

## CHANGING THE CONSTITUTION

The question of the separation of governmental powers under the United States Constitution is again becoming of pointed interest. The President of the United States to-day exercises a control or influence over legislation at Washington far greater than ever before. There is an apparent subordination of Congress in respect of initiative, and a tendency to centralize all policies in the White House. To those "old-timers" who may be disposed to question the wisdom of this form of personal government, it may be of interest to examine into the presidential functions under the law.

The Constitution of the United States does not define the powers of government, nor expressly exclude the exercise by one department of the functions of another; but the separation of the government into executive, legislative and judicial departments is directly implied from the terms of the instrument. It is not a weakness that this separation arises by implication rather than from express statement. Every material word of written papers carries with it all the implications which a reasonable definition of the word makes necessary; and the Constitution, like all other fundamental laws, is surrounded by a mass of implications which makes it an operative instrument.

The Constitution of the United States provides:

Article I, Section 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."

Article II, Section 1: "The executive powers shall be vested in the President of the United States."

Article III, Section 1: "The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

Plainly, therefore, the Constitution of the United States recognizes three co-ordinate functions of government: the legislative, the executive, and the judicial, and confides them to separate persons.

Following the trend of thought prevalent at the time of their adoption, the Constitutions of the State governments accepted

the same division of powers, in many instances emphasizing the separation by specific prohibitions against encroachment. That this principle of separation was regarded as fundamental to American constitutional government, is shown by Mr. William Bundy in his work entitled "The Separation of Governmental Powers," printed (1895) in the Columbia University Historical Series, Vol. 5, where an admirable exposition of the concluded thought of the nation up to that time may be found.

Justice Miller of the Supreme Court of the United States said:<sup>1</sup>

"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

A late writer, Mr. Willoughby,<sup>2</sup> has stated the proposition well as follows:—

"A fundamental principle of American constitutional jurisprudence, accepted alike in the public law of the federal government and of the states, is that, so far as the requirements of efficient administration will permit, the exercise of the executive, legislative and judicial powers are to be invested in separate and independent organs of government. The value of this principle or practice in protecting the government from arbitrary and oppressive acts on the part of those in political authority has never been questioned since the time of autocratic royal rule in England. That the doctrine should govern the new constitutional system established in 1789 was not doubted."

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<sup>1</sup> *Kilbourn v. Thompson*, 103 U. S. 1. c. 190.

<sup>2</sup> Willoughby on the Constitution, Article 739.

An examination of the Constitutions of the Central and South American countries, modeled upon that of the United States, shows that the same principles have been adopted. Without further review of well known authorities, it is not too much to say, that the separation of government into the three essential departments has generally been accepted as the most important element of constitutional rule.

While the principle of separation is so strongly adhered to, it must not pass unnoticed that in the Constitution of the United States it has not been applied arbitrarily and with absolute exclusiveness. In the first place, the distinction between these powers is not always perfectly ascertainable. In the many complicated functions of government, there are subjects which may fall justifiably into any one of them, and upon these subjects, where they are within the general powers of the federal government, the action of Congress is final. Furthermore, the Constitution itself, both expressly and impliedly, confers powers, clearly classifiable as judicial, upon the law-making body, as in the case of impeachment; and the executive has been given pardoning power, which is thought to be judicial. The courts may exercise what is analogous to a legislative function in the adoption of rules of practice and procedure. The President is brought in touch with the legislative function by the approval of bills, the exercise of the veto power, and the right to recommend to the consideration of Congress such measures as he shall judge necessary and expedient. No refined argument can, therefore, be made with respect to the language of the Constitution conferring "all" legislative powers in Congress, since some legislative power has apparently in express terms been given to the executive. It follows, however, from a consideration of the whole subject, that where powers, legislative, executive or judicial, are sought to be exercised by a department to which they do not appropriately belong under the principle of separation, specific authority for the exercise of such powers must be found in the Constitution expressly or by necessary implication. *Expressio unius est exclusio alterius* is a fundamental doctrine of construction. So far, therefore, from furnishing an argument for the extension of the legislative powers of the executive, the exceptional points at which he is constitutionally empowered to act in connection with the legislative department are a prohibition against either the addition to or extension of these exceptional functions.

To the credit of all departments of the United States government since its foundation, and particularly that of the judiciary, few instances can be found of attempts of any of the departments to encroach upon the proper functions of the others. But a new view of the presidential attitude must now be considered. It is that accepted intellectually and applied in practice by the President.

Mr. Wilson has not left us in the dark as to his theories of constitutional government. In an able work—a series of lectures on Constitutional Government delivered before the students of Columbia University, New York, in 1907—he has presented a perfect picture of the presidential office as he considers it should be. His views rest upon two fundamental conceptions, the first of which is theoretical, and the second historical. They furnish the key to his interpretation of the Constitution.

Mr. Wilson defines constitutional government as follows:

“A constitutional government is one whose powers have been adapted to the interests of the people and to the maintenance of individual liberty.”

In the same work, in a historical review of the foundations of the Constitution of the United States, he says:

“The President created by our Constitution was conceived upon the model of what it was thought the King should have been under the older practice of the English Constitution, at the very time when English theory and practice alike were changing, and direct party government by the legislative leaders of the people was actually in course of being set up. We were fixed fast in respect of the presidential office, at the stage of constitutional development which England was leaving for forms simpler and still more advanced.”

“The Constitution of the United States, as framed by the Constitutional Convention of 1787, was intended to be a copy of the government of England, with such changes as seemed to our statesmen necessary to safeguard the people of America against the particular sorts of prerogative and power that had worked them harm in their dealings with the government of the mother country over the sea. But the government of England was then in a process of transition from an older to a newer form of the constitutional series, and had not advanced far enough in the transformation to disclose its real character.”

“The members of the Constitutional Convention of 1787 naturally enough thought of the King as the executive,

a power separate from Parliament, not only but often in contest with it, and did not see that influences were already working throughout the system which were to transmute the ministry, so soon as the suffrage should be reformed and Parliament should be truly representative of the nation, into a committee of the Commons of which the King should have formal appointment, but not real choice, and which should itself constitute the working executive of the country, making choice, in the King's stead, of every step of regulation or policy."

He, then, makes clear in the most able manner that the thought of the time upon governmental subjects was dominated by the views of Montesquieu respecting the natural division of government into legislative, executive and judicial functions, and goes on to say:

"In brief, as Montesquieu pointed out to them in his lucid way, they (the English politicians) had sought to balance executive, legislative and judicial off against one another by a series of checks and counterpoises, which Newton might readily have recognized as suggestive of the mechanism of the heavens. The makers of our federal Constitution followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm. The admirable expositions of *The Federalist* read like thoughtful applications of Montesquieu to the political needs and circumstances of America. They are full of the theory of checks and balances. The President is balanced off against Congress; Congress against the President; and each against the courts."

Before we come to consider with more detail the inferences which Mr. Wilson draws from these premises, it is worth while to examine them. The definition of constitutional government is purely literary, and too indefinite to be adequate. It borders upon the poetical, and is incontrovertible for that reason. The statement lacks the elements of both description and definition. To say that a constitutional government is one which is adapted to the needs of the people and preservative of individual liberty is to beg the question. The point still remains open, whether any particular constitutional government effects this end and to what extent. It should be sufficient for ordinary purposes to adopt the prevalent view of constitutional government as one wherein the administrators of government are bound in the exercise of their governmental functions by certain defined and settled

principles established by fundamental law or custom. An examination of these fundamental principles is necessary to determine what any particular constitutional government is. The literary definition given by Mr. Wilson is of no assistance in the interpretation of a written constitution and in fact may serve to lead men astray, as possibly it has led him astray, with respect to what the particular powers of the administrators of government may be. It is too liable to lead to the conclusion that any acts which in the judgment of the Executive contribute to the needs of the people are constitutional.

The historical discovery, as it may well be termed, that the division of powers formulated by the framers of the United States Constitution did not have a clear historical basis in English parliamentary history, comes with something of a shock to the minds of constitutional lawyers. The concession of the predominant influence of Montesquieu upon the makers of the Constitution is a singularly interesting statement. The thought also that the frame of the American government took the English Constitution at a transition stage in its development, and crystallized it with the subsequent inability to follow its further development, is both keen and enlightening. The fault in reasoning upon these matters as a basis may exist in an inference, not at all to be justified from them, that a future development of the government of the United States may rightly abandon the propositions of Montesquieu and follow the evolutionary development of the English parliamentary system. If it be true, as Mr. Wilson thinks, that the makers of the Constitution were somewhat obsessed by these considerations, it is also true that they acted definitely in accordance with their existing convictions, and so framed the Constitution. This historical aspect of the foundation of the United States Constitution, therefore, serves but to emphasize the proposition that the Constitutional Convention did adopt the principle of separation of powers as laid down by Montesquieu, and did not admit of a subsequent ministerial responsible government such as the English people later devised.

But Mr. Wilson does not see it so. After making some general remarks as to the breadth of the constitutional purpose and the existence of the instrument as a living and developing form of government, with compliments to the prescience and practical character of the members of the Convention, he jumps to the conclusion that the powers of the President under the Constitution

in respect of legislation were intended to be practically those of a responsible ministry. Out of a very much longer discussion of the subject, the following quotation is culled, as expressing the gist of his views with regard to the presidential office:

"Some of our Presidents have deliberately held themselves off from using the full power they might legitimately have used, because of conscientious scruples,—because they were more theorists than statesmen. They have held the strict literary theory of the Constitution, the Whig theory, the Newtonian theory, and have acted as if they thought that Pennsylvania Avenue should have been even longer than it is; that there should be no intimate connection of any kind between the Capitol and the State House; that the President as a man was no more at liberty to lead the Houses of Congress by persuasion than he was at liberty as President to dominate them by authority,—supposing he had which he has not,—authority enough to dominate them. But the makers of the Constitution were not enacting Whig theory; they were not making laws with the expectation that not the laws themselves, but their opinions, known by future historians to lie back of them, should govern the constitutional action of the country. They were statesmen, not pedants, and their laws are sufficient to keep us to the paths they set us upon. The President is at liberty, both in law and conscience, to be as big a man as he can. His capacity will set the limit; and if Congress be overborne by him it will be no fault of the makers of the Constitution,—it will be from no lack of constitutional powers on its part, but only because the President has the Nation behind him and Congress has not. He has no means of compelling Congress except through public opinion.

"That I say he has no means of compelling Congress, will show what I mean, and that my meaning has no touch of radicalism or iconoclasm in it. There are illegitimate means by which the President may influence the action of Congress. He may bargain with members, not only with regard to appointments, but also with regard to legislative measures. He may use his local patronage to assist members to get or retain their seats. He may interpose his powerful influence in one covert way or another, in contests for places in the Senate. He may also overbear Congress by arbitrary acts which ignore the laws or virtually override them. He may even substitute his own orders for acts of Congress which he wants but cannot get. Such things are not only deeply immoral, they are destructive of the fundamental understandings of constitutional government itself."

Holding this conception of the presidency in abeyance for the moment, it is well to notice some distinctions which should be borne in mind while considering it.

Legislative acts or, rather, acts of the legislature are of two fundamentally different natures. There are acts which are administrative or transitory in character, and there are acts which are strictly legislative and permanent. Congress enacts many measures which are called legislative, and require the forms of legislation to be followed, because they are included within the express delegation of powers to Congress, but which in their nature are administrative. Such are, among other things, the annual appropriation bills assigning funds to the different departments and for the several purposes of government; acts to authorize the construction of buildings, the purchase of supplies, the coinage of money, the building of war vessels, the equipment of the army, the employment of officials, and all those measures which deal with particular situations and transitory subjects. For its proper information and intelligent action upon these matters, the committees of Congress must keep in touch with the President and the executive departments, and predicate their action to a great extent upon information derived from them. The other classes of measures with which Congress deals are rules of action which command what is right and prohibit what is wrong, and are therefore laws in the proper sense of the word. With these the executive has nothing to do, under the Constitution, except in the respects which the Constitution provides. Without noticing the distinction between the quality of legislative acts, this is the view expressed by Mr. James Bryce in his "American Commonwealth," as late as 1894.

Another desirable distinction is that between giving information of the state of the Union, and taking an actual part in the framing of bills and pressing them to action.

Taking up the statement of Mr. Wilson with respect to the relation of the President to legislation, we find that it is a new view of that office, the only fair basis for which seems to lie in the conception of the government of the United States as a living organism, with the right to develop or change, after the manner of the English Constitution. Certainly prior to 1901 it had no standing in American history. It is a little hard to understand just what the author means by referring to the earlier and more conservative conception of the presidency as "literary." If it



is that the Constitution is a written instrument which means, to-day (except for the amendments which have been made to it), what it meant when it was adopted, this is a fault which is inherent in all organic governments established in definite terms by the minds of men. The remedy lies in intentional and conscious amendments of the instrument. While the principles of government stated in the Constitution are expansible to apply to new conditions not existing at the time of its adoption, there is nothing in the instrument which can justify a merger of the departments of the government by the will of any of them.

Mr. Wilson, in filling the position of President of the United States, big man as he is, has put in force exactly the ideas which he has expressed. In doing so, however, he is evidently modifying the Constitution as it has been understood before his time. In his views of the propriety of similar action on the part of other departments of the government, he has set another standard. In his work on "Congressional Government" (1898), he says:

"It is not often easy to see the true constitutional bearing of strictly legislative action; but it is patent even to the least observant that in the matter of appointments to office, for instance, senators have outrun their legal rights to give or withhold their consent to appointments, by insisting upon being first consulted concerning nominations as well, and have thus made their constitutional assent to appointments dependent upon an unconstitutional control of nominations."

Why could not the sentence be paraphrased by a statement that it is patent even to the least observant that in the matter of legislation the President has outrun his legal rights to approve or veto bills, by insisting on being first consulted concerning their character and details before their introduction or enactment, and has thus made his constitutional assent to acts of Congress dependent upon an unconstitutional control of legislation? There is more propriety in the Senate insisting upon being consulted about appointments which must be made "by and with the advice and consent of the Senate," than in the control of legislation through the influence of the President.

It is apparent that he himself recognizes the danger inherent in the conception, for he points out with perspicuity the things which the President ought not to do to coerce Congress. He should not bargain with members with regard to appointments or legislative measures. He should not use his patronage to

assist members to get office. He should not interfere in contests for places in the Senate or overbear Congress by arbitrary acts. These things are "deeply immoral." Perhaps the next President may take a view still further enlarged upon that of the present one, and regard these inhibited acts as not immoral, not unconstitutional and not destructive of constitutional government.

Washington said:<sup>3</sup>

"It is important, likewise, that the habits of thinking, in a free country, should inspire caution in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding, in the exercise of the powers of one department, to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A first estimate of that love of power and proneness to abuse it which predominates in the human heart, is sufficient to satisfy us of the truth of this position."

Or, to cite the statement of James Madison:<sup>4</sup>

"If it be a fundamental principle of free government that the legislative, executive and judicial powers shall be separately exercised, it is equally so that they be independently exercised."

Men who are conscientiously striving for the public good seldom regard the bad precedent which may exist in an expansion of their powers. It is only when the benevolent despot is followed by a tyrant that such faults become plain. The functions of the President are now becoming so extensive that the people are looking to him for all good and ill. No monarch of Europe can pretend to a title of his power.

If the capacity of the President alone sets the limit, the concentration may go on indefinitely.

Mr. Wilson has said, with confidence, that if Congress be overborne by the President, it would be from no lack of constitutional power on its part, but only because the President has the Nation behind him and Congress has not. "He has no means of compelling Congress except through public opinion." This is not true. Mr. Wilson, in close juxtaposition with this statement, points out that the President has other means of coercing Con-

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<sup>3</sup> Farewell Address.

<sup>4</sup> Journal of Constitutional Convention.

gress, though he recognizes that they would be immoral and improper. But in point of fact, the persuasions of the man who fills the position of President cannot be separated from the great power of that office. As it is one of Mr. Wilson's views that the President is the leader of the party which puts him in power, he wields the tremendous power of that party to override the judgment of the constitutionally elected representatives of the people by excommunication from its ranks, and the application of rewards and punishments to those who are dependent upon the party for their standing and careers. And with respect to public opinion, an indefinite though powerful force, in particular exigencies it is impossible to distinguish it from the demands of party politicians and the views of a partisan press. And that great mass of thought, slowly formed and still slower in operation and effect, called public opinion, is not quick enough to stand as a corrective in the exigencies and heat of the actual enactment of legislation. By the time its momentum is felt the objectionable laws will be in force.

It seems that Mr. Wilson is engrafting upon the Constitution, with the acquiescence of the American people, a change which may bring it into closer conformity with the English system of government, with dominant parties and responsible ministries. Whether this is desirable or not, a pertinent question in that connection is, "has he the right to do so?"; but a more practical question is, "do the positive barriers of the Constitution permit of any close assimilation of government under the United States Constitution to that of a responsible ministry under the English Constitution?" It may be possible, indeed, through the weakness of Congress and the great personality of the President, to give the President and his cabinet a passing similarity to the English ministry, and there may be administrative measures and governmental bills and the application of the party whip, with all outward resemblance to the English methods; and we may in that way get some of the benefits of a unified government, without checks and balances. But what becomes of the parallel if the presidential power falters and the representatives of the people refuse to enact its measures or vote a want of confidence? The English system requires, in such cases, dissolution of the Houses or the resignation of the ministry. Our Constitution makes no provision for such acts. Should the President and his cabinet then reverse their policies and press those of the changed majority, expressive of the will of the people? This is likewise

inconceivable. The President still remains the "leader of his party," and his views have undergone no alteration. Is he to be a puppet in the hands of Congress, as Congress has been in his hands previously?

The English system of government is based upon a reciprocal control between the ministry and the House of Commons. The American system is based upon the independence of the three departments of government. There can be no control of the President by Congress. Congress cannot by a vote of censure force a resignation or an appeal to the country. There should be no control of Congress by the President. It follows that while the terms of office of the President and members of Congress are fixed, and neither the President nor his Cabinet have seats in the legislative body, no view of his relation to the country can be sound except that of an executive, non-partisan in action, bound to obey the law and cautious against using the power of the office to coerce legislation. His veto is a quasi judicial act which should be held free from the prejudices of congressional strife. The government should be one of laws and not of men, by which is not meant that laws have any power to enforce themselves, but that the same men should not make the laws who have the duty to put them into operation. The American people should at least be made aware of the impending change and not enter into it unadvisedly; and they should appreciate the real bearing of the Constitution upon it.

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