how these "watchdog" Committees help to keep administration within its bounds.[6] But appointment of such committees is not the peculiar function of the Senate alone. In fact, investigations by committees of Congress are as old as Congress itself, "Legislative oversight of administration is familiar and well-grounded assumption of responsible Government," writes Arthur Macmalon, and Congress can look into any subject whenever it deems necessary in order to carry out its law making, amending, electoral, directive and supervisory, or other duties. Alexander Hamilton and the Treasury Department were investigated into by the Second Congress; Presidential and Cabinet officers have been frequently investigated ever since.

Congressional investigations help to make administration accountable. A proper function of the Legislature, a body representative of the people, is to keep constant watch and control over the activities of the Government which they support and to make public its policies and acts. Under a parliamentary system there are many devices available to do so. In the presidential system there are no such means available and responsibility cannot be adequately enforced. Legislative investigations are, therefore, a major technique, even though it is sometimes cumbersome and has fearful implications for holding the Executive and administrative agencies accountable. Still, the need for throwing adequate light of publicity on what the administration does has become really imminent during recent times. As Congress has been required to extend the area of governmental functions, it has also been compelled to delegate regulatory powers, to authorise wide increase in the number of administrative bureaus, and to support by "appropriation and sustain by law a great and complex government machine involving an expenditure of over $ 42,000,000,000 (which has exceeded by more than a million by now) annually and the activities of over two million (which now touches the figure by a little more than half a million) government employees."[7]

Many Americans have held investigatory powers of Congress as un-American and have pleaded that they should be outlawed. Actually the Constitution does not provide for such investigations, but, at the same time, they are deeply rooted in American legislative procedure.[8] It is true that there has been extravagant abuse of the investigatory powers by the politically inspired members of these Committees, but "corruption and bribery have often been revealed only through Congressional investigations. The inadequacy of old laws and the necessity for new ones have been determined only by investigations. The abuse of offices, inefficiency, misapplication of powers have all been curtailed not only by investigation but by the constant possibility of an investigation."[9]

LEGISLATIVE FUNCTIONS

Extent of Legislative Functions

In spite of the importance and immensity of its non-legislative functions, after all Congress is primarily a legislature and to it the Constitution assigns "all legislative power herein granted." The words "herein granted" have two important meanings. In the first place, it means that consistent with the principle of limited government, the powers of Congress, too, are limited and they are enumerated in two lengthy Sections of the Constitution.[10] There are some eighteen different categories on which it has been made competent to enact laws. Secondly, the subjects not enumerated are beyond the authority of Congress but at the same time, the Constitution expressly details what Congress cannot do.[11] The general conclusion is that Congress may exercise those powers which are expressly granted and not definitely prohibited by the Constitution, and the rest remain within the jurisdiction of the States.

After expressly enumerating in succession the various powers of Congress, the Constitution concludes with a sort of general grant, empowering Congress to make all laws which shall be necessary and proper for carrying into execution

6. *See ante,* Chap. V.
7. Tourtellot, A. B., *The Anatomy of American Politics,* p. 98.
8. The colonial assemblies of America were authorized to conduct specific investigations. The Constitutions of some of the original thirteen States contained general authorization of this kind.
9. Tourtellot, A. B., *The Anatomy of American Politics,* p. 99.
10. Article I, Sections 7 and 8.
11. Article I, Section 9.

"the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[12] Within a few years after the founding of the Constitution, Congress desired to pass laws relating to matters that the Constitution did not mention particularly in connection with the proposal of Hamilton to establish a United States bank. Hamilton contended that the authority to establish such an institution was clearly implied in the power to borrow money and pay the debts of the United States. A federal bank, he asserted, was a proper, if not necessary, means for carrying into effect these important powers of Congress, just as the establishment of mint was necessary to carry out the power relating to the coinage of money. Jefferson and his associates maintained that Congress had no right to exercise any power which was not expressly conferred. As a result of the liberal attitude which ultimately prevailed and the policy of liberal interpretation, which Chief Justice Marshall of the Supreme Court and his associates adopted, Congress has profusely relied upon the doctrine of implied powers for its authority to legislate on many important questions. "Let the end be legitimate," said Marshall speaking for the Court, "let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the Constitution, are constitutional."[13] Implied powers are, therefore, those that may reasonably be deduced from delegated or enumerated powers or, to use the language of the Constitution, those that are "necessary and proper" for carrying delegated or enumerated powers into execution. Implied powers do not give the Federal Government a *carte blanche* to do anything it wishes. Implications can be made from some delegated or enumerated powers in the Constitution and the end should be, as Chief Justice Marshall remarked, "legitimate" and all means adopted to achieve that end are "appropriate."

But Chief Justice Marshall In *McCulloch* v. *Maryland* went even beyond the doctrine of implied powers when he invoked the theory of the resultant power. The result has been to strengthen the National Government in order to enable it fulfilling the great purpose for which it was created.

The doctrine of implied powers has been further cemented by the express provisions in some of the Amendments that Congress shall have the power to enforce them by "appropriate legislation."[14] The "General Welfare Clause" has further helped the authority of Congress to expand. The Constitution provides that "Congress shall have the power....to provide for the common defence and general welfare of the United States." It means that Federal Government possesses powers which are neither specifically enumerated nor implied, under the constitutional provision of the common defence and general welfare of the United States. For example, when States cannot adequately handle particular problems, which fall within their jurisdiction of residual authority, then, it devolves upon the National Government, under the General Welfare Clause, to assume the power in an attempt to relieve the situation. This opinion was supported by Justice Stone[15] in his dissenting opinion to support the Agricultural Adjustment Act. A similar opinion was expressed in *Steward Machine Company* v. *Davis* and *Helvaring* v. Davis in 1937. Justice Cardozo, delivering the majority judgment, used the "General Welfare Clause" to justify the Social Security Act. Since then, Congress has legislated on many matters embracing diversified problems covered by this mystic constitutional provision.

Reliance has also been placed on the so-called "emergency powers." During the economic depression of the thirties and the World War II, Congress passed emergency legislation on subjects beyond its normal jurisdiction. Congress has no emergency powers and the Constitution does not prescribe any. Nevertheless Congress has enacted laws, when the country was in the midst of economic or international crisis, which it never would have passed under ordinary circumstances. The Supreme Court, however, held that the "emergency does not create power," nor does it increase power already given in the Constitution. The powers which Congress wields at such time are not special powers. It relies on powers which it already has, but for which there is little or no need to use ordinarily.[16]

12. Article 1, Section 8, Clause 18.
13. *McCulloch* v. *Maryland.*
14. Refer to Amendments XIII, XIV, XV, XIX and XXIV.
15. *United States* v. *Butler (1936).*
16. *Home Building and Loan Association* v. Blaisdell (1934).

Thus, the powers expressly given to Congress do not convey the extent of the powers actually exercised today. Two of the eighteen express powers relate to levying taxes, spending public money, and borrowing on federal credit. The third brings in foreign and inter-state commerce. These three items alone have been expanded so amazingly that despite the six lines of type which they require in an ordinary printed copy of the Constitution, they now constitute the basis for hundreds and even thousands of far-reaching statutes which Congress has from time to time enacted. The Commerce clause has been invoked during the past three decades, to justify the regulation of business practices, the protection of organised labour, the regimentation of the coal-mining industry, and the stabilization of the stock and grain markets. The remaining gap was filled by the general welfare clause and the crowning event was made under common defence. When the economic depression began there was some feeling that Congress lacked adequate powers to tide over the difficulties in which the country was placed at that time. Today, no such fear can be entertained even remotely. Indeed, the chief apprehension in many minds at present seems to be that too much responsibility has been loaded on Congress, especially in those fields which were long left to private and state control.

THE MAKING OF LAWS

Legislative Procedure

The British and Americans, says Griffiths, are alike in their ideals as to how to legislate. "Both strive to provide thorough discussion and consideration. Both are determined that the minority shall have a fair opportunity to be heard, to criticize, to offer alternatives. Both offer opportunity to criticize the administration and call it to account."[17] And he concludes that such differences as there are in two countries are chiefly differences in procedural methods rather than in objectives. Griffiths makes two important observations here. American procedure, he says, provides much greater legislative specialization in substance and in detail and this suits well the enormity of legislation which Congress has before it. Much of it, which in part concerns details, in Britain is left to departmental orders or private Bills. Secondly, in comparison to the simple standing orders of the House of Commons and the precedents thereunder, Rules of Procedure and precedents in both the House and the Senate "present a maze, a mystery which even those of long standing membership often find it difficult to master completely."[18]

Each Congress in its two years of existence faces over 10,000 Bills and resolutions, of which less than 2,000 are private Bills, which follow a simplified procedure. The remaining Bills are public. A Bill introduced in the first session of a two-year Congress does not have to be re-introduced in the second session of the same Congress. With the election of the new Congress all previously introduced Bills, which have not been enacted into laws, lapse and these must be re-introduced, if need is felt to do so, with the coming in of the new Congress. The principal reason for this huge number of Bills is the doctrine of equality among the membership. A backbencher and a Chairman of a Committee rank equally. No distinction is also made between a minor Bill and an important measure, both are of equal importance. There is no such distinction, as it is in Britain, between a Government and a Private Member's Bill.

The greater part of the work of the Senate and the House of Representatives is transacted through the medium of Bills or joint resolutions. There is practically no difference between the two, except that the latter are narrower in scope and more temporary in purpose. Otherwise, they are similar to Bills, undergo the same procedure and after having been passed by both the Chambers are sent to the President, and if assented to by him, have the full force of law. But joint resolutions differ from *concurrent resolutions* and *unicameral* or *simple* House or Senate resolutions. Concurrent resolutions are employed to express an attitude, opinion and objective of both the Chambers. They are not submitted to the President for his approval and consequently have no legal effect unless prior enactment has been made dependent upon them. Unicameral or simple House or Senate resolutions express the opinion, purpose, or intention of the Chamber concerned and are not to be endorsed by the other. That is to say, unicameral resolutions concern the operations of either Chamber alone and may be covered by a simple resolution, acted upon in only the Chamber concerned. Unicameral resolutions, like the concurrent resolutions, are not submitted to the President and have no legal

17. Griffiths, *The American System of Government*, p. 39.
18. *Ibid.*

effect.

There is a good deal of variation among Bills themselves. Some of the Bills are of fundamental importance and embody major programmes of government policy and cover important details spreading to fifty, seventy-five or even more printed pages. Other Bills pertain to private affairs, for example, to provide pensions for widows of former Presidents, or appropriate money to pay for damages caused by post office or army trucks. The former are known as *Public Bills* and the latter as *Private Bills* that is, they do not concern public matters. *A* private Bill is primarily of interest to some individual or group of individuals and aims at their benefit. But here, too, as in the case of Bills and joint resolutions, the distinction is not always followed in practice.

There are six major stages that a public bill usually passes through before it becomes law after receiving the assent of the President: (1) drafting and introduction of the bill; (2) consideration and approval by committee in the Chamber in which the bill is introduced; (3) consideration and approval by that Chamber itself; (4) consideration and approval by committee in the second Chamber; (5) consideration and approval by the second Chamber; and (6) ironing out differences between the two Chambers in conference.

Unlike Britain, where bills are introduced, sponsored and piloted by the government, there are no government bills in the United States. The government has no place in Congress and all bills, public or private, are introduced and defended by members of Congress. It does not, however mean that all proposals to enact legislation originate among the Senators or the Representatives. Some bills have their origins primarily within Congress. They may reflect the wishes and labours of Congressmen who introduced them. Or a bill may have its birth in the deliberations of a standing committee which has given much time and consideration to the need for new legislation in a particular field. Most new tax bills are so prepared by the House Ways and Means Committee. Some Bills originate with, or at least are inspired by pressure groups, or persons outside of Congress.[19] But a majority of the bills come from the administration, that is, from the President or from one of the Executive Departments or independent agencies. Whatever be the source of origin, a bill must become a member's child and he may appear in one of the Chambers as its sponsor.[20] The Senators and the Representatives generally act as intermediaries rather than originators in the making of laws.

With very few exceptions, any member of either Chamber may introduce a bill or resolution dealing with any subject over which Congress has jurisdiction. But the Constitution requires that revenue bills be introduced in the House of Representatives, and by custom appropriation bills are so considered first by the House. Under the Constitution, resolutions proposing the impeachment of federal officers may also be introduced in the House. The ratification of treaties, confirmation of appointments, and trial of impeachment cases are all restricted by the Constitution to the Senate, and accordingly, any motion or resolution bearing on these matters can be presented only by a Senator.

The member introducing a bill endorses the copy with his name and drops it in the "hopper," a box on the Clerk's desk in the House and the Secretary's in the Senate. The bill is immediately numbered and sent to the Government Printing Office and made available to members next morning at the document room. With this procedure the first stage in the career of a bill is over. The introduction of a bill by a member does not necessarily mean that he endorses it. Many bills bear the notation, "By request," which means that the member has introduced the bill as a matter of courtesy.

Reference to a Committee is the next step in the legislative procedure. In the great majority of cases the bill goes to an appropriate Standing Committee of the House, into which it is introduced, automatically. The title of the bill indicates what particular Standing Committee should receive it. Before 1910-11, the Speaker in the House of Representatives determined the Committee to which a Bill was to go. But now the Speaker has been deprived of this power. Sometimes, however, a Bill is of such a nature that it might be referred with almost equal propriety to any one or two or more appropriate Committees. In all such exceptional cases, the Speaker decides

19. It was widely reported that certain Sections of the 1954 Act revising the federal income tax were originally written by business groups and reflected the desires of business for more favourable tax treatment.

20. An Act of Congress is frequently known by the name of the Representative or Senator who introduced the Bill out of which the Act emerged, *e.g.*, the Sherman Act. If a Bill originates from a Committee an Act is sometimes known by the Chairman of the Committee that handled it, *e.g.*, the Taft-Hartley Act.

to which Committee a Bill shall be referred. But it is the accepted practice for Speakers to exercise the discretion freely and without party prejudices. In the Senate the reference to a Committee is even more automatic than in the House, because the Presiding Officer there has never had the discretionary authority to assign Bills to Committees.

In Committees, Bills are first given a preliminary examination and a decision is taken whether the proposal has merit or not. The Bills which are deemed worthy of consideration are sorted and the rest are entrusted to the Committee files. It means, Bills meriting no consideration are "pigeon-holed." It is estimated that from 50 to 75 per cent of the Bills introduced in Congress come to final rest in Committee files and are never heard of again. The more important Bills which merit consideration are studied in details, and relevant information is gathered both from official and public sources. The Committee may seek to obtain all the light on the subject. Specified portions of the measure or even the whole of it may be assigned to a sub-committee. The sub-committees are very much like regular Committees, "sorting the wheat from the chaff," deciding what changes should be recommended in a certain Bill, and otherwise preparing to dispose of the business entrusted to them. In 1946 Congress decided to provide a research staff for each Committee.

Committees charged with the consideration of important Bills frequently hold public meetings at which interested parties may appear and present arguments for and against the measures under consideration. In addition to the prepared statements of witnesses, numerous questions are often put by members of the Committees for the purpose of elucidating certain points or eliciting further information. Apart from the testimony received in connection with public hearings, Standing Committees are very often subjected to outside influences. The President may himself talk personally or even write letters to top-ranking members of the Committee for their due consideration of important measures. Officials of administrative agencies may ask the Committees to be heard in person or they may submit detailed statements with their reasons for a favourable action by the Committee on a certain Bill. Representatives of pressure groups also manage to make their influences felt whether public hearings are held or not. Sometimes they manage to get themselves invited to the private hearings of Committees.

On the basis of its own investigations, the information gathered at public hearings, the opinion elicited from high Government officers and the influence exercised by pressure groups, the Committee meets in executive (closed) session to arrive at its verdict. Before the final meeting is held the sentiments of various members are canvassed. It may take by majority vote one of the following courses:

(1) it may recommend the Bill back to the Chamber concerned with recommendation that it be passed;

(2) it may amend the Bill and recommend that it be passed as amended;

(3) it may entirely change the original Bill except its title and report a new one in its place;

(4) it may report the Bill unfavourably and recommend that it need not be passed;

(5) it may "pigeon-hole" the Bill, that is, to take no action on the Bill at all, or report it so late in the session that it may not find an opportunity for consideration.

The Report to the House is usually made by the Chairman of the Committee or someone designated by him. On important matters Committee Report may be extensive and exhaustive; on minor matters it may convey a little more than a simple affirmative note. Hearings of the major Committees on important legislation are published, some in the 'documents' series of Congress. Minority reports may also be filed.

The Caucus System

Before describing the next stage in the legislative procedure, it is necessary to briefly refer to the caucus system. We have already referred to the absence of leadership in Congress and consequently the need for devising some other means to see the Bills through or to oppose them. The mechanism which has been developed to meet the situation is known as the "caucus" or "conference."

There are numerous Bills which are non-controversial and do not demand much political interest. Such Bills are left to find their own way in Congress and the individual members are permitted by their parties to take stands as they please. But the most important legislative proposals cannot be left to themselves and it is here that the caucus system intervenes. A caucus is a meeting of the members of a political party both belonging to the Senate and the House and all members are expected to attend unless they have

a valid reason for absence. The caucus at its first meeting of the session elects its party leader, steering committee, floor leader, whips and party assignments on Congressional Committees. The caucus of the majority party plans a positive programme for the particular session of Congress. The minority caucus has less an active role to play, although it may decide to oppose certain controversial Bills which, "are regarded especially dear to the majority party." In the caucus meetings members are free to express their opinions and persuade the caucus to accept their view. But once the decision has been taken and a particular stand determined, all members of the caucus are expected to abide by its decision no matter what their personal views on the measure may be.

The caucus system is used more in the House of Representatives rather in the Senate. The caucus of the Senate used to be as strong as that of the House of Representatives, but during the last two decades the caucus in the Senate "have limited themselves to setting up party machinery and arranging committee assignments, leaving Senators free to divide themselves as they like on pending Bills."[21] It does not, however, mean that the party Whip is not issued to the members to pass a Bill which is deemed in the best interests of the party, but no official caucus is taken which would bind the party Senators in voting.

Procedure on the Floor

Each Bill reported out of a Committee to the floor of the House is placed on one of the three principal calendars. A Legislative Calendar is a docket or list of measures reported from Committees and ready for consideration. The House of Representatives maintains three of these for different types of measures: (1) A Calendar of the Committee of the Whole House on the State of the Union, to which are referred all public Bills raising revenues or involving a charge against the government. It is also called the Union Calendar. (2) A House Calendar for all public bills not raising revenues nor appropriating money or property. (3) A Calendar of the Committee of the Whole House for all private bills; also called the Private Calendar. Bills are listed on these Calendars in the order in which they are received from the committees and remain there until the final adjournment of Congress, unless they are removed for consideration. All Bills are not invariably called up from the calendars in the order in which they are listed. Most important bills are lifted out of their sequence on the lists and put in a preferred position. If this is not done, there may not be any chance of their being taken up for consideration and hundreds of bills "die on the calendars" in every Congress.

Both Houses guard jealously the right of the minority to be heard. In the House of Representatives it usually takes the form of apportioning an equal amount of time on a given measure to its opponents and proponents. In the Senate it appears in the facilities extended for almost unlimited debate.

When the time fixed for bringing a Bill to the floor of the House of Representatives has arrived, the House ordinarily meets as a Committee of the Whole. The Senate before 1930 used Committee of the Whole more frequently than the House, but it has now abandoned this practice for the consideration of ordinary Bills, except in debating treaties. The Committees of the Whole are of two kinds: a Committee of the Whole House for consideration of private Bills, and a Committee of the Whole House on the State of the Union of considering public Bills. When the House goes into the Committee of the Whole, the Speaker leaves the chair and calls someone else to preside in his place. The presence of 100 members constitutes a quorum. Debate in the Committee of the Whole is conducted rather informally, and greater freedom of discussion is allowed. Divisions are taken only *viva voce,* by rising vote or by tellers and no record is kept how members vote. Motions to refer or to postpone are not permitted and when discussion is completed the Committee votes to rise, the Speaker resumes the chair and the mace is again placed on a marble pedestal on the right of the chair.

The device of the Committee of the Whole is really important, because it enables all Finance Bills and most other important Bills to be considered in such a way that ordinarily every member who desires to speak and offer amendments can do so. He is, in fact, given an opportunity for that. It also, affords large number of amendments to be presented, explained and disposed of speedily. "It facilitates rapid fire, critical debate which commonly shows the House at its best. And, for better or worse, the absence of recorded ayes and nays enables members to register their sentiments without check or restraint such as published votes

21. Zink, H, *A Survey of American Government,* p. 353.

sometimes impose."

Three readings of each Bill are required by House rules. The first requirement is satisfied by printing the title of a Bill in the *Congressional Record and the Journal.* Then, the measure goes to the Committee and if reported back, is placed upon its Calendar for a second reading. The second reading occurs at the time the Bill is taken up for consideration in the House or in the Committee of the Whole. This is the actual reading in full with opportunity for debate and for amendments to be offered. Some amendments are general, "considered" amendments are seriously intended as alterations in the Bill. Others are *pro forma*, involving the striking out of the last word or two of a section. In the conduct of the Bill the top-ranking members of the Committee who had supported the Bill pilot it through in the House. The minority members of the Committee oppose it. Time for debate is generally predetermined and is equally divided between the supporters and opponents of the Bill.

At the conclusion of the consideration, the Speaker states: "The question is on the engrossment and third reading of the Bill." If adopted, the Bill is ordered engrossed and read a third time. After this "the question is on the final passage of the Bill." If it is passed, then, it is sent, duly signed by the Speaker, to the Senate.

Action by the Senate

The engrossed Bill is sent to the Senate through a messenger where it is received with due dignity. The President of the Senate refers it to the appropriate Standing Committee in conformity with the rules. The Senate Committee gives the same kind of detailed consideration as it received in the House of Representatives, and may report it with or without amendment. Then, it is placed on the Calendar.

The Rules of Procedure in the Senate differ from those in the House of Representatives. The Senator making the report may ask consent of the Chamber for the immediate consideration of the Bill. If there is no objection and the Bill is of non-controversial nature, the Senate may pass the Bill even without a debate after a brief explanation of its purposes and effect. Any Senator may also move an amendment thereto. If there is any objection to its immediate consideration, the report, must lie over one day and the Bill is placed on the Calendar. Unlike the House of Representatives, there is only one Calendar of Bills in the Senate.

At the conclusion of the morning business for each legislative day the Senate proceeds to the consideration of the Calendar of Bills. Bills that are not objected to are taken up in their serial order permitting each Senator to speak for five minutes only on any question. Objections my be raised at any stage. When the Bill has been objected and passed over on the call of the Calendar, it is not necessarily lost. The majority party of the Senate determines the time at which the debate takes place and a motion is made to consider the Bill. The motion may lead to filibuster. Closure may be applied if 16 Senators sign a motion to that effect and the motion is carried by two-thirds of the members voting. Amendments may be moved even at this stage, and these, including those proposed by the Committee that reported the Bill, are considered separately.

After final action on the amendments, the Bill is ready for engrossment and the third reading . The Presiding officer then puts the question upon the passage and the vote is taken *viva voce*. A simple majority is necessary to pass the Bill. The original engrossed House Bill, together with the engrossed amendments, if any, is returned to the House with a message stating the action taken by the Senate.

On return to the House, it is placed, with all the relevant papers, on the table of the Speaker to await further action. If the amendments are minor these are accepted by the House, and the Bill is ready for enrolment for presentation to the President. If the amendments are substantial or controversial and the House does not agree thereto, a member may request for a conference. At the conference only matters in disagreement are considered. In many instances the result of the conference is a compromise. If no agreement is reached the matter is reported by the conferees to their respective Chambers.

Bill Becomes Law

A Bill cannot become a law until it has been approved in identical terms by both Houses of Congress. When the Bill has finally been approved by both Houses it is sent to the President for his assent. If he approves the Bill he signs it and usually writes "approved" and it becomes law. If the President decides to veto it, he returns it with a message stating the objections to the Chamber in which the Bill originated. If the measure is repassed by both the Houses, with two-thirds votes in each, it becomes law without the signatures of the President. If two-thirds vote

is not forthcoming the veto stands. If the President keeps a Bill for ten days without signing it while Congress is in session, it becomes law without his signatures. But if Congress adjourns within ten days and the President does not sign the Bill, the Bill is killed. This has been called the "pocket veto."

Committee System Analyzed

Law-making in the United States is a labyrinth, complicated and tortuous process wherein Committees play the key role. It is here that the Bills languish and die and the Chairmen of the Committees play a strategic role in the process of selecting the Bills that the Committees will take up, in shaping the size and jurisdictions of the sub-committees, and in selecting members who may sponsor legislation. In countries with parliamentary system the part which the Committees play is secondary. Their purpose is to give the Bill a final shape and it comes to them when the Chamber itself has already approved its general character. The Minister sponsoring the Bill holds its charge throughout : it is his child. It is just the other way in the United States. Woodrow Wilson appropriately characterised American Government as "Government by the Standing Committees of Congress."

The Committees are of two types in the United States: Standing or "Legislative" Committees and Special Committees. The House of Representatives has twen-ty-two Standing Committees and the Senate sixteen. They are permanent Committees, each of which watches over a particular segment of legislative business. The number of Committees though slightly different, the division of responsibility among Committees is very similar in both Houses. Each of the Senator is assigned two of the Committees, though three even four Committee assignments are sometimes made, whereas one Representative, with some exceptions, however, gets only one. Many Committees constitute their Sub-Committees, some of which are permanent and are subject to little control by the parent Committee.

A House Committee, a phrase commonly referred for a Standing Committee of the House of Representatives, consists of nine to fifty-one members, and a Senate Committee usually has eight to twenty-six members. All the Standing Committees in both the Chambers are bipartisan in character and the proportion is fixed by the Party in majority for the time being. There is a tendency to appoint members to Committees in the work of which they are interested. It is a forum of specialised interests, for example, ex-soldiers seek places on the Committee dealing with veterans, members from the farm States go to the Committee on Agriculture and the industrial states of the North and East are represented on the Finance Committee. Special or Select Committees may be created at times to perform specific tasks. Their members are appointed by the Speaker and are created by a simple resolution. The best known Select Committees are investigating committees. When the function has been carried out the Select Committee automatically expires. In recent years, however, such Committees are seldom appointed and investigations are assigned instead to the relevant Standing Committees.

Special Investigating Committees are sometimes set up to gather information on some subjects as an aid to law-making, to check on the administration of laws, or to investigate into alleged undesirable practices or conditions. The House of Representatives frequently votes itself into the Committee of the Whole for the purpose of expediting business and reaching agreements on detailed provisions of Bills. When the House meets as a Committee of the Whole, all its members sit as a committee with an appointed chairman.

Joint Committees consisting of an equal number of Representatives and Senators have been created by law in a few well-demarcated fields, such as, the Joint Committees on Atomic Energy, on the Economic Report, on the Library of Congress, on Internal Revenue Taxation. Conference Committees are a special form of Joint Committee used to iron out differences on Bills as passed by the two Houses. The Speaker appoints House conferees, and the Vice-President those of the Senate. Normally the House appoints three or five conferees, but the Senate tends to appoint more.[22] If the conferees agree on a compromise they report the result to their respective Chambers. Should the House and Senate both agree to accept the recommendations of the Conference Committee, the Bill is deemed to have passed in the form the Conference Committee proposed it. If one or both Chambers refuse to accept the recommendations of the Conference

22. In a recent Congress, Senators outnumbered Representatives on one Conference Committee by fourteen to five and on another by thirteen to five.

Committee, the Bill dies or another Conference Committee meeting may be arranged to resolve the differences in the light of the deliberations and sentiments expressed by the House and the Senate.

The real work of legislation, which averages 5,000 to 7,000 Bills in a session, is done through the Standing Committees. These Committees call out those Bills which they regard important and recommend to Congress for enactment. In fact, most Bills are enacted in the form given them in the Committees. Some Bills are redrafted *de novo* in Committee rooms. The Standing Committees, therefore, play a vital role in the Congressional legislative process. The reduced number of Standing Committees, 61 prior to 1927, 47 from 1927 to 1946 and since then 22, has resulted in the greater use of sub-committees as the work-load of Committee work remained the same after 1946.[23]

In theory Chairmen of the Committees in each House are designated by the Committee on Committees of the majority party. But in practice each assignment goes to that Member of the majority party who has the longest unbroken service on the Committee. This seniority rule in the appointment of Chairman is a subject of deep controversy as it ignores ability and puts premium on continuous service on the Committee itself. The American Political Science Association appointed, in 1945, a Committee on Congress and it recommended the abandonment of the seniority rule. The Committee suggested two alternatives to the prevailing system. First, the Chairmen of Standing Committees should be selected at the beginning of each Congress by a Committee on Committees of the majority party on the basis of merit, or, if seniority remains the dominant consideration, then an automatic limit of six years be placed on the term of all Chairmen, thereby forcing a reasonably regular rotation of office.

The role of the Chairman of a Committee in the legislative process is extremely important. He has the power to arrange the meetings of the committee; to select its professional staff; to appoint the members of the sub-committee; to determine the order in which it considers Bills; to decide if public hearings on a Bill are desirable; to arrange to have a Bill, favourably reported by the committee, brought to the floor of the House; and serve as a manager on the Conference Committee on a particular Bill, should one be necessary. "In theory the manner in which a Chairman exercises these powers is subject to review and even control by the committee as a whole, but it is a rare committee that even undertakes to check or rebuke its Chairman." It also goes to the credit of a Chairman that he does not seek to ride roughshod over a majority of his Committee members.[24]

A significant merit of the Committee system in the United States is that the Committees are well equipped to consider measures referred to them. The members of the Committees are sufficiently experienced, many members having first-hand information on the subject covered by a bill. In addition to the clerical staff, each committee is authorized to appoint not more than four professional staff members on a permanent basis.[25] The Legislative Council and the Legislative Reference Service of the Library of Congress render assistance to the Committees for the successful and efficient performance of their duties. But the vital source of information is the testimony given by Government officials, representatives of organized groups, and private citizens at public hearings.

In addition to making recommendations on legislation, the Standing Committees scrutinize administration of laws by the Executive branch of Government. The Legislative Reorganization Act, 1946, directs each Committee of Congress to "exercise continuous watchfulness of the execution by the administrative agencies concerned of any law, the subject-matter of which is within the jurisdiction of such Committee."[26]

FINANCIAL FUNCTIONS

The Constitution establishes the financial supremacy of Congress by specifying that "no money shall be drawn from the Treasury but in consequence of appropriation made by law." The Constitution also provides that all Bills for raising revenue shall originate in the House of Representatives. The usage adds to it that the appropriation Bills are also initiated there. The Senate possesses co-equal powers with the

23. The Legislative Reorganization Act, 1946, reduced the number of Senate Standing Committees from 33 to 15. But now there are 16 whereas in the House there are 22.
24. Galloway, G. B., *The Legislative Process in Congress*, p. 280.
25. The Appropriation Committee in each House is authorized to appoint such staff as it determines to be necessary.
26. Section 136 of the Legislative Reorganization Act, 1946.

House of Representatives in accepting or rejecting Financial Bills, but in practice it "functions as a Court of Appeals in financial legislation often mending defects of such measures sent over from the House."

The budgetary powers of Congress are, indeed, great as both Congress and the President shape national policy-making. It is "a system of separated institutions sharing powers."[27] How Congress shares powers with the President is succinctly explained by David E. Bell, President Kennedy's first Director of the Bureau of the Budget. The Budget, he said, is ".....a major means for unifying and setting forth an overall executive programme....." It "reflects (the President's) judgment of the relative priority of different federal activities. Thus, the President's budget necessarily reflects his policy judgments and the Congress in acting on the President's budget necessarily reviews these policy judgments as to the relative importance of alternative uses of national resources.

.....The essential idea of the budget process is to permit a systematic consideration of our Government's programme requirements in the light of available resources; to identify marginal choices and the judgment factors that bear on them; to balance competing requirements against each other; and finally, to enable the President to decide upon priorities and present them to the Congress in the form of a coherent work programme and financial plan."[28]

GENERAL APPRAISAL OF CONGRESS

The Founding Fathers, who drafted the Constitution of 1787, had great hopes for Congress. Congress was conceived as the dominant and most powerful of all three branches of government. It was given a place of precedence and it is the first and the longest Article of the Constitution—longer than all other original Articles combined. The Constitution gives to Congress control of the laws of the nation, the finances of the nation, the strength of the armed forces of the country. By implication it possesses unlimited investigatory powers. It has the right to impeach the President, the Vice-President and other officers of the United States, exercises complete supervisory powers over administrative agencies and has the choice to select the President and Vice-President if no candidate receives an electoral majority. In brief, because of its supervisory and appropriation power, Congress has stronger ultimate administrative powers than the Presidency, and because of its impeachment powers, including the impeachment of the judges themselves, it is a higher Court of justice than any other, including the Supreme Court, in the land. The powers of Congress, except for certain exceptions, are clearly constitutional and detailed carefully to cover eighteen different phases of national life and emerging therefrom are the Implied powers and Resultant powers. Members of Congress are the only officials who are exempt from arrest while attending sessions, except for treason, felony or breach of peace and from libel law.

Its working and achievements disclose that Congress stands out as one of the successful Legislatures of the democratic world. It has endured for more than two hundred years and has never failed to serve the country loyally. Nevertheless, Congress has from the beginning not fulfilled the expectations of the framers of the Constitution. It has suffered declining prestige, weakened influence, and a more or less chronic inability to get its work done, as the Presidency has in general grown and as the Supreme Court has on the whole held its own.

Not a Really National Representative Body

Primary among the reasons of its declining prestige and authority is the fact that Congress is not, in very real sense, a national representative body. It is an assemblage of State delegations. "Its historic development, unlike the Presidency, has been along generally regional lines; its major pre-occupation has been the resolution, usually by compromise, of conflicting regional interests; its ordinary approach to national legislation has been through the avenue of the effect of such legislation, not on the welfare or the opinion of the nation as a whole, but on the interests and the reaction of the area from which the Senators and Representatives come and to which they must return."[29] Congress, is, as Professor Laski pointed out, the legislature of a continent and a member of Congress is expected to think in terms of sectional interests. He must think about the effect of a measure upon the particular area for

27. Neustadt, Richard E., *Presidential Powers*, p. 33.
28. Statement of David E. Bell, Hearings Before the *Sub- committee on National Policy Machinery*, as quoted in Polsby's *Congress and the Presidency*, p. 83.
29. Tourtellot, A. B., *An Anatomy of American Politics*, p. 79.

which he sits rather than its effects on the country as a whole. This regional attitude of Congress has given it a position of backwardness, but to the advantage of Presidency which Americans regard as the pivot of national solidarity.

At the position of Congress and its members is the working of the "locality rule." The Constitution demands that the Senators and Representatives shall be residents of the States they represent and convention insists that Representatives shall, in addition, be residents of the congressional district that they wish to represent. A member of the House of Representatives is constantly aware that every two years he will be judged by his constituents and this awareness makes him far more responsive to his judgment of what will please them. The obvious result is that every Congressman keeps his ear to the ground and sacrifices national for local and sectional interests. Locality rule accounts in part of the comparative local-mindedness of the American Congress.

A memmber of Parliament in Britain cannot afford to disregard the party whip and go against the behest of the party even if the decision of the party may be antagonistic to the wishes of his constituents. In America, neither the Senator nor the Representative can afford to obey the party call against the wishe of the State or a district he represents. He knows that if he is defeated it will mean the end of his Congressional career. The President or the party can do nothing for him, "cannot procure for him a seat outside his own bailiwick, can only solace him with a job—and cannot always do that." The result is that the whims of the local party boss, if his fate depends upon his judgment, or that of an important section of his "home-folks" are more near and dearer to him than the national leaders of his party. Voters, too, feel that if they elect a man he should be the local champion. All these factors combined together do not make Congress really a national representative body and, consequently, its authority and prestige are grievously impaired.

Separation between Executive and Legislature

The Presidential system of government envisages a distinct mechanism of government. Parliament, in Britain, is only formally a legislative body. Its real business is to endorse the decisions of the Cabinet and make them effective. Parliament may bring about minor amendments here and there in the measures before it, but fundamentally legislation is shaped in the Whitehall and not in Westminster. With Congress, it is just the reverse. Legislation is the main business of both the Chambers in the United States. The Senate and the House do not act under the instructions of the President. They, no doubt, co-operate with him, particularly during times of national emergencies but Congress is a co-ordinate branch of government with the Executive. To put it still more explicitly, the Executive and the Legislature are co-equal partners in working the governmental machinery. There is, however, no cohesiveness and the party ties which bind the Executive and Legislative departments of government are too flimsy for an integrated policy as obtainable in Britain and other countries with a parliamentary system of government. To put it in the words of Laski, the party ties which bind the two wings of government "never bind them into a unity." The interests of Congress are separable from those of the President.

From the very beginning of the establishment of the Union, Congress has always emphasized its independent existence and its independent will, except only during war, or an emergency like that of March 1933, where there had been unity of purpose and unity of will. This is for two reasons. First, the realisation of the fact that administration does not depend for its existence on Congress if it acts on its own way; and, secondly, every individual Congressman endeavours to assert himself and his rights that Congress cannot be overshadowed by the President. To put alterations and modifications to the measures of the President "is to draw attention to itself that he is not unqualified master of the nation." Sometimes the "very political survival of the Congressman, who is, after all, subject to renomination and re-election on the local level, demands that he break on one or more issues with the President of his own party."[30]

The provisions of the Constitution with respect to foreign policy are "an invitation to struggle" between the President and Congress, in the opinion of Professor Edward S. Corwin. The invitation lies in the intricate system of checks and balances by which the framers of the Constitution sought to ensure that neither the President nor Congress would totally dominate the other. Congress has not always accepted the

30. Polsby, Nelson E., *Congress and the Presidency*, p. 114.

Constitution's invitation to struggle with the President over foreign policy. There had been periods when Congress was content to leave the matter to the President—because of the strong personality of a particular President, because of Congessional indifference, or, most importantly, because Congress generally agreed with what the President was doing. The most recent such period of relative Executive-Congress peace lasted approximately 20 years, from World War II till about the middle of 1960's. This broad consensus between Congress and a succession of Presidents, in American public opinion generally was cracked by President Lyndon Johnson's intervention in the Dominican Republic in 1965 and then shattered by the deepening U.S. involvement in Vietnam beginning the same year. Since that watershed Congress has become increasingly assertive of its constitutional rights and prerogatives. Through a variety of legislative devices, it has sought and secured a much greater measure of detailed control over Executive branch agencies. The technique of consensus which Roosevelt, Truman, Eisenhower, John Kennedy and Lyndon Johnson could hammer out and enlist the aid of key congressional leaders and Committee Chairmen has become a casualty of 1970s. "Neo-Congressional government," observes Alexander Haig, "would not be harmful if we had a parliamentary system. But our Congress is neither temperamentally nor structurally adapted to discharge executive branch responsibilities, nor is its constitution mandated to do so." He, therefore, concludes that the eighteenth century concept of balance is "as essential to our constitution as is its emphasis on checks. The machinery of government becomes harmonious not in paralysis but in balanced action."

Short-sighted Policy of Congress

The net result is incoherency and irresponsibility. The Executive has no place in Congress to coordinate its activities and establish a hyphen between the Executive and Legislative departments of government. Legislation is every Congressman's concern, but it is no one's child. To impress upon his constituents his worth as a legislator and in order to cater to the local sentiments and to justify the trust reposed in him by his electors, every Congressman has a mania to rush in all kinds of measures. Congress is, accordingly, charged of wilful parochialism and neglect of national needs. It has, consequently, seldom succeeded in formulating and enacting long range and lasting policies unless they were imposed upon it by a strong President.

Polsby maintains that even the "efficient minority" of Congressmen, who stand eminent in the legislative sphere, determine the consequences of their behaviour from the point of their careers. "The questions he must continually pose to himself are: How will my behaviour today affect my standing in the House tomorrow, the next day, and in years to come? How may I act so to enhance my esteem in the eyes of my colleagues ? How may I lay up the treasures of my obligation and friendship against my day of need? Or, if he is oriented to public policy: How may I enhance the future chances of policies I favour."[31] Such a state of mind has made Congress "the butt of jokes among all the people, the subject of despair among the enlightened and the instrument of hope among the ruthless."[32] It has, therefore, been correctly observed : "If the law is regarded—as properly it should be—as a codification of the moral judgment of the community as a whole, which in this case is the nation, then, Congress has been strangely and unbelievably obtruse in determining that judgment."

The Congress, thus, speaks in a confusion of tongues and the long decline of Congress has contributed greatly to the rise of Presidency. It cannot operate successfully without leadership, which none but the President can offer. When Congress finally gave up its primary responsibility for preparing the national Budget in 1921, it had no choice but to call on the President to come to its rescue. By abdicating this ancient and primary function, it exercised the most short-sighted policy since it gave a tremendous boost to the power of the President, not only to control his administration, but to influence the legislative process too.

Inefficient Working of Congress

Even a cursory observer of the working of Congress would regret the amount of legislative time wasted on relatively minor issues, and the haste, especially in the House in which matters of great importance are dealt with. The rules of filibuster and the two-thirds votes required for ratifying treaties in the Senate are a great hindrance in the way of the majority and Congress carrying out its purpose. The Rules of Procedure

31. *Ibid.*, p. 102.
32. Tourtellot, A. B., *The Anatomy of American Politics*, p. 88.

followed in both the Houses encourage minorities to obstruct its business by making frequent points of order and time consuming motions, introducing irrelevant business, and repeatedly demanding quorum calls.

The Congressman is not only a legislator, but he is also expected to serve his constituents as an "errand-boy" in varied fields divorced from legislation. An active Congressman once said, "Nevertheless at least half of my time is taken up with matters that has nothing to do with my legislative duties. Answering letters from my constituents, trotting around to the Departments doing their errands, trying to represent them in one way or another as a broker, a factor, an attorney, an agent, an emissary, and whatever you will takes up about half the time of the average Congressman. And I don't have to do it if I don't want to. All I have to do is to neglect it; then I get licked at the next election.....[33] Such kind of work seriously interferes with Congressman's real usefulness as a national law-maker. The theory of representation as prevailing in the United States demands that the representative gives his attention, first to his constituents and secondly, to national affairs. Local sentiment and pressure are, thus, intensified. Though neither residence in the district nor the elements of short term of office are present in the Senate, " the attitude fostered by the relationship of constituents to their representative," write Professors Swarthout and Bartley, "is transferred over to the Senator in similar, though diminished, fashion."

The criticism of many members of Congress themselves, together with those of other officers of government and outside commentators, about the adequacy of Congress to meet the challenges of the twentieth century, are compiled on the Hearings of the Joint Committee on the Organization of Congress,, which were held from March to June 1945, and which culminated in an enactment of the Legislative Reorganization Act of 1946. The Director of the Bureau of the Budget, Harold E. Smith, in his testimony urged the Joint Committee to "consider broadly what the role of Congress should be in the government of the United States." He developed his point as follows: "we are familiar with the observation that this is a different sort of world from that which existed when the Constitutional Convention devised the framework of our government. Yet we still lack a penetrating and practical restatement of the role of representative assemblies in the light of the changed problems with which they deal and the altered conditions under which they operate. We are up against the fact that legislative bodies have not changed very much but the kinds of problems with which they must cope have changed radically. Your own talents and the keenest minds you can command could very well be devoted to rethinking the functions of the Congress under present conditions. A sound formulation of the role of the representative body is basic to all the work of your committee. Only on such a basis can one develop standards by which to judge and develop proposals for changes in organization, procedure, staffing, and other matters."[34]

Influence of Lobby

A Congressman is further bedevilled by the presence in the national capital of numerous individuals who press him at every turn to support or reject given legislation. There is no open bribery or graft, but the methods employed by the 'lobbyist' are frequently so subtle that the "unsuspecting legislator is under lobby influence before he is quite aware of what has happened." The 'lobbyists'[35] are the representatives of the special groups economically or otherwise interested in the legislation before Congress. They are called 'lobbyists' because they buttonhole individual members of Congress in the lobbies and elsewhere too. The members succumb to the special interest groups. The existence of lobbies is a serious problem to Congress, because they place on the legislator a burden "from which he cannot always disassociate himself. The pleadings—and threats—of special interest groups are constantly in his ears. Even many of the church groups of the nation now mantain paid lobbyists in the nation's capital." Lobbying, no doubt, is good and it frequently performs necessary services, "but it has outgrown its evil associations and more sordid ways" with shocking results on the reputation and integrity of Congress as a national legislative body. The Federal Regulation of Lobbying Act is an important section of

33. Also refer to Ferguson and McHenry, *The American System of Government,* pp. 281-82.
34. Organization of Congress, Hearings before the Joint Committee on the Organization of Congress (1945), pp. 670-71.
35. The term lobby arose from the use of lobbies, or corridors, in legislative halls as places to meet with and persuade legislators to vote a certain way. Thirty years ago there were 2,000 lobbies, and now there are more than 15,000 of them registered at Washington, D. C. spending some two million dollars, to push their real projects.

the Legislative Reorganization Act of 1946, which aimed to remedy some of the glaring defects in the "lobby." The Lobbying Act requires persons, corporations, and organized groups of all kinds seeking to influence the passage or defeat of legislation by Congress "to register, list contributions, and file quarterly statements of expenditures with the Clerk of the House of Representatives." But it is no remedy and does not help to elevate the stature of Congress.

Rigours of the Committee System

The Committee System is also subjected to severe criticism and it centres to a considerable degree on the methods used in Committees of Investigation. The seniority rule in choosing Committee Chairmen, sometimes almost dictatorial power of Committees Chairmen, and broad authority of the Committees to "pigeonhole" legislation are matters which are disturbing and they have since long troubled some students of Congress. "Yet curtailing these powers, without generally overhauling the entire congressional machine and drastically altering philosophy of the members would result in an impossible volume of work for Congress." As regards purposes of Congressional investigations, other reasons aside, investigations are often motivated by the desire of a political party to advance its own interests or to embarrass its adversary. In 1920 and 1930, the Democratic Party did its best to discredit the Republican Party through investigations into the scandals of Harding Administration and the evils of bankers and businessmen. The Republican Party took its revenge in 1947-48 and 1953-54 to expose the shortcomings of Roosevelt and Truman administrations. Thus instead of giving fair, impartial information to Congress and to the public for constructive use, an investigating committee usually starts out to prove something and hunts the evidence which will support this proof and this vicious circle continues without any qualms of conscience. The public can hardly expect Congress to function with wisdom under the circumstances.

Judicial Review

The process of judicial review also depresses the enthusiasm of the legislators. While the last word rests with the Supreme Court, the legislators while initiating any legislative measure have not only to think that what their constituents want, or will stand, but also whether what Congress does decide will be acceptable to the Supreme Court in case its validity is challenged. No one can predict what the Supreme Court will do, but the apprehension is there. "When all legislation," observes Professor Brogan, "has to run this kind of gauntlet, the results are apt to depress the legislator and his supporters, to blunt the edge of zeal and hope to turn the minds of both parties to more practicable and tangible achievements, favours and jobs."[36]

Unification of Socio-economic Interests

In the context of the present state of affairs in the country there has been the growing unification of the nation's economic and social interests. The sectional economic issues are fast disappearing and all sections of the people now stand together for their common interests. The rejection of Jimmy Carter for the second Presidential term and even his own South repudiating him, except his own State of Georgia and there, too, his own huge margin of 1976 whittled down by almost 20 per cent, clearly indicates that national politics have now few sectional aspects and it is not easy to split the country geographically on economic issues. The nation accepted Reagan's economic policy and even the Democratic Congressmen had supported some aspects of that policy. Socially, too "the Midwest farmer, the Farwest rancher and the Eastern plant manager are becoming unified in their tastes and values; their children no longer go solely to their own sectional colleges and universities; their travel and vacations are no longer within sectional limits." But there is no change in the attitude of Senators and the Representatives. "The senior Senator from Tennessee is no more concerned with or closer to the residents of Oregon that he was two or three generations ago. In the halls of Congress sectional values, sectional attitude and sectional roots remain."

The result is that the people with their new national standards do not look favourably towards Congress. They are, indeed, unwilling to place great faith in a legislature which, while still protecting what local interests remain, frequently "by procrastination, indecision or opportunistic compromise endangers the nation's interests." They look to the President as the embodiment of national unity and national solidarity. This really is dangerous to the prestige of Congress and a grave cause of its weakness.

36. Brogan, D. W., *The American Political System*, p. 138.

STRENGTHENING THE CONGRESS

Executive-Legislative Coordination

It should, thus, be obvious that the problem of coordinating the Executive and Legislative branches has been aggravated by the fact that usage has intensified a separation that the Constitution only implied. This happened immediately after the inauguration of the Constitution when the first Congress required the Secretary of the Treasury, Alexander Hamilton, to make his reports in writing instead of orally, which he was ready and eager to do. Since then this practice has been rigidly followed with the consequence that the Executive is entirely divorced from the legislature and as Judge Story described a century ago: "The Executive is compelled to resort to secret and unseen influences, to private interviews and private arrangements to accomplish his own appropriate purpose instead of proposing and sustaining his own duties and measures by a bold and manly appeal to the nation in the face of the representatives." The nation cannot stand at ease when the President and Congress wrangle and deadlock over important issues. The President, being the representative of the nation, the generalissimo of administration, and the people's choice, is the leader of the nation. His leadership can only be established and stabilized, if there is proper co-ordination and cooperation between the Executive and the Legislative departments. The co-ordination really means strengthening Congress itself and thereby aiming to remove the instinctive and inherent tendency of Congress to be anti-Presidential. Three-quarters of a century ago, James A. Garfield, after a long service in the House of Representatives, declared : "It would be far better for both departments if members of the Cabinet were permitted to sit in Congress and participate in the debates or measures relating to their several departments but, of course without a vote. This would tend to secure the ablest men for the chief executive offices; it would bring the policy of the administration into the fullest publicity by giving both parties ample opportunity for criticism and defence."

There are some students of Congress who have gone so far as to advocate the abolition of the entire concept of presidential government and the substitution in its stead of the cabinet system of government. If America is to remake her constitution, it will most surely be a parliamentary system. But this will not happen. Some discussion on the merits of the British cabinet system took place before the Joint Committee on the Organisation of Congress when that Committee was making plans for the Legislative Organization Act of 1946. Walton H. Hamilton of the Yale Law School, expressed his alarm on the pace at which adoption of the British system was being advocated and observed that the situation in which Americans were placed and their needs had not been correctly analysed. He remarked: "The clash of executive and the Congress is greatly overdone; it presents no more than a minor problem. The character of the English system is missed; the distinctive conditions of American society, which it would never fit, are overlooked; the activities which make up our pattern of government are not adequately taken into account. The life of any political system is function; imitation, especially where situations are unlike, can never spell functions.[37] The conviction that the British cabinet system would not meet American needs is widely held and it is believed that the presidential system "with all its operational groanings and creakings has afforded a different, but equally practical and probably better adopted solution to the problem of governmental power in the United States.

Even proposals to introduce Executive initiative in legislation and to make administration responsive and responsible within the existing framework of government have not been well received. Two years after Garfield's recommendation, referred to above, young Woodrow Wilson proposed giving "the members of the Cabinet seats in Congress with the privilege of the initiative in legislation." In 1883, he urged that President Cleveland "now assume the role of Prime Minister with the Cabinet as the agency of co-ordination to accomplish the popular will." And when he became President, he wanted in very truth to be a Prime Minister. He stressed his function as the leader of his party, addressed Congress in person, and promoted and carried out a programme of notable legislation. When he faced possible defeat on the proposed repeal of the exemption of American vessels from payment of Panama Canal tolls he declared: "In case of failure of this matter I shall go to the country after my resignation is tendered." In 1918, he appealed to the country for the returning of a Democratic majority to both the Senate and the House of Representatives. "I am your servant."

37. Organization of Congress, Hearings before the Joint Committee on the Organization of Congress (1945), pp. 702-03.

he said in his appeal to the electorate "and accept your judgment without cavil, but my power to administer the great trust assigned to me by the Constitution would be seriously impaired should your judgment be adverse, and must frankly tell you so because so many critical issues depend upon your verdict.," The American electorate appeared to resent the appeal and a Republican Congress was elected although many other factors doubtlessly contributed to that event. "President Wilson learned eventually," remark Professors Binkley and Moos, "that such a system does not conform to American traditions and apparently cannot be institutionalised in the American setting."[38] Don K. Price, an authority in the field of Public Administration, has remarked,"Perhaps only a psycho-analyst could explain America's peculiar nostalgia for the obsolescent institutions of the mother country."[39]

Another proposal of Congressional—Executive relations has been suggested on somewhat different and less radical lines. It is suggested that ex-Presidents be given lifetime seat in the Senate. But such an arrangement is not likely to cement the relations between the occupant of the White House and Congress, though it would provide to the Senate additional knowledge of the problems surrounding it which that body might not otherwise gain.

M. La Follettee Jr. advocated for the creation of a permanent group consisting of important Congressional leaders—Vice-President, Speaker, majority floor leaders of the two Houses, chairmen of major Committees—and key Cabinet members who should regularly meet and plan in outlines the broad basis of national policy. Regular meetings between the Congress leaders and the executive chiefs would enable them to know one another well and, thus build a team spirit. "The penalties for excluding Congress from the national council are high," says Roland Young. "Their exclusion means a continuance of the localism which are so often a predominant characteristic of Congressional behaviour. When Congress feels ignored it often retaliates irrationally, by sulking, by refusing to pass needed legislation, and by passing ill-advised legislation. When Congress is nettled, it is well to treat her like a desperate woman and walk the other way."[40]

There are cumbersome and awkward methods of obtaining information on administration by Congress. For example, Congress may pass resolutions of inquiry directed to heads of Departments. Hearings may be conducted by Congressional Committees and too often these investigations are not held jointly by both Houses. Departmental information may be obtained by personal interviews or by correspondence of Congressmen with administrative officials. Recent Presidents have held weekly press conferences at the White House with leaders of the Senate and the House. The substitution of the question hour, modelled after the British practice, taking the place of the prevailing American practices, has been proposed by Representative Kefauver and Senator Fullbright. According to this plan, it is suggested that during the question hour in both Houses,"Cabinet" members and other key administrators should be present to answer to questions put by members. The reform, it has been maintained, would bring administrators and Congressmen together thereby removing the element of indifference that now exists. But introduction of the question hour has been considered by many thoughtful men in the United States as a sheer waste of time of the already overburdened Congress. Walton Hamilton observed, in his testimony before the Joint Committee on the Organization of Congress that "we have a device here which is vastly superior to that (question hour), and that is the appearance of the administrative officer before the Congressional Committee where the matter is a great deal more searching than it could ever be before the House."[41]

The outcome is not clear, though the need for co-ordination and harmony between the Executive and Legislative departments is keenly felt on all sides, but within the existing system of government. "Congress and the Presidency," observes Polsby, "are like two gears, each whirling at its own rate of speed. It is not surprising that, on coming together, they often clash. Remarkably however, this is not always the case. Devices which harmonize their differences are present within the system, the effects of party loyalty and party leadership within Congress, presidential practices of consultation, the careful restriction of partisan opposition by both Con-

38. Binkley, W. E., and Moos, *President and Congress,* p. 382.
39. Price, Don, K., "The Parliamentary and Presidential Systems," *Public Administration Review,* Vol. II, p. 317.
40. Roland Young, *This is Congress,* p. 257.
41. Organization of Congress, Hearings before the Joint Committee on the Organization of Congress (1945), p. 705.

gressional parties, and the readily evoked overriding patriotism of all participants within the system in periods—which now-a-days, regrettably, come with some frequency—universally defined as crises."[42]

But this is not sufficient. Congress need be strengthened and the legislative-executive relationship urgently requires to be improved. An often repeated suggestion is that candidates for membership in Congress be permitted to run for election in any constituency which they might choose, or in which they might be chosen, without regard to residence. If candidates are thus freed from the grips of local politics, the persons elected would have a national stature and a national outlook towards problems confronting the country. The Report of the Joint Committee to study the Organization of Congress (1945) called for the creation of majority and minority policy committees in each Chamber of Congress, a joint legislative-executive council, restructured committees of the House and the Senate, an increase in services and aids to Congress, reduction of "petty duties" that take time of Congress, and more adequate compensation of members. Many of the recommendations of this Joint Committee were enacted into law with the passage of the Congress Reoganization Act of 1946.

Another identical Joint Committee was again appointed in 1966. The Report of this Committee advocated few major reforms, but it did also recommend safeguards for majority rule and fair procedure in committees, to strengthen fiscal control of Congress,to provide added services by the Library of Congress, to lighten regulation of lobbying and some realignment of committees. A modest reform Bill was introduced in the Senate and it passed therefrom in 1947, but the House of Representatives did not concur.

Neither the 1946 nor 1966 Joint Committee proposed any bold solution or challenged the sacrosanct seniority rule. "If Congress does establish", observe Ferguson and McHenry, "the joint committee on congressional operations recommended in the 1966 report, it will have a device for self-criticism and self-improvement."[43]

During the last four decades, American Presidents have acquired increasing supremacy not only due to their national leadership but also due to their international leadership making Congress more and more subordinate and subzervient to the wishes of the President, who is now the leader of the only super power left in the world.

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CHAPTER VII

Federal Judiciary

Need for a Federal Judiciary

The Articles of Confederation made no provision for a national judiciary. Hamilton declared this to be the crowning defect of the old Government, for laws, he asserted, were dead letter without courts to expound their true meaning and define their operations. During the period of Confederation all judicial controversies were left to the State Courts, and each State having its own legal system presented a variety of conflicting decisions which created conditions of uncertainty and innumerable complexities. The major task of the Founding Fathers was to evolve out a judicial system which should preserve the integrity of the new government to be established and remove the chaotic conditions which were existing then. They also realised that under the system of govenment they were establishing, disputes between the States would become more frequent in the future and an impartial umpire, standing outside them all, would be needed to settle their controversies. Similarly, there would be questions bearing on the relations of the United States with foreign nations on matters covered by treaties which could not, even for reasons of political expediency, be left to the State courts. To do them so, meant placing the peace and well-being of the country at the mercy of thirteen conflicting authorities. Then, disputes were certain to arise as to the meanings of various provisions of the new constitution and with regard to the interpretation of laws passed by Congress. To leave such disputes to the courts of the different States would have meant invitation to chaos, for each State court would give different decisions, one opposed to the other.

Finally, the framers of the Constitution were planning for a "more perfect union" and to "estabilsh justice." If the new constitution and the laws and treaties made under it could achieve the objects set, it was imperative, they concluded, that there should be a distinctive federal court, supreme, and independent of the States.

Guided by these reasons, the Constitution-makers made a provision (Article III) in the Constitution for the federal judiciary, and while doing so they made the judicial power co-ordinate with Executive and Legislative powers. It is a brief reference and the Constitution does not say much about its structure and organisation. Article III merely states that judicial power will be vested in one Supreme Court and such inferior courts as Congress may from time to time ordain and establish. Thus, Congress is given authority for the proper functioning of the Supreme Court, and to create additional courts as and when it deemed necessary and expedient. But in order to maintain the independence and integrity of the judges of all such courts, the Constitution provides for permanence of tenure during good behaviour and a compensation for their services which cannot be diminished during their continuance in office.

In spite of these constitutional provisions, Congress has still the means to control the federal judiciary. True, Congress cannot abolish the Supreme Court, or diminish the salaries of the Justices, or remove any one of them from office, except by due process of impeachment, but it can make significant changes in so many other ways. Congress can by law reduce the number of Justices by prescribing that on death, or resignation of any of them them the vacant post shall be abolished, or accept a plan, as one proposed by President Franklin Roosevelt, to appoint new Justices up to six to the Supreme Court when Justices after reaching the age of seventy fail to resign within six months, and thus to increase the number of Justices and secure the right kind of "appointments." With regard to the inferior courts, control by Congress has been real and more comprehensive. In 1802 during Jefferson's Presidency, it repealed the law of the preceding year creating sixteen posts of Circuit Judges which President Adams had filled, with men strong in federalist conviction at the close of his term of office. Congress can, also by law, prevent certain classes of cases from coming before the Supreme Court by refusing to provide a system of appeals. But on the whole, it can be safely said that except in times of crisis the Federal Judiciary

enjoys a high degree of independence from legislative interference.

Appointment and Tenure of Judges

The Constitution merely stipulates that the President and Senate are to appoint Justices of the Supreme Court and authorises Congress to vest the appointment of such "inferior officers" as it thinks proper in the President alone, in the court of law, or in the heads of Departments. All Justices of the Supreme Court are, thus, nominated by the President and appointed by and with advice and consent of the Senate. With regard to the inferior courts, it has been settled by uniform practice that judges of all lower federal tribunals are not "inferior officers" and their appointment should not, therefore, vest in any other authority than the President and the Senate.

The Constitution does not state what qualifications are demanded of Justices of the Supreme Court, either as to age, citizenship, and legal competence, or as to political views and background. From the time when President Washington submitted to the Senate his first list of Supreme Court appointments, the attempt has been made almost invariably to select men of high prestige and outstanding ability. Appointments have been made from time to time, it is true, "to pay political debts, to show deference to a particular section of the country, or even to provide representation for a political party, which would not otherwise be represented." But even then the calibre of the men selected has been exceptionally high. It is also true that Democratic Presidents have appointed Republicans to the Bench and Republican Presidents have selected Democrats. The men appointed to the Supreme Court are, usually, well advanced in age at the time of their appointment.[1] Since Justices do not readily give up office even with the approach of senility, the membership of the Court has often included men past the age when they could carry the share of their work.

One reason for the reluctance of aged Justices to resign from the Court is that they hold office during good behaviour and they can be removed only by impeachment. There has been much criticism of life appointments. By the Act of 1937, Justices of the Supreme Court may retire, without resigning, after 10 continuous years of service and upon reaching the age of 70. The membership of the Supreme Court has been fixed at nine.[2] No Justice of the Supreme Court has been removed by impeachment. Samuel Chase is the only Supreme Court Justice to have been impeached, but he was not convicted.[3]

FEDERAL JURISDICTION

Jurisdiction of the Federal Judiciary

The powers of the Federal Government being delegated they are limited. The jurisdiction of the federal judiciary, accordingly, extends over only those classes of cases as enumerated or implied in the Constitution. The State Courts have jurisdiction over all others.

1. Cases under Constitution : Laws and Treaties

Article Three section Two of the Constitution provides : "The judicial power of the United State shall extend to all cases, in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority." It means that only cases of a justiciable character can come before the Federal Courts. It cannot decide questions executive or legislative in character unless such a question involves the interpretation of the Federal Constitution, or a federal law, or a treaty in which the United States is a party. Anyone who claims that an executive action or legislative Act encroaches upon his rights guaranteed to him by the Constitution, laws or treaties of the United States, he can bring an action against the appropriate authority for the restoration of his rights. The situation is well summed up in this statement of the Supreme Court: "The jurisdiction of the courts of the United States is properly commensurate with every right and duty created, declared, or necessarily inspired by and under the Constitution and laws of the United States. But the right must be a substantial and not merely an incidental one in order to warrant its assertion in the Federal Courts. It must appear on the record.....that the suit is one which does really and substantially involve a dispute or controversy as to a right

1. Joseph Story became a member of the Supreme Court at the age of thirty-two and served from 1811 to 1845. Justices James Iredell, Bushrod, Washington and William Johnson were appointed before they were forty years old.
2. President Reagan appointed Mrs. Sandra Day O' Connor to serve on the United States Supreme Court and, thus broke almost two centuries of male exclusivity in the high ranks of the American Judiciary. Another has been added by George Bush.
3. Chase was impeached in 1804 on charge of partisanship. The charges were not supported by the Senate and he was acquitted. He remained on the Bench until his death.

which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained."

Congress and the President cannot, therefore, ask the Justices of the Supreme Court to express themselves on the constitutionality of a proposed legislation. The Court is not an advisory body and will not give advisory opinions. It will render its decision only as and when a real dispute is presented to it for decision. Consequently, there must be a party of interest to challenge the constitutionality of law in toto or in part. Nor has Congress powers to assign the Judiciary any duties other than judicial. This was definitely established in the *Hayburn* case. Congress in this instance had instructed Circuit Judges to function as pension Commissioners. The Judges individually refused and the Supreme Court upheld their action.

2. Cases Affecting Ambassadors and Others

In the second place federal jurisdiction extends to all cases affecting diplomats accredited to the United States. But according to the well accepted principle of International Law diplomatic agents of foreign States are immune from prosecution in the court of the country to which they are accredited. The provision in the Constitution extending federal jurisdiction to all cases affecting diplomats is intended to check the State Courts from the infringement of International Law. If a diplomatic agent commits an offence, his recall may be requested or he may be even expelled, but so long as he remains a duly accredited diplomat his immunity from legal process is guaranteed.

3. Admiralty Cases

Admiralty and maritime cases relate to American vessels on the high seas or in the navigable waters of the United States and they embrace all cases arising from disputes on freight charges, wages of the seamen, damages due to collison and marine insurance. In time of war, it covers cases relating to prize vessels captured at sea. The reason for giving admiralty jurisdiction to Federal Courts was twofold. In the first place, admiralty is a distinct branch of jurisprudence and it differs in substance and procedure from the common law and equity appiied in ordinary courts of law. Secondly, foreign commerce is a federal subject and the framers of the Constitution thought it best to vest admiralty and maritime jurisdiction in the Federal Courts.

4. Cases Relating to U.S. or States

The jurisdiction of the Federal Courts extends to all disputes to which United States in one of the parties, or when the dispute is between a State and a citizen of another State. As originally provided in Article Three, Section Two of the Constitution, suits could be brought before Federal Courts against a State by citizens of other States, or by citizens of foreign countries. Soon after the Constitution went into effect a citizen of South Carolina named Chisholm, sued the State of Georgia (1793) for the recovery of a debt. The Supreme Court entertained the suit and ruled that such suits could be maintained.

This decision caused a widespread popular indignation as it had been openly asserted, when the Constitution was before the States for their ratification, that no State could be sued by an individual without its own consent. The Government of Georgia felt that it was derogatory to the dignity of a sovereign State. A demand was, accordingly, made that the Constitution be suitably amended so as to prevent such "suits" in future. As a result of this demand the Eleventh Amendment was adopted in 1795, which expressly forbids Federal courts to take cognisance of any suit brought against a State by a citizen of another State, or by citizens or subjects of any foreign State. Such suits can only be brought in the courts of the State concerned aspermitted by law. If there is no legal authorisation courts cannot entertain such suits. But a State can be sued in Federal Courts when the other party is the United States, or another State of the Union or a foreign State.

5. Cases between Citizens of Different States

Finally, the judicial power of the Federal Courts extends to all cases between citizens of different States, between citizens of the same State claiming lands under grants of different States and between a State, or the citizens thereof, and foreign States, citizens or subjects. It means that disputes between foreigners and citizens of the foreign States and between citizens of different States can be brought before the Federal Courts. For purposes of this provision corporation or Company is a citizen of the State in which it was incorporated.

Exclusive Concurrent Jurisdiction

Although the cases mentioned above may come before Federal Courts, the Constitution does not insist that Federal Courts must assume exclusive jurisdiction in all such cases. The Con-

stitution gives the Federal Courts no exclusive jurisdiction whatsoever. Congress is free to distribute jurisdiction over them as it pleases and, indeed, it may completely divest Federal Courts of jurisdiction in some instances. As matters stand, Federal Courts have exclusive jurisdiction over: (1) all cases involving crimes against laws of the United States; (2) all suits for penalties brought under laws of the United States, all suits under admiralty and maritime jurisdiction, or under patent and copyright laws; (3) all bankruptcy proceedings; (4) all civil actions in which the United States or a State is a party, except between a State and its own citizen; and (5) all suits and proceedings brought against ambassadors, others possessing diplomatic immunity, and foreign consuls.

Over practically all other kinds of cases to which the federal judicial power extends, Federal and State Courts have concurrent jurisdiction. That is to say, in all such cases, which of necessity are always civil, and involve amounts of $ 3,000 or more, the plaintiff has the choice to commence it in a Federal court or, in the Courts of a State to which he belongs, or in the Courts of a State where the defendant resides. The defendant is, however, given the privilege of having the case removed to a Federal Court if it has been instituted in a state Court provided the request is made before the latter has reached a decision.

Federal Courts are denied jurisdiction over cases involving parties with diverse citizenship and are for amounts less than $ 3,000. These cases must be tried in State Courts, if at all.

Federal Court Writs

In the exercise of national judicial power granted by the Constitution, the Federal Courts have the authority to use the writs of *habeas corpus, mandamus, injunction* and *certiorari.*

TYPES OF FEDERAL COURTS

There are two general types of courts: Constitutional and Legislative.

Constitutional Courts

Constitutional Courts are established under the authority of Article III to exercise the Judicial power of the United States. They consist of the Supreme Court, Federal Courts of Appeal, and District Courts. The Constitution provides only for the Supreme Court and empowers Congress to ordain and establish the "inferior courts." The establishment of inferior courts is, therefore, not mandatory. They have been created and their jurisdiction is defined by the statutes of Congress starting with the Judiciary Act of 1789. The Congress can, thus, at will abolish the "inferior courts," but not the Supreme Court.

Legislative Courts

Legislative courts are created by Congress and their authority is outside of Article III. They do not exercise the judicial powers of the United States, but are special courts created to aid the administration of laws enacted by Congress in pursuance of powers delegated to it or implied in such powers. For example, Article I, Section 8 grants to Congress the power to impose and collect "taxes, duties, imposts and excises." In order to decide disputes about the valuation of goods and subject to import duties, Congress established the United States Customs Court, composed of nine Judges. Similarly, Congress is given power to govern territories and has created territorial court systems under that authority. Congress can set rules in regard to patents and has created the United States Court of Customs and Patent Appeals which handles appeals from the decisions of the United States Patent Office, the Customs Court and Tariff Commission. There is also a civilian court of Military Appeals to hear appeals from military courts martial.

All these are courts and they follow a judicial procedure. But they have been created under the Congressional power and not under the Judicial Article of the Constitution. The difference between the Constitutional and Legislative Courts, thus, lies in the source of their respective authority and the nature of the cases over which they have jurisdiction. Article II mentions the types of cases and controversies to which the federal judicial power extends and these must all come before constitutional Courts. Legislative Courts, on the other hand, carry into execution such powers as those of regulating inter-state commerce, spending public finds, laying and collecting import duties and governing territories.

Yet another difference may be marked between the two. All Judges in the Constitutional Courts are appointed by the President with the advice and consent of the Senate and they hold office during good behaviour. They can be removed from office only by impeachment. Judges in Legislative Courts are similarly appointed, but almost always they serve for fixed terms and can be removed by methods other than impeachment.

In spite of these differences, the Legislative Courts are tied into the regular Federal judicial machinery. Appeals may be taken from their

decisions to specified courts of the regular system, usually to Federal Court of Appeals.

In the District of Columbia, Congress has set up a complete system of local courts including a Municipal Court. The District has also a U.S. District Court and a U.S. Court of Appeals. These are based partly on Article III and partly on Articles 1 s.s cl. 17, which authorises Congress to exercise exclusive jurisdiction over the seat of Government of the United States.

CONSTITUTIONAL COURTS

Supreme Court

At the apex is the Supreme Court and it is the creation of the Constitution and specifically mentioned in Article Three, Section one. It was first organised under the Judiciary Act of 1789 with the Chief Justice and five associate Justices. Its membership has, however, varied and the present strength of a Chief Justice and eight associated Justices was fixed in 1869 where it has remained ever since.[4] The Court held its first two terms in Wall Street in New York City. Its next two terms were held at Philadelphia and thereafter it met at Washington.

Justices of the Supreme Court are appointed by the President with the advice and consent of the Senate. The Constitution does not prescribe any qualifications hence the President may appoint anyone for whom Senatorial confirmation can be obtained. Terms of Federal Judges are for life or during good behaviour and they are removable by impeachment only. After reaching the age of seventy they may retire or resign and receive full salary, provided they have served for ten years or more. Or they may retire at sixty-five with fifteen years of service, at full pay. If they retire, and not resign, they are still Federal Judges and can be given an assignment.[5] Their salaries are fixed by an Act of Congress, and while they can be raised at any time no dimunition can be made during the tenure of office of any judge.

The jurisdiction of the Supreme Court is both original and appellate. The original jurisdiction, however, is extremely limited and an average of only four or five cases come before the court each year for original trial. The Constitution opens the court to such trials when (1) a foreign ambassador, minister or consul, or (2) one of the States is a party. This jurisdiction of the Supreme Court is the grant of the Constitution itself and the Supreme Court has decided, in the famous *Marbury* v. *Madison* that Congress can neither increase nor reduce the jurisdiction of the court in this respect. Legislative action, however, has granted concurrent trial power to the District Courts in some of these cases. Under the present Judicial Code the following original cases must be brought to the Supreme Court: (1) cases against foreign ambassadors and ministers and (2) cases between one of the States and the United States, a foreign State or another one of the States.

In all other cases the Supreme Court has appellate jurisdiction both as to law and facts "with such exceptions and under such regulations as Congress shall make." In accordance with this provision, Congress has defined in detail the appellate jurisdiction of the Supreme Court. At present, cases come to it from State Courts, Federal Courts of Appeal and in a few instances, Federal District Courts. The expectation is that the Supreme Court should not devote its time "upon mere settlement of law suits in the manner of an ordinary law court, but rather upon constitutional interpretation and policy, especially in economic and social fields, appeals lacking in this higher interest are likely to encounter no very warm reception."[6]

There are, thus, two general sources from which cases may reach the Supreme Court on appeal:

(a) Cases from the highest State Courts where a federal question is presented, namely, when the State Court has held that a federal law, treaty, or executive action violates the Constitution of the United States or has held that the law enacted by the State or the State action is valid under the Constitution and when that finding of the State Court is challenged. The power of the Supreme Court to review laws is based upon the constitutional provision that the laws made by Congress and treaties concluded by the Federal Government are supreme law of the land and, consequently, supersede the Constitutions and laws enacted by the State Legislatures. Some of the Court's greatest decisions have been rendered in such cases, where an appeal has been taken to

4. President Roosevelt made an attempt in 1937 to have the membership of the court vary between nine and fifteen depending upon Justices who did not resign at the age of seventy. The plan did not succeed.
5. There has been only one instance of a Supreme Court Justice to have been reappointed after an interim of private life. Justice Charles Evans Hughes was appointed on May 2, 1910, by President Taft. He resigned in 1916 to be Republican candidate for Presidency. On February 13, 1930, he was appointed Chief Justice by President Hoover.
6. Ogg and Ray, *Essentials of American Government*, p. 351.

it when a State Court has denied a claim based upon an alleged federal right.

(b) Cases from the lower Federal Courts, chiefly from the Courts of Appeal. But the cases coming to the Supreme Court on this count are insignificant, only one in thirty cases, since final determination had been vested by law in these courts in many types of cases between private individuals. But when a litigant claims that a constitutional right has been denied to him, it is a case for the Supreme Court.

Two special proceedings may, also, be noted. The Supreme Court may require a Court of Appeal to transmit a case to it, either before or after decision, when, on a petition of a party to the suit, the Court concludes that the case is of such significance as to make decision by the highest court desirable. A Court of Appeal may also take the initiative of certifying to the Supreme Court questions or propositions of law involved in a case that it requires instructions from a superior court to enable it to make a proper decision. The Supreme Court may, on such a reference, merely answer the question or it may require that the whole case be submitted to it for final decision.

Cases in a few instances may go directly from a District Court to the Supreme Court. If a District Court holds a Federal law to be unconstitutional in a case in which the United States is a party or in a case between two private parties in which the United States has been made a "party by intervention" direct appeal goes to the Supreme Court. The Judiciary Act of 1937 permits such direct appeals to the Supreme Court. An occasional case also goes up from one of the special courts.

The Supreme Court meets on the second Monday in October for a session which generally extends through to June. Special session may be called by the Chief Justice when the Court is adjourned, but the occasion must be of unusual urgency and importance.[7] Six Justices constitute a quorum no matter whether the Chief Justice is present or not. When a case has been argued, the court holds a conference where the Justices discuss their views and, then, vote. The Chief Justice usually states his opinion first and other Justices follow him in order of their seniority. The meeting culminates with a vote conducted by the Chief Justice who calls upon his associates in reverse order according to the dates of their commission and himself voting last. If the Chief Justice belongs to the majority opinion, he may request one of his associates to prepare the opinion of the Court, or he may prepare it himself, after which it is scrutinised by the Court at a second conference and approved. Any member of the Court who disagrees with the majority may file a dissenting opinion, a right frequently taken advantage of. The concurrence of at least five of the nine Judges is necessary to the validity of a decision[8] and, as a matter of fact, many important decisions have been rendered by a bare majority of the Court, that is 5 to 4.

Federal Courts of Appeal

Next below the Supreme Court are Federal Courts of Appeal, known before 1948 as the Circuit Courts of Appeal, 12 in all, one for each of the eleven judicial circuits in which the United States is divided and an additional one for the District of Columbia created in 1948. These Courts were created in 1891 to relieve the overburdened Supreme Court of a great deal of its appellate jurisdiction by making many decrees and judgments of the Circuit Courts final. The Chief Justice is assigned by law to the Federal Court of Appeal of the District of Columbia. The eight associate Justices are distributed by assignment among the other circuits. Six of them are assigned to one district and each of the remaining two are assigned to other districts. The requirement of the original Judiciary Act that Justices of the Supreme Court travel on circuit has been repealed and they now only rarely if ever choose to do so. A Court of Appeal must have at least three Judges, two of whom are necessary for a quorum. The number of Judges in each circuit varies from three to nine. Appeal Judges are appointed by President with the advice and consent of the Senate for terms of good behaviour.

The Federal Courts of Appeal have essentially appellate jurisdiction, that is, they hear and determine only cases appealed from the lower courts, and their decisions are final in most cases except where the law provides for a direct review by the Supreme Court. This relieves the Supreme Court of all but the most important cases and

7. In 1942 the Court was called to a special session on July 29 to consider a petition for writ of *habeas corpus* of seven German "saboteurs."
8. There is a difference between opinion and decision. An opinion is the statement of the reasoning by which the Court fortifies a decision in a particular case. The decision is reached by secret vote of the Justices, and the Chief Justice then assigns a Justice the task of writing the opinion.

enables it to dispatch its business more promptly. Federal Courts of Appeal also review and enforce orders of the Legislative Court, and quasi-judicial boards and commissions. The Supreme Court may call up from a Federal Court any case on a writ of *certiorari* involving an important constitutional or legal point.

District Courts

The lowest grade of Federal Courts is the District Court, ninety-four in number. In some cases a State constitutes one district in other cases a State is divided into two or three districts. Districts have from one to twenty-four judges; in a few instances one judge serves two or more districts. The judges are appointed by the President with the approval of the Senate for terms of good behaviour.

Excepting the few cases which originate in the Supreme Court, and those of special character that commence in the Legislative Courts, most other cases, civil and criminal, under the laws of the United States, start in District Courts. Their jurisdiction is original and no case comes to them on appeal, although cases begun in State Courts are occasionally transferred to them. Ordinarily, cases are tried with one judge presiding. Since 1937, three judges must sit in most cases involving the constitutionality of federal statutes. Appeals in such cases may be taken directly to the Supreme Court and it was a part of President Roosevelt's proposal to reorganise the Federal Courts. Otherwise, appeals as a rule, go first to the appropriate Court of Appeal.

The jurisdiction of the Federal Judiciary may thus, be summed up:

SUPREME COURT

Original Jurisdiction:

1. Action by the United States against a State.
2. Action by a State against a state.
3. Cases involving ambassadors and other public ministers.
4. Action by a State agains citizen of another State or aliens (jurisdiction is not exclusive).

Appellate Jurisdiction:

1. From lower Federal Courts.
2. From state Courts when a 'federal question' is involved.

11 COURTS OF APPEAL

Appellate Jurisdiction only:

1. From certain District Courts.
2. From certain Legislative Courts.
3. From certain great commissions, such as, Securities and Exchange Commission.

89 DISTRICT COURTS:

Original Jurisdiction:

1. Over cases of crimes against the United States.
2. Over civil actions by the United States against an individual.
3. Over cases involving citizens of different States.
4. Over actions by a State against an alien or citizen of another State.
5. Over cases of admiralty and maritime jurisdiction.
6. Over such other cases as Congress may validly prescribe.

JUDICIAL REVIEW

Power of Judicial Review

The Supreme Court is the most powerful judicial agency in the world. Alexis de Tocqueville, writing in 1848, observed: "If I were asked where I placed the American aristocracy, I should reply without hesitation.....that it occupies the judicial bench and bar.....scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question." Exactly a century later Professor Harold Laski wrote: "The respect in which the Federal Courts, and above all, the Supreme Court are held is hardly surpassed by the influence they exert on the life of the United States."[9] What accounts for this great influence and prestige of the Supreme Court is its power to interpret the Constitution. Justice Frankfurter put it rather bluntly that "the Supreme Court is the constitution." When Justices interpret the Constitution, they make policy decisions and thereby have the final say over the determination of the social and economic issues that confront the country. They uphold or declare null and void and, consequently, of no effect the acts of Congress or State Legislature or Executive orders which are in conflict with the Constitution. By doing so the Supreme Court becomes the guardian of the constitutional system of the United States.

9. Laski, H. J., *American Democracy*, p.110.

Professor Henry J. Abraham defines the term "Judicial review" to mean "the power of any court to hold unconstitutional and hence unenforceable any law, any official action based upon it, and any illegal action by a public official that it deems.....to be in conflict with the Basic Law, in the United States and its Constitution."[10] Theoretically, any court in the United States can declare a law or an executive action unconstitutional, but the Supreme Court is the final arbiter. Actually, however, the Supreme Court will not review every case in which questions of constitutionality are raised. It has established maxims or criteria and cases coming before the Court must fulfil the set criteria, numbering sixteen.[11] This has been done to eliminate the very large number of appeals which otherwise would have come before the Court.

There is no direct authority in the Constitution which empowers the Supreme Court to declare the constitutionality or otherwise of State or Federal Acts. Some writers, however, hold that the framers of the Constitution did not intend to confer such a power, at least over Federal Acts, upon the courts of the United States and the exercise of authority of holding Federal Acts, or orders unconstitutional is the usurpations of power. President Jefferson had unequivocally declared that the "design of the Fathers" was to establish three independent departments of Government and to give the Judiciary the right to review the acts of Congress and the President was not only the violation of the doctrines of the Separation of Powers and limited government, but it was also in violation of the intentions of the makers of the Constitution.

There are others who consider that judicial review is inherent in the nature of a written Constitution. There are two important provisions of the Constitution, it is maintained, which are indicative of the intentions of its framers. One is Article VI, Section 2, which reads, *inter alia*: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." The second provision is found in Article III, Section 2, which says: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under this authority...." Both these provisions are sufficient to fill in the gap which the Constitution failed to expressly provide for. The thread of the intention of the framers of the Constitution can be connected with what Hamilton wrote in the *Federalist*: "The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[12] Professor Beard remarks that there is good reason for thinking that a majority of the prominent members of the Philadelphia Convention "took a similar view of the federal judicial powers."[13] In fact, judicial review was already in existence in the American States after their break with Britain in 1766. If it was not expressly provided in the Constitution, it was because the framers believed the power to be clearly enough implied in the language used in Articles III and VI.

10. Abraham, Henry, J., *The Judicial Process*, p. 251.
11. Some of these maxims are :
"(1) Before the Court will glance at particular issue or dispute, a definite 'case' or 'controversy' at law or in equity between bona fide adversaries under the Constitution must exist, involving the protection or enforcement of valuable legal rights, or the punishment, prevention, or redress of wrongs directly concerning the party or parties bringing the justiciable suit.
(2) The party or parties bringing suit must have standing.
(4) Not only must the complainant in federal court expressly declare that he is invoking the Constitution of the United States, but a specific live rather than dead constitutional issue citing the particular provision on which he relies in that document must be raised by him; the Court will not entertain generalities.
(6) The federal question at issue must be substantial rather than trivial; it must be the pivotal point of the case; and it must be part of the plaintiff's case rather than a part of his adversary's defence."
12. No. LXXVIII.
13. Beard, C. A., *American Government and Politics*, p. 233.

Chief Justice Marshall made the issue clear. Whatever may have been the intention of the framers of the Constitution, the issue was finally decided by Chief Justice Marshall in 1803 in the famous case of *Marbury* v. *Madison* and since then judicial review has become a part of the constitutional law, in fact, its very cornerstone. The facts of the case, briefly stated, were that Congress had provided in the Judiciary Act of 1789, that requests for *writs of mandamus*[14] could be made to and granted by the Supreme Court. On the night of March 3, 1801, Marbury was appointed Justice of Peace for the District of Columbia by President Adams, whose term of office expired before the commission of his appointment could be delivered to Marbury. The new President Jefferson and his Secretary of State, Madison, refused to deliver the commission to Marbury who petitioned to the Supreme Court for a *writ of mandamus* ordering Madison to deliver the commission. Marshall, in writing the opinion of the Court, held that Marbury was entitled to his commission and that *mandamus* was a proper remedy in the situation, but the Supreme Court had no authority to issue the writ. The issuance of such a writ, declared Marshall, was in violation of the constitutional provision of Article III as it clearly does not include such writs. The Judiciary Act of 1789, which empowered the Supreme Court to issue writs enlarged the original jurisdiction of the Supreme Court and Congress was devoid of authority to enlarge its original jurisdiction. Marshall argued that Justices were bound by oath to support the Constitution, and when they found that one of its provisions was in conflict with the law they must hold the latter repugnant and void.

The argument of Chief Justice Marshall, in brief, was that the Constitution is the supreme law of the land and the Justices are bound to give effect to it. When the Court is called upon to give effect to a statute passed by Congress which is clearly in conflict with supreme law of the Constitution, it must give preference to the latter, otherwise the declaration of the supremacy of the Constitution would have no meaning. The implications in Chief Justice Marshall's decision may be summarised as under :—

(1) that the Constitution is a written document that clearly defines and limits the powers of government;

(2) that the Constitution is a fundamental law and is superior to the ordinary law passed by Congress;

(3) that the Act of Congress which is contrary to and in violation of the fundamental law is void and cannot bind the courts; and

(4) that the judicial power conferred by the Constitution together with the oath to uphold Constitution,[15] which the Justices take on the assumption of office, require that the courts should declare, when they believe, that the Acts of Congress are in violation of the Constitution.

Since Marshall's decision in 1803, the power of the Supreme Court to declare Acts of Congress invalid has been resented, evaded, and attacked but never overthrown. The principle of judicial review is now firmly embedded in the American System of government and *Marbury* case forms the basis of the important authority exercised by the Supreme Court. During the first eighty years only in the key case of *Marbury* v. *Madison* and subsequently in the *Dred Scot* v. *Sonford*[16] a federal law was disallowed. Since then more than eighty Acts of Congress, in whole or part, have been invalidated. In the four years between 1933 and 1937, thirteen federal and fifty-three state Acts were declared null and void. Since 1937, no economic measure enacted by Congress has been held unconstitutional and the Supreme Court "has displayed a tolerant attitude toward economic regulations enacted by the States. In this area the judicial neutralism advocated by Justice Holmes has become dominant."[17] Statistically the incidence of judicial review on Congressional legislation has been extremely slight. State laws have been more frequently the subject of Supreme Court disallowance.

Since Marshall's time, the Supreme Court has emphasised repeatedly that it is not concerned with the policy, wisdom or expediency of legislation but only with its constitutionality. In its own words, it "neither approves nor con-

14. Judicial orders commanding government officials to perform duties required by law.
15. Without prescribing any specific form, the Constitution requires (Art. VI), all judicial as well as executive officers to take oath to support the Constitution. The wordings of this oath were fixed by the Act of 1868.
16. In this case the Supreme Court held that negroes were not citizens of the United States. Chief Justice Taney ruled, such persons were considered as "subordinate and inferior class of beings." The Fourteenth Amendment reversed this decision.
17. Saye, Albert B., and others, *Principles of American Government*, p. 403.

demns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends." In another case the Court ruled, "Even should we consider the act unwise and unprejudicial to both public and private interests, if it be fairly within delegated power, our obligation is to sustain it."

Although the final judgment in cases of this kind is made by the Supreme Court of the United States, judicial review is a prerogative of all courts from the highest to the lowest. Even a Justice of the Peace may exercise this authority in proper cases, although his decision would certainly be appealed. When a court declares a legislative Act unconstitutional, it means that it cannot be enforced as its inconsistency with the Constitution deprives it of the character of law. But the courts have no power at their disposal to carry out their decrees. It is for the Executive to enforce them and it may be possible for an executive officer to ignore them and this has actually happened in a few cases as, for example, in a famous case in connection with which President Andrew Jackson wrathfully remarked that "John Marshall has made his decision, now let him enforce it." Generally, however, "the prestige of the doctrine is so great that a pronouncement of the Court is accepted as final even when the act declared unconstitutional is a popular one." As Bryce expressed it, the Supreme Court is "the living voice of the Constitution," and, as such, the country obeys, both by inclination and habit.

Process of Judicial Review Examined

Those who have critically studied the power of judicial review contend that as a result of it the Supreme Court has expanded its authority to such an extent that it has become a non-elective super-legislature. The judges while giving their decisions, and in whatever legal dress such decisions are clothed, are political decisions. The judges do not confine themselves to such legal questions as the limits of Federal or State jurisdiction, or the carrying out of legal regulations which are essential to make due process of law, but they discuss the advisability of legislation, its essential justice, and its conformity to the law of reason. The law of reason and essential justice, are what the temperments, characteristic attitudes, and views of the Justices are. The Justices have their own political, economic and social predilections and to which they very often owe their appointments. The appointments of the Judges are customarily, but not exclusively, partisan. And in interpreting and applying phrases, like "regulate," "commerce," and "due process of law," they hardly can fail to be swayed consciously or unconsciously by their social philosophies and general outlook on affairs. Between the Civil War and the New Deal, Republicans were in White House for all but sixteen years. Regardless of party affiliations, most of the Presidents and Senators believed in the policy of complete *laissez faire* and looked with suspicion any proposal which restricted the right to economic freedom regarding it "dangerous, socialistic, populistic and anarchic." And these were the men who appointed most of the Justices of the Supreme Court. With the appointment of Melville Fuller as Chief Justice in 1888, a new period began in the history of the Supreme Court. Between 1888 and 1937, it became "an aristocracy of the robe and twisted the due process clause into a moat around all forms of private property." It censured and invalidated all kinds of legislation which, in the opinion of the Justices, unreasonably interfered with the use of private property. The Court gave a narrow meaning to the inter-State commerce and, thus, in many ways clipped the powers of Congress. It did not even hesitate to veto all attempts by Congress to forbid child labour.

In 1895 the Supreme Court reversed an old and well-accepted and hitherto practised precedent and made it impossible for the Federal Government to levy income-tax. It was a decision of five to four Justices and Justice Field made manifest the feelings of the majority opinion about such experiments. He regarded income-tax as a sheer assault on capital and contended that "it will be but the stepping stone to others, large and more sweeping, till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness."[18] When the Supreme Court retarded the manifestation of public opinion by imposing upon the nation its own construction what the social and economic order ought to be, it really assumed the power of super- legislature but not in its representative capacity. The popular opinion took a po' 'cal revenge by adopting the Sixteenth Amendment in order to reverse this decision. In

18. *Pollock* v. *Farmers Loan and Trust Co.*

the "notorious" *Atkins* case Justice Sutherland, speaking for the majority, "defined the role of the court," as Brogan says, "in a way that a radical critic could hardly have bettered."[19] And referring to this case Boudin remarked : "the announcement that the court has constituted itself in a super-legislature is perhaps plainer than in any other case."[20] Justice Sutherland had unequivocally asserted that "there are limits to power and when these have been passed, it becomes the plain duty of the Courts in the proper exercise of their authority to so declare." Such decisions are, indeed, political in nature, and are not impressive, impartial and worthy of any special respect as the decision of a court should generally command.

It may also be noted that all such decisions had come forth with five to four majority and if Justice Sutherland is to be relied upon that it was the plain duty of the courts, in proper exercise of their authority, to declare invalid any exercise of authority which passed beyond the limit, it follows that the four dissenting Justices had always been oblivious of their plain duty. In the Atkins case particularly the minority included the very conservative Chief Justice Taft.

The Supreme Court's assumption of power as a super-legislature has always been contested by a minority of the Justices. Justice Oliver Wendell Holmes (1902-32), who spent well over thirty years on the Court, consistently and ceaselessly protested "against his colleagues' habit of writing their own economic predilections into the Constitution." Holmes was a conservative with a little faith in social reform in legislation, but he never allowed his personal views to become the measure of the constitutionality of legislation and he was, accordingly, in dissent. Louis D. Brandies too, appointed in 1914, by President Wilson, joined with Holmes in protesting against "the major direction of the Supreme Court's opinions and exposing the reasons behind the Court's majority." With the coming in of Harlan Fiskstone, in 1923, "Holmes, Brandies, and Stone dissenting" became a familiar phrase in the law review.

There is yet another aspect of the problem. While interpreting and applying the spirit and language of the Constitution the Justicess also decide questions of public policy. When an Act of Congress comes before the Supreme Court, the Justice are either accepting or rejecting a policy embodied therein. The policy once rejected by them has no chance of enforcement until a differently constituted court at some later time takes a different attitude. The Supreme Court is the least responsive to public opinion. If the Constitution is supreme because it is an expression of the people's ideas then those agents who most directly represent those ideas have the best right to interpret the Constitution. It is, therefore, pertinently asked why should five men, who constitute a majority of the Court, holding office for life and brought to their posts for their strong political, social and economic predilections, have power to tell Congress and the President, elected by the people, what they may not do ? The undue partiality and excessive dependence on legal formula shown by the Supreme Court has seriously retarded progress in the United States.

The claim of Chief Justice Hughes that "we are under a Constitution but the Constitution is what the judges say it is" or to express the same what Justice Frankfurter tersely said, "The Supreme Court is the Constitution" is difficult to accept so long as some, at least, of the Justices are keen politicians by training and are keen enough "to yearn for the Presidency even after they have becomes Justices of the Supreme Court."[21] It is not, indeed, an exaggeration to say that, at any given time, one or two of the Justices are potential candidates for Presidency. It would not also be out of place and unimportant to mention here that Chief Justice Taft did not "think it compatible with his high office to act as a personal adviser to Mr. Coolidge throughout his Presidential terms."[22] Chief Justice Hughes and some of his associates, it is alleged, played a considerable part in the defeat of President Roosevelt's Court plan in Congress. When Judges are politicians and become active politicians, the prestige of judiciary does not carry with it the esteem which it should carry as an impartial custodian of the Constitution.

Judicial review assumed a new aspect after

19. Brogan, *The American Political System*, p. 22.
20. As *cited*. in above.
21. Laski, H. J., *The American Presidency*, p. 68. Justice Charles Evans Hughes was appointed on May 2, 1910 by President Taft. He resigned in 1916 to be a Republican candidate for Presidency. On February 13, 1930, he was appointed Chief Justice by President Hoover.
22. *Ibid.*

the appointment of Earl Warren as Chief Justice in 1954. It is known as "judicial activism." Prior to Warren's appointment judicial review had only been used to invalidate legislation on the ground that it was in conflict with the Constitution; a negative concept indeed. During the tenure of Chief Justice Earl Warren's office, judicial review had been used positively to create legislation. The Court accepted a modern liberal style of judicial review—the discussion of economics, the references to political history, the use of the sociological treaties, "the absence of appeals to precedents as wholly controlling." The rules of the Constitution were applied in a "reflective and broad-gauged manner consistent with the intention of the Framers and the needs of public policy."[23] It was claimed that the judicial process during the two decades following Warren's appointment "was being brought to bear in favour of a progressive, democratic, libertarian society."[24] Apart from its "leadership in the black revolution, the most significant piece of egalitarian reformist activitism in which the Warren Court engaged was its imposition of the 'one man one vote' principle upon representation" in State Legislatures and Congress. The Court threw precedents and the "political questions" doctrine overboard and held by a six to two majority in *Baker* v. *Car* (1962) that State legislative apportionment properly was subjected to judicial scrutiny under the equal protection clause.

There was an avalanche of criticism directed at the Court. The gist of the criticism was that the Court had unwisely fashioned itself "into a kind of permanent libertarian constitutional convention, which sat from day to day intent on solving all of the political and social ills of the country through a continuous process of judicial intervention." The Justices, it was argued, disregarded precedents and long-standing rules of law and on occasion even resorted to spurious "law office history" in order to endow their decisions with a superficial constitutional plausibility. All this seriously violated the democratic process in that it "imposed" reform without regard to majority will or the normal legislative organs for effecting social change.

Dissatisfaction with such experiments in "venturesome constitutionalism,"[25] as one of the critics described the Supreme Court decisions, was widespread in the entire country and by the end of 1969, the legislatures of thirty-three States petitioned Congress to call a constitutional convention.[26] Earlier in 1958 the conference of the Chief Justices (of the Supreme Courts of the 50 States) had adopted a resolution calling on the United States Supreme Court to "depart from politics and return to the law."[27]

Warren Burger who succeeded Earl Warren, had never been accused of being a flaming liberal. But the appointment of William H. Rehnquist, in succession to Chief Justice Burger, evoked widespread criticism. He was criticised, at a gruelling Senate hearing to confirm his nomination by President Ronald Reagan, for his extreme views on race, the poor, rights for women and freedom of speech. Senator Edward Kennedy described Rehnquist as "too extreme to be Chief Justice." When Richard Nixon nominated him on the Supreme Court in 1971, the minority report, filed by members of the Senate Judicial Committee, declared that Rehnquist had "failed to show a demonstrated commitment to fundamental human rights", that "he was outside the mainstream of American thought" and, therefore, should not be confirmed.

Political historians generally agree that the most permanent legacy that a United States President leaves to the nation is the appointments he makes to the Supreme Court. This is because the nine Supreme Court Justices enjoy life-time tenure and their interpretation of the Constitution is the final word in the United States. There is no final appeal. Reagan's appointment of Chief Justice William Rehnquist was the President's phenomenal success in changing the ideological face of America's judiciary. The ideological tilt was expected to be advanced by Justice Rehnquist's accession. He was fully conservative as President Reagan's most conservative instincts. The President's ultimate aim was to pull the nine-member Supreme Court away from its

23. Emette S. Redford, and others, *Politics and Government of the United States,* p. 519.
24. Kelly, Alfred H., and Harbison, Winfred A., *The American Constitution: Its Origins and Development,* p. 1017.
25. Dissenting in the Reapportionment cases of 1964, Justice Stewart observed : "I am convinced that these decisions mark a long step into that unhappy era when a majority of the members of this Court thought by many to have convinced themselves and each other that the demands of the Constitution were to be measured not by what it says, but by their own notions of wise political theory...What the Court has done is to convert a particular philosophy into a constitutional rule, binding upon each of the 50 States.....*Lucas* v. *Colorado* (1964).
26. *Congressiosnal Quarterly,* August 1, 1969, p. 1572.
27. *Report of the Committee on Federal-State Relationships.* The Conference of the Chief Justices, August 1958, p. 14.

slight liberal inclination. Only a conservative could expect to reach the Supreme Court Bench. It was a calculated move of President Reagan that by the end of his term of office in 1988, at least half of the Justices should be his nominees.[28]

Suggestions for Reform

The system of judicial review has, from time to time, been violently assailed and many remedies have been suggested. One reform suggested is not to permit invalidation of statutes by mere majorities of the Court or even by the votes.[29] The spectacle of important Congressional legislation being overthrown by votes of five to four does not add to the prestige of the Supreme Court. In fact, it adds to the scepticism of "judicial infallibility." It has, therefore, been proposed that an exercise of the power of judicial review should require the concurrence of seven of the nine Justices of the Supreme Court. Such a kind of reform, it is contended, can be accomplished by an Act of Congress. But it is doubtful if the Supreme Court would declare this kind of Act valid. Two other proposals have been suggested. One is to abolish the power of judicial review by constitutional amendment. But this is an impossible task. There has actually been little or no demand for abolishing judicial review; its continuance being assumed even by various schemes for altering the personnel and jurisdiction of the Courts. The second is that Congress may repass a law set aside by the Court as it may override a Presidential veto. But this, too, would require a constitutional amendment.

The remedies which require a constitutional amendment are not deemed sufficiently efficacious, because of the difficulties of uncertain results and circuitous methods involved therein. It took nearly twenty years for the Sixteenth Amendment to come into effect and, thus to undo the work of the Supreme Court. One of the most drastic proposals suggests that the Constitution be amended to establish a "Court of the Union" composed of the Chief Justices of the Supreme Courts of 50 States, with power to review and reverse decisions of the United States Supreme Court when States' rights are involved. But critics of this proposal rightly ask: would this not lower the prestige of the Supreme Court and impair its effectiveness? Is it practicable to have a court composed of fifty members? Would the Chief Justices of the Supreme Courts of the States most of whom are popularly elected, be of high quality and capable of taking a detached view?

During more recent times there have been serious proposals afoot to curb the powers of the Supreme Court. When the Court struck down State anti-subversion laws in the 1950s or, in the *Miranda* case of 1966, defining the rights of prisoners undergoing interrogation, dozens of Bills came before Congress to restrain it. Most of them were intended to keep the so-called "moral" or "social" issues—principally abortion, school prayer, and school desegregation—outside the scope of unifying federal decision, such as, the Supreme Court would provide. The conservatives, who dominated the Senate argued that the role of the federal judiciary had been unjustifiably enlarged and that the Supreme Court was not the sole interpreter of the Constitution. The legislative authority towards curbing the Supreme Court was chosen because it is relatively quick and easy. None was passed. But will the Supreme Court Stand it if Congress passed any of such measures? It still has the power to review legislation passed by Congress. The Court may not, therefore, be so much vunerable to attack by a legislative measure as conservatives propose and suppose.

None of the proposals, referred to above, has evoked popular enthusiasm, and most Americans continue to hold the system of judicial review a desirable feature of the governmental system as obtainable in the United States. "Generally speaking," as Burns and Peltason put it, "Americans have never been willing to put full trust in the majority. An independent judiciary with the power to judicial review has been the major institutional sign of this fear of unchecked legislative and popular majorities."[30] But how far independent are judges? Enough has been said about it, but one more illustration will be relevant in this connection. Chief Justice Taft feared to

28. President Reagan appointed one another Supreme Court Justice, Mrs. Sanda Day O' Connor who was also a conservative. The Court's two leading liberals, Justices William Brennan and Thurgood Marshall (the Court's only black) were 80 and 77. Two moderates, Justices Lewis Powell and Harry Blackmun, were 78 and 77. Therefore, the chances of additional vacancies through death or voluntary retirement caused by illness or age during the remaining period of Reagan's presidency were weighted in his being able to leave behind a Supreme Court with at least a solid five-conservative majority.
29. In the event of tie, the decision of the inferior Court is affirmed.
30. Burns and Peltason, *Government By the People, op. cit.*, p. 582.

resign lest the "radical" Hoover be allowed to appoint someone in his place. In 1929 he wrote, "I am older and slower and less acute and more confused. However, as long as things continue as they are, and I am able to answer in my place, I must stay on the Court in order to prevent the Bulsheviki from getting control."[31]

But a serious problem that faces the Supreme Court is the number of cases before the Court which have increased manifold during recent years. Chief Justice Warren E. Burger, in 1983 gave the quantum of the case-load that already was. In 1953, Chief Justice Earl Warren's first year, there were 1,463 filings and in 1981, there were 5,311 cases on the docket and if the increase continued at the current rate, the Chief Justice said, that during his tenure on the Court there would be 7,000 to 9,000 cases a year on the docket. "No nine people in the world can handle that many cases and handle them properly." To maintain the quality of justice, he suggested, fundamental changes in the United States Judicial System, such as creating a Second Court of last resort. In his annual report to the American Bar Association, the Chief Justice called on Congress to create a commission to look into the whole problem. So far Congress has done nothing in this respect, though the Chief Justice had viewed the problem of massive and mounting case-load as "very serious."[32]

Roosevelt Proposals

President Franklin Roosevelt's battle with the Supreme Court is a more recent and "more dramatic attempt by a political leader to influence the course of judicial decisions." President Hoover left office in March 1933, in the midst of the great economic depression. On the same date, President Roosevelt entered upon his duties promising a "New Deal" and steer the country out of the economic chaos. Under his leadership Congress passed in quick succession laws of far reaching importance in record breaking time. Haste was justified by the emergency.

By 1935, these measures began to come before the Supreme Court. The Supreme Court declared five of the New Deal Statutes unconstitutional during the Court term beginning in October 1935. In all it invalidated, within three years of its battle with the President, twelve New Deal statutes or its provisions thereof. It is instructive to note something about the composition of the Supreme Court at that stage. Between 1933 to 1937, the Supreme Court consisted of nine judges, all of whom had been appointed before 1933, and except two, McReynolds and Brandies, the rest were appointed by Republican Presidents. Their average age was seventy-two (in 1937), the highest in the Supreme Court history, and it so happened that four (McReynolds Sutherland, Butler and Van Devanter) of the six, who were over seventy, were "conservatives" while the fifth (Hughes) was a "middle of the roader" and only the sixth (Brandies) a "liberal". On most of the measures which came before the Supreme Court the Justices were divided into two definite blocs: "conservative" and "liberal."

Early in 1937, when the conflict between the President and the Supreme Court was moving towards its climax, Roosevelt presented to Congress his own programme to reorganise the federal judiciary. The President and the Democratic Party had given no indication of such a reorganisation during the Presidential election campaign. His message to Congress on February 4, 1937, embodying his reorganisation proposals had, therefore, a dramatic effect. The most significant proposal was to give the President the power to appoint an additional Justice for each member of the Court who had served for ten years and who remained on the Bench after reaching the age of seventy, provided the maximum number should never exceed fifteen. The object of the proposal was to "rejuvenate" the Supreme Court and to make it more efficient so that it could keep up with its work.

The proposal was defeated in its entirety. The only redeeming feature which emerged out of it was that Congress permitted Supreme Court Justices with ten years of service to retire at seventy with full pay. Although it was a political defeat for Roosevelt, yet, as it has been observed the President "lost his battle but won his war." In 1938, Justice Roberts wrote another majority opinion, this time holding that the Agricultural Adjustment Act of 1938, which also aimed to regulate agriculture, was constitutional. It is true that by the fall of 1937, the "liberals" were clearly in majority in the Supreme Court and by September 1942, only Justices Roberts and Stone remained out of the old lot. But even before any changes could be made in the personnel of the

31. *Ibid.*, pp. 583-84.
32. *News and World Report*, February 14, 1983, published at Washington, D. C.

Supreme Court, the Court manifested a change of mind by reversing its previous attitude towards State Minimum Wage Law for women, by redefining the Commerce clause as to include 'manufacturing,' by upholding the Social Security Act and the Labour Railway Act.

The Switching on of Chief Justice Hughes and Justice Roberts, who had up to that time voted with 'conservative' Justices, indicated the truthfulness of the newly coined political terminology: "A switch in time saved the Nine." Within four years most of that which President Roosevelt had sought to achieve by his proposal to liberalise the court had been achieved without changing its structure. Since 1936, only two minor sections of two Federal Laws had been declared unconstitutional. The Court now interprets the Constitutions in the light of the social and economic condition prevailing in the country. It treats the Constitution as a body of living principles and consequently has validated a large expansion in the authority of the Centre under the commerce clause and in a new interpretation of the welfare clause. The result is the emerging legislation in the context of a Welfare State.

Another significant feature of the Supreme Court's 'modernization' is a substantial change in its regard to precedents. Justices of the old school had adhered to precedents to the point of religious devotion which robbed the Constitution of its adaptability to changing conditions. The new Court attitude freed constitutional interpretation from the restrictions of *stare decisis*. In 1941 and 1957 the Court reversed its previous decisions in child labour and women's minimum wages respectively. The new Court attitude was best expressed by Justice Reed. He declared in *Eire Railroad Company* v. *Tompkins* (1938), "In this court *stare decisis*, in statutory construction, is a useful rule, not an inexorable command."

But all this was feared to be reversed by the Rehnquist Court. Central to Rehnquist's view was his obligation to the political activism encompassed by the phrase "The living Constitution." Fidelity to the "original intent" of the framers is the cornerstone of Rehnquist's constitutional interpretation. The constitutional language, for him, is not infinitely elastic, to be shaped to perceived needs of succeeding generations. His belief in the centrality of original intent as a search for "what the words they (the framers) used meant to them" runs consistently in his public pronouncements, particularly in his judicial decisions already on record.

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